The Stickiness of the MDL Statute

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INTRODUCTION

On February 9, 2017, shortly after the inauguration of President Donald Trump, the Republican Party gained control of the executive branch and both houses of the legislature. Representative Bob Goodlatte, of Virginia, introduced the "Fairness in Class Action and Furthering Asbestos Litigation Act," H.R. 985.[1] Rep. Goodlatte's introducing the bill, clearly aimed at curbing mass-tort litigation, was unsurprising to those who follow procedure—Republicans in the House had pushed such legislation in the past, knowing that prospects of overcoming a Democratic filibuster in the Senate were poor, and that prospects of avoiding a veto by President Obama were non-existent.[2] With the future of the legislative filibuster in the Senate now

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1. H.R. 985, 115th Cong. (2017); *Goodlatte Introduces Major Litigation Reform Bill to Improve Access to Justice for American Consumers* (Feb. 10, 2017), http://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=809 (press release from Goodlatte House office promoting introduction of bill in House Judiciary Committee).

2. *See, e.g.*, ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 151 n.1 (2017) (describing statutes proposed to prevent "frivolous lawsuits"); Lydia Wheeler & Christina Marcos, *House Passes Bill to Reform Asbestos Lawsuits*, THE HILL (Jan. 8, 2016), *available at* http://thehill.com/blogs/floor-action/house/265226-house-

uncertain, and a new President perhaps more amenable to litigation "reform," informed observers expected the reemergence of the class-action bill.[3] What was unexpected, however, was a new section of the bill devoted to changes in procedure in multidistrict litigation, changes that had not been part of the similar legislation introduced in past Congresses. Not only were the proposed changes unexpected, they are changes that go to the heart of how MDL cases are litigated — affecting the nuts and bolts of pleading, bellwether trials, appeal, and settlements.[4]

These amendments to the MDL statute are not only the most extensive ever proposed, but if passed, would also be the first changes ever made directly to the MDL statute. Other amendments to the statute have been proposed over the years, most notably the repeated attempts to overrule by statute the Supreme Court's decision in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*,[5] which prohibited MDL judges from transferring cases filed in other districts to themselves for trial.[6] But those efforts, which were by any definition more modest than those proposed in H.R. 985, failed repeatedly.[7] In short, the MDL statute has remained the same as it was when it passed nearly fifty years ago in 1968.[8]

Despite mass-tort litigation being in the crossfire for decades, the MDL statute has persisted without alteration or much outside interference. This is as its drafters hoped—they intended that the newly created Judicial Panel on Multidistrict Litigation (JPML) operate with maximum discretion. But this was not the drafters' original vision when they first began work on the statute. When the Coordinating Committee on Multiple Litigation, the small group of judges tasked in 1961 with organizing the massive antitrust litigation arising out of price-fixing in the electrical-equipment industry, began

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passes-bill-to-reform-asbestos-lawsuits (noting passage of the legislation in the House on party-line vote).

3. Perry Cooper, *Bill Targeting Class Actions, MDLs Sent to House*, BLOOMBERG BNA (Feb. 16, 2017), https://www.bna.com/bill-targeting-class-n57982083903/ (noting that an "earlier version" of the bill "stalled in the Senate").

4. H.R. 985, 115th Cong. § 5 (2017).

5. 523 U.S. 26 (1998).

6. Courtney E. Silver, *Procedural Hassles in Multidistrict Litigation: A Call for Reform of 28 U.S.C. § 1407 and the* Lexecon *Result*, 70 OHIO ST. L.J. 455, 475–79 (2009) (noting that although "Congress has been toying with the idea of reform for far too long" the efforts to legislatively reverse *Lexecon* had failed).

7. *Id.*

8. 90 CONG. REC. H4927–4928 (daily ed. March 4, 1968) (noting passage of the bill on the consent calendar).

to consider a proposal that would make their innovations a permanent part of the federal procedural system, their original idea was quite different from what we know today.

Dean Phil C. Neal of the University of Chicago Law School and Judge William H. Becker of the Western District of Missouri were deputized to develop a permanent provision for litigation pending in multiple districts. They started out with the idea that limited transfer to a single district for pretrial proceedings could be accomplished through a new Federal Rule of Civil Procedure, or a barebones statute that would delegate to the Civil Rules Advisory Committee the authority to make rules permitting MDL under certain circumstances and governing the procedure in MDL cases. For a variety of reasons discussed below, Becker and Neal eventually abandoned that idea. Instead, they opted to cut the Rules Committee out of the process entirely by seeking Congressional passage of a statute that would broadly define the circumstances under which MDL would be appropriate, and to delegate to the new JPML almost unfettered discretion to make those decisions. In the end, there would be no Federal Rules governing the availability of MDL, the identity of the transferee judges, or how MDL cases would proceed. Instead, that power would be exercised by the JPML and transferee judges, who could tailor procedure to the individual case.[9]

In this Essay, I argue that the drafters' decision to cut the rule makers out of the MDL statute was significant because it has insulated the MDL statute from amendment and scrutiny over the years. 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. The new and major interventions proposed by this Congress are therefore significant not only because of the practical changes they would make on the ground in MDL cases, but because they interfere with the statute in the first place.

In their remarkable new book, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION, Stephen Burbank and Sean Farhang chronicle and illustrate with rich empirical data the nearly half-century old movement to restrict private enforcement of the substantive law through litigation.[10] That

9. *See infra* Part I (discussing the history, considerations, and development of the MDL Statute).

10. STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017). Burbank and Farhang's book follows and augments a series of articles about this subject:

movement, in their words a "counterrevolution" against the earlier enthusiasm for private enforcement expressed by the Congress, the Supreme Court, and Civil Rules Advisory Committee, has sought to "diminish or disable the infrastructure for private enforcement of federal rights."[11] The tilt against private enforcement that has emerged in recent decades has manifested itself in numerous changes to procedural rules and doctrine, which, together, as Benjamin Spencer has evocatively argued, represent a "restrictive ethos . . . A threshold skepticism that yields an interest in excluding or discouraging claims rather that supporting or encouraging them."[12]

Although Burbank and Farhang add important historical detail to this narrative, their most important contribution is their empirically supported explanation of how and why the efforts of those seeking to restrict public enforcement predominantly failed in the legislative branch and succeeded in the judicial branch. The authors use quantitative data and political-science theory to explain that while reformers had only sporadic success in Congress and the Rules Committee, "conservative majorities of the Supreme Court have transformed federal law over the past four decades, making it less and less friendly, if not hostile, to the enforcement of rights through private lawsuits."[13] Burbank and Farhang amply demonstrate that, as a structural matter, legislation dismantling the private-enforcement regime is extremely difficult to achieve; as they say "the institutional hurdles were simply too high."[14] But doing so through Supreme Court decisions that interpret federal statutes and rules is easier because "the ostensibly technical and legalistic qualities of the Court's decisions on issues affecting private enforcement, and the gradual, evolutionary nature of case-by-case decision making, opened a pathway of judicial retrenchment that was remote from public view as compared to

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Litigation Reform: An Institutional Approach, 162 U. PA. L. REV. 1543 (2014); *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015); *The Subterranean Revolution: The Supreme Court, the Media, and Litigation Reform*, 65 DEPAUL L. REV. 293 (2016).

11. BURBANK & FARHANG, *supra* note 10, at 2.

12. A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 359 (2010); *see also, e.g.*, Lahav, *supra* note 2, at 145 (discussing how modern day litigation trends often focus on procedures rather than rights, which prevents otherwise legitimate cases from being litigated); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013).

13. BURBANK & FARHANG, *supra* note 10, at 218–19.

14. *Id.* at 219.

legislative politics, court rulemaking after the reforms of the 1980s and Supreme Court decisions on highly salient issues."[15] In short, what Burbank and Farhang show is that retrenchment is an extremely difficult task to achieve through legislation and rulemaking, but one which is possible through interpretation by judges. They write: as "the Court's posture toward private enforcement underwent a transformation from highly supportive in the 1970s to antagonistic today," it has achieved the goals of the counterrevolution more effectively than legislative reformers.[16]

My goal in this essay is not to review Burbank and Farhang's book or recap their argument. Rather, with that research as a backdrop, my aim is to suggest that the MDL statute provides another compelling example of the difficulty of achieving procedural retrenchment through legislation. The drafters' strategic decisions to pass MDL as a statute and not a rule, and to separate the JPML as a body independent from the rulemakers made MDL and the JPML especially insulated from future interference. In other words, the MDL statute and process are "sticky." And although this insulation has prevented the counterrevolution from reaching MDL, at least directly, it has also had costs, in terms of making the deficiencies in MDL practice more difficult to solve through rulemaking.

It is, however, important to note two caveats. First, the Federal Rules of Civil Procedure of course apply to MDL. To the extent those rules have been amended by the rulemakers and reinterpreted by the Supreme Court over the years, those changes have been felt in MDL cases. Second, the fact that the MDL statute was designed as it was is not the only reason for its staying power—quite the contrary is true. Numerous scholars, myself included, have argued that there are multiple explanations for MDL's success and recent ascendance to the position of dominance in the federal civil-litigation scheme that this Symposium reflects. For one thing, MDL was, as Judith Resnik memorably described it, a "sleeper" for decades,[17] a second banana to the class action, which was a subject of major controversy from the beginning. For many years, MDL was hiding in plain sight, available

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15. *Id.*

16. *Id.* at 217.

17. Judith Resnik, *From Cases to Litigation*, 54 LAW & CONTEMP. PROBS. 5, 47 (1991) (describing MDL as a "sleeper—having enormous effect on the world of contemporary litigation but attracting relatively few critical comments"); *see also* Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1350 (2014) (noting that "[MDL] remains one of the least studied types of federal litigation").

when the mass-tort class action lost its somewhat short-lived status as the central mechanism for aggregate litigation in the federal courts.[18] It therefore makes sense that, while class actions have been a subject of regular debate, and indeed occasional legislation, the Congress would have generally ignored MDL.[19]

There are other reasons for the lack of attention to MDL, besides its relative obscurity. Throughout its existence, MDL has also always been shrouded by a patina of innocuousness—that it serves merely to consolidate cases for pretrial proceedings before their (purported) eventual return to their home districts for trial.[20] And one should also not overlook what is perhaps the simplest explanation for MDL's staying power: that, imperfect though it may be, it may be better than currently available alternatives at accommodating all the players' interests.[21] That is, MDL serves plaintiffs by facilitating aggregation, defendants by facilitating peace, and the courts by facilitating efficiency.[22] Certainly, it may not do any of these things as well as theoretical alternatives—for defendants, this much is demonstrated by the restrictive amendments proposed in H.R. 985—but it at least fulfills all three of these purposes sufficiently enough to

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18. Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 832–33 (2017); *see also* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 155 (2015) ("The most successful step taken in the administration of aggregate litigation in the United States was the creation of the JPML in 1968.").

19. *Cf.* David Freeman Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Economy*, 165 U. PA. L. REV. 1531 (2017) (discussing how, despite a period of wide interest in a proposal to modify class action lawsuits, the final proposal could not be agreed upon, causing the proposal to ultimately fail and interest in continued reform to fade); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293 (2014).

20. Jeremy T. Grabill, *The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation*, 74 LA. L. REV. 433, 457 (2014) (stating that MDL "merely brings related lawsuits before one judge so that they can be organized and managed collectively to avoid the need to conduct duplicative discovery").

21. Howard M. Erichson & Benjamin C. Zipursky, *Consent versus Closure*, 96 CORNELL L. REV. 265, 270 (2011) (explaining that MDL "creates the perfect conditions for an aggregate settlement"); 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, 2272 (2008) (describing how MDL "produced [settlement] out of the chaos").

22. Bradt, *supra* note 18, at 835.

muddle through. As a result, MDL has been a less enticing target for reform when the bigger class-action fish has always been there to fry.

