

# THE LOOMING BATTLE FOR CONTROL OF MULTIDISTRICT LITIGATION IN HISTORICAL PERSPECTIVE

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## INTRODUCTION

2018 marks fifty years since the passage of the Multidistrict Litigation Act. But instead of thoughts of a golden-anniversary celebration, an old Rodney Dangerfield one-liner comes to mind: “[M]y last birthday cake looked like a prairie fire.”<sup>1</sup> Indeed, after a long period of relative obscurity, multidistrict litigation (MDL) has become a subject of major controversy—and not only among scholars of procedure.<sup>2</sup> For a long time, both within and beyond the rarified world of procedure scholars, MDL was perceived as the more technical, less extreme cousin of the class action, which attracted most of the controversy.<sup>3</sup>

But as class actions have receded, at least in mass-tort cases, MDL has stepped into the spotlight.<sup>4</sup> The attention is in part due to sheer numbers—

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1. Tom Shales, *Rodney Dangerfield Gets Respect*, WASH. POST (Aug. 28, 1979), <https://www.washingtonpost.com/archive/lifestyle/1979/08/28/rodney-dangerfield-gets-respect/ecaf3fc9-4299-49f8-b008-91409be7ca94/> [<https://perma.cc/99U6-YSPG>].

2. See, e.g., Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015) (describing the importance of steering committees); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 541.

3. 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”).

4. Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 793–94 (2010); see also Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 296 (2014) (describing U.S. Supreme Court jurisprudence limiting availability of class actions).

39 percent of the pending federal civil docket is in MDL.<sup>5</sup> But it is also because MDL is now the arena in which many issues of major public concern are playing out<sup>6</sup>—and typically being settled.<sup>7</sup> Examples include the Volkswagen clean diesel scandal,<sup>8</sup> the National Football League concussion litigation,<sup>9</sup> the Deepwater Horizon oil spill,<sup>10</sup> and, now, the opioid-addiction crisis, which has thrust MDL into the public consciousness.<sup>11</sup> Due to both the scope of the opioid epidemic and the aggressive posture of the judge in charge, explanations of what MDL is, how it works, and what it does have now made their way into the pages of major newspapers and onto the screens of major websites. This shift is an odd development for those of us who once struggled to explain concepts like the Judicial Panel on Multidistrict Litigation (JPML) and limited transfer for pretrial proceedings to our nonproceduralist colleagues and now find ourselves discussing these topics with reporters.<sup>12</sup>

Even before opioids, MDL's dominance had begun to garner plaudits—indeed, as Professor Coffee puts it, “the most successful step taken in the administration of aggregate litigation in the United States was the creation of the JPML in 1968.”<sup>13</sup> But with this success has come scrutiny; as MDL has grown ever more prominent, it has also attracted the attention of not just scholars, but lawmakers. Today's MDL framework is effectively the same as when it was enacted by Congress in 1968,<sup>14</sup> but that may not be the case

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5. 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) (noting that this is “a number that tends to shock even those law professors who teach procedure”).

6. Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 850 (2017) (noting the “stunning growth” in MDL, especially in high-profile cases).

7. Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 270 (2011) (describing MDL's facility in coordinating global settlement).

8. See generally *Wyoming v. Volkswagen Grp. of Am., Inc. (In re Volkswagen Clean Diesel Mktg., Sales Practices, & Prods. Liab. Litig.)*, 264 F. Supp. 3d 1040 (N.D. Cal. 2017).

9. See generally *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351 (E.D. Pa. 2015), *aff'd*, 821 F.3d 410 (3d Cir. 2016).

10. See generally *In re Oil Spill by the Oil Rig “Deepwater Horizon” on April 20, 2010*, 21 F. Supp. 3d 657 (E.D. La. 2014); Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397 (2014).

11. See generally *In re Nat'l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375 (J.P.M.L. 2017).

12. See, e.g., Christa Case Bryant & Henry Gass, *An Unprecedented Effort to Stem Opioid Crisis—and the Judge Behind It*, CHRISTIAN SCI. MONITOR (May 9, 2018), <https://www.csmonitor.com/USA/Justice/2018/0509/An-unprecedented-effort-to-stem-opioid-crisis-and-the-judge-behind-it> [<https://perma.cc/X3EQ-YKU5>]; Abbe R. Gluck, Opinion, *Can a Judge Solve the Opioid Crisis?*, WALL ST. J. (May 7, 2018, 6:24 PM), <https://www.wsj.com/articles/can-a-judge-solve-the-opioid-crisis-1525731873> [<https://perma.cc/S7CX-7QEY>].

13. JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* 155 (2015).

14. 90 CONG. REC. 4927–28 (1968) (noting the passage of the bill on the consent calendar).

forever.<sup>15</sup> 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.<sup>16</sup> The bill was passed on party lines in the House—without hearings—and currently languishes in the Senate.<sup>17</sup> But the 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.<sup>18</sup> Although current prospects for FICALA’s passage are uncertain in the Senate,<sup>19</sup> those behind the legislation are also now pursuing reform through a different avenue: the Advisory Committee on Civil Rules (“Rules Committee”). In late 2017, numerous proposals, many of which are similar or identical to those in FICALA, were presented for consideration to the Rules Committee, which caused the chair to appoint a subcommittee to investigate whether Federal Rules of Civil Procedure for MDL should be considered.<sup>20</sup> This would be a striking change as these rules would be the first ever directed to MDL.

MDLs have always been thought to be adequately governed by the plain old Federal Rules. Indeed, in what today seems like a redundancy, the MDL statute provides that the JPML may not create rules for MDL that are inconsistent with the Federal Rules.<sup>21</sup> Currently, however, proponents of FICALA and the Federal Rules for MDL, most notably the advocacy group Lawyers for Civil Justice,<sup>22</sup> take the position that the typical rules are inadequate. Rather, they perceive MDL judges as effectively unbound by procedural doctrine—operating in something like the Outback Steakhouse of litigation: “No Rules, Just Right.” In their view, these judges see themselves as “cowboys” with a roving commission to resolve and settle major national crises by whatever means necessary, often making it up as they go along.<sup>23</sup> Once an MDL gets going, they believe judges use the effectively limitless

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15. See Andrew D. Bradt, *The Stickiness of Multidistrict Litigation*, 37 REV. LITIG. (forthcoming 2018) (manuscript at 18–20) (on file with author).

16. H.R. 985, 115th Cong. § 105 (2017); Press Release, Rep. Goodlatte, 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> [<https://perma.cc/WPA7-FQP7>].

