
ARTICLE

UNORTHODOX CIVIL PROCEDURE: MODERN
MULTIDISTRICT LITIGATION'S PLACE IN
THE TEXTBOOK UNDERSTANDINGS
OF PROCEDURE

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Multidistrict litigation (MDL) is unorthodox, modern civil procedure. It is an old-but-new procedural tool that significantly disrupts decades of worked-out doctrinal equilibria—and, now comprising a shocking 39% of the cases on the civil docket, MDLs warrant more attention than they have received. The MDL puts a thumb on the scale of nationalism over federalism, consent over adversity, procedural exceptionalism over transsubstantivity, and common law over the Federal Rules. In other words, the MDL takes what has generally been the losing side of procedure's big theoretical and doctrinal debates; it is a symptom of deeper pressures on the system to recalibrate procedure's traditional baselines.

MDLs are modern because they see the need for a national, not state-centered, approach to questions of procedure. They disrupt traditional legal relationships, turning judges and lawyers into collaborative partners in practical problem solving and creating a new judicial elite among the federal judges chosen to lead them. MDLs exemplify procedural exceptionalism—a type of litigation that judges insist is too different from case to case to be managed by the transsubstantive values that form the very soul of the Federal Rules. Instead, judges develop their own special MDL procedures—yet this new kind of procedural law is rarely treated as precedential or even subject to customary appellate review.

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These deviations from the “textbook” have caused academic anxiety. Scholars worry about lack of transparency, loss of the individual claim, and the dearth of uniform procedural law. Many judges who try MDLs, on the other hand, view them favorably—often as the only way to ensure access to court for massive claims on a national scale—and also as highly enjoyable judicial work. This Article relies on interviews with MDL judges to offer a new set of counterpoints to the academic criticism.

The Article also sets MDLs in the broader context of “unorthodox lawmaking”—a phenomenon documented in the legislative context but not yet in procedure. MDLs, like omnibus legislation and other forms of nontraditional lawmaking, are responses to pressure on the system, some way in which legal rules have not kept up with the obstacles of modern times when the consensus is that Congress and the courts must nevertheless take action. All of these unorthodox vehicles thus tend to operate outside the relevant rules, raising questions about the value of the rules themselves. They raise the question: What do we care about most? Is it access to court (or, analogously, the production of legislation)? Or is procedure for procedure’s own sake the more important value—even if upholding that value means fewer cases get resolved? MDLs highlight this tension. They are likely more symptom than cause of procedure’s modern challenges.

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INTRODUCTION

From the very first paragraph of the Federal Rules of Civil Procedure (FRCP)—in which is set forth the goal of the “just, speedy and inexpensive determination of every action”¹—it is evident that the system is anchored in a set of competing norms and tensions. The rules and doctrines of the field themselves may be understood as mechanisms to effectuate this constant mediation of tradeoffs. There is the structural tradeoff between federalism and nationalism, evident in procedure’s theories and doctrines of jurisdiction and choice of law. There is the negotiation between transsubstantive, or “one size fits all,” rules of procedure and rules that are instead tailored to particular kinds of cases.² And the system struggles with the competing norms linked together by Rule 1, that is, between access to justice and efficiency. Through it all is a meta-debate about the value of the FRCP themselves as a system-organizing mechanism, and the process by which the rules are made—a process very different from what emerges when judges make procedure in common law fashion. To understand these systemic tensions is also to understand the institutional arrangements that the rules and doctrines of procedure have painstakingly arranged. Central to those arrangements are the horizontal and vertical relationships among the system’s key players—clients, lawyers, and judges (both state and federal)—who interact with one another, sometimes as adversaries, other times as peers and collaborators, and still other times as superiors and inferiors, in the more traditional hierarchies of the judge–lawyer relationship and appellate review.

Enter multidistrict litigation. The so-called “MDL” is an old-but-new procedural tool that significantly disrupts many of these worked-out equilibria. The MDL is unorthodox, modern, non-textbook, civil procedure. It also may be a symptom of deeper pressures now on the system to recalibrate even more of procedure’s traditional normative and doctrinal baselines.

But this does not mean that MDLs are rare, or even new. Born fifty years ago as the quieter sibling of class actions, the MDL has recently evolved from its initial purpose—to accommodate a rash of antitrust litigation against

¹ FED. R. CIV. P. 1. For a brief history of Rule 1, see generally Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 288–300 (2010).

² Cf. Harold Hongju Koh, “*The Just, Speedy, and Inexpensive Determination of Every Action?*”, 162 U. PA. L. REV. 1525, 1531 (2014) (describing cases evincing these tensions).

electrical equipment manufacturers³—into a more central procedural mechanism than ever imagined. Today, actions consolidated in MDLs comprise *thirty-nine percent* of open cases on the federal docket.⁴ *Thirty-nine percent*—a number that tends to shock even those law professors who teach procedure, because MDLs have attracted so little attention in academic work⁵ or the casebooks.⁶ The average number of pages devoted to MDLs in the leading first-year civil procedure casebooks is *two*.⁷

MDLs are unorthodox because they are workarounds to the currently accepted baselines of civil procedure: the FRCP as preferred over common

³ See Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711, 713-14 (1991). The MDL became a permanent feature in 1968 with the enactment of what is now 28 U.S.C. § 1407 (2012).

⁴ Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017). Note that this number includes open cases; it is not thirty-nine percent of new filings per year. Some believe this figure overstates the share of MDLs on the docket, because each case in an MDL does not take the same amount of time as an ordinary case, and thus thirty-nine percent of the docket does not mean thirty-nine percent of judicial attention. But one judge I interviewed, while generally agreeing with that assessment, noted the possibility the thirty-nine percent figure might actually *undercount*, since some MDLs allow plaintiffs' counsel to file consolidated complaints on behalf of multiple claimants, which means there may sometimes be more claimants than cases.

⁵ The work of Elizabeth Burch is a rare exception. See, e.g., Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667 (2013) [hereinafter Burch, *Disaggregating*]; Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506 (2011); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015) [hereinafter Burch, *Judging Multidistrict Litigation*]; Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399 (2014) [hereinafter Burch, *Remanding Multidistrict Litigation*]; Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network* (Univ. of Ga. Legal Studies Research Paper Series, Paper No. 2016-04, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2724637 [<https://perma.cc/J8GL-M9Q7>]. Duke Law School has also held a number of working conferences on MDL procedure. See, e.g., *Increasing the Number of Women and Minority Lawyers Appointed to Leadership Positions in Class Actions and MDLs*, DUKE L.: CTR. FOR JUD. STUD., <https://law.duke.edu/judicialstudies/conferences/apr2017/> [<https://perma.cc/4YUL-9UAD>]; *Multidistrict Litigation (MDL) Conference*, DUKE L.: CTR. FOR JUD. STUD., <https://www.law.duke.edu/judicialstudies/conferences/may2013/> [<https://perma.cc/V87D-E9VJ>] (describing a May 2013 conference on the future of MDL). As this Article went to press, the academy began paying sustained attention to MDLs, including a panel focused on “MDL Problems” at the 2017 Association of American Law Schools Conference. See ASS'N OF AM. LAW SCH., 111TH MEETING: WHY LAW MATTERS 43-44 (2017); see also, e.g., Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action "Alternative"*, 165 U. PA. L. REV. 1711 (2017); Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation* (UC Berkeley, Pub. Law & Legal Theory Research Paper Series, Paper No. 2828461, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2828461 [<https://perma.cc/PL33-H3RE>]; Alexandra Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. (forthcoming 2017).

⁶ See, e.g., OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES 593-94, 596-98 (2003); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 380-82 (11th ed. 2013); GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE 320-21 (11th ed. 2016); LINDA J. SILBERMAN ET AL., CIVIL PROCEDURE 311, 979, 1111-12 (4th ed. 2013); STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE 1074 (5th ed. 2016).

⁷ See *supra* note 6.

law rules; federalism considerations; traditional institutional relationships; and—in the ultimate unorthodox workaround—MDLs are designed to avoid trial itself. Although styled as a mechanism for only pretrial resolution of cases unamenable to class action but with sufficient similarities to justify some consolidation,⁸ it is the worst-kept secret in civil procedure that the MDL is really a *dispositive*, not pretrial, action. MDL judges, unlike judges even in class actions, do not generally manage to trial or even to the possibility of trial.⁹ Only about three percent of cases remand to the originator (transferor) district judge; all others settle in or are resolved—for instance, through summary judgment—by the MDL court.¹⁰ That is a shocking statistic when one considers the mandate of the MDL statute itself, which provides that any MDL “action . . . shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred.”¹¹ By all accounts, the statute’s idealized vision differs dramatically from the real-world practice of MDL. Indeed, most MDL cases are understood by all involved to be unamenable to trial at the *outset*. As one judge put it, “[i]t’s the culture of transferee courts. You have failed if you transfer it back.”

MDLs are modern because they see the need for a national, not state-centered, approach to questions of jurisdiction and even choice of law. The way MDLs respond to this challenge also is emblematic of bigger forces pushing procedure in a multitude of different areas. MDLs are the product of the nationalization of the modern economy and a symptom of the lack of tools inside the FRCP to accommodate those changes.

MDLs also depend almost entirely on consent and, in turn, disrupt traditional relationships among their players, turning judges and lawyers into deeply collaborative partners in (as one judge put it) “practical problem solving.” MDLs have created a judicial elite among the federal judges chosen to lead them, subverting the baseline premise of horizontal equality among federal district judges and instantiating Judge Richard Posner’s view that federal judges, with life tenure and little prospect for formal promotion, are eager to find some way to distinguish themselves from the pack.¹² The MDL judge in many ways acts more like a modern *administrator* than the judge the FRCP envisions, not

⁸ See 28 U.S.C. 1407(a) (2012) (“When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated *pretrial* proceedings.” (emphasis added)).

⁹ Burch, *Remanding Multidistrict Litigation*, *supra* note 5, at 399-402 (“Multidistrict litigation has frequently been described as a ‘black hole’ because transfer is typically a one-way ticket.” (footnote omitted)).

¹⁰ *Id.* at 400.

¹¹ § 1407(a) (emphasis added); see also *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 33-35 (1998) (holding that § 1407’s plain language prohibits an MDL court from using the common practice of transferring consolidated cases to itself for trial).

¹² See RICHARD A. POSNER, *HOW JUDGES THINK* 132-47 (2008).

least because, like agencies, the particular MDL judges who are chosen for these cases are delegated to specifically for their expertise in practical administration.¹³

Finally, MDLs exemplify procedural exceptionalism. This is a type of litigation that judges insist is unique, too different from case to case to be managed by the transsubstantive values that form the very soul of the FRCP. Instead, judges develop their own special MDL procedures, often in collaboration with specialist lawyers, that build on previous MDLs or analogous actions. As a result, what has emerged is essentially a *federal common law of MDL procedure*. Yet, in another deviation from the norm, this common law is rarely treated as precedential or even subject to the customary judicial appellate review.

These deviations from the painstakingly crafted textbook of procedure have caused academic anxiety. Many scholars worry about the lack of MDL transparency, the loss of the individual claim, and the dearth of uniform MDL procedural law.¹⁴ Some put MDLs together with arbitration as another mechanism that undermines trial and the traditional class action.¹⁵

But of course, 99% of all filed civil cases today are resolved without trial.¹⁶ The FRCP also now gives judges broad case management discretion in *all* kinds of cases and encourages a general managerial approach. My goal is not to convince the reader that the MDL is unique. Rather it is to present the MDL as a perhaps extreme example of developments in procedure that may tell us something about the modern pressures on the system, both in traditional cases and otherwise. These pressures are likely to produce only

¹³ See Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 403 (2007).

¹⁴ See, e.g., Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 339-40 (2008) (“[T]he MDL judge’s tactics undermine consent as a justification . . . [and t]hus there is good reason to question the traditional day-in-court participation right.”); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 301-03 (2011) (noting the difficult problems of obtaining the “authentic consent” of MDL plaintiffs and that “lawyers overwhelmingly would prefer to obtain their clients’ advance consent to settlement”); 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, 110-11 (2015) (raising due process concerns); Judith Resnik, *From “Cases” to “Litigation,”* 54 L. & Contemp. Probs. 5, 64-68 (1991) (raising concerns about individuals in aggregated claims). For a more positive academic perspective on MDLs and mass tort aggregation, see Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 214-15 (describing the benefits of “quasi-class action” litigation in processing mass torts); and Richard Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2254-58 (2008) (attempting to dispel the notion of MDL’s negative effect on fairness).

