MULTIDISTRICT LITIGATION AND ADVERSARIAL LEGALISM

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This Symposium has been one of several over the last year that have marked the fiftieth anniversary of the Multidistrict Litigation Act of 1968,[1] and I have been privileged to contribute to several of them.[2] After having attended such events, and other conferences about multidistrict litigation (MDL) over the last few years, I can attest that the mood has not been quite as celebratory as one might think on such an occasion. After all, MDL began in many ways as the little statute that could—a "radical proposal" envisioned and developed by a very small group of federal judges and one academic[3] —that, fifty years later, has come to be such an important part of the federal litigation system as to comprise, by some measures, a third of the federal docket.[4] One might think that the prominence of MDL would call for champagne.[5]

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[1] 28 U.S.C. § 1407.

[2] *E.g.*, Symposium, *MDL Turns 50: A Look Back and the Way Forward*, 53 GA. L. REV. (Feb. 7, 2019); Andrew Bradt, Professor, University of California Berkeley Law School, Panel on Jurisdiction and Choice of Law at the New York University School of Law Conference: MDL at 50 (Oct. 12, 2018); Symposium, *Civil Litigation Reform in the Trump Era: Threats and Opportunities, Searching for Salvageable Ideas in FICALA*, 87 FORDHAM L. REV. 19 (2018).

[3] Specifically, Dean Phil C. Neal of the University of Chicago Law School, Judge William H. Becker of the Western District of Missouri, Judge Alfred Murrah of the Tenth Circuit Court of Appeals, and Judge Edwin Robson of the Northern District of Illinois. Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 838–39 (2017).

[4] Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV 1669, 1672 (2017) ("Today, actions consolidated in MDLs comprise thirty-nine percent of open cases on the federal docket. *Thirty-nine percent*—a number that tends to shock even those law professors who teach procedure . . . ." (footnote omitted)). *But see* Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary Over the Past 50 Years*, 53 GA. L. REV. 1245, 1272 (2019) (criticizing the use of the 40% statistic and noting that, at the high end, "21% of filed cases are included in [MDL] proceedings").

It should be noted that the Lawyers for Civil Justice, a defense-side group pushing for uniform rules to apply to MDLs, promotes the statistic that MDLs "now account for more than half of the federal civil caseload" if one excepts prisoner and Social Security cases. *MDL Cases Surge to Majority of Entire Federal Civil Caseload*, RULES 4 MDLS (Mar. 14, 2019), https://www.rules4mdls.com/copy-of-new-data-on-products-liabil. There are many reasons to be skeptical of this figure as Dr. Williams's paper demonstrates. In my view, it is fair to say, simply, that MDL is very important, regardless of the percentage of the civil docket it takes up, but to use that percentage as a scare tactic in support of policy changes is misleading. To say so does not diminish the importance of MDL. Rather, I suggest only that there is no "crisis," however one crunches the numbers.

[5] In case one needed such justification. As F. Scott Fitzgerald once said, "Too much of anything is bad, but too much champagne is just right."

Instead, the fiftieth anniversary comes at a moment when, despite its meteoric growth, MDL seems to be taking it on the chin, from several angles. Conservative groups are targeting MDL for legislative or rule-based "reforms" on the ground that it is too plaintiff-friendly and effectively forces defendants to pay off non-meritorious claims.[6] Some academics, for their part, have taken up arms against MDL on the ground that it actually harms plaintiffs and leaves them helpless at the hands of their repeat-player lawyers,[7] who negotiate sweetheart deals with defendants, to the benefit of MDL judges, who get the cases off their dockets.[8] Some have gone so far as to say that MDL constitutes an unconstitutional violation of due process.[9]

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[6] *See* Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87, 89 (2018) ("Last year, the House introduced a bill backed exclusively by Republicans, the Fairness in Class Actions Litigation Act (FICALA), which included a lengthy set of new provisions to "reform" multidistrict litigation. . . . [T]he extensive MDL provisions in the bill demonstrate that the interests of corporate defendants hew toward significant changes to MDL procedure, which they believe is currently rife with abuse by plaintiffs and overreach by imperialistic judges."); Howard M. Erichson, *Searching for Salvageable Ideas in FICALA*, 87 FORDHAM L. REV. 19, 20 (2018) (describing FICALA as "a defendant-driven effort to reduce liability exposure by making it difficult for plaintiffs to aggregate claims, difficult for plaintiffs' lawyers to make money, expensive for plaintiffs to pursue claims to adjudication, and difficult for plaintiffs' lawyers to choose the forum").