17. Perry Cooper, *Bill Targeting Class Actions, MDLs Sent to House*, BLOOMBERG BNA (Feb. 16, 2017), <https://www.bna.com/bill-targeting-class-n57982083903/> [<https://perma.cc/3FGD-S66R>] (noting that an “earlier version” of the bill “stalled in the Senate”).

18. H.R. REP. NO. 115-25, at 3 (2017).

19. Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. REV. 903, 939 (2018) (“It is uncertain whether this proposed legislation will ultimately be adopted.”).

20. See *infra* Part II.

21. 28 U.S.C. § 1407(f) (2012).

22. Lawyers for Civil Justice describes itself as “a partnership of leading corporate counsel and defense bar practitioners . . . . [Which] unit[es] the business and defense bar communities in propelling reasonable reform initiatives.” See *About Us*, LAWYERS FOR CIVIL JUSTICE, <http://www.lfcj.com/about-us.html> [<https://perma.cc/Y9NF-YWC9>] (last visited Aug. 24, 2018).

23. Gluck, *supra* note 12.

power at their disposal to broker a global settlement.<sup>24</sup> In their view, this unbalanced procedure results in plaintiffs bringing meritless MDL claims and forces defendants into settlements to make them go away and satisfy the judge.<sup>25</sup> Determining whether any of this is true demands rigorous empirical analysis—analysis one hopes will be undertaken dispassionately before any changes are made.

In the meantime though, it is worth remembering what Professor Burbank taught long ago: procedure is about power, when it comes both to who writes the rules and what they say.<sup>26</sup> And the fight over MDL, both past and present, is a striking example of this battle for power.

My goal in this Article is to situate the looming battle for control over MDL within its historical context. MDL was, from the beginning, a power grab, albeit a well-intentioned one, by judges who believed that concentrated national judicial power was necessary to meet the demands of a coming “litigation explosion” in the federal courts.<sup>27</sup> These judges thought that control over managing these cases needed to be taken out of the hands of both individual litigants,<sup>28</sup> particularly well-resourced corporate defendants who benefited from delays, backlogs, and complexity,<sup>29</sup> and passive judges inclined to allow the parties to decide the pace of their cases.<sup>30</sup> They believed what was urgently necessary was a statute that gave judges control over nationwide litigation and enabled them to aggressively move cases to a conclusion, thereby preventing the federal courts from breaking down under the coming wave of litigation and ensuring that the law would be enforced.<sup>31</sup>

Although initial proposals for the MDL statute envisioned Federal Rules of Civil Procedure for MDL cases, the judges who supported the initiative came to believe that participation by rule makers would unduly delay implementation of the statute and that rigid rules would interfere with the flexibility necessary to manage the coming deluge of complex cases.<sup>32</sup> They also recognized that the corporate-defense bar, which had effectively blocked the statute’s passage in Congress in 1966, opposed MDL because its effectiveness at enforcing the substantive law would work to the detriment of their clients who benefited from delays and resource advantages.<sup>33</sup> Accordingly, the MDL statute was intentionally designed to avoid

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24. LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULE MAKING TO THE ADVISORY COMMITTEE ON CIVIL RULES 3 (2017), [http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj\\_request\\_for\\_rulemaking\\_concerning\\_md\\_cases\\_8-10-17.pdf](http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_request_for_rulemaking_concerning_md_cases_8-10-17.pdf) [https://perma.cc/7P5U-NQWR].

25. *Id.*

26. Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 513 (1996).

27. Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 907 n.528 (2017).

28. LAWYERS FOR CIVIL JUSTICE, *supra* note 24, at 3.

29. *Id.*

30. Bradt, *supra* note 27, at 841–42.

31. Andrew D. Bradt, *Something Less and Something More: MDL’s Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1713 (2017).

32. *Id.* at 1732–33.

33. *Id.*

rulemaking and to ignore the objections of the defense bar. The locus of control of MDL would be the newly created JPML with the transferee judges handpicked to manage the consolidated pretrial proceedings.<sup>34</sup>

Part of what makes the current legislative proposals—which are almost entirely driven by the corporate-defense bar—interesting is that they threaten this central, and very intentional, locus of control. Externally imposed procedures for MDL cases, whether mandated by Congress or the Rules Committee, would undermine one of the crucial goals of the drafters of the statute, who believed that flexibility for individual judges was necessary to adapt to the endless variety of complicated cases that face the federal courts.<sup>35</sup> Instead of a one-size-fits-all structure, judges wanted to manage litigation on a case-by-case basis to demonstrate that the federal courts could in fact handle the coming wave of litigation, and thereby enforce the laws they had been charged with effectuating. Rather than rules imposed by other parties, the judges who created MDL wanted independence for the JPML and transferee judges—independence that could be guided by the suggestions described in the original *Manual for Complex and Multidistrict Litigation*, which was primarily drafted by Judge William Becker of Kansas City, the same judge who spearheaded the effort to create the MDL statute.<sup>36</sup> The *Manual*, like other judicial guides to handling complex cases before it, was intended to provide a nonbinding set of suggestions judges might consider when presented with multidistrict cases.<sup>37</sup> It was to be the *Manual* that would guide MDL practice—not strict procedures imposed from without.<sup>38</sup> Today, the drive to create MDL “rules” threatens these basic features of the MDL framework, and the battle lines look just like they did in the 1960s.

My goal in this Article is not to argue that this history binds either the Rules Committee under the Rules Enabling Act or Congress, which is ultimately in charge of federal procedure.<sup>39</sup> Nor is it to defend the practices of the judges who used their influence to push the MDL statute over the congressional finish line in 1968. Instead, my intent is to shed light on the reasons the statute was constructed as it was and suggest that those engaged in the current debate ask, after becoming informed by available data, whether those reasons have lost any of their currency. I also offer some tenuous predictions about the path forward, recognizing that the prediction business

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34. See generally Bradt, *supra* note 15.

35. See *infra* Part I.

36. See *In Memoriam: Judge William H. Becker*, 807 F. Supp. LXIX, LXXII (W.D. Mo. 1992) (“[I]t 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.”).

37. Bradt, *supra* note 27, at 853.

38. See Pub. L. No. 90-296, 92 Stat. 1407 (1968) (codified as amended at 28 U.S.C. § 1407 (2012)) (granting wide discretion to transferee judges in MDLs).

39. Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1678 (2004) (noting that Congress “holds the cards” when it comes to federal procedure).

is a dangerous one in the current political climate. First, I review the history to explain why the MDL framework was built without Rules Committee involvement. Then, I fast-forward to the present day and discuss briefly the nascent proposals to either amend the MDL statute or provide for Federal Rules of Civil Procedure for MDL. Finally, I conclude by assessing the current debate and make some suggestions as this debate winds its way forward. In 1968, the small cadre of judges who developed and fought for the MDL statute won the battle for procedural power. Today, fifty years later, the MDL statute continues to operate as they imagined. However, with success comes scrutiny, and what had been settled is now once again up for debate.

