ESSAY

THE ORDINARY AND EXTRAORDINARY IN MASS TORT LITIGATION

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Mass torts have inspired a number of innovative procedural approaches. They include creative uses of class actions, multidistrict litigation ("MDL") and, more recently, the bankruptcy system. These procedural innovations have been challenged as a "revolution" that departs from "traditional litigation goals," particularly our "deep-rooted tradition" of one having their "day in court." In this Essay, we question just how "traditional" or "deep-rooted" these goals are. While mass torts do indeed raise challenging issues of due process and federalism, we show that these issues are neither new nor do they depart from a "deep-rooted tradition," at least not one that isn't often honored only in the breach. Instead, we suggest that history reveals an alternative "tradition," one that we argue is much more normatively appealing, sensitive to the interests of the parties, and accommodating of practical procedural efforts to resolve nationwide and dispersed disputes.

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INTRODUCTION

Mass tort litigation is complex, as one would expect from litigation involving numerous and geographically dispersed personal injury claims against one or a few defendants.[1] Mass torts comprise a significant segment of federal court dockets,[2] and examples include litigation involving baby powder,[3] weedkiller,[4] opioids,[5] military-grade earplugs,[6] and, of course, asbestos,[7]

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[1] We provide what we hope is a noncontroversial and expansive definition of "mass tort litigation." *See, e.g.*, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.1, at 343 (2004) ("Mass torts litigation 'emerges when an event or series of related events injure a large number of people or damage their property.'" (quoting ADVISORY COMM. ON CIV. RULES & WORKING GRP. ON MASS TORTS, REPORT ON MASS TORT LITIGATION 10 (1999), *as reprinted in* 187 F.R.D. 293, 300)); *see also* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT, at xii (2007) ("Each of the defining features of a mass tort—numerosity, geographic dispersion, temporal dispersion, and factual patterns—poses challenges for the conventional tort system.").

[2] For example, actions asserting mass tort claims, such as products liability claims, comprise a substantial proportion of both pending actions and new filings in federal court. *See* Alan Rothman, *And Now a Word from the Panel: A Strong Year for MDLs*, LAW360 (Jan. 24, 2024), https://www.law360.com/articles/1789343/and-now-a-word-from-the-panel-a-strong-year-for-mdls [https://perma.cc/D9PV-QVBW] (relying upon 2023 statistics, "[p]roduct liability MDL proceedings now make up more than 38% of all MDL proceedings"). In fact, one mass tort MDL involving military-grade earplugs alone accounted for a substantial portion of the total U.S. federal docket. *See* Nate Raymond, *3M Earplug Mass Tort's End Spurs Drop in Federal Lawsuits in 2024*, REUTERS (Mar. 12, 2025), https://www.reuters.com/legal/government/3m-earplug-mass-torts-end-spurs-drop-federal-lawsuits-2024-2025-03-12/ [https://perma.cc/V9F6-WZ69] (noting that "[t]he number of new federal lawsuits fell 14% in the 2024 fiscal year" as a result of a global settlement in the 3M multidistrict litigation); *see also* Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1315 n.79, 1317 (2020) (noting that, as of the time of the article, "nineteen mega-MDLs accounted for more than 85% of all pending MDL cases" and that "we could easily categorize all nineteen mega-MDLs as 'mass torts'").

[3] *In re* Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Prods. Liab. Litig., 553 F. Supp. 3d 211, 215 (D.N.J. 2021); *see also In re* LTL Mgmt., LLC, 64 F.4th 84, 93 (3d Cir. 2023) (discussing and rejecting use of bankruptcy to deal with newly created Johnson & Johnson entity containing the company's talcum powder mass tort liability).

[4] *In re* Roundup Prods. Liab. Litig., 390 F. Supp. 3d 1102, 1110 (N.D. Cal. 2018).

[5] *See* Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2087–88 (2024) (rejecting use of third–party releases in Purdue bankruptcy to deal with mass tort liability arising from opioids); *In re* Nat'l Prescription Opiate Litig., 589 F. Supp. 3d 790, 795 (N.D. Ohio 2022).

[6] *In re* 3M Combat Arms Earplug Prods. Liab. Litig., 474 F. Supp. 3d 1231, 1235 (N.D. Fla. 2020).

[7] *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 416 (J.P.M.L. 1991); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (rejecting use of class actions for global asbestos settlement).

the "ur-mega mass tort."[8] Moreover, Congress rarely steps in to provide remedies when things go south, leaving courts to find a way out of the morass.[9]

Given its sheer scale, mass tort litigation is inherently "extraordinary" litigation, at least when compared to a mine-run one-on-one dispute. So, understandably, mass tort litigation has been the site for many "extraordinary" procedural innovations. These include early but later disfavored uses of the class action,[10] to the more accepted use of multidistrict litigation ("MDL"),[11] and, more recently, experimentation with the bankruptcy system.[12] Even more understandably, these creative procedural responses to mass tort litigation have been the subject of criticism. After all, if they are departures from the norm demanded by a need for efficiency (among other things), then it must mean the corners are being cut somewhere, right?

In this Essay we focus on a specific subset of criticisms directed at the use of MDLs and bankruptcy for mass tort litigation.[13] According to these critiques, the use of MDL and

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8 D. Theodore Rave & Francis E. McGovern, *A Hub-and-Spoke Model of Multidistrict Litigation*, 84 LAW & CONTEMP. PROBS. 21, 25 (2021) ("The asbestos litigation is the ur-mega mass tort.").

9 For instance, in the opening status conference of the Opioids MDL, Judge Polster lamented that "[t]he federal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government, federal and state, have punted. So it's here." Transcript of Proceedings at 4, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Jan. 9, 2018).

10 *E.g.*, Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 667 (1989) (discussing innovative use of class actions in the *Jenkins v. Raymark* asbestos litigation). *But see Amchem*, 521 U.S. at 625 (rejecting use of Rule 23(b)(3) class actions for asbestos global settlement); Ortiz v. Fibreboard Corp., 527 U.S. 815, 864 (1999) (rejecting use of Rule 23(b)(1) class actions for asbestos litigation); PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 1.02 reporters' notes cmt. b(1)(B) (AM. L. INST. 2010) (noting that "[a]s a doctrinal matter, the class action has fallen into disfavor as a means of resolving mass-tort claims arising from personal injuries" (first citing *Amchem*, 521 U.S. 591; and then citing *Ortiz*, 527 U.S. 815)); *cf. In re* Nat'l Prescription Opiate Litig., 976 F.3d 664, 667 (6th Cir. 2020) (rejecting novel use of "negotiation class" action to encourage global settlement in opioid litigation).

11 Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 833 (2017) ("MDL has become the leading mechanism for resolving mass torts.").

12 Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 FORDHAM L. REV. 325, 327–28 (2022) (observing that "mass tort defendants are increasingly filing for bankruptcy to resolve mass tort liability and impose a new bargain on claimants").

13 Here we focus on the important and penetrating work of Elizabeth Burch and Abbe Gluck. *See* Abbe R. Gluck, Elizabeth Chamblee Burch & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Tort Litigation*, 133 YALE L.J.F. 525, 544–50 (2024)

bankruptcy procedures for mass torts is "unorthodox, modern, non-textbook, civil procedure"[14] that departs from "tradition," particularly "the 'deep-rooted historic tradition that everyone should have his own day in court.'"[15] For these critics, the collectivization imposed by MDLs and bankruptcy prevents the plaintiffs from the participation, control, and forum choice that comprise "procedure's traditional rules and values."[16] Indeed, centralization itself undermines "our traditional dual system of state and federal courts."[17]

We argue that the "tradition" that these critics rely upon is not as authoritative, well-defined, or supportive as they claim, even if one sets aside the reality that even in "simple" litigation the number of trials is vanishingly small.[18] As an initial matter, we show that the "tradition" these critics identify is arguably a recent invention, at least when it comes to the U.S. Supreme Court, and that historically there has been much more flexibility and experimentation with respect to procedural innovation than these critics acknowledge. We are reminded of similar criticisms of a different type of complex litigation—institutional

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(criticizing use of bankruptcy for mass torts); Elizabeth Chamblee Burch & Abbe R. Gluck, *Plaintiffs' Process: Civil Procedure, MDL, and a Day in Court*, 42 REV. LITIG. 225, 228–34 (2023) [hereinafter Burch & Gluck, *Process*] (criticizing both MDL and bankruptcy procedures as applied to mass torts); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 6–7 (2021) [hereinafter Gluck & Burch, *Revolution*] (criticizing use of MDLs for mass torts, focusing on opioids as a case study).

Other important voices of these criticisms include Martin Redish and Linda Mullenix. *See generally* Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109 (2015); Linda S. Mullenix, *The Short Unhappy Life of the Negotiation Class*, 56 U. MICH. J.L. REFORM 613 (2023); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511 (2013).

Finally, one voice worth highlighting is the work of the late Richard Nagareda, who Burch has acknowledged is a major influence of her own work. *See* ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION, at xiii (2019) (acknowledging influence of Nagareda). *See generally* NAGAREDA, *supra* note 1.

14 Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1671 (2017) (describing the MDL); *see also* Gluck, Burch & Zimmerman, *supra* note 13, at 534.

