

REORIENTING THE PROCESS DUE: USING JURISDICTION TO FORGE POST- SETTLEMENT RELATIONSHIPS AMONG LITIGANTS, COURTS, AND THE PUBLIC IN CLASS AND OTHER AGGREGATE LITIGATION

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The 1966 revision of Rule 23 has shaped our political and legal imagination. Building on the 1950 ruling of Mullane v. Central Hanover Bank and Trust Company, which approved the possibility of binding absentees nationwide through representative litigation, Rule 23 expanded the groups eligible for class treatment. Aggregation responded to felt social needs—for banks to pool trusts, school students to enforce school desegregation injunctions, and consumers to pursue monetary claims too small to bring individually.

Key to the legitimacy of doing so for Rule 23's drafters was "the homogeneous character" of claims, permitting an identity of interests between the representative and absent members of the class. The 1966 Rule 23 put judges in charge twice: first, to determine the shape of the class and the adequacy of the representation and second, if a compromise was proposed, to assess again whether representative plaintiffs had proffered a fair and adequate resolution.

Rule 23 gave a limited role to absentees, many of whom were in mandatory classes from which no exit was possible. Added on late in the drafting was a mandate to provide notice at the outset that class actions were pending. That notice was required only for a subset of cases; individuals with monetary stakes were given formal opportunities to "opt-out"—even if, as a practical matter, individual lawsuits were not likely feasible.

While not producing a mass of opt-outs, notice requirements have pushed the processes of class actions into the public realm. Class actions gained a visibility not only because of the stakes and the judicial decisions on certification and settlement but also through mass mailings that brought the idea of class actions into the homes of millions of potential beneficiaries of lawsuits.

Aspirations and utility thus combined to reframe constitutional understandings of the "process due" by legitimating the authority of courts to deal in the aggregate

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without individuals affirmatively consenting to participate when cases began. But what fifty years of experience with class actions and related forms of aggregation—including multi-district litigation (MDL) and bankruptcy—have made plain is that an aggregate litigation’s life-span often continues after settlement or trial. New information can emerge about difficulties in effectuating relief, as can conflicts among claimants, whose “homogeneous character” may diminish after resolution. Thus, aggregate litigation in practice has come to have three phases—certification, resolution by settlement or trial, and implementation of remedies.

Critics of class actions, aiming to disable their use, rely on problems of implementation to argue against certification at the outset, and they invoke due process rights of both defendants and absent plaintiffs. A new law of due process is also emerging in the arena of personal jurisdiction—as the Supreme Court circumscribes the ability of courts to decide claims involving non-resident defendants. I bring that doctrine into discussions of class actions, first because the Supreme Court expanded the ability to aggregate litigants in 1950 through expanding jurisdiction and second because the Court’s decisions reflect unease with adjudicative authority not founded on relationships among the forum and those whose rights are decided. The concern about ensuring that defendants are “at home” parallels class action notice, as both seek forms of affiliation between litigants and the jurisdictions deciding their rights.

The Supreme Court has used its new personal jurisdiction law to circumscribe the scope of courts’ reach. Here I propose to borrow its concerns for the opposite purpose—to build affiliations so to expand the authority of courts during aggregation’s third phase. Aggregation’s pooling of resources has new importance today, as tens of thousands of civil litigants appear in state and federal courts without lawyers. Revising its practices is one way for democratic polities to help all classes of persons have access to court-based remedies.

In 1950 in Mullane, the Supreme Court approved what has been called “jurisdiction by necessity” to license state courts to determine the rights of all claimants when lawsuits had a nexus with the forum and notice was provided. In this century, the Court should likewise recognize the necessity of giving judges jurisdiction to oversee aggregation post-settlement so as to monitor implementation, respond to conflicts, and assess distributional equities. And, just as the 1966 Rule drafters turned to notice as a means of doing “something” to connect litigants with courts, notice can again be put to work during aggregation’s third phase to provide the “publicity” (to borrow from Jeremy Bentham) that makes connections possible and that forces the practices of courts, lawyers, and auxiliary personnel before the public.

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I

THE PUZZLES OF LEGITIMATING COURTS' RELATIONSHIPS
TO LITIGANTS: CLASS ACTIONS, NOTICE, AND
PERSONAL JURISDICTION

“The question whether a binding class action is proper must not become tied in mechanical fashion to the question whether notice has been given; the grand criterion for a class action remains the homogeneous character of the class.”

—1962 Memorandum from the Reporters to the Advisory Committee Revising the Federal Rules of Civil Procedure¹

¹ (Preliminary Memorandum) Modifications of the Provisions for Class Actions, appended to Tentative Proposal to Modify Provisions Governing Class Actions—Rule 23, at EE-11 n.5 (dated in Congressional Information Services (CIS) compilation as May 28–30, 1962) [hereinafter Tentative Proposal and Modifications Class Action, May 1962], at CIS No. CI-6309-44. The memorandum was referenced in a related memo, “Class Actions—Some Further Thoughts,” which has a handwritten note “August 1962,” at its top; the Further Thoughts memo noted that the Modifications memo had been provided in advance of the May 28–29, 1962 meeting of the Advisory Committee of Civil Rules, drafting Rule 23. *See* Class Actions—Some Further Thoughts 1 (Aug. 1962) [hereinafter Class Actions—Some Further Thoughts 1962], from the papers of Professor Kaplan archived in the Historical and Special Collections of the Harvard Law Library, at Box 75, folder 5 in the Benjamin Kaplan Papers, 1939–2010, at the Historical and Special Collections of the Harvard Law Library [hereinafter Kaplan Papers].

A word on sources is thus in order. The Harvard Law Library’s finding guide, entitled “Kaplan, Benjamin. Papers, 1939–2010: Finding Aid,” is available at: <http://oasis.lib.harvard.edu/oasis/deliver/~law00250>. References are to materials in specific boxes and, when available, the subfolders. Many of the memos are not signed; several use the term “we”; a few have both reporters’ initials or names noted at the outset, and some reference the Reporter’s memo (singular). Kaplan was the Reporter and Professor Al Sacks the Associate Reporter to the Advisory Committee on Civil Rules, which developed the revisions to Rule 23 (as well as to several other rules). Kaplan is assumed to be the primary author of materials on Rule 23 because he was the principal reporter; his correspondence to committee members as well as a transcript of a meeting in 1963 recorded that he took the lead in many exchanges; Sacks is known for having been intensely involved in revising discovery rules, and Kaplan published articles after 1966 about Rule 23. I have reviewed some but not all of the materials in the archive from Professor Sacks, *see* Sacks, Albert, Papers, 1915–1991: Finding Aid, Harvard Law Sch. Library, <http://oasis.lib.harvard.edu/oasis/deliver/~law00259> (last visited July 24, 2017), which makes plain that he participated in some aspects of the Rule 23 revisions. Therefore, I have referenced the memos as from the Reporters and explained the sources and the dates.

In addition to the Kaplan and the Sacks papers, other resources on rulemaking are also publicly available, albeit some behind pay walls; for example, the Administrative Office of the U.S. Courts (AO) has posted a subset of materials from the Rules Committees on its website, including rules suggestions and comments, committee reports, and meeting minutes. Records and Archives of the Rules Committees, Admin. Office of the U.S. Courts, <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees> [<https://perma.cc/JV59-CAMD>].

I have also reviewed unpublished materials located in boxes housed in the late 1980s, warehoused in a facility in Maryland, and archived in the National Records Center as Record Group No. 116, Accession No. 82-0028. Thereafter, the Congressional Information

The 1966 revision of Rule 23 has shaped our political and legal imagination. The Rule's structure transformed the potential for courts to issue binding judgments precluding subsequent litigation. The Rule's impact can be found across the litigation docket, from injunctions governing schools and prisons to distributions of damages for oil spills, fuel emissions, and harmful drugs. The pattern has become familiar, with motions to certify and to settle class actions dotting the news and the case reports, along with class-action notices regularly delivered by the U.S. Postal Service or electronically to the homes of millions of people.

Yet, as reflected in the epigraph from a 1962 memo written to the Rule drafters, today's assumption that individual notice is at the heart of the constitutionality and legitimacy of class actions was not the focal point of exchanges in the early 1960s as the Rule was crafted. Archived materials from Harvard Law School Professors Benjamin Kaplan (the Reporter to the Advisory Committee and the principal drafter of the Rule) and Al Sacks (the Associate Reporter) include exchanges debating what kind of classes ought to be authorized, when and how to let anyone know about the pendency of representative actions, and how judges should relate, if at all, to absentees.

Moreover, as promulgated in 1966 and as in effect today, Rule 23 neither requires notice at the front-end to members of all classes nor addresses the question of whether notice is required if cases go to trial, rather than settle or be dismissed. Further, Rule 23 falls silent once settlements have been approved. The Rule places no obligations on parties to inform judges or the public about the results of settlements, in terms of the implementation of whatever remedies are required, nor for judges to be in contact with the litigants affected.

These lacunae are at the center of this essay—exploring the remarkable success of Rule 23 in creating new relationships among litigants and courts and arguing the need to do more. Rule 23 confirmed that courts could, constitutionally, decide about the rights of absent, as well as present, litigants. To do so, the rule-drafters saw that

Service (CIS) put some of the National Archive Records on microfiche that libraries can obtain. These records are indexed in a volume entitled *Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935–1988*. For each item listed by name, the index provides an ID number. For example, materials are identified as CI-7003 to indicate the card number on which the material can be found (i.e., the roll of microfiche), and -03 to identify the specific frame. See *RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988*, at ix (“User Instructions”). CIS provides dates for specific items or by group. *Id.* I have also used some research materials provided by Andrew Bradt of some materials from the papers of Dean Phil C. Neal, who helped to shape multidistrict litigation (MDL) and which are archived at the University of Chicago.

problems of legitimacy could be solved by court superintendence during two phases—when classes were certified and if classes were settled. Thus, the rule dispatched judges to assess facets of whether a group cohered—numerosity, typicality, and commonality, as we have come to call the first three criteria of Rule 23(a).² The fourth prerequisite was adequacy of representation, requiring an inquiry into the named representatives' relationship to class members to assure that no conflicts of interests existed and that lawyers had the resources and knowledge to work well on behalf of the class. As is also familiar, the Rule then charged judges with determining whether, if these prerequisites were met, class membership would be mandatory under 23(b)(1) and (2) or optional, with formal rights of exit via 23(b)(3).³

Here, I preview the argument to come by sketching the varied relationships among aggregation, jurisdiction, participation in lawsuits, notice, legitimacy of court decisions, and ideas about the process due. A first point is that aggregation, enabling economies of scale for a variety of claims, has become normatively acceptable across the litigation spectrum—even if its pervasive impact has sparked a host of efforts to derail it.

Second, anchoring the ordinariness of aggregation required rethinking the relationships between courts and litigants and revising ideas about what process was due. As reflected in the archival materials on the options under consideration between 1962 and 1966 when Rule 23 was formulated, the indeterminacy of due process law at the time meant that various routes seemed to be plausibly constitutional methods of binding absent individuals through representative litigation. Rather than looking at these archives for the “drafters’ intent,” my interest is in their puzzles and inventions. Positing that judges could identify groups sharing common interests, the drafters did not focus on how to address conflicts *within* classes after settlement, when remedies were to be implemented. Centered on classes based on the “homogeneous character of the class,”⁴ the drafters gave judges the task of overseeing the adequacy of representation at two points in time—certification and settlement.

The 1966 class action rule revisions also reflected a growing awareness that the egalitarian promise of a “day in court” could not, absent different forms of litigation subsidies, welcome individuals across the economic spectrum. Yet to use aggregation as a means of supporting access to courts entailed attenuating individual participa-

² See FED. R. CIV. P. 23(a), reprinted in 39 F.R.D. 69, 95–96 (1966).

³ See FED. R. CIV. P. 23(b)(3)(c), (d), reprinted in 39 F.R.D. 69, 96–98 (1966).

⁴ Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at E-11, n.5.

tion in a lawsuit, which had been the predicate relied upon to legitimate the imposition of a court's judgment. Fierce in seeing the "necessity" for court action,⁵ Rule 23's drafters relaxed expectations of individual participation; they were confident in their self-described "paternalistic" faith that judges could identify "homogeneous" claims appropriate for joint resolution.⁶

Individual participation was not their core concern; identity of interest was. The drafters referenced the 1940 decision of *Hansberry v. Lee*, which made plain both the potential to bind absentees and the need to ensure adequate representation based on an identity of interests.⁷ Further, Rule 23's drafters thought that, at least as a matter of "common decency," even if courts did not need absentees' participation, people should be told that their rights were being resolved.⁸ They turned to the "gesture" of notice to provide some connection between courts and those who were to be subjected to their judgments. Yet the drafters also understood that pressures to be part of class actions would be significant, perhaps constituting "compulsion."⁹ What people might do upon receipt of notices was not much in focus, in part because of the drafters' hope that if "solidarity of interest" was strong,¹⁰ and if the judges were wise, the right results would be patent.

Third, those of us who have never lived outside Rule 23's umbrella may undervalue how creative the Rule was in bringing into being new legal relationships among class members, their counsel, the public, and courts—played out in tens of hundreds of lawsuits.¹¹ People who did not know each other and whose only commonality

⁵ The term "jurisdiction by necessity" comes from George B. Fraser, Jr., *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305 (1951). See *infra* notes 87–106 and accompanying text for a discussion of *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

⁶ Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-11, n.5.

⁷ 311 U.S. 32 (1940).

⁸ Modification of Rule 23 on Class Actions, CI-6313-56, at EE-5 (1963) [hereinafter Modification of Rule 23, 1963] and at Kaplan Papers, Box 79, Folder 4 (quoting ZECHARIAH CHAFEE JR., SOME PROBLEMS OF EQUITY 230 (1950)). Chafee's discussion of "common decency" was also cited in the memorandum, Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-9 to EE-10, and repeatedly in the Advisory Committee's note to the 1966 amendments to Rule 23. See *infra* notes 74–84 and accompanying text.

⁹ Class Actions—Some Further Thoughts 1962, *supra* note 1, at Box 75, Folder 2, at 10.

¹⁰ Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 376 (1967).

¹¹ Accurate data on the numbers of certified, as well as of proposed class actions, are not available. See Deborah R. Hensler, *Happy 50th Anniversary, Rule 23! Shouldn't We Know You Better After All This Time?*, 165 U. PA. L. REV. (forthcoming 2017).

might be that they purchased the same product gained legal identity as a cohort advancing claims in court. The class became a litigating entity, able to produce binding outcomes for a host of diverse individuals.¹² As judges interrogated the quality of representation when certifications and settlements were challenged, judges became deeply enmeshed in validating class actions and came to understand themselves as “fiduciaries” for absentees.

For cases involving monetary relief, notice became the vehicle for disseminating information about the pendency of the claim. And while not producing a mass of opt-outs, the millions of mailed notices helped—along with the stakes of the cases and courts’ decisions—to put class actions on the front pages of newspapers and into the public sphere.

This new approach to due process became conventional wisdom. The legitimacy that class actions had gained was underscored in 2008, when the Supreme Court in *Taylor v. Sturgell* rejected a common law doctrine of “virtual representation” through which one individual lawsuit could preclude another, based on the overlap between parties.¹³ The details merit recounting because the two plaintiffs had more in common than members of many class actions. The plaintiff in the second lawsuit, Brent Taylor, had served as the president of the Antique Airplane Association,¹⁴ as had the plaintiff, Greg Herrick, in the first lawsuit. The same lawyer filed both cases,¹⁵ based on the Freedom of Information Act (FOIA).

Both lawsuits sought the design for an F-45, a “vintage model” airplane manufactured in the 1930s by the Fairchild Engine and Airplane Corporation.¹⁶ Herrick lost on the grounds that the 1930s plans had regained their trade secret status after the company had objected to disclosure by the Federal Aviation Association in the 1950s.¹⁷ The

¹² See generally David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998). Why and when to pierce the concept of the class as an entity and consider its function as an “aggregation” of individuals is discussed *infra* note 31 and accompanying text.

¹³ See *Taylor v. Sturgell*, 553 U.S. 880, 904 (2008).

¹⁴ *Taylor v. Blakey*, No. 03-0173, 2005 WL 6003553, at *1 (D.D.C. May 12, 2005).

