
ARTICLE

“VITAL” STATE INTERESTS: FROM REPRESENTATIVE ACTIONS FOR FAIR LABOR STANDARDS TO POOLED TRUSTS, CLASS ACTIONS, AND MDLS IN THE FEDERAL COURTS

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This Article maps the transformation of constitutional understandings of the forms of aggregation that due process permits by putting these expanding views into the context of the changes in the federal docket during the past half century. In the 1940s, jurists interpreting the representative action provisions of the Fair Labor Standards Act thought individuals who had not personally agreed to be part of those cases could not be bound by the results. In the 1950s, however, the Supreme Court

† Judith Resnik, all rights reserved, 2017. Arthur Liman Professor of Law, Yale Law School. This Article was prepared for the University of Pennsylvania Law Review Symposium, “1966 and All That: Class Actions and Their Alternatives After Fifty Years,” held in November 2016. Thanks are due to the Law Review and to Stephen Burbank, Jonah Gelbach, and Tobias Wolff for asking me to participate; to commentators Janet Alexander and William Fletcher and to other panelists; to Deborah Hensler and Jonah Gelbach for collaborative assistance on obtaining data on the federal judicial docket; to Sam Issacharoff and Andrew Bradt for materials related to multidistrict litigation; to Brian Fitzpatrick, Larry Fox, John Leubsdorf, Geoff Shaw, Adam Zimmerman, Scott Dodson, David Noll, Zachery Copton, and Denny Curtis for comments; to John Coffee, Roberta Romano, and Michael Klausner for insights into securities litigation; to members of the staff of the Administrative Office of the U.S. Courts and of the Federal Judicial Center: Emery Lee, Carol Krafka, Wendell Skidgel, Donna Stienstra, and Brad Sweet for providing assistance on a myriad of research questions related to federal data keeping; to the staff at the Special Collections of the Harvard Law Library; to Yale Law librarian Michael VanderHeijden; to Abbe Gluck, Reva Siegel, David Super, John Witt, and other participants in the Yale Faculty Workshop, and to a wonderful group of students with whom I have learned a great deal—Matt Butler, David Chen, Kyle Edwards, Clare Kane, Marianna Mao, Catherine McCarthy, Urja Mittal, Heather Richard, Regina Wang, Emily Wanger, and Iva Velickovic; and to Bonnie Posick, for her expert editorial assistance. Like others, I have participated as an academic and lawyer in some of what I write about. See, e.g., Letter from Judith Resnik & Thomas D. Rowe, Jr. to Honorable Thomas M. Reavley, Chair, Ad Hoc Comm. on Asbestos Litig. (Mar. 8, 1991) (on file with author); In re Nineteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig., 982 F.2d 603 (1st Cir. 1992); In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295 (1st Cir. 1995).

approved aggregation to serve the “vital state interest” in protecting banks from large numbers of claims when trust accounts were pooled. And in 1966, Rule 23 created a broader mechanism to bind absentees without their affirmative consent or their participation at the inception of a lawsuit. Through analyzing unpublished memos by Rule 23 drafters, I show how remarkably successful they were in displacing once conventional constitutional wisdom by disentangling autonomy, consent, and individualization in litigation from the strictures of the Due Process Clause.

One marker of change comes from data on the related aggregate form of multi-district litigation, which in 2015 accounted for almost forty percent of the federal courts’ docket of pending civil cases. Other data mark the need for aggregation: twenty-five percent of the civil filings in federal court, and fifty percent of the appeals, are by litigants without lawyers. Aggregation provides infusions of resources that are central to enabling litigation, and hence aggregation continues to serve the “vital interest” of the government—in need of legitimate court systems to which diverse users have access.

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I. CONSTITUTIONALIZING AGGREGATE LITIGATION

Narratives of class actions identify the 1966 reforms of Rule 23 as liberating aggregation. But the key decision enabling today’s aggregates dates from the early 1950s when the Supreme Court, in service of protecting what it saw to be a “vital state interest,” relaxed the strictures of the Due Process Clause to enable banks to preclude subsequent claims by beneficiaries of pooled trusts. In the 1960s, rule drafters built on that model to deploy federal courts to do other kinds of work, including facilitating lawsuits for groups of civil rights plaintiffs and consumers who could not have pursued cases individually.

This Article maps the transformation of constitutional understandings of what due process permits by putting these expanding views into the context of the changes in the federal docket during the past half century. In the 1940s, jurists interpreting the representative action provisions of the Fair Labor Standards Act thought individuals who had not personally agreed to be part of those cases could not be bound by the results. A key shift occurred in 1950 when the Supreme Court approved binding beneficiaries to protect banks pooling trust funds.¹¹ But Rule 23 went further and created a broader mechanism to bind absentees without their affirmative consent or their participation at the inception of a lawsuit. Through analyzing unpublished memos by Rule 23 drafters, I show how remarkably successful they were in displacing once conventional constitutional wisdom by disentangling autonomy, consent, and individualization in litigation from the strictures of the Due Process Clause.

Not only did Rule 23 embed expansive readings of due process that had been thought a few decades earlier to be impossible, Rule 23 so deeply normalized aggregate processing that it became commonplace for the very cases—mass torts—presumptively exempt in the 1960s. One marker of that change comes from 2015, when the related aggregate form of multi-district litigation (MDL) accounted for almost forty percent of the federal courts' docket of pending civil cases, and product liability cases were ninety-two percent of the individual actions clustered within the MDL docket.

The rise of aggregation intersects with other shifts in courts, as judicial promotion of settlement along with other forms of alternative dispute resolution came to the fore. Most of these managerial and settlement efforts take place outside public courtrooms. The mix of cases has also changed and, during the last decade, the number of unrepresented litigants has swelled. Individuals without lawyers file a quarter of the civil cases annually brought to the federal courts.

In the 1990s, conflicts over the propriety of class actions gained intensity. Congress banned legal service lawyers from bringing class actions and constrained the use of prison and securities class actions. In 2011, the Supreme Court licensed a broad evisceration by interpreting the Federal Arbitration Act (FAA) to permit job applications and consumer forms to ban aggregation.

The preclusion of class actions through the FAA and the prevalence of aggregation share a conceptual predicate: legally-constructed, rather than actual, consent. The individuals affected are not the authors of the terms under which their rights are decided. Yet the reasons for doing so diverge. Class action bans *impose costs* on the pursuit of rights by cutting off access to courts and

1 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

suppressing information relevant to other potential claimants. Class actions and MDL proceedings aim to *enable access* to remedies through group-based redress in a public forum.

During the past fifty years, discussions of aggregation have been laced by two motifs: utility and hostility. In 2017, Congress launched yet another attempt to derail class actions as well as to limit tort-based MDLs. But criticism of aggregation ought not distract its proponents from considering how to respond to the experiences over the decades with aggregate practices. The legitimacy of court-based judgments has been keyed either to direct participation or adequate representation of absentees' interests. Since its inception, discussions of Rule 23 have focused on the similarities and the differences across claimants at two points—certification of classes and approvals of settlements.

“Vital” state interests need again to be brought into focus to require making patent—rather than opaque—decisions to shape distribution systems under the rubric of class actions and MDLs, so as to bring into focus the challenges, after settlements are crafted, of responding to diverse interests. Putting those issues under the court's aegis and before the public's eye can shift (again) constitutional understandings of what courts can and should do.

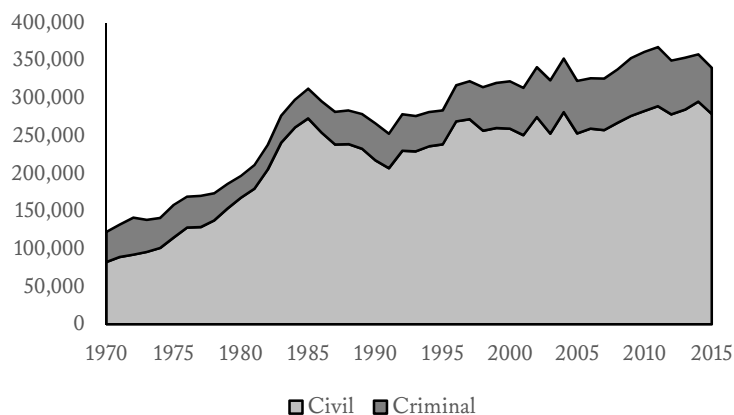
II. COLLECTIVELY DEPENDENT

Five facts about the docket and doctrine of the federal courts inform my reflections on the fiftieth anniversary of the modern class action. Filings have flattened; significant proportions of pending cases are aggregated through multidistrict litigation; large numbers of unrepresented litigants file cases; doctrines have constricted the availability of class actions; and almost no trials, as well as much else, take place in public proceedings in the federal judicial system.

First, filings in the federal court system, which had more than doubled between 1970 and 1985, have experienced little growth in the last three decades. The details are in Figure 1, a graph of federal district court filings between 1970 and 2015.²

² The data in Figure 1, U.S. District Court Filings, 1970–2015, were derived from William F. Shughart II & Gokhan R. Karahan, *Determinants of Case Growth in Federal District Courts in the United States, 1904–2002* (ICPSR 3987), INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/3987> [https://perma.cc/TE9Z-E42E]. Civil caseload data for 1998–2015 were derived from *Caseloads: Civil Cases, U.S. a Party, 1870–2016*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/courts/caseloads-civil-cases.u.s.-party-1870-2016> [https://perma.cc/MG8U-FHWP]. Criminal caseload data for 1998–2015 were derived from *Caseloads: Criminal Cases, U.S. a Party, 1870–2016*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/courts/caseloads-criminal-cases-1870-2016> [https://perma.cc/M476-8GGM]. Criminal and civil caseload data for 2001–2015 (for the twelve-month period ending Mar. 31) were adapted from yearly reports created by the Administrative Office of the U.S. Courts. ADMIN. OFFICE OF THE U.S.

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



During the past fifteen years, civil and criminal filings have held steady, ranging from between 300,000 and 360,000 cases per year. In 2015, 279,036 civil cases were filed, and the federal government brought more than 60,000 criminal cases,³ a significant proportion of which involved multiple defendants.⁴

In contrast to flattened *filings*, the number of *pending* civil cases, tracked in Figure 2, more than tripled between 1970 and 2015. As of 2015, 341,813 cases were pending. But thousands of these cases are not dealt with individually.

Rather, a second key fact about the federal courts is that, in addition to an unknown number of cases certified as class actions,⁵ tens of thousands of cases

COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.C, <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics> [<https://perma.cc/WJ68-WK3M>] (navigate to “Federal Judicial Caseload Statistics” hyperlink for each respective year, then “C series” tables for civil data and follow “download” hyperlink); *id.* at tbl.D (navigate to “Federal Judicial Caseload Statistics” hyperlink for each respective year, then “D series” tables for criminal data and follow “download” hyperlink).

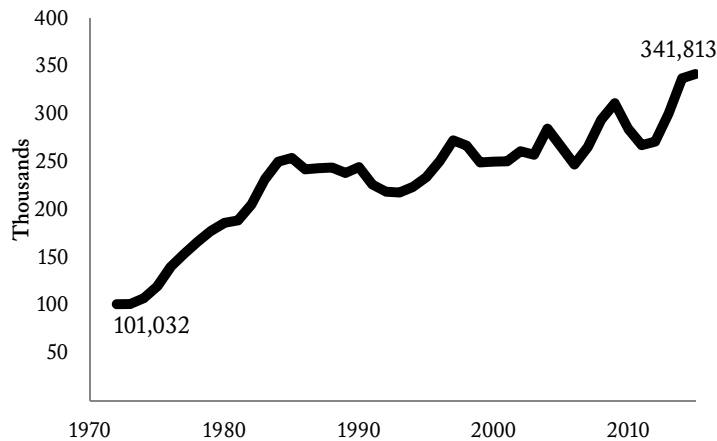
³ ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbls.C&D, <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics> [<https://perma.cc/WJ68-WK3M>] (navigate to “Federal Judicial Caseload Statistics 2015” hyperlink, then “D series” table for criminal data and “C series” for civil data and follow “download” hyperlink).

⁴ Aggregation rather than individualization is also a phenomenon found in criminal prosecutions. In 2015, the U.S. government commenced prosecutions against 80,069 defendants; given 60,000 cases, almost a quarter of all defendants were prosecuted in a multi-defendant case. *U.S. District Courts—Criminal Defendants Commenced, Terminated, and Pending (Including Transfers), During the 12-Month Period Ending March 31, 2015*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/sites/default/files/do1dmar15_o.pdf [<https://perma.cc/3AFS-9T3Z>].

⁵ While MDL data are collected and made available by the Administrative Office of the U.S. Courts, obtaining parallel data on the use of class actions over the years is difficult, as is identifying proposed class actions. See Deborah R. Hensler, *Happy 50th Anniversary, Rule 23! Shouldn't We Know You Better After All This Time?*, 165 U. PA. L. REV. 1599, 616-23 (2017); EMERY G. LEE, III &

are clustered together under the 1968 “multidistrict litigation” (MDL) statute.⁶ Based on findings by the Judicial Panel on Multidistrict Litigation (JPML) that the statutory criteria for pre-trial aggregation are met (“civil actions involving one or more common questions of fact . . . pending in different districts”),⁷ the Panel transfers the cases to a single judge. The result is an uneven pattern of assignments around the United States, given that, as of the fall of 2015, almost forty percent of pending federal civil cases were part of MDLs.⁸

Figure 2: Civil Cases Pending in Federal District Courts, 1972–2015⁹



THOMAS E. WILLGING, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS, FED. JUDICIAL CTR. (Apr. 2008).

⁶ 28 U.S.C. § 1407 (2012).

