

REFLECTIONS OF A RECOVERING AGGREGATIONIST

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INTRODUCTION

Professor Stephen Subrin's long and illustrious career tilling in the civil procedure vineyard has resulted in an influential body of work addressing myriad aspects of procedural justice. Over a span of more than four decades, Professor Subrin has borne witness to vast sea-changes in procedural law and has written about, debated, lobbied (for or against), and taught much of the modern history of federal civil procedure. His writings have focused on such diverse topics as the rulemaking process,¹ the concept of transsubstantive procedure,² civil discovery,³ alternative dispute resolution,⁴ trials and judging,⁵ and civil rights litigation.⁶ He also has been a faithful champion of legal history, includ-

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¹ Steve Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES E. CLARK, NEW YORK UNIVERSITY SCHOOL OF LAW INGRAM DOCUMENTS IN LEGAL HISTORY (P. Petruck ed., 1991); Steve Subrin, Daniel Coquillette & Mary Squires, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Merging Procedural Patterns*, 137 U. PA. L. REV. 999 (1989); Steve Subrin, *The Role of Local Rules*, 75 A.B.A. J. 62 (1982); Steve Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System, The Case for Presumptive Limits*, 49 ALA. L. REV. 79 (1997).

² Steve Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All Assumption"*, 87 DENV. U. L. REV. 337 (2010).

³ Steve Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002); Steve Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998); Steve Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994).

⁴ Steve Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196 (2003).

⁵ Steve Subrin & Stephen B. Burbank, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399 (2011); Steve Subrin, *Thoughts on Misjudging Misjudging*, 7 NEV. L.J. 513 (2007).

⁶ Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution and Elemental Fairness*, 12 NEV. L.J. (2102); Steve Subrin & A.R. Dykstar, *Notice and the Right to Be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449 (1974); Steve Subrin, P. Baumann & J. Brown, *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487 (1987); Steve Subrin, P. Baumann & J. Brown, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV.

ing interpretation of history to contribute to an understanding of the Rules Enabling Act as it exerts limits on the rulemaking function.⁷

Within the context of this impressive body of legal scholarship, Professor Subrin perhaps is chiefly renowned for his much-cited, highly influential article, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*.⁸ Professor Subrin's article chronicled the extent to which the Federal Rules of Civil Procedure were based on equity rather than the common law (hence, describing how equity "conquered" the common law).⁹ This article, then—in tribute to Professor Subrin's contribution to our collective thinking about the influence of equity on modern civil procedure—focuses on the American class action rule¹⁰ and the aggregate litigation movement that has evolved over the span of Professor Subrin's forty-year career.

Arguably, of all the Federal Rules of Civil Procedure, the Rule 23 class action is the rule most patently grounded in equity. Class actions truly are a creature of equity. As we are constantly reminded, prior to the promulgation of the Federal Rules of Civil Procedure in 1938, the modern Rule 23 class action had its antecedents in the English Chancery Bill of Peace and Equity Rules 28 and 38.¹¹ Whatever may be said of other Federal Rules, class action litigation remains the arena where equity still holds pervasive sway in jurisprudential arguments and judicial opinions. Hence, lawyers and judges alike frequently make recourse to the trope that Rule 23 class actions are creatures of equity.¹²

211 (1992); Steve Subrin, J. Brown & D. Givelber, *Treating Blacks as if They Were White: Problems of Definition and Proof in Section 1982 Cases*, 124 U. PA. L. REV. 1 (1975).

⁷ Steve Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988); see also Subrin, *Charles E. Clark*, *supra* note 1.

⁸ Steve Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

⁹ See also Steve Subrin, *The Empirical Challenge of Procedure Based in Equity: How Can Equity Procedure Be Made More Equitable?*, in EQUITY AND CONTEMPORARY LEGAL PROBLEMS 761 (1992).

¹⁰ FED. R. CIV. P. 23.

¹¹ See generally 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1751 (1986) (history and purpose of the class action rule, citing to the English Court of Chancery Bill of Peace, and Federal equity Rules 48 and 38).

¹² See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999) (class actions developed as exception to formal rigidity of necessary party rule in equity); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (Rule 23 stems from equity practice); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985) (class action was invention of equity); Brief for W.R. Huff Asset Management Co., L.L.C. as Amicus Curiae in Support of Petitioner, *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 2014 WL 2361890 (U.S. May 28, 2014) (No. 13-640), at 16 (noting class action developed from equity jurisprudence); Brief for the Petitioner, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 2009 WL 2040421 (U.S. July 10, 2009) (No. 08-1008), at 29–30 ("In short, Rule 23 creates a procedural device to serve procedural ends. In so doing, it follows in a long tradition of the use of class litigation by federal courts. Class action procedures were developed by the federal courts sitting in equity to allow adjudication of rights common to groups of litigants too numerous for joinder, and

In addition, at least some federal judges—most notably Judge Jack Weinstein of the Eastern District of New York—have frequently invoked Rule 23's equitable roots as the basis for adventuresome resolution of complex class litigation involving both private and public social justice issues.¹³ Judges similarly have invoked the courts' equitable powers in support of the creation of the so-called "quasi-class action."¹⁴ And at least one judge relied on Rule 23's equitable basis as a rationale authorizing the court to order an opt-in procedure for a Rule 23(b)(3) damage class action,¹⁵ an extension of the court's equitable powers in the class action arena that the Second Circuit Court of Appeals subsequently (and swiftly) rejected.¹⁶

As a scholar deeply invested in the equitable roots of civil procedure, the arc of Professor Subrin's academic career has neatly traversed the arc of modern class action litigation. The modern era of class litigation began with the 1966 amendments to Rule 23.¹⁷ As a putative child (actually, young adult) of the 1960s and an emerging legal scholar in the 1970s, Professor Subrin turned his early attentions to the use of class litigation in the civil rights arena.¹⁸ His attention to the procedural efficacy of class litigation in the civil rights arena reflected the first decade of class litigation after the 1966 Rule 23 amendments went into effect, a period characterized by the emergence and domination of a new paradigm of public law and institutional reform litigation.¹⁹ This era of class litigation was exemplified by cases contesting school desegregation, chal-

the principles developed in such cases were later incorporated into the Federal Equity Rules. This Court long ago recognized that the Equity Rules' provision for class actions was a valid exercise of the federal courts' inherent (as well as statutorily conferred) power to regulate their own procedures." (citing *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 363–64 (1921))).

¹³ See, e.g., *In re Simon II Litig.*, 211 F.R.D. 86, 104 (E.D.N.Y. 2002), *vacated*, 407 F.3d 125 (2d Cir. 2003) (class action based on equity practice flexible enough to assure fair remedy and due process in vexing tobacco litigation); *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 803 (S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1993) ("It is this principle of fashioning remedies where none exist at law that underlies Rule 23 and justifies its application to this complex of asbestos cases. Rule 23 is a child of equity.").

¹⁴ See, e.g., *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 553–54 (E.D. La. 2009) (quasi-class action conferring on court equitable authority to review contingent fee contracts for reasonableness); *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) (quasi-class action subject to general equitable powers of the court).

¹⁵ See *In re Ski Train Fire in Kaprun, Austria* on Nov. 11, 2000, 220 F.R.D. 195, 220 (S.D.N.Y. 2003) (invoking equitable powers of the court in class action litigation to order an opt-in class).

¹⁶ See *Kern v. Siemens*, 393 F.3d 120, 128–29 (2d Cir. 2004) (rejecting concept that court's equitable powers in the class action arena extended far enough to supersede the requirements of Rule 23).

¹⁷ See WRIGHT, MILLER & KANE, *supra* note 11, § 1753 (the 1966 revision of Rule 23).

¹⁸ See Steve Subrin & John Sutton, *Welfare Class Actions in Federal Court, A Procedural Analysis*, 8 HARV. C.R.-C.L. L. REV. 21 (1973); see also Steve Subrin & John Sutton, *Class Action: Welfare*, TRIAL, Jan./Feb. 1974.