¹⁵ The attorney listed as counsel of record, Michael John Pangia, had represented Herrick as well. *Herrick v. Garvey*, 200 F. Supp. 2d 1321, 1322 (D. Wyo. 2000).

¹⁶ *Sturgell*, 553 U.S. at 885–86.

¹⁷ *Herrick v. Garvey*, 200 F. Supp. 2d 1321, 1328–29 (D. Wyo. 2000). The *Herrick* case had argued that 1955 materials from the manufacturer had authorized public disclosure of documents that it had submitted to the government when initially obtaining manufacture and sale permission from the Civil Aeronautics Authority, the predecessor to the Federal Aviation Administration (“FAA”). *Sturgell*, 553 U.S. at 886–87. The district court commented that “only sixteen” of the F-45 planes were ever built. *Herrick*, 200 F. Supp. 2d at 1323. That court noted that the documents had not in fact been released and further, that reasserting the private right reversed its waiver. *Id.* at 1329.

Tenth Circuit affirmed and declined to reach the legal questions, raised belatedly, of whether trade secret status could attach after a FOIA request was made or could be “restored” and, if so, how and when.¹⁸

Taylor filed in the District of Columbia and argued that the 1930s plans were no longer protected as trade secrets.¹⁹ Taylor lost at the district and circuit levels on the grounds that Herrick had been his “virtual” representative, sharing “the same incentive” to obtain disclosure.²⁰ The D.C. Circuit thought that without preclusion, “tactical” manipulation by a second litigant would permit “multiple bites of the litigatory apple.”²¹

The Supreme Court disagreed; professional connections and friendship, shared lawyers, documents, and the same goal of disclosure were not the proper bases on which to preclude Taylor from going forward.²² Herrick and Taylor had no formal relationship—generated through legal categories of relationship or through notice of proceedings—that licensed preclusion. Yet, while rejecting “virtual” representation despite these multiple points of overlap, the Court reiterated the variety of ways in which individuals *could be precluded*, despite not being named as parties.²³ That list included contracts that authorized representation; factual control over a lawsuit that resulted in practical participation; and a variety of relationships created through law by rules or statutes, such as assignee and assignor, proxies and actors in privity, and class actions, trusteeship, and bankruptcy.²⁴

Taylor v. Sturgell is thus one of many Supreme Court decisions since the 1970s illustrating the acceptance of class actions *as a form*, even as some of the Court’s rulings have rejected its use in particular cases.²⁵ Indeed, despite the 1966 Advisory Committee commentary explaining that mass torts were generally not appropriate for class

¹⁸ *Sturgell*, 553 U.S. at 887; see *Herrick v. Garvey*, 298 F.3d 1184, 1194 n.10 (10th Cir. 2002).

¹⁹ *Blakey*, 2005 WL 6003553, at *1–2.

²⁰ See *Taylor v. Blakey*, 490 F.3d 965, 972 (D.C. Cir. 2007); *Blakey*, 2005 WL 6003553, at *6.

²¹ *Blakey*, 490 F.3d at 975 (internal quotation marks omitted).

²² *Sturgell*, 553 U.S. at 905–07. As I have noted elsewhere, FOIA could also be read as creating individual rights that would support another basis for refusing preclusion. See Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers’ Powers*, 79 GEO. WASH. L. REV. 628 (2011).

²³ *Sturgell*, 553 U.S. at 892–96.

²⁴ *Id.*

²⁵ See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). See generally Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

treatment, aggregate tort litigation has since become commonplace.²⁶ One means of doing so has been through the multidistrict litigation (MDL) statute,²⁷ enacted in 1968, two years after the new Rule 23 was promulgated. That statute requires the Judicial Panel on Multidistrict Litigation to assess whether its criteria for pre-trial aggregation are met (“civil actions involving one or more common questions of fact . . . pending in different districts”).²⁸ The Administrative Office of the U.S. Courts tracks cases consolidated under MDL; as of the fall of 2015, almost forty percent of pending federal civil cases were part of MDLs, clustered before a single federal judge to whom cases were consolidated for pre-trial proceedings.²⁹ When moving from the level of an MDL to the cases within, mass torts represented more than ninety percent of the pending MDL cases.³⁰

Fourth, even as rules, case law, and statutes structure aggregation, fifty years of its use has made plain that “solidarity of interest” is a complex concept. Whether litigants are seeking injunctions to desegregate schools or damages for torts, the “homogeneous character” of a class can decline, as remedies are crafted and allocated. For critics, disuniformity of interests, coupled with the emotive image of individual rights to a “day in court” and the uneven successes (and, at times, failures) of distributing remedies, have been the hooks upon

²⁶ For more discussion of the shift in attitudes toward mass torts, see Judith Resnik, “Vital” Interests of the State: From Collective Actions for Fair Labor Standards and Pooled Trusts to Class Actions and MDLs in the Federal Courts, 165 U. PA. L. REV. (forthcoming 2017) and Judith Resnik, From “Cases” to “Litigation,” 54 LAW & CONTEMP. PROBS. 5, 21–22 (1991) [hereinafter Resnik, From “Cases” to “Litigation”].

²⁷ Pub. L. No. 90-296, 82 Stat. 109 (Apr. 29, 1968), now codified at 28 U.S.C. § 1407 (2012).

²⁸ 28 U.S.C. § 1407(a).

²⁹ Specifically, 132,788 cases out of 341,813 pending cases were in MDLs. See U.S. JUDICIAL PANEL ON MULTIDIST. LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2015, at 5, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2015_0.pdf [<https://perma.cc/5BDY-W9SJ>]; ADMIN. OFFICE OF THE U.S. COURTS, TABLE C-1: U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, TERMINATED, AND PENDING DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2015 (2015), http://www.uscourts.gov/sites/default/files/data_tables/C01Sep15.pdf [<https://perma.cc/6UXT-YNWP>] (both data sets are from the year ending September 30). The data might be differently broken down, for example, by carving out the large number of cases in certain MDLs (such as the seven transvaginal mesh MDLs, with more than 70,000 cases as of 2015, in the Southern District of West Virginia), or by comparing the length of time during which MDLs are pending, as compared to individual cases.

³⁰ The data are based on materials provided for use by Professor Samuel Issacharoff. See Samuel Issacharoff, Snapshot of MDL Caseload Statistics 2 (Oct. 8, 2015) (presentation at Duke University School of Law).

which to hang efforts to bar aggregates.³¹ Such arguments against class actions are often framed as problems of due process.

Fifth, the Supreme Court's law on personal jurisdiction needs to be linked to discussions of class actions because the underlying concerns—the legitimacy of courts' authority to bind litigants—are parallel. A willingness to expand jurisdiction over non-residents was part of the history of aggregation's development. In 1950, in *Mullane v. Central Hanover Bank & Trust Co.*, when the Court approved the authority of New York to settle accounts in pooled trusts regardless of where beneficiaries resided, the Court did so by relaxing constraints of personal jurisdiction law.³² As a commentator explained a year thereafter, personal jurisdiction was no longer “based on power alone”; rather, “[f]airness to both parties” was becoming the “major consideration.”³³

The fairness approach had by then gained traction under the 1945 decision in *International Shoe Co. v. Washington*, which tasked judges with assessing the contacts of an absent defendant to a forum sufficed to make the exercise of jurisdiction “fair and just.”³⁴ In more recent decades, and despite Justice Brennan's efforts to answer that question by having personal jurisdiction rest on the relationships among a forum, the litigants, the cause of action, and the defendants,³⁵ the Supreme Court has insisted on a narrower approach, focused on defendants' voluntarily affiliating with a forum.³⁶

In the twenty-first century, participation by non-resident defendants in a forum³⁷ (described as whether a defendant is “at home” in a particular jurisdiction³⁸) has become the touchstone for this body of substantive due process law. When curbing “judicial power” to hale defendants into court, the Court has explained its concerns as a mix

³¹ One example is the proposed Fairness in Class Action Litigation Act of 2017. H.R. 985, 115th Cong. (2017). The bill is discussed *infra* notes 185–89 and accompanying text.

³² See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

³³ Fraser, *supra* note 5, at 319.

³⁴ 326 U.S. 310, 316 (1945).

³⁵ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299–313 (1980) (Brennan, J., dissenting).

³⁶ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (White, J., opinion of the Court).

³⁷ See Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987).

³⁸ See *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1776 (2017) (citations omitted); *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). See generally Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L.J. 1161 (2015).

of the need to respect other states' "sovereignty" and "individual liberty."³⁹

Due process concerns about affiliations between litigants and courts can also be found in the law governing non-resident class action members. The Supreme Court's 1985 ruling in *Phillips Petroleum Co. v. Shutts* insisted on a nexus between absent plaintiffs seeking damages and the courts that would rule on their rights in the aggregate.⁴⁰ However, unlike the 1950 ruling in *Mullane* in which the Court held N.Y. State had to provide notice to beneficiaries but not offer exit rights,⁴¹ the *Shutts* Court concluded that the Constitution required giving absent plaintiff class members the opportunity to exclude themselves. But like Rule 23(b)(3), affirmative individual consent was not required; notice and opt-out opportunities were deemed sufficient to mark the relationship of a court and the litigants subject to its judgment.⁴²

Of course, individual liberty is a central value of constitutional law. In the context of litigation, liberty suggests autonomous decisions to pursue legal claims, resulting in opportunities for a "day in court." But the data about today's courts undermine an assumption that many people enjoy that form of liberty. Unrepresented litigants now file about one quarter of the civil cases in the federal trial courts,⁴³ and about a half of the appeals.⁴⁴ A recent study by the National Center for State Courts, reviewing some 650,000 civil cases in ten major coun-

³⁹ In *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011), the focus was on individual liberty. In *Bristol-Myers Squibb*, 137 S. Ct. at 1780, Justice Alito's opinion for the Court addressed the important "territorial limitations on the power of the respective States" (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). The relationship between these two ideas is explored in terms of the power of sovereigns and fairness to litigants in Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966), and in terms of the legitimacy of the exercise of authority in George Rutherglen, *Personal Jurisdiction and Political Authority* (VA. PUB. LAW & LEGAL THEORY RESEARCH, PAPER NO. 2017-13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2951109. In contrast, Alan Morrison has argued that, in terms of non-resident businesses, the Court ought to approach the issues as regulated under the Dormant Commerce Clause. See Brief for Alan B. Morrison as Amicus Curiae Supporting Respondents, *Bristol-Meyers Squibb Co. v. Superior Court*, (No. 16-466) (filed Mar. 30, 2017).

⁴⁰ 472 U.S. 797, 811–12 (1985).

⁴¹ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

⁴² *Phillips Petroleum Co.*, 472 U.S. at 812–13.

⁴³ The federal district court database details what it terms "pro se filings" back to 2005. In each of the years analyzed at least twenty-five percent of civil cases were filed by unrepresented plaintiffs. See *Judicial Business*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/report-names/judicial-business?tn=C-13&pt=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D> (last visited July 24, 2017).

⁴⁴ ADMIN. OFFICE OF THE U.S. COURTS, TABLE 2.4: U.S. COURTS OF APPEALS—PRO-SE CASES FILED (2014), http://www.uscourts.gov/sites/default/files/table_2.04_0.pdf.

ties, found that in more than eighty percent, one party was in court lawyer-less.⁴⁵ Middle-class and lower-class individuals are effectively priced out of litigation, which has become a kind of “luxury” good.⁴⁶ Thus, if enabling pursuit of legal claims remains an aspiration in the American polity, aggregation—with its attenuated relationships among courts and litigants—is an essential mode of providing cross-litigant subsidies, and class actions are one relatively developed method of doing so.

Sixth, whether enabling access to courts *remains* an aspiration is now in question, as statutes and rules prevent the people most in need of aggregate litigation from using it. In the 1990s, Congress prohibited Legal Services Corporation (LSC) lawyers from bringing class actions and placed limits on prisoner and security class actions. More recently, the Supreme Court’s expansive reading of the Federal Arbitration Act (FAA) has licensed the enforcement of bans on aggregate proceedings imposed on consumers and employees. And, as I write, a new, proposed “Fairness in Class Action Litigation Act of 2017”⁴⁷ would require plaintiffs in class actions seeking monetary relief to establish that each individual within a class “suffered the same type and scope of injury” as did the named representative.⁴⁸ The 2017 provisions also seek to curb the use of MDL aggregation in torts.⁴⁹

Looking at class actions over the course of the past fifty years makes plain the ideological shifts in which the expansion and contraction are embedded. Rulemaking in the 1960s was infused with the residue of New Deal optimism and confidence in government expertise, and motivated by a sense of urgency about racial injustice and the need for oversight of economic transactions. Since the 1990s, congressional and judicial efforts aiming to close off class actions reflect the ascendant ideology of deregulation, implemented in part through limiting access to courts.⁵⁰ Critics of aggregation argue that it conflicts with the adversarial autonomy of American litigation, and that class actions benefit plaintiff lawyers who exploit weak claims and extort

⁴⁵ See NAT’L CTR. FOR STATE COURTS, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* 14–16, 21, 33 (2015).

⁴⁶ Jonathan Lippman, *Overview*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA* xxxii (Samuel Estreicher & Joy Radice eds., 2016).

⁴⁷ H.R. 985, 115th Cong. (2017).

⁴⁸ *Id.* § 1716(a).

⁴⁹ See 28 U.S.C. § 1407 (2012).

⁵⁰ See generally STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441 (2013).

settlements to the detriment of plaintiffs and of economic vitality. Proponents of aggregation in turn resist as they argue aggregation's centrality to the enforcement of common law, constitutional, and statutory entitlements under state and federal law. Current class action debates are predicated on these conflicting political conceptions of the function of courts and of the governments that deploy them.

Seventh, in this era when conflicts center around radical economic and racial inequalities, a pervasive unease about government institutions, and a fierce individualism, aggregation is both essential and in need of retooling. My hope is that class actions can be part of a response to the tragic fracturing of social ordering. Courts hold out promises of a respite, as their structure and rules oblige judges, as well as disputants, to join in a civilized discourse about deeply divisive issues. Further, they may be one of many places to build "solidarity of interest." The values encoded in the Due Process Clause and the First Amendment imagine judges responding to arguments made in open courts through a regimented process subjected to public scrutiny. What Jeremy Bentham termed "publicity" (which he called the "soul of justice"⁵¹) imposes discipline, permits participation, and anchors the legitimacy of rulings, in individual and in aggregate litigation.

But a piece of that public oversight and litigant affiliation is missing. Rule 23 and MDLs build in publicity when aggregates come into being and when they are settled, but not thereafter. Yet class actions do not end at settlement or trial because aggregate remedies take time to implement. Thus, these cases have three phases: certification, settlement, and implementation. Cases involving structural injunctions such as civil rights and prisoner claims regularly rely on special masters and compliance monitors and on repeated trips to court to enforce decrees. Aggregations involving monetary relief have likewise involved a variety of steps and actors, including escrow agents and claims facilities. Their practices have, however, been subjected to less public scrutiny, in part because defendants seeking closure have few incentives to raise questions about the distribution of remedies. Yet in some cases, only a small subset of plaintiffs recoup—either because the time and effort required to do so are greater than the likely recovery or the information demanded for remedies is not easily available. Furthermore, not all of the difficulties in making disbursements may be known when settlements are crafted and approved.

⁵¹ Jeremy Bentham, *Draught for the Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same*, in 4 THE WORKS OF JEREMY BENTHAM 305, 316 (John Bowring ed., 1843) [hereinafter Bentham, *Organization of Judicial Establishments*].

During this third phase of aggregation, the question of whether interests are homogeneous (which preoccupied the 1966 drafters focused on certification and settlement) needs to be considered again. Instead of using, as critics propose, the difficulties of implementation, the conflicts, and low claims rates to argue against class certification, I write to sketch ideas about how to craft processes to acknowledge the complexities of making remedies effective. Just as the class action rule aimed in the 1960s to provide cross-plaintiff subsidies during the pre-judgment phases of litigation, the rule could be retooled to shape methods of generating group-based participatory rights and public debates during this third phase. Even if, as David Shapiro suggested, the class is best understood as “an entity” (rather than as an aggregation of individuals) before resolution,⁵² the question of disaggregation needs to be asked during the remedial phase to learn whether once adequately represented interests diverge depending on the form relief takes.⁵³ Moreover, whether discord emerges or not, court oversight is needed to ensure distributional fairness and public access to the processes and outcomes.