¹⁵ See, e.g., Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 936-37 (1995) (“[W]e are witnessing the alteration of . . . individual adjudication—as it melds with ‘alternative dispute resolution’ . . . and increasingly emphasizes settlement.” (footnote omitted)).

¹⁶ U.S. COURTS, U.S. DISTRICT COURTS—CIVIL CASES TERMINATED, BY NATURE OF SUIT AND ACTION TAKEN 1 (2016), http://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2016.pdf [<https://perma.cc/CC92-8BKP>].

more unorthodoxies over time.¹⁷ And in the MDL context, the deviations do tend to be especially far-reaching, with many judges adopting a discernable cowboy-on-the-frontier mentality that is not as apparent in other contexts. In other words, as the old saying goes, a difference in degree may convert into a difference in kind.

However labeled, the view from the ground seems very different from the view in the academy. This Article relies on lengthy and confidential oral interviews of twenty judges (fifteen federal, five state), each with significant experience in MDL litigation.¹⁸ The federal judges who try these cases, and even some of the state judges who try parallel proceedings, are emphatic proponents of the MDL form. These judges describe MDLs as immensely satisfying, “roll up one’s sleeves” work. They find MDLs superior to class actions, in large part because they feel they are better “litigated,” even though they never go to trial. (This reveals another unanswered question: what does it mean to “litigate” in the modern era of infrequent trial?) What’s more, MDL judges resist at all cost imposing rules—whether in the FRCP or through uniform federal procedural common law—on the MDL process.

This Article focuses on large MDLs, which the judges described as quite different from smaller ones. It is the unique pressure of managing hundreds, often thousands, of individualized claims in the aggregate that has birthed the procedural unorthodoxies that are the subject of this Article. To appreciate the scale of these large MDLs, note that the vast majority of cases on the MDL docket have been consolidated into a very small number of MDLs—in March 2017, for instance, 87% of cases were consolidated into only 18 MDLs, each with 1000 or more civil actions.¹⁹

¹⁷ Cf. Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. (forthcoming 2017) (discussing procedural legislation that arises, in ad hoc fashion, to meet new needs of particular cases).

¹⁸ I am deeply grateful to all the judges with whom I spoke. I interviewed each judge in person or over the phone for approximately one hour. The federal judges were asked why they think MDLs are on the rise; how MDLs compare to class actions; how MDL procedure is made; about the relationship between MDL procedure and FRCP 16; whether a separate rule for MDLs would be a positive development or whether Rule 23 could be expanded to include MDLs or make them less necessary; about relationships among judges and attorneys in MDLs; about federalism and choice of law; about relationships and coordination among federal judges and between federal and state judges; about concerns regarding access to justice, transparency, the individual case, and lack of judicial review; how MDLs differ from non-MDL cases; about the role of consent; why they think MDLs are increasing; how they learned how to conduct an MDL; about the MDL panel and its process; about requiring state-court attorneys in parallel actions to pay into the common benefit fund; and about the low remand rate. Interviews with the state court judges included all of these issues but focused on the relationship between state and federal MDL cases that are parallel or consolidated.

¹⁹ See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT (2017) [hereinafter MDL STATISTICS REPORT BY DISTRICT], http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-March-15-2017.pdf [https://perma.cc/T4AH-4ZMT]; see also DUKE LAW CTR. FOR JUDICIAL STUDIES, STANDARDS AND BEST PRACTICES FOR LARGE AND

MDL judges deny that MDLs undercut the individual case or individual access to justice. Instead, they argue that, *without the MDL*, the courthouses would be closed to the majority of cases that currently are consolidated. Thus the MDL, to their minds, is not the instantiation of Owen Fiss's nightmarish world of settlement.²⁰ Rather, it is the MDL that has *brought* these cases—whether it be the NFL concussion case,²¹ the BP oil spill case,²² the GM ignition switch litigation,²³ countless drug cases,²⁴ or other large-scale cases (that sometimes include multiple class actions within the MDL alongside individual claims)—into court for public resolution. It may not be the kind of resolution Fiss envisioned, but in the system we have, these judges say, it is the best option. One very experienced MDL judge put it this way: “Winston Churchill once said: ‘Democracy is the worst form of government except for all the others.’”²⁵

The judges are, of course, a biased sample. But they offer what might be said to be the “best case” arguments for the MDL, and so show academics critical of the MDL the arguments they must meet. The interview methodology was selected because there is relatively little academic work on the MDL and much of what has been written has been one-sided, skewed to the negative.²⁶ (There

MASS-TORT MDLS, at xi (Jaime Dodge et al. eds., 2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf [<https://perma.cc/8U4A-ABPA>] (reporting identical statistics for June 2014).

²⁰ Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (describing settlement as a “highly problematic technique for streamlining” that “should be neither encouraged nor praised” since “although dockets are trimmed, justice may not be done”).

²¹ *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351 (E.D. Pa. 2015).

²² *In re Oil Spill by Oil Rig “Deepwater Horizon”*, 792 F. Supp. 2d 926 (E.D. La. 2011).

²³ *In re General Motors LLC Ignition Switch Litig.*, 154 F. Supp. 3d 30 (S.D.N.Y. 2015).

²⁴ *E.g.*, *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 65 F. Supp. 3d 1402 (J.P.M.L. 2014); *In re Lipitor (Atorvastatin Calcium) Mktg.*, 997 F. Supp. 2d 1354 (J.P.M.L. 2014); *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

²⁵ *See generally* Winston S. Churchill, Speech at the House of Commons (Nov. 11, 1947), in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, at 7566 (Robert Rhodes James ed., 1974) (“[D]emocracy is the worst form of government, except for all those other forms that have been tried from time to time.”).

²⁶ *See, e.g.*, L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 208–15 (2004) (suggesting the Supreme Court “recognize[s] the potential for collusion [and unfairness] in settlements” of aggregated mass tort proceedings); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 297 (2013) (expressing skepticism that the benefits of “quasi-class action[s]” like MDLs “justif[y] judicial control over collective settlements and attorneys’ fees matters”); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 422–26 (2011) (“The MDL . . . was never intended to . . . provide judicial cover for privately negotiated backroom settlement deals that do not comport with the rule of law, are subject to scant checks for abuse or due process violations, and that resolve the claims of . . . absent claimants. This, however, is precisely [its] legacy”); Redish & Karaba, *supra* note 14, at 110 (describing the MDL as “a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies”). By contrast, a project by the ALI has been more positive. *See generally* PRINCIPLES OF THE LAW

has been more scholarly attention paid in the specific, but limited, context of MDL settlement and attorneys' fees;²⁷ as a result, this Article does not focus on those two important topics.) Given the prevalence of MDLs and the desire on the part of many federal judges to preside over them, it seemed to this author that there must be a more positive side to the story. The interviews elicit that story and so outline the attractions of the MDL for the practicing bar that may not be captured by the academic literature.

MDL judges have an outsized role in this area due to the vast discretion they have, making their perspectives particularly important. Their views flesh out the big-picture story of where MDLs sit in civil procedure's overarching doctrinal and theoretical debates. MDLs are now sufficiently central to the system that, however unorthodox they may be, they deserve a place in the mainstream understandings of how our system really works.

I. UNORTHODOX CIVIL PROCEDURE: MDLS AND THE WORLD BEYOND PROCEDURE

Before going further, a word is warranted about the title of this Article—*Unorthodox Civil Procedure*. One way to look at the rise of MDLs is to see it from outside the field of civil procedure entirely, one of an increasing number of ways in which traditional legal structures have informally evolved to address pragmatic concerns of modern lawmaking that “textbook” processes have failed to address in a satisfying way. In previous work, I have chronicled the analogous rise of “unorthodox lawmaking”—Congress's increased use of legislative pathways and vehicles that do not track the traditional *Schoolhouse Rock!* cartoon “how-a-bill-becomes-a-law” paradigm.²⁸ Here, I suggest making the connection between those developments and the rise of MDLs.

OF AGGREGATE LITIGATION (AM. LAW INST. 2010). For other exceptions, see also Issacharoff, *supra* note 14, and Marcus, *supra* note 14.

²⁷ For work on the role of settlement in MDLs, see Burch, *Disaggregating*, *supra* note 5, at 673-79; Marcus, *supra* note 14, at 2277-79; Miller, *supra* note 26, at 286; and Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1349-73 (2013). For analyses of fee arrangements in MDLs, see Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1283-85, 1295-97 (2012); Burch, *Judging Multidistrict Litigation*, *supra* note 5, at 109-15; Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2166-72 (1999); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 131-43 (2010).

²⁸ Compare Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 762 (2014) (noting that in 2011 only 8% of laws passed by Congress went through the “textbook” legislative process), Abbe R. Gluck, Commentary, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 96-99 (2015) (describing the Affordable Care Act as an example of unorthodox lawmaking), and Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1799-1803 (2015) (detailing

Unorthodox legislative vehicles share features with MDLs. For instance, omnibus laws bundle bills that alone would not make it through Congress.²⁹ MDLs have likewise become vehicles to aggregate and resolve legal claims that alone cannot make it through the system. Newly developed mechanisms to bypass traditional, sometimes cumbersome, legislative procedures—such as committee consideration and the filibuster—find parallels in the ways in which MDLs find more efficient paths to discovery and claim narrowing, and bypass trial altogether.

I have also chronicled, with Anne O’Connell and Rosa Po, “unorthodox rulemaking”: the analogous development of new mechanisms outside of the Administrative Procedure Act (administrative law’s analog to the FRCP).³⁰ These nontraditional administrative procedures help agencies implement modern, increasingly complex, federal laws in ways that are more flexible, more efficient, and less transparent. The link to the MDL should be obvious.

To be sure, there are other procedural vehicles that could fall into this unorthodox category and that further substantiate the claim about the pressures on the traditional system. The rise of alternative dispute resolution, for instance, is another salient example. But even just focusing on the MDL, it seems worth noting that the various ways in which modern law is made—whether through big national litigation or through sprawling federal legislation—are developing in parallel. These common threads may signal that we are entering a new environment of lawmaking across the board. Indeed, such was the case in the late 1930s when, not coincidentally, we welcomed the FRCP, the New Deal, and the APA at essentially the same time.³¹ That was a moment for introspection about our legal system, its needs, and how it changes. This may be another.

The Federal Judicial Center has extensively compiled MDL statistics,³² as has the Judicial Panel on Multidistrict Litigation (JPML) itself,³³ so only a snapshot

many forms of unorthodox policymaking as “the norm rather than the exception”), *with Schoolhouse Rock!: I’m Just a Bill* (ABC television broadcast Feb. 5, 1977), <http://abc.go.com/shows/schoolhouse-rock/episode-guide/season-1/24-im-just-a-bill> [<https://perma.cc/T7HD-UJ CZ>].

²⁹ See Gluck et al., *supra* note 28, at 1803-07.

³⁰ See Gluck et al., *supra* note 28 (detailing numerous modern administrative law workarounds, including the APA’s good cause exemption and use of guidances instead of notice-and-comment rulemaking). Of course, some of these workarounds are in the APA itself, raising the question of how unorthodox they really are.

³¹ The FRCP was enacted in 1938; the APA in 1946; the New Deal—era roughly spans 1933 and 1939.

³² See EMERY G. LEE III, SURVEY OF FEDERAL TRANSFEREE JUDGES IN MDL PROCEEDINGS REGARDING COORDINATION WITH PARALLEL STATE PROCEEDINGS (2011), [http://www.fjc.gov/public/pdf.nsf/lookup/leemdlfedst.pdf/\\$file/leemdlfedst.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/leemdlfedst.pdf/$file/leemdlfedst.pdf) [<https://perma.cc/DY3X-TZG6>]; *Caseload Statistics Data Tables*, U.S. COURTS, [http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=&pn=All&t=681&m\[value\]\[month\]=&y\[value\]\[year\]=](http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=&pn=All&t=681&m[value][month]=&y[value][year]=) [<https://perma.cc/K3YS-SD9N>].