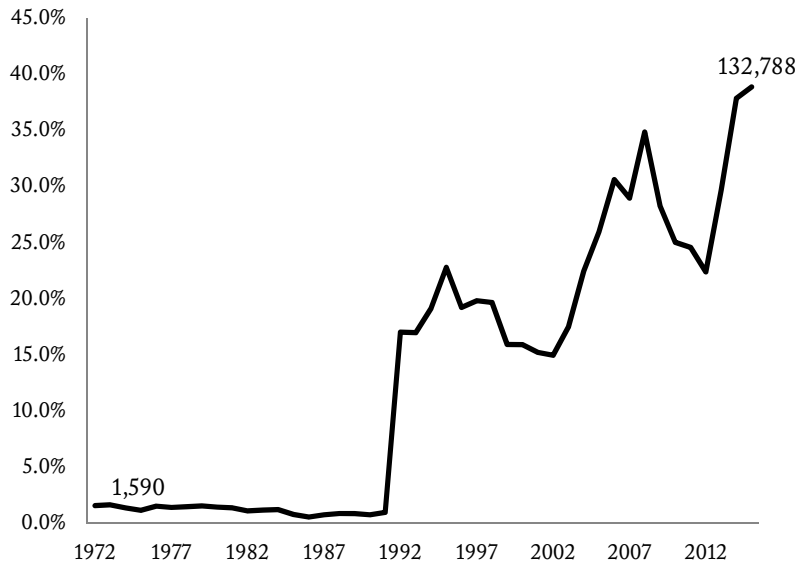
⁷ *Id.* § 1407(a).

⁸ Specifically, 132,788 cases out of 341,813 pending cases were in MDLs. See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2015 7, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2015_o.pdf [<https://perma.cc/5BDY-W9SJ>] (data are from the year ending September 30).

⁹ The data on pending civil cases come from Table C of each annual Report of the Proceedings of the Judicial Conference of the United States Courts, Judicial Business of the United States Courts. In some years, the data were revised in a subsequent publication, and in such instances, we have used revised numbers. For example, for Fiscal Year 1991, the number cited (226,234 pending cases) comes from the 1992 report, rather than the number of 240,599 pending cases published in the 1991 report. For the data for 1998 to 2015, see *Caseload Statistics Data Tables*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> [<https://perma.cc/WTM8-YLTU>] (navigate to “search by table number,” search by table number “C-6” then follow hyperlink for each corresponding year). Data for each year between 1968 and 1990 are for the year ending June 30; data for each year between 1991 and 2015 are for the year ending September 30.

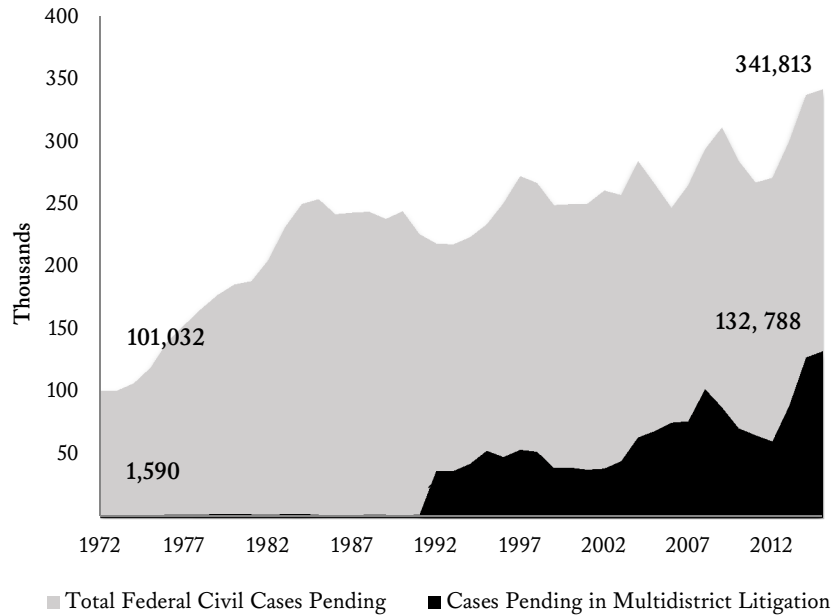
The growth in the aegis of MDL is significant, as is charted in Figure 3, focused on the numbers of cases consolidated through MDLs, and in Figure 4, comparing the numbers of pending federal civil cases to those within MDLs.¹⁰

Figures 3: Percentage of the Pending Federal Civil Docket in Multidistrict Litigation, 1972–2015



¹⁰ The method for data collection used in Figure 2 was also used for Figure 3, Percentage of the Pending Federal Civil Docket in Multidistrict Litigation, 1972–2015, and for Figure 4, Pending Multidistrict Litigation Compared to Pending Civil Cases in Federal District Courts, 1972–2015. *See supra* note 9. MDL data for 1972–1979 are from the “Legacy Statistics 1968–1979” Report from the Judicial Panel on Multidistrict Litigation. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, LEGACY STATISTICS 1968–1979, http://www.jpml.uscourts.gov/sites/jpml/files/Legacy_Statistical_Reports-1968-1979-Compressed.pdf [<https://perma.cc/Q3HD-CT85>]. MDL data for 1980–1991 are from the “Legacy Statistics 1980–1991” Report. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, LEGACY STATISTICS 1980–1991, http://www.jpml.uscourts.gov/sites/jpml/files/Legacy_Statistical_Reports-1980-1991-Compressed_o.pdf [<https://perma.cc/HR39-XK9J>]. The remaining MDL data (for 1992–2015) are from the respective annual reports of the United States Judicial Panel on Multidistrict Litigation. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL INFORMATION, <http://www.jpml.uscourts.gov/statistics-info> [<https://perma.cc/U78V-VPPR>] (navigate to “Fiscal Year” hyperlink under Statistics File for each respective year). Note that data for each year from 1972 to 1991 were collected ending June 30; data for each year from 1992 to 2015 used the ending date of September 30.

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



In 1991, fewer than 2232 cases (or about one percent of the civil docket) were part of MDL proceedings.¹¹ By September 2015, of 341,813 federal civil cases pending,¹² 132,788 were concentrated in 247 proceedings aggregated before a single judge.¹³ In 2015, some 150 judges were assigned one MDL,

11 U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, LEGACY STATISTICAL REPORTS 1980–1991 445, http://www.jpml.uscourts.gov/sites/jpml/files/Legacy_Statistical_Reports-1980-1991-Compressed_o.pdf [https://perma.cc/M89H-RCAC]. Data are from year ending on June 30.

12 See *U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Period Ending September 30, 2015*, ADMIN. OFFICE OF THE U.S. COURTS tbl.C-1 (Sept. 30, 2015), http://www.uscourts.gov/sites/default/files/data_tables/CotSep15.pdf [https://perma.cc/7RB2-DGN6]. The pending cases use the end date of September 30, while the MDL reports use the fifteenth of each month.

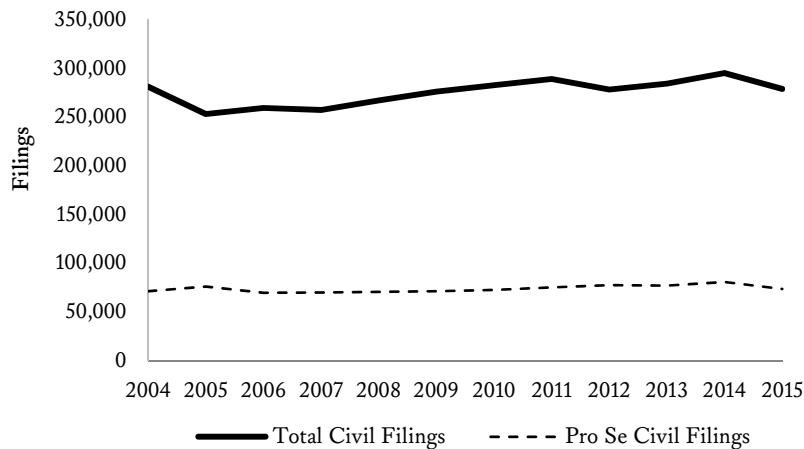
13 U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2015, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2015_o.pdf [https://perma.cc/A66M-BWCE]. The FY 2015 Report stated that 307 MDLs were extant but also that 60 MDLs had terminated, and hence we put the number of pending MDLs at 247. *Id.* at 15, 27, 33-35.

A few MDLs have played a disproportionate role in contributing both to the federal docket and to the number in MDL. For example, if asbestos (numbering 856 pending cases) and vaginal mesh litigation were removed from both the numbers of MDL cases and the federal civil docket in the 2015 data, the number of pending federal civil cases would be 267,877 and the number of pending

twenty-eight had two MDLs each, and ten had three or more, some of which involved different manufacturers of a product alleged to be harmful.¹⁴

The third structural fact is illustrated in Figures 5 and 6, charting the filings by litigants who are not represented. Lawyers are absent in a significant portion of the federal civil docket.

Figure 5: Filings by Unrepresented Litigants in the U.S. District Courts, 2004–2015¹⁵

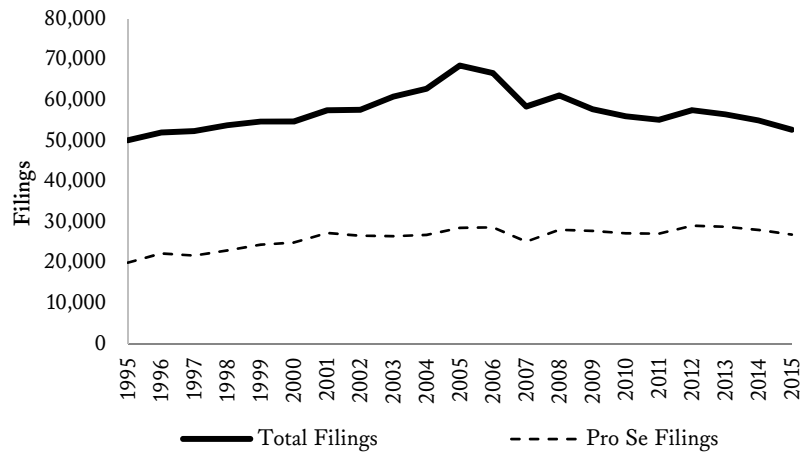


cases in an MDL would be 58,852. Thus, the percentage of the federal pending cases in the fall of 2015 under the MDL rubric would have been twenty-two percent, rather than almost forty percent.

¹⁴ To calculate the number of MDLs per judge, we relied on the “Summary By Docket of Multidistrict Litigation Pending as of September 30, 2015, Or Closed Since October 1, 2014” in U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2015, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2015_0.pdf [<https://perma.cc/A66M-BWCE>]. The prestige generated by being assigned an MDL is detailed in Abbe Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669 (2017).

¹⁵ The data for Figure 5, Filings by Unrepresented Litigants in the U.S. District Courts, 2004–2015, were derived from the respective yearly reports from the Administrative Office of the U.S. Courts. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, <http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts> [<https://perma.cc/98AT-4BVS>] (navigate to “Judicial Business” hyperlink for each respective year, then “Judicial Business Tables” for each year’s tables and follow “download” hyperlink for Publication Table No. C-13). Note that the collection relies on ending the years on September 30.

Figure 6: Filings by Unrepresented Litigants
in the U.S. Courts of Appeals, 1995–2015¹⁶



As the graphs illustrate, by 2015, more than twenty-five percent of the plaintiffs filing civil cases in federal courts did so without counsel at the trial level,¹⁷ and on appeal more than fifty percent of litigants did.¹⁸ Disaggregated

16 The data for Figure 6, Filings by Unrepresented Litigants in the U.S. Courts of Appeals, 1995–2015, for 1995–96 were derived from ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE JUDICIAL BUSINESS OF THE UNITED STATES COURTS 48, 125–27 (1996). Data for 1997–2015 were derived from the respective yearly reports from the Administrative Office of the U.S. Courts. See *supra* note 9.

17 The Administrative Office, using the term “pro se,” has reported data on unrepresented litigant filings at the trial level since 2004. See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.C-13 (2016), http://www.uscourts.gov/sites/default/files/data_tables/C13Sep15.pdf [<https://perma.cc/DM39-NKPP>]. Specifically, 73,745 of the 279,036 civil filings (26.4%) were filed by unrepresented litigants; the percentage of filings by unrepresented civil litigants was about one quarter of the filings from 2010 to 2015. *Id.*

18 See, e.g., *U.S. Courts of Appeals—Pro Se Cases Filed*, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.2.4 (2015), http://www.uscourts.gov/sites/default/files/table_2.04_0.pdf [<https://perma.cc/VR4P-YKV2>]. Since 2010, the percentages of unrepresented filers have been about fifty percent. See, e.g., *U.S. Courts of Appeals—Pro Se Appeals Commenced and Terminated, by Circuit, During the 12-Month Period Ending September 30, 2015*, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.B-9 (2016), http://www.uscourts.gov/sites/default/files/data_tables/B09Sep15.pdf [<https://perma.cc/GZJ6-92NN>] (reporting 24,247 civil pro se cases of 41,318 total pro se cases filed—58.7%). To review the same table (B-9) for each year from 2010–15, see *Caseload Statistics Data Tables*, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2016), <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=B-9&pn=All&xt=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D> [<https://perma.cc/SBW3-HGHD>] (navigate to “Search by table number,” search by table number “B-9” then follow hyperlink for each year).

by circuits, the range ran from about a third to sixty-four percent of the filings.¹⁹ These numbers included both thousands of prisoner filings and many cases brought by people who were not incarcerated.²⁰

Fourth, the use of class actions has been limited by statutes, by Supreme Court interpretations of Rule 23, and by the Court's reading of the 1925 Federal Arbitration Act (FAA).²¹ Constraints on class actions date back to the 1970s when, in *Eisen v. Carlisle & Jacquelin*, the Supreme Court insisted that under the then-recently-amended Rule 23, plaintiffs provide and pay for notice to individual class members.²² That requirement priced some lawyers out of the class action market.

Major inroads into class action practice came in 1996, when Congress deprived the neediest litigants of ready access to class actions. Altering rules governing the Legal Services Corporation, Congress banned recipients of LSC funds from bringing class actions.²³ In the same year, Congress enacted the Prison Litigation Reform Act (PLRA), which limited access to relief for prisoners and imposed new costs on prison-conditions class actions.²⁴ Congress provided that defendants and interveners could move to terminate

¹⁹ The range was thirty-three percent in the Court of Appeals for the District of Columbia to sixty-four percent in the Fourth Circuit. See *U.S. Courts of Appeals—Pro Se Cases Commenced and Terminated, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 2015*, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL tbl.B-9 (2015), <http://www.uscourts.gov/statistics/table/b-9/judicial-business/2015/9/30> [<https://perma.cc/CU7Y-ZBX9>].