[7] *See, e.g.*, Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 67 (2017) ("Anytime repeat players exist and exercise both oligopolistic leadership control across multidistrict proceedings and monopolistic power within a single proceeding, there is concern that they will use their dominance to enshrine practices and norms that benefit themselves at consumers' (or here, clients') expense."); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 95 (2015) ("[R]epeat play can also create fertile soil for collusion, reciprocity concerns, and incentives to protect one's deal making or collaborative reputation at the expense of uniquely situated clients.").

[8] *See, e.g.*, Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011) ("MDL judges . . . by endorsing the concept of the quasi-class action have greatly expanded the scope of their authority and have become complicit in allowing private parties to accomplish the very backdoor settlements that the Supreme Court and federal courts have disallowed for decades.").

[9] *See* 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, 151 (2015) ("[A]s currently structured, [MDL] must be deemed unconstitutional, because it infringes on individual claimants' procedural due process rights."). Indeed, I have nodded in this direction, though ultimately came to the opposite conclusion, at least in the vast majority of cases. *See* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1237–38 (2018) ("That MDL has been able to skate on questions of jurisdiction is typical of MDL generally, in that many questions of due process salient in individual cases are diminished in the name of efficient resolution of mass controversies. But to say that current explanations of MDL's expansive jurisdictional reach are wrong or incomplete does

All of these reactions are wholly understandable. For the so-called reformers, one might charitably describe their efforts as a good-faith attempt to both level the playing field and bring some order to the MDL process. One might uncharitably describe their efforts as rent-seeking, or attempting to exploit a momentary political advantage.[10] Either way, one can understand and even perhaps forgive lawyers for defense-side interests working to change the rules to benefit their clients.[11]

As for the academics who point out potential flaws in the MDL system—a group of which I have been and intend to remain a member[12]—the criticisms are equally understandable. A central part of a legal scholar's job is to point out ways the system might be improved, even if the system happens to be one that, all things considered, works relatively well. And if it is not working relatively well, then scholars are often in the best position to point that out—and offer solutions—without fear of retribution. Moreover, although I must recognize and acknowledge my own biases in saying so and that few incentives in the academy align with defending the status quo, academic research is far more likely to expose real problems within MDL than research intended to benefit a particular constituency. In fact, much of the academic literature on MDL consists of articles pointing out MDL's weaknesses and proposing possible solutions.[13] Even as a relative enthusiast for MDL, I

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not make MDL unconstitutional. Rather, they require us to look at MDL in a more realistic way and take seriously whether the power it concentrates in a single federal judge is constitutionally justified.").

[10] *See* Bradt, *supra* note 6, at 96 ("Ultimately, the judges pushing the MDL statute concluded that defense counsel were little more than rent seekers, out to preserve their advantages in costs and delays while also undermining the courts as a vehicle for private enforcement of the substantive law.").

[11] If nothing else, defense-side lawyers' attempts to restrict the efficacy and availability of MDL has a long historical pedigree. Such lawyers fought passage of the statute and sought to amend it to reduce its applicability on numerous grounds. *See* Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1732 (2017) (noting that when the Coordinated Committee on Multiple Litigation "announced that it would pursue a permanent MDL statute, the defense bar fought it tooth and nail"); *id.* at 1735 (noting that two law firms, Cravath, Swaine & Moore and Dechert, Price & Rhoades, sought to add a predominance requirement to the statute).

[12] *See, e.g.*, Andrew Bradt and D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. 1259 (2017).

[13] *See, e.g.*, Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. Rev. 1273 (2012); Linda S. Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 REV. LITIG. 129 (2018); Charles Silver &

recognize that there are myriad possibilities for improvement, some of which are being investigated in this Symposium.[14]

Nevertheless, on this momentous anniversary, MDL's accomplishments are worth noting. Indeed, this statute, which began as the brainchild of one law professor and one judge in the early 1960s, has been an extraordinary success.[15] The academic—Dean Phil C. Neal of the University of Chicago Law School—and the judge—Judge William Becker of the Western District of Missouri—along with the others who supported the statute—most prominently, Chief Judge Alfred Murrah of the United States Court of Appeals for the Tenth Circuit—firmly believed that the MDL statute was necessary and would become a central aspect of the federal litigation scheme.[16] They anticipated a litigation explosion resulting from population growth, enhanced nationwide technological interconnection, and the increase in viable causes of action in areas like products liability, civil rights, and consumer protection.[17] Instead of responding to more litigation by attempting to stop it, as future "tort reformers" would do, the MDL drafters sought to facilitate that litigation in the federal courts.[18] Moreover, they believed that if they did not adequately deal with the litigation explosion, the advantages would accrue primarily to corporate defendants, whose greater resources allowed them to benefit from

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Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

[14] *See, e.g.*, Myriam Gilles & Gary Friedman, *Rediscovering the Issue Class in Mass Tort MDLs*, 53 GA. L. REV. 1305 (2019) (suggesting the increased use of issue classes in MDL proceedings); Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393 (2019) (tracing the evolution of aggregation and its recurrent problems).

