

The rule of law in multidistrict litigation

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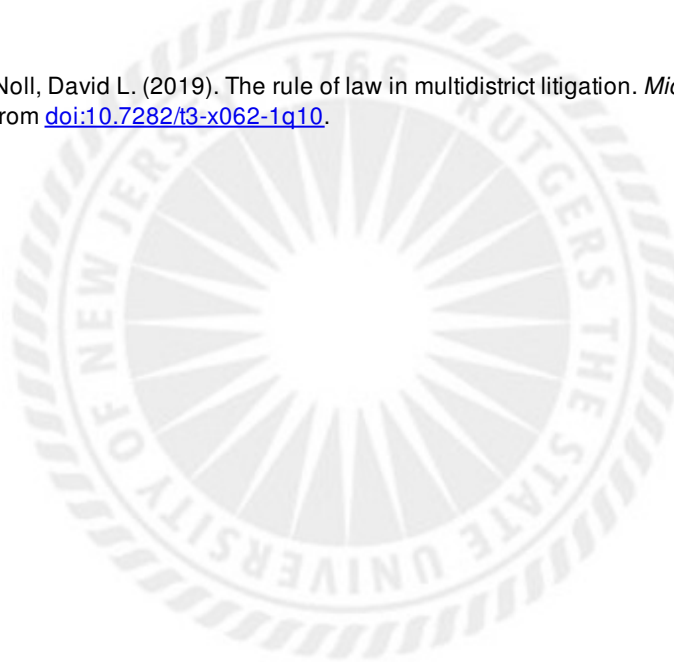
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THE RULE OF LAW IN MULTIDISTRICT LITIGATION

David L. Noll*

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

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

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

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INTRODUCTION

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

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

¹ In re Nat’l Prescription Opiate Litig., 290 F. Supp. 3d 1375 (U.S. Jud. Pan. Mult. Lit. 2017). See, e.g., Mitch Smith & Monica Davey, *With Overdoses on Rise, Cities and Counties Look for Someone to Blame*, N.Y. TIMES, Dec. 20, 2017, <https://www.nytimes.com/2017/12/20/us/opioid-cities-counties-lawsuits.html>; Dave Bangert, *City Joins Opioid Suit Amid Crisis*, INDIANAPOLIS STAR, Dec. 23, 2017, at A5.

² See Transcript of Proceedings at 4, In re: National Prescription Opiate Litigation (N.D. Oh. Jan. 9. 2018) (Doc. No. 71).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Jan Hoffman, *Opioid Lawsuits Are Headed to Trial*, N.Y. TIMES, Jan. 30, 2019, <https://www.nytimes.com/2019/01/30/health/opioid-lawsuits-settlement-trial.html>

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

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

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

As MDL has grown in importance, critics have charged that its procedural flexibility violates the rule of law. The charges come from both sides of the “v.” On one hand, legal scholars concerned with MDL’d plaintiffs contend that MDL’s lack of regular procedure allows the lawyers who control it to enrich themselves at the expense of plaintiffs for whom they perform “common benefit” work.¹⁰ Large corporate defendants traditionally made heavy use of MDL, which allows them to centralize federal court litigation and delay the resolution of mass torts.¹¹ But as plaintiffs used MDL to drive billion-dollar settlements in cases like the Volkswagen clean diesel litigation, defendants joined long-standing academic complaints about MDL’s ad hocery.¹² Citing statistics that purport to show MDL’d cases make up more than 40% of the federal docket, defense groups argue that MDL’s unstructured procedure encourages the filing of meritless claims and subjects them to unfair settlement pressure.¹³

The attack on MDL took on new urgency as the corporate defense bar mobilized behind reforms that would subject MDL to its own procedural rules.¹⁴ In late 2017, three interest groups persuaded the Advisory Committee on Civil Rules to form a subcommittee to study MDL-specific amendments to the FRCPs.¹⁵ If those amendments are adopted, MDL would for the first time be subject to rules other than those in the ordinary federal rules.¹⁶ Also in 2017, the House of Representatives passed H.R. 985, the “Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act,” which included several MDL-related provisions.¹⁷ Neither the new subcommittee

¹⁰ Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 107 (2017). See also *infra* note 134 (collecting further scholarship on agency problems in MDL).

¹¹ See Mark Hermann, *To MDL or Not to MDL? A Defense Perspective*, LITIG., Summer 1998, at 43.

¹² See, e.g., Max Heckendorn & Steven E. Swaney, *Meritless Claims Create Inefficiencies in Multidistrict Litigation*, PRODUCT LIABILITY & MASS TORTS BLOG (Feb. 12, 2019), <https://www.lexblog.com/2019/02/12/meritless-claims-create-inefficiencies-in-multidistrict-litigation/>; U.S. CHAMBER INSTITUTE FOR LEGAL REFORM: MDL PROCEEDINGS: ELIMINATING THE CHAFF (Oct. 2015), https://www.instituteforlegalreform.com/uploads/sites/1/MDL_Proceedings_web.pdf.

¹³ See LAWYERS FOR CIVIL JUSTICE, MDL PRACTICES AND THE NEED FOR FRCP AMENDMENTS: PROPOSALS FOR DISCUSSION WITH THE MDL/TPLF SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES (Sept. 14, 2018), available at <https://static.reuters.com/resources/media/editorial/20181004/rules4mdl-proposalsforrulescommittee.pdf>; LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULE MAKING TO THE ADVISORY COMMITTEE ON CIVIL RULES 14-15 (Aug. 2017), http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_request_for_rulemaking_concerning_mdj_cases_8-10-17.pdf; WASHINGTON LEGAL FOUNDATION, MULTIDISTRICT LITIGATION: REDUCING INCENTIVES FOR ABUSE 1 (Autumn 2017), available at https://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf. For an explanation of why the 40% figure is misleading, see Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GEORGIA L. REV. (forthcoming 2019).

¹⁴ See generally Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87 (2018).

¹⁵ *Id.* at 98.

¹⁶ See *id.* at 89.

¹⁷ H.R. 985, 115th Cong. (2017).

nor H.R. 985 is likely to result in immediate changes to MDL procedure.¹⁸ But they reflect a determined, well-organized, and well-funded effort to reform MDL. That project is explicitly premised on the view that MDL as now practiced violates the rule of law.¹⁹

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

The attack on MDL draws on a conception of the rule of law that equates it with fair procedures laid down in advance of disputes.²⁰ The use of such procedures ensures that courts resolve cases in a fair and predictable manner. To some, they are essential to the very idea of adjudication. For example, Lon Fuller argued that adjudication “must act through openly declared rule or principle, and the grounds on which it acts must display some continuity through time. Without this, joinder of argument becomes impossible and all the conventional safeguards that surround decision . . . forfeit their meaning.”²¹

But this understanding of the rule of law is hardly the only one relevant to the legitimacy of novel governmental institutions. In a number of well-established federal programs, Congress delegated open-ended authority to an administrative agency to overcome its own inability to predict the procedures needed to resolve an anticipated flood of cases. MDL does the same. The system’s enabling statute, the Multidistrict Litigation Act of 1968, first authorizes the JPML to centralize cases before a single district judge.²² It then directs the judge to conduct “coordinated or consolidated pretrial

¹⁸ See MDL Subcommittee Report *in* Advisory Committee on Civil Rules, Agenda Book 207, 207 (Apr. 2-3, 2019) (noting the subcommittee’s belief that a survey of federal judges may be valuable, “but also that such a survey should be deferred until it is clearer what possible amendment ideas seem most worthy of serious study”), https://www.uscourts.gov/sites/default/files/2019-04_civil_rules_agenda_book.pdf.

¹⁹ See RULES 4 MDLS, <https://www.rules4mdls.com/> (last visited Feb. 15, 2019) (“With so much of the pending federal civil caseload consolidated into MDL cases, the FRCP should be modernized with clear, uniform rules that apply in MDL cases, benefiting all stakeholders by providing the same fairness, clarity and certainty that the FRCP ensure for all other civil cases.”).

²⁰ See *infra* text accompanying notes 120-123.

²¹ LON L. FULLER, THE MORALITY OF LAW 171-72 (1964).

²² 28 U.S.C. § 1407(a).

proceedings”²³—a directive that judges have interpreted as an instruction to develop ad hoc procedures to overcome emergent problems. In all of this, MDL follows a pattern familiar from federal administrative programs, using courts rather than administrative agencies as its delegate.

If MDL’s procedural flexibility is no big deal, however, other aspects of its model of aggregate litigation are a source of concern. Responding to criticisms remarkably similar to those leveled at contemporary MDL, mid-century legal reformers devised alternative structures to protect against arbitrary action in administrative programs that were not governed by regular court procedures.²⁴ In brief, those structures aimed to ensure the transparency of the administrative process (*e.g.*, by requiring advance notice of certain actions), the accessibility of the process (most notably by guaranteeing “an opportunity to participate” in rulemaking²⁵), and liberal opportunities for judicial review of agency action. Those structures contributed to a distinctive “administrative” conception of the rule of law, which played an important role establishing the legitimacy of the modern administrative state. And they are largely lacking in MDL. The problem, then, is not that MDL is ad hoc. It is that MDL lacks guarantees of transparency, public participation, and ex post review that underpin modern administration.

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

The choice is not so stark. Reconceiving MDL as a form of public administration highlights alternative reforms that would preserve MDL’s dynamism while making it more transparent, accessible, and accountable. For example, MDL judges are not required to publish case management orders and transcripts of proceedings in a format that is reasonably accessible to

²³ *Id.*

²⁴ See *infra* text accompanying notes 275-280

²⁵ 5 U.S.C. § 553.

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

MDL'd plaintiffs and their counsel. The nature of lead counsel's duties to consolidated plaintiffs—and, conversely, those plaintiffs' authority to participate in case-management decisions—is uncertain. And as Pollis notes, many case-management decisions are effectively final once they are entered. Administrative law contains models for addressing these shortcomings, which would not cripple MDL's capacity to resolve staggeringly complex disputes.

This Article contributes to recent scholarship on “ad hoc procedure” by showing how ad hoc procedure is central to the design of section 1407 and MDL's ability to resolve complex litigation.²⁷ It also holds insights for two related literatures.

The first is the burgeoning literature on MDL.²⁸ Unpacking the structural choices that define MDL's model of aggregate litigation, the Article helps explain the growth of MDL and highlights institutional reforms that are not apparent when MDL is approached as a larger version of ordinary civil litigation.

The second literature examines the relationship between court and agency implementation of federal regulatory programs.²⁹ Legal scholars and political scientists have long recognized that when Congress enacts a statute, it chooses between the statute being implemented by courts or an agency (or agencies) in the first instance. That choice is often said to be exclusive: Congress *either* charges an agency with implementing the statute (subject to judicial review) *or* Congress authorizes courts to hear claims under the statute.³⁰ But as MDL shows, the border between court and agency implementation is more porous. In particular, MDL shows how Congress can

²⁷ See, e.g., Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. (forthcoming 2019); Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CAL. L. REV. 991 (2018); Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017); Lindsey Simon, *Chapter 11 Shapeshifters*, 68 ADMIN. L. REV. 233 (2016).

²⁸ See, e.g., Burch, *supra* note 10; Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. 1259 (2017); Thomas E. Wilging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after Ortiz*, 58 U. KAN. L. REV. 775 (2009); Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5 (1991). See also Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 (2003).

²⁹ See, e.g., SEAN FARHANG: THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (2002); Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633 (2018); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363 (2010); Mathew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1036 (2006); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE. 233, 247 (1982).

³⁰ E.g., Lemos, *supra* note 29, at 434 (“judicial interpretations are likely to be narrower than those of agencies”); Fiorina, *supra* note 29, at 35 (“Congress delegates power to regulatory agencies instead of passing laws and allowing the courts to oversee their enforcement.”).

use Article III courts to perform functions that are commonly thought to be the province of administrative agencies and executive departments. Thus, this Article adds to the small body of legal scholarship highlighting ways in which the judiciary itself functions as an administrative agency.³¹ To date, that literature has focused on idiosyncratic issues such as the Supreme Court’s certiorari process and choice of policymaking forms.³² These accounts overlook the elephant in the room of “judicial administration:” MDL.

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

I. MDL’S “UNORTHODOX CIVIL PROCEDURE”

As Judge Polster’s remarks suggest, MDL is a site of intense procedural innovation. The attorneys and judges who control MDL do not resolve cases using a standard procedural playbook but regularly devise new ways of organizing, investigating, and resolving cases. Analogizing procedural design in MDL to the explosion of unorthodox legislative pathways in Congress, Abbe Gluck writes of MDL’s “unorthodox civil procedure.”³³ According to critics, the use of such procedure makes MDL incompatible with the rule of law.

³¹ See, e.g., Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1 (2011); Glen Staszewski & Lumen N. Mulligan, *The Supreme Court’s Regulation of Civil Procedure: Lessons From Administrative Law*, 59 UCLA L. REV. 1188 (2012); see also Scott Dodson, *Should the Rules Committees Have an Amicus Role?*, 104 VA. L. REV. 1 (2018). This phenomenon is in one sense the converse of administrative agencies making judicial procedure, see, e.g., Urja Mittal, Note, *Litigation Rulemaking*, 127 YALE L.J. 1010 (2018); David L. Noll, *Regulating Arbitration*, 105 CAL. L. REV. 985 (2017), and the use of agencies to police access to Article III courts, see David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L. J. 530 (2013). Each of these bodies of work draws on a body of political science scholarship that “seeks to shift from a focus on the judiciary as an autonomous bubble, in which judges make policy according to their own preferences, to a focus on the judiciary as an institution that is used, strategically and instrumentally, by the elected branches in support of their political and policy agendas.” FARHANG, *supra* note 29, at 32.

³² See *id.*

³³ See Gluck, *supra* note 8, at 1669.

This Part outlines the developments behind that charge, focusing on “mega” MDLs³⁴ that motivate proposals in Congress and the rulemaking process to reform MDL.³⁵ This Part first situates MDL procedure-making within the larger universe of ad hoc procedure. It then provides a roadmap to the procedures that have emerged in modern MDL. Finally, it explains the larger structural features that influence procedure-making in MDL.

A. Ad Hoc Procedure in MDL

While it is widely recognized that MDL is more dynamic than ordinary civil litigation, it is hardly the only context where ad hoc procedure is found. In prior scholarship, Pamela Bookman and I surveyed the many contexts where lawmakers develop new procedures to address emergent procedural problems and the kinds of law that formalize these innovations. Ad hoc procedure is used in state and federal courts, international institutions, and private dispute resolution systems.³⁶ It is formalized in federal and state statutes, court orders, court rules, local rules, special-purpose institutions, international agreements, contracts, party agreements, and customs that lack the force of law.³⁷ In short, “[o]nce one begins to look for ad hoc procedure, examples of it appear everywhere.”³⁸

³⁴ The MDL literature conventionally defines “mega” MDLs as those where more than 1,000 actions are transferred to a single court. See, e.g., John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2230 (2008). Unless the transferee judge limits joinder under Rule 20, a single action may of course include many plaintiffs and defendants.

³⁵ The JPML compiles some statistics about its activities and the federal MDL docket, and a handful of researchers have done valuable work on characteristics of MDL’d cases. See e.g., Judicial Panel on Multidistrict Litigation - Judicial Business 2017, United States Courts, <https://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2017>; Williams *supra* note 14; Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CAL. L. REV. (forthcoming 2019). However, no body systematically collects information about the progression of specific MDLs and how they are resolved. The absence of such data means that claims about how MDL functions inevitably have an impressionistic quality and invite objections along the lines of: “That’s not how MDL X worked!”

In the absence of systematic empirical data, this Part relies on Gluck’s interviews with MDL transferee judges and a review of all publicly available filings and transcripts in three MDLs that have been litigated over the past decade to describe practice in mega MDLs. The MDLs are *In re: Vioxx Products Liability Litigation*, MDL No. 1657 (E.D. La.) (Fallon, J.), *In re: Oil Spill by the Oil Rig “Deepwater Horizon,”* MDL No. 2179 (E.D. La.) (Barbier, J.), and *In re: National Prescription Opiate Litigation*, MDL No. 2804 (N.D. Oh.) (Polster, J.). I selected these three MDLs because transcripts of court proceedings were available from the transferee court or Bloomberg Law’s replica of the district court’s CM/ECF system, and because they culminated in different types of resolutions: a non-class aggregate settlement (*Vioxx*), a series of class action settlements (*Deepwater Horizon*), and a litigation that, as of writing, had not been resolved (*Opioids*). These litigations are not representative of the entire universe of MDL—a category that includes smaller cases that proceed in a manner not dissimilar from ordinary litigation. See Williams, *supra* note 14 (manuscript at 2 tbl. 2); Zachary D. Clopton, *MDL as Category* (working paper on file with author). However, they illustrate the kind of mega case that both motivated section 1407’s enactment and motivate current proposals to rule-ify MDL. As such, they provide a workable sample for evaluating proposals that MDL should be reformed in response to problems revealed in mega MDLs.

³⁶ Bookman & Noll, *supra* note 27 at 784-91.

³⁷ *Id.*

³⁸ *Id.* at 785.

Moreover, judges have considerable discretion in even ordinary cases.³⁹ According to some proceduralists, the use of discretion to facilitate resolution “on the merits” is the guiding ethos of the 1938 FRCPs.⁴⁰ In addition to the many matters that the rules explicitly leave to district courts’ discretion,⁴¹ courts have “inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases.”⁴² And a court sitting in equity has discretion to shape procedures and remedies if an adequate remedy is not available at law.⁴³ Courts have invoked these authorities to develop new procedures in complex commercial litigation,⁴⁴ public law litigation,⁴⁵ national security cases,⁴⁶ and other contexts.⁴⁷

Even so, MDL is home to an unusual amount of procedural innovation. In the opioid litigation, for example, Judge Polster announced that he would not entertain motion practice because he wanted the parties to focus on settlement.⁴⁸ In ordinary litigation, the entry of such an order would be an aggressive, and potentially reversible, application of a district judge’s discretion.⁴⁹ In a mega MDL, it is all in a day’s work.