²⁰ The Administrative Office of the U.S. Courts (AO) categories for which pro se filers are recorded were "Criminal, U.S. Prisoner Petitions, Other U.S. Civil, Private Prisoner Petitions, Other Private Civil, Bankruptcy, Administrative Agency Appeals, Original Proceedings and Miscellaneous Applications." In 2014 and 2015, non-prisoners filed 24,274 and 25,117 cases pro se, respectively. *Civil Pro Se and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2014*, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1 (2014), http://www.uscourts.gov/sites/default/files/statistics_import_dir/C13Sep14.pdf [<https://perma.cc/CR5S-TWX4>]; see tbl.B-9, *supra* note 18 (reporting 2015 data). On appeal, non-prisoner, non-criminal cases were forty-four percent of all pro se cases tallied. *U.S. Court of Appeals—Pro Se Cases Commenced and Terminated, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 2015*, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1 (2015), http://www.uscourts.gov/sites/default/files/data_tables/B09Sep15.pdf [<https://perma.cc/4M2D-GMS7>].

In 1995, about forty percent of the 50,000 appeals were pro se. In 2014, fifty-one percent of the 55,000 appeals were filed by individuals without lawyers. Thus, more than 28,000 appeals were lawyerless on at least one side, and about 12,000 of those appellants were not prisoners. Because filings categorized as prison petitions were about 13,000–14,000 in both 1995 and in 2014, the rise in filings by unrepresented individuals cannot be attributed solely to prisoner petitions.

²¹ Pub. L. No. 68-401, 43 Stat. 883 (codified at 9 U.S.C. § 1 (1925)).

²² 417 U.S. 156, 178-79 (1974).

²³ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1321-53; see also generally Judith Resnik & Emily Bazelon, *Legal Services: Then and Now*, 17 YALE L. & POL'Y REV. 291, 292 (1998).

²⁴ Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1321-66 (1996) (codified as amended in scattered sections of 11, 18, 28 & 42 U.S.C.).

injunctive relief (including longstanding consent decrees).²⁵ Congress further limited the fees that lawyers for prisoners could be paid.²⁶

Congress also enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), creating a more restrictive format for those class actions.²⁷ Before seeking class certification, plaintiffs had to publish in “a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class,” and had to seek appointment as a lead plaintiff.²⁸ Congress thereby slowed down certification and required judges to announce which clients and lawyers would gain leadership status as the “most adequate plaintiff.”²⁹ In 2005, class actions took another hit, this time through the Class Action Fairness Act (CAFA), which enabled federal courts to take jurisdiction over certain large-scale class actions filed in state courts under state law.³⁰ The operative assumption of CAFA’s proponents was that once federal judges had such cases, they would decline to certify some of the cases as class actions.³¹

More recently, the U.S. Supreme Court has been at the forefront of curbing class actions,³² in part through interpretations of Rule 23.³³ Yet the decisions are variegated, in that constrictions of Rule 23 depend on the underlying substantive rights and on the stage of the litigation.³⁴ Moreover, class-based claims remain vital in arenas from high-profile monetary settlements such as the Volkswagen emissions litigation³⁵ and the BP oil spill³⁶ to lawsuits brought about general prison conditions and solitary confinement.³⁷

²⁵ See 18 U.S.C. §§ 3626(a)(2), (b)(1)(A) (2012).

²⁶ 42 U.S.C. § 1997e(d) (2012).

²⁷ Pub. L. No. 104-67, § 101, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

²⁸ 15 U.S.C. §§ 78u-4(a)(3)(A)(i) & (B)(i) (2012).

²⁹ 15 U.S.C. § 77z-1(a)(3)(B) (2012).

³⁰ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

³¹ See generally Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1448-49 (2008); Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: “The Political Safeguards” of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1934 (2008).

³² See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1435 (2013); *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2556-57 (2011).

³³ See generally Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013).

³⁴ See Maria Glover, *The Supreme Court’s Non-“Trans-Substantive” Class Action*, 165 U. PA. L. REV. 1625 (2017); see also Linda S. Mullenix, *Class Actions: A Court Divided*, 8 PREVIEW U.S. SUP. CT. CASES 291, 291 (2016).

³⁵ See Settlement Agreement, *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*, 148 F. Supp. 3d 1367 (J.P.M.L. 2016) (No. 3:15-md-02672).

³⁶ See generally Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397 (2014).

³⁷ See, e.g., *Brown v. Plata*, 563 U.S. 493 (2011); Stipulation, *Parsons v. Ryan*, No. 12-00601 (D. Ariz. Oct. 14, 2014); Settlement Agreement, *Ashker v. Gov. of Cal.*, No. C 09-05796 CW (N.D. Cal. Sept 1)(ECF No. 424-2). Aggregation also comes through Department of Justice litigation under the Civil Rights of Institutionalized Persons Act, and gathering of aggregate data about prison

The Court's other major mechanism for limiting class actions comes from its recent reading of the 1925 FAA to condone class action bans, inserted into a variety of forms provided to consumers and prospective employees.³⁸ By licensing providers to insist on single-file processing, the Court has cut off the infusion of resources which aggregation provides across an array of federal statutory, as well as state and common law, claims.

The fifth key fact about the federal courts is that almost no cases reach trial. As of 2015, about one in 100 civil lawsuits filed began a trial before either a judge or a jury.³⁹ Which cases make it to trial is not readily knowable; my preliminary review of available data on the roughly 3000 cases tried in 2015 permits only a window into aspects such as whether litigants were unrepresented, whether in classes or MDLs, the subject matter, and where the cases were filed across the United States.⁴⁰

Of course, judges do a good deal of adjudication without trials. Assessments of judges' time spent in open court ("bench presence"), based on statistics from the Administrative Office of the U.S. Courts (AO), reflect

conditions is used both administratively and litigiously to drive reform. *See, e.g., Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison*, LIMAN PROGRAM, YALE L. SCH., & ASS'N ST. CORRECTIONAL ADMINS. (Aug. 2015), https://law.yale.edu/system/files/documents/pdf/asca-liman_administrative_segregation_report_sep_2_2015.pdf [<https://perma.cc/N53P-AT4J>].

³⁸ *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)); *see also generally* Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011) [hereinafter Resnik, *Fairness in Numbers*]; Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) [hereinafter Resnik, *Diffusing Disputes*].

³⁹ This figure is frequently cited and based on data gathered by the Administrative Office of the U.S. Courts annual reports. *See, e.g., U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending June 30, 2015*, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.C-4 (2015), http://www.uscourts.gov/sites/default/files/co4jun15_o.pdf [<https://perma.cc/96QP-QL2L>].

⁴⁰ *See* *Federal Court Cases: Integrated Data Base 2014: Codebook for Civil Terminations Data with Docket Numbers, PLT and DEF Blanked*, FED. JUDICIAL CTR., <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/36110> [<https://perma.cc/LST9-MVHV>] [hereinafter FEDERAL JUDICIAL CENTER, *Civil Codebook*].

The dataset tracks 4.6 million civil cases brought between 1996 and 2015. Within this dataset, we focused on fiscal year 2015 and counted 69,200 cases commencing a jury or bench trial by picking cases with values 6, 7, 8, 9 in the "PROCPRG" column. *See id.* at 21 (explaining the "PROCPRG" field). The information reported comes from court clerks, who use civil cover sheets and other materials prepared by lawyers and complete forms (JS5 and JS6) transmitted at least quarterly to the AO. No independent methods of verifying uniformity or accuracy were undertaken centrally.

Through this analysis, in FY 2015 (between 10/1/2014 and 9/31/2015), we identified about 1.5 percent of cases (2976) which proceeded to trial, albeit not all ending in verdicts, as some were settled after a trial had begun. Thanks are due to Emery Lee for advance access to what became available as of Spring 2017 on an updated www.fjc.gov website and to Jonah Gelbach for directing us to this resource and related data. The FJC data are now available at *Civil Cases Filed, Terminated, and Pending from SY 1988*, FED. JUDICIAL CTR., <https://www.fjc.gov/research/idb/civil-cases-filed-terminated-and-pending-sy-1988-present> [<https://perma.cc/6UTH-3HLF>].

a “steady year-over-year decline in total courtroom hours” from 2008 to 2012.⁴¹ The result was that, in 2012, judges spent “less than two hours . . . per day” in the courtroom, or about “423 hours of open court proceedings per active district judge.”⁴² While judges may be interacting with litigants and lawyers through forms of alternative dispute resolution (ADR), those exchanges are outside the public realm.⁴³

These five structural facts are all about the relationship of “class,” in different senses of that word, to courts as state-provided services. Around the world, commentators describe judiciaries navigating this “age of austerity.”⁴⁴ In the United States, state courts are identified as the center of struggles, given their own lack of financial wherewithal and legions of unrepresented individuals. Tallies from California and New York detail millions of civil litigants proceeding without lawyers.⁴⁵ The challenges facing the federal courts also need to be brought into view, as twenty-five percent of trial-level filings and fifty percent of appellate filings in the federal courts come from unrepresented parties. Even though the federal courts are comparatively well-financed, a significant proportion of their litigants are not.

Turning from “class” in the sense of the economic capacity of individuals and judicial systems to “class” as a form of litigation, looking at the federal docket underscores that aggregation is a dominant procedural form. As noted, the AO does not provide comprehensive data on class actions but it does track MDLs—enabling us to know that almost forty percent of the civil cases proceed in clusters of various sizes. That percentage requires revising classic discussions of class actions, which have focused on the utility for individuals with neither the resources nor knowledge to litigate single-file.⁴⁶

⁴¹ Jordan M. Singer & William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 *NEW ENG. L. REV.* 565, 565 (2014).

⁴² *Id.* at 566.

⁴³ See generally Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 *NEV. L.J.* 1631 (2015).

⁴⁴ See, e.g., Xandra E. Kramer & Shusuke Kakiuchi, *Relief in Small and Simple Matters in an Age of Austerity*, in *XVTH INTERNATIONAL ASSOCIATION OF PROCEDURAL LAW WORLD CONGRESS 221-24* (H. Pekcanitez, N. Bolayir & C. Simil eds. 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610773 [<https://perma.cc/6FKT-FHJ4>]. I discuss the ways in which government subsidies of courts and their users put justice systems in the category of social and economic rights in Judith Resnik, *Courts and Economic and Social Rights/Courts as Economic and Social Rights*, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* (Katharine G. Young ed., forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2983853 [<https://perma.cc/73HQ-MC2N>].

⁴⁵ See, e.g., Sargent Shriver Civil Counsel Act, CAL. GOV'T CODE § 68650 (2012); Jonathan Lippman, Chief Judge of the State of New York, *The State of the Judiciary 2015: Access to Justice: Making the Ideal a Reality*, N.Y. STATE UNIFIED SYS. 19 (Feb. 17, 2015).

⁴⁶ See generally Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 *U. CHI. L. REV.* 684 (1941).

Class actions provide economies of scale for defendants and for judges by limiting repetitive work and inconsistent decisionmaking and by holding out promises of a "comprehensive resolution" if not "global peace."⁴⁷

What my analysis of the federal courts reflects is that judges also *need* aggregation to ensure that some cases are staffed by lawyers with resources to clarify the claims advanced. Thus, an irony of the class action "wars"⁴⁸ is that the federal judiciary should be included in an accounting of those "injured" by such assaults, including the effort to undercut class and tort-based MDLs launched in Congress in 2017.⁴⁹

Pointing to the utility of aggregate litigation for governing authorities has a long history, dating back to Medieval Europe.⁵⁰ This fiftieth year celebration of the 1966 revisions of Rule 23 may obscure that its central element—binding absentees who have not participated and functionally are without realistic opportunities to litigate individually—was enshrined in U.S. law more than a decade earlier.⁵¹ The foundational re-conception of the Due Process Clause came in 1950 in *Mullane v. Central Hanover Bank & Trust Company* when the U.S. Supreme Court approved aspects of New York's banking laws that enabled fiduciaries to obtain judicial clearance, in the aggregate, of potential claims from beneficiaries of pooled trusts.⁵² Not only did the Court license binding individuals whose "whereabouts could not with due diligence be ascertained,"⁵³ the Court revised its jurisdictional rules to permit a state to close off the rights of individuals from other states. Moreover, the Court structured notice requirements to avoid making them too costly. As Justice Jackson explained,

the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the

⁴⁷ Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 *FORDHAM L. REV.* 1943, 1944 (2017). In contrast, some argue that class litigation subjects government defendants to undue judicial oversight and corporate defendants to "bet[ting] the company," as Justice Scalia put it for the Court in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011).

⁴⁸ Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 *HARV. L. REV.* 664, 664 (1979).

⁴⁹ See Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (2017).

⁵⁰ See STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).

⁵¹ See generally John Leubsdorf, *Unmasking Mullane: Due Process, Common Trust Funds, and the Class Action Wars*, 66 *HASTINGS L.J.* 1693, 1728 (2015).

⁵² 339 U.S. 306 (1950).

⁵³ *Id.* at 317.

Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.⁵⁴

In the 1960s, new vital state interests—facilitating filings by civil rights and small consumer claimants—came to the fore. Aggregate litigation was then enlisted through revisions of Rule 23 to move due process parameters again. As I write in 2017, efforts to dislodge aggregation—in the name of state interests in unfettering the authority of both the public and private sectors—have taken center stage. My argument, in contrast, is that the facts about the federal docket make plain that aggregation continues to have important contributions to make. But what fifty years of working under the 1966 template has taught is that the arc of litigation extends beyond settlement. States should be vitally concerned with bringing the challenges of interest representation, arising during the implementation phase of remedies, under the courts' aegis and before the public's eye.

To explain the history and the present problems, I first sketch the developing “class-consciousness” in the twentieth century, as judges and legislators devised methods to welcome new sets of litigants through a mix of substantive legal entitlements and procedural endowments, including the subsidies provided by collective actions. To clarify the conceptual constitutional leap that the 1950 decision of *Mullane* entailed and that Rule 23 consolidated, I begin with the categorization of class actions outlined in the 1938 version of Rule 23 and with the 1938 Fair Labor Standards Act (FLSA),⁵⁵ which seemed to provide a radically capacious invitation for representative litigation.

