Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers

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Abstract

A half century ago, class actions were controversial. Aggregation was seen as permissible only under exceptional circumstances that could justify departures from the obligations of individual voice, participation, and control of the then-dominant procedural framework. The adoption in 2009 by the American Law Institute of Principles of the Law of Aggregate Litigation *marks the normalization of group-based adjudication as well as the embrace of group-based settlements through which lawyers and judges shape binding and preclusive judgments. In its 2009 promulgation, the ALI offered two models of the "process due." One, centered on courts, requires public explanations of decisions to authorize group-based resolutions. The other imposes some regulation on out-of-court behavior yet relaxes relational constraints on lawyers by licensing them to enter into individual contracts that sign over control about mass settlements of claims to a cohort of clients and their lawyers.*

The ALI's expansive attitudes contrast to another understanding of due process, exemplified by the 2008 Supreme Court decision of Taylor v. Sturgell. *That ruling insisted that courts could not rely on the idea of "virtual" representation to use a judgment against one party to preclude another, even if the sequential plaintiffs shared the same lawyer. In this Article, I explore the his-*

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My thanks to the 2009 ALI Reporters, Samuel Issacharoff, Robert H. Klonoff, Richard A. Nagareda, and Charles Silver, for their stewardship; to Roger Trangsrud and Jay Tidmarsh, who shaped the symposium of which this Article is a part; to other Advisers who joined in sessions to consider the shape of the ALI's efforts; and to Denny Curtis and William Rubenstein for their reading of earlier drafts. Law students helped with adept research; special thanks to Jason Glick, who has shepherded this project and informed it a great deal; to Adam Grogg for his research on public rights of access to court proceedings; to Elliot Morrison for examining the history of the use of terms such as "due process" in Supreme Court caselaw; and to Joe Pace, Ruth French-Hodson, and Matthew Pearl. This work is also related to the book Judith Resnik & Dennis E. Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms (2011), and to the essays Judith Resnik, *Managerial Judges, Jeremy Bentham and the Privatization of Adjudication*, 49 Sup. Ct. L. Rev. 205 (2010), and Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 4 Law & Ethics Hum. Rts. (forthcoming 2011).

tories, differences, and benefits of these divergent approaches as they allocate authority among disputants, lawyers, judges, and thereby give meaning to the phrase "due process of law."

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I. THE CHANGING CONTOURS OF THE PROCESS DUE IN TWENTIETH- AND TWENTY-FIRST CENTURY PROCEDURE

In 2009, the American Law Institute ("ALI") adopted new principles of the law of aggregate litigation to provide for more kinds of

aggregations, in and out of court.[1] How does this codification compare to predecessor efforts to shape large-scale litigation? What concerns animated the drafters, and what do the ALI precepts teach about aspirations for courts, lawyers, due process, and regulation? These questions are the focus of this Article, and my argument is that within the ALI's ambitious project is evidence of the success of the past century's impressive procedural reforms, a primer on contemporary attitudes toward adjudication and its alternatives, and serious questions about what "due process" will and should be understood to require in the coming decades.

The procedural project of the twentieth century was opening up courthouse doors, and it was the success of that work that, in 2009, produced the *Principles of the Law of Aggregate Litigation*. Although courts and adjudication have ancient roots, their contours changed dramatically over the last century, as an array of individuals and groups gained new entitlements enforceable through litigation. Not only did women and men of all colors come to be understood as rights-holders, but the range of rights grew to encompass interactions among households, protection of employees at workplaces, prohibitions on certain forms of discriminatory conduct, respect for environmental conditions, and obligations of due care in the manufacture and distribution of products.

Substantive transformations of rights dovetailed with procedural reforms. In the second half of the twentieth century, the constitutional term "due process of law" was reread, no longer to require only conformity with prescribed rules of procedure but as an independent metric of value: that individuals have opportunities to be heard, to present evidence to sustain factual claims, and to obtain judgments by independent decisionmakers as a predicate to preclusive and binding judgments.[2] This "developmental theory of due process"[3] became, for some, a constitutional imperative, as seen in a recent Supreme Court ruling, *Taylor v. Sturgell*,[4] decided in 2008 and detailed below.[5]

In conjunction with the broadening view of constitutional obligations, national federal rules welcomed litigants through forgiving

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1 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. (2010) (approved with changes at the ALI's annual meeting, held on May 20, 2009).

2 *See generally* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986).

3 *See* J. Roland Pennock, *Introduction* to NOMOS XVIII: DUE PROCESS, at xv, xxiv (J. Roland Pennock & John W. Chapman eds., 1977).