[15] *See* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION 155 (2015) (arguing that "the most successful step taken in the administration of aggregate litigation in the United States was the creation of the JPML in 1968"); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action is Not Possible*, 82 TUL. L. REV. 2205, 2208–09 (2008) (defending MDL as achieving efficiencies of class actions within a "looser and more flexible structure").

[16] *See* Bradt, *supra* note 3, 838–39 (describing the history and impetus for the Act).

[17] *See id.* at 834, 889–90 (highlighting Judge Becker's testimony at a House hearing in which he emphasized the need for the MDL statute based on the litigation explosion occurring in the Federal courts).

[18] Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1890 (2008) (describing tort reformers' efforts beginning in the 1970s to solve the "litigation explosion" by proposing "measures designed to drive plaintiffs from the courts").

backlogs and delays.[19] In addition, the judges who supported the MDL statute were concerned that if the system were overwhelmed with claims, defendants would use that as proof that the courts could not handle such extensive litigation.[20]

The small group of judges who supported the MDL statute was also remarkably prescient about the kind of litigation that would fall within its ambit.[21] They were very careful not to limit the cases eligible for MDL treatment to any particular subject matter because they wanted the statute to be available in all sorts of situations involving all sorts of substantive law.[22] In a letter to Senator Joseph Tydings of Maryland, Chairman of the Senate Judiciary Committee's Subcommittee on Improvements in Judicial Machinery, responding to suggestions by defense-side law firms seeking to reduce the scope of the MDL statute, Judge Becker actually predicted that defective-drug and products-liability cases would become grist for the MDL mill.[23] Yet MDL chugged along in relative obscurity until recently, likely due to the temporary prominence of the mass-tort class action and parties' consequent ignorance of the power and usefulness of MDL.[24] Now, fifty years after the statute's passage, MDL, warts and all, is achieving the central role in federal civil litigation its creators predicted.[25] In fact,

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[19] *See* Bradt, *supra* note 3, 838–39 (describing the drafters' motivation).

[20] Bradt, *supra* note 3, at 876–77 (citing Judge Becker's concern that defense counsel in the electrical-equipment cases hoped to show that such "antitrust litigation would overwhelm the Courts and demonstrate the unworkability of 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").

[21] Bradt, *supra* note 11, at 1735–36 (discussing Judge Becker's prescience on the subject matter of future litigation).

[22] *Id.* at 1736 (discussing the ways in which Judge Becker saw how limiting the statute's scope by means of a predominance requirement for common questions of law or fact could prevent the aggregation of claims).

[23] *Id.* at 1735–36.

[24] *See* Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 47 (1991) ("Unlike class actions, MDL did not become identified as enabling plaintiffs (such as consumers, school children, or prisoners) to file lawsuits otherwise beyond their resources and information . . . . As such, it has been a "sleeper"—having enormous effect on the world of contemporary litigation but attracting relatively few critical comments.").

[25] Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2258–75 (2008) (discussing the evolution of MDL and the Judicial Panel on MDL's maximalist attitude toward litigation combination).

all one need do is take a glance at the national controversies that have found their way into an MDL—for example, the opioids epidemic, the British Petroleum oil spill, the NFL concussion scandal, and the Volkswagen Clean Diesel debacle—to see MDL's prominence in modern American life.[26] This is a remarkable accomplishment on the part of the visionaries who saw it coming.

To play my own small role in commemorating this anniversary, I thought it might be worth reflecting on why MDL has had such staying power. I have opined before about some of MDL's features that give it such durability, but here my goal is to go beyond summarizing and suggest that MDL "works" because it "fits" within the broader American system of "adversarial legalism." This term is not my own; it was coined by Professor Robert Kagan. In his seminal book, *Adversarial Legalism: The American Way of Law*, Kagan, a professor of law and political science, sketches out the main features of the American system of litigation and its role in our government.[27] His description is capacious, drawing together strands of political science, legal culture, and history. In sum, he describes our system as dominated by a "rambunctious, peculiarly American style of law and legal decisionmaking,"[28] which he defines as "policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation."[29] One characteristic of this system is a "particularly flexible and creative" judiciary that is "less constrained by legal formalisms . . . [and] more attentive to the equities (and inequities) of the particular situation."[30]

As Kagan summarizes, "The very pervasiveness of American adversarial legalism . . . suggests that it is best viewed not merely as a method of solving legal disputes but as a mode of governance, embedded in the political culture and political structure of the United States."[31] Unlike systems which rely on centralized, bureaucratic government agencies to resolve major public-policy

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[26] *See* Bradt, *supra* note 6, at 88 (identifying issues of major public concern that pushed MDL into the public consciousness); Gluck, *supra* note 4, at 1676 (discussing major cases MDL brought into court for public resolution).