But federal judges insisted that the FLSA's authorization for employees to file on behalf of “other employees similarly situated”⁵⁶ could not, constitutionally, permit lawsuits to proceed without record evidence of individuals' personal consent.⁵⁷ The 1940s FLSA case law's loyalty to individual participation rather than to interest representation underscores the distance traveled in constitutional interpretation, a move that is now generally taken for granted:⁵⁸ the binding through class actions of absentees who have not affirmatively consented to be represented.⁵⁹

⁵⁴ *Id.* at 313-14. Justice Burton dissented, arguing that states had discretion to decide whether they had to “supplement the notice” to beneficiaries. *Id.* at 320 (Burton, J., dissenting).

⁵⁵ Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. §§ 201-19) [hereinafter 1938 FLSA].

⁵⁶ *Id.*

⁵⁷ *See, e.g.,* *Wright v. U.S. Rubber Co.*, 69 F. Supp. 621, 624 (S.D. Iowa 1946); discussion *infra* Section III.A.

⁵⁸ *But see* MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 5-15 (2009).

⁵⁹ The Supreme Court has required opportunities to opt out for absent class action plaintiffs in cases seeking monetary relief. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

The next part of this Article is devoted to *Mullane's* 1950 rereading of the Due Process Clause, the purposefulness of the 1966 Rule 23 revisions, and aggregation's expansion through the creation of the MDL transfer system of cases across federal district courts. The 1966 Rule did on a grand scale what the judges reading the FLSA thought was impermissible—deciding the rights of absentees without their affirmative consent.⁶⁰ But even with impressive ambitions, the drafters of Rule 23 focused on arenas in which they thought the need for lawyers most pressing. The 1960s Advisory Committee presumed that mass torts did not fit their class action paradigm because tort claims were thought to be individualized in a way other cases were not and resourced through contingency fees.⁶¹

Yet, as I discuss in the next section, within two decades, the 1966 system for redistributing power to civil rights and consumer plaintiffs came to be seen as useful for the older form of rights claims: torts. The market utilities across the litigation landscape are reflected in the MDL data; not only do MDLs constitute almost forty percent of the federal civil docket, but also some ninety percent of the individual cases that come under MDLs are product liability actions.

I close by analyzing what fifty years of aggregate practice, mixed with other shifts in federal practice, has taught. Heavy reliance on MDLs is evidence that attempts to eviscerate class actions are dysfunctional—lessening the regulation of aggregation while not abating the form. Decades of debating whether classes should be mandatory⁶² have distracted us from understanding how profound has been the eclipse of the individual litigation model. Opt-out classes appear to validate values of individual autonomy, consent, and participation that have come to be associated with due process, but only rarely are clients and lawyers able to vote with their feet and go their own way.

What then are the vital interests of the state for which reconstruction of constitutional doctrine and rules are again in order?⁶³ Binding absentees

⁶⁰ See generally Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996). FLSA cases can also proceed as class actions. See *Ervin v. Rest. Servs., Inc.*, 632 F.3d 971 (7th Cir. 2011).

⁶¹ FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment, reprinted in 39 F.R.D. 69, 103 (1966).

⁶² See, e.g., David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002).

⁶³ My focus is on courts, but these issues lace informal groupings by lawyers and judges as well as administrative agencies, aggregating through grids and rules authorizing agency class actions. For example, in the spring of 2017, the Court of Appeals for the Federal Circuit held that the Veterans Court "has the authority to certify a class for a class action and to maintain similar aggregate resolution procedures." *Monk v. Shulkin*, 855 F.3d 1312, 1314 (Fed. Cir. 2017); see also generally Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5, 21-25 (1991) [hereinafter Resnik, *From "Cases" to "Litigation"*]; Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the*

through aggregation and the preclusion of class actions by signatures on employment applications and consumer product circulars reflect the diminution of individual authorship and participation in events that structure their rights. But the two have divergent goals. Despite incursions on individual volition, class actions and MDLs enhance another form of autonomy—the ability to participate in collective efforts to obtain redress in public for alleged illegalities. In contrast, barring aggregation stifles joint action and closes off needed resources, thereby reducing the ability to bring to public light claims for rights and remedies.

Further, the numbers of lawsuits filed by unrepresented individuals demonstrate the hopes that people have in courts as well as the misfit between institutions designed for lawyers and the efforts of non-professionals to use them. Unrepresented individuals pose challenges for their opponents and for judges. Although often assumed to have cases without legal merit, a significant number of the cases that reached trial in the federal courts in 2015 had included unrepresented litigants. In the 2975 cases that we identified in which trials began that year, about 450 cases (fifteen percent) included unrepresented litigants on one or both sides.⁶⁴ In short, in a world full of rights and riddled with inequality, the federal courts need to anchor their own legitimacy by finding ways to enable claimants to pool resources. Hence, courts themselves have become all the more dependent on aggregation for their own ability to function.

But even as court-based aggregation enhances the capacity to pursue rights, the current practices are not sufficiently responsive to other vital interests of democratic orders, encoded in the United States in due process and the First Amendment guarantees protecting access by the public to court processes. Aggregate lawsuits do not end at settlement because time is needed to implement remedies, and information is often developed post-settlement about the challenges of enforcement.

Yet, as I sketch here and elaborate in a related essay,⁶⁵ neither current rules nor doctrine have structured post-settlement decisionmaking to protect litigant interests, to respond to disagreements about distributions, and to make accessible to the public the processes and results. Due process concerns about the adequacy of representation ought to come into play not only at certification and when settlements are approved but also thereafter, as decisions are made about allocation of remedies for sets of individuals within the aggregate.

Agency Class Action, 126 YALE L.J. 1634 (2017); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011).

⁶⁴ See FEDERAL JUDICIAL CENTER, *Civil Codebook*, *supra* note 40.

⁶⁵ Judith Resnik, *Reorienting the Process Due: Forging Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 93 N.Y.U. L. REV. (forthcoming 2017) [hereinafter Resnik, *Reorienting the Process Due*].

III. COURTING COLLECTIVITY: ACCESS SUBSIDIES, LITIGATION INCENTIVES, AND EFFICIENCY BOOSTS

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

To understand the transformation in the 1950s and 1960s of constitutionally licit collective action requires context. Two markers create the frame: the 1938 version of Rule 23 and the Fair Labor Standards Act.

In July 1938, the American Bar Association (ABA) and the School of Law of Western Reserve University in Ohio hosted an "Institute on Federal Rules."⁶⁶ Arthur Vanderbilt, then President of the ABA, described the event as the "first time that lawyers from all over the country had come together to go to school."⁶⁷

One of the presenters, Charles Clark, the 1938 Rules Reporter, called the version of the class action rule a "real attempt at clarification of . . . an ancient rule of equity and . . . allowed under code practice, but the limits of which have always been rather doubtful."⁶⁸ Clark explained that this Rule 23 was "not designed to state new principles" but to make the old rule "more usable" by distinguishing three forms of class actions: "true class suit," in which all within the class had a "joint, or common" right; the "hybrid class suit," where a common property was to be adjudicated; and the "spurious class action," in which rights were separate and for which the Rule had found "a place in the federal system."⁶⁹

⁶⁶ See RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, WITH NOTES, AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES iii (William W. Dawson ed., 1938).

⁶⁷ *Id.* at 177.

⁶⁸ *Id.* at 263.

⁶⁹ *Id.* at 263-65. The 1938 version of Rule 23 read in pertinent part:

a. Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that an owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; or

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought

FED. R. CIV. P. 23 (1940). The first was seen as a "true" class, the second a "hybrid" class, and the third a "spurious" class. JAMES W. MOORE, FEDERAL PRACTICE 2235-41 (1938).

As noted, in the same year (and subsequently overshadowed by the 1966 class action rule⁷⁰), Congress enacted the FLSA⁷¹—or, as a 1939 symposium called it, “The Wage and Hour Law.”⁷² The statute required minimum wages (not “less than the new 30-cent minimum hourly wage”) and overtime pay (if working more than “42 hours weekly”).⁷³ About eleven million employees were estimated to be covered in 1939,⁷⁴ and enforcement came by way of criminal prosecution, civil injunctions, and private lawsuits.⁷⁵

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

Any employer who violates the . . . [minimum wage or maximum hours provisions] . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, . . . and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment award to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant and costs of the action.⁷⁶

What kind of lawsuits did the 1938 FLSA create? The one comment in the legislative history on enforcement under this provision came from a congressman who described private suits as having the “virtue of minimizing the cost of enforcement by the Government;” the self-help provision “puts directly into the hands” of employees a means to “assert and enforce their

⁷⁰ See Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1321 (2008).

⁷¹ 1938 FLSA, *supra* note 55, § 16(b).

⁷² Paul H. Sanders, Foreword, *The Wage and Hour Law*, 6 LAW & CONTEMP. PROBS. 321, 321 (1939).

⁷³ *Id.*

⁷⁴ Carroll R. Daugherty, *The Economic Coverage of the Fair Labor Standards Act: A Statistical Study*, 6 LAW & CONTEMP. PROBS. 406, 409 (1939).

⁷⁵ A contemporary example of the multiple avenues for enforcement is *Tyson Foods, Inc. v. Bouaphakeo*, which was filed both as a collective action and a class action; the jury verdict “combined the two.” 136 S. Ct. 1036, 1054 n.1 (2016) (Thomas, J., dissenting).

⁷⁶ 1938 FLSA, *supra* note 55, § 16(b).

own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the Act.”⁷⁷

Other virtues ascribed to the FLSA sound familiar to those steeped in discussions of Rule 23 and MDL. In 1942, James Rahl, an attorney in the U.S. Office of Price Administration that was charged with implementing the FLSA, explained:

To require each employee to sue individually might well congest court calendars immeasurably and produce long delays in the gaining of rightful recoveries. Joinder in cases where it would be permissible under the practice rules of the jurisdiction might prove an impracticable and cumbersome device, and in some jurisdictions might be totally ineffective if interpreted strictly according to some of the rules of permissive joinder.⁷⁸

Yet, as Rahl noted, while vesting authority in “any court of competent jurisdiction” (and hence enlisting state as well as federal courts), the collective action provision did not detail “the requirements to be satisfied, the procedure for courts to follow in reaching a decision as to the numerous individual claims, and the process and effect of judgment.”⁷⁹

A brief overview of 1940s FLSA opinions provides windows into then-understood constitutional limits on representative actions, the efforts by federal judges within those constraints to use the FLSA to respond to employee vulnerability, and docket concerns. First, decisions within a decade of the FLSA’s enactment reflected federal judges’ anxiety that, if employees were to be included “who did not wish to enter their appearance,” Section 16(b) could be “unconstitutional.”⁸⁰ Lower court federal judges read the “constitutional requirement of due process of law” as requiring employees

⁷⁷ 83 CONG. REC. 9264 (1938) (statement of Rep. Kent Ellsworth Keller); *see also* Joseph V. Lane, Jr., *Is the Fair Labor Standards Act Fairly Construed?*, 13 FORDHAM L. REV. 60, 66 (1944).

⁷⁸ James A. Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 U. ILL. L. REV. 119, 123 (1942). Rahl attempted to fill the gap by setting forth suggested procedures to use. *Id.* at 134-36.

⁷⁹ *Id.* at 123. The 1938 FLSA also made retaliation a criminal offense. Within a year of the enactment, one commentator tallied six criminal prosecutions and sixteen civil enforcement actions brought by the Wage and Hour Division of the Department of Labor, as well as twenty-five “civil employee suits.” Samuel Herman, *The Administration and Enforcement of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 368, 385-86, nn.114-15, 387-88 n.126 (1939).

⁸⁰ *Wright v. U.S. Rubber Co.*, 69 F. Supp. 621, 624 (S.D. Iowa 1946) (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)); *see also* *Shain v. Armour & Co.*, 40 F. Supp. 488, 490 (W.D. Ky. 1941). To glimpse how courts applied § 16(b) in its first decade, I reviewed the thirty-seven cases flagged as “Notes of Decision” annotations in Westlaw between 1938 and 1948 under “Class or Group Actions, Parties and Pleadings” and “Consent to be parties, parties and pleadings.”

personally to intervene or through other “affirmative action” record that they had designated the representative plaintiff to “proceed” on their behalf.⁸¹

As one judge explained, Congress could not “force one to become a plaintiff against his will or without his consent, or to select for him an agent or attorney to represent him.”⁸² Another opined that, “regardless of the academic question of whether or not [the FLSA provision was] a true class suit,” the Constitution required approval by those who were to be represented.⁸³ Such opinions reflected the impact of the Supreme Court’s 1940 ruling in *Hansberry v. Lee*, famously holding that a prior enforcement action of a racially restrictive covenant could not constitutionally preclude a new challenge because the earlier representative did not have the same interests as those purported to be represented.⁸⁴ In the FLSA context, despite the close alignment of interests among employees, federal judges insisted that each employee assent to representation by a fellow employee.

Judges were nonetheless determined to find ways to welcome additional litigants into FLSA proceedings. Thus, although wage and hour claims were not “identical,” and hence not a “true” class action, judges concluded that they were sufficiently “similar” (arising “out of the same character of employment”) to be “presented and adjudicated” together even as they were also “separate and independent of each other.”⁸⁵ The key elements were that individuals specifically consented and that “certain questions of both law and fact” (such as whether they worked in interstate commerce) were “common to all employees.”⁸⁶

Second, judges read the statute to empower employees by easing access to courts and by enabling safety in numbers. Courts interpreted Section 16(b) as liberalizing intervention rules,⁸⁷ such that all “who care to come into the case” could join, including simply by notifying the court (rather than a lawyer filing a motion) that they had signed onto a lawsuit.⁸⁸ Moreover, for purposes of the statute of limitations, intervention was deemed by some judges to date back to the filing of “the main suit.”⁸⁹ Further, judges understood that collectivity protected vulnerable employees. As one circuit court explained in

⁸¹ *Shain*, 40 F. Supp. at 488, 490; *see also* *Swettman v. Remington Rand*, 65 F. Supp. 940, 944 (S.D. Ill. 1946); *Calabrese v. Chiumento*, 3 F.R.D. 435, 437 (D. N.J. 1944); *Smith v. Stark Trucking, Inc.*, 53 F. Supp. 826, 827 (N.D. Ohio 1943).