³³ See *Statistical Information*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, <http://www.jpml.uscourts.gov/statistics-info> [<https://perma.cc/9ENF-PEEE>].

will be provided here. According to the Center, the MDL docket has grown dramatically since its inception. From its launch through 2015, the MDL Panel centralized 400,000 cases.³⁴ In early years, the “caseload was relatively flat—in the late 1970s and throughout the 1980s, the Panel averaged only around 40 [consolidation] motions per year.”³⁵ It was in the 1990s that the caseload burgeoned. As of March 2017, there were 233 pending MDLs.³⁶ As noted, open MDL cases now comprise thirty-nine percent of the federal docket.³⁷ My work on legislative and administrative unorthodoxies tells a strikingly parallel story about the recent increased use of unorthodox vehicles that make modern lawmaking possible.³⁸

In the legislation and administrative law contexts, I have argued that the theories and doctrines of legislation and administrative law are not set up to address the problem—or even the existence of—unorthodox lawmaking. The procedure context looks quite similar. For instance, the APA does not account for or establish any system of judicial review for presidential executive orders, an undoubtedly powerful tool of modern unorthodox lawmaking.³⁹ Similarly, there has been little legal development of MDL procedural “law.” To take just one example, the meat of the MDL takes place in the pretrial context. But under current doctrine—28 U.S.C. § 1291—pretrial rulings are typically not “final decisions” and therefore are not eligible for routine appellate review and the accompanying written decisions that would ultimately create MDL common law. If we want more accountability for any of these modern developments, we will need to rethink, or at least tweak, the traditional frameworks that we have erected to regulate them.

Space limitations prevent more than cursory treatment of that next question: exactly how might doctrines change in the face of unorthodox lawmaking? But it is worth noting that doctrines already may be evolving. The Supreme Court in *King v. Burwell*, the 2015 challenge to the Affordable Care Act, acknowledged for the very first time that a statute’s unorthodox legislative process might have an impact on how it should be interpreted.⁴⁰ The same year, in *Gelboim v. Bank of America*, the Court issued its second-ever opinion on MDL procedure, upholding the individuality of each case for the purposes of ripeness in appeals,⁴¹ effectively making partial appeals of an MDL possible—precisely the kind of “tweak” in the name of evolution referenced above, a move that would increase

34 Emery G. Lee III et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, 218 (2015).

35 *Id.* at 221.

36 MDL STATISTICS REPORT BY DISTRICT, *supra* note 19.

37 *See supra* note 4 and accompanying text.

38 *See supra* notes 28–30 and accompanying text.

39 *See* Gluck et al., *supra* note 28, at 1860–61.

40 135 S. Ct. 2480, 2492 (2015) (noting that since the Affordable Care Act did not go through “the traditional legislative process,” “rigorous application of [a traditional textual rule of statutory interpretation] does not seem a particularly useful guide”).

41 135 S. Ct. 897, 904 (2015).

MDL appellate review. Whether these cases are “one-offs” or the beginning of a more general conversation about how lawmaking has changed across many fields over the past fifty years remains to be seen.

* * *

This Article deliberately takes a 30,000-foot view, working in broad strokes rather than at the level of individual cases. The goal is to introduce students and nonexpert academics to the MDL, and to mainstream it in everyday conversations about the study of procedure—just as I have argued that, in courses and writings on public law, recent changes in the legislative process likewise must be studied, acknowledged, and understood as the new normal.⁴²

All of these modern unorthodox processes share common features. They each are a response to some pressure on the system, some way in which legal rules and doctrines have not kept up with the pace and pressures of modern lawmaking during a time when the consensus is that Congress, the executive branch, and the courts must nevertheless take action. They therefore tend to operate outside the relevant rules, raising questions about the value of the rules themselves and relying on consent rather than formal constraint, thus altering traditional relationships and often changing the balance of power.

And with each of these deviations, the modern unorthodoxies raise the critical question: *What do we care about most?* Is it access to court—or analogously, the production of legislation or regulation? Or is legislative, administrative, or civil procedure for *procedure’s own sake* the more important value—even if upholding that value means fewer cases get resolved or fewer laws get passed?

The MDL presses these tradeoffs. The MDL puts a thumb on the scale of nationalism over federalism, consent over adversity, procedural exceptionalism over transsubstantivity, and common law over FRCP. In other words—and this is what adds to its departure from tradition—the MDL takes what has generally been the *losing* side of procedure’s big theoretical and doctrinal debates.

To the extent that one resists the scales tipping in that direction, the MDL may be more symptom than cause. If the system envisioned by the FRCP set the baseline, procedure’s unorthodoxies arguably began years ago, with the disappearing trial as just one example. The MDL simply illuminates, perhaps in more extreme fashion, already existing unorthodoxies in the traditional model. And yet, as in other contexts, what was once unorthodox can become orthodox in short order. For example, the concept of “*Chevron* interpretive deference” to federal agencies was novel when first developed, but today

⁴² See, e.g., Gluck et al., *supra* note 28.

Chevron is the most cited case in the federal reports.⁴³ The once-revolutionary notion of judges as case managers is likewise now entrenched in the FRCP itself and cloaked with the legitimacy of Rule 16.⁴⁴ So too, it is possible the MDL may soon seem more like the baseline than the exception.

II. NATIONALISM V. FEDERALISM

One way to think about the recent rise of the MDL is to view its development through the lens of the more general tensions between nationalism and federalism in civil procedure. Procedure's current doctrines of jurisdiction, choice of law, and class action all effectuate a relatively federalist view of the world that in some ways is incompatible with the modern concept of a nationally integrated economy. MDLs highlight and respond to that pressure by working around those doctrines.

Look first at the current doctrines. The law of personal jurisdiction clings to antiquated concepts of territoriality and emphasizes state sovereignty. It still does not accommodate a concept of minimum contacts for jurisdictional purposes based on the premise that goods may be aimed at the United States as a whole (the idea of a national economy) rather than at a particular state.⁴⁵ Justice Kennedy's assessment in *J. McIntyre Machinery, Ltd. v. Nicastro* offers a recent and memorable iteration of this conclusion: "[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis."⁴⁶ As this Article went to press, the Court decided another case, *Bristol Myers Squibb Co. v. Superior Court of California*,⁴⁷ reaffirming its rejection of a conception of specific jurisdiction grounded in the fact of a national economy.

With respect to choice of law, the *Erie* doctrine still reigns and is, of course, state-centered.⁴⁸ *Erie* requires federal courts to apply the substantive law of the

43 Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 612 (2014). Recently, we have seen evidence the doctrine may now be unstable. Several Justices, including newly confirmed Justice Gorsuch, have implied the doctrine may be ripe for revisiting. See Philip J. McAndrews III, *What SCOTUS Nominee Neil Gorsuch's Interpretation of Chevron Could Mean for Environmental Administrative Law*, GEO. ENVTL. L. REV. (Mar. 5, 2017), <https://gelr.org/2017/03/05/what-scotus-nominee-neil-gorsuchs-interpretation-of-chevron-could-mean-for-environmental-administrative-law/> [<https://perma.cc/Pq8B-RB9R>].

44 See FED. R. CIV. P. 16 (articulating standards for scheduling and management of pretrial conferences).

45 For a rarely used exception, see FED. R. CIV. P. 4(k)(2) (allowing for personal jurisdiction over a defendant not subject to jurisdiction in any state).

46 564 U.S. 873, 884 (2011).

47 137 S. Ct. 1773 (2017).

48 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

forum state.⁴⁹ This requirement, in turn, makes many nationwide damages suits unamenable to class certification because federal courts tend to view these differences across state law as fatal to Rule 23's commonality requirement.⁵⁰ National litigation, then, has to look elsewhere.

The civil procedure literature does not have nearly as much discussion of this nationalism–federalism tension as one might suppose. The existing work tends to be limited to the classic minimum-contacts teaching cases, such as *Asahi Metal Industry Co. v. Superior Court of California*⁵¹ and *McIntyre*.⁵² Those cases, however, do not concern the fact pattern that most often gives rise to the MDL. Instead, those cases concern where jurisdiction might lie for an international defendant who aims products at the U.S. economy. For decades, the Court has infamously failed to produce a majority opinion on that question and has never concluded that merely putting one's product in the stream of American national commerce would suffice; instead, connection to a specific state is likely still necessary.

Enter MDLs. MDLs offer an interesting twist on procedure's jurisdictional chestnuts because many of the biggest MDLs involve *American* defendants. Thus the issue is not whether there is a place that the defendant can be sued. Rather, the issue in MDLs tends to be that the defendant can be sued in *too many places*.⁵³ Although the MDL drafters may not have envisioned how pervasive the MDL has become, the statute from the start was indeed always intended to address this problem, namely, cases in which “massive filings . . . are reasonably certain to occur” in different jurisdictions.⁵⁴

A. *The Race to the Courthouse: Horizontal Parity, not Sovereignty, Is the Issue*

One of the main problems MDLs aim to solve is therefore horizontal federal duplication and disuniformity. The typical MDL consists of damages actions across numerous states, resulting in cases being filed in potentially all ninety-four federal district courts (not to mention state courts). A traditionally federalist view might embrace the potential diversity—both procedural and substantive—that such horizontal proceedings are likely to produce. But from a national perspective, horizontal filings of this nature

⁴⁹ *Id.* at 78 (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”).

⁵⁰ See Genevieve G. York-Erwin, Note, *The Choice-Of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1794 (2009).

⁵¹ 480 U.S. 102 (1987); see *infra* note 52.

⁵² 564 U.S. 873. For examples of such work, see generally Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 STAN. J. COMPLEX LITIG. 1 (2014); Stewert E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163 (2013).

⁵³ See *infra* Section II.A.

⁵⁴ Lee et al., *supra* note 34, at 213 (quoting H.R. REP. NO. 90-1130, at 2 (1968)).

raise concerns about conflicting duties for the parties and wasteful, duplicative efforts by the courts. MDL consolidation thus expresses a preference not only for efficiency but also for a kind of judicial self-protection that, in turn, advances the nationalization of litigation.

Federal courts, beginning with *Marbury*, have always crafted doctrines with an eye toward protecting their own power and the enforceability of their rulings. Prudential rules, such as rules about finality and prohibiting advisory opinions, are all about the federal courts ensuring that when they speak, their mandates have teeth. In the MDL context, federal district courts have a similar interest: an interest in not having the rulings of one district judge undermined by the rulings of another. As one judge put it: “You need [MDLs] to prevent wars of jurisdiction. These conflicts are a nightmare. There is no ready mechanism for resolution, . . . [no] way to avoid whipsawing litigants and undermining judges.”

Other judges emphasized the “real world” discovery challenges arising from multiple horizontal litigations, and how the MDL ameliorates those challenges. For example:

The problem is discovery would be a nightmare without the MDL. Some judges allow certain documents and others don't and the plaintiffs' bar communicates every step of the way and would get the documents from each other they can't get from the other judge. Judge #2 says they are privileged but now they are being used in the real world.

Another judge reported: “It would be chaos if you didn't have [MDLs]. If you had these cases all over the country, no one could comply with forty schedules, one witness can't be deposed fifty times, it's not fair to the parties to expose them to conflicting expectations so you need [the MDL].”

Several judges emphasized how these practical concerns intersect with the federal courts' general appreciation of “good case management”: “We see multiple cases arising out of the same issue with the same defendant in multiple courts. Let's not reinvent the wheel in fifteen different federal courts, let's deal with discovery in one place. That's just good case management.”

The way in which the MDL docket has evolved also supports the theory that the nationalization of the economy has been a driving cause of the MDL's rise. Early MDLs focused on isolated incidents, such as airline crashes and “common disaster.”⁵⁵ Prior to 1990, only *six* products liability actions had been consolidated into MDLs.⁵⁶ As of December 2016, however, it was those very cases that had taken over the docket. Products liability

⁵⁵ *Id.* at 222.

⁵⁶ Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 KAN. L. REV. 775, 793 (2010).

actions had the largest share of the number of consolidated proceedings on the MDL docket, at 29.1%.⁵⁷ Moreover, each product liability MDL tends to have many more individual cases consolidated within it than other types of MDLs, meaning that products liability actions dominate the MDL docket. Antitrust was second, at 22.5% of the docket.⁵⁸ This shift is consistent with the understanding that modern MDLs are motivated by the way companies now do business on a national scale—and so the harm they inflict affects potential plaintiffs across the country. In the words of one judge: “We are in an era of mass litigation and mass marketing. Think about things like FDA warnings. It’s all en masse and when you have that, it’s about nationalizing litigation.” As discussed in Part IV, the nationalization is substantive as well as procedural: state-law and even federal-circuit law differences tend to get smoothed over when cases are consolidated.

B. *Evolving Procedure Doctrine for the National Context*

Could a more nationally focused set of procedure doctrines address the concerns that some find most troubling about MDLs? A more welcoming Rule 23 or something like a “pretrial class action” rule is unlikely to help. Although there is a good deal of commonality in consolidated cases, individualized examination is still almost always required. In personal injury cases especially, causation—and sometimes also damages and applicable state law—typically requires case-by-case evaluation.⁵⁹

A different response might be to apply to MDLs the same safeguards now applied to settlement class actions. It may be the case that such a designation would encourage more scrutiny and procedural regularity attendant to the final settlement, including a fairness hearing. But that type of scrutiny still would not change the “meat” of the MDL itself—the pre-settlement, information-gathering and consolidating phase. Moreover, some academics worry that incorporating aspects of Rule 23 would actually make things worse by giving MDLs an aura of legitimacy they believe MDLs should not have.⁶⁰

Similarly, shifting personal jurisdiction doctrines to embrace a more national focus—for instance, enacting a rule for nationwide jurisdiction

⁵⁷ U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., CALENDAR YEAR STATISTICS: JANUARY THROUGH DECEMBER 2016 11 (2017), http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2016.pdf [<https://perma.cc/RA2G-LLLD>].