### I. CONTROL OVER MDL: THE 1960S STORY

The MDL statute was passed without a single dissenting vote in 1968—but that fact risks obscuring the real story. The MDL statute was enormously controversial, both among federal judges and the practicing bar, particularly the corporate-defense bar.<sup>40</sup> That it became law at all was due largely to the maneuvering and lobbying of a small group of federal judges, led by Circuit Judge Alfred Murrah and District Judge William Becker.<sup>41</sup> In addition, the efforts of Maryland Senator Joseph Tydings, who chaired the Senate Judiciary Committee, were critical.<sup>42</sup> I have outlined the story of the MDL statute in detail elsewhere.<sup>43</sup> Here, I focus on aspects of that story relevant to our subject—where control over MDL rests.

The MDL statute arose out of the massive and unprecedented litigation that followed revelations of price-fixing in the electrical-equipment industry in the 1950s.<sup>44</sup> A deluge of civil litigation began across the country, and in 1962 Chief Justice Earl Warren appointed a committee of federal judges, the Coordinating Committee on Multiple Litigation (CCML), to consider ways of streamlining the litigation to avoid grinding the business of the federal courts to a halt.<sup>45</sup> Warren did not choose the judges on the committee randomly; they were selected because they were longtime proponents of then-novel principles of case management in complex litigation.<sup>46</sup> The dominant norm in federal judging had been a hands-off approach—these judges, and in particular Judge Murrah, were men who believed that judges needed to take rigid control of cases, actively manage discovery and motion practice, and even promote settlement.<sup>47</sup> Given the massive influx of

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40. See Bradt, *supra* note 27, at 838–40.

41. See *id.*

42. See *id.*

43. *Id.*

44. *Id.* at 854–63.

45. *Id.* at 855–56.

46. *Id.* at 851–59.

47. See 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 when judges began to “see themselves . . . more as managers of a costly and complicated process”).

electrical-equipment antitrust cases, some 1900 of them, each of which would have been a complicated “big case” individually, Chief Justice Warren believed nationwide managerial innovation was necessary and that these were the judges to develop it.<sup>48</sup>

The CCML began an aggressive campaign of organized discovery, pretrial conferences, and uniform orders.<sup>49</sup> But the Committee had no statutory mandate. Instead, it relied on the cooperation of all of the judges to whom the cases had been assigned around the country to stick with the program. Happily, due in large part to the magnitude of the electrical-equipment litigation crisis, the program was successful on its terms, and the cases were almost entirely resolved by 1966.<sup>50</sup> It was during this period that the CCML, with the support of Chief Justice Warren and the Judicial Conference, turned toward creating a permanent statutory mechanism for coordinating related cases filed in multiple districts.<sup>51</sup> These judges believed that such cases of nationwide import would become increasingly common as technology and communications brought the country together, the population grew, and new causes of action proliferated.<sup>52</sup> The electrical-equipment cases were just the tip of the iceberg.<sup>53</sup>

Coordinating cases in a single district for pretrial proceedings followed by remand for trial was the brainchild of the Secretary for the CCML, Professor Phil C. Neal of the University of Chicago Law School.<sup>54</sup> This idea of “limited transfer” was the hallmark of the MDL statute from the beginning.<sup>55</sup> But in its initial phases, the plan was for the MDL statute to enable the Advisory Committee on Civil Rules to develop Federal Rules of Civil Procedure to determine when an MDL should be created, where it should be assigned, and what rules should govern it after transfer. Indeed, this was the plan as late June 1964.<sup>56</sup> As Judge Becker described the draft statute to his colleagues on the CCML, “‘the rule making power [should] be employed to the maximum’ [to] ‘allow greater flexibility for amendment and supplement of the procedures.’”<sup>57</sup>

But in this respect the CCML changed course soon thereafter. The judges decided that, instead of delegating power to the Rules Committee, the power to decide whether to create an MDL should be lodged in a new and independent committee of judges, the JPML, and they abandoned entirely the idea that there should be special rules of procedure for MDL cases.<sup>58</sup> Why the change in course? First, the CCML had observed the difficult and

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48. See Bradt, *supra* note 27, at 854–56.

49. *Id.* at 856–58.

50. *Id.* at 859–60.

51. *Id.* at 863–64.

52. *Id.* at 889–90.

53. See *id.* at 863–66.

54. *Id.* at 864–65.

55. *Id.* at 839.

56. *Id.* at 871–72.

57. *Id.* at 870. The underlying archival research is discussed in-depth in my Article. See *generally id.*

58. *Id.* at 881.

protracted fight in the Rules Committee over the amended joinder rules, including new Rule 23.<sup>59</sup> The CCML, fearing an imminent litigation explosion, did not want to wait out a lengthy Rules Committee process before getting MDL started, particularly if such a process would work a change in their vision.<sup>60</sup> Second, and relatedly, to avoid the Rules Committee's involvement in an area it likely considered its jurisdiction, Judge Becker would have to take the MDL proposal "straight to the top" of the Judicial Conference to secure its support for the MDL statute in Congress.<sup>61</sup> To do so, Becker and Murrah would have to get the blessing of Chief Judge Alfred Maris of the Third Circuit, who was the powerful chairman of the Committee on Revision of the Laws and whose support was necessary to influence the congressional judiciary committees.<sup>62</sup> Judge Maris, helpfully it turned out, generally supported the MDL idea of limited transfer for pretrial proceedings, but he was deeply skeptical of the idea of Federal Rules for the conduct of MDL.<sup>63</sup> Maris believed that these cases would come in all shapes and sizes and was leery of any rules that assumed all cases should all be conducted in a particular way.<sup>64</sup>

By late 1965, the CCML concurred with Maris and adopted his insight on the importance of case-by-case flexibility. Moreover, they all agreed that there need not be Rules Committee involvement—both to avoid entanglements and delays, but also to avoid retarding innovation in overseeing complex cases of nationwide importance.<sup>65</sup> The decision was thus made to cut the rule makers out of the process entirely and instead lodge power over MDL in the new JPML, which would autonomously decide whether and where to establish MDLs, create rules for its own conduct, and be almost entirely insulated from appellate review.<sup>66</sup> Maris agreed with this course of action and endorsed the revised MDL statute in the Judicial Conference, which agreed to support the statute in Congress.<sup>67</sup>

Judicial Conference support was a necessary but not sufficient condition for the MDL statute's enactment.<sup>68</sup> The Judicial Conference had significant influence in Congress in the 1960s, but such influence was not enough on its own in the face of other obstacles, namely the opposition of the corporate-defense bar led by particularly powerful New York antitrust lawyers who believed that they had been steamrolled into settlement in the electrical-

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59. Bradt, *supra* note 15 (manuscript at 2).