15 Burch & Gluck, *Process*, *supra* note 13, at 241 (quoting Martin v. Wilks, 490 U.S. 755, 762 (1989)).

16 Gluck & Burch, *Revolution, supra* note 13, at 5 (discussing MDLs).

17 Gluck, Burch & Zimmerman, *supra* note 13, at 544.

18 Richard L. Jolly, Valerie P. Hans & Robert S. Peck, *Democratic Renewal and the Civil Jury*, 57 GA. L. REV. 79, 112 (2022) (describing the "[p]recipitous [d]ecline of the [c]ivil [j]ury").

litigation seeking to reform state and local governmental entities.[19] Just like with mass tort litigation today, critics of institutional litigation appealed to a tradition of a "private, dualistic, and remedially limited system of dispute resolution."[20] That same tradition was not present then, nor is it present now.

But more importantly, we argue that history supports an alternative tradition, one in which courts routinely and heroically experiment with procedures to meet the challenges of the litigation before them. This alternative tradition, we argue, is not only supportive of the use of MDLs and bankruptcy to deal with mass tort litigation but is also more normatively appealing, and only in part because it is practically necessary.

I
OUR "DEEP-ROOTED" TRADITION?

As noted above, some have criticized the use of MDLs and bankruptcy for mass torts because these procedures depart from tradition, particularly our "deep-rooted historic tradition that everyone should have his own day in court."[21] Relying upon this "deep-rooted historic tradition," they argue in favor of "provid[ing] plaintiffs with more autonomy, control, and at least some individualized treatment,"[22] both to serve plaintiffs but also to honor "our traditional dual system of state and federal courts."[23]

It is easy to see how the MDL and the bankruptcy process depart from traditions like a "day in court." Unlike class actions for money damages,[24] the plaintiffs cannot opt out of

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19 Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 465 (1980) (describing attacks on institutional litigation as a departure from "what was once a private, dualistic, and remedially limited system of dispute resolution"); *see also* Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 37 (1979); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1304–09 (1976).

20 Eisenberg & Yeazell, *supra* note 19, at 465.

21 Burch & Gluck, *Process*, *supra* note 13, at 241 (quoting Martin v. Wilks, 490 U.S. 755, 762 (1989)).

22 *Id.* at 235; *see also* Redish & Karaba, *supra* note 13, at 113 (arguing in favor of a conception of due process that protects "a form of 'meta'-autonomy—in other words, an individual's autonomy in choosing how to exercise his liberty to participate in the governmental process").

23 Gluck, Burch & Zimmerman, *supra* note 13, at 544.

24 Or, more precisely, unlike Rule 23(b)(3) class actions, which require a court to provide an opportunity to class members to opt out of the class. FED. R. CIV. P. 23(c)(2)(B)(v) (requiring notice stating "that the court will exclude from the class any member who requests exclusion"). No such opt out right (or even notice) is

the MDL or bankruptcy.[25] Indeed, the captive nature of these proceedings is a crucial element of their design. Moreover, even though, unlike a class action, the plaintiffs in MDLs and even bankruptcy often are represented by their own attorneys,[26] the courts in both MDLs and bankruptcy often create leadership positions or "committees" to allow some unelected, largely uncontrolled attorneys to do work on behalf of the plaintiffs.[27] And MDLs and bankruptcy proceedings are, for at least some participants, centralized in far-flung forums they would not have chosen.

In sum, critics contend that in both MDL and bankruptcy contexts each plaintiff is, at least at first glance, a cog in a machine, not an individual victim with their own claim, their own tort, and their own story. And victims hardly ever get the "day in court" that due process purportedly demands.

But, as we discuss below, there is much more than meets the eye. The picture of an individual plaintiff being lost in the sea of mass tort makes too much of "tradition" (if any such tradition exists) and makes too little of the practical realities of mass tort litigation and the benefits claimants achieve through aggregation. If anything, collective procedures like MDLs and bankruptcy are designed to *empower* plaintiffs because the mass tort itself puts each plaintiff at a structural disadvantage

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required for the other Rule 23 categories of class actions. *See id.* 23(c)(2)(A) (stating that for "(b)(1) or (b)(2) Classes" the "court may direct appropriate notice to the class" (emphasis omitted)).

25 *See* Uber Techs., Inc. v. U.S. Jud. Panel on Multidistrict Litig., 131 F.4th 661, 673 (9th Cir. 2025) ("It is clear from the text of Section 1407 that the statute does not create an individual right to centralization that may be waived but instead vests the JPML with a power to manage the federal docket by centralizing cases that is unfettered by private agreements."); Samir D. Parikh, *The New Mass Torts Bargain*, 91 FORDHAM L. REV. 447, 478 (2022) ("A truly surprising facet of the [MDL] process is that victims are unable to exit."); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (noting that an exception to the "day in court" ideal exists "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate" (quoting *Martin*, 490 U.S. at 762 n.2)).

26 One exception worth noting is that bankruptcy can also include "futures" who, because of long latency periods, have not yet suffered any injury. In those contexts, the bankruptcy court will typically assign a future claimants' representative ("FCR") on behalf of those potential claimants. *See* Campos & Parikh, *supra* note 12, at 346–47 (discussing the FCR).

27 David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433, 436 (2020) ("Appointing leaders is extremely common in contemporary MDL . . . ."); S. ELIZABETH GIBSON, FED. JUD. CTR., JUDICIAL MANAGEMENT OF MASS TORT BANKRUPTCY CASES 38 (2005) (noting that "[i]n virtually all mass tort bankruptcies to date, U.S. trustees or bankruptcy courts have appointed at least one committee for the tort claimants").

relative to the defendant.[28] More importantly, due process law, to its credit, has understood that traditions like the "day in court" may actually be a *problem*, not the solution, when it comes to mass torts.

A. Sources

As an initial matter, it is far from clear that the "day in court" ideal is a "deep-rooted tradition." The "deep-rooted" language can be traced to Justice Rehnquist's majority opinion in *Martin v. Wilks*.[29] In that case, Black firefighters sued the city of Birmingham, Alabama for allegedly "engag[ing] in racially discriminatory hiring and promotion practices" in violation of Title VII of the Civil Rights Act.[30] The Black firefighters and the city negotiated a consent decree, but the consent decree was later challenged by a group of white firefighters who intervened in the lawsuit only *after* the consent decree was reached.[31] The district court denied their intervention request and later dismissed the white firefighters' separate lawsuit as an impermissible collateral attack on the decree.[32] The Eleventh Circuit reversed, siding with the white firefighters, and the Supreme Court affirmed the reversal.[33]

Justice Rehnquist, writing for a majority, stated at the outset that "[a]ll agree that '[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by

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28 *See* David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 394 (2000) (noting that, regardless of the procedure used, in mass torts "the defendant exploits economies of scale to invest far more cost-effectively in preparing its side of the case than plaintiffs can in preparing their side"); Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 78 (2019) (arguing that "[r]epeat players add value in large part by leveraging their experience and access to level the playing field against defendants, who will almost always be repeat players, as will their teams of BigLaw attorneys").

29 490 U.S. 755. Much of this discussion draws from one coauthor's prior work on *Martin v. Wilks*. *See* Sergio J. Campos, *Class Actions and the "Day in Court" Ideal: Class Actions as Collective Power Against Subordination*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 332 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022).

30 *Martin*, 490 U.S. at 759.

31 *Id.* The white firefighters argued that the consent decree itself violated Title VII. *Id.* at 759–60.

32 *Id.* at 759–61.

33 *Id.* at 761.

service of process.'"[34] He then stated "[t]his rule is a part of our 'deep-rooted historic tradition that everyone should have his own day in court,'" quoting a volume of Wright and Miller's *Federal Practice and Procedure* treatise from 1981.[35] Relying on these principles, the Court ultimately allowed the white firefighters to intervene and challenge the consent decree, essentially because the preclusive effect of the consent decree could not bar a lawsuit from someone who was not a party to the suit that resulted in the decree.[36]

As an initial matter, the support of the "deep-rooted historic tradition that everyone should have his own day in court" is remarkably thin. When one reviews the 1981 volume of Wright and Miller that the *Martin v. Wilks* Court relied upon, the volume itself does not cite to anything for the proposition.[37] Instead, the volume discusses as a "simple example" an observation that a bus company's failure to recover from the defendant driver would not preclude "the surviving spouse and dependent children of a bus passenger who was killed in the same accident."[38] Even then, the volume fails to cite anything, not even a case with similar facts, to support this "simple example."[39]

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34 *Id.* (second alteration in original) (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

35 *Id.* at 762 (quoting 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1981)).

36 *See id.* at 768–69. This is a standard tenet of preclusion law, which cannot bar a lawsuit by one who was not a party to the prior litigation, unless one of the exceptions enumerated in *Taylor v. Sturgell*, 553 U.S. 880, 893–95 (2008), applies. For a careful analysis questioning the importance of the "day in court" even in the nonparty preclusion context, see Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 199 (1992) (arguing that "both outcome-oriented and process-oriented participation theories, when properly understood, support an expansion of nonparty preclusion doctrine").