All of these explanations are important and perhaps indispensable parts of the story. But for several reasons, MDL's statutory structure should not be ignored. As it shows, statutes are simply hard to change—they are remarkably sticky once they are passed. While Federal Rules are also difficult to amend, they are easier to change and more prone to serious scrutiny than statutes. As the history of Rule 23 demonstrates, the spotlight of Rules Committee consideration may generate more controversy than real change, but even seemingly marginal amendments to the Federal Rules, such as the provision for interlocutory appeal of class-certification decisions, can have significant impact.[23] And, as recent history has amply demonstrated, whether one likes it or not, the Federal Rules are open to major reinterpretation by the Supreme Court, which can change their meaning by judicial decision.[24] Of course, the Court can do the same with statutes, but if there had been Federal Rules for MDL, there would have been much more for the Court to interpret. Moreover, as Rule 23 also illustrates, one reason there has been a pipeline of class-action cases to the Supreme Court has been the development of appellate case law interpreting the rule. By design, the decisions of the JPML are insulated from review, except by extraordinary writ, and most decisions by MDL judges are interlocutory, meaning there are few challenges to their conduct that would garner Supreme Court attention.

How one views the insulation from amendment that the design of the MDL statute provides likely depends on how well one thinks that MDL works, or how well one thinks the rulemaking process works. Litigating either of those controversial and complicated issues

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23. Richard S. Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J. L. REFORM 637, 644 (2013) ("The public hearing process is a great boon to the Committee and produced understandable second thoughts in 1997. Only the Rule 23(f) proposal went forward, and it has indeed produced a body of appellate law on class certification that has contributed to significant changes in the way class actions are handled.").

24. Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1562 (2015) ("The stickiness of the rulemaking status quo has continued to make bold retrenchment difficult to achieve, even for those who are ideologically disposed to it, once more setting in relief the ability of a conservative majority of the Supreme Court to make potentially radical inroads on private enforcement by 'interpreting' the Federal Rules.").

is beyond the scope of this Essay.[25] But here, I hope to make three points:

First, the MDL statute's relative imperviousness to amendment has protected it from the kinds of cutbacks, large and small, achieved by the shift toward retrenchment of public enforcement of substantive law through litigation.

Second, if the MDL statute has been insulated from possible retrenchment efforts, it has also been insulated from amendments that might make MDL more powerful. For instance, as noted above, the efforts to amend the statute to reverse the Supreme Court's decision in *Lexecon* all failed, despite the fact that they did not seem to attract much opposition. Moreover, the fact that the Rules Committee does not control the rules for MDL, it has never considered rules that could solve some of the alleged problems with MDL, such as the lack of judicial power to formally approve or reject non-class aggregate settlements.

Third, despite the MDL statute's relative insulation from change, it is nevertheless not set in stone. Indeed, as H.R. 985 demonstrates, Congress may now be paying attention to MDL, and it, of course, "holds the cards" when it comes to procedure.[26] With MDL now playing such a prominent role, Congress could decide that the time for change is ripe. As could the Rules Committee, which might conclude that it ought to develop specific rules for MDL, though whether it has authority to do will be controversial.[27] But even if Congress and the Rules Committee do not amend the MDL statute or develop MDL rules, there is a lever of control that is underappreciated: the Chief Justice's control over the membership of the JPML. As other scholars have shown, the Chief Justice's appointment power over

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25. *Compare* Harold Hongju Koh, *The Just, Speedy, and Inexpensive Determination of Every Action?*, 162 U. PA. L. REV. 1525, 1535–36 (2014) (praising rulemaking in general), *with* Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 448 (2013) (describing the debate over the rulemaking process).

26. Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1678 (2004) ("A clear-eyed view that is informed by precedent and history leaves little doubt that Congress holds the cards and that the questions of the moment are, therefore, whether, when, and after what process of consultation, it should play them.").

27. *See Agenda Book, Advisory Committee on Civil Rules* (November 7, 2017), *available at* http://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf (highlighting a pending a proposal that the Civil Rules Advisory Committee consider the possibility of making Rules for MDL during the committee's November 2017 meeting).

Judicial Conference committees means that he can populate those committees with like-minded judges.[28] If he comes to disagree with the JPML's positions on consolidation or its selections of transferee judges, the Chief Justice might decide that the membership of the Panel should be different in terms of its policy orientation.

The essay proceeds in three parts. In Part I, I briefly return to the history of the MDL statute, explaining why the drafters made the strategic decision to cut the Rules Committee out of the process. In Part II, I discuss why the drafters' design has left the MDL statute relatively insulated from change. And in Part III, I examine why the status quo is nevertheless amenable to change. I conclude by expressing hope that if, in fact, the MDL statute is entering a period of reexamination, that period is characterized by debate, empirical examination, and participation by all affected groups. If we are going to open the MDL statute to the political process that it has eluded for the last fifty years, then that process should be an open one most likely to generate rational reforms.

I. LOOKING BACKWARD—THE DEVELOPMENT OF THE MDL STATUTE

It has now been nearly fifty years since the MDL statute was passed in 1968 without a single dissenting vote in either house of Congress.[29] Since then, the JPML has operated with remarkable success and little interference. Indeed, though the currently proposed H.R. 985 may represent a shift, the counterrevolution against private enforcement has not otherwise landed on the shores of MDL. The Federal Rules of Civil Procedure of course apply to MDL cases, so the Court's recent decisions affect MDL, but, *Lexecon* aside, the Court has not had the opportunity to interpret the MDL statute itself in a restrictive way. If nothing else, the counterrevolution was a boon to MDL in the sense that it eviscerated the mass-tort class action.[30] As I

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28. *Federal Court Rulemaking*, *supra* note 10, at 1571; Spencer, *supra* note 12, at 370 ("Dominant interests retain control over the mechanisms that control civil procedure, namely the federal judiciary and derivatively the membership of the federal rulemaking committees. In turn, those controlling the development of procedure since the 1970s have tended to prefer anti-access reforms that stymie the efforts of social out-groups to use the federal courts to vindicate their interests.").

29. 90 CONG. REC. H4927–4928 (daily ed. March 4, 1968) (noting passage of the bill on the consent calendar).

30. *See* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION 132 (2015) ("After a long, steady, retreat for nearly two decades, the domain of the class action has substantially shrunk, much like a grape in the sun, drying slowly into a raisin.");

will describe below, one reason for MDL's humming along without interference is that the drafters of the statute designed it that way—the JPML is a body that makes decisions with maximum discretion, writes its own procedural rules, and faces virtually no threat of appellate review.