¹⁹ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

lenging conditions of confinement in prisons and mental health facilities, and confronting various forms of discriminatory behaviors.²⁰

However, this initial eagerness to harness the class action to resolve social justice problems soon engendered a judicial backlash,²¹ which resulted in restrictive decisions that tempered attorney enthusiasm for pursuing group relief through the class action device. By the late 1970s, the so-called “Golden Age” of class litigation in the 1960s began to recede. As will be discussed, however, the late 1970s marked a shift away from public interest law class litigation to a new form of complex litigation vexing the courts: namely, mass tort litigation.

The era of mass tort litigation, then, marked the beginning of a long and gradual shift in collective redress mechanisms away from the class action to alternative forms of non-class aggregate litigation. Over the span of Professor Subrin’s academic career—and based on expansive theories of equitable justice—efforts to accomplish relief for collective harms have transcended the class action rule and substituted new forms of largely unrestrained aggregate dispute resolution techniques. A new generation of “aggregationists,” building on the work of an older generation of “aggregationists,” has ironically abandoned the class action or declared it moribund.²²

If the older generation of aggregationists embraced the class action rule as the procedural panacea for resolving massive societal harms, a new generation of aggregationists has instead turned its back on the class action rule as a disutilitarian vehicle for achieving collective redress. Not only is this true in the judicial arena, but the new aggregationist movement is championed by a fresh generation of academic scholars who often propose extreme approaches to resolving aggregate litigation, seemingly unbounded by law.²³ It has been ob-

²⁰ See, e.g., *Hart v. Cmty. Sch. Bd. of Educ.*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff’d*, 512 F.2d 37 (2d Cir. 1975) (ordering an integration plan for the Mark Twain middle school in Coney Island, Brooklyn); *Soc’y for the Good Will to Retarded Children, Inc. v. Cuomo*, 572 F. Supp. 1300 (E.D.N.Y. 1983) (ordering corrective measures at state institution for mentally handicapped children in violation of constitutional rights), *vacated*, 737 F.2d 1239 (2d Cir. 1984); *Order, Manicone v. Cleary*, No. 74 C 575 (E.D.N.Y. Dec. 12, 1977) (prisoner access to telephones); *United States v. Kahane*, 396 F. Supp. 687 (E.D.N.Y. 1975) (right of defendants to obtain food meeting dietary requirements); *Wilson v. Beame*, 380 F. Supp. 1232 (E.D.N.Y. 1974) (tolerance for Muslim prisoners).

²¹ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (allocating costs of sending notice to class members on plaintiffs); *Zahn v. Int’l Paper Co.*, 414 U.S. 291 (1973) (requiring that all class members in diversity class actions individually satisfy the jurisdictional amount in controversy requirement).

²² See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming Near Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013); George Rutherglen, *Wal-Mart, AT&T Mobility, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. in brief 24 (2012); Benjamin Sachs-Michaels, Note, *The Demise of Class Actions Will Not Be Televised*, 12 CARDOZO J. CONFLICT RESOL. 665 (2011).

²³ See, e.g., Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059 (2012) (arguing in favor of taking away claimant’s autonomy in mass tort class actions); Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOK. J. INT’L L. 751 (2102) (proof of classwide

served that it is the inevitable role of the next generation of legal scholars to react against the theories and policies of their mentors; the new generation of young scholars have forsaken their predecessors and embraced new aggregationist theories.

I was an aggregationist of the old-school variety. Similar to many of my procedural colleagues, I was swept up by the great aggregationist movement inspired by the mass tort litigation crisis of the 1980s. I readily joined the procedural reform bandwagon urging expanded use of the class action rule (and related doctrinal jurisprudence) to address mass tort injuries.²⁴ But the twenty-first century, observing the gradual transformation of class action litigation into something else, prompted my reconsideration of the wisdom of aggregate procedure. For reasons explained below, I now consider myself to be a recovering aggregationist. And I am not alone in such rethinking.²⁵

I. THE ORIGINS OF THE AGGREGATE LITIGATION MOVEMENT, 1986–1996

As indicated above, by the late 1970s the great era of civil rights class action litigation was in retreat or hibernation, largely the victim of increasing judicial resistance to such cases. At approximately the same time as this denouement, the problem of mass tort litigation began to emerge on federal and state dockets. The story of first generation mass tort litigation has been well-documented in several book-length treatments.²⁶ These well-known cases in-

injury should not be necessary to certify a class action); Sergio J. Campos & Howard M. Erichson, *The Future of Mass Torts*, 159 U. PA. L. REV. PENNUMBRA 231 (2011); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043 (2010) (arguing the 100 percent awards should be made to class counsel in small claims consumer cases to ensure maximum deterrent effect of such class actions); see generally Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011) (discussing problems with non-class aggregate settlements); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775 (2010) (trend to non-class aggregate settlements).

²⁴ See generally Linda S. Mullenix, *Beyond Consolidation: Post-Aggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475 (1991); Linda S. Mullenix, *Class Resolution of the Mass Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986); Linda S. Mullenix, *Federalizing Choice of Law in Mass Tort Litigation*, 70 TEX. L. REV. 1623 (1992).

²⁵ Elizabeth Chamblee Burch, *Disaggregation*, 90 WASH. U. L. REV. 667 (2013); Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97 (2013); Georgene M. Vairo, *Lessons Learned by the Reporter: Is Disaggregation the Answer to the Asbestos Mess*, 88 TUL. L. REV. 1039 (2014).

²⁶ See, e.g., PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1986); MICHAEL D. GREEN, *BENEDICTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* (1996); MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* (1985); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (Belknap Press 1986); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995); DAVID WEIR, *THE BHOPAL SYNDROME* (1987).

cluded asbestos, Agent Orange, the Dalkon Shield, DES, and Bendectin litigation.²⁷

The emergence of mass tort litigation inspired the creation of the first generation of dedicated aggregationists. This aggregation movement was advanced by five major developments: (1) an emerging crisis mentality in the judicial system, (2) the studies by various institutional reform organizations, (3) the actions of an array of aggregationist judges, (4) the efforts of judicial surrogates, and (5) the scholarly contributions of academic camp followers who enthusiastically joined the aggregationist movement.²⁸

The mass toxic substance, defective medical device, and pharmaceutical cases shared several characteristics that suggested the arrival of a new form of litigation that was unlike the civil rights and institutional reform cases of the 1960s. First and foremost was the sheer volume of mass tort cases filed in federal and state courts. The litigation also was characterized by problems relating to geographic dispersion, latent injury, indeterminate plaintiffs and defendants, and complex issues of causation and scientific proof.²⁹ By the mid-1980s, some federal and state judges were seized by a "crisis mentality," provoked by the wave of new mass tort cases filed in their courts and consequent problem of docket congestion.

As judges struggled to manage the mass tort litigation on their dockets, virtually all major institutional reform organizations initiated research projects to study the new phenomenon of mass tort litigation and propose recommendations to address the burgeoning problems related to it.³⁰ While the institutional

²⁷ See BRODEUR, *supra* note 26; GREEN, *supra* note 26; MINTZ, *supra* note 26; SCHUCK, *supra* note 26; WEINSTEIN, *supra* note 26; WEIR, *supra* note 26.

²⁸ Myself included: see Mullenix, *Beyond Consolidation: Post-Aggregative Procedure in Asbestos Mass Tort Litigation*, *supra* note 24; Mullenix, *Class Resolution of the Mass Tort Case: A Proposed Federal Procedure Act*, *supra* note 24; Mullenix, *Federalizing Choice of Law in Mass Tort Litigation*, *supra* note 24.

²⁹ See AM. LAW INST., REPORTER'S STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY VOL. II, at 389-93 (1991) (defining the salient characteristics of a mass tort action).