Doing so requires opening the door (literally and metaphorically) to post-resolution assessment (and sometimes readjustments) in court, so as to forge public relationships to legitimate the authority of courts, under which the remedial obligations were spawned. The law of personal jurisdiction relies on defendants affirmatively affiliating with a forum and the Court has used that doctrine to contract courts’ authority. I propose borrowing the idea of litigants being “at home” in the law of post-settlement aggregation but deploying it for the opposite purpose—to *expand* courts’ jurisdiction by building new mechanisms that maintain affiliations between litigants and the courts, and making those ongoing relationships part of the public practices of courts.

The result would reflect the realities of distinctions among sets of individuals with overlapping, albeit not totally homogeneous, interests. Litigation systems bundle them together because, as one English jurist described long ago, it is “better to go as far as possible toward

⁵² Shapiro, *supra* note 12.

⁵³ The focus of this essay is on procedure in the United States. But the use of aggregate litigation elsewhere includes examples of some forms of oversight. In Australia, distribution of funds pursuant to representative proceedings that are settled entail a court-approved settlement distribution plan—a settlement distribution scheme (SDS)—and some courts have developed rules on oversight. See Rebecca Gilsenan & Michael Legg, *Australian Class Action Settlement Distribution Scheme Design* (2017), <http://www.cari.unsw.edu.au/sites/cari.unsw.edu.au/files/class-action-settlement-distribution-design-CARI-paper.pdf>.

justice than to deny it altogether.”⁵⁴ The law of class and other aggregate actions needs to generate connectiveness for absent litigants throughout the phases of class actions and thereby underscore the interdependencies of litigants and their court systems in a thriving body politic.

II
 “SOLIDARITY OF INTEREST,” “COMMON DECENCY,”
 AND READING THE CONSTITUTIONAL TEA
 LEAVES OF THE 1960s

Procedures had to be “devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.”

—*Hansberry v. Lee*, 1940⁵⁵

Rule 23 instantiated new understandings of what due process permitted. To understand its impact and to explore the role that notice has come to play as a mechanism for legitimating court authority, I detail some of the exchanges among the Rule’s drafters, exploring options to expand the reach of courts through class actions.

Between 1962 and 1964, the Advisory Committee discussed what kinds of claims were to be eligible for class treatment, the interaction between those affected and the courts rendering judgments, the preclusive impact of class action rulings, and the constitutional parameters that could affect the design of a new rule. They read the Supreme Court’s case law to recognize the constitutionality of aggregate litigation but not to direct its parameters. Shared interests were key, but which absentees needed to know what, when, and why was not clear. The discussions reflect that the drafters of Rule 23 had a sense of constitutional possibilities rather than fixed constitutional strictures. They aimed to leave a great deal to the discretion of judges, thought able to identify which cases to certify as classes, to decide who (if anyone) to notify, and thereafter, to determine how much preclusion should result.

As Benjamin Kaplan subsequently explained in 1969, the Advisory Committee drafting Rule 23 was keenly aware of the then-growing federal dockets and of the goal of “reduc[ing the] units of

⁵⁴ *Duke of Bedford v. Ellis* [1901] AC 8 (HL) 11 (appeal taken from Eng.). Chafee discussed this case in his book, *SOME PROBLEMS OF EQUITY*, *supra* note 8, at 215–16. Chafee regularly referenced Lord Eldon as a guide to understanding representative litigation. *Id.* at 204–27.

⁵⁵ 311 U.S. 32, 43 (1940).

litigation.”⁵⁶ But the Committee also wanted, “even at the expense of increasing litigation, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.”⁵⁷

Doing so entailed revamping the limits of the 1938 version of class actions with its three categories distinguishing “true,” “hybrid,” and “spurious” class actions—delineations that had become mired in case law struggling to decide the impact of a first class action lawsuit on those pursuing further litigation. The Reporters’ memorandum accompanying a “Tentative Proposal” in 1962 suggested abandoning those categories altogether. By focusing on the “character of the right,” cases would be identified in which “solidarity of interest among class members” was strong enough that their interests could be “adequately and faithfully represented.”⁵⁸ Salient examples included school desegregation cases, in which enforcement became problematic after named-plaintiff students had graduated, as well as group-based injuries when utility companies overcharged customers.⁵⁹

The 1940 Supreme Court decision of *Hansberry v. Lee*,⁶⁰ which one of the 1962 Reporters’ memorandum described as “difficult” to read,⁶¹ exemplified both the permissibility of class actions and the uncertainty of their requirements. At issue in *Hansberry* was the ability to enforce racially restrictive covenants, limiting housing to whites in an area of Chicago by prohibiting the selling of land to “any person of the colored race.”⁶² A first lawsuit (*Burke v. Kleiman*⁶³) had been brought to enforce the restrictions; based on its success in doing

⁵⁶ Benjamin Kaplan, *A Prefatory Note*, 10 B.C. L. REV. 497, 497 (1969).

⁵⁷ *Id.*

⁵⁸ Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-23, EE-26 (“Summing Up”); *see also* Modification of Rule 23, 1963, *supra* note 8, at EE-15 to EE-19. Discussed were the insufficiency of the old categories and need for a “more practical” rule that would “lead to a better understanding and sounder formulation by the courts of the proper extent” of class action judgments. *Id.* at EE-19.

⁵⁹ For a discussion on the Committee members’ concerns for civil rights litigants, *see* Resnik, *From “Cases” to “Litigation,” supra* note 26, at 14, 47 and in David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 705 (2011). As for consumers, the Reporters’ memos cited repeatedly *Washington Gas Light Co. v. Baker*, 195 F.2d 29 (D.C. Cir. 1951), which involved illegal rate increases involving 175,000 consumers obtaining gas from Washington Gas Light Company. The Reporters’ memos discussed the district court’s imposition of interest payments (which were reversed), and the set-aside under the common benefit theory for the lawyers who brought the case. *See* Class Actions—Some Further Thoughts 1962, *supra* note 1, at 5.

⁶⁰ 311 U.S. 32 (1940).

⁶¹ Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-22 to EE-23.

⁶² *Hansberry*, 311 U.S. at 37.

⁶³ 277 Ill. App. 519 (1934).

so, the Illinois Supreme Court held in 1939 in the *Hansberry* litigation that *Burke* precluded a new lawsuit by blacks seeking to purchase homes.⁶⁴

The U.S. Supreme Court reversed, ruling that closing the courts to the *Hansberry* plaintiffs denied them due process.⁶⁵ Noting that representative litigation was an exception to the requirements of being “made a party by service of process,”⁶⁶ the Court commented that individuals could be bound either through adequate representation or through participation.⁶⁷ The *Burke* representatives had interests that were “not necessarily or even probably the same as those whom they are deemed to represent.”⁶⁸ Thus, the new black plaintiffs were not bound by the outcome of the lawsuit filed by white proponents of the restrictions.

As Jay Tidmarsh has since explained, *Hansberry* established “the constitutional floor for all class actions, state or federal: class representatives must ‘adequately represent’ absent class members.”⁶⁹ But what constitutes “adequacy” remains a source of debate. Justice Stone’s decision for the Court noted two sources that would make representation adequate and hence legitimate: a unity of interests or participation. If those conditions were met (as that 1962 Rule 23 memo explained when quoting from the decision), the *Hansberry* Court thought binding absentees permissible.⁷⁰ If “the rights of its members” turned on “a single issue of fact or law,” a state could create procedures that would be preclusive of subsequent litigation.⁷¹ What was required (as quoted in this Section’s epigraph) were procedures “devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.”⁷²

⁶⁴ *Lee v. Hansberry*, 372 Ill. 369 (1939).

⁶⁵ *Hansberry*, 311 U.S. at 45.

⁶⁶ *Id.* at 40.

⁶⁷ *Id.* at 42–43.

⁶⁸ *Id.* at 45. Facts appearing central to the holding—such as that only fifty-four percent of the owners of the footage had signed the restrictive covenants—have not been substantiated. A search of land records suggests a much higher number of signatories. Jay Tidmarsh, *The Story of Hansberry: The Rise of the Modern Class Action*, in *CIVIL PROCEDURE STORIES* 233, 263–70 (Kevin M. Clermont ed., 2d ed. 2008) [hereinafter Tidmarsh, *The Story of Hansberry*].

⁶⁹ Tidmarsh, *The Story of Hansberry*, *supra* note 68, at 275.

⁷⁰ Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-11.

⁷¹ *Hansberry*, 311 U.S. at 43.

⁷² *Id.* at 43. These passages are cited in Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-11.

What then were “procedures” that sufficed? The 1962 memo noted that it was “possible to interpret *Hansberry* as giving the matter of notice an independent significance (as well as the probative force . . . on the question of adequate representation),” but the memo did not endorse that position because *Hansberry* had not directly addressed notice. Instead, the Reporters’ suggestion was to leave the decision on the “character and timing” of notice “to the discretion of the judge on the firing line.”⁷³

When discussing what courts ought to tell individuals whose rights were to be determined, the Reporters repeatedly referenced the 1950 volume *Some Problems in Equity*, by Zechariah Chafee, Jr., who reviewed a host of examples of “representative suits” and called for revision of then-current federal practice.⁷⁴ Chafee described English judges who “had no hesitation in jumping, not only the obstacle of unjoined parties, but also the obstacle of binding them without a day in court,” so long as the representatives “fairly and honestly” dealt with the “general questions at issue and [did] not betray the interests of their many absent associates.”⁷⁵

But, as Chafee explained, in the United States, one had to “worry about the ‘due process’ clause” and, therefore, to consider whether it was “arbitrary to bind persons who never had notice or a chance to be heard”⁷⁶ Chafee noted that, while “old process” was “due process” for the English,⁷⁷ the U.S. Supreme Court had imposed more constraints, but he also cited examples when it too had ignored notice and had bound absentees.⁷⁸ For example, in the 1921 decision of *Supreme Tribe of Ben-Hur v. Cauble*, the Court had held that Indiana citizens were bound by a reorganization plan benefitting tens of thousands and relied on the conceit that they could have intervened under the doctrine of ancillary federal court jurisdiction.⁷⁹ Chafee’s bottom line was to distinguish the constitutionally required “due process” from what he termed “fairness.” As he understood it, while “unnamed members of a class” might “have no constitutional rights” to notice or participation, nonetheless “considerations of fairness” remained.⁸⁰

⁷³ Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-11 to EE-12; *see also* Modification of Rule 23, 1963, *supra* note 8, at EE-37. (“[T]he court is to decide the matter of notice in the exercise of its sound discretion”).

⁷⁴ *See* CHAFEE, *supra* note 8, at 205–85.

⁷⁵ *Id.* at 212–13.

⁷⁶ *Id.* at 225.

⁷⁷ *Id.*

⁷⁸ *Id.* at 226–27 (citing *Smith v. Swormstedt*, 57 U.S. 288, 16 How. 288 (1853)).

⁷⁹ *Id.* at 227–29 (citing 255 U.S. 356 (1921)).

⁸⁰ *Id.* at 230.

Thus, when sorting out what to recommend for the 1960s class action revisions, the Reporters invoked Chafee's concerns about lawsuits that "seriously affect[ed]" the financial interests of individuals who were not notified about the litigation; they quoted Chafee: "Surely, in the future, common decency requires some sort of steps to be taken to apprise people that litigation is under way" when they had financial stakes in the outcome.⁸¹ Chafee called for

courts to work out some kind of machinery to inform unnamed persons about their predicament. Of course, formal notice is out of the question; that would defeat the chief advantage of a class suit. Yet there ought to be *something*—perhaps postcards, perhaps an advertisement on the financial page of the *New York Times*.⁸²

Doing "*something*" thus had appeal to the 1960s drafters, even as it entailed inventing a new form of notice, short of formal process.⁸³ Yet doing "*something*" was also a source of concern; some members of the Civil Rules Advisory Committee thought that providing information about pending lawsuits would give rise (in an era when lawyer advertising was prohibited) to solicitation of clients.⁸⁴

Another 1962 memo, offering "Some Further Thoughts," again raised notice, described as especially important for the draft's formulation of what would later become today's (b)(3) classes: "if a satisfactory manner of giving notice is employed, it seems likely that the requirements of the due process clause will be satisfied."⁸⁵ And in yet another exchange, again quoting Chafee, a memo reiterated that "common decency" entailed taking some "steps" to let those affected by a litigation know that it was "under way."⁸⁶

Today's readers could easily assume that *Mullane* was a major case regularly invoked when Rule 23 was drafted in the 1960s. Indeed, a citation to the decision sits in the 1966 Advisory Note to Rule 23(d)(2) along with *Hansberry* as part of a string of cases standing for the proposition that the "mandatory notice" for (b)(3) classes "is designed to fulfill requirements of due process to which the class action procedure is of course subject."⁸⁷ But the 1962 memo that had discussed *Hansberry* at length mentioned *Mullane* only in a footnote

⁸¹ *Id.*

⁸² *Id.* at 231.

⁸³ Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-11 n.5.

⁸⁴ See Class Actions—Some Further Thoughts 1962, *supra* note 1, at 11–13 (responding in part to committee member John Frank's concerns).

⁸⁵ *Id.* at 9.

⁸⁶ Modification of Rule 23, 1963, *supra* note 8, at EE-5; Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-9.

⁸⁷ FED. R. CIV. P. 23(d)(2) Advisory Committee's note to 1966 amendment.

to the comment that notice could potentially have “independent significance . . . in determining whether a class action binding outsiders comports with due process.”⁸⁸ That memo also explained that a “failure to inform members of the class may mean in some cases that a judgment purporting to bind the class violates the due process clause (and therefore will be denied full faith and credit).”⁸⁹

Notice has since taken center stage, in part because of the Supreme Court’s 1974 decision in *Eisen v. Carlisle & Jacquelin*,⁹⁰ which insisted that plaintiffs pay for notice provided personally to individual class members and which relied heavily on the 1950 decision of *Mullane v. Central Hanover Bank & Trust Co.*⁹¹ Moreover, *Mullane* became the touchstone in another line of cases, elaborating procedural due process requirements in many contexts. From the 1970 decision in *Goldberg v. Kelly* to more recent rulings on homeowners’ forfeiture, the Court has regularly invoked the formula of notice and an opportunity to be heard.⁹² Therefore, the role that notice played in *Mullane* itself requires elaboration here.

The backdrop of the *Mullane* case was legislation enacted by New York in 1937 to give banks permission to pool individual trusts to insulate banks from a host of potential claimants. The statute authorized banks to seek a kind of declaratory action to obtain judicial affirmation that they had properly discharged their fiduciary duties when managing and distributing assets of all the trusts’ beneficiaries.⁹³ The statute creating the aggregation in *Mullane* did not rely (as the Illinois class action provision at issue in *Hansberry* had) on one person standing in for others, similarly situated. Rather, judges were to appoint outsiders as guardians ad litem to represent interests that they did not personally share. The point was to lower administrative costs

⁸⁸ Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-10 to EE-11 n.4. *Mullane* is also mentioned once in the eighteen page memorandum, “Class Actions—Some Further Thoughts,” in that “jurisdiction by necessity” coupled with “adequate notice” was what *Mullane*’s “rationale” seemed to support. Class Actions—Some Further Thoughts 1962, *supra* note 1, at 9. It is also cited in Modification of Rule 23, 1963, to support the proposition that “the fact that adequate advance notice would have been given to members of the class, with specific opportunity to take steps for their own protection consistent with the fair and efficient conduct of the action, would fulfill the requirements of due process.” Modification of Rule 23, 1963, *supra* note 8, at EE-35.

⁸⁹ Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-11.

⁹⁰ 417 U.S. 156 (1974). The ruling was seen as profoundly undermining Rule 23. See Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97.

⁹¹ 339 U.S. 306 (1950).

⁹² See *Goldberg v. Kelly*, 397 U.S. 254 (1970); see also *Jones v. Flowers*, 547 U.S. 220 (2006); *Dusenbery v. United States*, 534 U.S. 161 (2002).