⁵⁸ *Id.*

⁵⁹ *Cf.*, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622-25 (1997) (noting the problems of a “sprawling” settlement class stemming from disparate causation inquiries and differences in state law).

⁶⁰ See Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 539 (2013) (“[T]he harnessing of the settlement class device to MDL jurisdiction resonates in the back-room deal making, blanketed with an aura of judicial legitimacy and largely liberated from the due process concerns and protection associated with the class action itself.”).

(a possibility hinted at by Justice Kennedy in *McIntyre*⁶¹)—might not change much on the ground. Cases would still likely be transferred under 28 U.S.C. § 1404 to a single jurisdiction. To be sure, that single jurisdiction would have the power to finally dispose of cases (unlike the MDL court, which, as a formal matter, has only pretrial authority⁶²). But as a practical matter, the majority of MDL litigants waive their rights to return home for disposition and so the MDL court de facto already has this power.⁶³ And even under a hypothetical nationwide jurisdiction rule, differences related to state law applicable to each transferred case would presumably remain, barring a significant doctrinal shift in choice of law.⁶⁴

C. General Jurisdiction as an Example of Modernizing Procedure?

One area in which procedure doctrine has arguably modernized in recent years—and done so at least in part as a reaction to the expansion of the national economy—is general jurisdiction. A finding of general jurisdiction means that the defendant can be sued in that jurisdiction for any act committed anywhere (even outside the jurisdiction), since it is the forum in which that defendant is “essentially at home.”⁶⁵ As most Court watchers know, general jurisdiction was essentially a static doctrine—it had been taken up by the Court only once after it originated in 1952⁶⁶—until 2011. That year, the Court in *Goodyear Dunlop Tires Operations, S.A. v. Brown*⁶⁷ embarked on what now appears to be a multi-case process of reviving, clarifying and modernizing the doctrine in response to current economic conditions.⁶⁸ There may be something in this story for the MDL.

⁶¹ See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (“In this case, petitioner directed marketing and sales efforts at the United States. It may be that . . . Congress could authorize the exercise of jurisdiction in appropriate courts.”).

⁶² See *supra* notes 8–11 and accompanying text.

⁶³ Cf. Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2357–58 (2008) (describing the use of litigant “*Lexecon* waivers” to enable the transferee court to “conduct fruitful bellwether trials”).

⁶⁴ See *Ferens v. John Deere Co.*, 494 U.S. 516, 532 (1990) (holding a transferee court applies the transferor court’s substantive law); *Van Dusen v. Barrack*, 376 U.S. 612, 642–43 (1964) (holding that that following a § 1404(a) transfer, the transferee court must apply the substantive law, including choice of law rules, of the transferor court); cf. *Klaxon Co. v. Stantor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 498 (1941) (holding that in a diversity case, the district court must apply the choice of law rules of the state in which it sits).

⁶⁵ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

⁶⁶ See generally *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (discussing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)).

⁶⁷ 564 U.S. 915 (2011).

⁶⁸ See generally Meir Feder, *Goodyear, “Home,” and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671 (2014) (describing *Goodyear*’s “far-reaching effects on both the doctrine and theory of general jurisdiction . . . cast[ing] doubt on a large body of lower court case law”).

The new general jurisdiction cases are modern because they actually acknowledge and strive to find a workable way to deal with the fact that companies like Starbucks now do business in every state. Before *Goodyear*, general jurisdiction was tied to the concept of territorial jurisdiction—a concept even more antiquated than the state-tied stream-of-commerce doctrine discussed in the specific jurisdiction context. *Goodyear* brings general jurisdiction into the era of the nationally—even internationally—integrated economy. Can Starbucks be sued for anything, anywhere, in all fifty states, merely because of its business reach? Or is there some more limited number of jurisdictions—some number between one and fifty—that is a better fit? Justice Ginsburg, speaking for the majority in both *Goodyear* and *Daimler AG v. Bauman*,⁶⁹ the second case addressing this question, has strived to find a limitation.⁷⁰ Justice Sotomayor concurred in *Daimler* to urge a more capacious view of the possibility of nationwide general jurisdiction: subjecting multinational corporations to general jurisdiction in each state in which they engage in continuous and substantial contacts.⁷¹ As this Article went to press, the Court decided a third case, *BNSF Railway Co. v. Tyrrell*,⁷² which closely tracked *Goodyear* and *Daimler*. Justice Sotomayor was again in dissent.⁷³ The point is that the Court is grappling with how the law of procedure should react to how the economy has evolved, even as a majority of the Court has continued to resist a truly nationalized standard.

It may be no coincidence that Justice Ginsburg also wrote for the Court in *Gelboim*, the Court's second-ever opinion on an MDL procedural issue.⁷⁴ Although *Gelboim* did not address the nationalization theme, it did take a practical view of MDL litigation and might even be read as an MDL-inspired (albeit limited) update to 28 U.S.C. § 1291's final order rule. There, the Court reversed the Second Circuit's ruling that parties in an MDL cannot appeal an order if the order disposes of their claims but not all other claims in the consolidated action.⁷⁵ Instead, the Court came down in favor of appellate review in the MDL context, holding that the resolved cases "become immediately appealable" even if the other remaining issues in the MDL would not be.⁷⁶ Justice Ginsburg, of course, also authored

⁶⁹ 134 S. Ct. 746 (2014).

⁷⁰ *See id.* at 760-61 ("Plaintiffs would have us . . . approve the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business. That formulation, we hold, is unacceptably grasping." (citation and internal quotation marks omitted)).

⁷¹ *See id.* at 770.

⁷² 137 S. Ct. 1549 (2017).

⁷³ *Id.* at 1560-62.

⁷⁴ *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015). The Court's first MDL procedure case was *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). *See generally supra* note 11.

⁷⁵ *Gelboim*, 135 S. Ct. at 905-06.

⁷⁶ *Id.* (quoting DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 9:21 (2016)).

Amchem, an opinion that merely acknowledged the existence of a parallel MDL (noting its formation was a response to judicial “lack[of] authority to replace state tort systems with a national toxic tort compensation regime”⁷⁷), but that likely precipitated the rise of future MDLs because it rejected the role for “judicial inventiveness” in bending Rule 23 to allow for a settlement class in a nationwide asbestos damages case.⁷⁸

III. THE FRCP V. A FEDERAL COMMON LAW OF MDL PROCEDURE

How procedure should get made is another one of the field’s most central debates and one in which the MDL also intervenes unorthodoxly. The choice between the FRCP and judge-fashioned rules of procedure raises three distinct types of questions. First, there is the question of the way in which we want our procedure rules to be fashioned. Procedure rules can be made through the formal FRCP rulemaking process, by congressional statute, or by judges themselves. There are obviously different democracy and legitimacy implications attendant to which method is chosen, and judicial intervention has been generally more controversial than development through the formal rulemaking process. The most familiar recent example of how these choices play out is the development of the pleading standard originally set forth in Rule 8. As is well known to all followers of procedure, the Court significantly and controversially altered the meaning of Rule 8 through its decisions in *Bell Atlantic Corp. v. Twombly*⁷⁹ and *Ashcroft v. Iqbal*.⁸⁰

An obvious corollary question to the choice between the FRCP (or a procedure statute enacted directly by Congress) and a judge-made common law of procedure is the extent to which uniformity should be the paramount value in considering how we make procedure. The assumption that a litigant can walk into any federal courtroom in the country and know that the same procedures will apply to her case is an animating principle of the FRCP (even if that principle is already significantly undermined, MDL or not, by the proliferation of local and individual chambers rules).⁸¹

⁷⁷ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 599 (1997).

⁷⁸ *Id.* at 620.

⁷⁹ 550 U.S. 544 (2007).

⁸⁰ 556 U.S. 662 (2009).

⁸¹ Compare FED. R. CIV. P. 1 (“These rules govern the procedure in *all* civil actions and proceedings in the United States district courts.” (emphasis added)), and Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 441 (1958) (aspiring toward “the real ideal of a uniform and natural procedure for courts, both federal and state”), with Charles Alan Wright, Foreword, *The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 11 (1994) (arguing variations in procedure from district to district have resulted in “procedural anarchy”), and Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 553 (2002) (describing the “balkanization of federal civil procedure” as resulting in a “stunning array of local measures” that are “duplicative” and “difficult to discover, master, and satisfy,” “undermin[ing] the

To be sure, procedural uniformity does not necessarily depend on the existence of an FRCP. A Supreme Court-articulated standard might well have universal application; the standard set forth by the famous *Erie* decision is perhaps the best known example in procedure. But especially when it comes to *pretrial* procedure, precedential and uniformly applicable judge-made rules are rare, because such rulings are not often subject to appellate review. Lower federal judges might strive for uniformity which comes out imperfectly, or they might not strive for uniformity at all, instead deciding that different kinds of cases merit different kinds of procedural rules.

This brings us to the third issue, the “transsubstantivity” question: should the same procedure rules apply to all cases? We might have a different rule, for example, for antitrust cases as opposed to discrimination cases, or for pro se cases as opposed to lawyered cases, and so on. This debate, too, was implicated by *Twombly*’s raised pleading bar—that opinion was initially read as possibly intended only for the antitrust context.⁸² The FRCP itself explicitly engages this tension. A few FRCP are *not* transsubstantive: for instance, Rule 9 requires specialized pleading in fraud cases.⁸³

Now, let us bring the MDL into this debate. There is no FRCP specific to the MDL—that is part of what makes the MDL unorthodox. The MDL statute, 28 U.S.C. § 1407, concerns when MDLs are authorized, but does not mention the procedures that they should deploy for case management and resolution. FRCP 16’s case management framework may be said to loosely bind, or at least inspire, the MDL process.⁸⁴ But virtually all of the judges interviewed reported that typical MDL management goes far beyond the confines of Rule 16. As one judge put it: “It’s like Rule 16 on steroids. In the MDL, you need to strategize more. You have to look beyond immediate deadlines and see how all the pieces fit together.” Several judges remarked that, if we were to characterize the creative case management that typifies the MDL as simply normal work occurring under Rule 16, the result would be that Rule 16 “means nothing,” because it could accommodate virtually anything.

federal rules’ core precepts”). This proliferation of local variation can be seen by consulting the websites of each federal district, which contain local rules and even individual rules for each judge. See, e.g., *Recently Amended Practices*, U.S. DISTRICT CT. SOUTHERN DISTRICT N.Y., http://www.nysd.uscourts.gov/amended_practices.php [<https://perma.cc/8UM8-MLJ3>].

⁸² See, e.g., *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541 (6th Cir. 2007) (“Significant ‘uncertainty as to the intended scope of the Court’s decision [in *Twombly*]’ persists . . . particularly regarding its reach beyond the antitrust context.” (alteration in original) (quoting *Iqbal v. Sorema N.A.*, 534 U.S. 506 (2002))).

⁸³ See FED. R. CIV. P. 9(b).

⁸⁴ See FED. R. CIV. P. 16 (articulating standards for scheduling and management of pretrial conferences).

A. MDL Exceptionalism When It Comes to the Rules

The singular theme that emerged from the interviews is what might be called MDL exceptionalism. All of the judges respected the FRCP, but *every* judge opposed the idea of a new FRCP for MDLs or even a uniform common law approach. The recurring comment was that “every MDL is different,” and that the very hallmark of the MDL is the ability to deviate from traditional procedures—i.e., for the judge to remain flexible and creative in every case. As in the case of the comments regarding Rule 16, several judges emphasized that any rule that allowed judges the required degree of flexibility would add nothing.

Another reason that the judges resisted any kind of uniform procedure is their consensus view that MDL procedure is still a work in progress, but one that may never be complete. “MDLs are still evolving,” one judge reported. As an example, he pointed out that “bellwether[trials] weren’t being done ten years ago and now are prevalent.” He continued: “Practices are always evolving. Fact sheets are a great example. It’s a big innovation, everyone now uses them Necessity is the reason for innovation.”⁸⁵

These comments were echoed by many judges. For example, another judge noted: “I see ways to change course each time, new ways to tweak it. At what point can we have enough experience with this type of litigation to formulate it into rules? If we did it too early people would just go around them Every case is different.” The only change suggested by a few judges was that a rule on MDL attorneys’ fees (and *only* that rule) would be helpful.