³⁰ There was a flurry of such efforts from the mid-1980s through the early 1990s. See generally AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994) (studying mass tort phenomenon and recommending changes to the multidistrict litigation statute and a federalized choice-of-law regime); *supra* note 29, at 389-93 (defining the problem of mass tort litigation); AM. BAR ASS'N, REVISED REPORT OF THE ABA COMMISSION ON MASS TORTS (1990), 58 U.S.L.W. 2747, 2477 (1990) (studying mass tort litigation and making recommendations concerning handling of litigation arising out of single event disasters or negligent product design); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (April 2, 1990) (part of the 1988 Judicial Improvements Act; containing three recommendations relating to complex litigation); REPORT OF THE AD HOC COMMITTEE ON ASBESTOS LITIGATION (the Reavley Committee Report March 1991) (recommending that Congress consider a national legislative scheme for resolution of asbestos personal injury claims or new statutory authority for consolidation and collective trials of asbestos cases; also recommending that Advisory Committee on Civil Rules study amendments to Rule 23 to accommodate requirements of mass tort cases); Mark A. Peterson & Molly Selvin, *Resolution of Mass Torts: Toward a Framework for Evaluation of Aggregative Procedures* vii, at 31-37 (1988). In addition to these institutional studies, other legislative bodies were actively

reform organizations studied the problem of mass tort litigation and issued assorted task force reports, studies, and projects, these efforts typically were accompanied by tepid or conservative recommendations unlikely to assist judges grappling with the burdens of with mass tort dockets. In addition, against this background of a crisis in the courts, Congress declined to act on any legislative initiatives to address various mass tort problems.

In the face of legislative inaction and tepid reform recommendations, a series of federal judges thus seized the initiative to discover or invent new management techniques for dealing with mass tort litigation. The new universe of aggregationist judges were impelled by several motivating forces: the need to consolidate similar cases into one aggregate group; the need to foreclose repetitive relitigation of essentially the same case; and the need to alleviate docket congestion. For many of the aggregationist judges, the prospect of individual relitigation of essentially the same tort claim became untenable, because individual litigants at the end of the judicial queue might die before having their claims adjudicated. Thus, for many aggregationist judges faced with such dockets, a rallying sentiment became the adage that justice delayed was justice denied.

Not surprising, the emerging judicial aggregationists of this period consisted of a small coterie of federal district court judges handling large mass tort dockets. These included Judge Jack Weinstein of the Eastern District of New York, handling the *Agent Orange* litigation; Judge Robert Parker of the Eastern District of Texas, Judge Lowell A. Reed, and Judge James McGirr Kelly of the Eastern District of Pennsylvania, handling large asbestos dockets; Judge Carl Rubin of the Southern District of Ohio, handling the *Bendectin* litigation; Judge Sam Pointer of the Southern District of Alabama, handling breast implant cases; Judge Mehrige of the Eastern District of Virginia, handling the *Dalkon Shield* litigation; and Judge John Grady of the Northern District of Illinois, handling the tainted blood products cases. In addition, Judge William Schwartzer of the Northern District of California, another leading judicial aggregationist, became the Director of the Federal Judicial Center in 1989 where

involved in proposing legislation to address the emerging problems relating to mass tort litigation. *See, e.g.*, The Multiparty, Multiforum Jurisdiction Act of 1993 (H.R. 1100, 103rd Cong., 1st Sess.) (1993 version of a succession of acts to deal with mass tort cases, intended to amend Title 28 to add a new section on multiparty, multi-forum jurisdiction and to amend 28 U.S.C. § 1407 to permit trial of transferred actions. A watered down version of this legislation, conferring diversity jurisdiction over civil actions arising from single accidents, was subsequently enacted in 2002; *see* the Multiparty, Multiforum Trial Jurisdiction Act, codified at 28 U.S.C. § 1369 (2012)); National Conference of Commissioners on Uniform State Laws, Uniform Transfer of Litigation Act (1991) (establishing a framework for transferring and consolidating cases in state courts); *see also* Deborah H. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 89–90 (1989) (noting the burgeoning interest in mass tort litigation and institutional law reform efforts underway in the mid-1980s).

he used his position to exercise considerable influence in promoting and advancing the aggregationist agenda.³¹

Collectively, these federal judges inspired a decade of innovative approaches to dealing with mass tort litigation that centered on expansive use of the class action rule. This impetus for these creative reform efforts followed a decade of federal judicial resistance to certify mass tort class actions.³² By the mid-1980s, mass tort judges were considerably frustrated by the inertia of the judiciary and legislative branches to address the growing problems of mass tort cases. Several appellate courts finally breached the mass tort logjam in 1986 and 1987, when the Second, Third, and Fifth Circuits upheld class certification in the *Agent Orange* and asbestos mass tort cases,³³ thereby vindicating the efforts of Judges Parker, Kelly, and Weinstein to resolve their mass tort dockets.

The procedural breakthrough that federal appellate courts accomplished in 1986–1987 unleashed a decade of judicial activism and experimentation in the class action arena. During this period judges experimented with (and approved) novel multiphase class action trial plans,³⁴ limited issue classes,³⁵ statistical damage sampling,³⁶ and eventually the settlement class.³⁷

³¹ See William W. Schwartz, *Structuring Multiclaime Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250 (1996); William W. Schwartz et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992); see also William W. Schwartz, *Reforming Jury Trials*, 132 F.R.D. 575 (1991) (discussing jury's inability to understand complex issues); WILLIAM W. SCHWARTZ, *MANAGING ANTI-TRUST AND OTHER COMPLEX LITIGATION: A HANDBOOK FOR LAWYERS AND JUDGES* (1982).

³² See, e.g., *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984) (repudiating class certification of Bendectin claimants); *In re N. Dist. of Cal. Dalkon Shield Prod. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982) (rejecting class certification of nationwide punitive damage class for Dalkon Shield claimants); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974) (rejection of proposed class of asbestos claimants for failure to satisfy Rule 23(b) predominance and superiority requirements).

³³ See *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987); *In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986); *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986).

³⁴ See, e.g., *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988) (trifurcated trial of causation and liability); *In re Beverly Hills Fire Litig.*, 695 F.2d 207 (6th Cir. 1982) (bifurcated trial of causation and liability); *Jenkins v. Raymark Indus.*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1985) (reversed bifurcated trial).

³⁵ See, e.g., *Castano v. Am. Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996) (certification of Rule 23(b)(3) limited issue class in nicotine addiction litigation; certification limited to core liability issues); *Jenkins*, 109 F.R.D. at 269 (limited issue trial of state of the art defense and liability for punitive damages); *Agent Orange*, 818 F.2d at 166–67 (limited issues certification for defense of defendant's status as a government contractor); *Payton v. Abbott Labs*, 83 F.R.D. 382 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (D. Mass. 1983) (limited issues trial in DES litigation). See generally, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.75 (2004) (Issues Classes).

³⁶ See *Hilao v. Estate of Marcos*, 103 F.3d 767, 782–87 (9th Cir. 1996) (sampling for discovery and aggregated trial of damages); *In re Shell Oil Refinery*, 136 F.R.D. 588 (E.D. La. 1991), *aff'd sub nom. Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992), *reh'g granted*, 990 F.2d 805 (5th Cir. 1993), *other reh'g*, 53 F.3d 663 (5th Cir. 1994) (damage sampling

This decade of judicial class action innovation, which centered on developing efficient means for managing and resolving mass tort litigation, also introduced novel roles for judicial surrogates such as magistrates and special masters.³⁸ Prior to the advent of the mass tort litigation inundating the courts, the appointment of special masters generally had been limited to a narrow universe of commercial law cases that needed an independent special master to conduct accounting functions for the courts. During the heyday of mass tort litigation, judges greatly expanded the role and function of special masters.

Thus, judges across the country appointed numerous special masters to devise multiphase trial plans in asbestos litigation;³⁹ to conduct assessment of the existence of a limited fund;⁴⁰ to assist with the settlement and implementation of the *Agent Orange* litigation and other mass tort litigation;⁴¹ to create data bases of claimants' alleged injuries and damages;⁴² to supervise all pre-trial matters and motions;⁴³ and to conduct discovery and hearings in the Philippine Marcos litigation.⁴⁴

approved; case settled before rehearing); *Cimino v. Raymark Indus.*, 1989 WL 253889 (E.D. Tex. 1989) (approving three phase trials with damage sampling), *rev'd*, 151 F.3d 297 (5th Cir. 1998).