37 18 WRIGHT, MILLER & COOPER, *supra* note 35, § 4449, at 417; *see also* Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1111 n.272 (2012) ("Justice Rehnquist's majority opinion in *Martin v. Wilks* is the first explicit recognition of such a tradition, but only cites a reference to *Wright and Miller* that provides no other historical references."). The current volume simply cites *Martin v. Wilks* and subsequent cases to support the proposition, in addition to one prior case, a dissent to a denial of certiorari authored by Justice Rehnquist, the author of *Martin v. Wilks*, that itself only quotes *Wright and Miller*. *See* 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449 (3d ed.), Westlaw (database updated May 2025) (citing, among other cases, Ashley v. City of Jackson, 464 U.S. 900, 902 (1983) (Rehnquist, J., dissenting)).

38 18 WRIGHT, MILLER & COOPER, *supra* note 35, § 4449, at 417.

39 *Id.* The reference to a bus accident is reminiscent of Brainerd Currie's use of a similar type of accident (a train crash) to illustrate his opposition to the use

Moreover, the simple example used to support the "day in court" tradition only illustrates that a nonparty generally should not be precluded by a previous judgment. Indeed, in justifying the "day in court" tradition, the volume emphasizes both "the general fallibility of litigation" and "the specific distortions of judgment that arise from the very identity of the parties."[40] This narrow focus on nonparty preclusion is understandable because, as critics themselves acknowledge, the "day in court" tradition "has largely been confined to preclusion as opposed to a context that mines the core virtues of individualized litigation."[41]

The "principle of general application in Anglo-American jurisprudence" that introduces the "day in court" language in Justice Rehnquist's opinion has a bit firmer foundation, as he quotes the Supreme Court's 1940 opinion in *Hansberry v. Lee*.[42] *Hansberry* itself cites *Pennoyer v. Neff*, the (in)famous personal jurisdiction case, for support of the principle that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[43] But the quote is also focused on the narrow context of preclusion, not a broader "day in court" right to participate and control the litigation.[44]

But even in this narrow context, the *Hansberry* Court in the next paragraph states:

> To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which

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of offensive non-mutual issue preclusion. *See* Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281, 285 (1957).

40 18 WRIGHT, MILLER & COOPER, *supra* note 35, § 4449, at 417 (stating that the day in court traditions "draws from clear experience" with these two considerations).

41 Burch & Gluck, *Process*, *supra* note 13, at 241.

42 311 U.S. 32, 40 (1940).

43 *Id.* (citing Pennoyer v. Neff, 95 U.S. 714 (1877)). Justice Stone's invocation of *Pennoyer* is made even more ironic by Stone's disembowelment of *Pennoyer* five years later in *International Shoe Co. v. Washington*. 326 U.S. 310, 316 (1945).

44 Indeed, in condoning several "exceptions" to its rule, whereby parties who are out of state and default *are* bound by the results demonstrates *Pennoyer*'s focus on the scope of state power, not any protection of the "day in court." *Pennoyer*, 95 U.S. at 734 ("To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident.").

> some members of the class are parties, may bind members of the class or those represented who were not made parties to it.[45]

For these exceptions, the *Hansberry* Court cites the "familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact *adequately represented* by parties who are present."[46] Indeed, this is why, with respect to class actions, *Hansberry* is best thought of as both a license and limitation. So even in the context of nonparty preclusion, the touchstone of due process is not necessarily a "day in court" but, as even the critics admit, "a right to have one's interest adequately represented."[47]

B. Participation

Critics would contend that, aside from the historical bona fides of the "deep-rooted tradition," there is something unseemly about plaintiffs not getting to participate in the litigation of their own claims. According to these critics, this "plaintiffs' process" is valuable and is worth protecting as a matter of due process.[48] But even admitting that individualized participation can be worthwhile in many contexts, it is worth examining the value of such participation in the context of a mass tort, and then balancing that value against the *benefits* of aggregation and the *interest of the state* in just, speedy, and inexpensive litigation.[49]

For starters, in both MDLs and bankruptcy, there is at least *some* amount of plaintiff participation. In MDLs all of the plaintiffs draft and file complaints to initiate suit,[50] with at

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45 311 U.S. at 41 (citing cases).

46 *Id.* at 42–43 (emphasis added).

47 Burch & Gluck, *Process*, *supra* note 13, at 241 (citing Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1584–85 (2007)).

48 *Id.* at 231–32 (arguing that "plaintiffs' process must become more relevant across the entire span of civil procedure").

49 *See* Mathews v. Eldridge, 424 U.S. 319, 319, 334–35 (1976) ("[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

50 Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1262 (2017) ("[I]n an MDL, . . . each claimant has hired a lawyer and filed her own lawsuit . . . .").

least a promise of participation at the trial level given the limitation of MDLs to pretrial proceedings.[51] Plaintiffs must also opt in to any non-class aggregate settlement.[52] In bankruptcy, any proposed reorganization plan requires a vote of all creditors, including mass tort claimants, so participation at least can be achieved in this mild form.[53] And all reorganization plans at least provide an option to sue the settlement trust, so one's right to a "day in court" is preserved,[54] albeit not against the debtor directly.[55]

But critics often bemoan the lack of *meaningful* participation, sometimes characterized as the right to "tell one's side of the story"[56] or, even more dramatic, as important to the functioning of democracy.[57] As an initial matter, it is unclear to what extent plaintiffs even value a more extensive right of

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Claimants also retain the right to appeal. *See* Gelboim v. Bank of Am. Corp., 574 U.S. 405, 413 (2015).

51 *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 34–41 (1998) (holding that, by the terms of the MDL statute, transferee courts have an inherent duty to remand after pretrial proceedings). *Lexecon*, though, like many procedural default rules, can be waived. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.93, at 463 (2004).

52 Bradt & Rave, *supra* note 28, at 104.

53 *See* Gluck, Burch & Zimmerman, *supra* note 13, at 555–56 (acknowledging, but criticizing as inadequate, the voting procedures for reorganization plans in mass tort bankruptcies).

54 Not everyone agrees. *See generally* Suneal Bedi & Samir D. Parikh, *Mass-Tort Trusts and the Faustian Bargain*, 110 CORNELL L. REV. 1595 (2026) (explaining that opt-out litigation rights in bankruptcy are plagued with limitations and restrictions that eviscerate the right's value).

55 Gluck, Burch & Zimmerman, supra note 13, at 546 (recognizing that the "channeling injunctions" in mass tort bankruptcies "force present and future . . . plaintiffs to sue the new bankruptcy trust" and not the debtor). Channeling injunctions are provided directly for asbestos bankruptcies under § 524(g) of the Bankruptcy Code. 11 U.S.C. § 524(g). For non-asbestos mass torts, bankruptcy courts have issued channeling injunctions using their equity power under § 105 of the Bankruptcy Code. *See* 11 U.S.C. § 105(a) (permitting a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code); *see also* Parikh, *supra* note 25, at 484 (noting the use of § 105 to "cherry-pick[] attractive provisions and concepts from § 524(g)"). One might consider that a legislative remedy in a mass tort situation would require even less participation, since any dissatisfied plaintiff would have to wait until his next trip to the ballot box to register disapproval.

56 Gluck, Burch & Zimmerman, *supra* note 13, at 552 (arguing that this is "a central reason why people sue"); *see also* Burch & Gluck, *Process*, *supra* note 13, at 242 (noting that in MDLs "plaintiffs can often be like proverbial cattle, herded into a forum they did not choose, wrangled by attorneys they did not hire who may assert claims telling only a part of their story").

57 Redish & Karaba, *supra* note 13, at 135 (arguing that "individual participation is inherently valuable in a democratic system"); *see also* Redish & Larsen, *supra* note 47, at 1582 ("The procedural due process guarantee is appropriately

participation. For example, statistics show that the settlement rates of most non-mass tort litigation are staggeringly high, suggesting that many plaintiffs are happy to forgo the right to tell their story.[58]

But the concern with telling one's story is perhaps most inapt when one considers the "mass" nature of the mass torts in MDLs and bankruptcy. What makes a mass tort a mass tort is that it arises from a uniform mass production decision or practice of the defendant that harms a large, dispersed population.[59] Consider the many examples discussed so far—Johnson & Johnson's decision to use asbestos-containing talc powder to produce baby powder,[60] or Monsanto's decision to use glyphosate, a potential carcinogen, in weedkiller,[61] or Purdue Pharma's decision to mass market opioids.[62]

Those decisions by the mass tort defendant, which affected *all* of the plaintiffs, also *have nothing to do with the plaintiffs*. Indeed, many of the plaintiffs had not even been born when Johnson & Johnson, Monsanto, or Purdue made their fateful decisions regarding their products. At most, the plaintiffs were all an amorphous blob, only materializing *after* the decision was made.[63] Features of that decision are crucial for determining the liability of the mass tort defendant and thus must be proven by the plaintiffs to recover. But, again, proof of those

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viewed as a constitutional outgrowth of democracy's normative commitment to . . . process-based political autonomy.").

58 For one such study, see Jolly, Hans & Peck, *supra* note 18, at 113–25.

59 Campos & Parikh, *supra* note 12, at 332.

60 Lisa Girion, *Johnson & Johnson Knew for Decades That Asbestos Lurked in Its Baby Powder*, REUTERS (Dec. 14, 2018), https://www.reuters.com/investigates/special-report/johnsonandjohnson-cancer/ [https://perma.cc/9U7P-SXDY].

61 *See In re* Roundup Prods. Liab. Litig., 358 F. Supp. 3d 956, 960 (N.D. Cal. 2019); Sergio J. Campos, *The Commonality of Causation*, 46 OHIO N.U. L. REV. 229, 231 (2020).