B. A Roadmap of MDL Procedure

MDL’s continual innovation makes it impossible compile an exhaustive catalog of the procedures that it has generated. But the different stages in the

³⁹ See, e.g., Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383 (2007); Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003). See also Edward Brunet, *The Triumph of Efficiency and Discretion over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 298 (1991) (quoting Judge Jack Weinstein to the effect that “the Federal Rules are of little significance”).

⁴⁰ See, e.g., A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 356 (2010); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987).

⁴¹ See Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 528 n.72 (2006) (“[T]wenty-eight of the eighty-four Federal Rules” vest discretion in district judge).

⁴² *Dietz v. Bouldin*, 136 S.Ct. 1885, 1892, 195 L.Ed.2d 161 (2016).

⁴³ See generally Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1004 (2015). As illustrated by the recent debate over the propriety of “national” injunctions, the scope of this equitable discretion is contested. See generally Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018).

⁴⁴ See *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006) (discussing proceedings in “six “focus cases” out of 310 consolidated class actions, which themselves were consolidations of thousands of separate class actions”).

⁴⁵ See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

⁴⁶ See Sinnar, *supra* note 27.

⁴⁷ See Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010 (1997).

⁴⁸ Case Management Order One ¶ 6(g), *In re: National Prescription Opiate Litigation* (N.D. Oh. Apr. 11, 2018) (Doc. No. 232) (“No party may file any motion not expressly authorized by this Order absent further Order of this Court or express agreement of the parties.”), <https://www.ohnd.uscourts.gov/sites/ohnd/files/cmo%201.pdf>.

⁴⁹ See *Richardson Greenshields Sec., Inc. v. Lau*, 825 F.2d 647 (2d Cir. 1987) (granting writ of mandamus to reverse district court’s denial of motion where filing of timely motion was prevented by district court’s demand for pre-motion conference).

lifecycle of an MDL predictably give rise to certain types of problems that are addressed through new procedures. For the benefit of those new to MDL, this section provides a brief roadmap.

1. The Statutory Framework

MDL takes place under the authority of 28 U.S.C. § 1407, which was added to the Code by the Multidistrict Litigation Act of 1968.⁵⁰ The statute establishes the JPML⁵¹ and authorizes it to transfer cases to a district court of its choosing “for coordinated or consolidated pretrial proceedings.” Transfer proceedings may be initiated by a litigant or the JPML “upon its own initiative.”⁵² The standard for transfer mirrors the standard under the ordinary venue transfer statute, 28 U.S.C. § 1404: the panel may transfer “civil actions involving one or more common questions of fact . . . upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”⁵³ In contrast to section 1404, the transfer decision is made by the JPML, not the court where an action was filed.

In the argot of MDL practitioners, the district court where cases are transferred is known as the “transferee” or “MDL” court. After the panel transfers cases to the transferee court, section 1407 authorizes the transferee judge to conduct “coordinated or consolidated pretrial proceedings.”⁵⁴ Section 1407 does not define the transferee judge’s powers, but courts have held that “[t]he transferee judge inherits the entire pretrial jurisdiction that the transferor court could have exercised had the case not been transferred.”⁵⁵ Thus, the transferee judge can rule on pre-trial motions, manage discovery, appoint masters, hold settlement conferences, enter trial orders, and generally do else that a district judge does during pre-trial. At the conclusion of pre-trial proceedings, “[e]ach action so transferred shall be remanded by the panel . . . to the district from which it was transferred unless it shall have been previously terminated.”⁵⁶ In *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, the Supreme Court concluded that this directive prohibited the

⁵⁰ Pub. L. No. 90-296, 82 Stat. 109 (codified at 28 U.S.C. § 1407).

⁵¹ 28 U.S.C. § 1407(d).

⁵² 1407(c).

⁵³ Cf. 28 U.S.C. § 1404(a) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”).

⁵⁴ 28 U.S.C. § 1407(a).

⁵⁵ 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3866 (4th ed. updated Nov. 2018).

⁵⁶ 28 U.S.C. § 1407(a).

practice of “self-transfer,” in which a transferee court used section 1404 to transfer a case to itself for trial.⁵⁷

Although MDL has been an important form of litigation since Congress enacted section 1407 in 1968, its importance grew after Congress enacted the Class Action Fairness Act of 2005 (CAFA).⁵⁸ That statute liberalized the requirements of federal diversity jurisdiction in certain “class” and “mass” actions, making it easier for defendants to remove those actions to federal court.⁵⁹ Once removed, MDL allows cases to be centralized in a single forum.

2. Organizing the Litigation

An initial challenge in a large MDL is to organize the thousands of parties and lawyers whose cases are transferred to a single court. Two decades ago, Judith Resnik, Denny Curtis, and Deborah Hensler observed that MDL transferee judges create “ad hoc law firms” through orders that charge lawyers with coordinating the prosecution or defense of consolidated cases.⁶⁰ The need for such orders arises from the sheer number of cases and attorneys in a mega-MDL. Absent centralized plaintiff’s leadership (and a centralized defense in multi-defendant cases), hundreds or thousands of individual parties would engage in simultaneous discovery and motion practice, transforming the litigation into a Babel of conflicting motions, orders, and discovery demands.⁶¹

A prototypical case-management orders appoints a Plaintiffs’ Steering Committee (PSC) that functions as a board of directors for plaintiffs, lead counsel who is charged with day-to-day management of the litigation, and various specialized committees which are charged with tasks like communicating with non-lead counsel, performing discovery, and settlement negotiations.⁶² Orders are entered under Rule 16, which permits a court to adopt special procedures for managing potentially difficult or protracted actions, and Rule 42, which permits a court to consolidate actions and “issue any other orders to avoid unnecessary cost or delay.”⁶³

⁵⁷ 523 U.S. 26, 40 (1998).

⁵⁸ Pub. L. 109–2, 119 Stat. 4–14 (codified at 28 U.S.C. §§ 1332(d), 1453, and 1711–1715).

⁵⁹ 28 U.S.C. § 1332(d).

⁶⁰ Judith Resnik, Denny Curtis & Deborah Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 321 (1996). See also Paul D. Rheingold, *The Development of Litigation Groups*, 6 AM. J. TRIAL ADVOC. 1 (1982).

⁶¹ See *In re Air Crash Disaster*, 549 F.2d 1006, 1013 (5th Cir. 1977).

⁶² See *Marginal Entry Order Granting Plaintiffs’ Renewed Motion to Approve Co-leads, Co-Liaisons, and Executive Committee*, *In re: National Prescription Opiate Litigation* (N.D. Oh. Jan. 4, 2018) (Doc. No. 37); *Pretrial Order No. 8*, *In re: Oil Spill by the Oil Rig “Deepwater Horizon,” MDL No. 2179* (E.D. La. Oct. 8, 2010) (Docket No. 506), <http://www.laed.uscourts.gov/sites/default/files/OilSpill/Orders/PTO8.pdf>; *Pretrial Order #6*, *In re: Vioux Products Liability Litigation*, MDL No. 1657 (E.D. La. Aug. 8, 2005).

⁶³ Fed. R. Civ. P. 15(c)(2)(L), 42(a).

The court-appointed leadership cannot settle or dismiss non-lead's cases consistent with traditional limits on non-party preclusion.⁶⁴ As one transferee judge observed, however, leadership nevertheless has "authority to make any number of decisions that are binding, either literally or effectively, on all . . . plaintiffs."⁶⁵ Appointment orders accomplish this by restricting the authority of non-lead counsel to engage in ordinary motion practice, take discovery, and access court resources. For example, orders entered in the General Motors ignition switch litigation provided that "Lead Counsel was expected to take the lead in speaking on behalf of all plaintiffs [at conferences] and that, barring permission, [Lead Counsel] would be the only counsel to speak at conferences on behalf of plaintiffs."⁶⁶ If non-leadership attorneys felt "that Lead Counsel [could not] adequately represent their views," they were "invited either to put issues on the agenda for a particular status conference via Lead Counsel and counsel for Defendants or to submit a letter motion to the Court requesting permission to be heard."⁶⁷

The mostly theoretical control that individual plaintiffs exercise over their own cases means that MDL is not, formally speaking, a type of representative litigation. As a practical matter, however, appointment orders carve out a limited exception to the rule against non-party preclusion. The justification for that exception is not that, by advocating their clients' interests, lead counsel necessarily advances the interests of the "class."⁶⁸ Rather, the exception is justified by the collective action problems that would otherwise make resolution of an MDL impossible.

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

An order consolidating actions during the pre-trial stages, together with the appointment of a general counsel may in many instances prove the only effective means of channeling the efforts of counsel along constructive lines. . . . By making manageable litigation that otherwise would run out of control they serve interests of the court, the litigants, the other counsel, and the bar, and of the public at large, who are entitled to their chance at access to unimpacted courts.⁶⁹

⁶⁴ See *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008).

⁶⁵ In re: Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543 (JMF), 2016 WL 1441804, at *7 (S.D.N.Y. Apr. 12, 2016).

⁶⁶ *Id.* at *2.

⁶⁷ *Id.*

⁶⁸ *Cf.* Fed. R. Civ. P. 23

⁶⁹ In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972, 549 F.2d 1006, 1014, 1017 (5th Cir. 1977) (quoting *MacAlister v. Guterma*, 263 F.2d 65 (2d Cir. 1958) (internal punctuation modified)).

Consistent with this rationale, appointment orders recognize that plaintiffs collected before an MDL court may seek different things from the litigation.⁷⁰ Thus, orders aim to “ensur[e] that the PSC represents the broadest possible swath of claimants or claims,”⁷¹ implicitly adopting a *democratic* model of litigating authority.⁷² Leadership is not authorized to act on behalf of the plaintiff “class” because consolidated plaintiffs necessarily want the same thing out of the MDL as leadership’s clients. Rather, leadership’s authority is premised on the practical necessity of coordinating the plaintiffs’ actions. Appointment orders assume that MDL plaintiffs will be better off with centralized representation because leaders will advance the interests of plaintiffs as a group, and the alternative is chaos.⁷³

Leadership appointments are prestigious and lucrative positions.⁷⁴ Leadership attorneys are compensated for “common benefit” work they perform on behalf of consolidated plaintiffs through court orders that require non-lead counsel to contribute a percentage of their contingent fees to a fund that the court distributes.⁷⁵

As Resnik, Curtis, and Hensler observe, however, little positive law governs the leaders’ selection or compensation.⁷⁶ Neither section 1407 nor the Federal Rules address the selection of MDL leadership; often, the court simply approves a “consensus” slate negotiated by plaintiffs’ counsel.⁷⁷ No statute or rule specifically authorizes the court to award leadership common benefit fees or addresses how such fees should be allocated.⁷⁸ No statute or rule sets terms for leadership’s relationship with consolidated plaintiffs.⁷⁹ In the absence of legislation or rules, elaborate best practices evolved surrounding each of these subjects. For example, in the Volkswagen clean diesel litigation, Judge Charles Breyer entered a 16-page protocol governing matters such as bookkeeping, compensable work, and compensation for the use of attorneys’ private jets.⁸⁰

⁷⁰ See Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 851 (2017).

⁷¹ *Id.*

⁷² See generally Margaret H. Lemos, *Three Models of Adjudicative Representation*, 165 U. PA. L. REV. 1743 (2017); Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577 (2011).

⁷³ See Ratner, *supra* note 70, at 851.

⁷⁴ See Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1526 (2017).

⁷⁵ See Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014).

⁷⁶ See Resnik et al., *supra* note 60 at 326-36.

⁷⁷ See Burch & Williams, *supra* note 28, at 1459.

⁷⁸ See Fallon, *supra* note 75 at 376 (“The theoretical bases for the application of the common fund concept to MDLs are the same as for class actions—namely, equity and her blood brother, quantum meruit.”).

⁷⁹ See Charles Silver, *The Responsibilities of Lead Lawyers and Judges in the Multidistrict Litigations*, 79 FORDHAM L. REV. 1985, 1988 (2010).

⁸⁰ See Pretrial Order No. 11, In re: Volkswagen “Clean Diesel” MDL, No. 15-MD-2672-CRB (JSC) (N.D. Cal. Feb. 25, 2016) (Docket No. 1254) (“Private or charter travel will not be reimbursed except in unusual

Even when control of the litigation is centralized in a PSC and lead counsel, docketing and organizing cases may involve serious logistical problems. To streamline filing, courts and attorneys invented the practice of “direct filing,” which allows a plaintiff to file directly in the MDL court rather than having a case transferred there by the JPML.⁸¹ To manage the variety of claims asserted in MDL, courts have ordered the filing of a “master complaint” or “master administrative complaint.”⁸² Where a single complaint cannot accommodate all of the plaintiffs’ claims, courts have used “pleading bundles”—essentially, master complaints for different types of parties or claims. In the Deepwater Horizon MDL, lead counsel proposed establishing different master complaints for different types of claims plaintiffs asserted against BP, TransOcean, and Halliburton.⁸³ After the district court approved the idea in principle, counsel devised specific pleading bundles. The court “so ordered” the bundles, and the clerk’s office modified its electronic filing system so that plaintiffs could “join” a pleading bundle by filing a short-form complaint drafted by lead plaintiff’s counsel.⁸⁴

3. Managing the Litigation

MDL’s ad hocery continues in the pre-trial stage. Here, the need for new procedure arises from the desire to move the litigation into a posture in which it can be resolved.⁸⁵ Contrary to conventional wisdom,⁸⁶ however, the endgame of MDL is not necessarily settlement. Douglas Smith details a variety of procedures that courts have invented to screen and cull cases.⁸⁷ They include plaintiff and defendant fact sheets, “show cause” orders that require parties to define claims or show they are non-frivolous, *Lone Pine* orders that require proof of facts crucial to plaintiffs’ claims, and assisted

circumstances, as approved by Lead Counsel.”), https://www.cand.uscourts.gov/filelibrary/1714/Pretrial_Order_11.pdf.

⁸¹ See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 796-97 (2012).

⁸² See *In re Bridgestone/Firestone Inc., ATX, ATX II, & Wilderness Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1075-76 (S.D. Ind. 2001) (“Master Complaint. . . combines dozens of class action complaints involving Firestone tires that were filed in or removed to federal district courts throughout the country and transferred to this MDL proceeding.”).

⁸³ See Transcript of Status Conference Proceedings at 35, *In re: Oil Spill by the Oil Rig “Deepwater Horizon,”* MDL No. 2179 (E.D. La. Sept. 6, 2010) (Docket No. 550).

⁸⁴ The “A” pleading bundle included claims for personal injury and death. The “B” bundle included 4 sub-categories including “Private Individuals and Business Loss Claims.” The “C” bundle included “Public Damage Claims.” Lastly, the “D” bundle included “Injunctive and Regulatory Claims.” Pretrial Order No. 11, *In re: Oil Spill by the Oil Rig “Deepwater Horizon,”* MDL No. 2179 (E.D. La. Oct. 19, 2010) (Docket No. 569).

⁸⁵ See Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2219 (2008) (“very function” of MDL “is to coordinate and resolve multistate litigation”).

⁸⁶ See, e.g., D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2176 (2017).

⁸⁷ Douglas G. Smith, *The Myth of Settlement in MDL Proceedings*, 106 KENTUCKY L.J. (forthcoming 2019) (on file with author).

review using magistrate judges and special masters.⁸⁸ Judges have used a range of devices, from special committees to anti-suit injunctions, to “coordinate” related state-court litigation.⁸⁹ In the late 1990s, courts devised the concept of “bellwether trials” to create settlement pressure where cases remained pending after discovery and culling.⁹⁰ In rare cases, transferee judges fed up with the lack of progress toward resolution have remanded cases to transferor courts for trial or threatened to do so.⁹¹

A striking feature of MDL practice is its lack of a fixed order of battle. Federal civil litigation typically proceeds in a predictable order, with motion practice leading to discovery, summary judgment, *Daubert* motions, and, in rare cases that survive without settling or being dismissed, trial.⁹² In the mega-MDLs that are this Article’s focus, this order of battle is often discarded. Courts separate litigation into tracks,⁹³ stay discovery in order to focus litigation on particular cases or issues,⁹⁴ or limit proceedings to issues such as general causation that hold the potential to make or break many cases at once.⁹⁵ The common thread running through these orders is that they address the needs of specific cases. As judges in Professor Gluck’s survey emphasized, “every MDL is different.”⁹⁶

⁸⁸ *Id.* (manuscript at 7-21). See Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. (forthcoming 2019).

⁸⁹ See Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339 (2014).

⁹⁰ See Eldon E. Fallon, Jeremy T. Grabill, & Richard Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2325 (2008); Alexandra Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 589 (2008).

⁹¹ See Order, *In Re: Depuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liability Litigation*, Docket No. 793 (N.D. Tex., Aug. 25, 2017).

⁹² This statement is based on the author’s experience as a clerk in the U.S. District Court for the Southern District of New York and conversations with federal judges and attorneys whose practice focuses on civil litigation in federal court. There are few studies that systematically examine the progress of federal civil litigation. However, the hypothesis that cases proceed in a regular order is consistent with findings in Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. EMP. L. STUDS. 175 (2010). That study coded for six mutually exclusive outcomes—(1) dismissal, (2) early settlement, (3) summary judgment loss for plaintiff, (4) late settlement, (5) trial win for plaintiff, and (6) trial loss for plaintiff—and found a drop-off of cases at each stage. See *id.* at 185-87. But see Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821 (2018) (arguing on the basis of “appellate opinions in a variety of procedural areas” that “the textbook order is not an accurate description of civil procedure in the federal courts”).

⁹³ See Law360, *2nd Bellwether Track Set in Opioid MDL*, <https://www.law360.com/articles/1114551/2nd-bellwether-track-set-in-opioid-mdl>.

⁹⁴ See Erin Marie Daly, *Judge Lifts Discovery Stay in Qwest MDL*, LAW360, Aug. 15, 2007, <https://www.law360.com/articles/32551/judge-lifts-discovery-stay-in-qwest-mdl>.