³⁷ See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *rev'd*, *Amchem Prods. Inc. v. Windsor*, 117 S. Ct. 2231 (1997) (upholding asbestos settlement class); *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), *vacated*, 117 S. Ct. 2503 (1997) (upholding asbestos settlement class); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995) (generally approving concept of settlement class, but disapproving particular application to class claimants for lack of adequate settlement); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989) (upholding settlement class in Dalkon Shield litigation).

³⁸ See FED. R. CIV. P. 53 (special masters).

³⁹ See Jack Ratliff, *Special Master's Report in Cimino v. Raymark Industries, Inc.*, 10 REV. LITIG. 521 (1991) (describing appointment as special master by Judge Robert Parker of the Eastern District of Texas, to create a multiphase trial plan for the resolution of asbestos cases).

⁴⁰ See *In re Joint E. & S. Dist. Asbestos Litig.*, 14 F.3d 726 (2d Cir. 1993) (appointment by Judge Weinstein of special master Marvin E. Frankel to assess the financial assets of the Keene Corporation for the purpose of determining the existence of a limited fund to certify a Rule 23(b)(1)(B) class action).

⁴¹ See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 F.R.D. 434 (E.D.N.Y. & S.D.N.Y. 1990) (appointment of special master Kenneth Feinberg to assist with settlement negotiations); see also *In re DES Cases*, 142 F.R.D. 58 (E.D.N.Y. 1992) (appointment of special master Kenneth Feinberg to assist with settlement negotiations of DES cases).

⁴² See generally Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989) (describing role as special master in collecting data in the *Jenkins* asbestos litigation in the Eastern District of Texas); Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986) (describing role as special master for Judge Lambros in Ohio, in conducting data collection for resolution of asbestos claims).

⁴³ See *Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 991 F.2d 1080 (3d Cir. 1993) (upholding appointment of special master Dean Henry G. Manne in asbestos abatement litigation).

⁴⁴ See *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (describing the role of special master Sol Schreiber in conducting discovery and holding damages with regard to determining damages of claimants in the *Marcos* human rights litigation).

Finally, by the mid-1980s, aggregationist fever gripped the academic community. Hence, as the scholarly fraternity observed developments introduced by aggregationist judges, the academy enthusiastically embraced these novel judicial experiments in the expansive deployment of the class action rule to resolve mass torts. The evolving mass tort landscape inspired an outpouring of academic articles commenting on, approving of, and suggesting new innovative techniques for the class action rule.⁴⁵ In some instances, a synergetic relationship developed between the judiciary and the academy, with researchers and professors offering academic support for some of the innovative initiatives utilized by courts, such as statistical sampling of damages.⁴⁶ Indeed, some law professors became personally invested as aggregationists when they assumed roles as special masters or expert witnesses in these cases⁴⁷—or in some instances, as counsel involved in the litigation.⁴⁸ Generally, critical reaction to the aggregationist movement, in this period, was muted and largely ignored in practice.⁴⁹

Thus, the first great age of aggregationist fervor, between 1986 and 1996, resulted in innovative expansion of the class action rule without actual amendment of Rule 23 itself. The activities of the aggregationist judges and their advocates did not go unnoticed; in some quarters, at least, critics began to question whether Rule 23 permitted such judicial activism in the mass tort litigation arena.⁵⁰ Consequently, the ferment in the lower federal courts inspired the Advisory Committee on Civil Rules to place a reconsideration of Rule 23 on its agenda in the early 1990s.⁵¹ This round of rule revision lasted from 1991

⁴⁵ The favorable academic commentary on judicial developments in mass tort litigation in the decade between 1986–1996 is substantial. *See, e.g.*, David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 *IND. L.J.* 561 (1987); David Rosenberg, *The Casual Connection in Mass Tort Exposure Cases: A “Public Law” Vision of the Tort System*, 97 *HARV. L. REV.* 851 (1984).

⁴⁶ *See, e.g.*, Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 *STAN. L. REV.* 815 (1992), *cited with approval in In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997); *In re Estate of Ferdinand E. Marcos Hum. Rights Litig.*, 910 F. Supp. 1460, 1467–68 (D. Haw. 1995) (“The Court finds persuasive the analysis of Professors Saks and Blanck in their discussion that aggregate trials do not violate due process.” (footnote omitted)).

⁴⁷ *See* McGovern, *supra* note 42.

⁴⁸ Professor Arthur R. Miller, then a Harvard law professor, argued in favor (on appeal) of class certification of the *School Asbestos* litigation in the Eastern District of Pennsylvania in 1986, and the *Castano* tobacco class litigation in the Eastern District of Louisiana in 1996. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986).

⁴⁹ *See, e.g.*, Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 *GEO. WASH. L. REV.* 1683 (1992); Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 *U. ILL. L. REV.* 69 (1985).

⁵⁰ *See generally* Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 *CORNELL L. REV.* 858 (1995).

⁵¹ *See* WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, 1, 1–4 (1997); Proposed Rules, 167 *F.R.D.* 523, 539 (1996) (presenting a proposed addition of new Rule 23(b)(4)); Richard Marcus, *Shoes That Did Not*

through 1997, but the Advisory Committee held in abeyance any radical amendment of Rule 23 pending the Supreme Court's decisions in the twin asbestos settlement classes.⁵²

It was perhaps inevitable that procedural backlash would set in as judges tested the limitations of their authority under the Rules Enabling Act.⁵³ Thus, the great aggregationist movement of the 1980s–1990s came to somewhat of a crashing halt with a trifecta of appellate decisions in 1985–1986 that effectively rejected the ability of district court judges to continue to certify mass tort cases.⁵⁴ By the end of the decade, the Supreme Court hammered the final nails in the mass tort litigation coffin with its repudiation of the comprehensive settlement classes in *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*⁵⁵ In the Court's *Ortiz* decision, Justice Souter took especial pains to admonish federal court judges against any further “adventurous” use of the class action rule.⁵⁶ The great era of experimentation with the Rule 23 class action substantially was over.

Yet class action litigation did not die as a consequence of the great 1985–86 appellate rout. Instead, plaintiffs' class action counsel retreated to more hospitable state court forums. Class action litigation performed the equivalent of going underground—in this instance, to state courts. The plaintiffs' bar reacted by regrouping and retreating—many attorneys determined to avoid federal courts altogether, and instead to pursue class litigation in state courts. This retreat to state courts ushered in a decade of rapidly expanding state court class action litigation, accompanied by forum-shopping for favorable venues and the emergence of so-called “judicial hell-holes,” so labeled because of the propensity of certain state courts to provide quick and easy class certification on the pleadings alone.

The ascendance of state court class litigation and easy class certification in state court forums precipitated its own backlash, which eventually resulted in efforts by the corporate defense bar to enact the Class Action Fairness Act

Drop, 46 U. MICH. J.L. REFORM 637, 642–43 (2013) (noting withdrawal of the proposed Rule 23(b)(4) settlement class proposal and massive negative reaction to proposal).

⁵² See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); see also Linda S. Mullenix, *Professor Ed Cooper: Zen Minimalist*, 46 MICH. J.L. REFORM 661 (2013) (discussing the Rule 23 proposed amendments in this period, and the failure of the Advisory Committee to take any action).

⁵³ 28 U.S.C. §§ 2071–72 (2012).

⁵⁴ See *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (rejection of class certification in tobacco litigation); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (rejection of class certification in penile implant litigation); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (rejection of class certification in tainted blood products litigation).

⁵⁵ See *supra* note 52.

⁵⁶ See *Ortiz*, 527 U.S. at 845 (“Finally, if we needed further counsel against adventurous application of Rule 23(b)(1)(B), the Rules Enabling Act and the general doctrine of constitutional avoidance would jointly sound a warning of the serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale.”).

("CAFA") of 2005.⁵⁷ CAFA provided a mechanism for corporate defendants to remove state class actions to federal court, where defendants could rely on the body of restrictive federal class action jurisprudence to defeat proposed class certification.⁵⁸ CAFA's legislative history clearly suggests that the legislative purpose in enacting CAFA was to provide corporate defendants with an alternative forum to, and some relief from, state court venues that unfairly favored class action plaintiffs.