60. *See* Bradt, *supra* note 27, at 873 ("Becker thought it important that the group sidestep the lengthy process of presenting its draft for revisions by the Civil Rules Committee, which could take years and would also leave their statute vulnerable to revision by other judges.").

61. *Id.*

62. *See id.*

63. *See id.* at 879–80.

64. *See id.*

65. *See id.* at 878–82.

66. *See id.*

67. *See id.* at 881–83.

68. *See* PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 301–06 (1973) (describing the power of the Judicial Conference in Congress in the 1960s).

equipment cases.<sup>69</sup> In language that would seem quite familiar today, those lawyers complained bitterly that the focus on speed and resolution in the electrical cases effectively railroaded them into paying out meritless claims. As Breck McAllister of Donovan, Leisure, Newton & Irvine, put it, “it became very clear that . . . the national program of the Committee would move forward and ‘nothing’ would interfere with its progress.”<sup>70</sup> Lawyer John Logan O’Donnell added that the speed of discovery eliminated defendants’ ability “to point out and question specific characteristics of the cases.”<sup>71</sup> And, as lawyer Miles G. Seeley later summarized, defense counsel believed that “they and their clients were caught up in a torrent of judicial efficiency over whose tumult they scarcely could make their voices heard.”<sup>72</sup>

Moreover, those lawyers understood well that aggregation of plaintiffs’ claims would eliminate one of their most potent litigation advantages: the imbalance of resources. By allowing plaintiffs to pool resources and coordinate activities, the MDL statute would level the playing field. As O’Donnell put it bluntly, the aggregation eliminated defendants’ “advantage of numbers” because “[p]laintiffs pool their resources and generally designate their most experienced lawyers.”<sup>73</sup> He continued, “more important, each plaintiff is handed a ready-made case to the extent that expert lead counsel can establish it and, in any event, a far better case than most plaintiffs’ counsel could ever establish without the coordinated program.”<sup>74</sup>

For their part, the judges of the CCML, particularly Becker, Murrah, and Judge Edwin Robson of Chicago, believed that defense counsel were mostly interested in preserving this resource advantage and, in Robson’s words, were “trying to do all they c[ould] to block this amendment.”<sup>75</sup> Indeed, the CCML set a meeting with some defense counsel in the electrical cases to solicit input on the proposed MDL statute. When the lawyers suggested circulating the provision to a wide group of lawyers for public comment, the CCML bristled, believing that the lawyers merely sought to delay and frustrate passage of the statute, or at least dominate the drafting process.<sup>76</sup> As Robson wrote to Becker, “It is apparent that defendants wish to kick the ball around.”<sup>77</sup> Becker’s skepticism was equally strong:

Underlying the action of some of the defendants’ counsel throughout this litigation must have been the hope that this electrical equipment antitrust litigation would overwhelm the Courts and demonstrate the unworkability of the antitrust laws allowing treble damage recoveries in civil suits. Every

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69. See Bradt, *supra* note 27, at 888.

70. Breck P. McAllister, *Judicial Administration of Multiple-District Treble Damage Administration*, in 1966 ANTITRUST LAW SYMPOSIUM 55, 60 (N.Y. State Bar Ass’n ed., 1966).

71. John Logan O’Donnell, *Pretrial Discovery in Multiple Litigation from the Defendants’ Standpoint*, 32 ANTITRUST L.J. 133, 137 (1966).

72. Miles G. Seeley, *Procedures for Coordinated Multi-District Litigation: A Nineteenth Century Mind Views with Alarm*, 14 ANTITRUST BULL. 91, 93 (1969).

73. O’Donnell, *supra* note 71, at 138–39.

74. *Id.* at 139.

75. Bradt, *supra* note 27, at 876.

76. *Id.* at 876.

77. *Id.*

measure proposed which would make multiple civil antitrust litigation manageable, impairs that hope.<sup>78</sup>

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. The result was that the judges abandoned their attempt to receive feedback from defense counsel and pressed ahead without their support.<sup>79</sup>

This was a disastrous legislative strategy. The defense lawyers that the CCML had rebuffed controlled the powerful antitrust section of the American Bar Association (ABA). Those lawyers generated a resolution from both the antitrust section and then the entire House of Delegates of the ABA at its annual meeting in 1966 and did so without notice to either the plaintiff-side members of the antitrust section or the judges supporting the MDL bill.<sup>80</sup> As Judge Robson accurately described things, “the cards were stacked against us by the defendants.”<sup>81</sup> Without ABA support, and with the opposition of powerful New York attorneys connected to House Judiciary Committee Chairman Emmanuel Celler, the MDL bill was stuck—and it would remain so until the ABA dropped its opposition.<sup>82</sup> Even in the Senate, where the MDL bill was getting traction—thanks largely to the interest of Senator Joseph Tydings of Maryland, who was especially interested in efficient judicial administration—prominent members of the corporate-defense bar railed against the bill. They offered amendments, such as a predominance requirement, that Becker believed were intended to cripple the effectiveness of the statute.<sup>83</sup> Becker successfully beat back those amendments in the Senate, but the ABA resolution continued to block the bill in the House until early 1968.<sup>84</sup>

What broke the logjam? Face-to-face politics. A corollary to the CCML’s eventual view that there need not be Federal Rules of Civil Procedure for MDL was the idea that innovation in complex litigation would be better developed through a set of nonbinding guidelines in a handbook that would be open to revision.<sup>85</sup> This project, led by Becker, was to be titled *Manual for Complex and Multidistrict Litigation* and was already underway when the MDL statute was stalled (proceeding without input from the defense bar).<sup>86</sup> As Professor Miller remembers, corporate defense counsel “were fighting the manual as it was then drafted tooth and nail” because it appeared to facilitate

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78. *Id.* at 876–77.

79. *Id.* at 877–78.

80. *Id.* at 887–89.

81. *Id.* at 888.

82. *See id.* at 899–902.

83. *See* Bradt, *supra* note 31, at 1731–37.

84. *See* Bradt, *supra* note 27, at 899–902.

85. *See* Andrew J. Simons, *The Manual for Complex Litigation: More Rules or Mere Recommendations?*, 62 ST. JOHN’S L. REV. 493, 496 (1988); Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 U. PA. L. REV. 2225, 2228–29 (2000).