⁹³ N.Y. BANKING LAW § 100-c (1937) (repealed 1986; codified as revised at N.Y. BANKING LAW § 100-c (2008)).

for beneficiaries as well as for banks and to expand investment options, while closing off the potential for an array of claims.⁹⁴ The law of *res judicata* would block unhappy beneficiaries from subsequently being able to allege imprudence.⁹⁵

In its 1937 enactment, the New York Legislature required that notice of the process for settling accounts be put into the initial trust documents provided to beneficiaries and, when banks filed actions, to place notices of the settling of accounts in selected newspapers.⁹⁶ The 1950 Supreme Court ruling in *Mullane* approved, in large measure, the ability of New York to adjudicate the rights of all the beneficiaries and thereby permitted what today we call nationwide jurisdiction.

To do so, the Court rejected relying on distinctions between “in personam” and “in rem” jurisdiction, which had been regular components of the law of personal jurisdiction. The Court authorized state courts to bind individuals outside their physical boundaries, if participating in trusts that were within those boundaries, as doing so was part of the state’s control over the trust and its beneficiaries.⁹⁷ The “interest of each state in providing means to close trusts” created under its laws was “so insistent” that it was “beyond doubt the right of its courts to determine the interests of all claimants, resident or non-resident, provided its procedure accords full opportunity to appear and be heard.”⁹⁸

But the *Mullane* decision is also famous for calling on banks to find individuals so as to provide notice to the absentees whose property interests were affected.⁹⁹ Yet not everyone had to be located. Jus-

⁹⁴ The banking lobby pressed for New York to enact the statute. As Justice Jackson explained, “[m]ounting overheads have made administration of small trusts undesirable to corporate trustees.” *Mullane*, 339 U.S. at 307.

⁹⁵ N.Y. BANKING LAW § 100-c (repealed 1986; codified as revised at N.Y. BANKING LAW § 100-c (2008)). Several other states authorized pool trusts without creating this form of accounting. John Leubsdorf, *Unmasking Mullane: Due Process, Common Trust Funds, and the Class Action Wars*, 66 HASTINGS L.J. 1693, 1708 (2015).

⁹⁶ N.Y. LAWS 1937, c. 687; N.Y. BANKING LAW § 100-c(12). In the Central Hanover accounting proceedings, Kenneth Mullane was designated to represent what was functionally one subclass, the inter-vivos beneficiaries, and James Vaughn was assigned the testamentary beneficiaries. Mullane had argued that, without notice sent directly to more beneficiaries, a bank would use pooled trusts “as a dumping ground for its own shaky and depreciated securities.” Appellant’s Brief at 26, *Mullane*, 339 U.S. 306 (1950) (No. 378), 1950 WL78701 (quoting 5 LAW & CONTEMP. PROBS. 430, 435). Vaughn did not object to the provision.

⁹⁷ As one commentator explained in 1950, since the jurisdiction was neither in rem nor in personam, “a court must be exercising a third type of jurisdiction.” Fraser, *supra* note 5, at 311.

⁹⁸ *Mullane*, 339 U.S. at 313.

⁹⁹ *Mullane*, 339 U.S. at 312–13, 320. The Court identified two forms of property interests: the “rights to have the trustee answer for negligent or illegal impairments” and the risk of a “diminution” in their funds through an “allowance of fees and expenses to one

tice Jackson read due process as not imposing “impossible or impractical obstacles” to producing a decision about the banks’ prudence, even as it required an “opportunity” for those affected to know so as to be able to present objections.¹⁰⁰ For those beneficiaries whose names were “at hand” and “easily” available on the bank’s books, notice was to be sent; for those unknown or for whom the costs of identification were too high, publication would suffice.¹⁰¹

Once again, interest representation was central; “notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all.”¹⁰² Indeed, the Court noted that an “individual interest does not stand alone but was identical with that of a class”; everyone shared interests in “the integrity of the fund and the fidelity of the trustee.”¹⁰³

The Court thus created a communication scheme, but the furtherance of individual autonomy was not at its core. The notice required by *Mullane* did not require New York State to offer exit rights. While objectors might be able to raise problems, no one could—upon receipt of the notice—decline to participate (or, in today’s words, “opt out”). These property holders were placed in what came to be called a mandatory class. Further, the individually small stakes made responses unlikely, especially from people living outside the state. Indeed, in the decades thereafter, neither recorded challenges by beneficiaries nor successful challenges by guardians ad litem have been located¹⁰⁴—prompting the question of whether notice in the pooled trust context has an impact on those transactions.¹⁰⁵ Thus, even as *Mullane* seems to epitomize the “homogeneous character of the claim” that the 1966 Rule drafters saw a decade later as the central justification for aggregate litigation, “*something*” more than New York State’s pro forma publication requirement was needed to legitimate the exercise of courts’ power over absentees.

who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest.” *Id.* at 313.

¹⁰⁰ *Id.* at 313–14. The reminder for those steeped in contemporary state action requirements applied to the Fourteenth Amendment is that the dispute was between private parties, enlisting the state courts to settle the accountings.

¹⁰¹ *Id.* at 319.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Leubsdorf, *supra* note 95, at 1729.

¹⁰⁵ See John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 970–76 (2005). Issues include whether the requirements have impact on the market or on how investments are made or distributed.

What the notice requirement has done is to put both disputants and courts to work in sending out the information that forces the fact of the pendency of a case into the public realm and into the homes of millions of people. Therefore, the metric by which to judge the innovations of *Mullane* is not the numbers of objections filed in pooled trust accountings but its impact on what today we call transparency. States, banks, and courts had authority to bind absentees, but they cannot exercise that authority invisibly. Notice has put not only the banks' work on display; it has also brought into focus the role played by lawyers and courts.

The result, to borrow from Jeremy Bentham, was "publicity"; by giving the public a role in observing "Judge & Co." (to wit, lawyers), courts provided education about what they did as well as enabled the "tribunal of public opinion" to evaluate their work.¹⁰⁶ And, of course, *Mullane* demonstrated what the *Hansberry* Court had suggested: a constitutional path to large-scale resolutions by courts whose legitimacy to bind absentees rested on a public process in which a subset were informed that their interests were being determined through a representative structure that gave them no exit rights.

Return then to the 1962–1964 drafting period to think about what relationships among class members and courts were then in the offing. Reflecting *Mullane*'s structure, in 1962, the memos to the Advisory Committee did not assume that class members had an "absolute right to opt out."¹⁰⁷ Yet notice could be useful, for along with "adequate representation," notice could assuage "doubts about the constitutionality of the representative procedure."¹⁰⁸ But the drafters were also aware that notice might not have produced much of a response (as the subsequent track record in pooled trusts later revealed). In the 1962 "further reflections" memo, the question was raised about "how much 'individual freedom' each member of the class in fact has . . . [T]he

¹⁰⁶ JEREMY BENTHAM, *Rationale of Judicial Evidence* (1827), in 6 THE WORKS OF JEREMY BENTHAM 1, 351, 22, 327 (John Bowring, ed., 1843); see also Fred Cutler, *Jeremy Bentham and the Public Opinion Tribunal*, 63 PUB. OPINION Q. 321, 321 (1999).

¹⁰⁷ The discussion of an "absolute right to 'opt out'" appeared later, and was described in the 1964 memo by Kaplan and Sacks. See Benjamin Kaplan & Al Sacks, (A) Discussion of Responses to Memorandum of December 2, 1963; (B) Recommendation That the Amendment as Revised Be Promptly Circulated to the Public for Comment and Criticism at 1 (internal quotation marks omitted), *microformed on* CIS No. CI-7003-08. In the 1964 memo, they concluded that judges ought to instead decide whether class members' "inclusion [was] essential to fair and efficient adjudication" and to state reasons for inclusion or exclusion. *Id.* at 5 (emphasis in the original). But the final Rule in 1966 provided opt-outs without judicial permission. See also Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-12 ("We prefer in general . . . to leave the question of notice . . . to the discretion of the judge . . .").

¹⁰⁸ Class Actions—Some Further Thoughts 1962, *supra* note 1, at 10.

pressure for submitting” and “to be bound . . . by a ‘model’ trial [would] often be so high” as to constitute “compulsion.”¹⁰⁹ That memo also noted that individuals did not have a “meaningful” interest in pursuing an individual lawsuit if “a single district [was] obviously and pre-eminently the most convenient forum.”¹¹⁰ In short, rather than focusing on enabling individual litigants to make autonomous decisions to file their own lawsuits, the drafters sought to generate some kind of connection between courts and absent litigants.

The sense that notice might not be a necessity was related to the drafters’ views on preclusion which, today, may also sound unexpected. The Reporters’ early memos did not assume that symmetry—between winning and losing plaintiffs and defendants in class actions—was required, nor did the memos presuppose that all subsequent litigation was barred.¹¹¹ Rather, the 1962 memos noted that class actions could be designed to have a one-way binding effect, enforceable against defendants but not preclusive of new rights for plaintiffs—for example, if “the law changes favorably to the asserted civil rights.”¹¹² While “‘two-way’ binding effect should be the norm,” judges might have discretion, after the fact, to identify “special considerations” that would not bar plaintiffs from bringing new cases.¹¹³ Chafee had also suggested that judges in class proceedings could insert “a statement in the judgment” about its bindingness, even if it would not be “conclusive” upon a later court.¹¹⁴ And *Hansberry* was cited for the proposition that judgments could be “open to reexamination” to assess whether members of the class were “adequately represented,” which turned on whether their interests were “unitary.”¹¹⁵

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 11.

¹¹¹ Modification of Rule 23, 1963, *supra* note 8, at EE-7, EE-32 to EE-35 (proposed note). Those views reflect the influence of the Kalven and Rosenfield article, *The Contemporary Function of the Class Suit*, which had argued in 1941 that if a class representative won, absentees should be able to benefit even if they were not to be bound by a loss. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941). The idea of “one-way binding” class actions was also discussed in the “Class Actions—Some Further Thoughts” memo in the context of *Washington Gas Light Co. v. Baker*, 195 F.2d 29 (D.C. Cir. 1951), discussed *supra* note 1. The comment was that, if the consumer plaintiff had lost, “other consumers would presumably have been free to try again.” Class Actions—Some Further Thoughts 1962, *supra* note 1, at 6.

¹¹² Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-27.

¹¹³ *Id.* at EE-30, EE-31.

¹¹⁴ Chafee, *supra* note 8, at 294.

¹¹⁵ Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-10.

By 1964, different parameters had emerged. The idea of one-way class preclusion had been dropped. The proposal stated that a class action judgment “shall extend by its terms to the members of the class, as defined, whether or not the judgment is favorable to them.”¹¹⁶ Further, the Advisory Committee’s published draft circulated for comment in 1964 required “reasonable notice” for all members of (b)(3) classes and implied that individual notice (what the draft called “specific notice”) needed to be provided to only a small subset—“each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.”¹¹⁷ Moreover, exclusion was not then as-of-right; it was presumptively available but judges were given the power to overrule individual efforts to exit. The 1964 version directed that “the court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefore.”¹¹⁸

The reminder is that, as promulgated in 1966, Rule 23 did not mandate notice for its (b)(1) and (b)(2) classes of the pendency of the class action at the outset.¹¹⁹ Further, while it called for notice if a dismissal or “compromise” were in the offing,¹²⁰ Rule 23 did not detail the kind, quality, or comprehensiveness of that notice. The notice that was required for (b)(3) classes after certification invoked *Mullane*’s standard of “best practicable under the circumstances,”¹²¹ which might well have been read to require less than what the Court concluded in *Eisen* to mandate.¹²² Indeed, given that Rule 23 does not

¹¹⁶ Rule 23(c)(2), Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 34 F.R.D. at 325, 386 (1964).

¹¹⁷ *Id.*

¹¹⁸ *Id.* The version of the rule printed in a memo by Kaplan and Sacks used the spelling “therefor.” Kaplan & Sacks, *supra* note 107, at 4.

¹¹⁹ Amendments to Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, and Rules of Criminal Procedure, 39 F.R.D. 69, 97 (1966). In 2003, amendments to the Rule expressly authorized district judges to use their discretion to require notice for b(1) and b(2) class members. FED. R. CIV. P. 23(c)(2)(A) (2003 amendments).

¹²⁰ FED. R. CIV. P. 23(e), *reprinted in* 39 F.R.D. at 98.

¹²¹ See FED. R. CIV. P. 23(c)(2) Advisory Committee’s note to the 1966 amendment. In a comment, Lawrence Fox thoughtfully detailed how the 1966 Rule had not answered “important questions” related to notice—what it entailed and who paid for it, “whenever” it was required. See Lawrence Fox, Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. PA. L. REV. 889, 905–15 (1968).

¹²² See Dam, *supra* note 90, at 109–16. Justice Powell’s opinion for the Court in *Eisen* did not make clear why so much time and money had to be spent on seeking out individuals as contrasted with the sampling that the district judge’s notice order had put into place to obtain representatives from whatever diverse interests existed. The district court had found plaintiffs were likely to succeed in establishing the violations of anti-trust

require notice for (b)(1) and (b)(2) classes, the *Eisen* decision is best read as an interpretation of Rule 23 itself and not of the Due Process Clause.¹²³

But by the time the Court had decided *Eisen*, it had also ruled in *Goldberg v. Kelly* that notice and an opportunity to be heard were constitutionally obliged when the property rights of recipients of public benefits were terminated.¹²⁴ The distinction that Chafee had drawn in 1950 between U.S.-style constitutional due process and “fairness” was evaporating, as fairness was increasingly the metric by which the Court judged the adequacy of adjudication, whether in administrative bodies or in courts.¹²⁵

The Court’s attachment to notice and its imposition of other restrictions on class actions should also be read in relationship to the Court’s recent law on personal jurisdiction. Both *Eisen* and the new doctrine on personal jurisdiction make using courts more challenging, in part by imposing costs on plaintiffs, either to provide notice to fellow class members or to travel to defendants unless the increasingly exacting requirements for defendants’ purposeful affiliation with a forum have been met. Both bodies of law share a concern to identify affiliating circumstances among litigants and courts that are sufficient to legitimate the political authority of courts to alter rights; both doctrines circumscribe the capacity of courts to address legal claims unless such ties are evident.

A final comment about the 1960s gestalt is in order. As Kaplan put it, the drafters were “paternalistic.”¹²⁶ As reflected in my brief summaries of the exchanges, they were also optimistic—seeking to open up new avenues for redress. They had faith in federal judges to identify “solidarity” of interests and then to resolve disputes to vindicate those rights.¹²⁷ Indeed, with *Hansberry* as a model, the problems of alignment of interests seemed straightforward—as the question of

and securities laws, that the costs of individual notice for the millions of odd-lot traders were prohibitive, and devised a method of sampling subsets and imposed the costs of doing so on the defendants. See *Eisen v. Carlisle & Jacquelin*, 54 F.R.D. 565 (S.D.N.Y. 1972), *rev’d*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974). Fox had argued that the Advisory Committee erred in citing *Mullane* in support of requiring individual notice for b(3) classes. See Fox, *supra* note 121, at 914–15.

¹²³ See generally Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996).

¹²⁴ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹²⁵ For an overview of that development, see Resnik, *Fairness in Numbers*, *supra* note 25, at 90–93.

¹²⁶ See Modification of Rule 23, 1963, *supra* note 8, at EE-6; see also Class Actions—Some Further Thoughts 1962, *supra* note 1, at 14.

¹²⁷ Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-21 to EE-25.

being for or against restrictive covenants appeared to have but two sides.¹²⁸

That confidence in the judiciary was reflected in early versions of Rule 23, which had two, not three, kinds of class actions. One category (then labeled Rule 23(c)) addressed “presumptively maintainable” class actions, and a second (under 23(d)) covered “class actions maintainable at the court’s discretion.”¹²⁹ But in 1963, the drafters discussed whether it would be better to follow the 1938 pattern of delineating three categories, even as they abandoned the reason (distinguishing between binding and nonbinding class actions) of the 1938 Rule for doing so.¹³⁰ And, in revisions thereafter, as Benjamin Kaplan reworked the rule to broker compromises in the Advisory Committee, Rule 23 grew to be more directive. Yet even in its final 1966 form, Rule 23 left a great deal of discretion to judges. The goal was to invite litigants to use courts to resolve multi-party large-scale disputes.