After 2005, then, this new round of class action backlash advanced through Congressional enactment of CAFA had substantially succeeded in transferring class litigation back to federal court pursuant to CAFA's removal provisions.⁵⁹ However, plaintiffs' class action lawyers who had been made gun-shy by the restrictive 1990s class action decisions, made the strategic decision to bypass class litigation if possible. By 2005, then, plaintiffs' enthusiasm for class litigation had been tempered and was replaced by a new appreciation of non-class techniques for resolving complex disputes.

As a consequence, a new generation of aggregationists emerged that included some of the old aggregationists of the 1980s, but a different cohort of federal judges and a younger generation of academicians eager to embrace innovative ideas for resolving massive, complex cases outside the confines of the class action rule. Like one's parents' old music, for this new generation of proceduralists the class action rule seems a dated (if not embarrassing) passion of a previous generation of proceduralists.

II. THE TRANSFORMATION OF THE AGGREGATE LITIGATION MOVEMENT IN THE TWENTY-FIRST CENTURY

In the post-CAFA era, the resolution of large-scale litigation has shifted away from Rule 23 class action auspices to innovative use of the federal multidistrict litigation ("MDL") procedure.⁶⁰ This is not without its own irony. Congress enacted the MDL statute in 1968, two years after the 1966 amendment of Rule 23 that gave us the modern class action rule. The impetus behind creation of the MDL procedure was to assist the federal courts in dealing with electronic products antitrust litigation of that era,⁶¹ but MDL procedure clearly remained a sort of statutory stepchild of the more prominent class action rule.

Indeed, throughout much of the mass tort era of the 1980s and 1990s, the Judicial Panel on Multidistrict Litigation chiefly declined to create mass tort

⁵⁷ See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5, 119 Stat. 4 (2005).

⁵⁸ See 28 U.S.C. § 1453 (2012) (concerning CAFA removal provision).

⁵⁹ *Id.*

⁶⁰ 28 U.S.C. § 1407 (1976).

⁶¹ See Wilson W. Herndon, *Section 1407 and Antitrust Multidistrict Litigation—The First Decade*, 47 ANTITRUST L.J. 1161 (1979); Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 FORDHAM L. REV. 41 (1971); John T. McDermott, *The Judicial Panel on Multidistrict Litigation*, 57 F.R.D. 215 (1973).

MDLs as a procedural means to resolve these cases.⁶² This resistance to use of MDL auspices for mass tort litigation abated somewhat in 1991, when the Panel finally relented and, in light of the perceived growing asbestos litigation crisis, authorized creation of an asbestos MDL.⁶³ Nonetheless, recourse to MDL forums and procedures during the heyday of mass tort class action experimentation remained relatively rare.

The modern era of expansive use of the MDL auspices perhaps began with the *Vioxx* pharmaceutical litigation, which the Judicial Panel on Multidistrict Litigation approved for MDL treatment in 2005⁶⁴—notably, the very same year that CAFA went into effect. As indicated above, once CAFA began to divert state class actions back into federal court, plaintiffs' attorneys strategically regrouped to explore alternative means, other than the class action, to resolve large-scale disputes. Thus, in the twenty-first century as class action jurisprudence grew more restrictive and exacting,⁶⁵ it became increasingly difficult for plaintiffs to plead class actions,⁶⁶ obtain class certification,⁶⁷ or accomplish settlement classes after *Amchem* and *Ortiz*.⁶⁸ In light of these and other considerable impediments, attorneys involved in large-scale litigation perhaps rightly questioned whether it made sense to pursue class litigation under Rule 23.

All actors in the complex litigation arena are well aware that virtually all class actions eventually settle and never go to trial. Once a court certifies a class action, the parties typically default to settlement mode and negotiate a classwide settlement subject to judicial scrutiny and approval.⁶⁹ Thus, in most complex litigation, settlement is the focal point of the litigation.⁷⁰ By 2005,

⁶² See *In re A.H. Robins Co., "Dalkon Shield" IUD Products Liab. Litig.* (No. II), 610 F. Supp. 1099 (J.P.M.L. 1985); *In re Sch. Asbestos Prods. Liab. Litig.*, 606 F. Supp. 713 (J.P.M.L. 1985) (declining to create MDL for school asbestos litigation); *In re Ortho Pharm. "Lippes Loop" Prods. Liab. Litig.*, 447 F. Supp. 1073 (J.P.M.L. 1978) (declining to create Lippes Loop MDL); *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906 (J.P.M.L. 1977) (declining to create an asbestos MDL).

⁶³ See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991) (approving creation of an asbestos MDL in the Eastern District of Pennsylvania).

⁶⁴ See *In Re Vioxx Prod. Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005) (148 total actions pending in forty-one federal district courts sought to recover from a drug company for damages as a result of alleged increased health risks caused by taking a certain anti-inflammatory drug). The panel found that "centralization under Section 1407 in the Eastern District of Louisiana will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." *Id.* at 1353–54. The panel also noted that consolidation was "necessary in order to eliminate duplicative discovery, avoid inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary." *Id.* at 1354.

⁶⁵ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (2009) (heightened standards for satisfaction of "rigorous analysis" standard for class certification motions).

⁶⁶ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (plausible pleading standard for anti-trust class actions).

⁶⁷ *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011).

⁶⁸ See *supra* note 52.

⁶⁹ FED. R. CIV. P. 23(e).

⁷⁰ RICHARD NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007).

plaintiffs' attorneys and defense counsel realized that both sides profitably could use the previously underutilized MDL auspices as a mutually advantageous means to resolve large-scale litigation. In essence, this new form of aggregate litigation gave primacy to settlement negotiation, skipping the bothersome processes of class certification at the front end, and settlement approval at the back end, altogether.

On both sides of the litigation docket, plaintiffs' attorneys and defense counsel had good reasons to endorse a shift to a new MDL modality for resolving complex litigation outside the confines of the class action rule. For plaintiffs, accomplishing a settlement under MDL auspices that would not be subject to Rule 23 meant that plaintiffs were no longer subject to the heightened class action standards and more restrictive jurisprudence that developed since the late 1990s. Plaintiffs no longer had to hazard the perils of expensive class certification proceedings and a class certification denial, which effectively would end the litigation. They could just proceed to settlement negotiations and attorney fee awards.

On the defense side of the docket, with the shift toward more robust recourse to MDL procedures, defense counsel essentially ceded the battleground of class certification. Similar to plaintiffs' class counsel, the bypassing of Rule 23 also spared defense clients the considerable expense and burdens of class certification discovery and proceedings. On the other hand, defense attorneys appreciated the shift to MDL auspices because it gave them more free rein in negotiating settlements to their advantage, because settlement and fee agreements would not be subject to the judicial scrutiny and approval process required by Rule 23(e).

As indicated above, the *Vioxx* litigation that was settled through MDL auspices provided a prototype of the new twenty-first century aggregate dispute resolution paradigm.⁷¹ The *Vioxx* settlement was pursued after creation of the

⁷¹ See Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1111 (2010) ("The *Vioxx* settlement took the form not of a class action settlement but of a contract between the defendant-manufacturer Merck & Company, Inc. and the small number of law firms within the plaintiffs' bar with large inventories of *Vioxx* clients. The contract described a grid-like compensation framework for the ultimate cashing out of *Vioxx* claims, but *Vioxx* claimants themselves literally were nonparties to that contract. The enforcement mechanism for the deal consisted not of preclusion but of contractual terms whereby each signatory law firm obligated itself to do two things: to recommend the deal to each of its *Vioxx* clients and—'to the extent permitted by' applicable ethical strictures—to disengage from the representation of any client who might decline the firm's advice to take the deal. Absent a signatory law firm's commitment of its entire *Vioxx* client inventory to the deal, Merck would have the discretion to reject the firm's enrollment such that none of the firm's clients would be eligible to participate." (footnotes omitted)); See Settlement Agreement Between Merck & Co., Inc., and the Counsel Listed on the Signature Pages Hereto (Nov. 9, 2007), available at <http://www.beasleyallen.com/alerts/attachments/Vioxx%20Master%20Settlement%20Agreement.pdf>. Other scholars noted the trend toward aggregate settlements even before the *Vioxx* settlement. See generally Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel*