62 *See* Harrington v. Purdue Pharma, L.P., 144 S. Ct. 2071, 2078 (2024) (noting that Purdue "marketed Oxycontin," an opioid-containing drug, "for use in 'a much broader range' of applications," leading to "one of the largest public health crises in this nation's history" (first quoting *In re* Purdue Pharma, L.P., 635 B.R. 26, 42 (S.D.N.Y. 2021); and then quoting Purdue Pharma, L.P. v. City of Grand Prairie (*In re* Purdue Pharma L.P.), 69 F.4th 45, 56 (2d Cir. 2023))).

63 *See* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice By Collective Means*, 62 IND. L.J. 561, 588 (1987) ("[I]n mass accident situations, the firm's accident prevention measures are of necessity the product of a collective, undifferentiated assessment of the probable loss from its activities for the class of potential victims as a whole; and, correspondingly, care-taking usually cannot be adjusted on an individualized basis."); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 129 (1987) ("Expected losses are a probability-weighted *aggregation* of losses that can arise in many individually unlikely ways.").

decisions will not depend on the individual stories of a particular plaintiff.

One vivid example can be found in *In re Denture Cream Products Liability Litigation*, an MDL in which the plaintiffs alleged that the use of Fixodent and similar denture creams caused "zinc-induced copper-deficiency myelopathy."[64] Plaintiffs proposed a number of experts to establish a causal link between exposure to the zinc contained in denture cream and copper-deficiency myelopathy. The experts relied upon "several bases to support their inference of general causation: (1) a biologically plausible explanation, (2) case reports of denture-cream users who have neurological problems, (3) de-challenge evidence, (4) animal studies, and (5) an FDA notice."[65] However, the court concluded that while such a causal link "is not ridiculous," the proffered testimony "will not reliably produce correct determinations of causation."[66]

Here, as in all mass torts, the decision of a defendant like Procter & Gamble to include zinc in Fixodent denture cream is unrelated to the circumstances of any of the plaintiffs. But even the issue of whether denture cream generally causes copper-deficiency myelopathy also does not depend on their stories. Indeed, the court noted that, when discussing the reliability of case studies to show general causation, "[c]ausal attribution based on case studies must be regarded with caution."[67] This all makes sense, as one should be cautious when inferring the general from the particular. Selection biases, for example, can distort the causation picture.[68] These biases not only make the "stories" of the plaintiffs unnecessary. The stories may even be harmful to determining proper inferences.[69]

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64 *In re* Denture Cream Prods. Liab. Litig., 795 F. Supp. 2d 1345, 1348 (S.D. Fla. 2011).

65 *Id.* at 1357.

66 *Id.* at 1367.

67 *Id.* at 1359 (quoting Mary Sue Henifin, Howard M. Kipen & Susan R. Poulter, *Reference Guide on Medical Testimony*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 439, 475 (2d ed. 2000)).

68 *See* Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571, 624 (2012) ("One must always suspect that any nonrandom method of picking sample cases will be skewed and therefore will be an inaccurate estimate of the population average.").

69 The Eleventh Circuit has even stated that "[c]ase studies and clinical experience, used alone and not merely to bolster other evidence, are also insufficient to show general causation." Hendrix *ex rel.* G.P. v. Evenflo Co., 609 F.3d 1183, 1197 (11th Cir. 2010).

It is these common issues of liability and causation that are an MDL's very reason for coming into existence. As the MDL statute states, centralization is only enabled "[w]hen civil actions involving one or more *common questions of fact* are pending in different districts."[70] Indeed, the primary drafter predicted nationwide products liability cases and cited their likely emergence as a reason the statute was necessary.[71] Moreover, although bankruptcy does not have a "common questions" requirement, that requirement is satisfied by the debtor itself, whose common mass-production conduct brings all of the mass tort claimants to bankruptcy in the first place. Even critics admit that common issues of liability and causation are "theoretically ripe for aggregate treatment."[72]

Critics would counter that, despite their origins, mass torts are still all about the individual. Yes, liability and general causation have to be established, but there also remains "a plaintiff's eligibility for relief,"[73] and eligibility depends on the individual stories and circumstances—and appropriate governing law—of each plaintiff. But, as an initial matter, if the plaintiffs fail on issues of liability and causation, then there are no individual eligibility issues to determine. In the *Denture Cream* MDL, for example, the failure to proffer admissible expert testimony on general causation effectively ended the litigation.[74]

But the particular circumstances of each and every plaintiff may not even be necessary for individualized issues of eligibility. This is because even individualized issues like specific causation often rely upon information provided by other

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70 28 U.S.C. § 1407(a) (emphasis added).

71 Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1735–36 (2017). The specter of such cases was the basis for Judge Becker's antipathy for a proposed "predominance" requirement in the MDL statute that would mirror Rule 23. *Id.* at 1736. Becker correctly anticipated that the predominance requirement would limit the effectiveness of the class action to handle mass torts.

72 Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1875 (2015).

73 *Id.* at 1857.

74 *See In re* Denture Cream Prods. Liab. Litig., No. 09-2051-MD, 2012 WL 5407868, at *4–6 (S.D. Fla. July 31, 2012) (granting summary judgment in favor of Proctor & Gamble given lack of reliable expert testimony on general causation); *see also* Hoffman v. Merrell Dow Pharms., Inc. (*In re* Bendectin Litig.), 857 F.2d 290, 315 (6th Cir. 1988) (endorsing the court's decision to try causation questions first over plaintiffs' objection that doing so would prevent them "exercising their right to present to the jury the full atmosphere of their cause of action").

cases.[75] For example, both MDLs and some bankruptcies rely upon bellwether trials to provide information from a sample of cases to help resolve and settle other cases.[76] In fact, some courts have experimented with bellwether mediations as a way of providing information to induce settlement, with the mediations done privately and thus not before the court at all.[77] In all of these instances resolution of plaintiff-specific issues is achieved without necessarily affording *every* plaintiff a right to tell their story.

C. Control

Critics sometimes invoke a "day in court" tradition to focus on something a bit stronger than participation. Here, they focus on the right to *control* their individual case.[78] But this focus on control as a due process right fundamentally misunderstands the reasons why collective procedures are sometimes permitted and, by extension, the law of due process.

One can understand collective procedures like MDLs and bankruptcy as procedures to deal with the disorganized nature of the plaintiffs. Unlike the mass tort defendant, who is usually already organized by its corporate form, the plaintiffs are strangers to each other from distant lands and probably have no interest in working together—indeed, this is why such a group has long been referred to as a "spurious class," a group created only by the existence of the members' similar claims. But the lack of organization is half the problem. There's no

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75 *See* Campos, *supra* note 61, at 255–62 (noting common evidence with respect to specific causation was possible from reverse bifurcation procedure used in in *Roundup* litigation).

76 *See* Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. 185, 186 (2018) ("The idea is that the outcomes of the bellwether cases will be used to price the remaining lawsuits in the litigation, ultimately yielding a settlement matrix for all claims."); *see also* Campos & Parikh, *supra* note 12, at 357–58 (discussing strategic lifting of the automatic stay to get functional bellwether trials in the PG&E bankruptcy).

77 *See generally* Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275 (2017) (discussing use of bellwether mediations to facilitate settlement of claims in state MDL).

78 *E.g.*, Redish & Karaba, *supra* note 13, at 134 ("The right to one's own day in court means a right to meaningful *control* over litigation strategy and goals, including choice of legal representative." (emphasis added)). This is most clearly seen in the work of the late Richard Nagareda, who has argued that claims are themselves property rights, and that "the usual rule for sales of either personal or real property is that the power of sale resides with the property owner." Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 160–61 (2003).

need, for example, for auto accident victims to "organize" to sue other drivers.

It is the disorganization of the plaintiffs *combined* with the organization of the defendant that creates what can be understood as a "tragedy of the commons" problem.[79] As noted earlier, all mass torts arise from a common mass production decision of the defendant, and it is this decision that creates the "common issues" of liability that each of the plaintiffs share.[80] Investment in these common issues—experts, discovery requests and responses, legal research—can be far from ideal if only done by one or a few plaintiffs. Their individual stakes are often too low when compared to the total aggregate stake of the defendant, who can "exploit[] economies of scale to invest far more cost-effectively in preparing its side of the case than plaintiffs can in preparing their side."[81] Accordingly, without help, the plaintiffs underinvest relative to their own private returns. This suboptimal investment leads some plaintiffs to not even file lawsuits (think of small claims where "only a lunatic or fanatic sues for $30"[82]), or to only invest a fraction of what they would have invested if the plaintiffs could somehow pool their resources.[83]

Here, the underinvestment in common issues that a mass tort can cause is similar to the classic "tragedy of the commons" situation of individual cattle owners overgrazing on collective grazing land. The underinvestment is caused by the fact that the individual plaintiffs fail to consider the externality of investing in common issues, since their investment can benefit others who share the same common issues. Indeed, freeriding is a hallmark of mass tort litigation.[84]

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79 *See* Campos, *supra* note 37, at 1085–87; *see also* Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1721–22 (2002) ("What we have here is a failure to cooperate. The current world of asbestos litigation can helpfully be viewed as a 'commons' problem."). For a general description of the "tragedy of the commons," see Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244–45 (1968).

80 *See supra* text accompanying notes 59–72.