⁸² *Lofther v. First Nat’l Bank of Chi.*, 45 F. Supp. 986, 989 (1941). Furthermore, “the defendant has a right to know by whom it is being sued and for what . . .” *Id.* at 990.

⁸³ *Shain*, 40 F. Supp. at 490.

⁸⁴ 311 U.S. 32, 45 (1940).

⁸⁵ *Shain*, 40 F. Supp. at 490.

⁸⁶ *Id.*

⁸⁷ *See, e.g., Saxton v. W.S. Askew Co.*, 35 F. Supp. 519, 520 (N.D. Ga. 1940).

⁸⁸ *Wright v. U.S. Rubber Co.*, 69 F. Supp. 621, 624 (S.D. Iowa 1946).

⁸⁹ *Id.*

1945, "no one of them need stand alone in doing something likely to incur the displeasure of an employer."⁹⁰

Third, judges repeatedly expressed concerns about how to respond to an expected large number of new filings. To "prevent a multiplicity of suits," lower courts read the FLSA to permit spurious class actions⁹¹ or easy intervention.⁹² Through liberalizing the administration of the Act, they used the FLSA to avoid "a litigious situation."⁹³

Having sketched the first decade of the FLSA, a brief review of what followed is in order. Cutbacks came in 1947 when Congress revisited the terms of its collective action provision. Prompted by interest in correcting the Supreme Court's reading of the FLSA to require compensation "portal-to-portal," Congress revised Section 16(b) by limiting initiation of private damage actions to employees (rather than representatives such as unions) and by expressly requiring employees who were joined to (in contemporary parlance) opt-in by filing written consent in court.⁹⁴ The FLSA continues to include incentives, including the award to plaintiffs of reasonable attorneys' fees and of costs paid to losing defendants.⁹⁵ Further, akin to Rule 23, judges have a role in overseeing settlements; the Supreme Court has interpreted the FLSA to prohibit settlements that had employers pay less than the law required.⁹⁶

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

The FLSA did not invent legislative incentives. Encouraging private enforcement of new federal rights has a long history, dating back to the Civil

⁹⁰ *Pentland v. Dravo Corp.*, 152 F.2d 851, 853 (3rd Cir. 1945). The FLSA thus "brings something of the strength of collective bargaining to a collective lawsuit." *Id.*

⁹¹ *Id.* at 854 n.6.

⁹² *See, e.g., Fowkes v. Dravo Corp.*, 62 F. Supp. 361, 362 (E.D. Pa. 1945); *Winslow v. Nat'l Elec. Prods. Corp.*, 5 F.R.D. 126, 129 (W.D. Pa. 1946); *Culver v. Bell & Loffland, Inc.*, 146 F.2d 29, 31 (9th Cir. 1944).

⁹³ *Barrett v. Nat'l Malleable & Steel Castings Co.*, 68 F. Supp. 410, 416 (W.D. Pa. 1946); *see also Fink v. Oliver Iron Mining Co.*, 65 F. Supp. 316, 318 (D. Minn. 1941).

⁹⁴ *See* Portal-to-Portal Act of 1947, Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87. The Supreme Court addressed the mechanisms in *Hoffmann-La Roche, Inc. v. Sperling*, and committed to district courts the discretion to facilitate notice to employees who might be interested in joining. 493 U.S. 165, 169-73 (1989); *see also* David Borgen & Laura L. Ho, *Litigation of Wage and Hour Collective Actions Under the Fair Labor Standards Act*, 7 EMP. RTS. & EMP'T POL'Y J. 129, 130 (2003).

⁹⁵ *See* Fair Labor Standards Act of 1938, amended by Pub. L. 110-233, § 302(a), 122 Stat. 920 (2008).

⁹⁶ *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 108 (1946). Some lower courts thereafter held that settlements require the supervision of the Department of Labor or the federal courts. *See, e.g., Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th Cir. 1982); *Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227, 1237 (M.D. Fla. 2010). Court assessment resembles the inquiry under Rule 23(e) for approval of class action settlements with an added criterion of whether a compromise "frustrates implementation of the FLSA." *Id.* at 1241.

Rights Act of 1871 and the Sherman Antitrust Act.⁹⁷ But the FLSA's collective action provisions were innovative. Even if read in then-conventional terms, the practice under the FLSA made plain the utility of bringing individuals together to generate what was described as "countervailing power."⁹⁸

Of course, the FLSA was part of a broader set of developments, running from the New Deal through the War on Poverty, the Second Reconstruction, and the civil rights, consumer, environmental, and equality movements of the second half of the twentieth century. Equipping these rights-holders was at the heart of the revisions of Rule 23, drafted in the 1960s by the committee appointed by Chief Justice Earl Warren and chaired by Dean Acheson.⁹⁹

Doing so entailed expanding the reach of courts, just as had been done a decade earlier, albeit in service of a different set of litigants—banks seeking to obtain judicial confirmation that their investments had been prudent so as to preclude beneficiaries from bringing challenges to their decisions. In *Mullane v. Central Hanover Bank & Trust Co.*,¹⁰⁰ the Supreme Court approved a New York provision requiring banks periodically to file a kind of declaratory action ("settling accounts"); once a judgment was entered on their behalf, the law of res judicata would block any unhappy beneficiary seeking subsequently to allege investment failures.¹⁰¹ But unlike the 1966 version of Rule 23 in which claimants stepped forward as representatives of the group, the New York statute provided that judges appoint lawyers to serve as guardians ad litem. As the name of the case reflects, Kenneth Mullane was designated to represent what was functionally one subclass, the inter-vivos beneficiaries; the other appointee, James Vaughn, assigned the testamentary beneficiaries, did not contest the procedures.¹⁰²

⁹⁷ See generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES* (2010).

⁹⁸ Luke Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 478-82 (2017); see also generally Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016).

⁹⁹ See Announcement of the Chief Justice of the United States, Committee on Rules of Practice and Procedure, Apr. 4, 1960, in 28 U.S.C.A. at xvii (West 1960).

¹⁰⁰ 339 U.S. 306 (1950). For a detailed account of the New York State Legislature's practices that led to *Mullane*, see Resnik, *Fairness in Numbers*, *supra* note 38, at 134-42.

¹⁰¹ N.Y. BANKING LAW § 188-a (1937) (codified as revised at N.Y. BANKING LAW § 100-c (Consol. 2008)). Several other states authorized pool trusts without creating this form of accounting. Leubsdorf, *supra* note 51, at 1708.

¹⁰² N.Y. BANKING LAW § 188-a (1937). In the Papers of Justice Robert Jackson, who wrote the opinion for the Court, Justice Hugo Black noted in correspondence before the final version of the *Mullane* decision that the ruling requiring notice would apply to all beneficiaries. See Supplemental Notes re First Draft of Opinion, Papers of Robert H. Jackson, 1816-1983 [hereinafter Justice Jackson Papers] (on file at the Library of Congress, Manuscript Division, Box 164, No. 378, *Mullane v. Central Hanover Bank & Trust Co.*) ("although the question as to what is required as to those interested in the principal is not before the court, I am sure that whatever we say [about] income beneficiaries would be understood as applying to principal beneficiaries. HCB"). The Library of

The holding in *Mullane* may, in hindsight, seem obvious. But at the time, the Court had to leap over entrenched distinctions between “in rem” and “in personam” jurisdiction as well as ideas that personal participation was requisite (as the FLSA 1940s case law reflected). The Court expanded the ability of states to bind individuals outside their physical boundaries by upholding what is, in today’s terms, nationwide jurisdiction, using the location of the trust and personal jurisdiction over the trustee as the hooks that empowered states to bring all the beneficiaries, wherever they lived, before their courts. Yet the Court tempered its ruling by finding that the statutory method of providing notice violated the Constitution.¹⁰³ Justice Jackson read due process as not imposing “impossible or impractical obstacles” to producing a decision about the banks’ prudence, while also requiring an “opportunity” for those affected to know so as to be able to present objections.¹⁰⁴

One issue for the Court to address was the mechanics of letting people know their rights were being determined, and another was the purpose. *Mullane* held that when names of beneficiaries were “at hand” and “easily” found on the bank’s books, notice by publication was constitutionally deficient.¹⁰⁵ Yet the Court did not want to impose too great an economic burden on the underlying activity. The Court did not offer an in-depth theoretical account of what today we term “interest representation” but explained that an “individual interest does not stand alone” but was “identical with that of a class.”¹⁰⁶ Thus, notice to those whose addresses were readily available sufficed, as everyone shared the same interests in “the integrity of the fund and the fidelity of the trustee.”¹⁰⁷

The Court explained that the purpose of the notice was to elicit objections: “notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections

Congress has archived these papers and created a finding guide, made available at <http://hdl.loc.gov/loc.mss/eadmss.ms003002> [<https://perma.cc/LZY8-NALB>].

¹⁰³ *Mullane*, 339 U.S. at 312-13, 320. Justice Black’s notes before the decision to Justice Jackson discussed the authority of a court to “discharge the trustee of further liability for the acts it approves.” Memorandum to Justice Jackson from Justice Black, Dated 3/3/50 (on file at Justice Jackson Papers, *supra* note 102, Box 164, No. 378).

¹⁰⁴ *Mullane*, 339 U.S. at 313-14. The reminder for those steeped in contemporary state action requirements is that the dispute was between private parties, enlisting the state courts to settle the accountings.

¹⁰⁵ *Id.* at 318-19.

¹⁰⁶ *Id.* at 319.

¹⁰⁷ *Id.* Justice Jackson’s notes on and outline of the opinion mentioned the importance of avoiding the costs of “wild-goose chases” and that providing notice to the “bulk” would protect the interests of others. Outline of Present Opinion, Dated 3/21/50 (on file at Justice Jackson Papers, *supra* note 102, Box 164, No. 378); Outline, Dated 3/25/50 Subheadings E&F (on file at Justice Jackson Papers, *supra* note 102, Box 164, No. 378).

sustained would inure to the benefit of all.”¹⁰⁸ The Court may have assumed the responsiveness to objections, but it did not address directly that New York provided *no method of exit*; these property holders were placed in what came to be called a mandatory class.¹⁰⁹

In today’s terms of voice, loyalty, and bonding, we can theorize that those noticed could both provide information to and monitor the actions of their court-selected representatives. Yet the individually small stakes made responses (in, and especially outside of, New York) unlikely. Indeed, in the last sixty years, during which pooled funds came to control billions of dollars, neither recorded challenges by beneficiaries nor successful challenges by guardians ad litem have been identified.¹¹⁰

But to focus on filed objections in cases as the only metric is wrong. Broadcasting information raised the potential of oversight that could affect decisionmaking, even if assessing the impact on investments and distribution of funds is difficult.¹¹¹ More generally, *Mullane* provided a constitutional path to large-scale resolutions by courts whose legitimacy to bind absentees rested on telling a subset that their interests were being determined through a representative structure. And, as I analyze in a related essay, *Mullane*’s insistence on notice put the fact of aggregation before a large set of claimants and thereby forced information into the public arena.¹¹²

Mullane’s potential was realized in the 1966 revisions to Rule 23. We know from records of the Advisory Committee that a goal of the revision was to bind absentees beyond those in a “true” class action.¹¹³ While the *Mullane*

¹⁰⁸ *Mullane*, 339 U.S. at 319.

¹⁰⁹ The Court identified two forms of property interests: the “rights to have the trustee answer for negligent or illegal impairments,” and the risk of a “diminution” in their funds through an “allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest.” *Id.* at 313.

¹¹⁰ See Leubsdorf, *supra* note 51, at 1725-27.

¹¹¹ See generally John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929 (2005).

¹¹² See Resnik, *Reorienting the Process Due*, *supra* note 65.

¹¹³ A note on sources is required. The Administrative Office of the U.S. Courts has posted a subset of materials from the Rules Committees on its website, including rules suggestions and comments, committee reports, and meeting minutes. ADMIN. OFFICE OF THE U.S. COURTS, RECORDS AND ARCHIVES OF THE RULES COMMITTEES, <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees> [<https://perma.cc/24CU-5A5y>]. In addition, I reviewed unpublished materials then located in boxes housed in the late 1980s at the National Records Center in Record Group No. 116, Accession No. 82-0028. Thereafter, the Congressional Information Service (CIS) put some National Archive Records on microfiche. The Harvard Law Library has also made available Benjamin Kaplan’s papers in its Special Collections. These materials are archived at Harvard, but currently, law review conventions use the phrase “on file at” which is invoked here as well. See Papers of Benjamin Kaplan, Reporter, Advisory Committee on Civil Rules, 1961-1965 [hereinafter Kaplan Papers] (on file at the Harvard Law Library, Historical and Special Collections). Harvard created a finding guide, entitled “Kaplan, Benjamin. Papers, 1939-2010: Finding Aid,” made available at <http://oasis.lib.harvard.edu/oasis/deliver/~law00250> [<https://>

Court changed due process doctrine to facilitate the viability of then-new economic products, the 1966 rule drafters had other kinds of problems in mind. The implementation of school desegregation orders was one concern. Individual students bringing discrimination claims were seen as each holding a separate right; the class actions filed on their behalf were then conceptualized as "spurious" rather than "true" class actions. Rule 23 drafters wanted to ensure that after any particular student-plaintiff graduated, others could go to court to enforce injunctions.¹¹⁴ Thus, rule drafters created what became Rule 23(b)(2), authorizing class treatment with no exit by co-plaintiffs when the "party opposing the class has acted or refused to act on grounds that apply generally to the class" and injunctive relief was appropriate.¹¹⁵

Also in focus were cases involving limited funds, in which plaintiffs could be in competition with each other when remedies were ordered. Defendants could also be at risk of being required in one case to change their behavior, but not in another—or what through Rule 23(b)(1) came to be termed "incompatible standards of conduct," for which the Rule authorized class action treatment. Small claimants posed another problem to be solved by the rule drafters, who saw the need to enable access for those who lacked the resources and knowledge to pursue rights. The drafting of 23(b)(3) gave such groups—when class treatment was "superior" to individual actions—routes to collective actions in court.¹¹⁶

The question of the constitutionality of bundling all these kinds of class members together for a final adjudication was addressed in a 1962 memo by the Reporter and drafter of Rule 23, Professor Benjamin Kaplan of Harvard Law School, who was joined by Professor Al Sacks as the Associate Reporter. That memo, outlining a "tentative" proposal, moved beyond the assumptions

perma.cc/K2JX-L7F5]. Most of the memoranda were not signed, and not all were dated. Some have handwritten notes on them, and some include notations that they were co-authored by Albert Sacks, also a Harvard Law professor and the Associate Reporter to the Advisory Committee.