4 Taylor v. Sturgell, 553 U.S. 880 (2008).

5 *Id.* at 891–96; *see infra* notes 324–59 and accompanying text.

pleading standards, capacious opportunities for discovery, and methods to group cases together through joinder, consolidation, class action, and multidistrict litigation ("MDL") rules. Over the course of the last hundred years, normative reconstructions of equality and fairness propelled new rights and practices that drove significant structural changes. Courts came to the fore as institutions with obligations to interact with a host of individuals—the immediate participants in disputes (litigants, witnesses, counsel) and a public audience, with their own rights to be present and to speak freely about what they observed.

Given the concomitant growth of the media and the legal academy, judges became a topic of intense scrutiny, producing a vast literature (laudatory as well as critical) about the propriety and quality of their judgments. Various metrics of success can be used and debated—in terms of whether the past decades of legal interventions have produced wise and just outcomes, are efficient, and have positive or negative externalities. Whatever positions one takes, commentators agree that during the twentieth century, the demand for adjudication rose as new individuals and groups turned to courts to seek redress.

The procedural project of the twenty-first century is figuring out what to do with all the diverse rights-holders, eligible to pursue enforcement of their entitlements in courts operating under the demands of this new theory of fair process. Three kinds of access challenges have become vivid. A first is informational: do individuals or groups recognize injuries, name them as wrongs, and claim them as rights?[6] A second is financial: resources are needed to pursue and to defend claims, and lawyers are at the center of fact and law investigation. A third is about the capacity of courts and their alternatives, which are also in need of funding, expertise, and methods to cope with large numbers of filings, some of which involve similar kinds of claims.

During the past few decades, the sense of the magnitude of the problem of access to courts intensified. One data point makes the point. As of 2009, more than 4.3 million people in civil actions in California's courts lacked lawyers.[7] Pressures from such challenges have produced a range of responses. One focus is the provision of lawyers

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6 I have paraphrased the title of the classic article by William L.F. Felstiner, Richard L. Abel, and Austin Sarat entitled *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1981).

7 *See Legislative Counsel's Digest to Assem. B. No. 590*, 2009–2010 LEG. REG. SESS. § 1(b), at 2, 4 (Cal. 2009) [hereinafter *Legislative Digest to Assem. B. No. 590*].

to individuals—either through state subsidies (predicated on constitutional right or legislative policies),[8] through donations ("pro bono"), or by governments bringing claims on behalf of individuals.[9] Skipping lawyers—by virtue of economic necessity or by choice—also lowers costs. A growing population in courts are persons who were once called "pro se" or "pro pers" and are now often described as the "self-represented."[10]

Simplification of rules by reformatting them to be more user-friendly and promotion of alternative dispute resolution ("ADR") procedures were other initiatives, refashioning the judicial role to include negotiation and settlement. In addition to these court-centered reforms, some claimants were routed elsewhere—either to public administrative agencies or to private dispute resolution providers.

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8 The effort has been nicknamed "civil *Gideon*" to invoke the landmark United States Supreme Court decision interpreting the Sixth Amendment to require lawyers for indigent defendants facing felony convictions, *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963). With the support of California's Chief Justice, Ronald M. George, and its Judicial Council, the California legislature enacted laws—the "Sargent Shriver Civil Counsel Act"—for pilot projects based in selected courts to provide appointed counsel for "low-income parties in civil matters involving critical issues affecting basic human needs." *Legislative Digest to Assem. B. No. 590*, *supra* note 7, § 68651(a). The law specifies support for "low-income persons who require legal services in civil matters involving housing-related matters, domestic violence and civil harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, or actions by a parent to obtain sole legal or physical custody of a child . . . ." *See id.* § 68651(b)(1). Child custody cases are among those to be given the "highest priorit[y]." *Id.* § 68651(b)(2).

The Chief Judge of New York State's system has likewise expressed his support for developing rights to counsel in civil cases. *See* John Eligon, *In Hearings, a Campaign for Legal Aid in Civil Cases*, N.Y. TIMES, Sept. 29, 2010, at A25; William Glaberson, *Top New York Judge Urges Greater Legal Rights for the Poor*, N.Y. TIMES, May 4, 2010, at A21. The American Bar Association has also registered its support. *See* TASK FORCE ON ACCESS TO CIVIL JUSTICE ET AL., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES (2006), http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf. That project has been supported by various sections of the American Bar Association. *See* Carolyn B. Lamm, *Finding New Ways to Help*, 95 A.B.A. J., Oct. 2009, at 9, *available at* http://www.abajournal.com/magazine/article/finding_new_ways_to_help; Brief of the American Bar Association as Amicus Curiae in Support of Appellee Siv Jonsson, Office of Pub. Advocacy v. Alaska Court Sys., No. S-12999 (Alaska Nov. 19, 2008), *available at* http://www.abanet.org/amicus/briefs/office_of_public_advocacy_v_alaska_court_system.pdf (arguing for the appointment of counsel for indigent litigants in adversarial child custody proceedings). *S*ee generally Symposium, *Access to Justice: It's Not for Everyone*, 42 LOY. L.A. L. REV. 859 (2009); Hon. Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503 (1998).