⁹⁵ See Sara Randazzo, *In Roundup Case, the Science Will Go on Trial First*, WALL ST. J., Feb. 15, 2019, <https://www.wsj.com/articles/in-roundup-case-the-science-will-go-on-trial-first-11550246311>.

⁹⁶ Gluck, *supra* note 8, at 1689.

4. Resolution

The aggregate settlements that many MDLs culminate in are another site of procedural innovation. The prototypical settlement resolves all the cases collected before a transferee judge by establishing a special-purpose claims facility to process claims according to streamlined procedures negotiated by the defendant and plaintiff's leadership.⁹⁷ These claims facilities are their own ad hoc institutions. The claims program established in the Deepwater Horizon MDL consisted of "the Court-appointed Claims Administrator, Patrick Juneau, and his staff of 25 people, who in turn employ five Claims Vendors employing more than 3,200 people working in locations throughout the country."⁹⁸ The group had headquarters in Louisiana and nineteen "Claims Assistance Centers" throughout the Gulf Coast region.⁹⁹

Any settlement must pull in parties, screen and evaluate claims, and protect settling defendants against future litigation.¹⁰⁰ As Elizabeth Burch shows, provisions that perform these functions migrate from MDL to MDL as the state of the art evolves.¹⁰¹ An example is provided by is the "inventory settlement" provisions that appeared in the early 2000s. After the Supreme Court's decisions in *Amchem* and *Ortiz* appeared to bar the use of settlements classes to resolve mass torts,¹⁰² attorneys devised contractual provisions that had much the same effect. Described by their authors as a "remarkable approach to resolution of 'mass tort' litigation" that "promise[d] to become the template for similar resolution of future litigations of this kind," the provisions required attorneys to recommend a settlement to their entire client base.¹⁰³ After first being used in the Propulsid MDL, they reappeared in the Vioxx, Forsamax, and Yasmin/Yaz MDLs.¹⁰⁴ More recently, MDL catalyzed the reemergence of settlement class actions that *Amchem* and *Ortiz* appeared to bar.¹⁰⁵ Reasoning that mega-MDLs provide structural guarantees of fairness missing in *Amchem* and *Ortiz*, courts approved class settlements

⁹⁷ See, e.g., *In re Deepwater Horizon*, 739 F.3d 790, 796 (5th Cir. 2014); *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 559 (E.D. La. 2009).

⁹⁸ *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico*, on Apr. 20, 2010, 910 F. Supp. 2d 891, 904 (E.D. La. 2012).

⁹⁹ *Id.*

¹⁰⁰ See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

¹⁰¹ Burch, *supra* note 10, at 92 tbl. 1.

¹⁰² See *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

¹⁰³ Memorandum in Support of Plaintiffs' Steering Committee's Motion for Award of Attorney's Fees and Reimbursement of Costs at 4, *In re Propulsid Prods. Liab. Litig.*, No. 2:00-md-01355-EEF-KWR (E.D. La. May 3, 2005).

¹⁰⁴ Burch, *supra* note 10, at 99.

¹⁰⁵ See Ratner, *supra* note 70; Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846 (2017).

notwithstanding conflicts of interests that those cases suggested could only be addressed through subclassing.¹⁰⁶

Again, one must be careful not to overstate MDL's uniqueness. The contractual nature of settlement means that it *always* provides an opportunity to devise creative solutions that a court following the strictures of the law could not impose.¹⁰⁷ Furthermore, scholars have shown that the major developments in the lifecycle of an MDL—aggregation of related claims, transfer of control to sophisticated bargaining agents, and mass resolution through grids or algorithms that resolve claims through factors shown to drive verdicts and settlements—occur whenever the market generates large numbers of factually related claims.¹⁰⁸ In this sense, MDL structures underlying market dynamics, rather than creating the conditions for settlement from scratch.

All the same, MDL has been remarkably successful at catalyzing innovative settlements. A “Who’s Who” of the largest and most innovative settlements devised over the past decade would be crowded with settlements negotiated in an MDL.¹⁰⁹ Indeed, it would probably contain nothing but.

C. The Structural Environment for MDL Procedure-Making

Before turning to the debate over MDL's legality, three overarching features of MDL procedure-making deserve mention. First, procedure-making in MDL is bottom-up, not top-down. As Burch, Gluck, and Margie Williams show, the central players in the design of MDL procedure are transferee judges and “repeat player” lawyers who have built specialized MDL practices.¹¹⁰ Like Daniel Plainview's character in *There Will Be Blood*, lawyers travel from case to case, bringing procedures they created in prior MDLs with them to new litigations.¹¹¹ Even modest efforts to impose hierarchical control on MDL procedure trail the state of the art by years.¹¹²

¹⁰⁶ See Ratner, *supra* note 70, at 827-28 (discussing the Deepwater Horizon, NFL concussion, and In re: Pet Food Products Liability Litigation settlements).

¹⁰⁷ See generally Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer As Problem Solver*, 28 HOFSTRA L. REV. 905, 916 (2000).

¹⁰⁸ See, e.g., Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004); Deborah Hensler, “The Real World of Tort Litigation,” in AUSTIN SARAT ET. AL., *EVERYDAY PRACTICES & TROUBLE CASES* (Austin Sarat ed., 1998); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1050 (1993).

¹⁰⁹ For an initial effort to create such a database, see NYU CENTER FOR CIVIL JUSTICE, *AGGREGATE LITIGATION DATA PROJECT* (last visited Feb. 15, 2019), <http://www.law.nyu.edu/centers/civiljustice/projects>.

¹¹⁰ Gluck, *supra* 88, at 1701; Burch & Williams, *supra* note 28, at 1475-87.

¹¹¹ See, e.g., Transcript of Discovery Conference 28-29, In re: National Prescription Opiate Litigation, MDL No. 2804 (N.D. Oh.) (“MR. BUCHANAN: . . . I have a stack of order after order in the last two or three years in major pieces of litigation with many thousands of cases, . . . involving Johnson & Johnson, Volkswagen . . .”); Transcript of Status Conference Proceedings 51, In re: Oil Spill by the Oil Rig “Deepwater Horizon,” MDL No. 2179

Second, many decisions in MDL are effectively immune from appellate review. The reason is that MDL inherits the procedural apparatus of ordinary litigation, including the final judgment rule of 28 U.S.C. § 1291.¹¹³ That section generally requires that a party await final judgment before taking an appeal. Thus, a party that objects to, say, the appointment of lead counsel or use of pleading bundles must wait until judgment is entered to appeal the relevant orders. During that time, the litigation may settle, presenting the party with a choice between quick resolution under the settlement or appealing the objectionable order. If the case does not settle, years may elapse before final judgment is entered.¹¹⁴

These two features might suggest that procedure-making in MDL is totally unrestrained. In fact, a review of transcripts from major MDLs shows many situations in which lead counsel and transferee judges were attentive to the limits of their authority under the Federal Rules and the governing substantive law.¹¹⁵ The reason is that plaintiff's leadership, defendant's leadership, the transferee judge, and potentially others hold an effective veto over the use of new procedures and the progress of the litigation generally. This, however, introduces a selection effect: the errors most likely to draw an objection are those that exceed the transferee court's authority *and* injure the interests of a player with veto power. If an unlawful procedure does not harm a player with veto power, it is likely to go unchecked.

In light of these dynamics, MDL procedure-making involves a high degree of collaboration among case leadership. Again and again in the transcripts, counsel would raise a procedural problem with the transferee judge only to be instructed to meet and confer or work something out.¹¹⁶

(E.D. La. Sept. 16, 2010) (Docket No. 550) ("MR ROY: . . . We're going to come back with a proposal that largely mirrors what Judge Fallon has done in *Vioxx*. THE COURT: Yes, because that's definitely what I want to do.").

¹¹² See DUKE LAW CENTER FOR JUDICIAL STUDIES, MDL STANDARDS AND BEST PRACTICES (2014); MANUAL FOR COMPLEX LITIGATION (4th ed. 2014).

¹¹³ See 28 U.S.C. §§ 1291, 1292(a), (b) (generally limiting interlocutory appeals to orders entering or refusing to enter injunctions and appeals certified for interlocutory review).

¹¹⁴ The Supreme Court's 2015 decision in *Gelboim v. Bank of America*, 135 S. Ct. 897 (2015), marginally increased MDL's exposure to appellate review in holding that an appeal could be taken from a Rule 54(b) order dismissing some of the claims consolidated in an MDL. But *Gelboim* appeals may only be taken from orders of dismissal, and not the crucial interlocutory decisions governing the organization, management, and settlement of an MDL.

¹¹⁵ See, e.g., Transcript of Status Conference 29, *In re: National Prescription Opiate Litigation*, MDL No. 2804 (N.D. Oh. June 6, 2018) (Docket No. 613) ("Plaintiffs would love to cabin discovery to what they decide is relevant with respect to how they choose to prove their case, but they cannot deprive us of our right to defend ourselves, and we have the right under the rules to take discovery that's relevant to those defenses."); Transcript of Status Conference 9, *In re: National Prescription Opiate Litigation*, MDL No. 2804 (N.D. Oh. Aug. 2, 2018) (Docket No. 854) ("I don't think I could have prevented motions – anyone from filing a motion."); Transcript of Proceedings 8, *In re: Vioxx Products Liability Litigation*, MDL No. 1657 (E.D. La. Jan. 18, 2008) "[A]ny plaintiff attorney who feels that he or she is entitled to receive some common benefit funds, they have the right to petition the Court for that.").

¹¹⁶ See, e.g., Transcript of Status Conference 16, *In re: National Prescription Opiate Litigation*, MDL No. 2804 (N.D. Oh. May 14, 2018) (Docket No. 418) ("You've been working cooperatively. Just continue to do that.");

When they returned to the court, the judge adopted their proposal for the entire MDL.¹¹⁷

On the whole, this environment makes MDL procedure-making fast, collaborative, and responsive to the needs of particular cases. One judge comments: “It’s problem solving together.”¹¹⁸

II. MDL AND THE RULE OF LAW

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

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

A. The Rule of Law as Regular Procedure

Because the “rule of law” means many things,¹¹⁹ saying that MDL “violates the rule of law” is vacuous if the argument is not specified further. The specific strand of rule-of-law thinking that MDL critics draw upon identifies the rule of law with regular procedure—particularly, the kind of procedures used by courts. In American jurisprudence, perhaps the most famous proponent of this view is Lon Fuller.¹²⁰

Transcript of Status Conference Proceedings 38, *In re: Oil Spill by the Oil Rig “Deepwater Horizon,”* MDL No. 2179 (E.D. La. Sept. 16, 2010) (Docket No. 550) (“I want liaison counsel, in consulting with other interested parties, to go back and meet and confer within the next week to ten days and report back to the Court to continue to see if you can work out some of these issues relating to timing and scope of discovery because that’s where it seems to be where the main rub is going to be right now.”); Transcript of Status Conference Proceedings 60, *In re: Oil Spill by the Oil Rig “Deepwater Horizon,”* MDL No. 2179 (E.D. La. Feb. 25, 2011) (Docket No. 1508) (“I think it’s absolutely necessary that everyone cooperate with each other, continue to be civil with each other, and, to the extent problems arise, which I know they will from time to time, meet and confer, and then if you can’t solve them yourself, bring them to my attention.”); Transcript of Proceedings 47, *In re: Vioxx Products Liability Litigation*, MDL No. 1657 (E.D. La. June 27, 2008) (“I do feel that the parties do better working this out non-judicially than allowing me to work it out because it will destroy this opportunity and make life more complicated for everybody.”).

¹¹⁷ See, e.g., Transcript of Teleconference Proceedings 12, *In re: National Prescription Opiate Litigation*, MDL No. 2804 (N.D. Oh. Dec. 13, 2017) (Docket No. 10) (“If I get no objections, I am going to adopt those proposals.”); Transcript of Status Conf., 34, *In re: Oil Spill by the Oil Rig “Deepwater Horizon,”* MDL No. 2179 (E.D. La. Feb. 25, 2011) (Docket No. 1508) (“Hearing no objection, I will sign that order today, okay?”); Transcript of Proceedings 18, *In re: Vioxx Products Liability Litigation*, MDL No. 1657 (E.D. La. June 23, 2005) (“I put some handwritten notes on this form and I will simply adopt it in an order and give you my thinking on that particular form.”).

¹¹⁸ Gluck, *supra* note 8, at 33.

¹¹⁹ See Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 140–45 (2002).

¹²⁰ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978). This posthumously published article was based on a working paper that Fuller used as the basis for lectures and courses at Harvard Law School. See *id.* at 353. For earlier works which anticipated Fuller’s account in some respects, see ALBERT VENN

In *The Forms and Limits of Adjudication*, Fuller set out to describe “the optimum and essential conditions for the functioning of adjudication.”¹²¹ Fuller’s project was to identify the features that distinguished adjudication from other forms of legal ordering (e.g., contract). Drawing on mid-century analytic philosophy and informal observations of adjudicators, Fuller argued that adjudication aims to provide “an authoritative determination of questions raised by claims of right and accusations of guilt.”¹²² To accomplish this, Fuller argued, adjudication necessarily involves the “[p]resentation of proofs and reasoned argument.”¹²³ As discussed below, Fuller did not believe that all matters of social life must be resolved via adjudication.¹²⁴ But he claimed that, where an issue *is* to be resolved through adjudication, the rule of law demands procedures that guarantee parties the opportunity to present evidence and argument.¹²⁵ Thus, Fuller and those following in his tradition insist on procedures such as adversary presentation of proof and argument, the right to be present at crucial stages in the proceedings, an impartial and properly qualified judge, and a right of appeal to an impartial tribunal.¹²⁶ Absent such procedures, we might have the application of legal authority, but we do not have “adjudication.”

As Jeremy Waldron observes, Fuller’s procedural principles are central to “the ordinary person’s conception of the Rule of Law.”¹²⁷ Indeed, if one distinguishes between sociological legitimacy, on the one hand, and legal and moral legitimacy, on the other, Fullerian procedure might seem essential to the legitimacy of state action.¹²⁸ Legitimacy in the sociological sense asks whether the relevant actors regard state action “as justified, appropriate, or

DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th ed. 1915); FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 74 (1944). The desirability of regular procedure is also a theme of Justice Scalia’s critique of discretionary standards. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). In it, he derided “[t]he common-law, discretion-conferring approach” as violative of our “fundamental sense of justice,” the realities of the Supreme Court’s limited docket, and the proper role of a federal appellate judge.

¹²¹ *Id.* at 364.

¹²² *Id.* at 368.

¹²³ *Id.* at 363.

¹²⁴ See *infra* note 291 and accompanying text.

¹²⁵ Fuller, *supra* note 121, at 363.

¹²⁶ *Id.* at 381-91. See STANFORD ENCYCLOPEDIA OF PHILOSOPHY, THE RULE OF LAW § 5.2 (last updated Jan. 2016) (procedural aspect of rule of law entails “a hearing by an impartial and independent tribunal that is required to administer existing legal norms on the basis of the formal presentation of evidence and argument; a right to representation by counsel at such a hearing a right to be present, to confront and question witnesses, and to make legal argument about the bearing of the evidence and the various legal norms relevant to the case; and a right to hear reasons from the tribunal when it reaches its decision, which are responsive to the evidence and arguments presented before it.”).

¹²⁷ STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 126, § 5.2. See also PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 4 (2016) (weak version of rule of law requires that coercive power “be used under rules that give those over whom that power is exercised the opportunity to call the users of the power to account on the basis of reasons”).

¹²⁸ See generally Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.”¹²⁹ A large body of research shows a strong connection between perceived procedural fairness and people’s willingness to accept decisions, whether or not they win.¹³⁰

B. The Attack on MDL

MDL’s ad hocery is difficult to reconcile with this conception of the rule of law. As Part I described, MDL procedure evolves in response to problems that arise in particular cases instead following of a standard rulebook. While MDL formally respects the individuality of consolidated cases, control of plaintiffs’ cases is exercised by lead attorneys that make crucial decisions on behalf of the plaintiff “class.” MDL transferee judges are archetypal “managerial judges,” appointing the lawyers who prosecute cases on behalf of consolidated plaintiffs, directing the order of business, and pushing overtly and subtly for settlement.¹³¹ Plaintiffs whose cases are swept into MDL have little opportunity to present evidence or argument until the litigation is settled. Many decisions are immune from appellate review.

Thus, it is not surprising that as MDL’s importance grew, critics trained their sights on its lack of regular procedures. Martin Redish and Julie Karaba describe MDL as a “procedural no-man’s land” that “involves something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies.”¹³² Linda Mullenix contends that the lawyers and judges who control MDL “manipulat[e] procedure to accomplish ends the mechanism was never intended to perform.”¹³³

Curiously, critics disagree over who is harmed by MDL’s flexibility. One line of criticism focuses on plaintiffs swept into an MDL.¹³⁴ Drawing on the parallels between MDL and class action litigation, critics argue that MDL is beset by the same agency problems that are claimed to affect the modern class action.¹³⁵ The appointment of MDL leadership separates control of claims

¹²⁹ *Id.* at 1795.

¹³⁰ See Bookman & Noll, *supra* note 27, at 779 (collecting studies).

¹³¹ See generally Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1030 (2013); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

¹³² Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 142 (2015).

¹³³ Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 553 (2012).

¹³⁴ See, e.g., Burch, *supra* note 10; Bradt & Rave, *supra* note 28, at 1264; Elizabeth Chamblee Burch, *Financiers As Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273 (2012); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 120 (2010).