Vioxx MDL;⁷² essentially the attorneys crafted a complex settlement agreement that derived its legitimacy based on contract principles rather than Rule 23 class action due process requirements.⁷³ And, notwithstanding an outpouring of critical commentary,⁷⁴ the *Vioxx* deal provided a blueprint for numerous subsequent large-scale non-class aggregate settlements, including the *Zyprexa* litigation resolved in an MDL under Judge Jack Weinstein's supervision.⁷⁵

The *Vioxx* and *Zyprexa* settlements, in turn, inspired the creation of the novel quasi-class action, intended to ameliorate some of the problems engendered by the lack of judicial oversight of fee arrangements in MDL negotiated settlements. Judge Weinstein, both the creator of the quasi-class action and an old-school aggregationist, readily embraced the new-school aggregationist movement.⁷⁶

A number of consequences flowed from the *Vioxx* litigation. First, MDL proceedings have proliferated since 2005.⁷⁷ If the 1980s and 1990s represented the high point of class litigation and experimentation, then MDL proceedings have replaced class litigation as the dominant form of complex litigation procedure. No sooner does some product defect, pharmaceutical adverse event, or consumer harm manifest than the Judicial Panel on Multidistrict Litigation creates an MDL for that litigation. Second, both sides of the docket often invest considerable energy in forum-shopping for preferable MDL forums,⁷⁸ which

in *Related Lawsuits*, 50 DUKE L.J. 381, 386 (2000) (citing prominent examples of aggregate settlements).

⁷² See *supra* note 64.

⁷³ Nagareda, *supra* note 71.

⁷⁴ See, e.g., Sybil L. Dunlop & Steven D. Maloney, *Justice Is Hard, Let's Go Shopping! Trading Justice for Efficiency Under the New Aggregate Settlement Regime*, 83 ST. JOHN'S L. REV. 521, 522–27, 541–42 (2009); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011); Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, The Tort System, and the Roles of Lawyers in Mass Tort Litigation*, 57 DEPAUL L. REV. 509 (2008).

⁷⁵ See, e.g., Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183 (2008); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009); David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949 (2008); Francis E. McGovern, *A Model State Mass Tort Settlement Statute*, 80 TUL. L. REV. 1809 (2006); Nagareda, *supra* note 71; Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008); Charles Silver, *Merging Roles: Mass Tort Lawyers as Agents and Trustees*, 31 PEPP. L. REV. 301 (2004); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

⁷⁶ See Jeremy Hays, *The Quasi-Class Action Model for Limiting Attorneys' Fees in Multidistrict Litigation*, 67 N.Y.U. ANN. SURV. AM. L. 589 (2012); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389 (2011).

⁷⁷ See Willging & Lee, *supra* note 23 (reporting data collected by the Federal Judicial Center on the increase in use of MDLs as opposed to class actions for resolution of complex cases).

⁷⁸ See John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2241 (2008) (discussing the standards by which the Judicial Panel on Multidistrict Litigation selects the MDL forum, noting the propensity of some attorneys to attempt to “game

typically means locating an MDL forum with an accommodating judge. Third, former class action attorneys have diverted their energies toward gaining appointment as counsel in MDL proceedings, contributing to multiday skirmishes over such appointments, which in reality are surrogate battles over eventual attorney fee awards. Fourth, litigation adversaries are now able to negotiate settlements in private, meaning that the settlements lack transparency and are not subject to judicial scrutiny. There are no guardians guarding the guardians.

Whatever its myriad problems, class litigation has always been undergirded by considerable due process rights and protections,⁷⁹ which provisions have been intended to safeguard class action members from collusive attorney behavior or self-dealing inadequate settlements.⁸⁰ Ironically, actors in the new MDL arena prefer this modality to class litigation precisely because it liberates them from such oversight.⁸¹ The new *Vioxx* paradigm then, represents a troubling triumph of contract law principles over constitutional due process.

Similar to the rebellious child who turns on the values of his or her parents, so too has the new generation of aggregationists turned on the values of the old-aggregationists. The twenty-first century aggregationists have little interest in reforming the class action rule. And, if they do, their recommendations frequently are along extremist lines, such as eliminating class clients altogether,⁸² or awarding 100 percent fees to class counsel.⁸³ Simply, the new aggregationists would reform the class action rule so that it doesn't function like the class action rule. For the new aggregationists, Rule 23 is the problem, not the solution.⁸⁴ Nonetheless, the new aggregationists have adopted much of the rhetoric of the 1980s class action debates—arguments based on efficiency and deterrence rationales⁸⁵—and pressed this rhetoric into service in support of new non-class arrangements.

the system”: “The Panel is particularly alert, however, to parties who may venture to use the MDL process for some substantive or procedural advantage, and will act to avert or deflect attempts by a party or parties to ‘game’ the system”).

⁷⁹ These include the requirement that a court certify a class action at the outset of the proceedings; insure that the class is adequately represented by class counsel and one or more class representatives; that notice and the right to opt-out be afforded in damage class actions; and that any proposed settlement be subjected to judicial scrutiny and approval. *See* FED. R. CIV. P. 23(a)(4), (c), (e).

⁸⁰ *See* Debra Lynn Bassett, *Constructing Class Reality*, 2006 B.Y.U.L. REV. 1415, 1445, 1447 (2006) (“Accordingly, a shift away from the representative nature of class actions—a shift that would lower constitutional due process protections—should require especially careful scrutiny before recommendation.”).

⁸¹ *See supra* note 75.

⁸² *See, e.g.*, S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 392–95 (2013) (outlining the ways in which MDL litigation has liberated complex dispute resolution from the constraints of Rule 23 judicial oversight and benefited repeated player plaintiffs’ counsel in structuring favorable outcomes in the counsels’ interests).

⁸³ *See, e.g.*, Campos, *Mass Torts and Due Process*, *supra* note 23.

⁸⁴ *See, e.g.*, Fitzpatrick, *supra* note 23.

⁸⁵ *See supra* notes 23, 75.

Finally, language is important. There is no better indicator of the sea-change in thinking about complex litigation than the modification of language that has accompanied the new twenty-first century paradigm. Hence, the American Law Institute (“ALI”) denominated its study of twenty-first century complex litigation as “*The Principles of the Law of Aggregate Litigation*.”⁸⁶ In so doing, the ALI essentially ceded the primacy of the class action to newer procedural techniques, ultimately and controversially advocating in favor of the *Vioxx* model.⁸⁷

III. RETHINKING AGGREGATION AND DE-AGGREGATION

As indicated above, in the twenty-first century the non-class aggregate settlement pursued through MDL auspices effectively has replaced class litigation as the preferred modality for complex dispute resolution. This represents a triumph of contract over constitution. The new aggregationist movement includes counsel from both sides of the docket, many federal judges, as well as a substantial academic following.

The new aggregationist movement, however, is unlike the aggregationist movement of the 1980s–1990s, which centered on innovative, experimental uses of the class action rule. The new aggregationist movement instead has turned its back on the class action rule as an inconvenient impediment to resolving mass disputes. With this in mind, the current efforts of the Advisory Committee on Civil Rules to revisit and amend Rule 23 seem akin to the old trope of fiddling while Rome is burning. For practitioners who will continue to make recourse to MDL proceedings as the preferred modality for resolving complex litigation, what the Advisory Committee might or might not do with Rule 23 in the future will make little difference.

Ironically, the new aggregationist movement (scholarly version) resorts to old-style aggregationist rhetoric in support of this new MDL settlement paradigm. Hence, the academic literature in praise of non-class aggregate settlements is replete with reliance on the primary rationales supporting class litigation: i.e., compensation, deterrence, and efficiency.⁸⁸ In this regard, the class action has been stood on its head and portrayed as subverting the very ration-

⁸⁶ AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). Several of the Reporters for the PRINCIPLES acted as attorneys or experts in the *Vioxx* litigation and hence became proponents of this model for resolving aggregate litigation, in preference to the class action model.