[27] ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2001).

[28] *Id.* at ix.

[29] *Id.* at 3, 16.

[30] *Id.* at 16.

[31] *Id.* at 5.

problems, our system depends on litigation and relies on courts to "step into the breach" and sort things out.[32]

All told, I believe MDL fits especially well within our idiosyncratic system of adversarial legalism, and this is one of the roots of its staying power. Effectively, our system draws nationwide controversies into the courts, and MDL, with its maximum flexibility—both for the Judicial Panel on Multidistrict Litigation, in consolidating cases and selecting the transferee judge, and the transferee judge herself—facilitates resolution of those controversies within a framework that maintains sufficient adversariness to comply with more traditional litigation norms.[33] Unlike other aggregation structures, MDL is able to maintain a façade of regular, old-fashioned litigation. In other words, like adversarial legalism more generally, MDL facilitates governance through litigation, and it does so by looking just enough like traditional litigation to do work far greater than such traditions would typically allow.

In this short Essay, I will briefly outline the main features of adversarial legalism and then explain why MDL is such an excellent example of it. I will conclude by arguing that preserving these features of MDL will be central to its continued effectiveness and expressing hope that the well-founded critiques of MDL can be addressed within its existing framework of judicial flexibility.

I. ADVERSARIAL LEGALISM

I have long admired Robert Kagan's *Adversarial Legalism* as a particularly trenchant overview of the American culture of litigation primacy. Kagan understands something about our politics that is perhaps obvious to American lawyers (and perhaps surprising to foreign lawyers studying law in America):

> Compared to other economically advanced democracies, American civic life is more deeply pervaded by legal

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[32] *Id.* at 45.

[33] *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. 1252, 1288–59 (2018) (noting that MDL "pay[s] lip service to traditional norms of federalism and individualization" while potentially "undermin[ing] these norms in the name of mass resolution").

> conflict and by controversy about legal processes. The United States more often relies on lawyers, legal threats, and legal contestation in implementing public policies, compensating accident victims, striving to hold governmental officials accountable, and resolving business disputes.[34]

Overall, Kagan notes that American legal culture is best described as one of "adversarial legalism," defined as "policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation."[35] This concept is distinct from other more centralized, bureaucratic "methods of governance" that other advanced democracies typically rely on.[36] Characteristic of this system is a "particularly flexible and creative judiciary" that is "less constrained by legal formalisms and more attentive to the equities (and inequities) of the particular situation."[37] As Kagan summarizes, "The very pervasiveness of American adversarial legalism suggests that it is best viewed not merely as a method of solving legal disputes but as a mode of governance, embedded in the political culture and political structure of the United States."[38]

Without providing a complete synopsis of the book, which goes far beyond civil litigation and examines criminal litigation and the regulatory state, there are a few salient aspects of our culture of adversarial legalism worth highlighting for the present discussion. First, as Sean Farhang has demonstrated in his work, the delegation of enforcement of the substantive law to the courts and private attorneys, rather than to centralized government agencies, has been an intentional choice by Congress and other legislatures.[39]

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[34] KAGAN, *supra* note 27, at 3.

[35] *Id.*; *see also* SEAN FARHANG, THE LITIGATION STATE 3 (2010) (noting that it "is a *legislative choice* to rely upon private litigation in statutory implementation").

[36] FARHANG, *supra* note 35; *see also* Stephen B. Burbank, Sean Farhang & Herbert Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013).

[37] KAGAN, *supra* note 27, at 3, 16.

[38] *Id.* at 100 ("The American system is shaped by an exceptionally large, entrepreneurial, and politically assertive legal profession, and less by national ministries of justice. A wider range of problems are taken to court in the United States, and . . . its civil justice system has swallowed much larger doses of adversarial legalism.").