¹³⁵ See generally, Bruce Hay & David Rosenberg, *Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (1999); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency In the Large*

from their owners. Acting for their own interests instead of the parties they serve, leadership negotiates settlements that deliver little compensation to plaintiffs and large common benefit fees to lead counsel and members of the PSC. No institution currently collects data that allows these claims to be evaluated on a systematic basis. But scholars point to cases such as the Propulsid litigation as proof that MDL leads to collusive settlements. There, 37 of 6,012 (.6 percent) of plaintiffs recovered money through an aggregate settlement negotiated by MDL leadership, who recovered more than \$27 million in fees.¹³⁶

If MDL consistently harmed plaintiffs, one might expect corporate defendants to support it. But while corporate defendants historically made heavy use of MDL, times have changed.¹³⁷ In recent Congresses, the U.S. Chamber of Commerce has supported legislation that would require MDL plaintiffs to submit evidentiary support for covered claims shortly after they were transferred to the MDL court, prohibit bellwether trials, and allow interlocutory appeals of orders entered by the transferee judge.¹³⁸ In 2018, a defense interest group called Lawyers for Civil Justice (LCJ) launched a project entitled “Rules 4 MDLs” to lobby for “clear, uniform rules that apply in MDL cases.”¹³⁹

LCJ mobilized support for 2015 amendments to Rule 26 that restricted discovery in federal civil litigation.¹⁴⁰ The premise of its new project—backed by advertisements, a social media campaign, and its own hashtag (#Rules4MDLs)—is that MDL courts’ refusal to follow a regular playbook subjects defendants to unfair settlement pressure. In August 2017, LCJ proposed six MDL-specific amendments to the FRCPPs.¹⁴¹ In September 2018,

Class Action, 54 U. CHI. L. REV. 877 (1987). For a somewhat overstated critique of the literature’s focus on agency costs, which contends that regulatory regimes enforced through class action litigation focus exclusively on deterrence, see Myriam Gilles & Gary B. Freidman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2007).

¹³⁶ Burch, *supra* note 10, at 127-28.

¹³⁷ See *Delaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147 (D. Mass. 2006).

¹³⁸ H.R. 985 § 105, 115th Cong. (2017).

¹³⁹ RULES 4 MDLS, <https://www.rules4mdls.com/> (last visited Feb. 15, 2019).

¹⁴⁰ LCJ’s membership brochure boasts that the group “has overcome the serious resistance of the trial lawyers to achieve important reforms” including “the 2015 amendments to the Federal Rules of Civil Procedure establishing a new ‘proportionality’ standard for the scope of discovery and a uniform rule governing sanctions for loss of ESI For these and other achievements, LCJ has been honored by the U.S. Chamber’s Institute for Legal Reform.” LAWYERS FOR CIVIL JUSTICE, SHAPE THE FUTURE OF LITIGATION (last visited Feb. 15, 2019), http://www.lfcj.com/uploads/1/1/2/0/112061707/membershipbrochure_10x19_october_2017.pdf.

¹⁴¹ They were: (1) require each plaintiff to file an individual complaint; (2) require individual claims to be pled with particularity under Rule 9(b); (3) create a new Rule 12(b)(8) motion “for individual claims in MDL cases that lack meaningful evidence of a valid claim”; (4) eliminate permissive claim joinder for certain plaintiffs; (5) require “plaintiffs in MDL cases to produce meaningful evidence in support of their claims, and to disclose the existence of third-party financing arrangements and the use of lead generators”; (5) establish “a confidential consent procedure without which bellwether trials in consolidated trials cannot occur; and (6) allow interlocutory appeals of “critical rulings in MDL cases.” LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULE MAKING TO THE

the group offered six revised proposals for discussion with the new MDL/Third Party Litigation Funding subcommittee of the Advisory Committee on Federal Rules governing matters such as master complaints, permissive joinder, and third-party litigation funding agreements.¹⁴² The proposals explicitly aim to prevent the experimentation and case-by-case procedural development described above. In LCJ's words, "the *ad hoc* use of mechanisms such as fact sheets and *Lone Pine* orders varies wildly and is inherently inconsistent with the fundamental idea of the FRCP that procedures should be uniform, clear and accessible."¹⁴³

C. MDL as Super-Sized Litigation

A striking feature of the attack on MDL is its assumption that MDL is simply a larger version of the litigation that takes place every day in federal district courts. LCJ, for example, argues that "[w]ith so much of the pending federal civil caseload consolidated into MDL cases, the [Federal Rules] should be modernized with clear, uniform rules that apply in MDL cases, benefiting all stakeholders by providing the same fairness, clarity and certainty that the [Federal Rules] ensure *for all other civil cases*."¹⁴⁴ Even opponents of LCJ's proposals do not challenge the assumption that MDL is mere litigation. For example, the plaintiff's bar through the American Association for Justice argues, "Judges need to remain empowered to exercise broad discretion in any particular case rather than be constrained by formalistic preconceptions of what a vocal minority consider to be 'best practices.'"¹⁴⁵

It is not difficult to understand why parties view MDL this way. Section 1407 appears in the venue chapter of the Judicial Code alongside provisions on interpleader, suits against the United States, and related matters.¹⁴⁶ Section 1407 speaks the language of litigation, referring to the "transfer" of "civil

ADVISORY COMMITTEE ON CIVIL RULES (2017), http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_request_for_rulemaking_concerning_md1_cases_8-10-17.pdf.

¹⁴² The revised proposals are: (1) a "Multidistrict Litigation Disclosure" amendment to Rule 26(a) "requiring disclosure of evidence showing the cause and nature of the injury alleged"; (2) a new rule allowing "an appeal from an order granting or denying a motion under Rule 12(b)(2) or Rule 56 in the course of coordinated or consolidated pretrial proceedings conducted pursuant to 28 U.S.C. § 1407(b), provided that the outcome of such appeal may be dispositive of claims in [50] or more actions in the coordinated or consolidated pretrial proceedings"; (3) a prohibition of bellwether trials; (4) mandatory disclosure to opposing counsel of third-party litigation funding agreements; (5) a prohibition on permissive joinder of plaintiffs under Rule 20; and (6) new rules "defin[ing] the documents used as pleadings in MDL cases." LAWYERS FOR CIVIL JUSTICE, MDL PRACTICES AND THE NEED FOR FRCP AMENDMENTS: PROPOSALS FOR DISCUSSION WITH THE MDL/TPLF SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES (Sept. 14, 2018), *available at* <https://static.reuters.com/resources/media/editorial/20181004/rules4mdl--proposalsforrulescommittee.pdf>.

¹⁴³ *Id.* at 3.

¹⁴⁴ RULES 4 MDLS, <https://www.rules4mdls.com/> (last visited Feb. 15, 2019).

¹⁴⁵ Bradt, *supra* note 14, at 99 (quoting a 2018 memorandum from the American Association of Justice's MDL Working Group to the Advisory Committee on Federal Rules' MDL subcommittee).

¹⁴⁶ See 28 U.S.C. pt. IV, ch. 87.

actions involving one or more common questions of fact” to a single district court for “coordinated or consolidated pretrial proceedings.”¹⁴⁷ The institution charged with moving cases from district courts for coordinated pre-trial proceedings—the JPML—is located within the federal judiciary.¹⁴⁸ The actor charged with managing the consolidated proceedings is an Article III judge. Even the title of section 1407—“Multidistrict *litigation*”—describes it as, well, litigation.¹⁴⁹

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

III. MDL AS PUBLIC ADMINISTRATION

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

To evaluate whether MDL actually violates the rule of law, however, one needs a richer understanding of what MDL *is*. Criticisms of MDL’s flexibility draw on a textbook picture of adjudication, which equates due process with adherence to fair rules of the road that are defined in advance of specific disputes. This understanding captures deeply held intuitions about the separation of powers and the appropriate role of courts and judges. Viewed from this vantage point, MDL’s ad hocery is indeed a problem. All

¹⁴⁷ 28 U.S.C. § 1407(a).

¹⁴⁸ See 28 U.S.C. § 1407(d).

¹⁴⁹ The official title of the Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, 82 Stat. 109, simply restates the act’s functions. See *id.* (“An Act to provide for the temporary transfer to a single district for coordinated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact, and for other purposes”).

concede that the mega cases that critics focus on are not resolved through an even-handed application of procedures defined in advance of disputes. In MDL, the judge is no umpire.

As this Part argues, however, the image of MDL as a form of litigation governed by the textbook understanding of due process is mistaken. When analyzing novel institutions, it is appropriate to consider, *inter alia*, the *problem* that motivated Congress to act, the *structural choices* reflected in the statute it enacted, and the manner that the statute *functions*.¹⁵⁰ Applied to MDL, this approach shows that section 1407 is best understood as a hybrid form of public administration that mixes procedures of ordinary civil litigation, on one hand, with structural features and tools of public administration, on the other.

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

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

An accurate institutional understanding of MDL matters for at least two reasons. The first is that, in a system of separated powers, the demands of the rule of law depend on the *kind* of institution exercising state power. For example, Congress may appropriate money; the President may not.¹⁵¹ Relevant here, a distinctive understanding of the “administrative” rule of law

¹⁵⁰ See, e.g., FARHANG, *supra* note 29; Keith E. Whittington, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2009); Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267, 314-18 (John E. Chubb & Paul E. Peterson, eds., 1989). See generally Jeb Barnes, *Bringing the Courts Back In: Interbranch Perspectives on the Role of Courts in American Politics and Policy Making*, 10 ANN. REV. POLI. SCI. (2007).

¹⁵¹ U.S. CONST. art. I, § 9 cl. 7.

emerged in the decades following World War II as the scope of the federal administrative state expanded. Responding to criticisms remarkably similar to those leveled against contemporary MDL, policymakers rejected the idea that agencies must follow regular procedures to satisfy the rule of law. But if agencies were free to develop new procedures, alternative arrangements were needed to ensure that they did not act arbitrarily and stayed within the limits of their statutory authority. The settlement that emerged—reflected in the Administrative Procedure Act (APA) and precedent interpreting it—was to guarantee the transparency of administrative action and the right to participate in the development of administrative policy, while providing liberal opportunities for judicial review. Viewed from this perspective, MDL’s procedural flexibility is ordinary, even to be expected.

The second reason an accurate understanding of MDL matters is that it has implications for the current debate over MDL reform. If MDL’s procedural flexibility not a cause for concern, it lacks guarantees of accessibility, transparency, and reasoned decision-making that underpin the legitimacy of the modern administrative state. The history of federal administration teaches that MDL’s viability as an institution for resolving complex problems depends on how it addresses those governance deficits.

A. The Problem for Congress

MDL’s similarity to public administration begins with the problem that motivated Congress to act.¹⁵² As is familiar, the Multidistrict Litigation Act was a response to the electrical equipment litigation, described by one participant as “the greatest challenge to the administration of civil justice in the history of the federal judicial system.”¹⁵³ In 1960, the Justice Department indicted “virtually every significant American manufacturer of electrical equipment” for a conspiracy to fix prices and divide up territory.¹⁵⁴ According to the indictments, the conspiracy affected \$6 to 7 billion in total sales.¹⁵⁵ In February 1961, the criminal cases were resolved through plea agreements that subjected the defendants to modest penalties.¹⁵⁶

¹⁵² This account largely follows Andrew Bradt’s path-breaking research on the origins of section 1407. See Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017) [hereinafter *Radical Proposal*]; Bradt, *supra* note 14; Andrew D. Bradt, *Something Less and Something More: MDL’s Roots As a Class Action Alternative*, 165 U. PA. L. REV. 1711 (2017). See also Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5, 29-35 (1991).

¹⁵³ William H. Becker, *Modern Discovery: Promoting Efficient Use and Preventing Abuse of Discovery in the Roscoe Pound Tradition*, 78 F.R.D. 267, 269 (1978).

¹⁵⁴ Bradt, *Radical Proposal*, *supra* note 152, at 854.

¹⁵⁵ See CHARLES A. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS* 83 (1973).

¹⁵⁶ Bradt, *Radical Proposal*, *supra* note 152, at 854-55. The penalties were “\$2 million in fines, some short jail sentences for relatively low-level defendant-employees, and consent decrees.” *Id.*

The pleas were only the beginning of the legal response to the scandal, however. On their heels, utilities and other companies that had purchased electrical equipment at inflated prices filed more than 1,800 treble damages actions.¹⁵⁷ The litigation was spread throughout the United States but concentrated in major cities.¹⁵⁸ Thomas Clary, the Chief Judge of the Eastern District of Pennsylvania, estimated that plaintiffs in the 1,800 cases asserted some 25,632 claims.¹⁵⁹

Those cases could not be resolved through ordinary civil procedure. With litigation pending in thirty-five districts, some mechanism was needed to prevent courts from issuing conflicting orders and to keep the discovery process from generating staggering transaction costs. In February 1962, Chief Justice Earl Warren formed an ad hoc subcommittee of the Committee on Pretrial Procedure to “consider[] the problems arising from procedures in multiple litigation filed in different judicial districts but with common witnesses and exhibits.”¹⁶⁰ The new subcommittee, termed the Coordinating Committee on Multiple Litigation (CCML), was chaired by Chief Judge Alfred P. Murrah of the U.S. Court of Appeals for the Tenth Circuit.¹⁶¹ Eventually, it grew to include eight circuit and district judges.¹⁶²

Lacking formal authority over district judges who were assigned electrical equipment cases, the committee’s modus operandi was to “encourage” judges to enter uniform orders that it drafted.¹⁶³ Judges from the CCML “sat together at arguments, conferred, and issued proposed orders that were then sent back to the more than thirty district courts in which the cases were pending.”¹⁶⁴ Through these orders, the committee effectively created a coordinated nationwide discovery program.

“In order to manage the nationwide depositions of defense witnesses, the plaintiffs’ lawyers met in Chicago to appoint a ‘steering committee’” that divided the discovery workload.¹⁶⁵ As litigation progressed, the committee developed damages models and settlement proposals. Manufacturers refused to negotiate until 1963. That year, Chief Judge Sylvester J. Ryan of the Southern District of New York and Judges Edwin A. Robson of the Northern District of Illinois and Wilfred Feinberg of the Southern District of New York

¹⁵⁷ BANE, *supra* note 155, at 50.

¹⁵⁸ Bradt, *Radical Proposal*, *supra* note 152, at 854.

¹⁵⁹ *Id.* at 855

¹⁶⁰ *Id.* at 856 (quoting Press Release, Admin. Office of the U.S. Courts 1-2 (Feb. 7, 1962))

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 857.

¹⁶⁴ Resnik, *supra* note 152, at 32.

¹⁶⁵ Bradt, *Radical Proposal*, *supra* note at 858.

made a push for settlement in cases against General Electric (G.E.), the largest defendant.¹⁶⁶ G.E. agreed to settle all litigation against it for \$300 million, the dam broke, and most other manufacturers agreed to global settlements.¹⁶⁷

The CCML planned to handle the remaining cases by transferring all cases involving a product line to a single judge for trial. However, the plan hit a roadblock when the largest remaining defendant, I-T-E Circuit Breaker, vociferously objected to its cases being transferred to Chicago.¹⁶⁸ I-T-E sought a writ of mandamus to prevent William H. Becker, a district judge from the Western District of Missouri and member of the CCML, from transferring his cases pursuant to the committee's plan.¹⁶⁹ The Eighth Circuit rejected the petition, noting that what I-T-E "seemingly wants done is simply to have all of the suits against it left alone."¹⁷⁰ With its cases consolidated in Chicago, I-T-E settled on the first day of trial.¹⁷¹ "Once I-T-E settled, settlements of the rest of the cases followed quickly. By the end of 1966 the litigation was over."¹⁷²

Though the defendants complained that they had been coerced into settling, the CCML's management of the litigation was hailed as a model for managing complex litigation.¹⁷³ The I-T-E episode, however, exposed the fragility of the committee's ad hoc approach. As a defense lawyer observed, resolving the electrical equipment litigation required "an extraordinary exercise in the use of judicial prestige and persuasion."¹⁷⁴ Had I-T-E prevailed in its objections—or had a district court judge refused to go along with the committee's "suggestions"—the effort to manage the litigation in a coherent manner would have failed.

These problems provided the impetus for the Multidistrict Litigation Act of 1968. The key figures in drafting and lobbying for the statute were Judges Murrah and Becker, and Phil C. Neal, the Dean of the University of Chicago Law School.¹⁷⁵ Senator Joseph Tydings, the Democratic chair of the Senate Subcommittee on Improvements in Judicial Machinery, helped steer the bill through Congress.¹⁷⁶

¹⁶⁶ *Id.* at 859.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 860.

¹⁶⁹ See *I-T-E Circuit Breaker Co. v. Becker*, 343 F.2d 361, 364 (8th Cir. 1965).

¹⁷⁰ *Id.* at 362.

¹⁷¹ See *BANE*, *supra* note 155, at 378.

¹⁷² *Bradt*, *Radical Proposal*, *supra* note 152, at 860.

¹⁷³ See EARL WARREN, CHIEF JUSTICE, SUPREME COURT OF THE U.S., ADDRESS TO THE ANNUAL MEETING OF THE AMERICAN LAW INSTITUTE, in *Manual for Complex and Multidistrict Litigation* 6 (1st ed. 1969).

¹⁷⁴ *Bradt*, *Radical Proposal*, *supra* note 152, at 861 (quoting Breck P. McAllister, *Judicial Administration of Multiple-District Treble Damage Administration*, in N.Y. State Bar Ass'n, 1966 Antitrust Law Symposium 55, 58 (1966)).

¹⁷⁵ See *Bradt*, *supra* note 14, at 92.

¹⁷⁶ *Id.*

Section 1407's authors realized that more cases like the electrical equipment litigation lay in the future.¹⁷⁷ They also believed that "power had to be centralized before judges who could manage cases to a conclusion, as was accomplished in the mass settlements of the electrical-equipment cases."¹⁷⁸ Beyond this, the drafters confronted a classic problem of statutory design. Apart from the need for centralized management of geographically dispersed cases, *how* courts would resolve future mega-litigation was not obvious. The discovery program that worked in the electrical equipment litigation was specifically designed for that case. What procedures would courts use to clear hundreds or thousands of cases filed following an airplane crash,¹⁷⁹ massive securities fraud,¹⁸⁰ or the release of a defective drug or medical device?¹⁸¹ When MDL's drafters attempted to formalize the process that had worked in the electrical equipment litigation, they confronted a "known unknown."