B. Transparency

Some academics look at the MDL landscape and worry about accessibility, transparency, and uniformity. If MDLs are managerial judging writ large, then they may implicate all of Judith Resnik’s concerns that managerial judging erodes traditional due process protections, eschews appellate review, threatens impartiality, and undermines public trials.⁸⁶ However, most of the judges interviewed put their MDL procedures on the record, create case websites, transcribe all proceedings, and create phone connections to allow lawyers, litigants, and even state court judges to listen to all proceedings. Several judges stated that their attentiveness to devising and publishing these special rules for each MDL has made MDLs *more* visible to the stakeholders in any particular MDL than in non-MDL proceedings. Typical of the comments was: “Plaintiffs often can follow

⁸⁵ Fact sheets are “questionnaires eliciting a wide range of information, such as the circumstances of their exposures and the severity of their injuries, to facilitate settlement negotiations or improve claim administration following settlement.” MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.91 (2004) (noting the recent use of fact sheets in MDLs).

⁸⁶ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424-31 (1982).

an MDL better because of the website, transcript, all options and orders. Plaintiffs have said they get more access [to information] than in regular cases.”

A survey of the websites of all pending MDLs on the JPML list revealed that only thirty-three percent of cases made procedural orders publicly available. Specifically, of the 245 pending MDL cases in December 2016, 111 had websites specific to their MDL, with 80 of those websites posting procedural rules publicly.⁸⁷ Parties may still have access to procedural orders through protected website access, but to the extent that a value of procedural transparency is that it informs the public outside of a case, and may also inform parties and judges for future cases, it is not clear whether the way in which the MDL judges make their proceedings available is accomplishing that goal. Of interest, however, and consistent with the judges’ reports that large-scale MDLs benefit from more special procedures, large MDLs are significantly more likely to have public websites than small ones.⁸⁸

* * *

The obvious question is whether MDLs are actually so different from other cases. Why is every MDL unique, but not every class action? Perhaps the sheer numbers involved demand flexibility and make the management challenges different in each case. Still, one wonders why certain common MDL practices, such as transparency of orders, the ways in which counsel are selected, settlement safeguards, and attorneys’ fees issues, could not actually be standardized.

What may be more unique is the claim-narrowing and information-gathering process required in each case to sufficiently educate each side before settlement can occur. Many of the judges interviewed emphasized that the biggest challenges in MDLs are often getting a handle on all the plaintiffs in the case, on the strengths and weakness of the various cases, and winnowing claims. Indeed, the very feature that makes many MDLs unamenable to class action—the need for individualized assessment of causation and damages—may be precisely what necessitates unique factfinding and discovery in each case.

In other words, perhaps there are MDL procedures and MDL *procedures*. The discovery/claim narrowing process, although technically “procedure”, is

⁸⁷ This data is taken from the December 2016 update to JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING (2016), http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_Actions_Pending-April-17-2017.pdf [<https://perma.cc/GM7N-HLXF>].

⁸⁸ Using a t-test (assuming unequal variances), the data demonstrated that larger MDLs were statistically significantly more likely to have a website than smaller MDLs (both for the historical number of actions, as well as for the number currently pending). Similarly, the data showed that among MDLs with websites, larger MDLs were significantly more likely to post procedural rules publicly than were smaller MDLs (both for the historical number of actions, as well as for the number currently pending).

essentially the very *substance* of the MDL. That might be where judges need some flexibility and the ability to innovate from case to case. That is where judges report creative procedure-making, such as the use of bellwethers—which are now used in MDLs not to manage to trial but to educate the parties about the kind of claims in the case⁸⁹—and fact sheets, which are essentially plaintiffs’ questionnaires that allow for claim narrowing and education of the defendant about the plaintiff group.⁹⁰ One judge reported that the most important aspect of the annual conference of MDL judges is the sharing of new management practices and tools for large-scale MDLs, such as computer programs that help to collect and categorize claims.

But might there be less “substantive” procedures in the MDL which are more “procedural” in the traditional sense? Questions of communication to and among the parties, transparency of orders, and settlement review could be standardized to some benefit. Even innovative procedures could be standardized if judges were able to select from a menu of such procedures and add new ones to the list.

C. *The Creation of MDL Common Law*

The common law of MDL procedure has developed both individually and collaboratively. Judges innovate case by case, but there is a great deal of horizontal information sharing. All of the judges interviewed emphasized the importance of the annual conference of MDL judges as a key place for shared learning and dissemination of best practices.

Surprisingly, many also emphasized the importance of the *lawyers* themselves in developing MDL procedures. MDL judges typically select lead counsel with experience in the particular kind of MDL at issue and then turn to those same counsel for case-management schemes from previous litigations and advice on the procedures to be developed to manage the current one. “It’s less judges making up procedures than good lawyers making them up and bringing them to judges,” explained one judge. “But the lawyers aren’t disinterested actors. Their interests aren’t my interests, but in terms of moving things along, getting stuff done quickly, it’s a collaboration between lawyers and judges. The relationship is a really different animal here.” Elizabeth Burch and Margaret Williams have suggested that lawyers may take advantage of these opportunities to create procedures in their favor.⁹¹ As further detailed in Part V, this procedure law–collaboration process between judge and lawyer is another way that the MDL creates unorthodox institutional relationships.

⁸⁹ See Fallon et al., *supra* note 63, at 2332; see also *supra* text accompanying note 85.

⁹⁰ See also *supra* note 85 and accompanying text.

⁹¹ See Burch & Williams, *supra* note 5 (noting that MDLs are ripe “for repeat players to influence, create, and change the standard practice”).

Further, true to this “common law method” (a phrase actually used by one judge), MDL judges look at both MDL and non-MDL analogous cases for examples of good procedure. One example already given—the use of bellwether trials from the class action context for the different purpose of educating parties about claims in the MDL—is illustrative. One judge also pointed out that the concept of the common benefit fund (CBF) to compensate MDL attorneys comes from analogizing to the class action context.⁹² As another example, Judge Jack Weinstein, while presiding over the Zyprexa MDL proceeding, characterized the MDL as a “quasi-class action” in order to exert control over privately negotiated fee arrangements that would have been under his control were the case brought as a class action.⁹³ Judge Fallon also employed the trope of the quasi-class in the Vioxx MDL to “giv[e] the Court equitable authority to review contingent fee contracts[.]”⁹⁴ Some academics have been critical of these borrowed tools, especially where judges pick and choose among safeguards without including the full protections of the class action or other procedure.⁹⁵

It is also worth noting that even the MDL guidance documents that do exist encourage this kind of nonbinding procedural innovation. The Manual for Complex Litigation explicitly states that it “should not be cited as[] authoritative legal or administrative policy.”⁹⁶ It goes further, stating: “[t]he absence of precedent or of legislative or rule-making solutions should not foreclose innovation and creativity.”⁹⁷ (A few judges did say they look to the Manual, but all emphasized taking more cues from one another and lawyers.)⁹⁸

A major drawback of this form of procedural lawmaking, particularly as distinguished from the FRCP process, is that even the final results can be opaque

⁹² Common benefit funds compensate the attorneys who work to benefit all plaintiffs even if they are not representing all plaintiffs. The attorneys representing individual plaintiffs, but not working for all plaintiffs, must contribute a portion of their fees toward the common benefit fund. See generally Silver & Miller, *supra* note 27, at 120-43. The concept of a common benefit fund dates back to a nineteenth-century equitable doctrine. See Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 337 (1995).

⁹³ See *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122, 122 (E.D.N.Y. 2006). Although Judge Weinstein is credited with coining the “quasi-class action” term, its roots “extend back to *In re Air Crash Disaster at Florida Everglades*.” Silver & Miller, *supra* note 27, at 110 n.7 (citing 549 F.2d 1006 (5th Cir. 1977)). Weinstein, in the earlier *Agent Orange* litigation, also asserted—over the Second Circuit’s objection—the application of “federal common law.” See *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 845-47 (E.D.N.Y. 1984).

⁹⁴ *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 554 (E.D. La. 2009).

⁹⁵ See Mullenix, *supra* note 26, at 391 (“MDL judges, in turn, by endorsing the concept of the quasi-class action . . . have become complicit in allowing private parties to accomplish . . . backdoor settlements . . .”).

⁹⁶ MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 85, at *Introduction*.

⁹⁷ *Id.* at § 22.1.

⁹⁸ Similarly, the various academic conferences on MDL—like those held at Duke Law School, see *supra* note 5—were not mentioned by the interviewed judges. The major interest seems to be in the kind of practical information sharing about case management tools that occurs at the judges’ own MDL conference.

to outsiders. As one judge noted: “You are not going to see this stuff on Westlaw. You don’t get published opinions, you just get procedural orders.” MDL procedures that are published on judicial websites do not have precedential value.

D. MDL as Delegation

One surprising theme that emerged from the interview questions about MDL procedure was the concept of delegation. There is a very strong view (from the admittedly biased sample group of MDL judges themselves) that MDL judges not only need discretion but are particularly *worthy* of the discretion that they have been given. Virtually every judge reported that only the “best” and “most experienced” judges are assigned MDLs in the first place.

The JPML is the panel of judges that decides whether to consolidate cases into MDLs, where the consolidated cases will be heard (i.e., which district), and which judges shall preside. This opportunity to hand-pick the judge for each case is not fully replicated in any other aspect of civil procedure.⁹⁹ And it results in, or at least seems to imply to the judges themselves, special confidence in the judgment of those selected to innovate and manage procedurally.

When asked about how the JPML selects judges, many respondents said that newer MDL judges are given “easy cases, as they build expertise.” One judge with experience on the JPML said:

When we grant an MDL, we look to whether a judge has particular experience; we are telling the judge this is a different kind of case because we are giving it to *you*. We are asking them to bring their experience to bear and figure out what remedy and procedure to use.

This feeling of special delegation may continue even on appeal. As the Third Circuit recently noted—quoting the D.C. Circuit—appellate courts review orders “with deference, particularly in the MDL context. . . . [d]istrict judges must have authority to manage their dockets, especially during a massive litigation such as this, and we owe deference to their decisions on whether and how to enforce the deadlines they impose[.]”¹⁰⁰

Outside the MDL context, the modern innovation most linked to the concept of delegation in civil procedure has been the use of magistrate judges. But this is decidedly *not* the kind of delegation that most of the MDL judges interviewed have in mind. In fact, many judges volunteered—without being

⁹⁹ One judge pointed out that similar discretion exists, in at least some circuits, for which district court judges are invited to sit on appellate panels and for the use of magistrates. For more on the latter in the MDL context, see *infra* note 101 and accompanying text.

¹⁰⁰ *In re Asbestos Prods. Liab. Litig.* (No. VI), 718 F.3d 236, 243 (3d Cir. 2013) (first alteration in original) (internal quotation marks omitted) (quoting *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 822–23 (D.C. Cir. 2009)).

questioned on this topic—that, unlike in most other cases, they generally do not give work to magistrates in MDL cases.¹⁰¹ (Many do use special masters instead, another unorthodoxy.) One reason is that any appeal from a magistrate decision requires a written opinion from the federal judge, and MDL judges are particularly focused on efficiency, so introducing the magistrate judge undermines that goal. The primary reason, though, was clearly attitudinal. Quite simply, the MDL judges interviewed *like* to be intimately involved in this work, and even more importantly, see themselves as essential players in it. The pleasure of feeling important appears in play.

E. *Unorthodox Lawmaking, Redux*

I return to the concept of unorthodox lawmaking here because, in other lawmaking contexts, similar innovations in delegation, rulemaking, and deviations from uniformity are characteristic of how legal systems have responded to modern challenges when they are reluctant to change the textbook model itself. Congress and the executive branch delegate to states, experts, private entities, and decision-making commissions to make difficult or especially challenging decisions.¹⁰² They deviate from longstanding and uniform rules—such as notice-and-comment rulemaking or rules about committee hearings, the filibuster, or conference committees—to create workarounds that help make and implement modern law. These workarounds include, for instance, bulletins and guidance issued without notice-and-comment to sidestep the APA¹⁰³ and fast-track legislative processes to bypass the filibuster and conference committees.¹⁰⁴ Party leaders, like MDL judges, are less substantive experts than practical problem solvers, and their use of unorthodox procedures increases their power at the expense of the more traditional, and flatter, organization of lawmaking led by congressional committees.