Although I have described the MDL statute's origins in earlier work, some context is necessary here.[31] As the small group of drafters of the statute developed their initial idea of limited transfer for pretrial proceedings into the statute we know today, they made a series of strategic decisions in order to facilitate its passage. Here, I focus on the specific decisions the drafters made that have served to insulate it from change.

As with all things MDL, the story begins with the Coordinating Committee on Multiple Litigation (CCML), which was created in 1962 by Chief Justice Warren to develop methods of handling the deluge of cases arising from revelations of price-fixing throughout the electrical-equipment industry. By 1963, the CCML was having some success at moving the nearly 2,000 electrical-equipment cases toward settlement, through an aggressive campaign of organized discovery and pretrial conferences.[32] It was at that point that the judges of the CCML—all of whom were confident proponents of the then-novel principles of active judicial management of civil cases—[33]turned toward developing a permanent procedural mechanism for coordinating cases pending in multiple districts. The judges believed that major nationwide cases, like the electrical-equipment scandal, would become increasingly common, and that the progress made in those cases, which relied on cooperation from (and in some cases acquiescence by) the involved lawyers and judges around the country would not be replicable—particularly when it came to defense counsel, who believed that consolidation had destroyed their resource advantage and had railroaded them to settle. What was necessary was

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William B. Rubenstein, *Procedure and Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISC. 136, 144 n.40 (2013) ("In the wake of *Amchem* and *Ortiz*, however MDLs have become *the* form for resolution of mass tort matters.").

31. Bradt, *supra* note 18, at 863-83; Andrew D. Bradt, *Something Less and Something More: MDL as a Class Action Alternative*, 166 U. PA. L. REV. 1711 (2017) [hereinafter *Something Less*].

32. Bradt, *supra* note 18, at 854–63.

33. David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1983 (1989) (describing the "major development" of the 1950s being judges starting to "see themselves . . . more as managers of a costly and complicated process"); Resnik, *supra* note 17, at note 23.

a permanent federal procedural mechanism mandating consolidation of cases pending around the country involving similar subject matter.[34]

The people on the CCML credited for making this a reality were Dean Phil C. Neal of the University of Chicago Law School and Judge William Becker of the Western District of Missouri.[35] The idea of limited transfer for pretrial proceedings followed by eventual remand for trial was Neal's brainchild, and he was given the initial drafting responsibility.[36] Early drafts of the statute demonstrate that Neal and Becker's initial vision was for the transfer provision to become part of the federal joinder rules. In the summer of 1963, when Neal and his law clerk Perry Goldberg began drafting the MDL statute, Judge Edwin Robson, the Chair of the CCML, thought it important to coordinate their activities with the Civil Rules Advisory Committee, which was simultaneously engaged in a revision of the joinder provisions of the Federal Rules, including, of course, the revamp of Rule 23 on class actions.[37] In November 1963, the Reporters for the Civil Rules Advisory Committee, Professors Benjamin Kaplan and Albert Sacks of the Harvard Law School, met with the CCML in New York City. At that meeting, Kaplan and Sacks discussed the proposed changes to the class-action rule with Neal and the judges of the CCML. That meeting significantly impacted the development of Rule 23 in several ways, including the addition of the superiority requirement and what turned out to be temporary limitations on the opt-out right.[38]

Judge Becker and Dean Neal emerged from the November 1963 meeting with the view that the Civil Rules Advisory Committee would develop the specifics of any MDL provision. But by the summer of 1964, after discussions with other judges on the CCML, Judge Becker had come to the view that any provision for limited transfer could not be enacted under the authority granted to the Supreme Court under the Rules Enabling Act.[39] A statute was necessary because issues relating to venue had traditionally been within the control of the Congress, and the Federal Rules were never

34. Bradt, *supra* note 18, at 863–82.
35. *Id.* at 863.
36. *Id.* at 864.
37. *Id.* at 866.
38. *Something Less*, *supra* note 31, at 869.
39. Bradt, *supra* note 18, at 870 ("Becker also added that even though he thought 'a substantial case could be made for the rule making authority on the theory that venue is procedural,' he believed that the reform must be accomplished through legislation in order to eliminate doubts under the Rules Enabling Act.").

intended to affect venue.[40] In Becker's view, the statute was to be a bare-bones amendment to the general federal transfer statute, 28 U.S.C. § 1404, delegating authority to the Rules Committee to create a set of rules defining (1) when multidistrict consolidation would be appropriate, (2) to which judges the consolidated cases should be sent, and (3) what rules of procedure should be followed in those cases. In his view, expressed in a memorandum to the committee, the CCML should seek "a minimum amount of legislation" and "the rule making power [was to] be employed to the maximum [to] allow greater flexibility for amendment and supplement of the procedures."[41]

By the summer of 1964, however, the CCML's enthusiasm for the Rules Committee having eventual control over multidistrict litigation had cooled. The judges had seen from afar the continuing—and still unresolved—process of amending the other joinder rules. They believed that time was of the essence in passing their proposal, in part because they believed a "litigation explosion" was coming to the federal courts, but also because other federal judges had begun to ask them to coordinate other complex cases pending around the country.[42] As a result, Becker did not want to wait for the Rules Committee to evaluate the proposal before it was presented to the Congress. Instead, the CCML would take its proposal "straight to the top" by seeking approval from the Judicial Conference, which would then officially endorse the proposal before the Judiciary Committees in the Congress.[43] To obtain such approval, however, the CCML needed to obtain the blessing of the Chairman of the Judicial Conference Committee on Revision of the Laws, Chief Judge Alfred Maris of the Third Circuit. Although Judge Maris recognized the need for some legislation to handle litigation pending in multiple districts, he was skeptical of the MDL proposal because it left promulgation of specific rules in these cases to the Rules Committee. Judge Maris was leery of any such one-size-fits-all approach to resolving such cases, making his support lukewarm.[44]

In a strange way, however, Judge Maris's objection was a source of inspiration. Judge Becker ultimately agreed that a set of procedural rules developed by the Rules Committee would be both

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40. *Id.*; FED. R. CIV. P. 82.