[39] *See* FARHANG *supra* note 35, at 9; Kagan, *supra* note 27, at 13 ("[I]t is helpful to think of 'adversarial legalism' as encompassing both *a method of policy implementation and dispute resolution* (characterized by a set of legal institutions, rights, and rules that facilitate or encourage adversarial, party-dominated legal contestation) and *the day-to-day practice of*

As a result, our tort system is especially decentralized and lawyer and judge dominated by judges and lawyers.[40] Second, adversarial legalism relies, unsurprisingly, upon adversarial and legalistic methods—that is, lawyer-driven and oppositional practices that rely depend upon the judge as a referee.[41] Third, and perhaps most relevant, is Kagan's explanation for the cultural roots of modern adversarial legalism, roots which, like the MDL statute, formed in the 1960s.[42] Kagan explains that there is "a fundamental mismatch between a changing legal culture and an inherited set of political attitudes and structures. Americans have attempted to articulate and implement the socially transformative policies of an activist, regulatory welfare state through the political and legal institutions of a decentralized, nonhierarchical governmental system."[43] This "mismatch" is between the desire to provide "total justice"—that is, "popular demands for fair treatment, recompense, and protection"[44]—and entrenched American attitudes that "mistrust[] government power" and demand decentralized and fragmented political authority.[45] Ultimately, we have a system that both demands the kinds of results a strong, centralized, bureaucratic state can provide and which fundamentally opposes the strength and centralization of power that such a bureaucracy would require.[46] Consequently, we are left to try to fulfill the desire for

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adversarial legal contestation, a practice whose rate or incidence varies over time and across settings, depending on the motivations and resources of potential disputants.").

[40] *See* KAGAN, *supra* note 27, at 11.

[41] *See id.* at 9 (discussing "formal legal contestation" and "litigant activism" as two salient characteristics of adversarial legalism).

[42] *See id.* at 37 ("[T]he 1960s initiated a period of striking change in the level and reach of adversarial legalism. Something new had been added to the stew of American law. It became much more spicy. It was served up more often and in larger portions. It nourished more people—while giving more indigestion to others.").

[43] *Id.* at 40.

[44] *Id.* at 57.

[45] *Id.* at 35.

[46] See *id.* (discussing the roots of adversarial legalism, specifically the political culture that demands "a more powerful, activist government—but that also mistrusts governmental power"). Moreover, Kagan argues: "The basic causes of adversarial legalism—popular demands for fair treatment, recompense, and protection, combined with mistrust of government and fragmentation of political and economic power—remain unchanged and perhaps unchangeable. Indeed, three decades of expanded adversarial legalism have deeply imprinted the ideas of American *legal* culture on the country's political culture as a whole." *Id.* at 57.

total justice with the tools of a decentralized government, and the most readily available tool is litigation in American courts.

In brief, what makes adversarial legalism so prominent in solving major American controversies is that it is typically the only game in town. Courts, in Kagan's words, "step into the breach."[47] And courts are especially able to do so because they both provide the tools for litigants to demonstrate wrongs and provide judges and juries with the discretion and array of remedies to respond.[48] That said, however, adversarial legalism can accomplish both "good and evil" because "the engines of American adversarial legalism can and often do advance the cause of justice in uniquely progressive ways. But the engines don't always work well or work the same for everyone. And even when they operate as advertised, they are so complex, expensive, slow, and erratic that they generate deeply distressing side effects."[49] Those who study MDL and know its history would likely say that this narrative sounds awfully familiar.

II. MDL'S STAYING POWER

So where does MDL fit within the framework of adversarial legalism? My answer is: quite comfortably, and perhaps more comfortably than any other aggregation device we have yet encountered. MDL serves as a vehicle to channel nationwide controversies into the courts, where adversarial norms are observed and litigation is typically vigorous. Nevertheless, the controversies eventually wind up being resolved through a global settlement, often thanks in large part to the efforts of a district judge who has used the flexibility afforded him under the MDL statute and applicable Federal Rules of Civil Procedure to achieve that result.[50] As Kagan argued, "in no other democracy is litigation so often employed by contestants in political struggles . . . . It is only a slight oversimplification to say that in the United States lawyers, legal rights, judges, and lawsuits are the functional equivalent of the large central bureaucracies that dominate governance in high-tax,

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[47] *Id.* at 45.

[48] *Id.* at 22–23, 45.

[49] *Id.* at 32.

[50] Bradt, *Radical Proposal*, *supra* note 3, at 834–35; Marcus, *supra* note 25; Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2209 (2008) (lauding MDL's "looser and more flexible structure").

activist welfare states."[51] MDL facilitates that kind of governance through litigation before an engaged federal judge as Kagan envisioned.[52]

That MDL fits comfortably within the framework of adversarial legalism is, of course, not the only reason for its staying power. One aspect of MDL's viability is undoubtedly its efficacy in serving the interests of its participants.[53] After all, when MDL leads to a global resolution, the parties are, in theory, content; the defendant can put the controversy behind it and move forward, and the plaintiffs (and their attorneys) have been compensated.[54] Plus, the courts have a major, resource-consuming set of complicated cases off of their collective plate.[55] In sum, despite the growing complaints surrounding MDL, all in all, MDL manages to serve its various constituencies and do what it set out to do.[56]

Moreover, MDL's statutory structure is an important contributor to its durability.[57] That MDL is a federal statute rather than a Federal Rule of Civil Procedure, and that it created a panel of judges with a maximal level of discretion, have insulated it from significant modification.[58] Statutes are "sticky" and difficult to change, even by those who, like Lawyers for Civil Justice Reform and the U.S. Chamber of Commerce, represent powerful interests aligned with

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[51] KAGAN, *supra* note 27, at 7, 15.