That problem would have been familiar to lawmakers who enacted statutes that charge an agency with processing a large number of claims. Consider the system of administrative courts that operates within the Social Security Administration (SSA).¹⁸² To administer the Social Security Disability Insurance and the Supplemental Security Income programs, SSA operates what is "probably the largest adjudication agency in the western world."¹⁸³ In recent years, the agency has processed some two million disability claims per year, about 600,000 of which required hearings before an administrative law judge (ALJ).¹⁸⁴

The principal statute that authorizes SSA to operate this system is section 205 of the Social Security Act.¹⁸⁵ That section was enacted as part of 1939 amendments that added survivors and dependent benefits to the prior program of old-age and unemployment insurance, creating the basic structure of modern social security.¹⁸⁶ When Congress enacted section 205, it acted with as little information as 1407's drafters.¹⁸⁷ Legislators would have assumed that

¹⁷⁷ Bradt, *Radical Proposal*, *supra* note 152, at 907.

¹⁷⁸ *Id.*

¹⁷⁹ *Cf.* In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972, 549 F.2d 1006 (5th Cir. 1977).

¹⁸⁰ *Cf.* In Re WorldCom, Inc. Securities Litigation, 293 B.R. 308 (S.D.N.Y. 2003).

¹⁸¹ *Cf.* In re Vioxx Prod. Liab. Litig., 360 F. Supp. 2d 1352 (J.P.M.L. 2005)

¹⁸² See generally JERRY L. MASHAW, BUREAUCRATIC JUSTICE (1983); JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM (1978).

¹⁸³ *Barnhart v. Thomas*, 540 U.S. 20, 28-29 (2003).

¹⁸⁴ SOCIAL SECURITY OFFICE OF RETIREMENT AND DISABILITY POLICY, ANNUAL STATISTICAL SUPPLEMENT, 2017, tbl. 2.F9, <https://www.ssa.gov/policy/docs/statcomps/supplement/2017/2f8-2f11.html>.

¹⁸⁵ 42 U.S.C. § 405.

¹⁸⁶ Pub. L. No. 76-379, 53 Stat. 1360, 1368 (1939). See Patricia P. Martin & David A. Weaver, *Social Security: A Program and Policy History*, 66 SOC. SECURITY BULL. 1 (2005).

¹⁸⁷ Phyllis E. Bernard, *Social Security and Medicare Adjudications at HHS: Two Approaches to Administration Justice in an Ever-Expanding Bureaucracy*, 3 HEALTH MATRIX 339, 363 (1993).

Article III courts could not be entrusted to adjudicate claims under new title II of the Social Security Act.¹⁸⁸ But apart from this, how claims should be processed was unknown. The Social Security system was only four years old and, to that point, had only paid benefits to retirees and their survivors.¹⁸⁹ The system faced major administrative challenges in the first years of its operation.¹⁹⁰ Its constitutionality was settled only in 1937.¹⁹¹ Existing administrative courts, such as those in the Interstate Commerce Commission, operated in different contexts and handled many fewer claims than social security would ultimately come to handle.¹⁹² Even the scope of federal disability benefits was unknown: the modern disability program was not created until two decades later.¹⁹³

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

B. Statutory Design

The information vacuum that lawmakers operated in when enacting title II of the Social Security Act and, later, the Multidistrict Litigation Act is a basic feature of modern lawmaking.¹⁹⁴ Congress faces constant pressure to address social problems. But lawmakers often lack a good understanding of the problem Congress is being asked to regulate and the costs and benefits of competing policy responses. In recognition of lawmakers' myopia, one political scientist describes the job of modern representative as "legislating in the dark."¹⁹⁵ But legislating in the dark carries political risk. Badly designed legislation may fail to accomplish its objectives, have unintended

¹⁸⁸ See Mark Tushnet, *THE STORY OF CROWELL: GROUNDING THE ADMINISTRATIVE STATE*, in *Federal Courts Stories*, 359, 367-68 (Vicki Jackson, ed., 2010) (describing Progressive lawmakers' distrust of Article III courts and use of expert tribunals as substitutes).

¹⁸⁹ Bernard, *supra* note 187, at 363.

¹⁹⁰ See LARRY DEWITT ET AL., *SOCIAL SECURITY: A DOCUMENTARY HISTORY* 5 (2008) ("For years, Social Security employees faced problems matching employers' contributions with the appropriate workers, and they were even tasked with tracking down covered employers and workers and making sure they were participating in the program.")

¹⁹¹ See *Helvering v. Davis*, 301 U.S. 619 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495 (1937).

¹⁹² See Tushnet, *supra* note 188, at 386.

¹⁹³ See, e.g., JONAH GELBACH & DAVID MARCUS, *A STUDY OF SOCIAL SECURITY LITIGATION IN THE FEDERAL COURTS* 9 (2016); Charles I. Schottland, *Social Security Amendments of 1956: A Summary and Legislative History*, *SOC. SEC. BULL.*, Vol. 19, No. 9, Sept. 1956, at 3.

¹⁹⁴ See, e.g., FRANK R. BAUMGARTNER & BRYAN D. JONES, *THE POLITICS OF INFORMATION: PROBLEM DEFINITION AND THE COURSE OF PUBLIC POLICY IN AMERICA* ch. 4. (2015); JAMES M. CURRY, *LEGISLATING IN THE DARK: INFORMATION AND POWER IN THE HOUSE OF REPRESENTATIVES* (2015).

¹⁹⁵ See CURRY, *supra* note 194, at 4.

consequences, or even exacerbate the problem Congress set out to address.¹⁹⁶ Lawmakers thought to have contributed to these problems expect to be punished at the polls.

One solution familiar from contemporary legislative politics is for Congress to do nothing.¹⁹⁷ In doing so, lawmakers bet that the political costs of inaction are lower than the costs of legislating in the dark. But for much of the twentieth century, Congress followed a different strategy: delegation. That is, Congress made basic policy choices itself and tasked an agency with formulating “subsidiary administrative policy within the prescribed statutory framework.”¹⁹⁸

For instance, section 205(a) of the Social Security Act provides that the SSA “shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions.”¹⁹⁹ That section goes on to direct the agency to “adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.”²⁰⁰ Rather than lay down rules of procedure itself, Congress delegated to the SSA.

The policy logic for such delegations is captured in the Attorney General’s landmark 1941 report on administrative procedure.²⁰¹ As the report explains, “inherent limitations upon [Congress’s] own functioning” argue “against action by Congress itself.”²⁰² Those limitations include “[t]he total time available” for members of Congress to consider legislation, the “[l]ack of specialized information,” and the “lack of a staff or a procedure adapted to acquiring it.”²⁰³ Even if Congress is able to work out all the details of statutory policy itself, there remains “constant danger of harmful rigidity” if the results

¹⁹⁶ See THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* 249 (2016) (describing difficulties in the rollout of the Affordable Care Act).

¹⁹⁷ See generally Symposium, *The American Congress: Legal Implications of Gridlock*, 88 NOTRE DAME L. REV. 2065 (2015).

¹⁹⁸ *Yakus v. United States*, 321 U.S. 414, 424 (1944).

¹⁹⁹ 42 U.S.C. § 405(a).

²⁰⁰ *Id.*

²⁰¹ UNITED STATES ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT, S. Doc. No. 8, 77th Cong., 1st Sess. app. A (1941). For the history of the report, see DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICAN: 1900-1940* (2014); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1594-97 (1996).

²⁰² ATTORNEY GENERAL’S REPORT, *supra* note 201, at 14.

²⁰³ *Id.*

“crystallize in the form of a statute.”²⁰⁴ Thus, there is “steady pressure . . . to assign such tasks to the controlled discretion of some other agency.”²⁰⁵

Since Congress created the first modern agency in 1887, statutes that delegate regulatory authority have been attacked for authorizing another institution to exercise the Congress’s Article I powers.²⁰⁶ But for as long as these objections have been advanced, they have failed. Since 1928, the Supreme Court has held that a statute satisfies Article I as long as it contains an “intelligible principle” to guide the delegate’s discretion. And the Supreme Court has struck only three statutory provisions—each part of poorly drafted statutes that were enacted at the height of the New Deal—for lack of an intelligible principle.²⁰⁷

The Multidistrict Litigation Act delegates authority in manner that is strikingly similar to statutes like section 205 of the Social Security Act. In fact, it delegates twice. Section 1407 authorizes the JPML to override plaintiffs’ forum choice and move cases to a single district court for coordinated pre-trial management.²⁰⁸ Similar to many statutes administered by an administrative agency, the standard for centralization is highly discretionary. The Panel is authorized to transfer cases if it finds that doing so “will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”²⁰⁹

Once the Panel redirects cases to a single district court, section 1407 delegates authority to the transferee court to conduct “coordinated or consolidated pretrial proceedings.”²¹⁰ This language does not expressly authorize the transferee court to manage the consolidated cases to resolution or develop new procedures. But even in 1968, lawmakers, judges, and

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1722 n.4 (2002). Article I, section 1 of the Constitution provides that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

²⁰⁷ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that section 3 of the National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933), lacked an intelligible principle); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (same, National Industrial Recovery Act § 9(c); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (same, price-fixing provisions of the Bituminous Coal Conservation Act of 1935, 49 Stat. 991, ch. 824). Even the well-organized attack on federal administration that has emerged from the conservative legal movement in recent years has failed to make headway against statutes that delegate regulatory authority. In 2010, Chief Justice John Roberts wrote, “No one doubts Congress’s power to create a vast and varied federal bureaucracy.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).

²⁰⁸ 28 U.S.C. § 1407(a).

²⁰⁹ *Id.*

²¹⁰ *Id.*

attorneys would have known that this would be the practical effect of section 1407's nationwide consolidations.²¹¹

Consider the views of Philip Price, Esq., a partner at Dechert, Price and Rhoads who submitted comments opposing section 1407 when it was being considered by the Senate judiciary committee.²¹² Price represented I-T-E Circuit Breaker in the electrical equipment litigation. He objected to “the extraordinarily broad scope of the proposed section” and “the unlimited power which it would vest, not in any court as heretofore constituted, but in a ‘judicial panel.’” In the transferee court, Price complained, judges would wield their power to “club[] into settling their cases parties who did not show what the judges thought was sufficient enthusiasm.” Doubtless this was a self-serving view of the electrical equipment litigation, and Price’s account of transferee judges’ motivations can be questioned. But his letter makes clear that sophisticated observers well understood the effects of section 1407’s delegations. As he stated: “what happened in [the electrical equipment] cases is a guide to what may be expected under the proposed § 1407.”

Section 1407’s history shows that the judges who drafted the statute and lawmakers who enacted it believed that transferee judges had ample authority to devise new procedures.²¹³ Whatever deficit of authority existed under the 1968 Act was eliminated by 1983 amendments to Federal Rule 16. Enacted with a package of rule amendments intended to encourage managerial judging,²¹⁴ amended Rule 16 authorizes district court judges to “adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.”²¹⁵ The amendment makes explicit what section 1407 assumes—that transferee judges will be procedural innovators.

²¹¹ See *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (“[I]t’s a ‘fundamental canon of statutory construction’ that words generally should be ‘interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.’”); *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 178 (2008) (when interpreting a statute, a federal court “must take into account its contemporary legal context” (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 698–99 (1979))). See also Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947) (“If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men. If they are addressed to specialists, they must be read by judges with the minds of specialists.”).

²¹² *Multidistrict Litigation: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Committee on the Judiciary*, 89th Cong. 2d Sess. 95 (1966) (Letter from Philip Price, Esq. to Sen Senator Hugh Scott).

²¹³ See Bradt, *supra* note 149 (“The judges’ contemporaneous papers demonstrate that, far from a modest tweak, they intended MDL to be an ambitious statute designed to transfer power over nationwide litigation from the hands of litigants and dispersed judges into the hands of a single judge who could shepherd the litigation to a final resolution.”). Cf. Proceedings of the Seminar on Protracted Cases for United States Judges, 23 F.R.D. 319, 506 (1958) (“[P]erhaps the greatest advantage and the most striking characteristic of the federal rules is the power and the discretion they give to the trial judge.” (Clarke, J.))

²¹⁴ See generally sources cited *supra* note 131.

²¹⁵ Fed. R. Civ. P. 16(c)(2)(L).

MDL's similarity to statutes that delegate authority to an administrative agency raises the question why Judges Becker and Murrah did not propose a "multidistrict litigation agency" when they put forward section 1407. The simplest explanation is that the idea appears not to have occurred to the judges, who were focused on codifying the structure that was successfully used to resolve the electrical equipment litigation.²¹⁶ More fundamentally, Congress could not have created such an agency without violating Article III. MDL courts resolve finally resolve private claims, and they "exercise[] the range of jurisdiction and powers normally vested only in Article III courts." Under *Crowell v. Benson* and *Commodities Future Trading Commission v. Schor*, these are functions that only an Article III court may perform.²¹⁷

C. The Operation of the Statute

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

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

1. Overcoming Problems Through Bottom-Up Innovation

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

With this, compare procedural design in agencies like the SSA. An initial example involves the creation of the Social Security Appeals Board (now called the Appeals Council), a body of ALJs within the agency that

²¹⁶ See Bradt, *Radical Proposal*, *supra* note 152, at 863-71.

²¹⁷ *Crowell v. Benson*, 285 U.S. 22, 59 (1932); *Commodities Future Trading Commission v. Schor*, 478 U.S. 833, 851 (1986).

reviews front-line ALJ decisions in an effort to improve the system’s accuracy and uniformity.²¹⁸ As the board’s director explained in 1959 testimony to the House Ways and Means Committee, the need for an internal appeals process arose from the slow pace of judicial review in Article III courts.²¹⁹ The original Social Security Act did not expressly authorize SSA to provide an internal appeals process but the agency nevertheless provided one.²²⁰ Later amendments to the Social Security Act confirmed the agency’s general authority to make procedure²²¹ and formally recognized the Appeals Board.²²² As Pamela Bookman and I show, this pattern of bottom-up innovation followed by legislative codification characterizes many ad hoc procedural statutes.²²³

A more recent example of procedural design within the SSA is the medical vocational guidelines, colloquially known as the “grids,” that the agency uses to adjudicate disability insurance claims.²²⁴ Under the Social Security Act, an individual is entitled to disability benefits if she cannot “engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment.”²²⁵ Before SSA adopted the grids, the availability of work was established through testimony of vocational experts who testified at individual disability hearings.²²⁶ This method was criticized for producing inconsistent outcomes and required the agency to pay for repeated testimony on an issue that should not have varied from claimant to claimant.²²⁷

To address these problems, the SSA invoked its authority “to establish procedures” under section 205 to promulgate the grids: a regulation that answers whether a claimant is disabled based on the claimant’s age, education, work history, and functional limitations.²²⁸ The grids aggregate information from national hiring and occupational surveys and are updated

²¹⁸ An applicant for social security disability benefits currently is entitled to appeal to the Appeals Board as of right. 20 C.F.R. § 416.1467 (2019). The Appeals Board’s regulations also authorize it to review the grant of benefits on its own motion, but this authority is rarely exercised. See § 416.1469.

²¹⁹ *Administration of Social Security Disability Insurance Program: Hearings Before the Subcomm. on the Admin. of the Social Sec. Laws, H. Comm. on Ways and Means*, 86th Cong. 641 (1960) (statement of Joseph E. McElvain, Director of the Office of Hearings and Appeals) [hereinafter McElvain Testimony].

²²⁰ See generally Pub. L. No. 74-271, 49 Stat. 620 (1935).

²²¹ See Pub. L. No. 76-379, 53 Stat. 1360, 1368 (1939).

²²² See Pub. L. 89-97, § 102(a), 79 Stat. 330 (1965).

²²³ See Bookman & Noll, *supra* note 27, at 788-91, 804-07 (discussing, *inter alia*, section 524(g) of the Bankruptcy Code, the Prison Litigation Reform Act, and the Private Securities Litigation Reform Act).

²²⁴ See MASHAW, BUREAUCRATIC JUSTICE, *supra* note 182, at 117-24.

²²⁵ 42 U.S.C. § 423(d)(1)(A).

²²⁶ See Heckler v. Campbell, 461 U.S. 458, 461 (1983).

²²⁷ See *id.* at 461.

²²⁸ 20 C.F.R. Part 404, subpart P, app. 2.

as new versions of those surveys are released.²²⁹ To determine whether an individual is unable to find work in the national economy (and therefore disabled), an ALJ enters the individual’s characteristics into the grids and the grids supply an answer.²³⁰

In *Heckler v. Campbell*, the Supreme Court upheld the grids against constitutional and statutory challenges arguing that they deprived claimants of a fair hearing.²³¹ The agency processed “[a]pproximately 2.3 million claims for disability benefits” per year, the Court observed, making the need for efficiency “self-evident.”²³² The grids deprived individual litigants of the opportunity to be present when evidence relevant to a key element of their claim was developed. But the survey data they incorporate could be challenged in action for judicial review,²³³ and an individual whose condition was not covered by the grids could “bail out” and demonstrate disability through individualized proof.²³⁴ Thus, the Court concluded that the grids were consistent with due process and the APA.

Many more examples of ad hoc procedure-making in the SSA and other agencies could be cited.²³⁵ But these suffice to show the basic point: like an MDL transferee court, the SSA devises procedures to address procedural problems that Congress did not—and could not—foresee when it enacted the agency’s enabling statute.

2. MDL’s Relationship to Other Forms of Aggregation Litigation

This Article is not the first to note the parallels between public administrative programs and aggregate litigation. As Nathaniel Donahue and John Fabian Witt observe, early twentieth century workers’ compensation

²²⁹ Brief of the United States 16 n.6, *Heckler v. Campbell*, 461 U.S. 458, 461 (1983).