The MDL analogously has created a judicial elite among district court judges and transformed the role of the judge for this class of cases. Across all of these examples, and certainly internal to procedure itself, the question is whether the overcoming of obstacles by the unorthodox process—in the case of the MDL, the centralizing of national cases into federal court at a scale otherwise extremely difficult, if not impossible, to resolve—has more value than

¹⁰¹ Obviously, there are exceptions. See, e.g., Pretrial Order #1 at 7, *In re Am. Med. Sys., Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2325 (S.D. W. Va. Feb. 29, 2012), http://www.wvwd.uscourts.gov/MDL/amsinc/pdfs/PTO_1.pdf [<https://perma.cc/T2K2-CMM2>] (referring all discovery disputes to a magistrate judge); see also Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L. J. 97, 187-88 (2013) (“The duties and burden of administering a large MDL must be shared with . . . magistrate judges . . .”).

¹⁰² See Gluck et al., *supra* note 28, at 1812.

¹⁰³ *Id.* at 1810-11.

¹⁰⁴ *Id.* at 1813-14.

the procedures circumvented by the untraditional process. Another question is whether there might be an alternative form more in sync with traditional norms.

IV. MDL, ACCESS TO COURT, AND THE CLASS ACTION COMPARISON

What are we comparing MDLs to? Academics worry that MDLs will exacerbate the broader trend toward “closing the courthouse doors.”¹⁰⁵ The class action tends to be held out in such scholarship as the ideal when it comes to aggregation,¹⁰⁶ and is the form of aggregation with which the nonexpert public is most familiar. Alternative forms of dispute resolution, including MDLs and arbitration, are sometimes charged with undermining the class action in ways that harm litigants.¹⁰⁷

This criticism did not resonate with the judges interviewed for this project. As a doctrinal matter, most judges felt MDLs and class actions are apples and oranges because, as many judges said, “most MDLs could never be certified.” They emphasized that MDLs, especially those grounded in tort, have too many individual elements to satisfy Rule 23. They also differentiated between the two types of actions because Rule 23 “manages to trial,” whereas MDLs are “a totally different animal.” As one judge put it:

The biggest difference between the class action and the MDL is that you can't really *try* the MDL so I am, at a very early stage, trying to group it . . . into 4-5 groups and I ask the lawyers to select 40 cases or so that represent the groups, and then I tell the parties just discover those. We do a limited discovery pool. Then we do bellwether cases We don't do this in a class action at all.

More than seventy-five percent of MDLs involve class actions.¹⁰⁸ Often there are multiple class actions within a single MDL, typically with individual claims also consolidated in the same MDL as well.¹⁰⁹ Combining multiple class actions into one larger class action instead of an MDL is generally not possible because of issues that divide them,

¹⁰⁵ See, e.g., Redish & Karaba, *supra* note 14, at 154 (presenting a “frontal assault on the constitutionality of the MDL”).

¹⁰⁶ See Mullenix, *supra* note 26, at 390; see also Silver & Miller, *supra* note 27, at 113 (noting differences between MDLs and class actions).

¹⁰⁷ See Mullenix, *supra* note 26, at 390.

¹⁰⁸ See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2016_1.pdf [https://perma.cc/C6KQ-AK6Y].

¹⁰⁹ *Id.*

such as differences across state law.¹¹⁰ Indeed, most judges interviewed expressed outright *confusion* when asked whether it would be salutary to loosen the Rule 23 requirements to allow more MDLs, or all MDLs, to be treated like class actions. One judge put it this way: “What would granting a class action do? It wouldn’t make a difference. You can’t have a class action with 900,000 people injured. Call it what you want, call it an elephant, you still need to individually prove everything, you have individual damages. This is the nature of modern litigation.”

Of course, the judges interviewed are unlikely to report that their procedures limit access to court. But academics who complain that MDLs diminish access to court should confront the argument that, without MDLs, there might be substantially less access. By way of comparison, and returning to the title of this Article, Barbara Sinclair, the political scientist who pioneered the idea of “unorthodox lawmaking,” began her work two decades ago as deeply critical of how modern legislative process—workarounds undermine the orthodoxies of the traditional lawmaking process. By the fourth edition of her book, however, published just five years ago, Sinclair had become a convert. Why? She came to the conclusion that, in the current environment of partisan gridlock and legislative complexity, legislation simply would not get made without unorthodox procedures.¹¹¹ For Sinclair, the laws themselves were a more important public good than the traditional procedures that historically framed the legislative process.

There is an analogous set of considerations in civil procedure. And they implicate an analogous tradeoff. Is access to court the ultimate good (akin to Sinclair’s production of legislation itself); or is procedure for procedure’s sake—the preservation of a uniform, transsubstantive, FRCP-minted procedure—a more important long-term system value? Critics of the MDL tend not to pose their objections in terms of this tradeoff, but these critics have yet to suggest how to harmonize the dueling considerations. During the interviews, many judges argued that it would be simply too expensive for individuals to mount such cases alone or to find representation, even for a handful of cases. In this regard, it is striking to see, in this volume, even Judith Resnik, one of the foremost critics of nontraditional case management, mirroring Sinclair’s evolution in the legislative context and recognizing the access-to-court benefits of the MDL.¹¹²

One judge said: “the only way we can ensure people can get lawyers is to most efficiently manage the cases. When I look at the MDL, I see more

¹¹⁰ See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 761 (2012).

¹¹¹ See BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 273-76 (4th ed. 2012).

¹¹² See generally Judith Resnik, “Vital” State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts, 165 U. PA. L. REV. 1765 (2017).

people getting some redress than it would be if it had to be litigated fully.” Another focused on the national and modern aspects: “It’s not about closing the courthouse doors at all They never would have been able to be litigated on their own, especially for mass torts [W]hen you have mass litigation, the notion of the individual plaintiff is totally anachronistic.”

The judges were not painting rainbows. They recognized that plaintiffs lose control of their cases through consolidation. They also acknowledged that the issue for plaintiffs of being represented by lawyers who the plaintiffs have not themselves selected, often in jurisdictions far away, is no small concern. As Martin Redish and Julie Karaba point out, when most of these plaintiffs file a lawsuit, they have no idea that the local attorney they choose is not likely to be the attorney directing their case, “because unless they are tag-along plaintiffs, they are unaware that they will eventually be transferred into an MDL.”¹¹³ One judge surmised there might even be constitutional problems when a plaintiff “has to watch helplessly as the case is sent to, say, New York and lead counsel is appointed who is totally unknown to the plaintiff.”¹¹⁴

Resnik, Dennis Curtis, and Deborah Hensler have shown how the absence of individual attention in a litigation can undermine plaintiffs’ perception of the legitimacy of a legal proceeding, regardless of outcome.¹¹⁵ To these concerns, the judges interviewed generally replied as did this one: “The question is whether a case goes forward at all. Is the choice essentially an MDL consolidation as opposed to not being able to litigate at all?” Another said:

Access is all well and good but for these cases it is pie in the sky. There are thousands of cases, enormous overlap. Would it be preferable to have those cases litigated in different courts in the country with different answers, different discovery? For a defendant to spend money on duplicative efforts instead of making the plaintiffs whole? How could you even function that way in cases like [ongoing MDLs involving] GM, the BP spill, pharma, or pelvic mesh?

One challenge for academics who disagree that the MDL is the answer to the access-to-court problem, then, is to identify what better alternatives might exist.

But it is not all about the plaintiffs, either. The judges’ positive impressions of the MDL seem motivated at least in part by what MDLs make feasible for *judges* and *defendants*, neither of which have limitless

¹¹³ Redish & Karaba, *supra* note 14, at 125.

¹¹⁴ Redish and Karaba have similarly argued the appointment system is an unconstitutional violation of due process. *Id.* at 133.

¹¹⁵ Resnik et al., *supra* 92, at 371-72.

capacity. For example, an individual litigant harmed by GM could “function” in an individual case, and it might well be worth it to her economically to bring the case if the value to her is sufficient. But how *judges* and *defendants* could handle these cases in nonaggregated form is a different question. For defendants, MDLs offer many obvious advantages, not least of which is being relieved of the burden of litigating simultaneously in multiple fora that may have conflicting rulings and being able to expose their key witnesses and discovery in general to only one round of coordinated scrutiny.

V. MDLs AND THE TRADITIONAL INSTITUTIONAL ARRANGEMENTS OF CIVIL PROCEDURE

The final lens through which we might examine the MDL is the institutional arrangements that structure American civil procedure. As noted at the outset, this Article puts to the side the most central relationship of all, that between the lawyer and her client. The MDL’s impact on that relationship, as well as the role of MDL lead counsel in general, has been well analyzed in the academic literature.¹¹⁶ Instead, this final part focuses on other ways in which the MDL reconfigures traditional relationships among lawyers and judges in the system.

A. *Horizontal Federal Judicial Relationships and the New Judicial Elite*

The MDL implicates two different types of horizontal relationships among federal district judges. The first, as alluded to in Part II, is what might be called the horizontal legitimacy of the federal district courts. One overarching motivation for the MDL, at least as the judges interviewed see it, is “to avoid whipsawing litigants and undermining judges” and to prevent a “race to judgment.” The MDL, conceived this way, protects the flat horizontal organization of the federal district courts, ensuring that no district is perceived as superior to another.

On the other hand, and in almost direct contrast, the MDL has arguably helped to create a judicial elite among federal district judges. Being selected by the JPML for case assignment, as others have observed and as all of the interviewed judges agree, is a mark of prestige.¹¹⁷ It is a way, like assignments to high profile judicial and rulemaking committees, for life-tenured federal judges (most of whom do not expect any further job promotion) effectively to rise in their own ranks.¹¹⁸

The judges who are selected as MDL judges view themselves as more qualified than other judges. The judges left out complain of unfairness and even

¹¹⁶ See, e.g., Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985 (2011).

¹¹⁷ See Burch, *Remanding Multidistrict Litigation*, *supra* note 5, at 417 (noting federal judges often “campaign” for MDL assignments).

¹¹⁸ See also *supra* note 12 and accompanying text.

discrimination. MDL judges are predominantly white and male, a trend former JPML Chair Judge John Heyburn is widely credited with starting to reverse.¹¹⁹ In 2010 only 17% of MDL judges were judges assigned their first ever MDL; by 2015 that number was 61%, with almost 200 judges having at least one MDL.¹²⁰ The current JPML Chair, Judge Sarah Vance, is the first woman to hold that position.¹²¹

The judges interviewed were blunt: “Judges aren’t created equal. I am doing a good job in my MDL so people will come back to me. Some judges are notoriously slow. This leads to repeat players. You need to assign cases to judges who understand how to move this along.” (We can see here, too, the high premium put on speed as marker of success in MDLs—a norm that pervades other aspects of civil litigation as well, and deserves its own separate treatment.)

The judges who are assigned MDLs universally report that they enjoy them because they are the “most challenging and best litigated cases,” and almost universally describe them as “the best cases, with the best lawyers. They are well financed and so the cases are presented in the most sophisticated way.” The feeling that these are the plum cases likely deepens the resentment of those judges who are not chosen to participate.

But to those who are chosen, an MDL assignment is perceived—at least by the judges interviewed—as a *reward*. As one judge put it: “This is our dessert. This is why we eat our diet. This is our reward for the prisoner cases. Academics are wrong to think we just want to settle and get rid of these cases.”

B. *Relationships With and Among Counsel: The Dominance of Consent*

MDLs operate by consent in almost every respect. This is a key element of their unorthodoxy. The procedures for each MDL are developed by consent. Litigants must waive their right to remand for the MDL judge to be able to dispose of their cases.¹²² Some jurisdictions now even allow litigants, by consent, to file cases directly in the MDL court (the so-called “direct file order”), without having to first file in their home jurisdiction and then have the JPML transfer

¹¹⁹ See John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, LITIGATION, Summer/Fall 2012, at 26, 30 (“The federal judiciary contains a deep bench of amazing talent, and we are taking advantage of it.”).

¹²⁰ At the request of the author, JPML Chair Sarah S. Vance asked the Panel staff to identify the transferee judges assigned to MDLs during the designated time periods and compare them to Panel records to determine which judges were receiving their first MDL assignment. Judge Vance also provided the author information regarding the results of its internal surveys of MDL interest among federal district judges.

¹²¹ See *Vance First Woman to Chair Major-Litigation Panel*, TUL. U. L. SCH. (Nov. 5, 2014), <http://www.law.tulane.edu/tlsNews/newsItem.aspx?id=19074> [<https://perma.cc/JYC5-VUJF>].