I have also reviewed portions of the archival materials of Albert Sacks, which are archived at the Harvard Law Library's Special Collections. See *Papers of Albert Sacks, 1915–1991* [hereinafter *Sacks Papers*] (on file at the Harvard Law Library, Historical and Special Collections). Materials focus on discovery reform but some reference is made to Rule 23; one letter, dated June 29, 1967, from Sacks to the Hon. William H. Becker, questioned that judge's view that a class action could be certified as a 23(b)(1), (b)(2), and (b)(3) class, and noted that "Ben Kaplan concurs in the general thoughts" in the letter and that "[b]oth of us have in mind the admonition that an author is sometimes the worst judge of the meaning of the language he has produced." Letter from Albert M. Sacks to Hon. William H. Becker 3 (June 29, 1967) (on file at Sacks Papers, *supra* note 113, Box 142-6). In addition, I benefitted from research materials provided by Andrew Bradt from the papers of Dean Phil Neal, who helped to shape MDL, and which are archived at the University of Chicago.

¹¹⁴ See 1966 Proposed Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 69, 102 (1966).

¹¹⁵ 1966 Proposed Amendments to Rule 23, *reprinted in* 39 F.R.D. 69, 96 (1966).

¹¹⁶ *Id.*

that permeated the FLSA decisions of the 1940s.¹¹⁷ The 1960s memos did not equate the constitutionality of class actions with individual notice but recommended leaving “to the discretion of the judge on the firing line” the decision on the “character and timing” of notice.¹¹⁸ As the memo put it, the “question whether a binding class action is proper must not become tied in mechanical fashion to the question whether notice has been given; the grand criterion for a class action remains the homogenous character of the class.”¹¹⁹

The Reporters explained that what was needed was a court with a “sufficient connection with a class situation,” so that it could (borrowing the phrase from an article discussing *Mullane*¹²⁰) exercise “jurisdiction by necessity” and bind absentees.¹²¹ Reflecting *Mullane*’s structure, Kaplan and Sacks were not focused on rights of exclusion and did not assume that class members had an “absolute right to ‘opt out.’”¹²² Such opportunities might not

¹¹⁷ Unsigned Memorandum, Tentative Proposal to Modify Provisions Governing Class Actions—Rule 23 (May 28-30, 1962) [hereinafter Tentative Proposal to Modify Class Actions 1962 Memorandum] (on file at Kaplan Papers, *supra* note 113, Box 75, Folder 5), *microformed on* CIS No. CI-6309-44 (Cong. Info. Serv.).

The FLSA was discussed occasionally. For example, committee member John Frank argued that FLSA cases provided examples of why the drafters ought to worry about champerty. Unsigned Memorandum, Class Actions—Some Further Thoughts, Handwritten Dated Aug. 1962, 14 [hereinafter Class Actions—Some Further Thoughts 1962 Memorandum] (on file at Kaplan Papers, *supra* note 113, Box 75, Folder 2). Another memo noted that the FLSA seemed to “envision a standard class action” but that case law did not support that interpretation. Tentative Proposal to Modify Class Actions 1962 Memorandum, *supra* note 117, at EE-28. Congress might not have wanted to “bind any particular employee by the adverse result of a suit in which he had not explicitly consented to join as a party.” *Id.* Another mention comes in the 1965 Advisory Committee note: “Reference is also made to ‘wage hour’ cases but these are covered by special legislation having a special history.” Statement on Behalf of the Advisory Comm. on Civil Rules to the Standing Comm. on Practice & Procedure of the Judicial Conference of the United States 8 n.3 (June 10, 1965), http://www.uscourts.gov/sites/default/files/fr_import/CV06-1965.pdf [<https://perma.cc/LCU8-DBV6>]; *see also* Comm. on Rules of Practice & Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, *reprinted in* 34 F.R.D. 325, 384-95 (1964); FED. R. CIV. P. 23(b)(3) advisory committee’s note to 1966 amendment, *reprinted in* 39 F.R.D. 69, 103 (1966).

¹¹⁸ Tentative Proposal to Modify Class Actions 1962 Memorandum, *supra* note 117, at EE-12. Given that the memorandum references “we” and in that a later, related 1963 memorandum had a cover sheet with the initials of both Kaplan and Sacks, the 1962 memo was possibly co-authored by the two. Sacks became the Associate Reporter in 1961, and he worked closely with Maurice Rosenberg, a Columbia Law professor, on rules governing discovery. That memo also noted that *Hansberry v. Lee* could be read to have given notice “independent significance” in deciding whether a class action comported with due process in binding “outsiders.” *Id.* at EE-10, EE-11.

¹¹⁹ *Id.* at EE-11 n.5.

¹²⁰ *See* George B. Fraser, Jr., *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305 (1951).

¹²¹ Class Actions—Some Further Thoughts 1962 Memorandum, *supra* note 117, at 9 (internal quotation marks omitted).

¹²² *Id.* at 9-11. As is familiar to scholars of Rule 23, drafts vested a great deal of discretion in district judges, including whether to permit individuals to exclude themselves. For example, in a January 31, 1964 memo, Kaplan and Sacks suggested that judges ought to decide whether class

have seemed relevant, as discussions in 1962 also raised the option of having some one-way class actions through which class members could benefit from a favorable judgment but not be adversely affected by an unfavorable one.¹²³

In another 1962 memo, offering "some further thoughts," the Reporters commented that notice to absentees was especially important for what the draft described as "optional" or discretionary class actions (which was the basis for what became (b)(3) classes): "[I]f a satisfactory manner of giving notice is employed, it seems likely that the requirements of the due process clause will be satisfied."¹²⁴ Moreover, "common decency" entailed taking some "steps" to let those affected by a litigation know that it was "under way."¹²⁵ That memo also explained that notice was not to be equated with personal service of process, nor to be turned into a vehicle for attorneys to solicit clients.¹²⁶

Even as the Reporters said that notice and "adequate representation" sufficed to assuage "doubts about the constitutionality of the representative procedure," they questioned "how much 'individual freedom' each member of the class" actually had; the "pressure" to submit and "be bound . . . by a 'model' trial [would] often be so high" as to constitute "compulsion."¹²⁷ The memo also noted that individuals did not have a "meaningful" interest in pursuing an individual lawsuit if "a single district" was "obviously and pre-eminently the most convenient forum."¹²⁸

The memos from 1962 mentioned both *Hansberry* and *Mullane* and reflected how opaque the Supreme Court case law was about what was required to bind absentees. The 1940 *Hansberry* ruling refused to enforce racially restrictive covenants because the prior representatives had interests that were "not necessarily or even probably the same as those whom they are deemed to

members' "inclusion" was "essential to the fair and efficient adjudication of the controversy" and to state reasons for doing so. Benjamin Kaplan & Al Sacks, Memorandum to the Advisory Committee, (A) Discussion of Responses to Memorandum of December 2, 1963; (B) Recommendation that the Amendment as Revised Be Promptly Circulated to the Public for Comment and Criticism at 5 (Jan. 31, 1964), *microformed on* CIS No. CI-7003-08 (Cong. Info. Serv.) (emphasis in original) (internal quotation marks omitted). The drafters were not focused on providing an "absolute right to 'opt out'" until the end of the drafting period, when the rule that was promulgated included opt-out rights for Rule 23(b)(3) class members. *Id.* at 1.

¹²³ Unsigned Memorandum, Modification of Rule 23 on Class Actions EE-4 to EE-7 (Feb. 1963) [hereinafter Modification of Rule 23 1963 Memorandum] (on file at Kaplan Papers, *supra* note 113, Box 79, Folder 4), *microformed on* CIS No. CI-6313-56 (Cong. Info Serv.). Those views reflect the influence of an article by Kalven and Rosenthal, who had argued in 1941 that if a class representative won, absentees should be able to benefit even if they were not to be bound by a loss. Kalven & Rosenthal, *supra* note 46, at 701.

¹²⁴ Class Actions—Some Further Thoughts 1962 Memorandum, *supra* note 117, at 9.

¹²⁵ Modification of Rule 23 1963 Memorandum, *supra* note 123, at EE-5 (quoting Professor Zechariah Chafee).

¹²⁶ *Id.*

¹²⁷ Class Actions—Some Further Thoughts 1962 Memorandum, *supra* note 117, at 10.

¹²⁸ *Id.* at 11.

represent” and therefore, the Court concluded, did not give absentees what due process required.¹²⁹ The due process problem was disunity of interests, and the Court did not discuss notice as the solution.

But the Court left the door open for other ways of binding absentees: if rights of class members turned on “a single issue of fact or law,” states could create mechanisms to preclude subsequent litigation.¹³⁰ Required were procedures “devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.”¹³¹

In 1964, the Advisory Committee circulated for public comment a draft rule that included provisions for what would become (b)(3) class actions. The Committee spoke of “reasonable notice” for such class members but discussed “specific notice” only for “each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.”¹³² Moreover, the 1964 version proposed that judges had to approve requests for opting out.¹³³ The draft instructed members to “request exclusion” by a date specified by the judge, and told judges to permit exit “unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor.”¹³⁴

Indeed, as promulgated in 1966, Rule 23 did not mandate notice at the outset for its (b)(1) and (b)(2) classes of the pendency of the class action.¹³⁵ Further, while Rule 23 called for “reasonable notice” if a dismissal or compromise was in the offing, it did not detail the kind, quality, or comprehensiveness of that notice. And, for (b)(3) classes, Rule 23 invoked *Mullane’s* standard of the “best notice practicable under the circumstances,”¹³⁶

¹²⁹ 311 U.S. 32, 45 (1940). The Court stated that only fifty-four percent of the owners of the footage had signed the restrictive covenants; yet a search of the land records does not support that proposition. See generally Jay Tidmarsh, *The Story of Hansberry: The Rise of the Modern Class Action*, in *CIVIL PROCEDURE STORIES* 233 (Kevin Clermont ed., 2d ed. 2008).

¹³⁰ 311 U.S. at 43.

¹³¹ *Id.* One illustration of a licit procedure came a decade after *Hansberry* in *Mullane*, but the Court was focused on a state statute requiring the provision of information to beneficiaries. *Mullane*, 339 U.S. at 312-20.

¹³² Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, reprinted in 34 F.R.D. 325, 386-95 (1964).

¹³³ See *id.*

¹³⁴ *Id.* at 386.

¹³⁵ Amendments in 2003 added that district judges had discretion to require notice for (b)(1) and (b)(2) class members. See FED. R. CIV. P. 23(c)(2)(A).

¹³⁶ FED. R. CIV. P. 23 (c)(2). A prescient essay given to me by its author, Lawrence Fox, detailed how the 1966 Rule did not answer “important questions” related to notice – what it entailed and who paid for it, “whenever” it was required. Lawrence Fox, Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. PA.

which could be understood as less demanding than what the 1974 *Eisen* decision read Rule 23 to mandate.¹³⁷

A summary is in order to reflect on the distance between constitutional law, as judges reading the 1938 FLSA provisions understood it in the 1940s, and what the Rule 23 drafters accomplished. Rule 23 drafters were remarkably successful in disentangling autonomy, consent, and individualization in litigation from the strictures of the Due Process Clause. Their rule, premised on the view that judges could readily identify classes when "community or solidarity of interest" was strong,¹³⁸ forced individuals who had filed no consent with a court to be parties, bound by outcomes through (b)(1) and (b)(2) classes. Even for the (b)(3) class action (to be certified if a judge found such a method of adjudication "superior" to individual litigation), the Committee did not adopt the FLSA "sign-up-with-the-court" model but crafted instead a default of inclusion, subject to opting out affirmatively.

Those decisions paralleled efforts by Congress to ease access to the federal courts. The means included the creation of the Legal Services Corporation in 1974, a fee-shifting statute for civil rights cases in 1976, and a host of new causes of action. Rule 23 thus contributed to our understanding of what lawsuits can do, as it enabled judges to oversee long-term school desegregation decrees and paved the way for parallel structural remedies addressing jails, prisons, mental hospitals, and employment.¹³⁹

Further, the Rule's goal of providing for low-value claimants (in Kaplan's words, "without effective strength to bring their opponents into court at all"¹⁴⁰) came to fruition. An equitable doctrine, developed early in the twentieth century, evolved into an understanding that class action plaintiff lawyers confer a "common benefit" on the class and should be compensated from funds recouped; methods range from calculating hourly rates to providing a percentage of the fund or some mixture (a "hybrid" approach) of the two.¹⁴¹ Thus, small claims turned into potentially lucrative aggregations, enticing lawyers to

L. REV. 889, 906 (1968). Fox argued that the Advisory Committee erred in interpreting *Mullane* to require individual notice in class actions. *Id.* at 914-15.

¹³⁷ See Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 S. CT. REV. 97 (1974).

¹³⁸ Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 376 (1967) [hereinafter Kaplan, *Continuing Work*].

¹³⁹ See generally Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

¹⁴⁰ Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) [hereinafter Kaplan, *A Prefatory Note*].

¹⁴¹ Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 337-38 (1996).

take the risk of serving as “champions of semi-public rights” and thereby augmenting administrative regulatory oversight.¹⁴²

IV. THE SUCCESS OF AGGREGATION AS THE NORM: THE CASE OF THE TORT AND THE EXPANSION OF MULTI-DISTRICT LITIGATION

The market-driven structure of Rule 23 was reflected in the rulemakers’ exclusion of tort claimants. Given the contingent fee system, the drafters wrote about the lack of a “need” to push against the traditions of individualization or to face federalism conflicts stemming from *Erie*’s impact on choice of law.¹⁴³ But, as we know now fifty years later, the aggregate structure that they created for civil rights and an array of consumers would not only be used *by* tort plaintiffs, but also be needed *for* them. Indeed, mass torts have become a dominant form of large-scale aggregation in the federal courts—by way of class actions, multidistrict litigations, and bankruptcies.