[52] It is important to note that this vision is somewhat different from the kind of judge-controlled process of civil law systems, although in MDL one person's aggressive case management is another's inquisitorial control. Nevertheless, I think there is a distinction to be made in the sense that American jurists enthusiastic about case management must act within the adversary system using the tools granted by the Federal Rules of Civil Procedure. Whether judges go beyond that, as some suggest, is up for debate, but judges must at least remain within the adversarial framework as a matter of form, if not substance.

[53] Bradt, *supra* note 3, at 834 (noting that one of the initial reasons for MDL was "the need for a device to efficiently process" increasing litigation in the early 1960s).

[54] *Id.* at 835–36 (describing the benefits of MDL for plaintiffs and defendants).

[55] *Id.* (describing the benefits of MDL for judges).

[56] *Id.* ("Plaintiff-side firms have come to appreciate the ability to join forces to achieve parity with well-resourced defendants. Defendants recognize the opportunity to litigate all claims in a single forum where they can both efficiently perform discovery and motion practice and eventually achieve peace, whether through victory on a dispositive motion or through settlement. And, for judges, the power of MDL to vacuum thousands of cases filed nationwide into one courtroom carries significant docket-clearing benefits." (footnotes omitted)).

[57] Andrew D. Bradt, *The Stickiness of the MDL Statute*, 37 REV. LITIG. 203, 205 (2018).

[58] *Id.* ("Because MDL was passed as a statute, and not a rule, and because MDL ultimately delegated control over MDL's implementation to the JPML and not the Rules Committee, it has been relatively difficult to tinker with.").

powerful governmental actors.[59] Additionally, although its creators originally envisioned that the statute would delegate to the Civil Rules Advisory Committee the power to draft specific Federal Rules of Civil Procedure for MDL cases, they eventually opted against it.[60] Instead, they decided not to hem transferee judges in with any specific rules, preferring that they retain maximum flexibility to manage litigation, guided primarily by a set of suggested best practices contained in the *Manual for Complex and Multidistrict Litigation*.[61] Finally, the drafters of the statute retained control over their creation by creating the Judicial Panel on Multidistrict Litigation, whose decisions are both highly discretionary and insulated from appellate review.[62]

In sum, the MDL statute was, with apologies to Tom Petty, built to last, and it has. Although it is not clear whether the current efforts to modify MDL by statute or federal rule will be successful, the system is likely to continue without major changes if the past fifty years serve as a prologue.[63] For what it's worth, this is the result I prefer because I believe the reasons that motivated the drafters of the statute to maximize discretion remain true today, especially as new controversies continue to arise, and judges offer new mechanisms to coordinate them.[64]

Although those features of MDL are important, and perhaps necessary, conditions of its staying power, they are not alone sufficient. There is something else about MDL that has given it additional durability beyond other tools of aggregate litigation, like the class action. It is what Professor Teddy Rave and I have argued is MDL's "split personality."[65] As a mechanism for aggregate

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[59] *Id.* at 206–09 (citing STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS & RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017)).

[60] *Id.* at 205 (discussing how MDL's creators "abandoned" the idea of creating MDL through a new Federal Rule of Civil Procedure).

[61] *Id.* at 215–16.

[62] *Id.* at 205, 209.

[63] For what it's worth, I hope that this remains the case, largely because I think the reasons that the drafters of the statute opted against Federal Rules remain forceful, namely that flexibility for the transferee judge is necessary to confront an endless number of cases and that there's no consensus on what the rules ought to be, even if they were warranted.

[64] Bradt, *Looming Battle*, *supra* note 6, at 106 ("[F]lexibility and independence on the part of the JPML and MDL transferee judges were necessary to cope with the onslaught of nationwide litigation headed for the federal courts.").