⁸⁷ See Bassett, *supra* note 80, at 1431 (“Thus, ‘aggregate litigation’ is a poor class action synonym because its overinclusiveness necessarily downplays and minimizes the distinctive representative nature of class actions. The primary significance of this linguistic development is that it reflects an underlying conceptual movement. The use of ‘aggregate litigation’ as a synonym or substitute for ‘class action’ reflects an underlying movement in the legal literature to construct a new class action reality—a movement that, in the name of efficiency, would inherently and necessarily compromise existing due process protections for absent class members.”).

⁸⁸ See *supra* notes 23, 75.

ales it was intended to promote. Into this breach steps the non-class, MDL aggregate settlement procedure.

The new aggregationist movement has its enthusiasts and its detractors, but its critics appear to have had little impact on the proliferation of this new mode of aggregate dispute resolution. Skepticism about or criticism of non-class aggregate settlements has not resulted in attorney behavior modification. In the class action arena, judicial oversight and appellate review had long served as a corrective to improper or over-reaching behavior. But with the advent of the MDL non-class aggregate settlements, there are virtually no means to control, review, or constrain the misconduct of attorneys participating in these supra-judicial proceedings.⁸⁹

A major impetus for the great aggregationist movement that developed in the 1980s was the emergence of mass tort litigation, with a concomitant “crisis mentality” that spurred on several judges to explore means to resolve cases on a wholesale basis. This aggregationist movement also was predicated on the belief that these mass tort claims could not be litigated individually, because this approach would overburden courts, cause unseemly delay, and contribute to waste and inefficiency. The aggregationist movement of the 1980s proceeded under the banner of justice delayed is justice denied.

The history of aggregate dispute resolution represents a seamless thread running from the 1980s to the current non-class aggregate settlement. But what if there are no litigation crises, and what if claims are capable of being adjudicated on an individual basis? What if the aggregationist movements—both old and new—have been constructed based on jurisprudential conceits that lack substance?

Judge Eduardo C. Robreno of the Eastern District of Pennsylvania has provided some insight into these questions, as well as supplied some interesting answers.⁹⁰ Judge Robreno inherited supervision of the nationwide federal MDL-875 asbestos litigation docket in October 2008.⁹¹ In the ensuing years, Judge Robreno developed and instituted a case management plan to resolve all the asbestos cases on the MDL-875 docket. Significantly, the program he fashioned accomplished the resolution of these asbestos claims on an individual, case-by-case basis.⁹² The success of this judicially managed program—dealing with the seemingly most intractable mass tort litigation—gives pause to those

⁸⁹ It is precisely this lack of judicial control or oversight of MDL non-class aggregate settlement that inspired Judge Weinstein to invent the quasi-class action, as a means to exert control over attorney fees in these non-class settlements. *See supra* note 76. Proponents of the new non-class settlement modality protested Judge Weinstein’s invocation of the quasi-class action because it interfered with their contractual right to negotiate and consummate attorney fees in any way they desired. *See Silver & Miller, supra* note 75.

⁹⁰ Robreno, *supra* note 25.

⁹¹ *Id.* Judge Robreno was designated to preside over MDL-875 (the asbestos MDL).

⁹² *Id.* at 126–46.

who contend that mass tort litigation involving thousands of claimants cannot be resolved on an individualized basis.

Asbestos litigation was the seminal mass tort litigation of the 1980s, and its procedural history provides an interesting parable about dispute resolution modalities. As Judge Robreno documents, the flood of asbestos litigation began in earnest in the late 1970s after the Fifth Circuit approved a strict liability theory in these cases.⁹³ For approximately fifteen years the Judicial Panel on Multidistrict Litigation resisted creation of an asbestos MDL, but after the Judicial Conference issued a report on the nationwide crisis in asbestos litigation, the Panel relented and finally created an asbestos MDL-875 in 1991.⁹⁴

The fate of asbestos litigation in the MDL-875 docket over the next decade presented a complicated narrative of class action failure. In 1991–1992, upon the urging of MDL Judge Charles R. Weiner and under the subsequent MDL supervision of Judge Lowell Reed, counsel representing asbestos plaintiffs and a consortium of asbestos defendants (the CCR), negotiated the first-ever nationwide class action settlement of all asbestos claims.⁹⁵ Although Judge Reed approved this class action deal, known as the *Georgine* settlement, both the Third Circuit and the Supreme Court eventually repudiated the settlement class in 1997.⁹⁶

The collapse of the *Georgine* class settlement within MDL-875 placed asbestos litigants, effectively, back at square one. Judge Robreno summarizes the consequence of this procedural history:

After nearly twenty years of intensive litigation in the federal courts, it seemed apparent to the court that efforts toward aggregation of cases and consolidation of claims had proven ineffective. Aggregation stopped progress on individual cases while the parties and the court worked on global solutions. Once the global solutions proved unfeasible, the parties did not return to the task of processing the cases individually. Ultimately, neither the court nor the parties were ready, willing, or able to move cases to trial and settlement. This stage of litigation led some litigants to refer to MDL-875 as a “black hole,” where cases disappeared forever from the active dockets of the court.⁹⁷

In the face of this massive failure of aggregative efforts to resolve asbestos litigation, Judge Robreno instead determined to employ his judicial case management skills toward creating a model that would resolve his asbestos docket on an individualized basis:

Given the apparent failure of aggregation and consolidation, the court determined that each case would be “disaggregated” or “deconstructed” into the lowest common denominator and proceed as “one plaintiff-one claim.” The pur-

⁹³ *Id.* at 105 (citing *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1092 (5th Cir. 1973)).

⁹⁴ *Id.* at 106.

⁹⁵ *Id.* at 112–13.

⁹⁶ *Id.* at 113. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

⁹⁷ Robreno, *supra* note 25, at 126 (footnotes omitted).

pose was to separate each case, and within each case, each claim against each defendant so that each claim could stand on its own merit.

Cases with multiple plaintiffs were severed into separate individual cases. Once severed, each case was placed on an individual scheduling order setting forth reasonable but fixed deadlines for completion of discovery and filing of dispositive motions. In issuing the orders placing each case on its own path, the court was committing to hands-on management of the cases. Once the court demonstrated it was ready to adjudicate cases on a fast track basis, the lawyers readily joined in. Each order and the deadlines in the order reflected the realities of each case. In other words, the court was now committed to systematic differential diagnostics—one size would not fit all.⁹⁸

After organizing court personnel and setting up a communications system, including a comprehensive website, Judge Robreno then implemented a six-step process to resolve each case.⁹⁹ This process consisted of: (1) transfer of all outstanding federal asbestos cases to the Eastern District of Pennsylvania,¹⁰⁰ (2) severance of all cases into single plaintiffs' motions (cases severed into one-plaintiff, one claim),¹⁰¹ (3) requirement of plaintiff's submission of medical reports,¹⁰² (4) institution of show cause hearings,¹⁰³ (5) issuance of scheduling orders for discovery,¹⁰⁴ and (5) provision for summary judgment motions.¹⁰⁵ Although the court initially contemplated—consistent with the requirement of the MDL statute—that cases would be returned to their transferor district for trial, Judge Robreno reports that cases that had been transferred and consolidated in MDL-875 were rarely remanded to the originating court.¹⁰⁶

The results of implementation of Judge Robreno's program are impressive. His docket consisted of both so-called land-based asbestos case and maritime asbestos cases (the "MARDOC" docket). He reports that since 2006, 186,524 cases were transferred to MDL-875. Of those cases, 183,545 have been resolved, leaving 2,979 cases on the MDL docket.¹⁰⁷

In light of these compelling results, Judge Robreno offers some lessons to be learned from his experience managing the largest and oldest personal injury

⁹⁸ *Id.* at 127 (footnotes omitted).

⁹⁹ *Id.* at 127–32, 135.

¹⁰⁰ *Id.* at 135–36.

¹⁰¹ *Id.* at 136–37.

¹⁰² *Id.* at 137–38.

¹⁰³ *Id.* at 139–41. Judge Robreno reports that:

After the conclusion of the hearing, each case received one of five different types of orders: (1) a dismissal for lack of prosecution (if no counsel appeared with information on that plaintiff); (2) a Rule 41(b) dismissal; (3) a Rule 41(b) dismissal with a transfer to the bankruptcy only docket; (4) a scheduling order allowing between 90 and 120 days for fact discovery; or (5) a referral to one of the magistrate judges for pretrial proceedings.