41. *Id.*

42. *See also* Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 515 (1996) ("The crisis emerging from the electrical equipment antitrust cases in the 1950s was in part a crisis for federal judges.").

43. Bradt, *supra* note 18, at 872.

44. *Id.* at 872–75.

unnecessary and unwise. The solution he and Dean Neal developed was to eliminate the Rules Committee from MDL altogether. That is, instead of a statute authorizing the rulemakers to implement an MDL statute, Dean Neal drafted a statute that created the Judicial Panel on Multidistrict Litigation and gave *it* control over implementation. The result was the statute we know well today: one that authorizes creation of the JPML with a membership appointed by the Chief Justice, provides a standard for when cases ought to be consolidated, and ensures very limited review of decisions to consolidate.[45]

So, while the initial plan for a permanent MDL mechanism placed the Rules Committee at the center, the final result removed that Committee from MDL altogether. Instead of a set of provisions developed by the Rulemakers for when an MDL would be consolidated, where it would go, and how it would be litigated, what Congress ultimately passed instead was a statute that identified the standard for consolidating cases and left the details to the new JPML. Chief Justice Warren appointed the original JPML on May 29, 1968, and its membership should come as no surprise to one attentive to the statute's origins—it was comprised by its backers, including Chief Judge Alfred Murrah of the Tenth Circuit and Judge Becker, both former chairmen of the Coordinating Committee.[46] What emerged in the early years of the JPML, then, was quite consistent with the vision of its drafters, placing the judge at the center of coordinating pretrial proceedings.[47] The Civil Rules Advisory Committee was nowhere to be found.

II. LOOKING AROUND—THE CONSEQUENCES OF THE DRAFTERS' DECISION

The drafters' strategic decision turned out to be a good one, at least from their perspective. The statute eventually did pass; the JPML was created and populated by the drafters, who had the discretion to make decisions without much threat of appellate oversight and to make rules for their own governance. Without the specific rules for MDL practice that were originally envisioned, MDL judges were left

45. *Id.* at 878–881.

46. Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1005 n.22 (1974) (discussing the composition of the original panel).

47. Martin I. Kaminsky, *The Judicial Panel on Multidistrict Litigation: Emerging Problems and Current Trends of Decision*, 23 SYRACUSE L. REV. 817, 818 (1972).

with the ability to tailor procedure to the individual cases before them, a process guided by the evolving Manual for Complex and Multidistrict Litigation—whose primary author was Judge Becker.[48] As a matter of pure design, the drafters of the MDL statute succeeded in making their vision a reality and granting significant discretion to the JPML and transferee MDL judges.

For reasons I will describe below, the MDL statute has been difficult to amend—at least more difficult than it would have been had the drafters' original vision of MDL via Federal Rule been accomplished. This relative insulation from amendment has both protected MDL from cutbacks, and also held it back from even more expansive use. On the one hand, MDL has chugged along without being directly targeted by the movement to retrench private enforcement of the law illuminated by Burbank and Farhang's work. While other areas of procedure have been targets of this movement, MDL has escaped unscathed. But on the other hand, because MDL is not within the purview of the Federal Rules, it has been held back. Amendments that would make MDL more efficient or that would respond to criticism have not been enacted. So, ultimately, MDL's insulation has been something of a double-edged sword.

Perhaps most obviously, MDL is a statute, which can only be amended by passing another statute. This is of course difficult, in part because the legislative process is designed that way.[49] Statutes are, in short, "sticky," and especially so when a change serves to "take away rather than to confer rights."[50] As Burbank and Farhang have shown, the major legislative effort undertaken by Republicans since the Reagan administration to retrench public enforcement through legislative amendment has largely failed, except for somewhat narrow and technically drawn exceptions, such as the Private Securities

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48. *See* Arthur R. Miller, *In Memoriam: Judge William H. Becker*, 807 F. Supp. *Lxxii* (W.D. Mo. 1992) ("It was Judge Becker's pen that really was reflected in the first draft of the manual."); *see also* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 294 n.26 (2013) ("The motor force behind the drafting of the Manual was the leadership of William H. Becker.").

49. BURBANK & FARHANG, *supra* note 10, at 50 ("An institutionally fragmented legislative process empowers many actors to block legislation, making legislative change difficult on contentious issues and leading to the 'stickiness' of the status quo.").

50. Burbank & Farhang, *supra* note 24, at 1560 (2015) (noting "institutional dynamics that likely account for this record of legislative failure, focusing on those contributing to 'the stickiness of the status quo, particularly when the proposal is to take away rather than to confer rights'").

Litigation Reform Act and the Class Action Fairness Act.[51] Until now, however, MDL has not been a focus for retrenchment through legislation, at least compared to the class action, which has been a target for reform since the 1970s—reform which has mostly been unsuccessful, even when support for it was bipartisan.[52] The difficulty in amending the MDL statute has actually been felt in a more restrictive way. After 1998, when the Supreme Court decided that MDL courts could not transfer cases to themselves for trial in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, there were repeated efforts to reverse that decision by statute. But despite some legislative traction and a seemingly broad base of support, each of those efforts failed, reflecting the difficulty of legislative change.[53]

Of course, as its drafters intended, the MDL statute defines the standard for creating an MDL, and leaves specific decisions on whether to consolidate cases, and where they should go, to the JPML.[54] And once a transferee judge is selected, that judge has power to oversee the case as she sees fit until pretrial proceedings are concluded and the JPML must remand the cases to their home districts.[55] Had the drafters followed their original vision, however, much of this development would have been in the hands of the Rules Committee, and therefore subject to amendment through the Enabling Act process. As Burbank and Farhang have shown, the retrenchment movement also sought to achieve their goals through amendments to the Federal Rules, but, as in Congress, this strategy also largely failed to produce results.[56] This is in part because of the 1988 amendments to the Rules Enabling Act that made the process more open to public

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51. BURBANK & FARHANG, *supra* note 10, at 48–49 (noting that "Republican successes were few" and "narrowly focused"); Stephen Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1564–67 (2014); Burbank & Farhang, *supra* note 50, at 1560 (stating that "Retrenchment bills have rarely been enacted, and that success, such as in the Private Securities Litigation Reform Act of 1995, and the Class Action Fairness Act of 2005, has been very difficult to achieve and has clustered in a few discrete policy areas.").