¹²² Cf. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 41-43 (1998) (emphasizing the “plaintiff’s right to a remand once the pretrial stage has been completed”).

them.¹²³ After consolidation is ordered, new plaintiffs also often file “tag-along” actions, which request permission from the JPML to join the MDL. Ironically, the one aspect of MDLs from which consent is absent is in the creation of the MDL itself. Section 1407’s transfer power is unilateral; plaintiffs are not allowed to opt out of MDL centralization, as that would defeat a core purpose of the MDL statute in the first place.¹²⁴ This is a major difference also from the 23(b)(3) class action, which does permit opt-outs (although MDL plaintiffs can still choose in the end not to settle and demand remand to the home district).

All of the judges described their own relationships with counsel as unusually collaborative. They also described the lead counsels’ relationships with one another in the same way. All interviewed said that class actions did not foster these same kinds of relationships. One distinguishing feature in this regard—another unorthodox deviation from the typical litigation—is that the MDL judge gets to select the case’s lead counsels (not just the lead plaintiffs, or the lead firm, as judges do in some class actions). The Manual for Complex Litigation advises judges to “take an active part in the decision on the appointment of counsel”;¹²⁵ a pamphlet published by the Federal Judicial Center suggests that transferee judges contact other judges to gain further information about the lawyers they may want to select as counsel.¹²⁶ Judges may also name committees of counsel, typically referred to as steering committees, to help resolve differences among counsel. Lead attorneys and their steering committees are accorded prestige, higher compensation, and the chance to gain or sharpen MDL expertise, while the remaining attorneys become dependent on this small group to represent their clients.¹²⁷

Selection of counsel is just the beginning of unorthodoxies in the MDL judge–counsel relationship. The judges interviewed take clear pleasure in directly engaging with the lawyers in these cases. As previously noted, they look to the lawyers to help them devise procedures. One judge observed:

Most MDL judges are involved more personally in these cases than other cases. For example in a recent case I told the lawyers we are wrapping up these cases and remanding everything in twelve months. I had a conference in person, it

¹²³ See Bradt, *supra* note 110, at 794 (“Direct filing allows the parties to bypass the administratively burdensome transfer process, and the court, in many cases, is allowed to retain complete jurisdiction over the cases to better facilitate a bellwether trial plan.”).

¹²⁴ See Silver & Miller, *supra* note 27, at 124.

¹²⁵ MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 85, at § 10.224.

¹²⁶ U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR., TEN STEPS TO BETTER CASE MANAGEMENT 2 (2d ed. 2014), <https://www.fjc.gov/sites/default/files/2014/Ten-Steps-MDL-Clerks-2D.pdf> [<https://perma.cc/RVN2-58JC>] (“Your judicial colleagues are a valuable source of information [when selecting lawyers to appoint as counsel]. Feel free to contact other MDL judges for evaluations of particular lawyers.”).

¹²⁷ See Silver & Miller, *supra* note 27, at 118-19.

was off the record, roll-up-sleeves work. I don't usually do this at all in civil cases, usually the [magistrate judges] do the pretrial management. This creates wonderful relationships and is very satisfying. It's problem solving together.

It is not just that the procedures and relationships are unorthodox. The work of the MDL itself, at least in the judges' perspectives, seems different from ordinary litigation. A separate question is why litigants in non-MDL cases should not benefit from the same kind of judicial attention.

A system premised on consent also raises concerns about adequacy and vigorousness of representation. Much has been written on consent in the class action context,¹²⁸ and more recently in the context of what consent means in an era of mandatory arbitration clauses.¹²⁹ Less attention has been paid to the critical role that consent plays throughout MDL system, and not just in the settlement context, where most of the attention has been trained. The attenuated relationship between plaintiff and counsel (who is almost surely not the counsel that plaintiff chose) combined with the close relationships among adverse lead counsels and the judge herself surely challenges traditional notions of how to evaluate consent.

But when pressed on whether MDL counsel disserve their clients by emphasizing cooperation and being less adversarial, the judges emphatically resisted. All emphasized the outstanding quality of MDL lawyering, indeed mentioning it time and again as the main reason judges want these cases. Many analogized MDL attorneys to a "specialized bar," like the small criminal and patent bars with repeat-player attorneys who have developed collegial ways of interacting. "It's very different in MDL than in class action," one judge said, "You have to work as a team, it's less adversarial. You need to discuss it and . . . to get along. When I form a [plaintiff steering committee] I try to create a virtual law firm: good trial lawyers, good organizers, people who work well together. It's a very different dynamic." Another explained that MDL lawyers

are not less adversarial. They are just better lawyers. They pick battles wisely and agree on many things, and focus on battles on things that really matter. They are still being zealous advocates, absolutely. At the end of the day, this isn't to say there aren't common interests. Most lawyers recognize at the end

¹²⁸ See, e.g., Fiss, *supra* note 20, at 1078 (describing settlement incentives that disincentivize adversarial conduct); see also Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1185-87 (1998).

¹²⁹ See, e.g., Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 L. & CONTEMP. PROBS. 55, 73-74 (2004); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2840 (2015); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635-36 (2005).

of the day they will settle, and both are just trying to cross that line and get leverage. But getting there still involves aggressive motion practice. There is no collusion. It's like the criminal bar. 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.

It goes without saying that being named lead MDL counsel also has its marker of prestige, as selection does for the judges.¹³⁰ Several of the judges interviewed described similar tensions as those in the judicial selection context between the desire to democratize lead counsel appointments and the necessity of ensuring that experts are in the driver's seat. As one noted, "I have heard the concerns about the elite group of lawyers but every judge wants to have someone with expertise." Another said: "If you are going to do brain surgery you aren't going to do it with someone who has never done it before. People know the lawyers. They respect and trust them. They get resume value by being on the committee."

The repeat-player nature of appointed MDL counsel has raised concern among some academics. Burch has pointed out, in regard to the *Vioxx* litigation, "[t]hree of the four lead lawyers in *Guidant* were also appointed to leadership positions in *Vioxx*, and one lead attorney in both of those litigations was also a lead lawyer in the *Genetically Modified Rice Litigation*."¹³¹ She and Williams have argued that MDL settlements benefit repeat-player attorneys more than one-shot clients.¹³²

Consent obviously also plays a large role in settlement, and several judges raised "serious due process concerns when cases are settled by inventory when there isn't a class." "Voluntary" agreement to the terms of a settlement can feel mandatory for plaintiffs. In the *Vioxx* case, for instance, "if any clients decided not to participate in the settlement, the lawyer was required to withdraw from representing the nonsettling clients."¹³³ Robert Bone and Burch would both pierce the veil of this formal consent, again because of the closeness of the

¹³⁰ Redish & Karaba, *supra* note 14, at 124-25; Silver & Miller, *supra* note 27, at 171.

¹³¹ Burch, *Judging Multidistrict Litigation*, *supra* note 5, at 82 (alteration in original) (footnote omitted). See generally Burch & Williams, *supra* note 5 (empirically assessing the rise and implications of repeat players in multidistrict litigation).

¹³² Burch & Williams, *supra* note 5, at 4; cf. Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1171 (2010) (arguing that the *Vioxx* settlement was a good example of "a response in the nature of hybridization—one that exposes hybrids of traditional *litigation* features with *aggregate* ones and that then seeks to regulate them as such, not to shoehorn them awkwardly within either the class action device or the traditional model of the one-on-one lawsuit" (emphasis added)).

¹³³ Erichson & Zipursky, *supra* note 14, at 266.

leading relationships of everyone in the MDL except the client.¹³⁴ Burch describes the plaintiffs' position as "a Morton's Fork: one must either continue litigating in front of and incur the displeasure of a judge who has played an active role in encouraging settlement or accept the settlement offer."¹³⁵

It should be noted that there are exceptions to the ubiquity of consent. But the exceptions raise problems of their own. A good example lies in the ongoing personal injury–toxic tort MDL against DuPont. DuPont refuses to settle and instead prefers to fight each case individually.¹³⁶ But at the rate of four-to-six individual trials per year, plaintiffs' attorneys have calculated that it would take between 583 and 875 years to try each of the approximately 3500 cases.¹³⁷ What justice then?

C. Horizontal Judicial Relationships Across State and Federal Systems

Federalism questions attendant to MDLs have not received deep academic attention either.¹³⁸ Many MDLs implicate federalism issues because the MDL is unable to formally consolidate all pending actions in one federal court, because § 1407 cannot transfer actions that remain pending in state courts around the country. The Class Action Fairness Act has complicated things further by bringing more multistate cases into federal court. Federalism tensions become unavoidable in these situations.

In the interviews, the MDL judges were asked about their relationships with state court judges and about the risk that important differences across state law are being smoothed over in consolidation. It is difficult to determine if those concerns were validated. On the one hand, most of the judges emphasized their processes of coordinating with state courts with parallel proceedings. Some of the judges reported that they call their state counterparts immediately on assignment, offer to do joint status conferences, joint discovery rulings, even joint opinions and settlement negotiations.¹³⁹ Some request the appointment of a special liaison from the state case to attend every meeting. This kind of coordination and collaboration, too, depends on consent.

¹³⁴ Burch, *Disaggregating*, *supra* note 5, at 682; *see also* Bone, *supra* note 14, at 335 ("Consent cannot validate an otherwise unjust settlement when the consent is the result of serious flaws in the procedural system . . .").

¹³⁵ Burch, *Disaggregating*, *supra* note 5, at 682.

¹³⁶ *See* Plaintiffs' Steering Comm.'s Trial Proposal for the Post-Bellwether Trials at 13, *In re* E.I. DuPont de Nemors & Co. C-8 Pers. Injury Litig., No. 2-13-MD-2433 (S.D. Ohio Dec. 18 2015).

¹³⁷ *Id.* Almost all of the cases originate in one state, so remanding would put far greater burdens on trial judges in this instance (where the alleged harm is particularly localized) than an instance in which a remand would send cases to many different federal districts.

¹³⁸ For an exception, *see* William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1693-1742 (1992).

¹³⁹ *See also id.* at 1708-26.

On the other hand, most of the judges ask the parties in the state court proceeding to pay into the common benefit fund in the federal case—the fund that covers fees for counsel in the *federal* MDL. This is a controversial practice that often creates tension.¹⁴⁰ A kind of coerced consent also figures in here. One state court judge called this “a huge problem. People get very upset, this is where we feel like we are the step-children but we don’t feel we have ways around it. If you don’t go into the CBF it puts the kibosh on cooperation.”

When it comes to substantive differences across state law, some of the federal judges acknowledged that state law issues can get “mushed” together by the MDL’s tendency to group similar cases together—cases that may include actions from states with closely related laws. But many judges insisted that they make efforts to apply the different state laws. If true, a perhaps counterintuitive way to think of the MDL would be as *pro*-federalist in a modern sense: a national litigation regime that allows—indeed expects—internal state variation. In different contexts, I have made similar observations about other modern federal lawmaking regimes that provide national frameworks and yet build state law variation into them. For instance, many federal statutes incorporate state law, and so the meaning of federal law varies from state to state.¹⁴¹ I label these kinds of regimes (and there are many) “national federalism.”¹⁴² It is intriguing to consider MDLs in that category.

That said, none of the judges interviewed mentioned such a virtue. Rather, a less-sunny view came from many of the judges, who reported “tremendous difficulties” with state law issues. Several pointed to one recent opinion (from the GM ignition switch MDL) by Judge Jesse Furman in the Southern District of New York addressing precisely this issue. Judge Furman rejected counsels’ attempts to lump state law claims together. He explained that “subtle differences in state law can dictate different results for plaintiffs in different jurisdictions,”¹⁴³ and so “while it entail[ed] a significant amount of repetition” his “Opinion and Order analyze[d] each claim in conjunction with precedent from the relevant jurisdiction.”¹⁴⁴ Several judges said Judge Furman’s opinion was exceptional, and most said that differences across state law claims are more typically ignored, or at least blended.

Some circuit court judges who reviewed this Article also remarked on the frequency with which they have had to reverse MDL judges for

¹⁴⁰ See also FED. JUDICIAL CTR. & NAT’L CTR. FOR STATE COURTS, COORDINATING MULTIJURISDICTION LITIGATION 7 (2013) (recognizing “the common benefit approach can create conflict”).

¹⁴¹ See generally Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996 (2013).

¹⁴² *Id.*

¹⁴³ *In re* Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543(JMF), 2016 WL 3920353, at *18 (S.D.N.Y. July 15, 2016).