81 Rosenberg, *supra* note 28, at 394.

82 Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).

83 For a game theoretic model of this observation, see David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEGAL ANALYSIS 305 (2014) (using a contest game theoretic model to show inherent advantage of mass tort defendant to mass tort plaintiffs in the investment of common issues).

84 *See* Rave & McGovern, *supra* note 8, at 36 ("By setting up a leadership structure and a common benefit fund, the MDL judge can reduce freeriding

But just as cattle owners fail to consider the externality of their own grazing activity, to their own detriment, the plaintiffs in mass torts often fail to consider the "benefit" that their own investment in common issues can and will have for other plaintiffs who share the same common issues of liability. Here, mass tort plaintiffs will tend to underinvest in common issues in much the same way that cattle ranchers will underinvest in preserving the grazing land.[85]

One can contrast the plaintiffs' incentives with the defendant's own investment in common issues. Because the defendant can anticipate the plaintiffs bringing lawsuits, it will invest "as if" they are already in a collective procedure, even if the plaintiffs bring their lawsuits one at a time.[86] A mass tort defendant can thus "sink (or credibly threaten to sink) a large investment at the start or in anticipation of litigation so as to confront plaintiffs with such a formidable common question defense that most if not all will forgo suit altogether."[87] Indeed, this is one of the hallmarks of the classic Galanterian "repeat player," always playing the long game.[88]

Collective procedures like MDLs and bankruptcy are specifically designed to overcome these externalities. Investment in common issues can be understood as an "indivisible"[89] good or "public good" that requires collective ownership to realize collective benefits.[90] And that is precisely what collective procedures like MDLs and bankruptcy do for the benefit of plaintiffs.

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and better incentivize lead lawyers to invest in work that will benefit all of the plaintiffs.").

85 Or, alternatively, "[p]laintiffs overuse their claim by suing separately," similar to ranchers overgrazing the land. Campos, *supra* note 37, at 1086.

86 *See* Rosenberg, *supra* note 28, at 400 ("In mass tort cases, defendants naturally collectivize the common defense to any given set of classable claims and thus exploit the scale economies of a *de facto* class action.").

87 Rosenberg & Spier, *supra* note 83, at 352.

88 *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 98–103 (1974).

89 *See* PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 2.04(c) (AM. L. INST. 2010) (noting that mandatory class action treatment is justified for "indivisible" remedies like injunctions and limited funds).

90 *See* Campos, *supra* note 37, at 1087 (noting that investment in common issues, and ultimately "enforcement of the law," is a public good). Admittedly, this scale problem could be solved through "parcelization," but in the mass tort context that would require a form of intellectual property protection of common issue investment that would not be feasible under current law. *See* Lee Anne Fennell, *Commons, Anticommons, Semicommons*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 35, 38 (Kenneth Ayotte & Henry E. Smith eds., 2011) (discussing parcelization as an alternative to collectivization to deal with "commons" problems").

With respect to MDLs, do not just take our word for it. Here a bit of history is helpful. The MDL statute itself was inspired by an ad hoc coordination of thousands of antitrust actions alleging the price-fixing of electrical equipment in the 1960s.[91] The collectivization was hugely successful in resolving the litigation, but not all of the parties were happy with it. Defense lawyer John Logan O'Donnell, in particular, "complained that the coordinated proceedings inured to the exclusive benefit of the plaintiffs,"[92] writing in a law review article that:

> Plaintiffs pool their resources and generally designate their most experienced lawyers and skilled cross-examiners as lead counsel to conduct depositions and supervise and coordinate all phases of plaintiffs' pretrial discovery.
>
> . . . First, costs are lessened and, in fact, there may be virtually no cost to a particular individual plaintiff. Like it or not, from the defendants' standpoint the potential cost to be incurred by plaintiffs in prosecuting a triple damage case is a factor which may lead to a favorable, reasonable and satisfactory settlement under ordinary circumstances. Second, and more important, each plaintiff is handed a ready-made case to the extent that expert lead counsel can establish it and, in any event, a far better case than most plaintiffs' counsel could ever establish without the coordinated program.[93]

O'Donnell's reaction to a proto-MDL style procedure can be faulted for saying the quiet part out loud,[94] but his reaction confirms the basic theory justifying collectivization of mass torts—that it empowers the plaintiffs to be on equal footing with the defendants. The judges who developed and advocated for the statute understood this well—as Judge Becker noted in response to a defense-bar proposal to add a predominance requirement to MDL, "[a]dvocates necessarily must in appraising a judicial reform take into account the interests of their clients and of their own practice. Judges necessarily

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91 Bradt, *supra* note 11, at 854–63 (discussing this prior litigation as an inspiration for the MDL statute).

92 *Id.* at 861.

93 John Logan O'Donnell, *Pretrial Discovery in Multiple Litigation from the Defendants' Standpoint*, 32 ANTITRUST L.J. 133, 139 (1966) (footnotes omitted); *see also* Bradt, *supra* note 11, at 862 (quoting this passage and observing that it "wins high marks for frankness").

94 *See The Simpsons: A Star Is Burns* (Fox television broadcast Mar. 5, 1995).

must consider only the interests of the administration of justice."[95]

These judges also espied another aspect of criticisms like those of O'Donnell and other antitrust-defense lawyers: a motivation to demonstrate that the federal courts could not deal with these cases. As Becker wrote to his fellow judges:

> Underlying the action of some of the defendants' counsel throughout this litigation must have been the hope that this electrical equipment antitrust litigation would overwhelm the Courts and demonstrate the unworkability to the antitrust laws allowing treble damage recoveries in civil suits.
>
> Every measure proposed which would make multiple civil antitrust litigation manageable, impairs that hope. Yet we must deal with the defendants' counsel who are inspired by this hope.[96]

In other words, by showing that the courts could not handle each case individually, the defendants would demonstrate that federal courts were not up to the task the Congress had imposed on them.

Bankruptcy similarly is a collective procedure to address a plaintiff collective action problem. Bankruptcy by definition is designed to deal with situations where the bankruptcy estate is too small to satisfy all claims, leading individual creditors to "overgraze," so to speak, by collecting on their claims to the detriment of the other creditors.[97] Thus, "[b]ankruptcy creates a way for creditors to 'act as one, by imposing a collective and compulsory proceeding on them.'"[98] Mass torts can (and often do) present the same collective action problem, where

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95 Bradt, *supra* note 71, at 1737 (quoting Memorandum from William H. Becker, C.J., U.S. Dist. Ct. for the W. Dist. of Mo., to the Subcomm. on Improvements in Jud. Mach., Comments on Memorandum for the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the Unites States Senate, by Cravath, Swaine and Moore 10 (Mar. 18, 1967) (on file with Nat'l Archives, Records of the Administrative Office of the United States Courts, Administrative Files, 1962–1967, Box 15, Folder 34)).

96 Bradt, *supra* note 11, at 876–77 (quoting Letter from Edwin A. Robson, J., U.S. Dist. Ct. for the N. Dist. of Ill., to William H. Becker, J., U.S. Dist. Ct. for the W. Dist. of Mo. 1 (Oct. 21, 1964) (on file with Nat'l Archives, Records of the Administrative Office of the United States Courts, Administrative Files, 1962–1967, Box 16, Folder 4, File 2)).

97 *See* Harrington v. Purdue Pharma, L.P., 144 S. Ct. 2071, 2090 (2024) (Kavanaugh, J., dissenting) (discussing purposes of bankruptcy, noting that "[w]ithout a mandatory collective system, the creditors would race to the courthouse to recover first").

98 *Id.* (emphasis omitted) (quoting THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 13 (1986)).

"[w]ithout a mandatory rule that consolidates claims in a single tribunal, tort claimants would rationally enter a race to the courthouse."[99]

Indeed, bankruptcy provides much stronger medicine than MDLs because it can deal with *holdouts* who may disrupt global resolutions that favor all plaintiffs. MDLs cannot "solve the collective action problem [of holdouts] because dissenting claimants can opt out of settlements even when super majorities favor them."[100]

Ultimately, these considerations show that a "day in court" is not an unalloyed good. In mass torts a "day in court" is often the problem itself.[101] It is the day in court that creates the very collective action problems of underinvestment, races to the courthouse, and selfish holdouts that ultimately harm the plaintiffs themselves.

More importantly, the law of due process has always taken these considerations into account when considering whether to protect a "day in court" as a matter of due process. As even critics admit, the touchstone of due process is not the "day in court," but whether the interests at stake are adequately represented.[102] To come somewhat full circle, consider *Martin v. Wilks*, the source of the "day in court" tradition. Shortly after *Martin v. Wilks* was decided, Congress passed the Civil Rights Act of 1991, which prohibited the late intervention that the white firefighters had sought to challenge the consent decree.[103]

No one has considered the amendment a violation of due process, and this is understandable when one considers the role that the *Martin v. Wilks* plaintiffs' "day in court" played in delaying the effectuation of the Black firefighters' civil rights. If there is a due process right to a late challenge to a consent decree, this can create problems with respect to providing relief to those harmed. Such a due process right "exposes every decree to the risk of subsequent challenge, actually to an almost endless series of challenges."[104] Indeed, when one considers the scope of such injunctive relief, the number of potential intervenors

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99 Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 997 (2023); *see also Harrington*, 144 S. Ct. at 2092 (Kavanaugh, J., dissenting) (quoting *id.*).