86. Bradt, *supra* note 27, at 903–04.

the kind of benefits for plaintiffs that the defendants had complained of in the electrical-equipment cases.<sup>87</sup>

In 1967, a meeting was held in New York between the judges supporting the MDL statute and the prominent defense lawyers opposing it.<sup>88</sup> At that meeting, the CCML judges emphasized their need for the lawyers' support of the MDL statute.<sup>89</sup> Shortly after, the lawyers changed course and facilitated the ABA's dropping of its opposition.<sup>90</sup> But something else happened: the defense bar got a seat at the table for the drafting of the *Manual*—a story I tell in some detail elsewhere.<sup>91</sup> Having reviewed the available historical record, my hypothesis is that the lawyers, rational actors and repeat players in the federal courts, saw this as a worthwhile exchange and dropped their opposition to the statute in exchange for influence on the *Manual*. And they exercised that influence, by suggesting an array of changes that found their way into the finished project.<sup>92</sup>

Moreover, once the opposition was dropped, the dam broke—the MDL statute was passed in remarkably short order and was signed by President Johnson on April 29, 1968.<sup>93</sup> Chief Justice Warren appointed the first JPML, and MDL was off and running.<sup>94</sup>

## II. CONTROL OVER MDL: THE 2018 STORY

Over the intervening five decades, MDL has hummed along with virtually no legislative or Supreme Court intervention.<sup>95</sup> So it came as something of a surprise when FICALA was proposed in the House in 2017. The surprise was not that the bill was introduced—that had happened before. But it had, as its title suggests, historically focused on class actions. But this time, the bill contained an entirely new set of provisions devoted to amending the MDL statute, including provisions that imposed rigid procedural rules and threatened the independence of the MDL transferee judge that was so important to the drafters of the statute.<sup>96</sup> For instance, the statute includes: (1) a requirement of evidentiary verification of allegations within forty-five days of filing or transfer; (2) a bar on bellwether trials without consent; (3) enhanced interlocutory review of most orders issued by the MDL judge; and (4) a requirement that personal-injury plaintiffs receive “not less than 80 percent of any monetary recovery.”<sup>97</sup> The accompanying report from the

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87. *Id.* (quoting *In Memoriam: Judge William H. Becker*, 807 F. Supp. LXIX, LXXII (W.D. Mo. 1992)).

88. Bradt, *supra* note 27, at 899.

89. *Id.* at 899–900.

90. *Id.* at 900–01.

91. *Id.* at 901–07.

92. *Id.* at 899–907.

93. *Id.* at 906–07.

94. *Id.*

95. Bradt, *supra* note 15 (manuscript at 2). *But see* *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998) (barring the practice of MDL judges transferring cases to themselves for trial).

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

97. *Id.*

House Judiciary Committee makes plain the purposes of these provisions, in language that could have come from MDL's opponents in the mid-1960s (except for the concern trolling on behalf of plaintiffs): "The resulting massive proceedings, often largely consisting of claims that should never have been filed, impose unfair burdens on courts and defendants and prevent plaintiffs with trial-worthy claims from timely getting their day in court."<sup>98</sup> FICALA passed the house on a party-line vote with no amendments and no hearings.<sup>99</sup> As of this writing, the bill remains in the Senate Judiciary Committee.<sup>100</sup>

Perhaps only mildly daunted, the proponents of these measures have opened up a new front for reform: the Advisory Committee on Civil Rules. Three groups made proposals to the Rules Committee for its November 2017 meeting: Lawyers for Civil Justice, Washington Legal Foundation, and the Duke Center for Judicial Studies represented by John Rabiej.<sup>101</sup> The proposals contain different provisions, but they share two of FICALA's foundational principles: that MDL judges need to be constrained, and that MDL attracts meritless claims that are underexamined before being folded into a global settlement. Also like FICALA, the proposals share enthusiasm for requiring early factual support for plaintiffs' claims, consent for bellwether trials, and increased interlocutory appeal. But some of the proposals go further and target other aspects of MDL procedure, such as the use of master complaints and internal governance of plaintiff steering committees.<sup>102</sup> As articulated in the agenda book for the November meeting, "the question is whether the time has come to undertake an effort to generate rules specially adapted to MDL proceedings."<sup>103</sup> The Rules Committee concluded that a subcommittee should be appointed to

gather more information. Valuable information has been provided, but it is mostly from one perspective . . . . But the Committee needs more, particularly from the Judicial Panel [on Multidistrict Litigation]. The Committee should launch a six- to twelve-month project to gather information that will support a decision whether to embark on generating new rules. A Subcommittee will be appointed to develop this information.<sup>104</sup>

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98. H.R. REP. NO. 115-25, at 3 (2017).

99. The House Report notes that hearings had been held on an earlier version of the bill in 2015, but that version did not contain any of the provisions amending the MDL statute. *Id.* at 6.

100. The Senate held hearings on November 8, 2017, but there has not been activity since then.

101. Advisory Comm. on Civil Rules, *Agenda: Meeting of the Advisory Committee on Civil Rules*, U.S. CTS., at 469–76 (Nov. 7, 2017), [http://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook\\_0.pdf](http://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf) [<https://perma.cc/9Y2Q-PWDZ>].

102. *See, e.g., id.* at 469–72.

103. *Id.* at 477.

104. Advisory Comm. on Civil Rules, *Agenda: Meeting of the Advisory Committee on Civil Rules*, U.S. CTS., at 92–93 (Apr. 10, 2018), <http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf> [<https://perma.cc/Z7NU-PFED>].

This Subcommittee issued a report for the April 10, 2018, meeting of the Rules Committee, though it emphasized that “it has reached no conclusions about whether any rule changes should be seriously considered, much less which ones. The range of issues is very broad, and forming a sufficient information base for serious consideration of rule amendments . . . will be challenging.”<sup>105</sup> Thus far, the plaintiffs’ bar, at least as preliminarily represented by the American Association for Justice, has expressed “deep reservations” about any MDL rules, largely on the ground that “MDLs are so case-specific that ‘one size fits all’ rules do not make sense. Judges need to remain empowered to exercise broad discretion in any particular case rather than be constrained by formalistic preconceptions of what a vocal minority consider to be ‘best practices.’”<sup>106</sup> For its part, the JPML apparently has reported to the Subcommittee “skepticism about whether rule changes would materially improve MDL practice.”<sup>107</sup> It has further reported that “[p]anel members are open to work on shared concerns, but may be inclined to think that distinctive aspects of different MDLs make some overarching set of new rules hard to imagine.”<sup>108</sup> At least at these early stages, the battle lines are drawn; well-funded corporate defense groups in favor of rules want to limit discretion of MDL judges, while the plaintiffs’ bar and JPML are copacetic with the status quo.