52. *See* Engstrom, *supra* note 19, at 1552-53.

53. Courtney E. Silver, *Procedural Hassles in Multidistrict Litigation: A Call for Reform of 28 U.S.C. § 1407 and the Lexecon Result*, 70 OHIO ST. L.J. 455, 475–79 (2009) (noting that although "Congress has been toying with the idea of reform for far too long" the efforts to legislatively reverse *Lexecon* had failed).

54. 28 U.S.C. §§ 1407(a), (b).

55. 15 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3866 (4th ed., updated April 2017).

56. BURBANK & FARHANG, *supra* note 10, at 67 ("The stickiness of the rulemaking status quo since the 1980s has made bold retrenchment difficult to achieve, even for those who are ideologically disposed to it.").

participation and comment—amendments sparked by the Rules Committee's efforts to go too far and too fast in the 1980s.[57]

Although amending the rules did not turn out to be an effective strategy for making massive changes to the litigation process, there have of course been important amendments to the rules.[58] Rule 23 provides a useful illustration. There have been numerous attempts to reform Rule 23 since its momentous amendment in 1966, but the major elements of the rule—the prerequisites and categories of class actions—have remained intact.[59] As Richard Marcus has noted, some of the major efforts at changing the class action were "shoes that did not drop."[60] Nevertheless, there have been some changes. Perhaps the most consequential was the addition of Rule 23(f), which provides for interlocutory appeal of class-certification decisions—a provision that the proponents of H.R. 985 seek to mimic in MDL.[61] The increased appellate activity generated by this change has mostly been detrimental to plaintiffs seeking certification.[62] Other changes

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57. *Id.* at 109 (describing the 1988 amendments to the Enabling Act); Burbank & Farhang, *supra* note 50, at 1587 ("The attempt to use the Federal Rules as the vehicle of retrenchment backfired, however, leading to major changes in the Enabling Act process—with the Advisory Committee laboring in the shadow of impending legislation for most of the decade."). To say that the PSLRA and CAFA were less momentous than other more far-reaching reforms is not to diminish their importance generally, however.

58. Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1872 ("Attempts to constrict civil litigation took place through rulemaking at the Advisory Committee, Standing Committee, and Judicial Conference levels even before reaching the Supreme Court on the way to acceptance or rejection by Congress.").

59. Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731 (2014).

60. Richard Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J. L. REFORM 637, 643 (2013) (noting that the effort to reformulate Rule 23 was "shelved").

61. FED. R. CIV. P. 23(f); H.R. 985, 115th Cong. (2017).

62. BURBANK & FARHANG, *supra* note 10, at 119 (describing how Rule 23(f) "has enabled and highlighted another path to retrenchment of private enforcement by substantially expanding the opportunities for conservative federal appellate courts, including the Supreme Court, to control the course of class action jurisprudence"); Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 741 (2013) ("In terms of sheer numbers, Rule 23(f) has served primarily as a device to protect defendants."); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 322 (2013) ("Even when an attempt to block class certification does not succeed, the very elaborate Rule 23 process called for by recent decisions imposes significant additional cost and delay, particularly when

included the amendments to Rule 23(e) to clarify the circumstances of judicial approval of settlement and protections for absent class members.[63] More such changes may be on the way.[64] Had MDL been the subject of rulemaking, similar changes might have been considered with respect to the kinds of non-class aggregate settlements that are typical in MDL. Indeed, these settlements, and whether claimants are sufficiently protected by their terms, are now perhaps the largest targets of scholarly criticism of the MDL process—as Professor Mullenix's contribution to this Symposium amply demonstrates.[65] The creation out of whole cloth of the "quasi-class action" by MDL judges attempting to assert oversight over the settlement process is a consequence of there being no rules to give them the formal authority to do so.[66]

It is difficult to predict what might have happened had MDL been a subject of Rules Committee consideration over the course of its lifetime. Perhaps nothing—just as MDL did not attract much attention generally over most of its lifetime, perhaps it would never have attracted the attention of the Rules Committee. But MDL's separateness from the rulemaking process has until recently kept it largely off that committee's radar screen, unlike other subjects of major importance, like discovery.[67] How one views this state of affairs likely depends on how one views the rulemaking process generally. My intent here is not to relitigate the positive and negative features of rulemaking—a debate that continues to be well ventilated, as well it

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interlocutory appellate review of a certification decision is sought and especially when it is granted.").

63. Purcell, Jr., *supra* note 59, at 1736.

64. *See* Preliminary Draft of Amendments of the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure at 212-217 (Aug. 12, 2016), http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment (discussing proposed expansion of approval responsibility).

65. *See* Linda S. Mullenix, *Policing MDL Non-Class Aggregate Settlements: Empowering Judges Through the All Writs Act,* 37 REV. LITIG. (forthcoming 2018).

66. *See* Andrew D. Bradt & D. Theodore Rave, *The Information Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. 1259 (2017) (discussing the role and limitations of judges in MDL settlement cases); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011); Charles Silver & Geoffrey P. Miller, *The Quasi-Class-Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 131–35 (2010).

67. *See, e.g.*, Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1095 (2016) (discussing amendments to discovery rules and addition of proportionality requirement).

should be. It bears mention, however, that Burbank and Farhang's data show that the vast majority of proposals for amendments in recent years have been anti-private enforcement.[68] It also bears mention that their data also show that judicial additions to the Rules Committee have skewed significantly toward judges appointed by Republican presidents.[69]

Beyond the lack of rules to create, abolish, or amend, the drafters' decision to cut the Rules Committee out of MDL has also meant that there are no rules for the Supreme Court to reinterpret through judicial decision. As Burbank and Farhang document, where legislative amendment failed for those seeking to retrench private enforcement, retrenchment by court decision has succeeded.