A sketch of why the 1960s class action rule presumptively excluded torts and of how torts have become a familiar facet of aggregate litigation—in class actions and via MDLs—underscores how assumptions about the individuality of certain kinds of claims gave way, as other “vital” state interests came to the fore. Thus, a return to the 1962-63 drafting of Rule 23 is in order.

At the time, the proposed Rule had two, not three, kinds of class actions. One category (then labeled Rule 23(c)) addressed “presumptively maintainable” class actions, and a second (then 23(d)) covered “class actions maintainable in the court’s discretion.”¹⁴⁴ But in 1963, the drafters considered following the 1938 pattern of delineating three categories, even as they were abandoning the 1938 Rule’s reason (distinguishing between binding and nonbinding class actions) for doing so. Kaplan commented that the absence of categories “might also tend toward the indiscriminate use of the class-action device in ‘mass tort’ situations, a result surely to be avoided.”¹⁴⁵ At the time, the referent was train or plane crashes, fires, and the collapse of building structures.

¹⁴² Kalven & Rosenfield, *supra* note 46, at 717.

¹⁴³ As one of the 1962 memos explained: “If the claim is fairly large, then, at least if a contingent-fee arrangement is available, there is no need for the individual claimant to resort to a class action in order to get his lawyer properly paid.” Class Actions—Some Further Thoughts 1962 Memorandum, *supra* note 117, at 11-12.

¹⁴⁴ Modification of Rule 23 1963 Memorandum, *supra* note 123, at EE-10, EE-11.

¹⁴⁵ *Id.* at EE-1.

Kaplan discussed that torts would be unlikely to meet the criteria of the Rule, as individuals would pursue their own cases, and differing state tort law would result in divergent governing law.¹⁴⁶ Kaplan proposed a note to state:

A "mass accident" resulting in injuries to numerous persons is on its face not appealing for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.¹⁴⁷

John Frank, a committee member, responded that he was "unpersuadably opposed to the use of the class action in the mass tort situation."¹⁴⁸ Frank was also of the view that Rule 23 ought to be limited to civil rights claims alone,¹⁴⁹ of which he was a staunch supporter.¹⁵⁰ Kaplan replied that eliminating the reach of the proposed class action rule would be "so retrograde a move" as to prevent publication of any revised draft.¹⁵¹

Whether Kaplan wanted to mollify an adamant committee member or believed torts ill-suited for class treatment,¹⁵² he wrote to Frank that he too was "anxious to keep [mass accidents] out."¹⁵³

It seems to me that it would strain interpretation to say that particular actions by injured parties in a mass accident will 'impair or impede the ability of the other members to protect their interests;' th[is] clause is redolent of claims against a fund.¹⁵⁴

¹⁴⁶ See Transcript of the Oct. 31–Nov. 2, 1963 Advisory Comm. on Civil Rules Meeting, Discussion of Rule 23-Topic EE 5 [hereinafter Advisory Committee 1963 Transcript] (on file at Kaplan Papers, *supra* note 113, Box 81, Folder 7), *microformed on* CI-7104-53.

¹⁴⁷ *Id.* Kaplan quoted from the proposed Rule 23 note at the October 1963 meeting.

¹⁴⁸ Letter from John P. Frank to Benjamin Kaplan 2-3 (Jan. 21, 1963) (on file at Kaplan Papers, *supra* note 113, Box 79, Folder 2).

¹⁴⁹ See Advisory Committee 1963 Transcript, *supra* note 146, at 8-10, 20 (statements of John P. Frank). Frank argued the potential for "fraud," with defendants trying to buy off plaintiffs' attorneys to cut off future claims. *Id.* at 9.

¹⁵⁰ For example, while teaching at Yale Law School, Frank joined Thomas Emerson in organizing a brief in 1949 on behalf of 189 law professors supporting the integration of law schools. Brief for Petitioner at 1-4, *Sweatt v. Painter*, 339 U.S. 629 (1950) (No. 44).

¹⁵¹ Advisory Committee 1963 Transcript, *supra* note 146, at 10.

¹⁵² Kaplan stated that he was not arguing a "wild appeal to bring in mass accidents," but sought a flexible rule that permitted judges to decide what kinds of cases fell within it. *Id.* at 10-12. Yet, when Judge Wyzanski commented that he was not as concerned about "the risk with respect to the mass accident," Kaplan replied that "the case of a mass accident will be, and probably ought to be, excluded from the class suit." *Id.* at 14.

¹⁵³ Letter from Benjamin Kaplan to John P. Frank 2 (Feb. 7, 1963) (on file at Kaplan Papers, *supra* note 113, Box 79, Folder 6).

¹⁵⁴ *Id.*

The result was what became a Committee note accompanying Rule 23(b)(3) and stating that “a ‘mass accident’ . . . is ordinarily not appropriate for a class action”¹⁵⁵

In comments published subsequently, Kaplan did not suggest that excluding mass accidents was a constitutional imperative; rather, practical problems stood in the way. Indeed, when describing the Rule’s ambit, Kaplan acknowledged the “dilution of procedural safeguards” entailed in Rule 23(b)(3).¹⁵⁶ Kaplan distinguished between “some litigious situations affecting numerous persons ‘naturally’ or ‘necessarily’ [which] called for unitary adjudication,”¹⁵⁷ and those involving “individual preference,”¹⁵⁸ for which opting out would be provided. Class treatment was not needed “where the stake of each member bulks large and his will and ability to take care of himself are strong.”¹⁵⁹

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

Moreover, another exemplar of damage actions—antitrust cases—were on the agenda of a different judicial committee, the Coordinating Committee for Multiple Litigation in the United States District Courts, which was charged by the Judicial Conference in the 1960s “with developing methods for expediting” such “big” cases.¹⁶⁰ Its work became the source of the 1968 MDL legislation.¹⁶¹ Members of the two committees met in 1963.¹⁶² As discussed in a transcript of that meeting and a 1963 memorandum, members of both

¹⁵⁵ FED. R. CIV. P. 23(b)(3) advisory committee’s note to 1966 amendment, *reprinted in* 39 F.R.D. 69, 103 (1966).

¹⁵⁶ Kaplan, *Continuing Work*, *supra* note 138, at 390; *see also* Benjamin P. Kaplan, Comments at the Proceedings of the Twenty-Eighth Annual Third Circuit Judicial Conference: The Impact of the Electrical Anti-Trust Cases Upon Federal Civil Procedure, 39 F.R.D. 375, 513-18 (1965).

¹⁵⁷ Kaplan, *Continuing Work*, *supra* note 138, at 386.

¹⁵⁸ *Id.* at 391. Kaplan explained that the rule still permitted individuals to opt out, even when their stakes are “so small as to make a separate action impracticable.” *Id.* at 391.

¹⁵⁹ Kaplan, *Continuing Work*, *supra* note 138, at 391.

¹⁶⁰ Resnik, *From “Cases” to “Litigation,” supra* note 63, at 29-30 & n.112; *see also* Andrew D. Bradt, *“A Radical Proposal”: The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 838 (2017).

¹⁶¹ *Id.*; *see also* Andrew D. Bradt, *Something Less and Something More: MDL’s Roots as a Class Action “Alternative”*, 165 U. PA. L. REV. 1711 (2017).

¹⁶² *See* Memorandum from Benjamin Kaplan & Al Sacks to the Chairman & Members of the Advisory Committee on Civil Rules, Completion of the Work Committee Meeting of October 31–November 2, 1963 4-8 (Dec. 2, 1963) [hereinafter Completion of the Work, Dec. 2, 1963 Memorandum], *microformed on* CIS No. CI-7104 (Cong. Info. Serv.). That memo reported on the “special meeting” with members of the Coordinating Committee.

committees did not view Rule 23 changes as the only vehicle for dealing with the challenges that mass accidents posed for the federal courts.¹⁶³

Above, I used the 1940s FLSA cases to mark how much work *Mullane* and Rule 23 did to reframe constitutional conventions. The 1966 Committee note, warning against the use of class actions for mass torts, offers another baseline for measuring change, which again happened relatively quickly. Rule 23's central function was to displace once-conventional constitutional wisdom about the legality of binding absent, non-participatory, non-directly consenting individuals. That approach became licit in tort and, through other forms of aggregation, Rule 23's modality migrated across the litigation spectrum.

The practical pressures to aggregate torts came from a rising number of individuals injured by the same products or events. The cost of such injuries showed that a (b)(1) class (protecting rights-holders to a "limited fund") could well have application to mass torts, as damages sometimes exceeded insurance policy funds. Further, the stakes and scale of such cases made plain that the individual contingent fee lawyer was not equipped to carry the load. Thus, commentators and judges soon questioned the presumption against mass torts of the Advisory Committee's note.¹⁶⁴ By the 1980s, federal district judges had certified mass tort cases in a range of cases, including famously litigation involving Agent Orange.¹⁶⁵

Lessons on aggregation of torts also came from another form of litigation—bankruptcy. Tort defendants such as Johns Manville (for asbestos) and A.H. Robins (the defendant in the Dalkon Shield IUD litigation) brought tort claimants into such proceedings.¹⁶⁶ In both class settlements and bankruptcy, lawyers and judges invented new structures including "claims facilities," which resembled both insurance companies making payments and mini-court systems resolving individual post-liability disputes. In lieu of tort plaintiffs and their

¹⁶³ Reported was that members of the Coordinating Committee did not think that mass accidents ought to be absolutely excluded from Rule 23. *Id.* at 5. Rather, "no single device . . . [could] be expected to 'solve' the questions of procedure and management posed by massive litigation affecting numerous parties." *Id.* at 4. Thus, "a variety of devices" needed to be invented, and rather than "stiff rules," "play in the joints" was "imperatively required." *Id.*; see also Bradt, *supra* note 160.

¹⁶⁴ See, e.g., J. WILLIAM MOORE, FEDERAL PRACTICE 23-811, ¶ 23.45 n.35 (Matthew Bender ed., 1969).

¹⁶⁵ *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied sub nom. Pickney v. Dow Chemical*, 484 U.S. 1004 (1988); see also generally PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1987). Other examples of certification of mass torts came from asbestos claims. See *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986), *reh'g denied*, 785 F.2d 1034 (5th Cir. 1986).

¹⁶⁶ See Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255 (2005); Harvey J. Kesner, *Future Asbestos Related Litigants As Holders of Statutory Claims Under Chapter 11 of the Bankruptcy Code and Their Place in the Johns-Manville Reorganization*, 62 AM. BANKR. L.J. 69, 71 (1988); Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)*, 61 FORDHAM L. REV. 617 (1992).

lawyers operating as solo actors, massive numbers were co-claimants, represented by Plaintiff Steering Committees (PSCs) dealing collectively with defense lawyers in search of comprehensive settlements (just as banks in the *Mullane* case had sought to preclude large numbers of potential claims).

By 1988, the Judicial Conference of the United States “approved in principle the creation of Federal jurisdiction based on minimal diversity to consolidate in the Federal courts multiple litigation in State and Federal Courts involving personal injury or property damage arising out of a single event or occurrence.”¹⁶⁷ In 1991, the Judicial Conference endorsed a report of the Ad Hoc Committee on Asbestos Litigation that recommended aggregate treatment of the pending asbestos cases.¹⁶⁸ The American Law Institute likewise became a proponent, first through a project on “complex litigation” in the 1980s and then by endorsing the “principles of aggregation” in 2010.¹⁶⁹ But as is familiar, the Supreme Court’s decisions in the late 1990s in *Amchem* and in *Ortiz* took much of the steam out of large-scale mass tort class actions.¹⁷⁰

Yet because a consensus had already emerged that aggregate processing was essential, mass torts found a home in MDLs, whose genesis also bears a brief reflection. Rising caseloads after World War II and a spate of antitrust cases prompted the federal judiciary’s leadership to argue that courts should take control of “protracted cases” or those cases would “threaten the judicial process itself.”¹⁷¹ In the early 1960s, after the United States had successfully pursued antitrust claims against electrical equipment manufacturers, “more than 1,800 separate damage actions were filed in 33 federal district courts.”¹⁷² The Judicial Conference created the Coordinating Committee for Multiple Litigation of the United States District Courts, which, as I noted, met in 1963 with the Rules Advisory Committee. Nine federal judges were charged with

¹⁶⁷ See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 22 (Mar. 15, 1988); *Multiparty, Multiforum Jurisdiction Act of 1989: Hearing on H.R. 3406 Before the Subcomm. on Courts, Intellectual Prop. & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 17 (1989) (prepared statement of Hon. William W. Schwarzer).

¹⁶⁸ See Linda Greenhouse, *Aid Sought from Congress to Ease Asbestos Caseload*, N.Y. TIMES (Mar. 13, 1991), <http://www.nytimes.com/1991/03/13/business/aid-sought-from-congress-to-ease-asbestos-caseload.html> [<https://perma.cc/PU4P-SJ65>].

¹⁶⁹ COMPLEX LITIGATION PROJECT (AM. LAW INST., Tentative Draft No. 2, 1990); AMERICAN LAW INSTITUTE, REPORTERS’ STUDY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE, 383-440 (1991); PRINCIPLES OF THE LAW OF AGGREGATE LITIG. (AM. LAW INST. 2010); see also Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers’ Powers*, 79 GEO. WASH. L. REV. 628, 630 (2011).

¹⁷⁰ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999).

¹⁷¹ JUDICIAL CONFERENCE OF THE U.S., PROCEDURE IN ANTI-TRUST AND OTHER PROTRACTED CASES, reprinted in 13 F.R.D. 41, 64 (1951); see also Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 925, 938 (2000).

¹⁷² Transfer of Pretrial Proceedings in Multidistrict Litigation, H.R. Rep. No. 90-1130, at 2 (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1899, 1903.

supervising nationwide discovery in these damage antitrust cases, in part through "uniform" pretrial orders adopted individually by each of the judges before whom the cases were pending.¹⁷³

That Committee's work resulted in the Multidistrict Litigation Act of 1968,¹⁷⁴ which instead of having judges in different districts coordinate by adopting parallel orders, transferred all pending cases to a single judge. Akin to aspects of the 1966 class action rule, the 1968 MDL legislation created a *mandatory* pretrial aggregation, with no personal rights of consent during that phase of the litigation. But because cases were to be "remanded" to the originating courts at the conclusion of the "pretrial proceedings,"¹⁷⁵ MDL appeared to provide only a temporary arrangement and (unlike Rule 23) retained the convention of individual lawyers representing individual plaintiffs.