### III. LOOKING AHEAD, WHILE ALSO LOOKING BACK

Whether any of these efforts will be successful is impossible to know at this early stage. The legislative effort appears stalled in the Senate, and the results of the November 2018 midterm elections may press the pause button for the foreseeable future. On the rulemaking side, the Subcommittee will be embarking on a lengthy period of study and reaching out to concerned parties and collecting data, as it of course should. And if past is prologue, changes coming through the rulemaking process are likely to be relatively modest and mirror changes in class actions that were, in Richard Marcus’s apt terms, “evolutionary” rather than “revolutionary.”<sup>109</sup> But even evolutionary changes can be significant and important. Consider, for instance, the effects of the interlocutory appeal provision for class

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105. *Id.* at 147; *see also id.* at 153 (noting that the Committee’s “inquiry is at a very early stage”).

106. *Id.* at 205 (appending a 2018 memorandum from the American Association of Justice’s MDL Working Group to the Subcommittee).

107. *Id.* at 158.

108. *Id.*

109. Marcus, *supra* note 19, at 917 (“In terms of potentially revolutionary change, the first two experiences with amending Rule 23 produced an evolution away from revolution that has continued through the most recent episode.”); *see also* David Freeman Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Political Economy*, 165 U. PA. L. REV. 1531, 1560 (2017) (noting that “[m]any scholars have decried the increasingly narrow ken of the Advisory Committee and its growing instinct for the capillary, not the jugular, in revising civil procedure rules”).

certification in Rule 23(f).<sup>110</sup> Similarly, any of the current MDL proposals in FICALA could work a major change in the dynamics of MDL practice.<sup>111</sup>

Nevertheless, as Professors Burbank and Farhang have taught us, major change through legislation is extraordinarily difficult and through modern rulemaking only somewhat less so. The status quo is “sticky,” particularly when codified by a statute or rule.<sup>112</sup> As a structural matter, “the institutional hurdles were simply too high” for conservatives to eliminate the legislation- and rule-based infrastructure of the twentieth-century procedural system.<sup>113</sup> As a result, procedural retrenchment was achieved through decisions made by an increasingly polarized and conservative Supreme Court, not legislation.<sup>114</sup> And, as I have written elsewhere, the drafters of the MDL statute designed it to be especially sticky by vesting power and maximal discretion in the hands of the JPML and its preferred transferee judges.<sup>115</sup> That MDL has eluded significant interference for the last fifty years is a testament to stickiness generally and the deftness with which Becker and his allies designed their creation. Indeed, what they saw to fruition in 1968 was built to last. The creators of the MDL statute were not modest about their work—at the time, they saw it as a “radical proposal,” one which would become a centerpiece of a federal procedural system which would come to be dominated by large-scale, nationwide, and, indeed, mass-tort litigation. That MDL has been such a success, warts and all, demonstrates amply their prescience.<sup>116</sup>

Increasing the odds against a new suite of federal rules for MDL is the fact that, as a practical matter, it would be an extraordinarily complicated endeavor. Simply collecting the necessary reliable data on MDL is a difficult and resource-intensive task.<sup>117</sup> And although the current momentum for

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110. Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1515 (2017) (noting how Rule 23(f) “seemed modest at the time [but] facilitated major changes in class action jurisprudence through court decisions” and demonstrated that “even in the domain of rulemaking, some consequential reforms can fly under the radar screen”); Miller, *supra* note 36, at 322 (describing how interlocutory appeal under 23(f) “imposes significant additional cost and delay”).

111. Indeed, both FICALA and the rulemaking proposals seek increased opportunities for interlocutory appeal of decisions by the MDL transferee judge.

112. Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1560 (2015) (describing the “stickiness of the status quo”).

113. STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 218–19 (2017).

114. *Id.*

115. See generally Bradt, *supra* note 15.

116. Bradt, *supra* note 31, at 1716 (describing how the “drafters thought [MDL] a ‘radical’ addition to the federal procedural toolbox”); Bradt, *supra* note 27, at 841 (arguing that “MDL is now working essentially as its creators intended”).

117. Advisory Comm. on Civil Rules, *supra* note 104, at 89 (noting a committee member’s view that “[w]e have nowhere near the information we would need to have’ to work toward rules proposals”); Advisory Comm. on Civil Rules, *supra* note 101, at 477 (noting that rulemaking would be “a formidable undertaking” and that “[a] great deal of information must be gathered to support useful rulemaking”).

rulemaking comes primarily from defense interests, opening the door to this debate will inevitably introduce criticism of how MDL works from other perspectives, including the plaintiffs'. Such criticism may not come from prominent members of the MDL plaintiffs' bar, which tends more often than not to be the subject of this criticism rather than the source, but from academics who argue that powerful repeat-player plaintiffs' attorneys are part of the problem and not the solution.<sup>118</sup> Ultimately, then, having loosened the lid on Pandora's Box by studying the possibility of rulemaking for MDL, this may be the sort of project that the rule makers might shy away from simply as a matter of prudence.<sup>119</sup> Indeed, one of the main reasons why Judge Murrah and Judge Becker, at Judge Maris's encouragement, backed away from rulemaking for MDL in the 1960s was the potential difficulty and time-consuming nature of the project.<sup>120</sup> If nothing else, the repeated attempts to revise the class action rules, attempts that have resulted in relatively marginal changes, have demonstrated the difficulty of making massive changes through the rulemaking process.<sup>121</sup> In addition, the openness of the rulemaking process today compared to the 1960s, due in large part to the 1988 amendments to the Rules Enabling Act, has made that process even more difficult.<sup>122</sup>

That said, much has changed since the MDL statute was passed in 1968, and those changes may make it more likely that amendments or new federal rules will come to fruition. Two examples come to mind. First, the general climate of private enforcement is far more controversial now than it was five decades ago.<sup>123</sup> As Professor Farhang has demonstrated, in the 1960s Congress made intentional choices to deploy private attorneys to enforce the substantive law through litigation.<sup>124</sup> And Congress, led in large part by

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118. Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2012). See generally Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

119. Richard Marcus, *Shoes That Did Not Drop*, 46 MICH. J. L. REFORM 637, 637 (2013) (“[W]hat the Advisory Committee on Civil Rules does not do is, in some ways, as important as what it does. . . . Amendments do not and should not happen often. Amending the rules is not easy and should not be.”).

120. Bradt, *supra* note 27, at 873 (noting that “Judge Becker thought it important that the group sidestep the lengthy process of presenting its draft for revisions by the Civil Rules Committee, which could take years and would also leave their statute vulnerable to revision by other judges”); *id.* at 881 (describing how cutting the rule makers out of the process would “retain maximum future flexibility and ensure control by the new Judicial Panel”).

121. Marcus, *supra* note 19, at 907 (noting that while there have been amendments to Rule 23 that “generated much commentary, nobody really thought them revolutionary”).

122. Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 903–04 (1999).

123. Burbank & Farhang, *supra* note 110, at 1503 (“It was not until the political and ideological valence of private enforcement became apparent that questions about democratic values in rulemaking . . . became obvious and insistent.”).

124. SEAN FARHANG, *THE LITIGATION STATE* 4 (2010) (detailing how “the legislative choice of private litigation over administrative power emerged from conflict between ideologically antagonistic interests, channeled through America’s fragmented political institutions”).

Senator Joseph Tydings's Judiciary Subcommittee on Improvements in Judicial Machinery and prodded by a legislatively active Judicial Conference,<sup>125</sup> expanded the machinery of the federal courts in order to efficiently handle the coming litigation.<sup>126</sup> The MDL statute was central to that ethos; indeed, one of the primary goals of the drafters of the statute was to ensure that the federal courts would be able to face the wave of coming litigation.<sup>127</sup> In short, the solution to the "litigation explosion" the judges feared was more efficient judicial machinery.<sup>128</sup> The ascendancy of this ethos was, however, short-lived. Not long after the statute was passed, private enforcement became much more controversial.<sup>129</sup> As Burbank and Farhang show, the goal of political conservatives was to squash litigation, not facilitate it.<sup>130</sup> In retrospect then, the MDL statute may represent the high-water mark for zeal for procedural innovations to assist private enforcement.<sup>131</sup> Today, even the use of the courts to enforce the substantive law is a source of major controversy,<sup>132</sup> and, as the proposals for revising the MDL statute illustrate, litigation itself is seen by many as an evil to be avoided. This view appears to be shared by Chief Justice Roberts and many of those he has chosen for the Rules Committees.<sup>133</sup>

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125. Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 288 (2000) (describing the lobbying of the Judicial Conference since the 1960s).

126. Bradt, *supra* note 27, at 891 (noting that Tydings was "exceptionally interested in improving the operations of the federal courts"); *see also* Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565, 567 (describing Tydings's interest in judicial administration).

127. Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1201 (2018) (noting the CCML's belief that "a permanent mechanism was needed to handle this influx of litigation").

128. Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1270 (2017) (noting how the drafters of the MDL statute "intended it to be the primary procedural mechanism for resolving the 'explosion' of mass-tort litigation they predicted was coming").

129. 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 the use of the term "litigation explosion" to drive "a broad range of legislative and judicial reform measures designed to drive plaintiffs from the courts"); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 359 (2010) (describing the "threshold skepticism that yields an interest in excluding or discouraging claims rather than supporting and encouraging them").

130. BURBANK & FARHANG, *supra* note 113, at 3 (describing "the conservative legal movement within the Republican Party . . . to weaken the infrastructure" of private enforcement).

131. Richard Marcus, *Misgivings About American Exceptionalism: Court Access as a Zero-Sum Game* 59 (Univ. of Cal. Hastings Coll. of the Law, Research Paper No. 248, 2017), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3042903](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3042903) [<https://perma.cc/X4M2-89VZ>] ("American procedure hit its liberal high point around 1970 . . . . Since then, the changes that have occurred have generally been in a direction that could be said to retreat from the broadest possibilities of open-access procedure.").

132. *Id.* at 69 (describing the "fierce debate in the US about whether private litigation is a good way to regulate industry and protect consumers").

133. BURBANK & FARHANG, *supra* note 113, at 2 (describing the desire to "diminish or disable the infrastructure for the private enforcement of federal rights"); *id.* at 33–34, 244

Second, procedure itself has changed, as has the perception of it, at least among lawyers and scholars. For one thing, as every reader of this Symposium surely knows, trial rates continue to drop to infinitesimal levels.<sup>134</sup> As a result, despite the outsized importance of bellwether trials in MDL cases, there is no denying that all of the action occurs in pretrial proceedings.<sup>135</sup> As a result, the notion that MDL is a mere technical device to ensure efficiency in discovery can no longer be maintained, though that was never an accurate description.<sup>136</sup> In 1991, Professor Resnik once referred to the MDL statute as a “sleeper”—she was correct then, but not so now.<sup>137</sup> This attention to MDL fits with the recognition that procedural law is powerful—both in terms of who writes it and what it says.<sup>138</sup> Both the controversial process and the product of the recent discovery-rules amendments provide ample evidence that the world has changed.<sup>139</sup> So while history would suggest that major changes to the MDL statute are not in the offing, perhaps those who are so aggressively pursuing change are actually striking at exactly the right moment.

Setting current politics aside, one goal of this Article is to suggest that while much has changed, there are also aspects of the current moment that closely resemble the mid-1960s. And, indeed, there may be some wisdom to be gleaned from the experience of the creation of the MDL statute that may prove useful going forward. For instance, the rule makers may simply conclude that the insights of Becker, Murrah, and their colleagues in the 1960s continue to persuade today. Those judges understood that rigid rules would simply not do for a dynamic area of law. They believed that MDLs would come in many shapes and sizes, and judges would need flexibility in order to manage them. Strict rules would potentially hamstring judges in their ability to adapt to changing circumstances, new laws, and different kinds of litigation. As a result, the judges eschewed rules and chose instead to collect wisdom in regularly revised versions of the *Manual for Complex Litigation*.<sup>140</sup>

It is difficult to see how, if at all, changes in the last fifty years have undermined this essential insight. As MDL has grown more prominent, particularly in the wake of obstacles to mass-tort class actions, numerous

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(noting Chief Justice Roberts’s enthusiasm for procedural reform and his early career as a Reagan administration advocate for legislative retrenchment of private enforcement).

134. Marc Galanter, *The Decline of Trials in a Legalizing Society*, 51 VALPARAISO U. L. REV. 559, 565 (2017) (“Now, trials are just a bit more than one percent of civil cases.”).

135. John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 526 (2012) (describing the importance of pretrial procedure in an era of rare trials); see also Marcus, *supra* note 131, at 58 (“In place of trial, it is said, litigation has come to focus on discovery and summary judgment.”).

136. Bradt, *supra* note 27, at 840–41.

137. See *supra* note 3.

138. Burbank, *supra* note 26, at 513 (arguing that the study of procedure is about “power: who has it and who should have it both in litigation and in making the rules for litigation”).

139. Richard Marcus, *How to Steer an Ocean Liner*, 18 LEWIS & CLARK L. REV. 615, 616–17 (2014) (describing the unprecedented controversy surrounding discovery amendments).