100 Casey & Macey, *supra* note 99, at 1005.

101 Campos, *supra* note 29, at 335–36.

102 Burch & Gluck, *Process*, *supra* note 13, at 231–32; *see also* Redish & Larsen, *supra* note 47, at 1584–85.

103 *See* 42 U.S.C. § 2000e-2(n)(1).

104 OWEN FISS, THE LAW AS IT COULD BE 110 (2003) (discussing *Martin v. Wilks*).

can be astounding—"all the present workers, managerial personnel, new applicants, the owners of the firm, or, in the case of a government agency, the taxpayers, and the customers or those otherwise dependent on the service provided by the firm or agency."[105] One need not amplify the problem by delving into the currently hot debate over "universal injunctions,"[106] but, perhaps needless to say, it is difficult to both defend that practice while also prioritizing the importance of the individual "day in court."

The law of due process has always sought a balance between the procedural rights of those affected and the ultimate goals of the law. As we see with Congress's response to *Martin v. Wilks*, insistence on a "day in court" may allow parties to delay or frustrate the plaintiffs' relief. Similarly, insistence on a "day in court" to assert one's individual defenses may make it impossible for a worker to sue for overtime pay.[107] Insistence on honoring a "day in court" before a judgment can preclude a claim may make small trust administration impossible.[108] And, similarly, insistence on a "day in court" can prevent the plaintiffs from achieving the strength necessary to have a fighting chance in mass tort litigation. This is why adequacy of representation, not a "day in court," remains the touchstone for due process, to maintain flexibility for situations where the "day in court" may cause harm.

Some critics would not disagree with all of the above. Indeed, to their credit some critics "celebrate th[e] process-opening aspect of MDL" and bankruptcy.[109] Instead, these critics would argue that collective procedures can and should coexist side-by-side with giving each individual a day in court. After all, the MDL statute itself only permits collectivization of "pretrial proceedings," with an obvious focus on the development of common issues, and, in theory, MDLs could (and should) remand back to the transferor court for more individualized treatment of the actions. Similarly, and as noted above,

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105 *Id.* at 111.

106 *See* Trump v. CASA, Inc., 145 S. Ct. 2540, 2560 (2025) (concluding that Congress did not grant courts equity power to issue universal injunctions).

107 *See* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 460 (2016) (affirming rule permitting representative, non-individualized evidence in Fair Labor Standards Act cases).

108 *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950) (permitting preclusion of nonparties without notice in some circumstances because to insist otherwise would "dissipate [the] advantages" of small trust administration under New York law).

109 Burch & Gluck, *Process*, *supra* note 13, at 227.

bankruptcy procedures often include an option for claimants to opt out of an approved plan and sue separately. Critics argue, for example, that MDLs should have more remanding of cases back to their home courts.[110]

We cannot, and do not, address every recommendation offered by critics.[111] But there are limits to accommodating plaintiff control with collective procedures in mass tort litigation. Even well-meaning critics often lose sight of the fact that collective procedures like MDLs and bankruptcy, purposefully and by design, frustrate an individual plaintiff's "meaningful choice of (a) forum, (b) representation, and (c) claim development,"[112] because these choices in the mass tort context can be, and often are, harmful even to the plaintiffs' own interests. Criticizing MDLs and bankruptcy for undermining individual control in mass tort litigation is akin to complaining about fire hoses for making things wet.[113] Perhaps we can get things less wet, but let us not lose sight of putting out the fire!

D. Federalism

Critics of MDLs and bankruptcy also often speak of a "federalism problem"—essentially that aggregation of claims in a single federal forum disrupts the traditional status quo in which cases would be litigated separately in state and federal courts scattered throughout the nation. What's lost are the benefits of multiple decision makers and development of different strands of law. Worse, the aggregation of a dispersed nationwide tort in a single court will inevitably require some plaintiffs to litigate far from their chosen forum. Whether these

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110 *See, e.g.*, *id.* at 262 (arguing for more remands).

111 For example, some critics have argued for more appellate review in MDLs. *See id.* at 259–60 (arguing for more appellate review); Gluck, Burch & Zimmerman, *supra* note 13, at 542 (same). At least one of us has written in opposition to enhanced appellate review, largely for the same reasons as we oppose robust "day in court" protection. *See generally* Andrew Bradt & Calen Bennett, *Adult Supervision? Appellate Review, Mandamus, and the Federal Rules in Multidistrict Litigation*, 50 FLA. ST. U. L. REV. 187 (2022). Moreover, as even critics concede, appellate courts have not exactly covered themselves in glory in the mass tort context. *See* Gluck, Burch & Zimmerman, *supra* note 13, at 540 ("In the years that followed, Justice Ginsburg's interpretation of Rule 23 [in *Amchem*] did not result in the careful subclassing and smaller actions that she had hoped for as an answer to *Amchem*'s commonality and representation issues.").

112 Burch & Gluck, *Process*, *supra* note 13, at 231.

113 *See id.* at 264 ("While civil-litigation aggregation is often intended to balance power between plaintiffs and defendants, the reality is that, sometimes, even as plaintiffs are empowered in numbers on the one hand, they are disempowered by losing control over their case on the other.").

are really problems of "federalism" or just benefits of decentralization is hard to parse out, and understandably so since, as the Supreme Court's choice of law and personal jurisdiction cases illustrate, both concerns inherently overlap.[114]

And these are indeed costs of aggregation. A central goal of aggregation is to *eliminate* duplication of effort in multiple forums, in part because the system, without significantly more investment, cannot handle each case one by one. Aggregation always trades off with individualism, but, as even critics agree, the relationship is not zero-sum.[115] If, by leveling the playing field, aggregation facilitates litigation of a claim that would not be viable on its own, surely one would say that the individual is better off. Ultimately, as with participation and control, the question is one of balancing costs and benefits.[116]

Personal jurisdiction provides a useful example. As one of us has written, the current law of personal jurisdiction in MDL is incoherent.[117] On one hand, the jurisdiction of the transferee court is derivative of the jurisdiction of the transferor court, such that a motion to dismiss for lack of jurisdiction is measured against the jurisdiction of the transferor court, even though the transferee court might be thousands of miles away. On the other hand, some courts say that the MDL statute permits a kind of nationwide service of process on behalf of the transferee court, only without the normal prerequisites of Congress saying so and process actually establishing jurisdiction.[118] Whether either of these explanations sufficiently justifies the essentially nationwide jurisdiction exercised by a transferee court is tangential to the real question: is it constitutional for a case to be transferred to a district court that, absent the MDL, would not have jurisdiction to hear the case?[119] The stakes are

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114 *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 813–14 (1985).

115 *See* Burch & Gluck, *Process*, *supra* note 13, at 241.

116 *See* Bradt & Rave, *supra* note 28, at 109 ("The failure of individualized norms to fully penetrate within MDL may actually be a good thing from the plaintiffs' perspectives if it allows their lawyers the leeway they need to be effective repeat players.").

117 *See* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1176 (2018) ("The explanations given for why MDL courts have unlimited national jurisdiction are unsatisfying. Closer inquiry is required, both of why personal jurisdiction has been completely ignored, and, if one stops ignoring it, whether and when MDL passes constitutional muster.").

118 *See generally id.* at 1208–25.

119 *Id.* at 1175 (arguing that "such jurisdiction is typically reasonable, . . . [but] means that the Fifth Amendment imposes limitations on the JPML in choosing a transferee district, and there are aspects of MDL practice that should be observed

heightened when one considers that an MDL can grant dispositive motions and therefore resolve the case before it is ever returned to the transferor court for trial.[120]

The answer to this question, of course, has implications for both plaintiffs and defendants. For defendants: if the JPML's selection of the transferee court were restricted to districts in states that had personal jurisdiction over all claims against the defendant, then the only available districts may be in states where the defendant is subject to general jurisdiction, because it is "essentially at home."[121] Plaintiff's personal jurisdiction is not typically a concern, because the plaintiff consents to the jurisdiction of the forum where she filed her lawsuit.[122] In an MDL, though, her case may be sent to a transferee district to which she never consented, and from which it may never return. If the plaintiff initially filed her case in state court, and the case's transfer into the MDL followed removal, then even the notion of consent to federal court jurisdiction is no longer even a thin reed on which to justify this result.[123] We agree with critics who contend that the Supreme Court's decision permitting personal jurisdiction over absent class members in states without minimum contacts over those members provides no help because the reasons for the *Shutts* holding (adequate representation and the right to opt out) do not apply to MDL.[124]

So what is the solution? Insisting on "minimum contacts" with the forum state does not help plaintiffs. As Justice Sotomayor recognized in the context of class actions in *Bristol-Myers Squibb*, this would essentially mean that dispersed mass

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to ensure that the inconveniences to parties that MDLs may create are not swept under the rug").

120 This was considered a critical element of the statutory scheme by those who drafted it. *See* Bradt, *supra* note 11, at 913 ("Nor was MDL exclusively about discovery, as the judges insisted from the beginning that the MDL court must have the power to grant dispositive motions. MDL was designed to give judges complete control over cases to bring them to a conclusion, as they had in the electrical-equipment litigation." (footnote omitted)).

121 *See* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1290 (2018).

122 Adam v. Saenger, 303 U.S. 59, 67–68 (1938) ("The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.").

123 *See* Bradt, *supra* note 117, at 1223.