[65] Bradt & Rave, *Information-Forcing*, *supra* note 12, at 1264; Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in*

litigation, there are many ways that multidistrict litigation is neither fish nor fowl. On one hand, it is a tightly knit unitary lawsuit controlled by and large by a single judge likely to shepherd it to resolution.[66] On the other hand, it is a temporarily coordinated set of individual lawsuits that retain their unique characteristics, are controlled by the individual parties, and are destined to return whence they came at the conclusion of pretrial proceedings.[67] In practice, of course, MDL is neither a single unit nor is it a temporary gathering—it is inherently betwixt and between and, therefore, its own animal.[68]

This split personality allows MDL to shape-shift in ways that enable it to look like traditional individual litigation, even when it is subverting individual litigation's underlying norms.[69] Unlike a class action, MDL is not "representative litigation" in which there are absentees represented by a single litigant and her attorney.[70] And, also unlike a class action, each litigant must decide to affirmatively "opt in" to a settlement agreement, rather than being bound if she does not timely "opt out."[71] These distinctions are important, both doctrinally and substantively, but it would be a mistake to take them too far. After all, most MDLs are not prosecuted by all of the plaintiffs' individually selected lawyers, but by a select number chosen by the court to be on the plaintiffs'

Multidistrict Litigation, 109 GEORGETOWN L.J. (forthcoming 2019) (manuscript at 5) (draft on file with author) (arguing that MDL has a split personality because "MDL preserves the individual nature of each consolidated case and, by respecting the autonomy of each individual litigant, MDL avoids many of the doctrinal tripwires and due process objections that hang up class actions. But on the ground, MDL operates in many ways like a powerful aggregation where plaintiffs' control over their cases is limited").

[66] *See* Bradt & Rave, *supra* note 65 (manuscript at 31) ("Formally, an MDL is a collection of individual cases, temporarily consolidated in front of a single judge for pretrial proceedings.").

[67] Professor Burch has memorably referred to MDL as a "no man's land." *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 899 (2010).

[68] *See* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 215 (2008) ("The quasi-class occupies an interesting midpoint between public and private ordering . . . ."); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1113-14 (2010).

[69] *See* Bradt & Rave, *supra* note 65 (manuscript at 32) ("MDL's formal adherence to individual litigation norms allows it to sidestep many of the stumbling blocks of the mass tort class action.").

[70] *See id.* ("[T]here are no formal absentees in MDL.").

[71] *See id.* (manuscript at 31–32) ("Most of the important strategic decisions are made by court-appointed lead lawyers.").

steering committee.[72] Although it is true that every litigant must opt into a global settlement, those settlements have come to contain many provisions that at least incentivize, and some might say coerce, plaintiffs into signing on.[73]

One example of this phenomenon that I have discussed is personal jurisdiction. There must be personal jurisdiction over every case in an MDL, but that personal jurisdiction is defined by that of the transferor court, even though it is abundantly clear that in most MDL cases little will actually happen there.[74] All of the action will likely occur in the transferee court, as evidenced by the historically low remand rate of transferred MDL cases.[75] Yet that transferee court may be one that is inconvenient for both defendants and plaintiffs, who may find their cases sent to a far-flung location and litigated by attorneys they have not chosen.[76] That MDL has grown in prominence while the Supreme Court has scrutinized personal jurisdiction more strictly presents an odd juxtaposition. Nevertheless, this mismatch is exemplary of how MDL works—it provides a mechanism for nationwide aggregation while finding a way to formally comply with otherwise applicable rules. Hence a single court is able to functionally determine hundreds of cases over which it would not otherwise have jurisdiction.[77]

Perhaps most importantly, MDL is a very strong aggregation device, in some ways even stronger than the class action. Recall that in a class action, a plaintiff can choose to opt out at any point prior to the case's conclusion and has several opportunities to do so as

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[72] *Id.*

[73] *Compare* Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1952–57, 1962–65 (2017) *with* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1507-09 (2017) *and* Howard M. Erichson & Benjamin C. Zipursky, *Consent versus Closure*, 96 CORNELL L. REV. 265, 301 (2011).

[74] *See* Bradt, *Long Arm*, *supra* note 9, at 1169 (noting the transferee court "does not need to be a court that would have personal jurisdiction . . . ").

[75] *See id.* ("[T]he MDL court does everything that matters in the vast majority of cases transferred to it.").

[76] *See id.* at 1172 ("[A]n MDL can be transferred to any district for pretrial proceedings, regardless of the district's connection to the litigation.").