III

ENABLING AND CONSTRAINING COLLECTIVITY: FROM MDL TO THE LSC, THE PLRA, THE PSLRA, CAFA, JUDICIAL REVISION OF THE FAA, AND THE 2017 PROPOSED CONGRESSIONAL LIMITS ON CLASS ACTIONS AND ON MDLS

“A Federal court shall not issue an order granting certification of a class action seeking monetary relief for personal injury or economic loss unless the party seeking to maintain such a class action affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative or representatives.”

—Proposed “Fairness in Class Action Litigation Act of 2017”¹³¹

Rule 23 was very much a part of “the 1960s” and should be read in the context of other innovations of that time. Within a decade, Congress opened courthouse doors for low or no-money cases by

¹²⁸ See Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137 (2009); see also Tidmarsh, *The Story of Hansberry*, *supra* note 68. As the literature on conflicts about remedies within civil rights litigation makes clear, in some set of cases, members of the class may—at different points within litigations—disagree. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

¹²⁹ Modification of Rule 23, 1963, *supra* note 8, at EE-10 to EE-11. In 1950, Chafee had suggested two kinds, a “Solid Class Suit” and an “Invitation to Come In.” CHAFEE, *supra* note 8, at 259–61, 293.

¹³⁰ Tentative Proposal and Modifications Class Action, May 1962, *supra* note 1, at EE-1 to EE-2.

¹³¹ For each subsection in H.R. 985 § 1716(a), enacted in the House of Representatives on Mar. 9, 2017; as of this writing, the Senate referred the bill to its Judiciary Committee on Mar. 13, 2017, where a parallel bill is likewise pending.

authorizing funding for lawyers for impoverished civil litigants through the creation of the Legal Services Corporation (LSC) in 1974.¹³² Thereafter, Congress enacted the Attorney Fee Act of 1976, authorizing fee-shifting for victorious civil rights plaintiffs.¹³³ When Rule 23(b)(2) was coupled with these provisions and other fee-shifting statutes, such as in Title VII,¹³⁴ novel sets of plaintiffs made their way into the federal courts to enforce a host of new statutory claims, regulating the environment, credit, discrimination, housing, pensions, and securities.

In the decades since, both the aspirations and the fears of the drafters have been realized. Coupled with *Mullane*, Rule 23 has transformed our understanding of what lawsuits can do by enabling judges to oversee long-term school desegregation decrees and other class actions seeking structural remedies to reform institutions such as jails, prisons, and child care agencies.¹³⁵ Further, the Rule 23 goal of providing access to low-value claimants who were, in Kaplan's words, "without effective strength to bring their opponents into court at all" came to fruition.¹³⁶ Through the equitable doctrine permitting those conferring a "common benefit" to recoup a percentage of the funds recouped,¹³⁷ small claims turned into potentially lucrative aggregations, enticing lawyers to take the risk of serving as "champions of semi-public rights."¹³⁸

Across the docket, the unit of analysis shifted from "cases" to "litigation," and phrases like the "asbestos litigation," the "tobacco litigation," (and now the "VW emissions litigation") became commonplace.¹³⁹ Those terms reflected the legitimacy of what Chafee had called "representation by rule of law."¹⁴⁰ New legal relationships were brought into being, anchoring courts' capacity to respond to claimants without independent means of pursuing their rights.

Moreover, class actions are but one of many ways to aggregate, both informally and formally,¹⁴¹ and each form raises the question of

¹³² 42 U.S.C. §§ 2996–2996(l) (2012).

¹³³ 42 U.S.C. § 1988(b) (2012).

¹³⁴ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e(17) (2012).

¹³⁵ See generally Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

¹³⁶ Kaplan, *A Prefatory Note*, *supra* note 56, at 497.

¹³⁷ Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 337–38 (1996).

¹³⁸ Kalven & Rosenfield, *supra* note 111, at 717.

¹³⁹ See Resnik, *From "Cases" to "Litigation," supra* note 26, at 6.

¹⁴⁰ CHAFEE, *supra* note 8, at 209.

¹⁴¹ Several of us have commented on these multiple forms in somewhat different contexts. See, e.g., Resnik, *From "Cases" to "Litigation," supra* note 26, at 36–39; see also Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011);

“the homogenous character” of their claims. Although data on proposed and pending class actions in federal courts and in agencies are lacking,¹⁴² information on what has become a dominant form of aggregation—cases consolidated under the 1968 MDL statute, which I discussed at the outset¹⁴³—is available. Once a panel of judges identified “one or more common questions of fact” (and hence, sufficient “solidarity of interests”) in cases pending in different federal courts, that panel can transfer them all to a single judge for pre-trial aggregate proceedings.¹⁴⁴

As I (and others) have detailed elsewhere,¹⁴⁵ in 1991, fewer than 2232 cases (about one percent of the civil docket) were part of MDL proceedings.¹⁴⁶ By 2015, more than 130,000 filings were in 274 proceedings aggregated before a single judge, selected by the MDL panel.¹⁴⁷ Thus, of the 341,813 civil cases pending,¹⁴⁸ almost forty percent were part of MDLs.¹⁴⁹ Those numbers are another tribute to the

Michael Sant’Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 *YALE L.J.* 1634 (2017).

¹⁴² See Hensler, *Happy 50th Anniversary, Rule 23!*, *supra* note 11.

¹⁴³ 28 U.S.C. § 1407 (2012).

¹⁴⁴ See 28 U.S.C. § 1407(a) (2012).

¹⁴⁵ See, e.g., Judith Resnik, *Lawyers’ Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 *FORDHAM L. REV.* 1899 (2017); see also Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 *N.Y.U. L. REV.* 71 (2015); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multi-District Litigation’s Place in the Textbook Understandings of Procedure*, 166 *U. PA. L. REV.* (forthcoming 2017). See generally Douglas G. Smith, *Resolutions of Common Questions in MDL Proceedings*, 66 *KAN. L. REV.* (forthcoming 2017).

¹⁴⁶ U.S. JUDICIAL PANEL ON MULTIDIST. LITIG., *STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION CUMULATIVE FROM SEPTEMBER 1968 THROUGH JUNE 30, 1991*, in *LEGACY STATISTICS 1980–1991*, at 442, 444 (1991), http://www.jpml.uscourts.gov/sites/jpml/files/Legacy_Statistical_Reports-1980-1991-Compressed_0.pdf. Data are from year ending on June 30.

¹⁴⁷ See 28 U.S.C. § 1407(b) (2012); U.S. JUDICIAL PANEL ON MULTIDIST. LITIG., *MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT* (2015), http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_Litigation_By_District-September-15-2015.pdf. This count is affected by a few MDLs, which play a disproportionate role in both the federal docket and the number of MDLs. One example is cases related to vaginal mesh pelvic litigation, which were 73,080 in number. *Id.* Were those mesh cases and asbestos cases—the other disproportionate MDL, historically—not in the mix, the federal pending cases that fall under the MDL rubric would be about 22%, rather than almost 40%.

¹⁴⁸ See ADMIN. OFFICE OF THE U.S. COURTS, *TABLE C-1: U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, TERMINATED, AND PENDING DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2015* (2015), http://www.uscourts.gov/sites/default/files/data_tables/C01Sep15.pdf [<https://perma.cc/6UXT-YNWP>]. The pending cases use the end date of September 30, while the MDL reports on the fifteenth of each month.

¹⁴⁹ Specifically, 132,788 cases out of the 341,813 pending cases were in MDLs. U.S. JUDICIAL PANEL ON MULTIDIST. LITIG., *supra* note 29, at 5; ADMIN. OFFICE OF THE U.S. COURTS, *TABLE C-1*, *supra* note 29 (both data sets are from the year ending September

impact of Rule 23, which (along with bankruptcy filings in response to tort and environmental claims) made commonplace the propriety of linking together individuals sharing common factual and legal claims.

I opened this Section with a quote from The Fairness in Class Action Litigation Act of 2017, which aims to curb MDLs as well as class actions. That bill reflects that MDLs have now joined class actions as objects of concern for those opposed to aggregate proceedings. In earlier decades, when MDL had a smaller footprint, it did not attract the ire leveled against Rule 23. The statute's managerial innovations were thought to respond to the administrative needs of the courts, while Rule 23's purposiveness in welcoming new litigants prompted concerns. An exemplar comes from Federal District Judge William Becker, who complained in the 1970s that the class action rule had, from "the judicial viewpoint," unleashed "unremitting social and economic warfare."¹⁵⁰ Thus, what Arthur Miller described as a "holy war" against class actions began soon after Rule 23's enactment.¹⁵¹

That hostility has intensified, as examples of exploitation of class action opportunities by lawyers—raised by the 1960s Advisory Committee members leery of notice—have been put forth, with accusations that the beneficiaries of class actions are lawyers, profiting at the expense of the plaintiffs whom they purport to represent and using class actions to leverage defendants. By the 1990s, efforts to disable Rule 23 had come to fruition—embodied in the statutes whose initials appear in the heading of this Section and denoting the array of activities targeted at undermining the ability to bring claims that (in Kaplan's words again) "otherwise would not be pressed."¹⁵² These enactments are a back-handed compliment, as the energy to try to stop Rule 23 attests to its importance as a vehicle for rights-claiming or, from the critics' perspective, of putting defendants into the position of having to "bet the company" if they do not settle.¹⁵³

Below, I focus briefly on four methods of curtailing class actions that cut out of court the very people, those with limited resources, whom Rule 23 had welcomed. Two examples come from the 1996

30). As noted, *supra* note 147, analyses of the docket could also focus on comparing the percentage of MDL cases to civil cases pending a comparable length of time.

¹⁵⁰ William H. Becker, *Introduction: Use and Abuse of Class Actions Under Amended Rule 23*, 68 Nw. U. L. REV. 991, 992 (1974).

¹⁵¹ Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 664 (1979).

¹⁵² Benjamin Kaplan, *Comment on Carrington*, 137 U. PA. L. REV. 2126, 2127 (1989). Kaplan's *Comment* was presented as part of the Law Review's Symposium on "The 50th Anniversary of the Federal Rules of Civil Procedure, 1938–1988."

¹⁵³ Justice Scalia used the phrase when writing the majority opinion in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011).

Congress, which banned class action representation by the Legal Services Corporation and imposed new constraints on class action relief in cases challenging prison conditions. A more recent cutback comes by way of the Supreme Court's expansion of the Federal Arbitration Act through interpretations permitting enforcement of class action bans imposed by would-be defendants. I close this section by sketching a proposal pending as I write: the Fairness in Class Action Litigation Act of 2017, which aims, as noted above and detailed below, to limit not only class actions but also MDL litigation.¹⁵⁴

Context is again needed. The restrictions on the LSC lawyers were part of efforts (renewed in the current President's proposed 2017 budget) to limit federal support for legal aid. The funding levels of the LSC in 1980 provide a baseline; Congress then provided \$300 million in support. In its first decades, the LSC created backup centers, which served as networks of coordination and communication on housing, welfare, and consumer law, and which helped to produce a series of class actions.¹⁵⁵ But those efforts had to be dismantled because, instead of keeping funding levels steady in real dollar terms (which would translate the \$300 million into \$850 million by 2014¹⁵⁶), Congress provided only \$375 million in 2014.¹⁵⁷

In addition to scarce funds, Congress barred LSC lawyers in 1996 from initiating or participating in class actions.¹⁵⁸ Also prohibited were forms of legislative advocacy, handling voter redistricting claims, initiating representation on behalf of prisoners, advocating that welfare laws were unconstitutional, or requesting attorneys' fees.¹⁵⁹ Regulations specifically prevented LSC lawyers from working on

¹⁵⁴ H.R. 985, 115th Cong. § 105 (2017).

¹⁵⁵ Lawrence J. Fox, *Legal Services and the Organized Bar: A Reminiscence and a Renewed Call for Cooperation*, 17 *YALE L. & POL'Y REV.* 305 (1998).

¹⁵⁶ Memorandum from Lisa Wood, Chair of the Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, to Legal Servs. Corp. 2 (June 2, 2014), <http://www.lsc.gov/sites/default/files/LSC/pdfs/3.%20ABA-SCLAID%20FY2016%20Budget%20Rec%20%20to%20LSC.pdf>.

¹⁵⁷ Legal Servs. Corp., 2014 Legal Services Corporation by the Numbers: The Data Underlying Legal Aid Programs 3 (2015), <http://www.lsc.gov/sites/default/files/attach/2015/08/LSC2014FactBook.pdf>; see also Consolidated Appropriations Act, Pub. L. No. 113-76, tit. 4, 128 Stat. 5, 128 Stat. 76 (2014).

¹⁵⁸ No organization that "initiates or participates in a class action suit" could receive funds. See Pub. L. No. 104-134, 110 Stat. 1321 (1996). The authority for this proposition is 29 U.S.C. § 2996e(d)(5); 110 Stat. 3009 (1996); 110 Stat. 1321 (1996).

¹⁵⁹ See § 504(a), 110 Stat. at 1321-52 (codified at 45 C.F.R. § 1617.3 (2016)). In 2001, the Supreme Court held that aspects of the restrictions prohibiting advice on arguments related to welfare law or seeking to amend welfare law were impermissible under the First Amendment. See *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533 (2001).

“adversarial” enforcement of final judgment and consent decrees.¹⁶⁰ The impact of an insistence on cases filed by individuals rather than by groups has resulted not in more “individual liberty” but in insufficient legal services. In 2014, the LSC estimated that more than sixty-three million Americans were eligible for its services (keyed to federal poverty guidelines and permitting aid to families of four who earn \$30,000 or less¹⁶¹), but that LSC lawyers could help only one in five of those eligible.¹⁶²

Another group of low-income litigants that Congress has targeted are prisoners. The Prison Litigation Reform Act (PLRA), enacted in 1996, was animated by an effort to “STOP” (the acronym for an earlier version of the PLRA) the substantial successes that prisoners had achieved through conditions of confinement litigation.¹⁶³ The PLRA created new work for lawyers representing prisoners, while lowering their potential attorneys’ fees if successful.¹⁶⁴ The PLRA encouraged efforts to terminate litigated injunctions by requiring new fact-finding of ongoing constitutional violations if requests were made to end decrees.¹⁶⁵ According to Margo Schlanger, the statute has “undermined prisoners’ ability to bring, settle, and win lawsuits.”¹⁶⁶ In her 2015 update on its impact, Professor Schlanger concluded that the PLRA had also “succeeded in radically shrinking—but not eliminating—the coverage” of injunctive orders,¹⁶⁷ in part by limiting the “life span of new orders.”¹⁶⁸ She mapped the decline from 1983 to 2006 in the percentage of jails (from 18% to 11%) and of prisons

¹⁶⁰ 45 C.F.R. §§ 1617.2, 1617.3 (barring LSC recipients from initiating or participating in class actions); see also David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 *YALE L. & POL’Y REV.* 337 (1998).

¹⁶¹ LEGAL SERVS. CORP., 2014 ANNUAL REPORT (2015), <http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC2014AnnualReport.pdf>. See generally *The Future of Legal Services: The Arthur Liman Colloquium Papers*, 17 *YALE L. & POL’Y REV.* 283 (1998).

¹⁶² *FY 2016 Budget Request*, LEGAL SERVS. CORP. (2016), <http://www.lsc.gov/media-center/publications/fy-2016-budget-request#bfrtoc-afy-2016-budget-request>.

¹⁶³ See H.R. 667, 104th Cong. (1995); *Overhauling the Nation’s Prisons: Testimony Before the S. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Steve J. Martin, General Counsel for the Texas Department of Corrections), 1995 WL 449222.

¹⁶⁴ 28 U.S.C. § 1915(b) (2012); 42 U.S.C. §§ 1997e(a), (d)(2), (d)(3), (e) (2012).

¹⁶⁵ 18 U.S.C. § 3626(a)(1)(A), (b) (2012).

¹⁶⁶ See Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 *U.C. IRVINE L. REV.* 153, 153 (2015) [hereinafter Schlanger, *Trends in Prisoner Litigation*]; see also Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 *N.Y.U. L. REV.* 550 (2006); Margo Schlanger, *Inmate Litigation*, 116 *HARV. L. REV.* 1555 (2003).

¹⁶⁷ Schlanger, *Trends in Prisoner Litigation*, *supra* note 166, at 155.

¹⁶⁸ *Id.* at 168.