124 *Id.*; Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463, 1479–82 (2019).

tort MDLs will only be litigable within the borders of states where the defendant is essentially at home or chose to act in a way common to all the plaintiffs (such as where a single product distributed nationwide was manufactured).[125] This is likely not an improvement for plaintiffs who will find themselves as the road team in the MDL. Perhaps even worse, if we insist that plaintiffs have minimum contacts with the state embracing the transferee court, well, that, too, likely limits the MDL to the defendants' home(s).[126] Or, it may wreck a nationwide MDL entirely, since a focus exclusively on the plaintiffs' contacts likely means there is no single state whose federal courts could have jurisdiction.

Critics do not have a solution to the doctrinal problem as it currently exists.[127] They also do not appear to have a solution to the practical problem. They seek additional appellate review and "more attention" to jurisdiction, but it's not clear what doctrinal rules they are after. Perhaps the only way to accommodate the *reasons* for limits on personal jurisdiction within a functioning MDL system is to reform the MDL in other ways that enhance plaintiff autonomy. Critics suggest perhaps more remands for trials in transferor courts, a practice that is increasing in popularity (albeit only for a small number of plaintiffs) and more attention to "adequate representation" by attorneys who will ensure different subgroups of plaintiffs' voices are heard, another practice gaining in popularity. Both practices have merit when the circumstances justify them.[128]

But these reforms don't answer the central question: can a single federal court, consistent with due process, decide these cases when neither the plaintiff, nor the defendant, has the requisite contacts with the transferee court's state? One of us have argued that the answer to this question is "yes." The reason for this goes back to where we began: the due process analysis requires a *balancing* of interests, including the *federal* interest in efficient resolution of nationwide controversies.[129]

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125 Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 277 (2017) (Sotomayor, J., dissenting).

126 Bradt & Rave, *supra* note 121, at 1291.

127 One of us has argued that the way out of the doctrinal tangle is to explicitly recognize that the MDL statute creates nationwide personal jurisdiction, but that such jurisdiction must be tempered by an assessment of reasonableness under the Fifth Amendment. Bradt, *supra* note 117, at 1228–30.

128 *See* Burch & Gluck, *Process*, *supra* note 13, at 261–62.

129 Bradt, *supra* note 117, at 1228–29 ("In sum, what this solution attempts to accomplish is an appropriate balance of interests; that is, a balance between

Without rehearsing the entire argument here, the question requires balancing this federal interest against the rights of the parties in meaningful participation in the litigation. In other words, the choice of the transferee court must be reasonable. Any district will not do in every case, but most defendants' challenges will be unavailing unless there is a legitimate reason the transferee court is unconstitutionally inconvenient.

With respect to plaintiffs, one must not lose sight of the *benefits* of MDL, including leveling the playing field.[130] One must also not lose sight of improvements in technology, such as livestreamed hearings and litigation websites, that reduce the impact of the distance to a far-flung court.[131] And we strongly agree with critics that the plaintiff's case should be governed by the law that would have been chosen by the proper forum she selected.[132] The plaintiff has lost the other advantages of her "venue privilege," but she has also gained an enormous amount. And if the case does reach the settlement stage, *every plaintiff has the right to reject the settlement* and return to their home court for trial. That such a trial might be less attractive than the settlement is perhaps evidence that the MDL process did its job.

In the end, then, it will only be in rare instances that a transferee court deprives any party of due process. The federal interest in efficient resolution and private enforcement of the law will outweigh defense complaints about any particular state and most plaintiffs' complaints that, all things considered, the MDL is unreasonable (especially in light of the alternatives of limiting MDLs to defendants' home turf or wrecking MDL altogether).

Will this analysis ultimately "fit" within the labyrinthine framework the Supreme Court has erected to decide jurisdiction cases over the last fifteen years? We won't speculate, but we do think that this solution is consistent with the foundational cases in this area, *International Shoe* and *Mullane*. Both cases recognize that when it comes to due process—generally and in specific procedural contexts like jurisdiction and notice—the

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the national interest in efficient resolution of nationwide controversies and the individual's interest in meaningful participation.").

130 *Id.* at 1230.

131 *See* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 849–57 (2017); Redish & Karaba, *supra* note 13, at 152–53 (suggesting the increased use of modern technology as a means of reducing due process concerns, though still rejecting MDL).

132 Bradt, *supra* note 117, at 1236–37 (arguing that "one of the main benefits of MDL is that it can facilitate aggregation without depriving plaintiffs of the law that would otherwise properly govern their claims").

watchword is reasonableness.[133] And any such determination, according to *Mathews*, "requires analysis of the governmental and private interests that are affected."[134] Critics often leave the governmental interest out of the analysis, whether it's the state's interest in its resident's rights being vindicated or its laws being enforced, or the federal interest underlying the MDL statute, to efficiently resolve nationwide controversies.[135]

And critics are correct that Congress worked a change when it passed the MDL statute. The judges who developed and advocated for the statute believed, accurately, that the federal courts would soon be facing a "litigation explosion" commensurate with increases in population, advances in technology knitting the country together, states' embrace of strict liability in tort, and Congress's enthusiasm for new federal causes of action. These judges did not believe that a truly decentralized vision of the federal courts could handle the coming deluge. Rather, these judges believed that the federal courts needed to be deployed as a national institution capable of handling nationwide problems.

The MDL statute was the culmination of this idea. As one of us has written, the drafters of the statute "did not intend the role of the MDL statute, or the power it confers on judges, to be modest. . . . The drafters believed their creation would reshape federal litigation and become the primary mechanism for processing the wave of nationwide mass-tort litigation they predicted was headed the federal courts' way."[136] Statements that MDL "has dramatically transformed"[137] or "morphed into a centripetal force for global resolution of nationwide litigation"[138] ignore this well-documented history. MDL has *always* been conceived as a force for nationwide resolution.[139]

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133 *See* Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1026–27 (2017). The Supreme Court seems to agree based on a recent decision. *See* Fuld v. Palestine Liberation Org., 145 S. Ct. 2090, 2109 (2025) (concluding that federal court jurisdiction over the defendants was "reasonable," noting that, like the Fourteenth Amendment, "the Fifth Amendment might entail a similar 'inquiry into the reasonableness of the assertion of jurisdiction in the particular case'" (quoting Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 115 (1987))).

134 Mathews v. Eldridge, 424 U.S. 319, 334 (1976)

135 Bradt, *supra* note 117, at 1228–29.

136 Bradt, *supra* note 11, at 839.

137 Burch & Gluck, *Process*, *supra* note 13, at 226.

138 Gluck, Burch & Zimmerman, *supra* note 13, at 542.

139 *See* Bradt, *supra* note 11, at 839.

But as one of us have argued, MDL is a hybrid—it has a split personality that asserts national control, but with respect for more traditional norms of individual control and federalism. MDL oscillates between these two competing aspects of its identity, but it is never doctrinally only one thing or the other.[140]

For instance, MDL preserves state choice of law in diversity cases. This is important because nothing in the MDL statute justifies changing the state law applicable to a plaintiff's case, MDL does not eliminate the interest of the transferor state in vindicating its law, and ensuring choice of law retains much of the substance of the plaintiff's "venue privilege."[141] It is undoubtedly true that differences in applicable law are often smoothed over in a large-scale settlement. But this observation does not mean, as MDL critics allege, that state law is not developed in MDL cases. The evidence otherwise is remarkably thin.[142] But there are numerous occasions for MDL judges to choose and apply state law—on dispositive motions and in the jury instructions for bellwether trials (trials that ironically may be more likely to occur within the confines of MDLs). The notion that MDL courts are not attuned to their obligations under *Klaxon Co. v. Stentor Electric Manufacturing Co.*[143] and *Van Dusen v. Barrack*[144] does not stand up to scrutiny.[145] To the extent some critics argue that MDL courts should do more of this, however, we likely are on common ground.

And, finally, some critics give short shrift to the reality that MDL cannot sweep claims beyond federal jurisdiction into its ambit. While it is true that sometimes federal and state court judges coordinate, state court proceedings (particularly state court analogs of MDL) do not appear to be under the thumb of the MDL judge—the recent state court trials in talc, Zantac, and Roundup cases stand as prominent counterexamples.[146] State courts are simply not the shrinking violets critics make them out to be.

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140 Bradt & Rave, *supra* note 28, at 103–04.

141 Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 818 (2012).

142 However, there are some concerns. *See generally* Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600 (2020) (showing that the rise of federal class actions and MDLs has resulted in reduction of state common law development of consumer contract cases).

143 313 U.S. 487 (1941).

144 376 U.S. 612 (1964).

145 Bradt, *supra* note 141, at 793.

146 *See, e.g.*, Brendan Pierson, *Bayer Ordered to Pay $175 Million in Latest Roundup Cancer Trial*, REUTERS (Oct. 28, 2023), https://www.reuters.com/

In the end, once one goes beyond appealing to "traditional values," the question goes back to one of balancing. One thing we agree with critics on is that a world without MDL would be far worse for most plaintiffs than one with it. And we likely would agree with some of the marginal improvements to MDL that critics suggest. But claims that the MDL statute violates due process on the basis of traditions honored only in the breach strike us as, at best, misguided.