9 *See, e.g.*, Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 3, 94 Stat. 349, 350 (1980) (codified at 42 U.S.C. § 1997a (2006)); *see also* Daniel J. Meador, *Proposed Revision of Class Damage Procedures*, 65 A.B.A. J. 48, 49 (1979).

10 Bonnie Rose Hough & Justice Laurie D. Zelon, *Self-Represented Litigants: Challenges and Opportunities for Access to Justice*, 47 JUDGES' J., Summer 2008, at 30, 30.

The approach taken by the ALI in 2009 exemplifies another kind of response—that a small group of lawyers can be spread across a wider group of disputants to produce outcomes in bulk.[11] Reading the 2009 precepts, one might forget the controversies—only fifty years ago—about whether class actions were permissible and whether judges ought to be actively involved in clustering cases to press for resolutions, including by settlement. While collective actions were not novelties of the twentieth century, they were in need of special justification.[12] Before the 1960s, only "real" class actions had binding force that cut off subsequent litigation on the same issues; decisions in "spurious" and "hybrid" classes (classifications, based on ideas of unified or diffuse interests, that were slippery in application) did not preclude the filing of new lawsuits to pursue what today would be considered the "same" claim.[13]

In the 1960s, the then-new Rule 23 of the Federal Rules of Civil Procedure was understood as challenging some of the commonly held procedural presuppositions.[14] The class action rule bent the emergent due process norms by weakening rights of individual autonomy and participation so as to produce binding outcomes across a wide set of individuals. But to do so, a judge had to determine, "as soon as practicable after commencement of an action," that the proposed grouping was part of a coherently aggregated set and adequately represented.[15] Moreover, through the 1970s, judicial efforts at settlement were frowned upon: while a settlement could be a "byproduct" of pretrial conferences, it was not to be the point.[16] And managerial judges—overseeing both lawyers and cases—were not then widely accepted.[17]

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11 *See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2146–47 (2000) [hereinafter Resnik, *Money Matters*].

12 *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 226–28 (1987).

13 *See* FED. R. CIV. P. 23 advisory committee's notes, *reprinted in* 39 F.R.D. 69 (1966); Stephen C. Yeazell, *From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514, 515 (1980).

14 *See* FED. R. CIV. P. 23(a)–(c) (1966); Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 45–46; Stephen C. Yeazell, *From Group Litigation to Class Action, Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1107–20 (1980). *See generally* Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137 (2009).

15 FED. R. CIV. P. 23(c) (1966).

16 AM. BAR ASS'N, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 78 (5th ed. 1971).

17 *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982) [hereinafter Resnik, *Managerial Judges*]; Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming*

The ALI promulgation in 2009 represents the normalization of aggregation, along with the embrace of management by judges, given a great deal of discretion.[18] Under a subsection entitled "General Principles for Aggregate Proceedings," the ALI's compilation outlines four goals explained as furthering "the pursuit of justice under law."[19] Included are "promoting the efficient use of litigation resources," "enforcing substantive rights and responsibilities," "facilitating binding resolutions of civil disputes," and "facilitating accurate and just resolutions of civil disputes by trial and settlement."[20] Understanding the costs of individual pursuit of rights, the ALI offers a range of potential methods and kinds of aggregate proceedings, both in court (through adjudication of aggregate status) and outside courts (through settlement aggregates).

In furtherance of these aims, the 2009 compilation licenses lawyers to enter into one-on-one contracts with clients, permitted to authorize those lawyers to treat them as part of an aggregate and to settle (even over their own objection) if a "substantial majority" of their cohort approved an agreement.[21] Akin to the proffer of a mandatory arbitration clause in a consumer or employee contract, the ALI gives lawyers the ability, in essence, to sell both ordinary and sophisticated clients on the utility of their signing over control about the resolution of their claims to a cohort and their lawyers. The ALI does not detail methods for intragroup communications, nor require ex ante judicial oversight.[22] The ALI does call for informed consent

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the Meaning of Article III, 113 HARV. L. REV. 924, 936–43 (2000) [hereinafter Resnik, *Trial as Error*].

18 Several articles address the utility and fairness of various forms of "mass" adjudication. David Rosenberg has long espoused this approach. *See generally* Luke McCloud & David Rosenberg, *A Solution to the Choice of Law Problem of Differing State Laws in Class Actions: Average Law*, 79 GEO. WASH. L. REV. 374 (2011) (proposing application of the average of differing state laws in response to choice of law issues in class actions); *see also* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984) (suggesting the use of remedial techniques such as damage scheduling and insurance fund judgments to mitigate problems raised by group litigation in mass torts). Another analysis comes from Robert Bone, assessing the implications of efforts to extrapolate to a set from bellwether trials. *See* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 563 (1993) [hereinafter Bone, *Statistical Adjudication*]. Sampling as a method is espoused by Alexandra Lahav, Rough Justice (Aug. 9, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1562677.