Id.

¹⁰⁴ *Id.* at 141.

¹⁰⁵ *Id.* at 141–43.

¹⁰⁶ *Id.* at 143–44.

¹⁰⁷ *Id.* at 180–81. Of the 186,524, 123,157 were part of the land-based docket and 63,367 part of the MARDOC docket.

mass tort litigation. First, he questions whether, in retrospect, a national MDL was necessary at all to handle the asbestos litigation.¹⁰⁸ Second, he opines that unless courts establish a “toll gate” at the entrance to litigation, non-meritorious cases will clog the process. Therefore, he urges courts to establish procedures at an early point by which each plaintiff is required to provide facts to support their claims by expert diagnostic reports or risk dismissal of their case.¹⁰⁹ Fourth, he recommends that each case be disaggregated or deconstructed into the lowest common denominator, separating each claim against each defendant to stand on its own merits.¹¹⁰ Fifth, he contends that any trial should not be bifurcated or trifurcated.¹¹¹

Judge Robreno’s experience in resolving his massive asbestos docket has made him chary of aggregative solutions to mass injury litigation, which he characterizes as falsely waiting for “Superman.” Thus, commenting on the failure of aggregate litigation, Judge Robreno concludes:

The consolidation or aggregation of large numbers of cases distorts the litigation and the settlement process. Aside from the significant due process issues raised by forcing parties to litigate or settle cases in groups, aggregation promotes the filing of cases of uncertain merit. The incentive becomes the number of cases that can be filed, *not* the relative merit of the individual case. Additionally, while the court searches for global solutions, the individual cases are not attended to by either the court or the individual lawyers. Since litigation or settlement is to be determined in mass, or at least in groups, there is no perceived need by the parties to litigate each case separately. While the parties wait for ‘superman’ to resolve the litigation, the cases linger.¹¹²

In order to avoid the sometimes perverse incentives that adhere to aggregate litigation, and the often less-than-satisfying results, Judge Robreno notes that it takes a dedicated commitment of judicial resources to implement a program such as the one he designed to handle his asbestos docket.¹¹³ In addition, he admonishes that we ought to let lawyers be lawyers and judges be judges,¹¹⁴ and that any system designed to adjudicate cases should manifestly lack an agenda that undermines litigants’ confidence in the process.¹¹⁵

CONCLUSION

This article began as an appreciation of Professor Steve Subrin’s long and illustrious career as a teacher, scholar, and guru in the field of civil procedure. It has endeavored to locate the arc of his professional career in tandem with the

¹⁰⁸ *Id.* at 186.

¹⁰⁹ *Id.* at 186–87.

¹¹⁰ *Id.* at 187.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 187–88.

¹¹⁴ *Id.* at 188.

¹¹⁵ *Id.*

arc of aggregate litigation, from class action litigation in the 1960s through non-class MDL procedures in the twenty-first century. As Professor Subrin remains the great expositor of the equity basis for the Federal Rules of Civil Procedure, it seems appropriate to end on the grace note asking what equity has wrought in the field of aggregate litigation.

During the 1980s and 1990s, the heyday of mass tort litigation, judges and scholars invoked equity as the jurisprudential basis to provide courts with substantial leeway to fashion new means for collective relief through experimental use of the class action rule. When the Supreme Court declined to follow on this adventurous journey, the power of flexible, equity-based class actions to remedy large-scale grievances subsided considerably. As indicated above, the de-nouement of the class action has been accompanied by the rise of MDL proceedings and non-class settlements under the umbrella of those proceedings.

Before the advent of the *Vioxx* settlement, complex litigation that was transferred and consolidated under MDL auspices almost always resulted in settlements. In this regard MDL procedure proved to be a powerful procedural mechanism for resolving large-scale dispersed litigation. But such settlements typically were consummated through a class action settlement within the MDL and subject to the scrutiny of the MDL court. Twenty-first century MDL procedure, on the contrary, has simply eliminated the class action role in complex dispute resolution after litigation has been transferred to the MDL forum.

This new aggregate settlement model is unlike the old in that it evades judicial oversight and invites dubious conduct that may be disadvantageous to claimants within the group. While the new paradigm finds admirers in utilitarianism and economic efficiency, it also inspires nervousness and disquiet among believers in litigant autonomy and democratic participation in the adjudicative process.

In surveying the forty years of aggregate litigation that has spanned Professor Subrin's professional life, the prevailing zeitgeist of different periods deserves some reflection. In the early days of class action litigation in the 1960s and 1970s, attorneys were instilled with an exuberant sense of idealism that made the class action the handmaiden of public institutional reform litigation. The class action decades of the 1980s and 1990s were infused with a spirit of American pragmatism: as one federal court put it, in approving an unprecedented asbestos class action: "Necessity moves us to change and invent."¹¹⁶

In contrast, in the twenty-first century the pervasive aggregate litigation conversation centers on attorney fees, with academic justifications for attorney fee awards filling the law reviews.¹¹⁷ Hence, an unattractive *sub rosa* "greed is

¹¹⁶ Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986).

¹¹⁷ See, e.g., Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 FORDHAM L. REV. 1833 (2011); Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 248 (1996) (noting that "standard contingency fees" are "usually thirty-three percent to forty percent of gross recoveries"); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An*

good” mentality seems to pervade the modern aggregate litigation landscape; the idealism that characterized old-school class action lawyers seems a naive artifact of an earlier era.

And while some of the old-school aggregationists have embraced the new-school aggregation paradigm, many (including myself), have not. For those who have not, it is difficult to reconcile the current aggregation models with the idealism that infused group litigation in the first place. Arguably, there may be reasons to approve of the new aggregationist paradigm, but there are as many compelling reasons not to. Professor Subrin, by age and temperament, seems to be an old-school aggregationist (1960s–1970s version), but we have few clues as to his appreciation of the new landscape of twenty-first century aggregate litigation.

For old-school aggregationists who have begun a process of rethinking (or re-education about) the virtues of aggregation, perhaps a good starting point is an appreciation of the fact that—contrary to received wisdom—it is not impossible to adjudicate large-scale dispersed litigation on an individualized basis. Judge Robreno has shown the way. In addition, as the judge points out, not every claim rushed into aggregation is meritorious or deserving of settlement within a collective redress mechanism.

Empirical Study, 1 J. EMPIRICAL LEGAL STUD. 27, 35–36 (2004) (explaining that economies of scale call for lower percentage fee awards when large amounts are given to the class); Fitzpatrick, *supra* note 23; Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 139–46 (2006) (arguing against lodestar cross-checks because they do not optimally deter); Joni Hersch et al., *An Empirical Assessment of Early Offer Reform for Medical Malpractice*, 36 J. LEGAL STUD. S231, S238 (2007) (referencing “the more typical one-third contingency fee rate”); F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: “Morals Without Technique”?*, 60 FLA. L. REV. 349, 383 (2008) (mentioning “the usual 33–40 percent contingent fee”); Patricia M. Hynes, *Plaintiffs’ Class Action Attorneys Earn What They Get*, 2 J. INST. FOR STUDY LEGAL ETHICS 243 (1999); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 286 (1998) (reporting the results of a survey of Wisconsin lawyers, which found that “[o]f the cases with a [fee calculated as a] fixed percentage [of the recovery], a contingency fee of 33% was by far the most common, accounting for 92% of those cases”); Charles Silver, *Due Process and the Lodestar Method: You Can’t Get There from Here*, 74 TUL. L. REV. 1809, 1811 (2000); Charles Silver, *A Restitutionary Theory of Attorneys’ Fees in Class Actions*, 76 CORNELL L. REV. 656, 657 (1991) (suggesting that “attorneys are entitled to be paid because class members are enriched at the attorneys’ expense”); Aimee Lewis, Note, *Limiting Justice: The Problem of Judicially Imposed Caps on Contingent Fees in Mass Actions*, 31 REV. LITIG. 209 (2012).