140. See *supra* note 38 and accompanying text.

massive controversies have found their way before transferee judges. Seemingly every major controversy of national scope, including massive consumer fraud, products liability, data breaches, and the gargantuan opioid epidemic, is now the subject of an MDL.<sup>141</sup> Although the growth of MDL as the central mechanism for resolution of complex litigation in the federal courts is a primary reason it now attracts critical attention after lingering in the shadows for decades, the massive number of complicated cases that now find their way into MDL is a reason to retain flexibility rather than freeze procedure through a set of specific mandates.

It may very well be true that some of the proposals found on the wish list of reform advocates would be worthwhile in certain kinds of cases. For instance, at a certain point in products liability MDLs (a point much further down the road than sixty days), *Lone Pine* orders and case censuses may well be justified to ensure that only meritorious claims remain.<sup>142</sup> And there certainly may emerge, after additional experimentation, best practices for selecting and conducting bellwether trials.<sup>143</sup> But whether such practices are appropriate in a given case should remain within the discretion of the transferee judge, perhaps guided by a much-needed revision to the *Manual for Complex Litigation* or other sets of best practices that may develop over the coming years. Any such best practices will hopefully, like any study by the Rules Committee, be informed by empirical data and the real-world experiences of judges, litigants, and lawyers in MDL.

Indeed, wide participation in such a project is crucial. As outlined above, such widespread participation was not a hallmark of the creation of the MDL statute. The small number of plaintiffs' lawyers that the judges consulted were happy to be on board because they recognized the potential benefits of aggregation.<sup>144</sup> The defense lawyers, on the other hand, sought at first to slow the process down and later to amend the statute to make it more defense-friendly. The judges, for their part, viewed these counsel as rent seekers opposed to both enforcement of the law and the public interest. As a result, the judges shut them out of the process and impugned their motives. The lawyers, of course, did not take this lying down and managed to both engineer an ABA resolution opposing the statute and block it in Congress. It was only after the judges and lawyers met face-to-face in New York, and the judges promised the lawyers a seat at the table for the drafting of the *Manual*, that the block dissipated and the statute passed.

Half a century later, the parallels are apparent. Once again, the lawyers of the corporate-defense bar are seeking to amend the MDL statute—and to dominate the process. From their point of view, the flexibility and

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141. Cabraser & Issacharoff, *supra* note 6, at 876.

142. D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2177 (2017); Elizabeth Chamblee Burch, *Comments on the Fairness in Class Action Litigation Act of 2017*, REUTERS (Feb. 13, 2017), <http://static.reuters.com/resources/media/editorial/20170213/houseclassaction--burchletter.pdf> [<https://perma.cc/HSJ4-3KST>].

143. Alexandra D. Lahav, *A Primer on Bellwether Trials*, 59 REV. LITIG. (forthcoming 2018).

144. Bradt, *supra* note 27, at 877.

unpredictability of MDL work against them—just as they thought the pre-MDL informal aggregation of the electrical-equipment cases did. The amendments they seek limit the discretion of the MDL judge and increase oversight. The current proposals, especially FICALA, appear more like an opening bid for reform from the defense perspective than an evenhanded rethinking of current policy, and we do not know whether the claims supporting them stand up to empirical scrutiny. The reforms suggested by groups like Lawyers for Civil Justice lead only to benefits for corporate defendants, so while they may open the bidding they should only serve to start the conversation. Before making sweeping changes to the MDL process, we must study more closely how MDL works in practice—both in large and small litigations—and we must ensure that any proposed reforms are vigorously debated in light of what that study reveals. My own view is that such debate would be best undertaken as part of a multiyear process of developing a revised *Manual for Complex Litigation*, but that is an argument for another day.

So we end where we began. The push for MDL reform remains about power and control. Lawyers who perceive themselves as harmed by the control that the drafters intentionally lodged in the JPML and transferee judges want to wrest it back by restraining those judges with defense-friendly rules. As Professors Burbank and Farhang have shown us, such success through legislation or rulemaking is likely a long shot.<sup>145</sup> But their story, of course, does not end there. The project of retrenchment succeeded in the U.S. Supreme Court, where rulings are final and five votes are all that is necessary. While statutes and rules are sticky, the Court is the universal solvent. By specifically *not* using the Federal Rules, lodging power in the JPML, and writing an open-ended statute, there is precious little in the MDL statute for the Supreme Court to retrench under the guise of interpretation. But there are nevertheless possibilities for the Court to cut back on MDL's applicability. For instance, I have argued that the basis for nationwide personal jurisdiction in MDL, at least as currently articulated, is surprisingly weak, though not unconstitutional.<sup>146</sup> All told, the MDL statute is relatively difficult to undermine through interpretation—statutory or constitutional—but one thing Burbank and Farhang have taught us is that the Supreme Court is extraordinarily powerful and ideologically polarized when it comes to private enforcement, so all bets may be off if MDL finds its way into the Court's crosshairs.<sup>147</sup>

#### CONCLUSION

Despite its growth, prominence, and success, on its fiftieth anniversary the MDL statute faces a looming battle for control of its future. Legislative and rule-based proposals abound, though prospects for their success are uncertain. What is clear, however, is that the corporate-defense bar is eager

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145. See BURBANK & FARHANG, *supra* note 113, at 218–19.

146. Bradt, *supra* note 127, at 1228.

147. BURBANK & FARHANG, *supra* note 113, at 218–19.

to impose procedural requirements on the operation of MDL cases, in order to rein in unpredictable and imperialistic judges and limit unmeritorious claims that flow into the MDL with little scrutiny. If their proposed rules are adopted, it would mark a major change in the structure of MDL, which was designed to operate with no one-size-fits-all requirements, much less Federal Rules of Civil Procedure or congressionally mandated strictures. This small group of federal judges believed that flexibility 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. Moreover, the MDL statute's supporters believed they were acting in opposition to the members of the corporate-defense bar, whom they thought opposed the statute in order to both preserve litigation advantages related to costs and delays for their clients and to frustrate private enforcement of the substantive law.

These two conclusions by the drafters—that rules would be counterproductive and that the defense bar was interested more in protecting their interests than in efficient administration of justice—led the drafters to design the MDL statute to be both insulated from rule makers and run with little interference. That is, the locus of control of MDL was placed within the JPML and their handpicked MDL transferee judges. It is that central feature of MDL that is now up for grabs. Whether change is coming is uncertain. At best, statutes are sticky and procedural change tends to be, in Professor Marcus's words, evolutionary rather than revolutionary.<sup>148</sup> But much has changed since the 1960s—MDL is having its moment in the spotlight, and those in favor of change show no signs of letting up. As the process moves forward, it will be critical to both gather data and query whether the decisions that the drafters of the statute made a half century ago still have power. Otherwise, the next fifty years of MDL may wind up looking very different from the first.

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148. See Marcus, *supra* note 19, at 907–08.