(from 27% to 18%) in court orders, and the rarity of statewide court orders in the twenty-first century.¹⁶⁹

Yet this picture of constraint needs to be tempered by acknowledgement of resiliency. Despite the PLRA, prisoner class actions remain sites of doctrinal vitality, with major decisions and consent decrees addressing solitary confinement of juveniles, the mentally ill, and general prison conditions.¹⁷⁰ Exemplary is the 2011 U.S. Supreme Court ruling upholding a three-judge court order limiting the population of California's state prisons as an appropriate remedy under the PLRA to combat the horrific lack of medical care that overcrowding had produced.¹⁷¹

More recently, in the 2015 *Ashker* settlement, a class of prisoners held in solitary confinement succeeded in reshaping California's "status-based" method of assigning individuals to profound isolation and in reducing the degrees of such isolation.¹⁷² *Ashker* exemplifies that even as plaintiffs have a "homogeneous" claim to end horrific deprivations, remedying those practices entails choices about what limits to impose on which subsets of individuals held in isolation (for example, people who have been in for many years, or people so confined because of their sentence) and about what forms of restructuring of conditions to require (such as changing the number of hours spent out of cell or creating transition programs for people who have been in solitary for decades).¹⁷³ To shape the remedies, lawyers needed to work with members of the class to resolve these kinds of internal tensions and potential conflicts.¹⁷⁴

¹⁶⁹ *Id.* at 169 tbl.8.

¹⁷⁰ See, e.g., Stipulation, *Parsons v. Ryan*, No. CV 12-00601-PHX-DJH (D. Ariz. Oct. 14, 2014), ECF No. 1185; Settlement Agreement, Disability Rights Network of Pa. v. Wetzel, No. 3:13-CV-00635-JEJ (M.D. Pa. Jan. 9, 2015), ECF No. 59. Further, aggregation in the context of prison reform comes in different types, from the work of the Department of Justice's litigation under the Civil Rights of Institutionalized Persons Act (CRIPA), class certifications in prison condition cases, to the intensive gathering of aggregate data about prison conditions that is used both administratively and in litigation to drive reforms. See, e.g., ASS'N OF STATE CORR. ADM'RS, AIMING TO REDUCE TIME-IN-CELL: REPORTS FROM CORRECTIONAL SYSTEMS ON THE NUMBERS OF PRISONERS IN RESTRICTED HOUSING AND ON THE POTENTIAL OF POLICY CHANGES TO BRING ABOUT REFORMS (2016), <https://law.yale.edu/system/files/area/center/liman/document/aimingtoeducetic.pdf>.

¹⁷¹ *Brown v. Plata*, 563 U.S. 493 (2011).

¹⁷² Settlement Agreement, *Ashker v. Gov. of Cal.*, No. C 09-05796 CW (N.D. Cal. Sept. 1, 2015), ECF No. 424-2. CENTER FOR CONSTITUTIONAL RIGHTS, SUMMARY OF *Ashker v. Governor of California* SETTLEMENT TERMS, <https://ccrjustice.org/sites/default/files/attach/2015/08/2015-09-01-Ashker-settlement-summary.pdf>; see also Erica Goode, *Punished for Life*, N.Y. TIMES, Aug. 4, 2015, at D1.

¹⁷³ Examples of various reforms of solitary that are underway in California and elsewhere are provided in Ass'n of State Corr. Adm'rs, *supra* note 170, at 55–72.

¹⁷⁴ Interview with Jules Lobel, Attorney for the *Ashker* Plaintiffs (Apr. 2016); see also Jules Lobel, Comments at the University of Pittsburgh School of Law Conference on

Another incursion into class actions comes by way of Supreme Court interpretations of the FAA, now used to preclude employees and consumers from joining class actions by requiring them, in job applications and in documents related to products and services, to waive the right to be part of an aggregate in court or in arbitration. I and others have mapped the Court's changing FAA case law,¹⁷⁵ which is, as Justice O'Connor put it in the 1980s, "an edifice of its own creation."¹⁷⁶ Here, I focus on the impact of class action bars. Despite the heralding of arbitration as a speedy and effective alternative to courts, the mass production of arbitration clauses has not resulted in a mass of arbitrations. Instead, the number of documented individual consumer arbitrations is startlingly small.

Arbitrations involving wireless services provide the example that I researched because the Supreme Court addressed the legality of bans on class arbitrations in its 2011 decision involving AT&T Mobility¹⁷⁷ and because data are publicly available on the number of claims brought to arbitration. AT&T designated the American Arbitration Association (AAA) to administer its arbitrations. Complying with state reporting mandates to post reports on the web reflecting five years of consumers' use of its services, the AAA has provided information that can be analyzed. After culling thousands of entries between 2009 and 2014, we identified 134 individual claims (about 27 a year) filed against AT&T.¹⁷⁸ During that same five-

International and Interdisciplinary Perspectives on Prolonged Solitary Confinement (Apr. 15, 2016).

¹⁷⁵ See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L.J.* 2804, 2860–93 (2015) [hereinafter Resnik, *Diffusing Disputes*]; Resnik, *Fairness in Numbers*, *supra* note 25, at 112–33; see also J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 *YALE L.J.* 3052 (2015).

¹⁷⁶ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring). The Court's expansion of its own role in preemption is not unique to arbitration cases, for "a nontextualist approach to interpretation" has gained traction. See Daniel J. Meltzer, *Preemption and Textualism*, 112 *MICH. L. REV.* 1, 56 (2013).

¹⁷⁷ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

¹⁷⁸ The American Arbitration Association provides quarterly reports on consumer arbitration pursuant to the laws of various jurisdictions in which it operates. *Consumer Arbitration Statistics*, AM. ARB. ASS'N (2015), <https://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat> [<https://perma.cc/8ZBZ-FX5T>] (select the document "Provider Organization Report"). To review five years of data required downloading the file documenting arbitrations from July of 2009 through June (the second quarter) of 2014 and by filtering claims against AT&T. The data we analyzed ran from July 2009 through June of 2014. Because one law firm had filed 1149 claims in an effort to create a de facto class action, we deleted those claims from the set and ended up identifying 134 individual claims. Thereafter, we sent summaries and drafts of our analyses to American Arbitration Association's (AAA) Vice President for Statistics and In-House Research, Ryan Boyle,

year period, AT&T had about 85 million to 120 million customers a year.¹⁷⁹

The absence of arbitration claims could be attributed to a lack of a need to pursue remedies—either because customer complaints of overcharges were met with repayments or because the company violated no laws. But that explanation is undercut by lawsuits filed by the federal government, which charged the company (along with other major wireless services) with a range of legal breaches, including systematic overcharging for extra services and insufficient payments of refunds when customers complained.¹⁸⁰

The data on the lack of use of arbitration in the wireless arena is paralleled by findings from the federally chartered agency, the Consumer Financial Protection Bureau (CFPB), which looked at federal court filings between 2010 and 2012 in five consumer product markets.¹⁸¹ The CFPB identified 3462 individual cases, or on average about 1100 per year, in addition to 470 federal consumer class action filings.¹⁸²

Mandated arbitration is thus a misnomer because obligations to arbitrate single-file, in practice, are rarely exercised. By reducing the unit to an individual, disputes are not relocated but diffused and dissolved. No process, rather than debates about the permissible boundaries of due process, is the result, which elsewhere I argued should be read as unconstitutionally depriving individuals of their property interests in litigation.¹⁸³

who provided materials on AAA's data and policies. More details on the methodology are in Resnik, *Diffusing Disputes*, *supra* note 175, at 2900–15.

¹⁷⁹ *Number of AT&T Wireless Subscribers from 2007 to 2014 (in 1,000s)*, STATISTA (2015), <http://www.statista.com/statistics/220692/number-of-atundt-wireless-subscribers-since-2007> [<http://perma.cc/PU6N-FTP4>]; *4Q 2014 AT&T by the Numbers*, AT&T (2014), http://www.att.com/Common/about_us/pdf/att_btn.pdf [<http://perma.cc/3CEP-YPER>].

¹⁸⁰ *See, e.g.*, Complaint for Permanent Injunction and Other Equitable Relief at 3–4, *FTC v. AT&T Mobility, LLC*, No. 1:14-cv-3227 (N.D. Ga. Oct. 8, 2014), <http://www.ftc.gov/es/system/files/documents/cases/141008attcmt1.pdf> [<http://perma.cc/FK95-6AEX>]; Stipulated Order for Permanent Injunction and Monetary Judgment at 16, *FTC v. AT&T Mobility, LLC*, No. 1:14-cv-3227-HLM (N.D. Ga. Oct. 8, 2014), <http://www.ftc.gov/es/system/files/documents/cases/141008attstip2.pdf> [<http://perma.cc/Z4D3-JQTB>].

¹⁸¹ *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET AND CONSUMER PROTECTION ACT § 1028(a) (2015) [hereinafter CFPB 2015 ARBITRATION STUDY], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<http://perma.cc/PSB9-JPSZ>].

¹⁸² *Id.* § 6, at 27–28. Filings ought not to be equated with decisions, as in some of the cases identified, defendants sought to stay litigation and filed motions to require arbitration. *Id.* § 6, at 8. Although CFPB researchers also sought to identify filings in a subset of states, they found that data challenges made that plan unworkable. *Id.* § 6, at 15.

¹⁸³ *See* Resnik, *Diffusing Disputes*, *supra* note 175, at 2810, 2823, 2936–39.

Disaggregation, and hence diffusion of claims of right, are also the goals of new efforts to disable class actions, put forth in the Fairness in Class Action Litigation Act of 2017.¹⁸⁴ Some of its features are familiar from prior bills, but this proposal has a wider lens: aiming to curb “abuses” in both class actions and “mass tort litigation.”¹⁸⁵ The justification is that such abuses are “undermining the integrity of the U.S. legal system.”¹⁸⁶

To do so, as this Section’s epigraph reflects, the bill would not permit class certification of cases “seeking monetary relief for personal injury or economic loss” unless a proposed class representative “affirmatively demonstrates that each proposed class member suffered the same type and scope of injury” as did the named representative.¹⁸⁷ Further, at the time of certification, the proponents of class actions would have to demonstrate “that there is a reliable and administratively feasible mechanism” to determine who falls within the class and to distribute remedies to a “substantial majority” if money is sought.¹⁸⁸ H.R. 985 also seeks to amend the MDL statute by requiring counsel for plaintiffs joining an MDL to “demonstrate that there is evidentiary support” of the factual contentions related to the injuries alleged within 45 days of a transfer.¹⁸⁹ In addition, attorneys cannot receive fee awards until distribution has occurred and data on that distribution are submitted to the Federal Judicial Center and the Administrative Courts.¹⁹⁰

IV AGGREGATION’S THIRD PHASE

“[T]he vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impracticable obstacles in the way could not be justified.”

—*Mullane v. Central Hanover Bank & Trust Co.*, 1950¹⁹¹

I have mapped revisions in the understandings of due process that expanded the aegis of courts, as well as the efforts to retrench, often argued as appropriate reflections of due process obligations to

¹⁸⁴ H.R. 985, 115th Cong. (2017).

¹⁸⁵ H.R. 985, 115th Cong. § 102(2) (2017). As of this writing, the proposed legislation is pending.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* § 103(a).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* § 105(i).

¹⁹⁰ *Id.*

¹⁹¹ 339 U.S. 306, 313–14 (1950).

process claims individually. In this Section, I focus on the potential to put due process to work again—not in service of contracting aggregate litigation but as a rubric under which law could recognize and structure relationships among courts, litigants, and the public to legitimate what I think should be understood as the *third phase* of aggregate litigation, which takes place after courts have approved or the parties have agreed upon a resolution that entails further action.

Rule 23, circa 1966, recognized that the interests of groups dealt with in the aggregate are not fixed over the lifespan of a litigation. The 1966 Rule 23 required judges to interrogate the homogeneity of interests at the time of certification and then to return to that question at settlement. Amendments in 2003 expanded the role of judges at certification and at settlement by charging them with appointing counsel for the class, by outlining rules for the award of attorneys' fees, and by enlarging the possibilities for interlocutory appeals.¹⁹² A robust body of law from district and appellate courts bears testament to courts' efforts to discharge these obligations.

But Rule 23 falls silent thereafter. As currently drafted, the Rule places no obligations for judges to oversee aggregation's third phase, during which remedies provided through settlements are implemented, so as to respond to disputes if they arise and to require public accountings of what transpires. Below, I sketch reasons to be concerned about this third phase. I discuss debates in the literature about the nature and scope of implementation problems and the responses proffered in Congress and by proposed revisions of Rule 23 drafted by the current Advisory Committee on Civil Rules. I conclude by outlining ways to articulate roles for disputants, judges, and the public.

Turn first to the problems. When arguing decades ago that judges had a special role in public law litigation,¹⁹³ Abram Chayes famously delineated concerns about their work in such polycentric configurations.¹⁹⁴ Yet as Theodore Eisenberg and Stephen Yeazell explained thereafter, these sprawling, multi-party remedial schemes were not novelties of the 1970s; rather they were "ordinary" aspects of the work of courts, which historically had dealt with the distribution of estates, bankruptcies, and railroad reorganizations and therefore had to oversee ongoing interactions among diverse parties. What was "extraordinary" was not the role of the judge but the changing faces of the plaintiffs; school children, prisoners, and welfare benefi-

¹⁹² See Fed. R. Civ. P. 23(g), (h), (f), reprinted in 215 F.R.D. 158 (2003).

¹⁹³ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

¹⁹⁴ The term is associated with the famous essay by Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978).

ciaries—in addition to railroads, corporations, and wealthy individuals—were making their way into court.¹⁹⁵

How do we know so much about the challenges of structural litigation, such as school desegregation and prison reform? Conflicts about implementation became vivid in the public law cases that Chayes wrote about because recalcitrant defendants were reluctant to desegregate schools, abide by health standards for prisoners, or enforce new rights to hearings before social benefits were terminated. In response, structural injunctions spawned an array of auxiliary personnel, working as special masters and compliance monitors, to try to put remedies into place. Further, when defendants sometimes sought to revise consent decrees, and when plaintiffs sought enforcement, those lawsuits returned to court. Hundreds of published opinions make public these conflicts.

Further, in 1992, the Supreme Court authorized a relaxed standard for governments seeking modifications of decrees and thereby marked a wider path to bring cases, after settlement, back to court.¹⁹⁶ Judges had then to decide either to adhere to or modify prior decrees.¹⁹⁷ In addition, because the Prison Litigation Reform Act of 1996 authorized an array of individuals to challenge the need for continuing court authority, injunctions related to prison conditions could be in court every two years for new fact-finding to sustain the decrees entered.¹⁹⁸

Liberal intervention in other cases enabled what Stephen Yeazell described as a “social process,” permitting the involvement of a variety of participants, some of whose interests only arose after settlement.¹⁹⁹ Thus, even as judges took up managerial roles superintending the implementation of remedies in structural injunctions, much of that

¹⁹⁵ Eisenberg & Yeazell, *supra* note 135, at 486–95.

¹⁹⁶ The first such decision announcing the new standard was *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). See also *Horne v. Flores*, 557 U.S. 433 (2009).

¹⁹⁷ For example, the litigation about the Texas prison system spanned more than three decades and resulted in dozens of decisions. An overview comes from the presiding judge. See William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 STAN. L. REV. 1 (1990). Examples of some of the last set of decisions include *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980); *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Tex. 1999); *Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001); *Ruiz v. Johnson*, 154 F. Supp. 2d 975 (S.D. Tex. 2001). See generally MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998); LARRY W. YACKLE, *REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM* (1989).

¹⁹⁸ See 18 U.S.C. § 3626(b)(1)(A)(i) (2012).

¹⁹⁹ Stephen C. Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244, 258 (1977).

work was undertaken through court proceedings that gave the public opportunities for insights into the conflicts and resolutions.²⁰⁰

Cases involving monetary relief have also generated post-settlement structures, focused on implementing remedies for consumers, employees, and tort plaintiffs. In some instances (securities litigation provides an exemplar), the records of sales and losses may be readily accessible, and technology can lower the transaction costs of disbursing sums. But other kinds of cases have prompted the creation of a retinue of auxiliary actors and institutions—escrow agents, trustees, and claims facilities—to facilitate distribution. That work ranges from insurance-company-like activities of paying claims to providing dispute resolution services when disputes arise about those claims.