> [A]lthough the counterrevolution largely failed in the elected branches and was only modestly successful in the domain of court rulemaking, it flourished in the federal courts. Having learned that retrenching rights enforcement by statute was politically and electorally perilous—and unlikely to succeed—the proponents of the counterrevolution pressed federal courts to interpret or reinterpret existing federal statutes and court rules to achieve the same purpose. They found a sympathetic audience in courts that were increasingly staffed by judges appointed by Republican presidents. Some of these judges were ideologically sympathetic to the retrenchment project; some were connected to the conservative legal movement that had given birth to the counterrevolution, and some had participated in or promoted the Reagan administration's failed efforts to retrench private enforcement of federal rights through legislation. Incrementally at first, but more boldly in recent years, conservative majorities of the Supreme Court have transformed federal law over the past four decades, making it less and less friendly, if not hostile, to the enforcement of rights through private

68. Burbank & Farhang, *supra* note 50, at 1580 ("Overall the data show that, conditional on the existence of a proposal affecting private enforcement, the predicted probability that it would favor plaintiffs went from highly likely . . . to zero.").

69. BURBANK & FARHANG, *supra* note 10, at 91; Burbank & Farhang, *supra* note 50, at 1574 ("Republican appointed judges had more than double the estimated probability of serving on the Committee.").

> lawsuits. This branch of the campaign for retrenchment achieved victories in a long succession of decisions interpreting statutory private enforcement regimes, reshaping standing and private rights of action doctrine, and interpreting the Federal Rules of Civil Procedure.[70]

This has been true with respect to statutes as well, most notably the Federal Arbitration Act[71]—and the Court did so with respect to the MDL statute on one occasion, *Lexecon*, but *Lexecon* has proven not to be terribly important, because its holding is so easy to evade.[72] But with respect to the Federal Rules, the Court seems to consider itself to have a great deal of leeway because it is the body delegated to make the rules in the first place by the Enabling Act.[73] Whether such leeway is legitimate is a difficult question, especially if, as Burbank and Farhang argue, the Congress has been making substantive law against the backdrop of a settled interpretation of the Federal Rules. Amending those Rules through Supreme Court fiat may, then, upend the Congress's intentions with respect to the ability to enforce those laws through litigation.[74] MDL—which has no implementing rules—has been immune from that process. The statute itself is so barebones that there is little for courts to interpret.

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70. BURBANK & FARHANG, *supra* note 10, at 218–19.

71. Andrew D. Bradt, *Resolving Intrastate Conflicts of Laws: The Example of the Federal Arbitration Act*, 92 WASH. U. L. REV. 603 (2015); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011).

72. Manual for Complex Litigation Section 22.93 (4th ed. 2004) ("Nothing in [*Lexecon*] precludes the transferee judge from presiding over cases that litigants filed in the transferee district originally, that transferor courts transferred by ruling on motions [to] change venue, or that the parties consented to have tried in the transferee district."); *id.* section 20.132 (stating that "evolving alternatives . . . permit the transferee court to resolve multidistrict litigation through trial while remaining faithful to the *Lexecon* limitations").

73. *See* Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 337 (2012) ("The Committee may also recognize that the Court—which still must sign off on any changes to the Rules—is unlikely to approve amendments that so quickly overturn its own decisions.").

74. BURBANK & FARHANG, *supra* note 10, at 241 (arguing that "respect for democratic values requires that existing statutory policy choices concerning private enforcement be respected. It therefore requires that changes to the Federal Rules that are potentially consequential for those policy choices be affected through rulemaking rather than (re)interpretation.").

III. LOOKING FORWARD—DANGERS AND OPPORTUNITIES

Although the MDL statute has been well insulated from amendment over the years, it is an open question whether the status quo will hold. In a world in which MDL is now so prominent, it would be rather difficult for it to escape the notice of legislators. Although rumors of the death of the class action are regularly exaggerated, as the mass-tort class action has receded into the background, its role as a perennial source of controversy may shrink as well.[75] If MDL supplants the class action, it is hard to imagine that it will not attract attention. Indeed, over the last several years, academic attention to MDL has ticked significantly upward—a phenomenon of which this Symposium is just one example.[76] While the drafters of the MDL statute intended that MDL practice would not be the province of the rulemakers, there are numerous ways in which MDL practice could face changes—from the Congress, the Supreme Court, or Chief Justice Roberts.

With respect to the Congress, of course, there is the bill that, as of this writing, has passed the House and is in the hands of the Senate Judiciary Committee. It is impossible to predict whether the legislation will emerge from that committee or the full Senate, particularly as the legislative filibuster continues to survive. But even if this version of the legislation fails or dies on the vine, it demonstrates that MDL is now very much on reformers' radar screens. While prior legislative attempts at litigation reform were focused primarily on class actions, MDL may increasingly become the cause du jour for legislators looking for a tort-reform target.[77] If such an effort were successful, it would be an exception to the decades-long trend of failure at procedural retrenchment through legislation; but there have been some exceptions, particularly in areas thought to be

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75. COFFEE, JR., *supra* note 30, at 2 (describing the "dismantling" of the class action as the "major procedural project of the conservative majority of the contemporary Supreme Court").

76. *See, e.g.*, Martin Redish & Julie Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015) (discussing the increased pervasiveness of MDL practice relative to class actions); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552 (2013).

77. Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 516 (1996) (noting the degree to which procedure has become a "political football").

technical or as specialized as MDL procedure.[78] Congress is the ultimate decider when it comes to procedural lawmaking, and it is always possible that, as in CAFA, the stars could align to pass legislative reform.[79]

Beyond the Congress, however, there may be other opportunities for the Supreme Court—or even Chief Justice Roberts—to significantly affect MDL practice. Indeed, although MDL is not subject to any special rules of procedure, there are numerous issues in MDL practice that could find their way to the Supreme Court. For instance, the scope of an MDL court's personal jurisdiction over plaintiffs and defendants is an area of possible controversy that would come to the Supreme Court as a question of constitutional interpretation, not an interpretation of the Federal Rules.[80] Moreover, as discussed above, the scope of an MDL judge's power to review non-class aggregate settlements and attorneys' fee awards has become a source of major disagreement, and not only among academics. The question of whether an MDL judge has the power to engage in such formal review under the aegis of "quasi-class action" raises issues of statutory and constitutional import—as Professor Mullenix's article in this Symposium notes. Ultimately, such issues could come to the Supreme Court for review, and, if they do, a majority that has continued to generally espouse Professor Spencer's "restrictive ethos" to civil procedure could also do so with respect to MDL.