¹⁴⁴ *Id.* at *2.

failing to pay attention to state law and the differences in applicable state law among MDL plaintiffs.¹⁴⁵ However, this may be a problem of aggregation that is not unique to MDLs, since a similar criticism has been levied in the context of settlement class actions.¹⁴⁶

One judge described a different kind of state/federal law problem in a typical MDL: there is often confusion about which law controls—confusion that results from different stages of the case occurring in different circuits, each with their own interpretations of state and federal law. For instance, assume that an MDL judge in Philadelphia issues a decision on summary judgment involving state law in a case that includes some cases from the Sixth Circuit. When the case is later remanded to the district court in Ohio, the Sixth Circuit would be reviewing a Philadelphia court that applied Ohio state law, but used the procedural and other federal law of the Third Circuit, which may not be the same as the Sixth's. Thus horizontal federal law, in addition to state law, may get confused or blended.

Some of the state court judges interviewed complained that MDLs have become more attractive than some class actions in state court, and that plaintiffs are using MDLs to “jump around” the state court system. Some state judges also complained about classic *Erie* problems, such as federal judges not following state law requirements on matters such as pre-pleading screening rules.¹⁴⁷ A lack of formal guidance about how certain cross-system issues should be handled was widely acknowledged, from issues relating to substantive law questions to questions about attorneys' fees. One federal MDL judge complained that the defendant in one of his cases “repeatedly raised [the] possibility of my forcing state judges to do things, but I had reservations about scope of my authority,” and yet had no controlling authority to consult on that question.

Both sides, unsurprisingly, want to be in the lead. One state court judge said: “If I get the case first I hit the ground running to get out in front of the MDL. We want to cooperate and coordinate but we don't want to cooperate and coordinate ourselves out of the system.” Some of the federal judges likewise emphasized the need to issue their own joint coordination orders early to “be sure the MDL case gets out front . . . This is one place the plaintiff's and defendant's interest in the MDL are aligned, both wanted me to get state judges under control, and to ignore objections of state plaintiffs' counsel.”

¹⁴⁵ For two recent examples from the Ninth Circuit, see *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981 (9th Cir. 2014); and *Slayman v. FedEx Ground Package Sys.*, 765 F.3d 1033 (9th Cir. 2014).

¹⁴⁶ See, e.g., Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 980 (2014).

¹⁴⁷ Several judges mentioned additional pleading requirements common in state law personal injury cases. Some states, for example, require an expert report before allowing a medical case to go forward. This is an unresolved *Erie* question with purchase outside the MDL: does *Erie* require a federal court to apply pre-pleading requirements as part of the substantive law of the state, or does Rule 8 effectively displace those requirements? For an example of the first approach, see *Chamberlain v. Giampapa*, 210 F.3d 154, 161-62 (3d Cir. 2000).

In 2014, a joint state–federal MDL study group was convened to produce best practice guidelines for state and federal interaction in the MDL context. State court judges were also recently invited for the first time to the MDL judges’ annual conference.¹⁴⁸ One judge reported that the state judge participation at the MDL conference has been very effective in driving the “message across in person” of the need “to always remember the parallel state court action.”

D. *The Final Vertical Relationship: Appellate Review*

Finally, as already alluded to, the MDL disrupts traditional practices of appellate review. This is not just because so much of MDL work is done in the pretrial context. Another important reason, as one judge put it, “is because we try to do everything by consensus. This also means there is not much to appeal. You are operating outside the rules so you need consensus or else you are getting mandamus and interlocutory appeals. Consensus works to everyone’s advantage.”

The fact that pretrial orders are not routinely appealable under 28 U.S.C. § 1291 is clearly an enormous factor, with a variety of implications.¹⁴⁹ Most obvious is the limitation it places on access to court—in particular, access to a different judge from the MDL district judge and the inability for error correction relating to pretrial rulings that can have enormous significance for many litigants. The lack of appellate review also means that little decisional law has developed to guide MDL judges and litigants, or to make MDL procedure consistent across jurisdictions. In the GM MDL described above, Judge Furman issued another opinion expressing surprise at the degree to which so much MDL procedure law remains unsettled.¹⁵⁰

The judges interviewed for this study discussed the desire for some decisional law. But most focused on attorneys’ fees and settlement, because they prefer more flexibility on other matters, such as structuring the MDL’s factfinding and claim-narrowing processes. One judge mentioned uncertainty about the common question of whether an MDL judge could “force lawyers not in your case into the common benefit fund,” and as evidence of that uncertainty pointed out a circuit split on whether that decision was permissible by consent.¹⁵¹

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¹⁴⁸ Academics and other speakers have also recently been invited.

¹⁴⁹ See Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 *FORDHAM L. REV.* 1643, 1647–48 (2011).

¹⁵⁰ *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543(JMF), 2016 WL 3920353, at *7–8 (S.D.N.Y. June 10, 2015).

¹⁵¹ Compare *In re Genetically Modified Rice Litig.*, 764 F.3d 864, 874 (8th Cir. 2014) (finding party consent necessary), with *In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d 524, 533–38 (3d Cir. 2009) (affirming the MDL judge’s discretion).

One way to address unorthodoxies in modern lawmaking is to bend modern legal frameworks to those new formats. The idea (maligned by the interviewees in this study) of a new rule of procedure for the MDL would be one way to do so. In the context of appellate review, and arising from the desire to foster development of a law of MDL procedure, a perhaps less controversial modification might be to alter the final order rule. Of course, such a modification, unless cabined to the MDL context, would have a ripple effect far beyond the MDL to all pretrial work and could overwhelm the appellate docket. It would also drag out MDLs significantly, because presumably there would be appeals every step of the way. Avoiding such scenarios is precisely one of the reasons we have the final order rule in the first place.¹⁵²

Such ripple effects often pose challenges for attempts to tailor legal frameworks to unorthodox lawmaking, as analogous considerations in other fields illustrate. The idea of special statutory interpretation rules for omnibus bills, for example, raises the question of why we would not also have special interpretation rules for especially long, even if non-omnibus, statutes, or for especially short ones. Yet creating special and exclusive frameworks for only unorthodox procedures entrenches their very exceptionalism. In a procedure system still largely grounded in transsubstantivity, the challenge is how far any proposed modification might extend.

E. *A Snapshot of MDL Appellate Review*

This is not to say there are *no* MDL cases in the federal courts of appeals. A brief review, based on cases accessible in Westlaw, reveals at least 100 MDL cases that reached the circuit courts on direct review over the past five years.¹⁵³ About a quarter of those cases reviewed procedural questions related to the MDL. Almost all of these cases made it up on appeal via § 1291, typically appealing a grant of dismissal, summary judgment, an order for fees, or under Rule 23(f) as appeals of class certification decisions. There were a handful of interlocutory appeals via 28 U.S.C. § 1292 and one mandamus.

The issues at stake in these cases included matters such as the apportionment of attorneys' fees, choice of law, and appellate jurisdiction. For example, in 2014, in the NFL concussion MDL, the Third Circuit wrote

¹⁵² *Cf.* *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (“Permitting piecemeal, prejudgment appeals, we have recognized, undermines ‘efficient judicial administration’ and encroaches upon the prerogatives of district court judges, who play a ‘special role’ in managing ongoing litigation.” (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981))).

¹⁵³ These rough figures capture appeals reviewing decisions of the transferee court or the JPML, but not all appeals that arise post-remand or all cases about MDLs in general, as there are cases that relate to MDLs but do not arise directly from them. For instance, a case concerning “law of the case” in the transferor court on remand clearly relates to MDL procedure but does not arise directly out of the MDL. *See, e.g., Howard v. Zimmer, Inc.*, 711 F.3d 1148 (10th Cir. 2012).

two opinions involving settlement, holding that it did not have jurisdiction to review objections to a preliminary approval of the settlement class.¹⁵⁴ The Eighth Circuit has heard several cases emerging from the genetically modified rice MDL, holding in one case that the transferee court has broad discretion to oversee the distribution of the common benefit fund, but not to order parties in cases not consolidated into the MDL to pay into the fund,¹⁵⁵ and in another case holding that federal district courts have jurisdiction to require parties to contribute to the CBF, even if the actual settlement occurs in state court.¹⁵⁶ Several cases reviewed MDL choice of law decisions.¹⁵⁷

The remaining cases on appeal (apart from these procedure-related appeals), involved ordinary substantive questions that just happened to arise in MDLs—such as federal preemption of state claims and other statutory questions—or questions about class certification for classes within the MDL, or questions involving motions to compel arbitration. Figure 1 provides a snapshot.

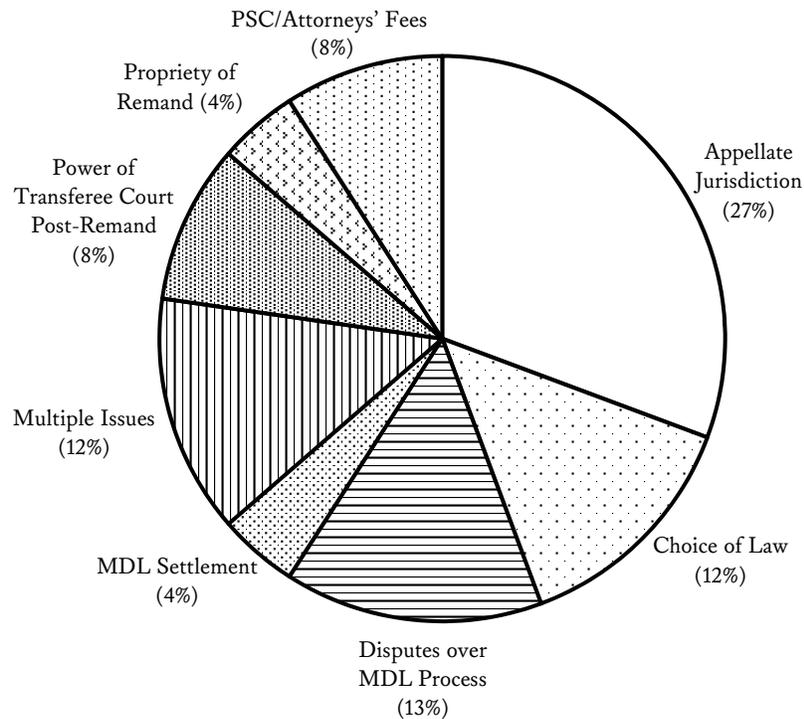
¹⁵⁴ *In re Nat'l Football League Players Concussion Injury Litig.*, 775 F.3d 570 (3d Cir. 2014); *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016).

¹⁵⁵ *In re Genetically Modified Rice Litig.*, 764 F.3d 864 (8th Cir. 2014).

¹⁵⁶ *In re Genetically Modified Rice Litig.*, 835 F.3d 822 (8th Cir. 2016). In a related case—not included in this survey because it arose collaterally to the MDL itself—the Eighth Circuit considered a class action brought by lead counsel against other attorneys in the MDL for failing to pay into the CBF. The appellate court found that the district with the MDL court had personal jurisdiction over plaintiffs' attorneys who initially filed the rice complaints in state court in another district. *See Downing v. Goldman Phipps, PLLC*, 764 F.3d 906 (8th Cir. 2014).

¹⁵⁷ *See, e.g., Wahl v. Gen. Elec. Co.*, 786 F.3d 491 (6th Cir. 2015).

Figure 1: MDL Procedural Issues on Appeal, 2011–2016



Nevertheless, the courts of appeals, at least in these cases, do not seem to be in the business of “making MDL procedure.” Although the very existence of these appellate decisions undercuts charges that MDLs are a doctrinal black hole and that access to an appellate court is impossible, very few of the cases decided actually seem to address any of the issues most troubling to those who worry about MDLs. This may well be because the cases are still coming up under § 1291, which would not generally be used to review the creative early-stage claim management decisions. As a result, the core of the work that captures the MDL’s unique features and unorthodoxies still seems largely absent from the appellate docket.

CONCLUSION: UNORTHODOX CIVIL PROCEDURE

The MDL is perhaps the most salient modern example of what this Article calls unorthodox civil procedure. Unorthodox does not necessarily mean “bad.” But the emergence of unorthodox lawmaking often does signify a system under stress, or in the process of change. Indeed, just as the rise of non-traditional

omnibus legislation is a symptom of the bigger problems of legislative gridlock and overwhelming regulatory complexity, the rise of the MDL may be a sign of deeper pressures on the traditional model of procedure. MDLs demand that we pay attention to the nationalization of litigation, the limits of the FRCP, and the real-world challenges of access to court under the traditional model.

MDLs are certainly not the only example of unorthodox civil procedure, but with thirty-nine percent of the federal docket, they are certainly warranting of more theoretical and doctrinal analysis. Moreover, additional unorthodoxies are likely not far behind. Just as in the legislative and administrative law contexts, the rise of one unorthodox vehicle is usually the beginning, not the end, of the trend.