Yet these actors have been less visible than have those working post-settlement in school and prison cases. In part, the relative invisibility comes from the incentives of the litigants. Defendants have interests in keeping whatever “peace” has been achieved and therefore not to press for renewed court intervention. Plaintiffs’ lawyers also want to hold onto deals, and they sometimes enter into agreements to persuade their individual clients to accept the settlements negotiated by lead counsel from afar.²⁰¹ Judges likewise have reasons to bring these sprawling disputes to closure. Indeed, as reflected in the disagreement on the Supreme Court about the wisdom of large-scale settlements in the asbestos litigation, many participants view some kind of resolution as better than none.²⁰² Moreover, and unlike structural injunctions, if problems emerge about distribution that were not knowable at the time of settlement, claimants do not have a recognized route back to court.

What we do not know are the dimensions of the problems of implementation, nor how frequent are the conflicts, even as competing claims about the “data” have been proffered. For example, in 2013, a law firm produced what it termed an “empirical study” of con-

²⁰⁰ In addition to the expanded role, post-trial, judges also developed a less visible role as managers and settlers before decisions were rendered. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

²⁰¹ See Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1944 (2017); Howard M. Erichson, *The Problem of Settlement Class Actions*, FORDHAM L. REV. 951 (2014).

²⁰² Justice Breyer explained these concerns in his dissent in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 631–34 (Breyer, J., dissenting). His vantage point was akin to that of Lord Eldon, quoted by Chafee as having argued centuries ago that it was “better . . . to go as far as possible toward justice than to deny it altogether.” Chafee, *supra* note 8, at 205 (citing *Duke of Bedford v. Ellis* [1901] A.C. 8 (HL) 11 (appeal taken from Eng.), which in turn quoted *Cockburn v. Thompson*, 26 Ves. 321, 329 (1809), written by Lord Eldon.

sumer and employee class actions.²⁰³ Relying on an odd-lot set of 148 federal cases (which social scientists would not call a “sample”), which were filed in 2009 and closed in 2013, the law firm argued that class actions created few benefits to individual plaintiffs.²⁰⁴ After excluding settlements with automatic distributions (which had accounted for thirteen of the forty cases identified as settled²⁰⁵), the report’s “bottom line” from the culled cases was that class actions did “not provide class members with anything close to the benefits claimed by their proponents.”²⁰⁶ The report argued that “for practical purposes,” lawyers were “the only real beneficiaries of the class actions.”²⁰⁷

That report was promptly met with counter-interpretations as well as compilations of statistics based on other cases. The National Association of Consumer Advocates (NACA) and the American Association for Justice analyzed the same class actions filed in 2009 and drew very different conclusions,²⁰⁸ in part by noting that more than half of all class action settlements did not require a claim form and therefore many cases resulted in a higher percentage of claims paid.²⁰⁹ Further, the NACA lauded the impact of injunctive and other remedies.²¹⁰

Law professors as well as administrative agencies, such as the Consumer Financial Protection Bureau, have provided additional

²⁰³ See, e.g., MAYER BROWN LLP, DO CLASS ACTIONS BENEFIT CLASS MEMBERS? AN EMPIRICAL ANALYSIS OF CLASS ACTIONS 1–2 (2013), <http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf> [<http://perma.cc/DT6J-T2YE>].

²⁰⁴ The report stated that thirty-three percent of the class actions studied resulted in settlement, “half the average” for individual litigation. *Id.* at 2. Reviewing eighteen cases resolved by “claims-made settlements,” the firm reported finding “meaningful data” on six. *Id.* at 7. The review also complained that in that set of 148 cases, none had gone to trial. *Id.* at 3. But the report did not add that such a result was not aberrant, given that one in one hundred civil cases end with a trial. As noted, we identified fifty of the 2976 cases that went to trial in 2015 were class actions.

²⁰⁵ *Id.* at 2, 8.

²⁰⁶ *Id.* at 2.

²⁰⁷ *Id.* at 12.

²⁰⁸ NAT’L ASS’N OF CONSUMER ADVOCATES & AM. ASS’N FOR JUSTICE, CLASS ACTIONS ARE A CORNERSTONE OF OUR CIVIL JUSTICE SYSTEM: A REVIEW OF CLASS ACTIONS FILED IN 2009 (2015), <http://www.consumeradvocates.org/sites/default/files/Class%20Action%20Report%202-27-15.pdf>. For example, that study identified successful class actions, such as an award of \$219 million in the case against Bernie Madoff, who had embezzled retirement funds by way of a Ponzi scheme. Also cited were awards of \$27.8 million to retiree owners who suffered damages due to a 2008 spill of coal ash sludge from a Tennessee Valley Authority coal plant, and a \$4.8 billion provision of debt relief for consumers victimized by the National Arbitration Forum. *Id.* at 4–5, 9.

²⁰⁹ *Id.* at 24. This report argued that, given the ongoing relations between financial institutions and class members, direct payments were and could be relatively easy. See *id.* at 25.

²¹⁰ See *id.* at 4.

studies with different sets of cases. Brian Fitzpatrick and Robert Gilbert reviewed fifteen small-value consumer class actions; they identified payouts to class members ranging from one to seventy percent of the class.²¹¹ Lynn Baker, Michael Perino, and Charles Silver did extensive work to open the “black box” of federal court class action securities settlements; they examined the seventy to eighty resolutions in the years they reviewed to learn about the relationship of fee awards to outcomes.²¹²

A 2015 publication by the CFPB focused on 419 federal consumer financial class action settlements from 2008 through 2012. The CFPB concluded that the settlements resulted in benefits for at least 160 million consumers, providing \$2 billion in cash relief and \$644 million in in-kind relief.²¹³ The CFPB reported an average claims rate of twenty-one percent across 105 settlements,²¹⁴ as well as 133 of the 419 settlements relying on automatic distributions.²¹⁵

Aggregation—and its challenges—are not limited to the United States; questions of utility have been examined in other jurisdictions. In Canada, for example, the University of Montréal has launched a “Class Actions Lab” to gain comprehensive data and to calculate the economic benefits in monetary class actions. One analysis found that in about sixty percent of fifty-one class actions reviewed in Québec, a “substantial majority of the class members” were compensated.²¹⁶

²¹¹ Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & BUS. 767, 770 (2015). Settlements with the highest compensation rates relied on automatic payments that did not require class members to file claims forms. *Id.* at 770, 781–83; *see also* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010). That review focused on attorney fee awards and identified \$33 billion in class action settlements in 2006 and 2007 of which \$5 billion was awarded to class action lawyers. *Id.* at 816–45. In work published in 2000, Deborah R. Hensler, joined by Nicholas M. Pace, Bonnie Dombey-Moore, Elizabeth Giddens, Jennifer Gross, and Erik K. Moller, found that from thirty to one-hundred percent of settlement funds were paid to class members in ten illustrative class action settlements. *See generally* DEBORAH R. HENSLER, NICHOLAS M. PACE, BONITA DOMBEY-MOORE, BETH GIDDENS, JENNIFER GROSS & ERIC K. MOLLER, *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* (2000).

²¹² Lynn A. Baker, Michael A. Perino & Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1375–81 (2015). The authors examined 431 securities class action settlements from January 1, 2007 to December of 2012 to calculate these figures. *Id.* at 1380.

²¹³ CFPB 2015 ARBITRATION STUDY, *supra* note 181, § 1, at 11; *id.* § 8, at 4, 16. Of the 251 settlements reporting data, \$1.1 billion had been paid or was scheduled to be paid in cash, debt forbearance, and cy pres payments for the benefit of class members. *Id.* § 8, at 4 n.5.

²¹⁴ CFPB 2015 ARBITRATION STUDY, *supra* note 181, § 1, at 17.

²¹⁵ *Id.* § 8, at 20.

²¹⁶ Catherine Piché, *The Value of Class Actions*, THEORETICAL INQUIRIES L. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009743.

But whether an anecdote or a genuine “study,” information deficits abound. What Nicholas Pace and William Rubenstein called a “veil of secrecy” shrouds class action litigation from “the moment the judge signs off on the agreement.”²¹⁷ Pace and Rubenstein looked at court records in thirty-one class settlements, interviewed participants in fifty-seven cases, and concluded that public data (as contrasted with what insiders knew) were available in “fewer than one of five closed cases.”²¹⁸

Yet, despite the limits on the information, the challenges of implementing remedies have become fodder for critics. As the proposed Fairness in Class Action Litigation Act of 2017 reflects, businesses and law firms associated with defendants use uneven distributions as arguments against class certification and for limiting court awarded attorneys’ fees. The 2017 Act would provide that, before a court may certify a class, the party seeking certification must “affirmatively demonstrate . . . a reliable and administratively feasible mechanism” both for identifying class members and “for distributing directly to a substantial majority of class members any monetary relief secured for the class.”²¹⁹ Further, before fees may be awarded to class counsel, “the distribution of any monetary recovery” to class members must be “completed.”²²⁰ The details proposed include “the total amount paid directly to all class members,” an estimate of the numbers of class members, those who received payment, “the average amount (both mean and median) paid directly,” the range, and the purpose of any other payments, including to the class counsel.²²¹ The legislation then calls on the federal judiciary to transmit to Congress “for public dissemination” information on fund distribution.²²²

The proposed bill does not address who pays for the data collection but enjoins judges from awarding fees to lawyers who worked (possibly for years) until the data are “in.” The bill puts the onus on plaintiffs’ lawyers seeking fees to provide the Federal Judicial Center and the Administrative Office of the U.S. Courts with “an accounting

²¹⁷ See Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data* (RAND Inst. For Civil Justice, Working Paper No. WR-599-ICJ, 2008), <http://www.billrubenstein.com/Downloads/RAND%20Working%20Paper.pdf>; see also Stephen Yeazell, *Transparency for Civil Settlements: NASDAQ for Lawsuits?*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 143 (Joseph W. Doherty, Robert T. Reville & Laura Zakaras eds., 2012).

²¹⁸ See Pace & Rubenstein, *supra* note 217, at v.

²¹⁹ H.R. 985 § 103(a).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

of the disbursement of all funds paid by the defendant pursuant to the settlement agreement.”²²³ Under that provision, the plaintiffs’ bar both bears the burden of collecting information and the risks of distribution failures.

Another response to remedial challenges comes from the current Advisory Committee on Civil Rules which, in August of 2016, circulated proposals to amend Rule 23. After the 2017 Fairness Act was introduced, the federal judiciary asked Congress to defer to the Rules Enabling Act process, rather than legislate changes for class actions.²²⁴ The Advisory Committee’s new provisions, altered slightly as of April of 2017, would direct judges, when reviewing class settlements, to consider whether class members are treated “equitably relative to each other.”²²⁵ The proposed Rule also calls on judges to assess “the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims,”²²⁶ and to require some form of disclosure about “side settlements” (that in some cases have been used to buy off potential objectors). But, while raising the issue of a proposed system of “distributing relief” at settlement, the pending rule revision neither requires information on implementation nor offers means by which, post-settlement, subsets of litigants could petition the court for assistance.²²⁷ Thus, although the new rule is a step in the direction of considering post-settlement challenges, it does not oblige either the parties or the court to gather and

²²³ *Id.*

²²⁴ See Letter from David G. Campbell, Chair, Comm. On Rules of Practice & Procedure of the U.S. Judicial Conference, & John D. Bates, Chair, Advisory Comm. On Civil Rules of the U.S. Judicial Conference, to Bob Goodlatte, Chairman, Comm. On the Judiciary of the U.S. House of Representatives (Feb. 14, 2017).

²²⁵ COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 214 (2016) [hereinafter Rule 23 Proposed Revisions, August 2016], <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2016-0004-0002&contentType=pdf> (amending Rule 23(e)(2)(D)). For revisions, see Text of Proposed Rule 23, in AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 105, 106–07 (Apr. 25–26, 2017) [hereinafter Rule 23 Proposed Revisions, April 2017], from the Committee’s April meeting “briefing book,” available at http://www.uscourts.gov/sites/default/files/2017-04-civil-agenda_book.pdf.

²²⁶ RULE 23 PROPOSED REVISIONS, AUGUST 2016, *supra* note 225, at 214 (amending Rule 23(e)(2)(C)(ii)).

²²⁷ A proposed note put forth in August of 2016 would have added that it “may be important to provide that the parties will report back to the court on the actual claims experience.” *Id.* at 222. But in the April 2017 revisions, those words are deleted, and the revised note would state: “Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.” *Rule 23 Proposed Revisions, April 2017, supra* note 225, at 111.

to put the experiences entailed in implementation and distribution data on the record.

Here, I outline a different approach that would require litigants and courts to gather and make public information on remedies. Before approving settlements for structural or monetary relief, courts should require that such agreements include periodic notices to claimants, regular reporting about implementation (with privacy for individuals when appropriate),²²⁸ and a method of returning to court, if conflicts arise across sets of claimants. The courts should thus build in ongoing relationships with litigants to maintain affiliations sufficient for the exercise of continuing jurisdiction during the full span of an aggregate. While improvements in class action and MDL communications have come by way of notice coupled with group chats enabling interactions among litigants and courts,²²⁹ more structured rules are needed to engage judges in oversight during this third phase of aggregation.

The goals of doing so would not be to inhibit certification or to price plaintiffs' attorneys out of the class action market. Rather, the obligations should be imposed on both plaintiffs and defendants, charged with bringing to fruition the settlements that they crafted. Doing so ought to be predicated on concerns about "decency" and "fairness" that were once seen as distinct from constitutional requirements but should now be understood as part of the "process due" to litigants.

Placing this third phase of class actions within the adjudicatory fold opens up the possibility of post-settlement disputes, which in turn requires a returning to questions raised in the 1960s about just how binding class action judgments should be. The current approach relies on a doctrine that frames such issues as "collateral" attacks on a judgment. A well-known example comes from the litigation related to Agent Orange, a toxic substance that harmed soldiers and civilians in Vietnam when the United States sprayed herbicides; years later, Agent Orange was documented to have caused injuries.²³⁰ In 1983, the Honorable Jack Weinstein of the Eastern District of New York famously certified a class of all persons who had served from 1961 to

²²⁸ For a parallel suggestion, see Letter from Brian Wolfman, Kevin M. Clermont, Brian Fitzpatrick, Deborah R. Hensler, Alexandra D. Lahav, Geoffrey P. Miller, Nicholas M. Pace & Charles Silver, to Richard Marcus, Assoc. Reporter, Advisory Comm. on Civil Rules (Mar. 17, 2015), which discusses the proposed class action disbursement disclosure rule (the new Rule 23(i)).

²²⁹ See Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846 (2017).

²³⁰ See generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987).

1972, were in or near Vietnam, and were injured by exposure to these chemicals.²³¹ That case was settled on the eve of trial, with a \$180 million fund providing for payments from 1985 until 1994.²³²

One set of challenges to this settlement emerged in 1989 and 1990; individuals went to state court and argued that they should be able to pursue claims because their injuries were not manifest until after the 1984 settlement was negotiated.²³³ The cases were removed to federal court and sent to Judge Weinstein, who dismissed the claims on the grounds that the new plaintiffs had been part of the original class and covered under the settlement as “future claimants,” and the Second Circuit affirmed.²³⁴ In the late 1990s, other plaintiffs—Daniel Stephenson and Joe Isaacson—became part of an MDL, once again assigned to Judge Weinstein, who likewise dismissed their claims as precluded by the prior litigation.

But in its 2001 decision, the Second Circuit invoked *Hansberry v. Lee* and reversed; the court concluded that while the soldiers were within the class (individuals serving in Vietnam during the relevant decade), the 1984 settlement had made no provision for individuals whose injuries had not become manifest before the settlement fund expired in 1994.²³⁵ Given the lack of the unity of interests that *Hansberry* required between representative and the represented, the new plaintiffs were to have an opportunity to raise their claims.²³⁶

The issue went to the Supreme Court, where the questions about the finality of class action judgments became entangled with whether the federal courts could, through the All Writs Act, take cases begun in state courts and approve their removal to federal court. In 2002, in an unrelated case, the Court held that the All Writs Act could not be the basis for removal.²³⁷ The Agent Orange litigation thus foundered.²³⁸ Although the Supreme Court has dealt with questions of col-

²³¹ *In re* “Agent Orange” Prod. Liab. Litig., 100 F.R.D. 718, 729 (E.D.N.Y. 1983).