²³⁰ In general, the grids give a yes/no answer to whether a claimant is disabled or direct the ALJ to consult a vocational expert if the surveys that the grid is based upon do not indicate the availability of work for individuals with the claimant’s combination of characteristics. See 1 J. DOUGLAS PETERS, *SOCIAL SECURITY DISABILITY CLAIMS* § 1.8 (June 2018 update).

²³¹ 461 U.S. 458 (1983).

²³² *Id.* at 461 n.2.

²³³ See 5 U.S.C. §§ 701, 702, 704 (generally authorizing judicial review of “final agency action for which there is no other adequate remedy in a court are subject to judicial review”).

²³⁴ *Heckler*, 461 U.S. at 462 n.5.

²³⁵ See, e.g., Michael Sant’Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 *YALE L.J.* 1600 (2017) (describing the development of group claim-processing procedures in the Equal Employment Opportunity Commission and Office of Medicare Hearings and Appeals and the use of “Omnibus Proceedings” within the National Vaccine Injury Compensation Program); Gerald K. Ray & Jeffrey S. Lubbers, *A Government Success Story: How Data Analysis by the Social Security Appeals Council (with a Push from the Administrative Conference of the United States) Is Transforming Social Security Disability Adjudication*, 83 *GEO. WASH. L. REV.* 1575 (2015) (describing the development of the SSA’s data analysis program and the “dramatic gains in productivity and quality of decisionmaking” that it produced); Verity Winship, *Fair Funds and The SEC’s Compensation of Injured Investors*, 60 *FL. L. REV.* 1104 (2008) (describing the development of “Fair Fund” procedures within the Securities Exchange Commission).

statutes “formalized for work accidents what virtually private and more-or-less decentralized mechanisms [for resolving claims] had been trying to achieve for half a century and more.”²³⁶ Harry Kalven and Maurice Rosenfield’s seminal essay on the mid-century class action likened it to a “semi-public remedy administered by the lawyer in private practice.”²³⁷ More recently, Richard Nagareda observed that—like workers’ compensation statutes and the social security grids—mass tort settlements rationalize the resolution of thousands of related claims using rules of thumb derived from litigated and settled cases.²³⁸

MDL settlements similarly rely on grids, rules-of-thumb, and algorithms to resolve masses of related cases, based on claim values discerned from prior verdicts and settlements. But MDL differs from the settlements that preoccupied Nagareda in a crucial respect: they are the product of deliberate congressional choice. In recognition of the inevitability of future litigation crises, section 1407 delegates authority to the JPML and, through it, the transferee court, to manage factually related cases. This grant of statutory authority and the consolidations it enables are but-for and proximate causes of MDL settlements. In short, MDL settlements are not merely the result of dynamics that occur in all forms of aggregate litigation; they are the product of section 1407’s design.

Perhaps because he wrote in the era before MDL had become the dominant forum for large-scale litigation, Nagareda overlooked the statutory underpinning for MDL settlements. Because of that, he believed that aggregate settlements suffer from a perpetual crisis of authority. Lacking authority to represent clients beyond the limits of traditional attorney-client relationships and Rule 23, lawyers nevertheless negotiate global resolutions to factually related cases.²³⁹ For Nagareda, private lawyers—not judges—were the actor analogous to agency heads who devise new procedures. And private lawyers decidedly lacked authority to impose global peace on unwilling parties.

Whether or not Nagareda was correct about the crisis of authority outside of MDL, it is not the case that MDL settlements take place in a vacuum of statutory authority. A transferee judge exercises authority under

²³⁶ Nathaniel Donahue & John Fabian Witt, *Tort as Private Administration*, 105 CORNELL L. REV. (forthcoming 2019) (manuscript at 13).

²³⁷ Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941).

²³⁸ See, e.g., RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* ch 4. (2008); Richard A. Nagareda, *Turning from Tort to Administration*, 94 Mich. L. Rev. 899, 921 (1996).

²³⁹ See NAGAREDA, *MASS TORTS*, *supra* note 238 at 58 (“Both workers’ compensation and grid-like rules for public benefits have achieved a high degree of institutional legitimacy. By contrast, court-administered statistical sampling and mass tort settlements have not.”).

section 1407 and the FRCPs. Dominant uses of that authority are to drive settlement and to devise procedures that facilitate it—such as bellwether trials, case inventory orders, and centralizing control of litigation in a PSC. Of course, MDL settlements are subject to due process limitations. But they do not occur in the legal no man’s land Nagareda portrayed. They are, instead, the consequence of section 1407’s design.

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

MDL resembles a public administrative program in the problem that motivated Congress to enact its enabling statute, the structural choices Congress made in that statute, and the way the statute functions. But procedure-making in MDL is structured differently than in administrative agencies such as the SSA. The reason is that MDL operates under the statutes and rules governing ordinary civil litigation,²⁴⁰ whereas administrative agencies are governed by the APA.²⁴¹ This results in substantial differences between the ways that administrative agencies, on the one hand, and MDL courts, on the other, use delegated authority to make procedure.

Again, the Social Security Administration provides a useful comparison. Because the agency is subject to the APA,²⁴² it has a general obligation to make agency records available under the APA’s freedom-of-information provisions.²⁴³ When promulgating the medical-vocational grids, the APA required the agency “to give interested persons an opportunity to participate.”²⁴⁴ In particular, the APA required agencies to provide advance notice of its intent to adopt the grids,²⁴⁵ make data and analysis supporting the grids available for public inspection,²⁴⁶ and respond to non-frivolous

²⁴⁰ See 28 U.S.C. 1407(a) (transferee judge to conduct “coordinated or consolidated pretrial proceedings”); 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3866 (4th ed. updated Nov. 2018) (“Courts interpret the phrase ‘pretrial proceedings’ [in 28 U.S.C. § 1407(a)] broadly, to give the transferee judge control over any and all proceedings before trial. The transferee judge inherits the entire pretrial jurisdiction that the transferor court could have exercised had the case not been transferred.”).

²⁴¹ See 5 U.S.C. § 551 *et seq.* (setting out procedures for “each authority of the Government of the United States, whether or not it is within or subject to review by another agency,” excepting Congress, the courts, and certain territorial and military institutions).

²⁴² See *Richardson v. Perales*, 402 U.S. 389, 409 (1971) (stating that the Social Security Act’s hearing procedure “does not vary from that prescribed by the APA”).

²⁴³ See 5 U.S.C. 552.

²⁴⁴ 5 U.S.C. § 553(c)

²⁴⁵ 5 U.S.C. § 553(b). (“General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.”). “The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be a ‘logical out-growth’ of the rule proposed. The object, in short, is one of fair notice.” *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (internal citations omitted and punctuation altered).

²⁴⁶ See, e.g., *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 236 (D.C. Cir. 2008) (“Under APA notice and comment requirements, ‘[a]mong the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies [in its rulemaking.’” (quoting *Chamber of Commerce v. SEC*, 443

comments before they were promulgated.²⁴⁷ The final grids were subject to judicial review under the substantial-evidence and arbitrary-and-capricious standards.²⁴⁸

Procedural development in MDL is more opaque. The dominant mode of procedure-making in mega MDLs is for leadership to work out a solution to an emergent procedural problem that is adopted or so-ordered by the transferee judge.²⁴⁹ Lead counsel may consult non-lead counsel in these negotiations but have no legal obligation to do so. Indeed, leadership often will have strategic reasons for excluding non-lead counsel from crucial procedural discussions.²⁵⁰ Non-lead counsel complain of being frozen out until leadership proffers a take-it-or-leave-it aggregate settlement.²⁵¹ Courts seal filings that, if made public, would embarrass leadership or thwart efforts at global resolution.²⁵²

Apart from its reliance on informal negotiation to design procedure, MDL is not subject to the APA-based transparency and participation norms that govern administrative agencies. The Judicial Code does not impose freedom-of-information requirements on district courts analogous to those applicable agencies. Some MDLs make transcripts of hearings freely available to the public.²⁵³ In others, transcripts are only available to those willing to spend thousands of dollars to purchase them from PACER or a court reporter.²⁵⁴ An MDL court can make important procedural decisions with little advance notice. There is nothing like the judicially-enforced obligation to

F.3d 890, 899 (D.C. Cir. 2006) (internal punctuation altered)); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) (“It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, critical degree, is known only to the agency.”).

²⁴⁷ See, e.g., *Action on Smoking & Health v. Civilian Aeronautics Board*, 699 F.2d 1209, 1216 (D.C. Cir. 1983) (“An agency need not respond to every comment, but it must respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.” (internal punctuation omitted); *Portland Cement*, 486 F.2d at 393 (agency must respond to comments that satisfy a “threshold requirement of materiality”).

²⁴⁸ See 5 U.S.C. §§ 701, 706; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

²⁴⁹ See *supra* notes 115-117. This finding is consistent with Gluck’s interviews of transferee judges, who emphasized that the MDL bar is “[a] smaller community, repeat players. Lawyers are more likely to encounter each other again and again, so there is an incentive for folks to play nicely in the sandbox.” Gluck, *supra* note 8, at 1702.

²⁵⁰ See Stephan J. Herman, *Duties Owed by Appointed Counsel to MDL Litigants Whom They Do Not Formally Represent*, 64 LOY. L. REV. 1, 17-18 & n.60 (2018) (noting that “defendants are frequently only willing to engage in such discussions under a veil of confidentiality and will discontinue the negotiations in the event of a breach”).

²⁵¹ PAUL D. RHEINGOLD, *LITIGATING MASS TORT CASES* § 7:21 (May 2018 update) (“The lawyer has to call friends, try to look through Pacer, or take other difficult steps to be kept abreast of developments in MDL.”).

²⁵² See Burch, *supra* note 10, at 126 & n.286.

²⁵³ See, e.g., *In re General Motors LLC Ignition Switch Litigation*, <https://gmignitionmdl.com/>.

²⁵⁴ See, e.g., *MDL 2804: National Prescription Opiate Litigation*, <https://www.ohnd.uscourts.gov/mdl-2804>.

consider and respond to comments that applies in agency proceedings; case management orders set out requirements without any underlying reasoning.

Nor are procedural innovations in MDL subject to the same level of after-the-fact scrutiny as major agencies decisions. Most of the important decisions in an MDL do not result in the entry of judgment, and thus are insulated from immediate appellate review. (As noted, settlement dynamics make it unattractive for litigants to appeal interlocutory decisions when judgment is entered.) In contrast, final agency action is presumptively subject to judicial review under the arbitrary-and-capricious and substantial evidence standards, with “finality” determined through a “‘pragmatic’ approach.”²⁵⁵ This provides parties who believe they have been injured by agency action an opportunity for review before a neutral decisionmaker. Indeed, pre-enforcement review is broadly available when agency action puts regulated parties to a choice between complying with a potentially invalid directive and incurring significant costs.²⁵⁶

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

D. The Rule-of-Law Debate Revisited

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

In fact, the structural features that MDL lacks were crucial to the development of a distinctive “administrative” understanding of the rule of law and played a central role establishing the legitimacy of the modern

²⁵⁵ See 5 U.S.C. §§ 701, 704, 706; *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

²⁵⁶ See *Abbott Labs.*, 387 U.S. at 152.

administrative state. The history of federal administration teaches that, if ad hoc procedure does not threaten MDL's legitimacy, these governance deficits do. Indeed, they are already being exploited by interest groups seeking to "reform" the MDL process for self-interested reasons.

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

1. Conceptual Background

Claims that an institution is violating the rule of law implicate at least two different conceptions of legitimacy.²⁵⁷ On one hand, the argument might be that the institution lacks *legal authority* to take a challenged action. From this perspective, the question is whether the institution's actions are contemplated by authorities recognized as relevant in the relevant legal system. For example, one might ask whether a federal agency has statutory authority to regulate a particular subject. Answering that question requires analysis of the statute that agency invokes as authority for its action, that statute's relationship to other laws that potentially limit or displace the agency's authority, and Congress's constitutional authority to enact the authorizing statute.²⁵⁸

The legal conception of legitimacy, however, has played a minor role in debates over the legitimacy of federal administrative agencies. From the Constitution's earliest days, Congress delegated regulatory authority to executive branch actors under open-ended statutory mandates.²⁵⁹ For example, "statutes establishing the Departments of War and State in the first Congress said little more than that the Secretaries of those departments were to do what the President told them to do."²⁶⁰ The first and second banks of the United States "handled all fiscal matters for the United States Government and, through their requirements for redemption of bank notes in specie, regulated the money supply."²⁶¹

²⁵⁷ See generally Fallon, *supra* note 128.

²⁵⁸ See, e.g., David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665 (2018) (analyzing federal administrative agencies' authority to regulate the use of arbitration).

²⁵⁹ See generally Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1294 (2006).

²⁶⁰ Jerry L. Mashaw, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975, 982 (2010).

²⁶¹ *Id.*

One can of course debate whether, notwithstanding this longstanding practice, Congress has authority to enact broad delegations of regulatory power.²⁶² Yet, because of the breadth of Congress's statutory delegations, attacks on federal administrative agencies have tended to invoke the *sociological* conception of legitimacy. The question from this perspective is whether action is "justified, appropriate, or otherwise deserving of support" apart from the formal legal authority that authorizes it.²⁶³ And as noted above, a key determinant of people's willingness to accept an institution's actions is their perception of its procedural fairness. Again and again, social psychologists have found that people are more willing to view state action as legitimate if that action is perceived to be the product of fair procedures.²⁶⁴

2. The Emergence of "Administrative" Rule of Law

Complaints about this kind of procedural fairness were the core of a mid-century attack on federal administration that is strikingly similar to current attacks on MDL.²⁶⁵ The immediate cause was the growth in federal administration during the New Deal. Beginning with the seventy-third Congress, Congress created scores of new agencies and tasked them with implementing the New Deal and bringing the U.S. economy back from the Great Depression.²⁶⁶ Some New Deal agencies followed essentially the same procedures as courts, but others adopted a corporatist approach that sought to bring methods of business administration to the public sector.²⁶⁷ Critics opposed to the growth of federal administration for political and ideological reasons latched onto anxieties over the fairness of agency procedure to launch a broader attack on the new agencies.²⁶⁸

The attack reached its highpoint in the notorious 1938 report of the American Bar Association Special Committee on Administrative Law authored by former Harvard Law School Dean Roscoe Pound.²⁶⁹ The report took aim at what it termed the "administrative absolutism" of federal

²⁶² See Posner & Vermeule, *supra* note 206.

²⁶³ Fallon, *supra* note 128, at 1795.

²⁶⁴ See Bookman & Noll, *supra* note 27, at 779 (collecting studies).

²⁶⁵ See generally ERNST, *supra* note 201, at 119-28; JOANNA GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 14-58 (2012). See also Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 51-61 (2017); Shepherd, *supra* note 202, pts IV-V.

²⁶⁶ Agencies created during the seventy-third Congress included the Tennessee Valley Authority, the Securities Exchange Commission, the Federal Deposit Insurance Corporation, and the Federal Communications Commission. See CENTER FOR THE STUDY OF DEMOCRATIC INSTITUTIONS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, SOURCEBOOK, <http://www.vanderbilt.edu/csdi/sourcebook.php> (last visited May 24, 2018).

²⁶⁷ See ERNST, *supra* note 201, at 56-75. See also James Q. Whitman, *Of Corporatism, Fascism and the First New Deal*, 39 AM. J. COMP. L. 747 (1991).

²⁶⁸ See ERNST, *supra* note 201, at 133.

²⁶⁹ American Bar Ass'n, *Report of the Special Committee on Administrative Law*, 63 ANNU. REP. A.B.A. 331 (1938). For the background to the report, see ERNST, *supra* note 201, at 121-25.

regulatory agencies. As with modern attacks on MDL, the basic complaint was that agencies were making things up as they went, to the detriment of parties subject to their authority. Thus, the report charged agencies with “tendencies” such as “arbitrary rule making for administrative convenience at the expense of important interests” and “a tendency to decide without a hearing, or without hearing one of the parties.”²⁷⁰ With the New Deal failing to pull the nation out of recession by the close of the 1930s, complaints that agencies were a law unto themselves gained political momentum.²⁷¹

As with MDL, critics of administrative agencies argued that the solution to agency’s “lawlessness” was to subject them to regular procedures. Indeed, in 1941 Congress passed a bill, the Walter-Logan Act, which did just that.²⁷² Fearing that the Act would cripple federal administration, FDR vetoed it.²⁷³

When Congress returned to administrative procedure at the close of World War II, it did not continue on this path. Influenced by the success of public-private collaboration during the war mobilization effort,²⁷⁴ lawmakers and executive branch lawyers settled on a model in which agencies were permitted to develop new procedures provided that they gave interested parties an opportunity to participate in administrative decisions and agency actions were subject to judicial review.²⁷⁵ In 1946, Congress codified this political settlement in the APA, a statute that supplies procedural default rules for “each authority of the Government of the United States.”²⁷⁶

The new statute addressed concerns about arbitrary agency action through new requirements that structured agency decision-making and liberalizing the availability of judicial review. As Joanna Grisinger observes, the statute’s central reforms focused on the formal on-the-record hearings that dominated agency practice at the time the APA was enacted. Under the new law, regulated parties had the right to be notified of pending administrative actions.²⁷⁷ Hearing examiners (later renamed ALJs) were granted statutory job protections and prohibited from receiving certain *ex parte* communications.²⁷⁸

²⁷⁰ American Bar Ass’n, *supra* note 269, at 346, 350. Pound explicitly linked these deficiencies of administrative procedure to the rise of fascism in Europe. As Ernst observes, the report was “a highbrow form of red-baiting.” ERNST, *supra* note 201, at 126.

²⁷¹ See ERNST, *supra* note 201, at 232.

²⁷² Walter-Logan Act, H.R. 6324 § 1(d), 76th Cong. (1939) (directing Supreme Court to promulgate “uniform rules of practice and procedure for the hearing of all claims and controversies between the United States or its governmental agencies and any person”).

²⁷³ 86 CONG. REC. 13,942-43 (1940).