Finally, Chief Justice Roberts possesses a particular power when it comes to the JPML.[81] Under the MDL statute, Chief Justice Roberts has the express authority to appoint the members of the Panel.[82] When the MDL statute was originally passed in the 1960s,

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78. BURBANK & FARHANG, *supra* note 10, at 49 (citing the PSLRA and CAFA).

79. Wasserman, *supra* note 3, at 345 (noting that "Congress has also become more active in procedural rulemaking"); Burbank, *supra* note 26, at 1678.

80. *See* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1181 (2017) (discussing the Supreme Court's role in personal jurisdiction, stating that ". . .for better or worse, the law of personal jurisdiction has developed as constitutional law expounded by the Supreme Court.").

81. Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1584–87 (2006) (describing power of Chief Justice over Judicial Conference).

82. 28 U.S.C. § 1407(d) ("The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit."). Beyond the JPML, the Chief Justice has power to appoint the members of other Judicial Conference committees; Theodore W. Ruger, *The Chief Justice's Special*

there would have been little doubt among the drafters that the current Chief Justice, Earl Warren, was sympathetic to their aims. After all, Warren had created the Coordinating Committee on Multiple Litigation to manage the then-massive electrical-equipment litigation. Warren repeatedly praised the Committee's efforts in that regard and encouraged the Committee in its efforts to develop the MDL statute.[83] And after the MDL statute finally passed in 1968, Warren appointed to the original JPML mostly supporters of the statute.[84]

One might wonder, however, what might happen if a Chief Justice became less sympathetic to the JPML. This may be a fanciful hypothetical, but it is not too far fetched. If the Chief Justice were to believe that the JPML had become either too willing to consolidate cases, or not willing enough, or if the Chief Justice came to believe that the JPML's case assignments were to judges whose views did not align with his own, one could easily imagine him changing the composition of the JPML to include judges whose views aligned more closely with his own policy views. There is little doubt that Chief Justice Roberts, himself a former litigator and advocate for legislative retrenchment efforts during his early years in the Reagan administration,[85] and, according to Burbank and Farhang's data, "one of the most anti-private enforcement judges in over 50 years,"[86] pays close attention to issues of procedure.[87] And as MDL becomes ever

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Authority and the Norms of Judicial Power, 154 U. PA. L. REV. 1551, 1567 (2006) (noting the "undivided authority" of the Chief Justice to appoint committees); Patricia W. Hatamayr Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1145 (2015) (noting the Chief Justice's "unfettered" power to appoint members to Judicial Conference committees).

83. Earl Warren, Address to the Annual Meeting of the American Law Institute, May 16, 1967, *quoted in* MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION, at 6 (1969) (lauding the "monumental effort of the nine judges on this Committee").

84. Bradt, *supra* note 18, at 906 (noting that the membership of the original JPML included Judges Murrah, Becker, and Robson—the three main judicial advocates for the statute).

85. BURBANK & FARHANG, *supra* note 10, at 33–34 (describing Roberts's role as "an initiator of the proposals to amend Section 1983" and "an active participant in deliberations over the fee-cap bill").

86. *Id.* at 244.

87. *Id.* (noting Roberts's "encouragement to move ahead with rulemaking in an area of intense controversy (discovery) . . . his decision to use the Chief Justice's entire 2015 annual report on the federal judiciary to emphasize his view of (or hopes concerning) their importance and to support training designed to make sure they are effective").

more central to the federal system, his attention could be drawn to the JPML. If that happens, he possesses the tools to influence its policy.[88]

CONCLUSION

All told, while the MDL statute long persisted unchanged in relative security, that may not always be the case. With its ascendance to the limelight comes renewed scrutiny. Although the drafters of the statute made it difficult to change by insulating it from the Rules Committee, there are other means of making changes. Indeed, such change is probably inevitable. And it may be salutary. After fifty years of experience with the statute (and class actions, for that matter), we have learned much, and applying that knowledge to improve the process is all to the good. Indeed, the Rules Committee has begun to consider whether to promulgate specific rules for MDL, though the process is too new to know what will emerge.[89] But, as with all procedural change, we should be cognizant of the fact that procedural rules are not neutral. They are intensely political. As I have argued elsewhere, politics need not be a dirty word in procedure[90]—but if changes are going to be made, they should be the product of open dialogue among all affected actors, including federal judges, on whom the burdens of implementing these changes will fall.[91] They should also be informed by empirical research and spirited debate.[92] It should

88. Ruger, *supra* note 82, at 1553 (evoking "the problematic specter of individualistic discretion in the hands of a single unelected official").

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

90. Bradt, *supra* note 18, at 912 ("Although one might lament the challenges associated with the new world of procedural lawmaking, 'politicization' is not an epithet."); *see also* Martin H. Redish and Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1334 (2006) ("politicization is by no means an inherently negative development").

91. Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1210 (1996) ("Congress needs the judiciary's expertise to make informed legislative choices, and the judiciary needs informed legislative choices to maintain control of its dockets and preserve the integrity of the judicial process."); Robert A. Katzmann, *The Underlying Concerns* in ROBERT A. KATZMANN, JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 8 (Robert A. Katzmann, ed. 1988) (describing the dynamic of Congressional actions increasing court activity without additional appropriations).

92. Harold Hongju Koh, *The Just, Speedy, and Inexpensive Determination of Every Action?*, 162 U. PA. L. REV. 1525, 1539 (2014) (describing the need for a

not follow the process that the House used in February 2017 when considering H.R. 985—a process that included no hearings at all. A subject as complicated and important as MDL certainly deserves better than that.

"more inclusive process"); Burbank, *supra* note 26, at 1689 ("If realism about procedure and power suggests inadequate defenses against improvident lawmaking, the answer lies in custom, dialogue, compromise, and statesmanship; it lies, in a word, in politics.").