In contrast to the controversy surrounding Rule 23, MDLs initially garnered little attention.¹⁷⁶ The divergent responses reflected what once were the differing ambitions of the two provisions. Class action revisions aimed to *enable* litigation, as Kaplan had stressed, to help "people who individually would be without effective strength to bring their opponents into court at all."¹⁷⁷ Class actions enabled sets of new plaintiffs—schoolchildren, prisoners, consumers, and employees—to make their way into the federal courts. MDL, on the other hand, was assumed to be only a vehicle to *expedite* cases already filed, and thereby to be a managerial effort to protect the judiciary and—to some extent—defendants, at risk of redundant and expensive discovery requests.

Moreover, in its first few decades, the MDL panel appeared to share the Rule 23 Advisory Committee's skepticism about tort aggregation.¹⁷⁸ The (in)famous example is asbestos. As caseload filings mounted in federal court, the Judicial Panel on Multidistrict Litigation (JPML) repeatedly rejected (in 1977, 1980, 1986, and 1987) requests to assign the cases to a single judge.¹⁷⁹ The

¹⁷³ Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 623 (1964).

¹⁷⁴ Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, 82 Stat. 109.

¹⁷⁵ 28 U.S.C. § 1407(a) (2012). The "remand" requirement was loosely enforced until 1998, when the Supreme Court read the statutory text to require sending cases back for trials. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998).

¹⁷⁶ A shift is underway. *See, e.g.*, Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017); Howard M. Erichson, Foreword, *Multidistrict Litigation and Aggregation Alternatives*, 31 SETON HALL L. REV. 877 (2001). Moreover, the 2017 congressional effort to restrict class actions included proposed limits on MDLs as well. *See* Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (2017).

¹⁷⁷ Kaplan, *A Prefatory Note*, *supra* note 140, at 497.

¹⁷⁸ Bradt's account suggests that the decisions of the panel were not in keeping with the ambitions of the Coordinating Committee. *See* Bradt, *supra* note 160.

¹⁷⁹ *See* Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 111 & n.80 (2013).

JPML's reasons echoed Kaplan's 1960s explanation—that these cases lacked the requisite commonality and that the existing litigation system sufficed.¹⁸⁰

But, in 1990, Chief Justice Rehnquist “appointed an Ad Hoc Committee on Asbestos Litigation,” which called for a statutory solution and, in the interim, MDL treatment.¹⁸¹ The JPML responded the next year. Quoting the Ad Hoc Committee's description of problems such as “long delays,” the same issues “litigated over and over,” as well as high “transaction costs” that could exceed “victims' recovery by nearly two to one” and that could exhaust defendants' assets, the Panel assigned all 26,639 pending cases from 87 federal districts to a federal judge in Pennsylvania.¹⁸²

Return to the five structural facts about the federal courts, circa 2015, with which I began—flattening filings, the rise of MDL garnering almost forty percent of the docket, the prevalence of unrepresented litigants, the decline of class actions, and the rarity of trials. As those facts reflect, the distinction between MDL aggregation for pretrial purposes only and class actions has been eclipsed. With the expansion of Rule 16 and the rise of ADR, the “pretrial” is the dominant form that all federal litigation takes. Further, aggregate resolutions are a common route for both MDLs and class actions, as demonstrated by the remand rate in 2015 for MDLs: about nineteen out of twenty cases in an MDL closed before being returned to another district for trial.¹⁸³

Disaggregating the types of claims in MDLs also makes plain that the presumption of individualization in tort has likewise waned. MDLs may include class actions, and some tort class actions are certified, with or without being a part of an MDL. Further, product liability cases were, as of July 2015, about twenty-four percent of the 287 then-pending MDLs; adding air crashes brings the total of tort MDLs to approximately a quarter of the MDL portfolio.¹⁸⁴ As detailed in the pie chart in Figure 7 on pending MDLs by the kind of case, when moving from the level of an MDL to the cases within, mass torts represented more than 90 percent of the 2015 pending MDL cases.

¹⁸⁰ See, e.g., *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 909-11 (J.P.M.L. 1977) (per curiam). The opinion noted that the parties objected; the Panel stated that, while not determinative, such views were relevant. *Id.*

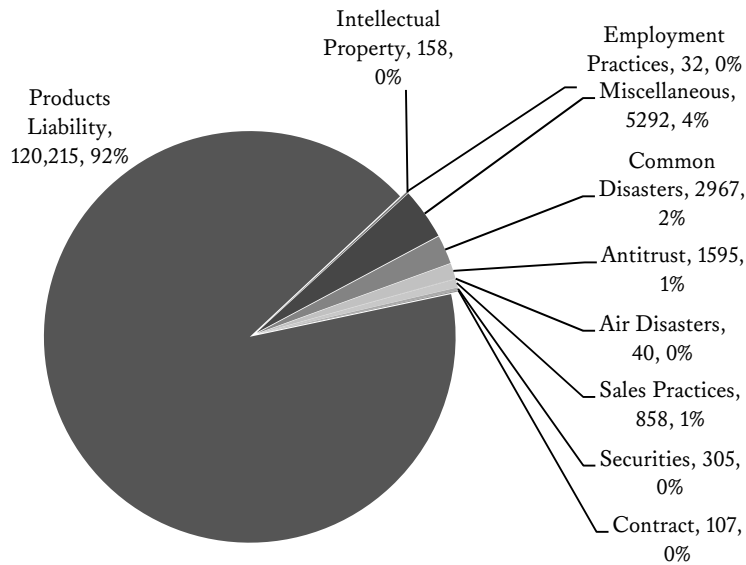
¹⁸¹ See ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (Mar. 12, 1991), http://www.uscourts.gov/sites/default/files/reports_of_the_proceedings_1991-03_0.pdf [<https://perma.cc/MY4Z-5V7D>].

¹⁸² *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 416, 419 (J.P.M.L. 1991).

¹⁸³ U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2015 5 (2015), http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2015_0.pdf [<https://perma.cc/3A87-WNPF>] (reporting 1934 cases remanded and 30,695 cases closed by the transferee court).

¹⁸⁴ The data come from Figure 7, Distribution of Pending MDL Actions by Type as of July 15, 2015, provided for use by Professor Samuel Issacharoff (on file with University of Pennsylvania Law Review). The chart was part of his Snapshot of MDL Caseload Statistics at 2 (Presentation at Duke University School of Law, Oct. 8, 2015).

Figure 7: Distribution of Pending MDL Actions by Type as of July 15, 2015¹⁸⁵



Another distinction drawn in the 1960s—between class actions as enabling new cases and MDLs as only expediting cases already filed—has likewise dissipated. Under the MDL, the practice of “direct filings” has emerged, in which a case is brought into an MDL after the MDL exists, cutting the time and costs of filing in what would become a “transfer” court and then be “tagging along.”¹⁸⁶ MDL opens the door to new cases, some of which may be free riders; absent aggregation, such cases would have been too expensive to pursue individually, even if meritorious.

MDLs thus produce the subsidies that Benjamin Kaplan praised class actions for creating. Further, judges have supervising roles in each. Under revisions in 2003 of Rule 23 and in MDL practice, judges identify the lawyers

¹⁸⁵ *Id.*

¹⁸⁶ Case management orders or stipulations may provide that jurisdiction or venue will not be contested. See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 795-97 (2012). A recent example of direct filing comes from several related MDLs about a product defect. In February of 2012, the JPML assigned a federal district judge in West Virginia some 150 cases related to failures of transvaginal mesh, used for pelvic surgery repairs. C. Gavin Shephard, *Transvaginal Mesh Litigation: A New Opportunity to Resolve Mass Medical Device Failure Claims*, 80 TENN. L. REV. 477, 478 (2013). By the fall of 2015, more than 70,000 pending cases were part of the seven transvaginal mesh MDLs (organized by product manufacturer), of which thousands had been filed directly in that court.

who will speak for the group; the lawyers have agreements about cost and fee sharing, and judges rely on the common benefit doctrine to award fees to pay lead lawyers (the Plaintiff Steering Committees or other primary counsel), who recoup the largest sums.¹⁸⁷ In practice, individual litigants with tort or other claims have attenuated relationships (at best) with the lawyers dealing directly with the judges and adversaries in MDL litigations.

Settlements are common in all the cases, and while formally individuals could exit, the costs of pursuit, whether opting out of classes or refusing MDL settlements, are high. Indeed, many settlements include “back door” or “walk away” provisions enabling defendants to exit if an insufficient number of claimants agree to be bound. Individual lawyers thus have complex duties to clients, and may believe that accepting settlements is the wisest or only plausible course.¹⁸⁸

In sum, both *Mullane* and Rule 23 altered the landscape of litigation by reconceptualizing the capacity of courts to generate decisions binding individuals—which is to say, changing the meaning of what constituted “due process” in courts. Yet the individualized model once seemed sufficient for personal injury cases, which in the early 1960s comprised almost forty percent of the federal courts’ dockets.¹⁸⁹ Moreover, in the 1940s, even as judges understood the congressional mandate in the FLSA to help workers obtain countervailing power, they thought it unconstitutional for Congress to “force one to become a plaintiff against his will or without his consent, or to select for him an agent or attorney to represent him.”¹⁹⁰ Today, reflecting the assumption of the legality of insisting on aggregate responses, we use phrases such as “the asbestos litigation” and the “vaginal mesh litigation,” and call without hesitation for congressional and executive efforts to shape global resolutions of the harms from asbestos, 9/11, and the BP oil spill.

¹⁸⁷ See generally Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425 (1998); Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014).

¹⁸⁸ Legal ethicists debate whether lawyers can agree to use their best efforts—including promising to withdraw—to ensure that their clients accept the global deals proffered in settlements. See Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 909-10 (2016); Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1943 (2017).

¹⁸⁹ See Marc Galanter, *The Life and Times of the Big Six; Or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 936 (1988).

¹⁹⁰ *Lofther v. First Nat’l Bank of Chi.*, 45 F. Supp. 986, 989 (1941).

V. REVISITING THE REGULATION OF CLASS ACTIONS AND MDL
AGGREGATES TO CRAFT NEW RULES FOR REMEDIES

As this account of the history, rules, and doctrine of aggregation makes plain, reforms have and should be motivated by problems in need of solutions. Proposals such as the 2017 anti-class action statute presume aggregation is itself the problem, producing too many litigants who lack meritorious substantive claims. My account offers a different analysis. The central elements of the contemporary federal court docket that I have identified demonstrate both the demand *for* and the contribution made *by* aggregation.¹⁹¹

The *Mullane* Court directed us to shape procedures to respond to “vital” state interests. Like the social orders of which they are a part, courts today are haunted by inequalities among participations. The legitimacy of courts rests on making welcome all eligible rights-claimants and providing opportunities for decisions that are subject to public scrutiny. Courts are thus one venue of the democratic, in the sense of enabling iterative debates through offering disciplined opportunities for participation by those affected, oversight through third-party public rights of observation, and commitments to equitable distributions across sets of similarly-situated claimants.¹⁹² Disagreements about the scope of legal rights and the function of remedies result through such public contestation.

Detailing the need for aggregation should not be equated with an assumption that the current practices suffice. What fifty years have taught—and what needs acknowledgement through new rules and doctrine—is that aggregate litigation has three stages: initiation, resolution through a mix of litigation and negotiation, and provision of remedies. All the relevant information about implementation (either in terms of locating recipients, dealing with recalcitrant defendants, or deciding how to revise remedies in light of changing conditions) is not always available at the time of settlement.

Judges have long described themselves as “fiduciaries” for absentees in class litigation,¹⁹³ but courts have not generally taken that obligation past

¹⁹¹ Data from state courts in ten major urban counties in 2012 underscore this point. Evaluations of more than 600,000 cases found that in about three-quarters, at least one of the civil litigants were unrepresented; reviewing more than 900,000 cases, less than four percent of the cases ended in a trial. See NAT'L CENTER FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 14-16, 21, 33 (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [<https://perma.cc/Z5GB-6SAT>].

¹⁹² See generally JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011); Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 2 (2011).

¹⁹³ Judges often invoke that term when considering whether to approve class settlements. See, e.g., *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 652-53 (7th Cir. 2006) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002)).

certification and settlement into the implementation phase. Nor have courts insisted on public mechanisms for dealing with conflicts that can emerge during distributions or documenting the actual impact of the remedies provided. Indeed, in some instances, such as in the Dalkon Shield bankruptcy, co-claimants were barred from learning what others had received.¹⁹⁴ Elsewhere, I outline potential responses to these problems.¹⁹⁵ My goal here has been to document the problems making aggregation central today.

Federal rules and statutes need to enable aggregation because neither judges, litigants, nor the public fare well in a lawyer-less world, where economic disparities among disputants vitiate the potential for access to a fair process—or access to any process at all. What the current federal docket illustrates is that federal courts themselves benefit from class and aggregate proceedings. But the individuals affected and the public at large have too attenuated a relationship with the resulting remedies.¹⁹⁶ Constitutional reinvention is again in order to enable, constrain, and legitimate the distributional decisions made.

I have offered a seventy-year history to document the ambitions and imagination that resulted in Rule 23 and in MDLs. The federal docket facts make plain the collective dependency of courts and litigants on lawyers and aggregation, and hence the need again to reimagine what courts could and must provide. The forms to honor constitutional obligations of openness in courts, litigant involvement with processes determining their rights, accountability of judges, and equal treatment of litigants have only begun to be developed.

¹⁹⁴ A \$2.3 billion settlement fund was established to compensate injuries from an intrauterine device; the Trust and Claims Resolution Facility did not disclose the range of specific awards made. *See Vairo*, *supra* note 166, at 655 n.136.

¹⁹⁵ *See Resnik*, *Reorienting the Process Due*, *supra* note 65.

¹⁹⁶ The result may well be disaffection, rather than affiliation and compliance. *See generally* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).