[77] *See id.* at 1176 ("[T]he possibility of potential return for local trial makes possible the aggregation of thousands of cases in a single forum that might otherwise be impossible."); Bradt & Rave, *Aggregation*, *supra* note 33, at 1296–99.

mandated by Rule 23 and the Due Process Clause.[78] There is, however, no opportunity to opt out of an MDL. Once the case is transferred for pretrial proceedings, there is no way to exclude oneself from the centralized pretrial proceedings. Rather, the case will be stuck there until pretrial proceedings conclude, or the case is resolved by the MDL court before pretrial proceedings come to an end, perhaps by summary judgment.[79] This was very much by design on the part of the statute's drafters, who not only opposed the rulemakers' adding an opt-out provision to Rule 23 but intentionally refused to include such a provision in MDL. In their view, allowing plaintiffs to opt out would fatally undermine the tightly knit aggregation that MDL sought to create.[80] To a high degree, MDL is an exceptionally effective—and aggressive—aggregation mechanism. Its ability to appear like—and its actual existence as—a set of individualized cases is one way of facilitating its tight packaging of cases.[81]

But there is something deeper than MDL's doctrinal split personality sustaining it, though it is inextricably related, and that is MDL's fit with our culture of adversarial legalism. In other words, there is more to MDL's success than its ability to thread doctrinal needles. It is the ability to facilitate courts' functioning to solve public-policy problems within the framework of adversarial legalism—in other words, MDL threads not only doctrinal needles, but also navigates competing concerns for total justice and mistrust of centralized governmental power that Kagan describes. MDL scratches the total justice itch by creating an opportunity to get all of the major players in a nationwide controversy in a single room,

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[78] *See* FED. R. CIV P. 23(c)(2); Philips Petroleum v. Shutts, 472 U.S. 797, 811 (1985) (holding that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court").

[79] This has led Professor Samuel Issacharoff to joke that MDL is like a "roach motel" because cases check in but never check out. *See* William B. Rubenstein, *Procedure & Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISCOURSE 136, 146 (2012) (citing *In re* TJX Cos. Retail Security Breach Litig., 584 F. Supp. 2d 395, 405 n.16 (D. Mass. 2018)).

[80] *See* Bradt, *Something Less*, *supra* note 11, at 1713 ("The creators of the MDL statute expressed to the Advisory Committee's Reporters their strong opposition to any opportunity to opt out of a consolidated mass tort proceeding, because such a right could threaten the efficiencies of aggregate treatment.").

[81] *See* Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471 (1987) (describing MDL as one of several "dubious packaging strategies that are supposedly provisional but that in substantive terms may be irremediable").

but it does not do so through the vehicle of a centralized, permanent, government agency. Of course, what MDL actually does is consolidate an enormous amount of power in the hands of the transferee judge of the JPML's choosing. The proceeding bears all of the hallmarks of individualized litigation—including respect for the Federal Rules of Civil Procedure, jurisdictional limitations, otherwise-applicable choice-of-law rules, and the due-process right to choose to opt in to a settlement in a case a plaintiff has filed. In sum, MDL is an ideal structure for a system that relies on adversarial legalism. Its creators understood this—and it plays a large role in MDL's staying power.

What stands out, fifty years after MDL was created, is how nicely it both fits in and adapts to the opportunities and constraints of governance through litigation. In case after case, MDL provides a flexible mechanism to achieve compensation for injured parties, but through the construct of something that looks and acts like traditional adversarial litigation. When a court strays too closely to something like bureaucratic power, as Judge Polster arguably did in his zeal to settle the opioid litigation before litigation began, it fails. But when the court observes the traditional adversarial norms of litigation, including, perhaps, bellwether trials, what eventually emerges is the kind of settlement that one might imagine being created by a more centralized bureaucracy. In that way, one can hardly imagine a more apt example of adversarial legalism than MDL.

CONCLUSION

As we turn the page on MDL's first half century, it is an appropriate time to reflect on why it has been successful enough to warrant this golden-anniversary celebration. MDL has emerged as a centerpiece of the federal civil litigation system, and it is the primary mechanism for governance in myriad disputes of nationwide importance. Much of this credit has to go to the creators of the statute, who saw clearly the need for it, and the need for the federal courts to adapt to a rising tide of tort litigation. What the drafters understood was that these disputes would be headed to the courts, largely because Congress chose to put them there through the machinery of private enforcement of the law through litigation

instead of regulation by a centralized bureaucracy. That Congress made such a choice, in a variety of areas of substantive law, would not come as a surprise to political scientists like Sean Farhang and Robert Kagan, who understand well the central role of the courts in a political and legal culture that demands redress for widespread wrongs but does not trust a central bureaucracy to do it. Ultimately, the gift the creators of MDL gave us was a device flexible enough to serve the needs of our culture of adversarial legalism while still maintaining a patina of traditional, individualized litigation. For that, they should be recognized and applauded. Now in year 51, MDL is firmly established, but it is also in a state of flux, as policymakers and the Rules Committee decide whether modifications are in order. While any such modifications that make the system work better should be applauded, one might hope that those with the power to make them will be attentive to their source and also to the experience that allows MDL to thrive at 50.