²⁷⁴ See Mariano-Florentino Cuéllar, *Administrative War*, 82 GEO. WASH. L. REV. 1343 (2014).

²⁷⁵ See GRISINGER, *supra* note 265, at 11.

²⁷⁶ 5 U.S.C. § 551(1).

²⁷⁷ 5 U.S.C. § 554(b).

²⁷⁸ 5 U.S.C. § 557(d).

And the statute opened up agency action to judicial review, providing a new cross-cutting right to judicial review.²⁷⁹ These reforms, however, stopped short of subjecting agencies to inflexible procedures. Bringing regulated parties into the administrative process and expanding the availability of judicial review was instead an *alternative* to formalized procedures. As Grisinger writes, “The act protected existing informal procedures, thus allowing cooperative relationships between regulated parties and agency officials to continue. At the same time, it made sure that those same parties had formal tools to challenge administrative action they opposed.”²⁸⁰

This same compromise—rejecting standardized procedures while guaranteeing the accessibility and accountability of the administrative process—informs an important line of cases on notice-and-comment rulemaking. In the 1960s and 1970s, Congress increasingly required agencies to make important decisions through informal rulemaking instead of adjudication.²⁸¹ The APA itself says little about the process for informal rulemaking. Elaborating on the APA’s general terms, courts in “paper hearing” cases obligated agencies to disclose the empirical and analytical bases for their actions, to show that they had considered evidence and argument submitted during rulemaking, and to provide a “reasoned explanation” for their choices.²⁸² Animating these requirements was the belief that a participatory rulemaking process would “not only improve the quality of agency decisions and make them more responsive to the needs of the various participating interests, but is valuable in itself because it gives citizens a sense of involvement in the process of government and increases confidence in the fairness of government decisions.”²⁸³

The model of administrative law that emerged from the APA and judicial interpretations of the statute reflected a distinctive “administrative” rule of law. As Grisinger writes, the APA came quickly to represent “a standard of due process against which other government procedures might struggle to be justified.”²⁸⁴

²⁷⁹ 5 U.S.C. § 702.

²⁸⁰ GRISINGER, *supra* note 265, at 108.

²⁸¹ See Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 188 (1996).

²⁸² See, e.g., *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 251-53 (2d Cir. 1977); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 392-4 (D.C. Cir. 1973); *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 629-31 (D.C. Cir. 1973).

²⁸³ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1761 (1975). See also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 483 (2003) (“[T]he interest group representation model [reflected in paper hearing cases] recreated the administrative process into one that would maximize the satisfaction of popular preferences.”).

²⁸⁴ See GRISINGER, *supra* note 265, at 107. Cf. ERNST, *supra* note 201, at 76 (tracing the administrative rule of law to decisions from the Hughes Court that were carried forward in the APA).

Though far from perfect,²⁸⁵ this understanding contributed importantly to the legitimacy of the federal administrative state. As the scope of federal administration expanded in the post-War decades, agencies such as the SSA enjoyed consistently favorable popularity ratings.²⁸⁶ Agencies' popularity has declined somewhat over the past two decades. But even survey respondents who say they are angry about government gave positive ratings to four agencies or institutions (the military, Postal Service, NASA and Defense Department) in an April 2010 poll.²⁸⁷ Polling from 2015 shows that federal agencies such as the Postal Service, Centers for Disease Control, Department of Health and Human Services, and SSA enjoy double-digits spreads between respondents who view the agency favorably and those who do not.²⁸⁸ Agencies' favorability far outpaces Congress's.²⁸⁹ Many administrative agencies are even viewed more favorably than the Supreme Court, the branch of the constitutional federal government with the highest favorability ratings.²⁹⁰

For rule-of-law theorists like Fuller, the key to agencies' legitimacy was that they performed different functions than common law courts. In *The Morality of Law*, Fuller continued to insist that if "adjudication" is to perform its "true" function, it must follow established rules that give litigants the opportunity to offer proof and argument.²⁹¹ But he now argued "economic management" was not suited for adjudication,²⁹² and that using courts procedures to perform managerial functions was "certain to result in

²⁸⁵ As Richard Stewart observed, a model of administrative law that depends on "interested parties" seeking to shape administrative action is biased in favor of well-organized groups that can coordinate members' activities and invest in influencing administrative action. Stewart, *supra* note 283, at 1713. Their influence on the administrative process has prompted fears of interest group "capture." See generally *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Daniel Carpenter & David A. Moss, eds. 2013).

²⁸⁶ See, e.g., AMERICAN ASSOCIATION OF RETIRED PERSONS, SOCIAL SECURITY 75TH ANNIVERSARY SURVEY REPORT: PUBLIC OPINION TRENDS (Aug. 2010); Sally R. Sherman, *Public Attitudes Toward Social Security*, 52 SOC. SEC. BULL. (1989).

²⁸⁷ THE PEOPLE AND THEIR GOVERNMENT: DISTRUST, DISCONTENT, ANGER AND PARTISAN RANCOR 55 (Apr. 2010). See also GALLUP, TRUST IN GOVERNMENT (last visited Feb. 17, 2019) (finding over the past decade that between 36% (Jan. 2019) and 51% (September 2012) of survey respondents have a "great deal" or "fair amount" of "trust and confidence . . . in our federal government in Washington when it comes to handling" domestic problems), <https://news.gallup.com/poll/5392/trust-government.aspx>.

²⁸⁸ See PEW RESEARCH CENTER, BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT 58 (Nov. 2015) [hereinafter BEYOND DISTRUST]; <http://www.pewresearch.org/wp-content/uploads/sites/4/2015/11/11-23-2015-Governance-release.pdf>.

²⁸⁹ *Id.* at 63 (27% of respondents hold favorable view of Congress compared to 55% for Social Security Administration).

²⁹⁰ See *id.* at 55 (50% of respondents hold favorable view of Supreme Court compared to 55% for Social Security Administration).

²⁹¹ See FULLER, *supra* note 21. *The Morality of Law* was based on a series of lectures given at Yale Law School in April 1963. *Id.* at v.

²⁹² *Id.* at 176 ("As lawyers we have a nature inclination to 'judicialize' ever function of government. . . . Yet me must face the plain truth that adjudication is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources.").

inefficiency, hypocrisy, moral confusion, and frustration.”²⁹³ Fuller thus accepted that, when the scope of state action exceeds the scale of a common law dispute, structural protections other than common law procedure satisfy the rule of law.

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

3. MDL’s Departures from the Administrative Rule of Law

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

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

Just as opponents of federal administration latched onto the “lawlessness” of the administrative process to attack administration in the 1930s and ‘40s, interest groups advancing a deregulatory agenda have latched

²⁹³ *Id.* at 173.

onto the “lawlessness” of the MDL process as a reason to reform it. LCJ, for example, describes itself as a “partnership of leading corporate counsel and defense bar practitioners” that “succeeds by galvanizing corporate and defense practitioners and legal scholars.”²⁹⁴ Its board of directors includes perennial MDL defendants like Merck, Pfizer, and Johnson & Johnson.²⁹⁵ However, the group presents its MDL reform proposals—which are, literally, a defense wish list—as “consensus” solutions to the lack of regular procedure in MDL. In the group’s telling, mandatory disclosure of litigation financing, prohibiting bellwether trials, and the like would “benefit[] *all* stakeholders by providing the same fairness, clarity and certainty that the [Federal Rules] ensure for all other civil cases.”²⁹⁶

The framing is disingenuous, but it reflects an incisive understanding of MDL’s political vulnerabilities. As mid-20th century politicians realized, unfair procedure invites reform. Defenders of the modern administrative state can respond to charges of unlawfulness by noting that, while agencies are indeed laboratories of procedure, their innovation is structured and constrained by the APA’s guarantees of transparency, participation and reasoned decision-making. Those guarantees are missing in MDL.

IV. ADAPTING MDL TO THE ADMINISTRATIVE RULE OF LAW

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

Thus, the question becomes whether MDL can incorporate aspects of the administrative rule of law that have contributed to the legitimacy of the

²⁹⁴ LAWYERS FOR CIVIL JUSTICE, MAJOR INITIATIVES AND CURRENT AGENDA, http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_onepage_overview_january_2018.pdf.

²⁹⁵ LAWYERS FOR CIVIL JUSTICE, 2017 ANNUAL REPORT, 4 http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_annual_report_2017_final_may_1_2018.pdf.

²⁹⁶ RULES 4 MDLS, <https://www.rules4mdls.com/> (last visited Feb. 15, 2019) (emphasis added).

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

Drawing on examples from administrative programs, this Part argues that this tension is best addressed through reforms that would improve the transparency, accessibility, and accountability of the MDL process *at the transferee-court level*. The general model is institutional designs that seek to foster an "internal" separation of powers. Recognizing that many agency functions cannot be controlled through judicial review or political oversight, those structures promote rule-of-law values by arranging internal agency relationships in a way that promotes transparency, participation, and reasoned decision-making.²⁹⁷ In MDL, similar interventions would address the opacity, inaccessibility, and lack of ex post review by restructuring proceedings in the transferee court.

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

A. The Misguided Quest for MDL Rules

An initial insight from understanding that MDL functions as a system of public administration involves proposals to subject it to a regular procedural rulebook. Once one recognizes MDL's administrative pedigree, it is obvious why those proposals are misguided.

For example, the "Rules 4 MDLs" project is premised on the assumption that for MDL to be fair, it must be governed by regular procedures like ordinary litigation. The actual proposals that LCJ has put forward stop short of offering a complete rulebook for MDL.²⁹⁸ But one can imagine what such a rulebook would look like. Rules drafted by the defense bar might require

²⁹⁷ See generally Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

²⁹⁸ See *supra* notes 141-142.

plaintiffs to file individual complaints, direct courts to screen complaints through a *Lone Pine* device early in the lifecycle of a litigation, instruct courts to focus on issues such as general causation that could resolve a large number of claims at once, and allow individual cases to be worked up only after general defenses were resolved. If cases survived these screens, bellwether trials would be prohibited, and cases would be remanded within a defined timeframe. This order of battle would ensure that MDLs were resolved in a fair and predictable manner that minimized opportunities for rent-seeking by plaintiff's leadership.

The difficulty is that this image of litigation is incompatible with section 1407's design. The statute addresses Congress's inability to anticipate the procedures needed to resolve complex disputes by delegating authority, first to the JPML and then to the transferee judge.²⁹⁹ The premise those delegations is that the procedures appropriate to resolve, say, the opioid litigation cannot be defined *ex ante*. If Congress could anticipate the necessary procedures, it could enact them itself.

At least since *Securities Exchange Commission v. Chenery*, the necessity of such after-the-fact lawmaking has been an accepted feature of federal administrative law. In *Chenery*, the Supreme Court addressed complaints that the SEC had abused its discretion by defining fiduciary duties under the Public Utility Holding Company Act of 1935 through adjudication rather than rulemaking.³⁰⁰ The Court rejected the argument, reasoning that—

problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.³⁰¹

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

²⁹⁹ See *supra* text accompanying note 208.

³⁰⁰ 322 U.S. 194 (1947).

³⁰¹ *Id.* at 202.

that apply in MDL cases” ignores this problem and the way that section 1407 addresses it.

B. Structural Reforms

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

1. Transparency

MDL’s first governance shortcoming is its opacity, particularly for transferred plaintiffs and their counsel. Some transferee judges direct lead counsel to develop websites with orders and transcripts.³⁰² But happenings in other MDLs are inaccessible to anyone who is not willing to spend thousands of dollars on PACER fees and court transcripts. Apart from basic case information, information about MDL outcomes is notoriously difficult to obtain. The terms of aggregate settlements are occasionally made public. But there is no apparent rhyme or reason to the disclosure. Settlement designers often choose to keep settlement terms confidential and file their agreements under seal.³⁰³ Data on common benefit fees, claiming rates, and referral fees is filed under seal if it is collected at all.

As transferee judges increasingly recognize, there is no good reason why basic case information should not be made available to parties and the public. Since 1946, the APA has required agencies to make available basic information about their structure and operations. That information includes “statements of the general course and method by which [the agency’s] functions are channeled and determined,” “rules of procedure,” “substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.”³⁰⁴ The APA further provides that “a matter required to be published in the Federal Register and not so published” has no legal

³⁰² See *supra* notes 253-254.

³⁰³ See Burch, *supra* note 10, at 126 & n.286.

³⁰⁴ 5 U.S.C. § 552(a)(1). The Freedom of Information Act of 1966, 5 U.S.C. § 552(a)(2) *et seq.*, imposes a separate obligation to make certain agency records available upon request.

effect unless a party has notice of the matter and is not prejudiced by its non-publication.³⁰⁵

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

Disclosure of outcomes data is a more complicated problem. Agencies are subject to a wide range of statutory reporting requirements, which both shape decision-making and allow it to be policed by Congress.³⁰⁶ No such requirements apply to MDL, but parties may have legitimate interests in keeping settlements confidential. Furthermore, MDL practitioners contend that, without the ability to ensure confidentiality, settlement would be more difficult or impossible.³⁰⁷

The design of a reporting scheme that balances these considerations is beyond the scope of this Article.³⁰⁸ But the current system of essentially random disclosure does not reflect a sustainable long-term equilibrium. Performance monitoring is a basic feature of modern administration; the lack of outcomes data makes such monitoring impossible in MDL.

2. Accessibility

MDL's second broad departure from the structure of modern administration involves the accessibility of its "administrative" process. As described above, the appointment of a leadership structure results in control of the litigation being transferred to court-appointed attorneys. Appointment orders provide varying degrees of protection for non-leads' control of their

³⁰⁵ 5 U.S.C. § 552(a)(1)(E).

³⁰⁶ See generally SAMUEL WORKMAN, THE DYNAMICS OF BUREAUCRACY IN THE US GOVERNMENT: HOW CONGRESS AND FEDERAL AGENCIES PROCESS INFORMATION AND SOLVE PROBLEMS (2015).

³⁰⁷ Herman, *supra* note 250, at 19-21.

³⁰⁸ For an idea of the type of information outcome reporting might cover, see U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, PROCEDURAL GUIDANCE FOR CLASS ACTION SETTLEMENTS (Dec. 5, 2018) <https://www.cand.uscourts.gov/ClassActionSettlementGuidance>. Following approval of a class action settlement, the guidance requires class counsel to provide an accounting that reports, inter alia, the number and percentage of claim forms submitted, the average and median recovery per claimant, the largest and smallest amounts paid to class members, the administrative costs, the attorneys' fees and costs, and the attorneys' fees in terms of percentage of the settlement fund. *Id.*

claims.³⁰⁹ But all accept that appointed leaders are in the driver's seat. This can result in non-leads' exclusion from crucial discussions about the structure and resolution of the litigation. At worst, non-leads complain, that they have no role until their clients are presented with a take-it-or-leave-it aggregate settlement.³¹⁰

The functional parallels between aggregate litigation and public administration have led some scholars to propose that the former incorporate notice-and-comment procedures from public law. For example, Nagareda proposed that an agency such as the Food and Drug Administration be charged with entering a rule that memorialized the terms of an aggregate settlement.³¹¹ As he envisioned it, post-settlement rulemaking would provide a stronger legal basis for restructuring parties' rights and obligations than either class actions or non-class aggregate settlements. Rulemaking would also provide an opportunity for an agency such as the FDA to review and restructure attorney's fees payment, to align attorneys' incentives with the long-term interests of the parties who a settlement bound.³¹²

But notice-and-comment is not the only tool in administrative law's arsenal, nor is it an attractive option for increasing MDL's transparency. A rulemaking at the conclusion of settlement negotiations would suffer from the same limitations as a Rule 23 fairness hearing: an outsider with little information about the bargaining process and the settling parties' resources and risk preferences would be called on to evaluate the fairness of a deal proffered by parties with every incentive to see it approved.³¹³ Earlier comment periods would provide a formal opportunity for non-leads to participate in important litigation decisions. But it is difficult to see how notice-and-comment would map onto decisions involving privileged and confidential information, and even a short comment period would interfere

³⁰⁹ Compare, e.g., Pretrial Order No. 7 ¶ 6, In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, MDL No. 2672 CRB (JSC) (N.D. Cal. Jan. 21, 2016) ("It is intended and expected [that,] to the fullest extent consistent with the independent fiduciary obligations owed by any and all plaintiffs' counsel to their clients and any putative class, that pretrial proceedings shall be conducted by and through the PSC"), with Order No. 12, In re: General Motors LLC Ignition Switch Litigation ¶ I.A.1, No. 14-MD-2543 (JMF) (S.D.N.Y. Sept. 15, 2014) (lead counsel "must . . . determine (after such consultation with members of the Executive Committee and other co-counsel as may be appropriate) and present (in briefs, oral argument, or such other fashion as may be appropriate, personally or by a designee) to the Court and opposing parties the position of the Plaintiffs on matters arising during the coordinated pretrial proceedings").

³¹⁰ See RHEINGOLD, *supra* note 251, § 7:21

³¹¹ See NAGAREDA, *supra* note 238, at 258.

³¹² See *id.* at 261.

³¹³ See, e.g., William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1445 (2005) (judges conducting Rule 23(e) hearings "suffer from a remarkable informational deficit in the fairness-hearing process"); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 808 (1997) ("Perhaps in no other context do we find courts entering binding decrees with such a complete lack of access to quality information and so completely dependent on the parties who have the most to gain from favorable court action.").

with MDL's capacity to resolve litigation in a timely manner. For instance, if the court had provided a standard 30-day comment period in *Deepwater Horizon* before approving the use of pleading bundles, the case would have been delayed for weeks if not months as the structure of the pleadings was debated. Add ten or twenty comment periods during the lifespan of a case, and the already-lengthy MDL process would drag out further.