²³² *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 253 (2d Cir. 2001) (citing the sequence of rulings).

²³³ *See* Ivy v. Diamond Shamrock Chems. Co., 510 U.S. 1140 (1994); Hartman v. Diamond Shamrock Chems. Co., 510 U.S. 1140 (1994); *see also* *In re* “Agent Orange” Prod. Liab. Litig., 996 F.2d 1425, 1430 (2d Cir. 1993); Ryan v. Dow Chemical Co., 781 F. Supp. 902, 912–14 (E.D.N.Y. 1991).

²³⁴ *In re* “Agent Orange” Prod. Liab. Litig., 996 F.2d 1425, 1436 (2d Cir. 1993).

²³⁵ *Stephenson*, 273 F.3d at 260–61.

²³⁶ The question of whether new litigation was precluded was decided; the court did not reach the issue of whether Dow Chemical could rely on a military contractor defense that would result in preclusion of relief. *Id.* at 261. On remand, those defenses resulted in the plaintiffs’ loss. *In re* “Agent Orange” Prod. Liab. Litig., 517 F.3d 76, 92–102 (2d Cir. 2008), *aff’g* 304 F. Supp. 2d 404, 441–42 (E.D.N.Y. 2004).

²³⁷ *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002).

²³⁸ The *per curiam* in the Isaacson case relied on the Court’s decision in *Syngenta*. *Dow Chem. Co. v. Stephenson*, 539 U.S. 111, 112 (2003). The Second Circuit decision in

lateral attacks in other arenas,²³⁹ it has not addressed how courts, post settlement, could incorporate, rather than reject, the problems of implementation and the parameters of relief.

Rather than conceptualize settlements as closed upon approval, aggregate resolutions (for injunctions or money) should be seen as ongoing until all relief is accorded. Building on ideas in the 1960s Rule 23 drafters' memos, once a court has a "sufficient connection with a class situation," it should retain power not only to decide questions related to absentees at certification and settlement, but also to respond to questions arising during aggregation's third phase.²⁴⁰ Appreciating what the *Mullane* Court described as the "vital state interest" (in that context to use aggregation to resolve the numbers of claims that could arise from pooled trusts), courts which are the homes of aggregation (via class certification or MDL transfers) ought to have continuing and nationwide jurisdiction over related claims, including—as in *Agent Orange*—of groups arguing that the settlement ought not preclude their claims.

As in *Mullane* and *Phillips Petroleum v. Shutts*, the vehicle for generating affiliation among absentees and courts would be notice in settlements to inform litigants that, if they can establish that settlement parameters did not systematically take their interests into account, judges would have to consider readjustments. If any cases were subsequently filed in state courts in efforts to avoid federal jurisdiction, the Court could revisit its All Writs Act jurisprudence to permit removal, rely on the Anti-Injunction Act to require removal "in aid of" the aggregate's court jurisdiction, or invoke *Mullane*-like due process authority and use the fact of the location in a court of a settlement (analogized to a pooled trust) as the basis for its jurisdic-

Stephenson was affirmed by an equally divided Supreme Court. Hence, the Court did not address the question that was posed in the certiorari petition: whether "absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, after class members have a full opportunity to opt out . . . , object, and appeal, and after both the trial court and the court of appeals, in the course of approving the settlement, expressly determined that the class representatives adequately represented the entire class." *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *cert. granted*, 539 U.S. 111 (2002) (No. 02-271).

²³⁹ See, e.g., *Martin v. Wilks*, 490 U.S. 755 (1989); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); see also *Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999).

²⁴⁰ The idea of expanding the role for courts under Rule 23 can also embrace MDL proceedings, as reflected in a proposal by John Rabiej to create a Rule 23.3, to structure judicial authority under the Federal Rules of Civil Procedure for MDL litigation. See Letter from John K. Rabiej to the Hon. John Bates, Chair, Federal Rules Committee (May 19, 2017) (on file with the *New York University Law Review*).

tion.²⁴¹ That exercise of authority is a kind of “jurisdiction by necessity”²⁴² that propelled the *Mullane* ruling.

The result would be that post-settlement disagreements should be seen not as “collateral to” but as a part of the initial litigation. Judges would be called upon to reconsider whether the identity of interests that existed at certification and settlement had diminished.²⁴³ In terms of concerns about spawning “multiple bites of the litigatory apple” (as the D.C. Circuit raised when finding a common law doctrine of virtual representation²⁴⁴), the Supreme Court’s decision in *Taylor v. Sturgell* provides a model for analyzing the degree to which identity of interests remains between new claimants and the original litigants. The fact of certification at a class action’s inception and at settlement should create presumptions that the results should remain in place, but should not be read as flatly preclusive of arguments that new issues require reconsideration of distributional outcomes.²⁴⁵ Of course, some settlements have built opportunities into their procedures to revisit aspects of their decisions or deliberately put off some issues. My suggestion is that whether parties do so or not, such opportunities be part of the structure of approval of aggregate settlements.

In addition to questions about how a third phase affects preclusion doctrine, issues of incentives need to be addressed. The numbers that I provided at the outset about the many unrepresented civil liti-

²⁴¹ In exchanges among the Justices when *Mullane* was pending, Justice Black pointed out in a March 3, 1950 note, that the N.Y. court had “personal jurisdiction over the trustee.” An outline of the opinion, dated March 25, 1950, described the first point on jurisdiction to include “[r]egardless of technical classifications, this type of proceeding . . . support[ed] judgment, provided only that those affected are properly notified.” See Papers of Robert H. Jackson, 1816-1983 (on file at the Library of Congress, Manuscript Division, Box 164, No. 378, *Mullane v. Central Hanover Bank & Trust Co.*).

²⁴² Class Actions—Some Further Thoughts 1962, *supra* note 1, at 9; see also Linda S. Mullenix, *Policing Non-Class Aggregate Settlements: Empowering Judges Through the All Writs Act* (UNIV. OF TEX. SCH. OF LAW PUB. LAW & LEGAL THEORY RESEARCH PAPER SERIES, No. 572, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2898980.

²⁴³ The Court refused a federal common law rule that would have added new grounds for preclusion. Instead, it reiterated its adherence to the “fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party.” *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008). The Court imposed parameters on the permissible forms of preclusion: preclusion can only occur if “at a minimum . . . [t]he interests of the nonparty and her representative are aligned” and “either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty.” *Id.* at 900.

²⁴⁴ *Taylor v. Blakey*, 490 F.3d 965, 975 (D.C. Cir. 2007) (internal quotation marks omitted).

²⁴⁵ Another exemplar comes from Rule 60(b) of the Federal Rules of Civil Procedure, providing that when there is new information that “with reasonable diligence, could not have been discovered” at the relevant time (here settlement, rather than trial), judges may provide some form of relief from judgment. FED. R. CIV. P. 60(b).

gants are reminders that procedural aspirations need to be accompanied by provisions for lawyers. Rather than burdening only plaintiffs' attorneys, as the pending Fairness in Class Action Litigation Act of 2017 would do, I suggest that a system be structured to oblige both settling parties and the court to make remedies effective. Judges should be required to ask—and both parties to respond—about getting results to individuals. Doing so will augment the information as well as help develop techniques to achieve more successful distributions. Current models include settlements that require defendants (not claims facilities) to make payments directly to consumers;²⁴⁶ insist that defendants who have access to data on class members provide assistance in distributing relief;²⁴⁷ and simplify claims forms when required.²⁴⁸

Moreover, Rule 23 could commend that, in appropriate cases, courts meet regularly and, presumptively, on the record, with all the parties' lawyers to learn about barriers to recovery. Further, the Rule could permit judges to tax uncooperative defendants by requiring settlements to have additional funds, set-aside, to pay the time of plaintiffs' lawyers for enforcement work, unless defendants use their best efforts to implement remedies. If implementation succeeds, then these set-aside funds could revert to defendants. In addition, while settlements under Rule 23 now recognize that plaintiffs may have more than one opportunity to opt out, the Rule does not direct judges to regulate the fairness of “back door” provisions permitting defendants to withdraw when insufficient numbers of plaintiffs agree to be bound. Just as side agreements have become a “trigger warning,” prompting courts to inquire about the quality of the settlement, back doors should likewise be seen as a prompt for court inquiries into the reasons why significant numbers of claimants decline to be included and whether adjustments are needed.

On the plaintiffs' side, the current class action and MDL landscape includes what some call “peace premiums,” paid to clients and their lawyers who join settlements. Incentives to make remedies effective could similarly have benefits, such as interim fee payments to class lawyers and sliding-scale fee awards, with higher percentages paid to lawyers who distribute funds successfully and economically. Moreover, one could enlist in MDLs the individually-retained plaintiffs' attorneys who file the cases initially (IRPAs, as Denny Curtis,

²⁴⁶ See, e.g., CFPB 2015 ARBITRATION STUDY, *supra* note 181.

²⁴⁷ See, e.g., *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005).

²⁴⁸ See Piché *supra* note 216, at 25.

Deborah Hensler, and I once called them²⁴⁹). When IRPAs are involved and if individualized work is needed,²⁵⁰ structured fee awards could link payments to IRPAs for client-centered work done to implement remedies. In short, rather than assume that the delineation between the class as an “entity” onto itself, as contrasted with an “aggregate” of individuals, the framing may shift over a litigation’s lifespan. The class as an “entity” may dominate pre-settlement, while disaggregation and more individualization may be relevant after settlement.

What is the good to be produced by the potential that I have outlined for more disputes and more work for the lawyers and judges involved in aggregation? The under-documented and under-regulated set of interactions among lawyers, clients, court-authorized auxiliary personnel, and judges needs to be brought within the mix of constitutional values and common decency that animated the original Rule 23. Reorienting the process due is again required: Distributional debates inside a claims resolution system should not be left to the private decision-makers authorized under such settlements without a subsequent opportunity for a return to public courts. The concerns about legitimacy that have come to lace the new doctrine of personal jurisdiction, focused on defendants’ affiliations with jurisdictions, need to become part of aggregation’s third phase, predicated on the importance of ongoing affiliations between the courts and the people to whom remedies are owed.

Moreover, due process is not the only relevant constitutional touchstone; First Amendment concerns also come into play. A line of cases recognizes a First Amendment right to have access to government proceedings in criminal and civil litigation.²⁵¹ Yet lower courts have debated, for example, whether reports by monitors appointed to

²⁴⁹ Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 300 (1996); see, e.g., *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 300 (1st Cir. 1995); *In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 605 (1st Cir. 1992).

²⁵⁰ See Order Denying Non-Class Counsel’s Motions for Attorneys’ Fees, *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2017 WL 1474312, at *1 (N.D. Cal. Apr. 24, 2017). Judge Charles Breyer denied “244 motions for attorneys’ fees and costs filed by attorneys who did not serve as Class Counsel . . . [b]ecause Volkswagen did not agree to pay these fees and costs as part of the Settlement, and because Non-Class Counsel have not offered evidence that their services benefited the class, as opposed to their individual clients.” *Id.* Such lawyers could, of course, recoup fees from individual clients with whom they had retainers. *Id.*

²⁵¹ See, e.g., *Del. Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014); *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286 (2d Cir. 2011).

oversee injunctions are “judicial documents” to which access is constitutionally obliged.²⁵² Research in both the United States and Canada shows how rare are “final, clear, and straightforward accounting” reports that detail how settlements are implemented.²⁵³ What I am proposing is public access to post-decision implementation through a reading of the First Amendment, understood as obliging that filings related to the monitoring of remedies through aggregate settlements become part of the judiciary’s records and be open to the public.

Reasons for doing so come in part from ideas that Jeremy Bentham advanced centuries ago about the value of public access. “Without publicity, all other checks are insufficient: in comparison with publicity, all other checks are of small account.”²⁵⁴ What today we call “transparency” was a practice that Bentham thought could impose discipline; “the more strictly we are watched, the better we behave.”²⁵⁵ And the behavior he sought to affect was that of judges. “Publicity is the very soul of justice. . . . It keeps the judge himself, while trying, under trial.”²⁵⁶ Such “notification” of the public not only imposed oversight but also a possibility of reform.²⁵⁷ Once informed, public opinion could exercise its authority to “enforce the will of the people by means of the moral sanction.”²⁵⁸

In Bentham’s wake, I have argued that publicity in democracies helped to move members of the public from the passivity of spectators

²⁵² Compare *United States v. Erie County*, 763 F.3d 235 (2d Cir. 2014) (requiring access to a monitor’s report related to jail conditions), with *IDT Corp. v. eBay*, 709 F.3d 1220, 1224 (8th Cir. 2013) (declining to require access), and *SEC v. Am. Int’l Grp.*, 712 F.3d 1 (D.C. Cir. 2013) (holding that reporters had no common law or First Amendment right of access to reports ordered to be provided by an independent consultant, dispatched pursuant to a court decree). See generally Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public’s Role in Court-Based ADR*, 15 *NEV. L.J.* 1631 (2015).

²⁵³ Piché, *supra* note 216, at 27.

²⁵⁴ Bentham, *Rationale of Judicial Evidence*, *supra* note 106, at 355 (“Of Publicity and Privacy, as Applied to Judicature in General, and to the collection of the Evidence in Particular.”).

²⁵⁵ UCL FACULTY OF LAWS, BENTHAM PROJECT, THE MORE STRICTLY WE ARE WATCHED, THE BETTER WE BEHAVE (2007), available at http://www.ucl.ac.uk/Bentham-Project/site_images/Leaflets/Panopticon%20Bentham%20DL%20UPDATED.pdf. The quote comes from 1 JEREMY BENTHAM, WRITINGS ON THE POOR LAWS 277 (Michael Quinn ed., 2001); and Bentham, *Organization of Judicial Establishments*, *supra* note 51, at 316. The website and the project’s pamphlet also provide a copy of Bentham’s emblem, which included an “all seeing eye, framed by the words ‘Mercy, Justice, Vigilance.’” Bentham Project, UCL Faculty of Laws, <https://www.ucl.ac.uk/bentham-project> (last visited July 26, 2017).

²⁵⁶ BENTHAM, *Organization of Judicial Establishments*, *supra* note 51, at 316; see also BENTHAM, *Rationale of Judicial Evidence*, *supra* note 106, at 355.

²⁵⁷ PHILIP SCHOFIELD, UTILITY AND DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM 261 (2006).

²⁵⁸ *Id.* at 263.

to an active posture as “observers,” not only possessing the moral authority of critique,²⁵⁹ but also the political power in democracies to argue for legal change. Centuries after Bentham, and in global networks awash with hackers, we know about disinformation as well as information overload, and that notices generated through Rule 23 sometimes go unread.

But class action notices are information-forcing, putting issues onto the public screen. The 1960s’ mix of paternalism and egalitarianism produced the insistence to do “*something*” to inform litigants and the public about the decisions that would affect their rights. Notice served as one placeholder for a relationship between absent litigants and courts to make legitimate the decisions resolving their claims. That “gesture” of notice did not produce legions of individuals personally appearing in courts, but it did produce bodies of law debating how to shape remedies for millions, as well as extensive media coverage of class actions and a host of enacted and proposed reforms.

To conclude, one last return to the 1960s is in order, when the drafters of Rule 23 invoked Chafee’s concerns about “common decency” as reflecting the need to let those affected by judgments know that resolutions were in the offing. Today, more than politeness and paternalism are at stake. Courts and litigation are the objects of attack, and they need to reassert their own role, “at home,” as institutions central to democratic governance. As in the 1960s, judges should be enlisted again to engage those affected—litigants and the public—because (to borrow phrases from *Mullane*²⁶⁰) it is “vital” to state interests that courts be accessible and accountable. The reason to shape a third phase is to build relationships both with subsets within the aggregate and with the public, to illuminate the benefits as well as the pitfalls of collective redress.

²⁵⁹ See Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 L. & ETHICS OF HUM. RTS. 226 (2011); see also JONATHAN CRARY, *TECHNIQUES OF THE OBSERVER: ON VISION AND MODERNITY IN THE NINETEENTH CENTURY* 1–24 (1990).

²⁶⁰ 339 U.S. at 313.