II
Our Actual Tradition

In this Essay we have questioned the "traditions" invoked by critics over the use of collective procedures like MDLs and bankruptcy for mass torts. We have tried to show that the support for these "traditions" is quite thin. But throughout our discussion we have identified instances of an alternative tradition, one less obsessed with formal categories and more concerned with how procedures affect real life.

Traces of this alternative tradition are revealed in the history of bankruptcy procedures. Bankruptcy is itself enshrined in the U.S. Constitution,[147] and its English law origins were initially concerned with something very close to the concerns of mass tort litigation. The early English bankruptcy statutes "gave the creditors of a merchant as a group rights they did not have individually," with the goal of "strengthening the hand of the creditors and increasing their chances of being paid."[148]

Further evidence can be found in the long history of the bill of peace,[149] a precursor to class actions and similar collective procedures.[150] U.S. courts often exercised their equity

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legal/bayer-ordered-pay-175-mln-latest-roundup-cancer-trial-2023-10-27/ [https://perma.cc/4HCZ-WW3T].

147 U.S. Const. art. I, § 8, cl. 4 (allowing Congress the power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States").

148 Douglas G. Baird, *A World Without Bankruptcy*, 50 Law & Contemp. Probs. 173, 173–74 (1987).

149 Indeed, a collective action brought in 1309 is often thought of as "the first consumers' class action." Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 Cath. U. L. Rev. 515, 521 (1974) (discussing Discart v. Otes (1309) (Eng.), *reprinted in* 30 Selden Society 137 (1914)). Many thanks to Adam Zimmerman for pointing this out to us.

150 Trump v. CASA, Inc., 145 S. Ct. 2540, 2555 (2025) (noting that the "bill of peace . . . evolved into the modern class action"); *see also* Henry E. Smith, *Equity as Meta-Law*, 130 Yale L.J. 1050, 1072 (2021) ("Equity's role in solving these multiparty problems gave rise to devices like joinder and the class action, and is the source of the devices for complex litigation familiar in the Federal Rules of Civil

jurisdiction based upon "the multiplicity of suits" and a sense that consolidated proceedings in equity could aid with the resolution of a major common issue in the litigation.[151] Even when individual issues of damages varied among the plaintiffs, the parties sometimes would "pool[] their resources and hir[e] one or two lawyers to represent the entire group in court."[152] And courts were happy to experiment with model jury trials, similar to bellwethers today.[153]

As noted earlier, the MDL arose from the experience of the electrical equipment antitrust litigation, which shares with mass tort litigation the same features of defendants engaging in common conduct harming a large number of dispersed individuals. The ad hoc coordination of the electrical equipment antitrust litigation inspired "ideas to codify a new statute or rule of civil procedure that would coordinate litigation pending in multiple districts."[154] It was during this time that the drafters of the MDL

Procedure." (citing Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 867 n.4, 868 (1977))).

151 *See* Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1332 (1932) (discussing this history, and arguing that at bottom the issue of whether to collectivize litigation is "not very different from that which confronts the prospective traveller in deciding whether to put his belongings into one trunk or several suitcases"); *see also* Smith, *supra* note 150, at 1072 ("Polycentric problems pervade the field of equity. A clear example is multiparty litigation with multiple interlocking claims.").

152 Chafee, *supra* note 151, at 1327 & n.97 (citing as an example Georgia Power Co. v. Hudson, 49 F.2d 66 (4th Cir. 1931), where "the multitude employed the same counsel in their separate actions at law").

153 *E.g.*, Marconi Wireless Tel. Co. v. Kilbourne & Clark Mfg. Co., 235 F. 719, 722 (W.D. Wash. 1916) ("The issue involving the validity of a patent or infringement should be litigated between the patentee and the principal infringer, when such parties are before the court, and such suit . . . should be regarded as the parent suit, where the main issue, for obvious reasons, should be tried."); *cf. In re* Sitagliptin Phosphate ('708 & '921) Patent Litig., 402 F. Supp. 3d 1366, 1367 (J.P.M.L. 2019) (consolidating actions brought by patentholder against infringers, concluding that "[a]ll actions involve substantially identical claims that defendants infringed the two Merck patents").

Of course, *Marconi* looks a lot like a precursor to the modern doctrine of nonmutual defensive issue preclusion, although we are not sure if the "parent case" would be limited to only when the patentee lost. *See* Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971) (allowing for nonmutual defensive issue preclusion in a suit involving a patentee suing a second patent infringer).

154 Bradt, *supra* note 11, at 863. We note here that one common criticism against MDLs is that they diverge from ordinary rules of procedure. But the Federal Rules of Civil Procedure apply equally to MDLs, and experimentation with procedure in non-MDL settings is common. *See* Alexandra D. Lahav, *Multidistrict Litigation and Common Law Procedure*, 24 LEWIS & CLARK L. REV. 531, 533 (2020) ("A significant amount of the American procedural landscape is only partially rules-based and largely common-law-like in its development.").

statute sought to coordinate their efforts with the Rules Committee who, at the time, were developing what would become the modern class action rule.[155] Ultimately the MDL drafters concluded that a "general solution of the problems posed by multiple litigation w[ould] require more comprehensive treatment" than a Rule can provide,[156] leading to the 1966 Rules Amendments and passage of the separate MDL statute in 1968.

The meeting was quite fruitful. In a memo discussing the meeting the drafters noted that "[t]he judges were quite aware of the problem that has given us concern, namely, that of allowing the individual litigants a fair amount of freedom while at the same time not undercutting the values (which in part accrue to the individuals) of efficient unitary adjudication."[157] Nevertheless, there was consensus that "[t]he interest of the individual in litigating as he pleased may be strong, but it should not be considered absolute."[158]

The modern class action casts a long shadow on this entire discussion, because, as even critics note, the rise of MDLs and bankruptcy to treat mass torts were all responses to the unavailability of class actions as a collectivizing device for mass tort litigation.[159] But it is worth noting that, during this productive time in the late 1960s, the Rules Committee putting together the amendments that would become the modern class action rule took an approach that was consistent with the approaches of the MDL drafters and even the early English bankruptcy statutes. The great Benjamin Kaplan, then a Harvard Law School professor, was the reporter for the Rules Committee at the time of the 1966 Amendment. In those Amendments Kaplan purposefully sought to "to shake the law of class actions free of abstract categories . . . and to rebuild the law on

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155 Bradt, *supra* note 11, at 867 (noting that Rules Committee reporter Benjamin Kaplan "met with the Coordinating Committee in November 1963 in New York").

156 *Id.* (alteration in original) (quoting Bulletin No. 20 from Coordinating Comm. for Multiple Litig. to JJ. Before Whom Elec. Equip. Anti-Trust Cases Are Pending 2 (Nov. 27, 1963) (on file with Nat'l Archives, Records of the Administrative Office of the United States Courts, Administrative Files, 1962–1967, Box 8, Folder 19)).

157 *Id.* at 868 (quoting Memorandum to the Chairman & Members of the Advisory Comm. on Civ. Rules 4 (Dec. 2, 1963), *microformed on* CIS No. CI-7104 (Cong. Info. Serv.)).

158 *Id.* (quoting Memorandum to the Chairman & Members of the Advisory Comm. on Civ. Rules, *supra* note 157, at 6).

159 *See* Burch & Gluck, *Process*, *supra* note 13, at 233 ("Modern MDL itself grew out of the ashes of Justice Ginsburg's 'small c' conservative class-action opinion in *Amchem*, which shut the door to global class-action resolution of most nationwide torts.").

functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties."[160]

Interestingly enough, the drafter of the original 1938 class action rule, James Wm. Moore, "envisioned the Federal Rules as a tool which embodies a practical philosophy of procedure, one which liberates the courts to achieve substantive ends."[161] And that philosophy itself has a pedigree, which includes Oliver Wendell Holmes's observation that "[t]he life of the law has not been logic; it has been experience."[162]

This very brief history of collective procedures generally confirms Holmes's observation, and in the history of bankruptcy, MDL, and class actions, one can see a tradition that focuses less on formalism and more on the real-life consequences of the procedures contemplated. At the heart of this alternative tradition is the "feel of a tension,"[163] the tension between procedure and substantive ends. It is important to rediscover this tension, to focus less on "tradition" and more on the trade-offs that procedure provides.

This focus on the tension between procedure and substance is historically the actual tradition at the heart of U.S. civil procedure, and even critics admit that "[c]omplex civil procedure is an adaptive organism and history proves its ability to evolve."[164] We should always ask, as Justice Sotomayor recently did in a personal jurisdiction dissent, "[e]ven setting aside the majority's caveats, what is the purpose of such limitations? What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated?"[165]

Conclusion

Our hope is that our brief discussion of the use of MDLs and bankruptcy in mass tort litigation opens a space for further reflection and conversation. At the very least, we hope that we can recalibrate the conversation to what truly matters in mass tort litigation.

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160 Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969). One coauthor takes some pride in noting that this was published in a law review published at the coauthor's home institution.

161 Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 Yale L.J. 718, 739–40 (1975).

162 Oliver Wendell Holmes, Jr., The Common Law 1 (1881).

163 Cover, *supra* note 161, at 718. Fittingly enough, much of this article is about the appropriateness of collective procedures. *See id.* at 733–40.

164 Burch & Gluck, *Process*, *supra* note 13, at 233.

165 Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 277–78 (2017) (Sotomayor, J., dissenting).