A better model is provided by statutes that impose duties on designated actors to act for the benefit of statutory beneficiaries. For instance, the Employee Retirement Income Security Act of 1974 (ERISA) provides that a person "is a fiduciary" with respect to a retirement plan if, among other things, "[h]e exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets."³¹⁴ As the Supreme Court has held, an ERISA "fiduciary" is not the same thing as at a fiduciary at common law.³¹⁵ Rather, the statute defines duties specific to the functions that plan fiduciaries perform. Under Title I of ERISA, a fiduciary must "[d]ischarge his duties with respect to a plan solely in the interest of the participants and the beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries, and defraying reasonable expenses of plan administration," and act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."³¹⁶

Leadership appointment orders in MDL already articulate a similar understanding of leaders' duties. As shown above, courts enter those order under FRCPs that give the transferee judge authority to consolidate actions and use special procedures in complex actions. The orders assume that leadership will advance the interests of all consolidated plaintiffs. Implicitly or explicitly, they adopt a model of representation in which leaders are expected to advance the interests of a heterogeneous group of plaintiffs.³¹⁷

But if appointment orders follow a model of representation with parallels in public law, they do not articulate the implications for leaders' authority and duties with anything near the specificity of ERISA. On one hand, attorneys appointed to MDL leadership positions have greater freedom of action than class counsel formally possess. Under the Supreme Court's decisions in *Amchem* and *Ortiz*, a single attorney may not make trade-offs

³¹⁴ 29 U.S.C. § 1002(21)(A).

³¹⁵ *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1993).

³¹⁶ 29 U.S.C. § 1104(a)(1)(A)-(B).

³¹⁷ See *supra* text accompanying notes 72-73.

among class members who seek different, incompatible outcomes from a litigation.³¹⁸ That limitation follows from the model of representation the class action is premised upon: a class representative is only permitted to act on behalf of class members because she “possess[es] the same interest and suffer the same injury” as the class.³¹⁹ In contrast, MDL leadership appointment orders do not assume that plaintiffs want essentially the same thing. Instead, they give leadership limited control over non-leads’ claims to overcome the collective action problems that would otherwise prevent cases from progressing toward resolution. Thus, like an ERISA fiduciary or trustee, MDL leaders have authority to make reasonable tradeoffs among the parties for whom they perform common benefit work. Even the most basic functions performed by leadership—*e.g.*, selecting one case over another as a focus for discovery—require such tradeoffs.

The corollary is that MDL leaders have obligations to *engage* with “class members” that do not apply to class counsel. Without interacting with consolidated plaintiffs, leaders cannot know the nature of their claims, what they hope to accomplish from the litigation, or their capacity to contribute to its prosecution. Accordingly, Elizabeth Cabraser and Samuel Issacharoff observe that in the Deepwater Horizon, Volkswagen, and NFL Concussion MDLs, plaintiffs “contact[ed] class counsel frequently, [made] demands for consumer service, [were] frequently represented by independent counsel, and have points of intermediate organization on Facebook or Twitter that allow[ed] them to function more like a group.”³²⁰ These were “gold plated” MDLs prosecuted by leading plaintiffs’ attorneys. In less prominent cases, non-leads complain that this level of engagement is missing.³²¹

The appropriate policy intervention is to better define leaders’ duties and responsibilities along the lines suggested here. That is, appointment orders should explicitly recognize leaders do not have the same obligations as class counsel and that, because of this, they have heightened duties to engage with plaintiffs for whom they perform common benefit work. In essence, the proposal is to require something like the model of interactive representation that Cabraser and Issacharoff contend already applies in gold-standard MDLs. Like the transparency reforms sketched above, the proposal would

³¹⁸ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999).

³¹⁹ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348–49 (2011) (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

³²⁰ Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 865 (2017)

³²¹ See *Rheingold*, *supra* note 251, § 7:21

ideally be implemented through legislation or rulemaking, though less formal implementation mechanisms could be used in the interim.³²²

There remains the question of remedy: if leaders violate their duty to include non-lead counsel in decision-making, what is the appropriate remedy? Commenters generally assume that violations of leadership's duties will be brought to the attention of the transferee judge who will take corrective action—the procedure followed in the GM ignition switch litigation.³²³ But a better approach might be to route complaints to a special master or an arbitrator identified at the outset of the litigation. Compared to routing complaints to the transferee judge, doing so would provide greater protection for confidential information and less distraction from the central work of an MDL.

3. Accountability

MDL's final departure from the structure of public administration involves the opportunities for ex post review of the transferee judge's decisions. As explained above, the final judgment rule bars appeals of interlocutory case-management decisions.³²⁴ Due to the unique settlement dynamics in large MDLs, those decisions are effectively immune from ex post review, a contrast with the broad availability of judicial review in administrative programs.³²⁵

a. *Ex post review.* – The most obvious policy intervention would be to relax the final judgment rule and allow more interlocutory decisions to be appealed to the court of appeals. Thus, Pollis proposes “a right of immediate appellate review in MDLs from interlocutory orders that raise important issues of unsettled law (or departures from settled law) and that are potentially dispositive of a significant number of the consolidated cases.”³²⁶

³²² The selection of MDL leadership provides another opportunity to open up the MDL process to non-lead counsel and their clients. Elizabeth Burch argues that “judges need to employ truly competitive processes in appointing lead lawyers” as opposed to relying on consensus slates. To accomplish this, Burch recommends that judges elicit information about: (1) counsel's role in past MDLs and the outcomes of those litigations; (2) “structural conflicts” between plaintiffs that are likely to arise in the course of the litigation; (3) plans for financing the litigation; and (4) counsel's relationship with third-party vendors. Burch, *supra* note 10, at 162-63. She proposes that judges appoint steering committees with “five to six members who are not like-minded,” and appoint a special master who can receive objections to attorneys or leadership slates in confidence. *Id.* at 138. Burch's proposals aim to mitigate the agency-cost problems that have preoccupied class action scholarship for decades. By providing an opportunity for consolidated plaintiffs to weigh in the selection of their leaders and furnish information to the transferee court, the proposals also make MDL more accessible to consolidated plaintiffs.

³²³ See, e.g., Silver, *supra* note 79, at 1986; Herman, *supra* note 250, at 13.

³²⁴ See *supra* notes 113-114 and accompanying text.

³²⁵ See *supra* note 256 and accompanying text.

³²⁶ Pollis, *supra* note 26, at 1648.

Others suggest that appeals be allowed in the discretion of the court of appeals.³²⁷

Even proposals to provide discretionary review of interlocutory decisions, however, would have a major disruptive effect on MDL's ability to drive resolutions. In 2018, the median time to resolve an appeal in the federal circuit courts was 8.9 months.³²⁸ The average MDL teams with important interlocutory decisions, from the selection of lead counsel to the award of common benefit fees. Appeals in even a handful of these matters would compromise MDL's capacity to resolve mega-litigation in a timely manner.

Proponents of non-discretionary interlocutory appeals argue that this is the price of civilization; to subject MDL to the rule of law, there must be "meaningful" appellate review.³²⁹ But this conflates the desirability of ex post checks on the exercise of delegated authority with the specific form of ex post review used in ordinary civil litigation. When MDL is understood as a form of public administration, it becomes clear that alternative institutional mechanisms would serve the same function with fewer costs for MDL's capacity to drive resolutions.

One such mechanism would provide for review of transferee judge's decisions by a panel of judges at the *district court* level. As noted above, the Social Security Administration has long maintained an internal appeals process that allows claimants to seek review of adverse decision.³³⁰ The system is more flexible and quicker than judicial review in Article III courts. In recent years, novel analytics programs undertaken by the Social Security Appeals Counsel "have provided information that has led to breakthroughs in how SSA conducts training and gives feedback to staff, which has in turn led to improved productivity and accuracy of work products."³³¹

A simple model of interlocutory peer review in MDL might subject transferee judges' decisions to review by a three-judge panel of other transferee judges. Upon application of an interested party, the panel would have authority by majority vote to reconsider the transferee judge's decisions and exercise all powers of the transferee court. Review would be available for appointment orders, rulings on pre-trial motions, case-structuring decisions,

³²⁷ Perry Cooper, *Consensus on MDL Problems, But Not on Solutions*, BLOOMBERG, June 27, 2017 (quoting Professor Maria Glover's suggestion that the rulemaking committees "import[] the Rule 23(f) discretionary appeal from class action practice into the MDL system to allow for review when the appeals court deems it necessary"), <https://news.bloomberglaw.com/us-law-week/consensus-on-mdl-problems-but-not-on-solutions>.

³²⁸ U.S. COURT OF APPEALS, JUDICIAL CASELOAD PROFILE 2 (2018), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0630.2018.pdf

³²⁹ Pollis, *supra* note 26, at 1645.

³³⁰ See *supra* text accompanying note 219.

³³¹ Ray & Lubbers, *supra* 235, at 1576.

and any other action taken by the transferee judge. But it would not divest the district court of jurisdiction, nor would proceedings be stayed while the review panel completed its work.

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

b. *Settlement review.* – Another intriguing proposal seeks to increase *private* oversight of settlements that emerge from MDL consolidations. Focusing on settlements where plaintiffs appear to be sold out by common benefit counsel, Andrew Bradt and Theodore Rave propose that judges publicly opine on the fairness of non-class aggregate settlements.³³² According to Bradt and Rave, “[t]he MDL judge just needs to force the disclosure of enough information so that the individual claimants can decide for themselves whether their lawyers are doing a good job at protecting the claimants’ interests.”³³³

At first glimpse, the Bradt/Rave proposal seems to address one of the most glaring governance deficits in MDL. The decision to accept or reject an aggregate settlement is one of the few junctures at which leadership's decisions are put to a market test. Yet as Bradt and Rave observe, parties who have not been actively involved in the prosecution of the action often lack sufficient information to make an informed decision about whether to take the settlement. The proposal aims to provide a richer information base for non-lead counsel and plaintiffs they represent to decide whether to participate in aggregate settlement. In so doing, the proposal promises improved oversight of leadership's work.

But these benefits are only as strong as the advice that the transferee judge renders, and it is not likely to be good. To see why, one can divide settlements into two categories: (1) those where the district judge plays an active role in settlement negotiations, and (2) those where the judge is not involved in settlement negotiations but is asked to facilitate a deal that was negotiated by an MDL's leadership.³³⁴

In type 1 settlements, the incentives for the judge to serve as a trusted “information intermediary” are not present. Where a managerial judge pushes parties to settle, the Bradt/Rave proposal puts the judge in the position of

³³² Bradt & Rave, *supra* note 28.

³³³ *Id.* at 1298.

³³⁴ These categories are of course points on a spectrum, not mutually exclusive alternatives.

evaluating her own work product. Having driven the settlement, the judge is unlikely to decide that it is fatally flawed.

In contrast, the judge in a type 2 settlement does not sit in judgment of her own work. But she faces the same information deficit that has frustrated judicial review of class action settlements for decades.³³⁵ A judge who did not participate in settlement negotiations has not seen client inventories and damages models. She is not privy to the financial position of the parties and their attorneys. She does know their preference or tolerance for risk. In short, the reviewing judge approaches the settlement from the same perspective as an informed outsider like a law professor or professional objector. She can evaluate the settlement's general features but depends on leadership to explain its logic.

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

C. The Question of Statutory Authority

The reforms sketched in the preceding section would bring MDL closer to the structure of administrative programs where a delegate devises novel procedures to overcome problems that could not be addressed through ex ante lawmaking. Yet even if policymakers implemented all of these reforms, MDL remains subject to a more fundamental criticism: that transferee judges exceed the authority granted by section 1407 and the Federal Rules.³³⁶ This is a different and more basic objection than the complaint that MDL's structure is inconsistent with the "administrative" rule of law. The objection is not that the system operates unfairly but that it is *ultra vires*.

³³⁵ See *supra* note 313.

³³⁶ See Mullenix, *supra* note 133, at 553 (lawyers manipulate MDL "to accomplish ends the mechanism was never intended to perform"); Redish & Karaba, *supra* note 132, at 132 (MDL consolidation was "originally envisioned as a temporary transfer to facilitate convenience and avoid duplicative discovery" but has become a "black hole"); *id.* at 154 ("[W]hile MDL promises respect for the individual day in court, it delivers only a 'Wild West' form of rough group justice, on the court-appointed steering committee's terms.").

Like the administrative programs it emulates, however, MDL draws upon broad delegations of statutory authority. Section 1407 provides that the JPML may transfer cases pending in different district courts to a single court “for coordinated or consolidated pretrial proceedings.”³³⁷ Pursuant to the Rules Enabling Act, the scope of “pretrial proceedings” in the transferee court is defined by the FRCPs.³³⁸ The Rules, in turn, expressly authorize district courts to control the timing and scope of motion practice discovery,³³⁹ to dispose of cases through motion practice and settlement,³⁴⁰ and to manage their trial calendar.³⁴¹ Furthermore, Rule 16 authorizes the district court to “adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.”³⁴²

These authorities authorize many of the practices that critics contend are ultra vires. First, they authorize the case-by-case procedural development that this Article has argued defines modern MDL. This point was central to the Fifth Circuit’s decision in *Center for Biological Diversity v. BP American Production Co.*, which upheld the use of pleading bundles in the *Deepwater Horizon* litigation.³⁴³ There, the appellant argued that the MDL court’s refusal to create a separate pleading bundle for its claims violated the citizen-suit provisions of three federal environmental statutes, and “resulted in a *de facto* dismissal of those claims.” Quoting Rule 16, the court of appeals answered that “[t]he Federal Rules of Civil Procedure specifically contemplate that in complex matters the district court may adopt ‘special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.’”³⁴⁴ The litigation “present[ed] an exceedingly complex matter, consisting of hundreds of individual cases and tens of thousands of claimants.” The court concluded: “In the face of this daunting litigation, and given the ‘broad grant of authority’ to the district court, we perceive no error in those aspects of the court’s management of the MDL that are involved in this case.”³⁴⁵

³³⁷ 28 U.S.C. § 1407(a).

³³⁸ 28 U.S.C. § 2072(a) (authorizing Supreme Court “to prescribe general rules of practice and procedure . . . for cases in the United States district courts,” and prohibiting rules from infringing “substantive rights”).

³³⁹ See, e.g., FED. R. CIV. P. 12(i), 16(a).

³⁴⁰ See, e.g., FED. R. CIV. P. 12, 16, 41, 56.

³⁴¹ FED. R. CIV. P. 40.

³⁴² FED. R. CIV. P. 16(c)(3)(L).

³⁴³ 704 F.3d 413 (5th Cir. 2013).

³⁴⁴ *Id.* at 432.

³⁴⁵ *Id.*

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

Second, MDL’s enabling statutes authorize the common practice of “managing to resolution”—i.e., retaining jurisdiction over transferred cases until it is clear that the MDL is incapable of resolving transferred cases. To be sure, section 1407’s remand clause provides that transferred actions “shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.”³⁴⁶ But it defies logic to say that a clause that explicitly recognizes the possibility that a transferred action “shall have been previously terminated” opposes pre-trial resolution.

If complaints about courts’ exercise of ultra vires authority generally miss the mark, the exception is practice of awarding common benefit fees to MDL leadership. From the early days of MDL, transferee courts recognized that they would need to appoint lead counsel to overcome collective action problems in cases with hundreds or thousands of parties.³⁴⁷ But there is no authority in section 1407 to rewrite contingent-fee contracts,³⁴⁸ and the allocation of attorney’s fees is almost certainly “substantive” for purposes of the Rules Enabling Act, taking the issue out of Rule 16.³⁴⁹ As Geoffrey Miller and Charles Silver show, equitable doctrines that courts have invoked to reallocate attorney’s fees are a shaky foundation for the practice.³⁵⁰

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

³⁴⁶ 28 U.S.C. § 1407(a).

³⁴⁷ See *In re Air Crash Disaster*, 549 F.2d 1006, 1013 (5th Cir. 1977).

³⁴⁸ See Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and A Proposal*, 63 VAND. L. REV. 107, 120 (2010) (“The MDL statute says nothing about fees.”)

³⁴⁹ See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 269 (1975) (modification of the American rule of attorney’s fees a “policy matter that Congress has reserved for itself”). For the point that the Rules Enabling Act’s substance/procedure dichotomy allocates power between Congress and the courts, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106 (1982).

³⁵⁰ Silver & Miller, *supra* note 348, at 120-21. *But see* Burch, *supra* note 10, at 147-48 (arguing that quantum meruit principles authorize the award of common benefit fees under certain conditions).

CONCLUSION

In recent years, it has become common for litigation crises to be resolved through billion-dollar settlements that resulted from MDL consolidations.³⁵¹ As MDL developed into a powerful mechanism for enforcing state and federal regulatory policy, critics charged that its ad hoc procedure was incompatible with the rule of law. If accurate, those charges would mean that a central and increasingly important component of the federal court system is illegitimate. But attacks on MDL misconceive what it is. In terms of statutory objectives, institutional design, and the way it operates, MDL is best understood as a form of hybrid public administration that mixes tools of ordinary civil litigation with tools of public administration. As such, MDL is properly evaluated through the lens of the “administrative” rule of law that evolved in the decades following World War II and which underpins the legitimacy of the modern administrative state.

Approaching MDL as a form of public administration does not eliminate concerns about its compliance with the rule of law. But it shows that critics’ focus on MDL’s ad hocery is misplaced. The greatest threat to MDL’s legitimacy is the absence of structural features—guarantees of transparency, participation, and ex post review—that played a key role in building popular and legal support for the modern administrative state. Whether MDL continues to be the preeminent forum for addressing intractable legal problems depends in large part on whether it is able to incorporate those features.

³⁵¹ See, e.g., David Shepardson, *U.S. Appeals Court Upholds Volkswagen’s \$10 Billion Diesel Settlement*, REUTERS (July 8, 2018), <https://www.reuters.com/article/us-volkswagen-emissions/u-s-appeals-court-upholds-volkswagens-10-billion-diesel-settlement-idUSKBN1JZ21G>; *Federal Judge Approves NFL Concussion Settlement*, ASSOCIATED PRESS, July 7, 2014, <http://www.nfl.com/news/story/0ap2000000363672/article/federal-judge-approves-nfl-concussion-settlement>.