19 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.03, at 37 (2010).

20 *Id.*

21 *Id.* § 3.17(b), at 262.

22 *Cf.* Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506 (2011) (calling for ways to develop intragroup coordination).

and offers some details as to its content and contours. But enforcement mechanisms to police those requirements come either from ethical oversight by the profession or from an individual with the wherewithal to find a new lawyer to bring a lawsuit, ex post, so as to challenge a settlement as unfair as applied to that particular person.

The 2009 ALI aggregation principles thus put into place a system of "procedure as contract" alongside a rule regime for aggregate adjudication predicated on a "due process procedure" model.[23] The contract model relies on lawyer-negotiated outcomes, both encouraged and enforced by the state, whereas the due process model looks to judges, authorized to determine legal liability and remedy and required to explain their judgments to the public.[24] The ALI's amalgam demonstrates that the adjudicatory system has shifted its focus toward settlement, seen as a mass public good, to be valorized and to some degree regulated.[25]

Accountability and transparency, predicated on the free flow of information, are not listed as components of the ALI's "General Principles" for "the pursuit of justice under law."[26] Yet some openness comes by way of what the ALI terms "aggregate adjudication," for judges will have to rule on whether to form aggregates, to try common issues, and to approve settlements. But the other facets of the ALI project—intent on organizing more means of aggregate settlements, incentivized by a broader swath for preclusion—do not entail dissemination of information beyond the group affected.

Ironically, from the vantage point of the 1960s controversies over class actions' incursions on participatory norms, under the precepts set forth in 2009, class actions become the high watermark of public regulatory processes. In class actions, judges enter the picture at the outset as collectives are being formed to police lawyers through the certifications of classes—which are public events, as are the class trials or (more likely) the required hearings about whether class action settlements should be approved. In contrast, the ALI's design for aggregate settlement mechanisms has neither judges, nor the public, nor

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23 *See* discussion *infra* Part IV. Additional discussion appears in Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 600–09 (2004) [hereinafter Resnik, *Procedure as Contract*].

24 *See* Resnik, *Procedure as Contract*, *supra* note 23, at 600–09.

25 *See* Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1179–80 (2009).

26 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.03, at 37 (2010). These are in contrast to "The Internal Objectives of Aggregate Proceedings" that entail advancing "common objectives," "compensating each claimant appropriately," and many others. *Id.* § 1.04, at 45.

structures by which the aggregating lawyer's collection of clients can coordinate with each other.

Thus, the ALI has not taken its insights about the centrality of aggregation for enhancing bargaining power and applied it to the lawyer-client relationship. The 2009 principles have responded to the three resource challenges—information, funding of disputants, and support of institutional arrangements to generate binding outcomes—with limited mechanisms to force information into the public realm about the activities of the circle of lawyers, judges, and disputants given authority to create binding resolutions.

The ALI's approach is not sui generis but is rather (like its predecessor, the 1960s class action rule revisions) part of political and legal gestalts.[27] The ALI effort fits within a larger set of procedural reforms that similarly empower professionals and aim to dispose of claims by managerial means in court, by devolving to administrative agencies, and by outsourcing to private entities.

Like these other reforms, the ALI project gives narrow berth to one of the central normative utilities of courts: contributions to the public sphere. Instead, the ALI project builds and reflects a world of judges, lawyers, private claimants, a few objectors, appointees, and the like. But a public face for their interactions is not in focus. The 2009 ALI promulgation adverts, on occasion, to the voice of claimants and respondents, but it does not address how to nurture the public's role as an audience that, under the model of due process procedure, has a democratic function of divesting power from both disputants and judges through observation, engagement, and critique of the legal rules governing the rights asserted. Not only are claimants left with relatively little recourse when they disagree with their representatives but, as I detail below, by reconfiguring courts as less open institutions and redefining what process law requires to be "due," the ALI undervalues attributes of adjudication that, during the twentieth century, legitimated the expansion of courts' authority.

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27 *Cf.* Amy J. Cohen, *Revisiting* Against Settlement*: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1163–66 (2009) (making a parallel point when providing an overview of the debates during the 1970s that were in support and in opposition to court-based settlement efforts and underscoring the historically contingent understanding of whether settlement modalities are collective political enabling efforts or privatizing diffusing ones).

II. Reconceiving Adjudication's Reach and Reconceptualizing Courts

An overview of the ideology and practices of litigation developed during the past century is required to provide a baseline against which to consider what is (and is not) changing under the 2009 ALI's aggregation approach. As noted at the outset, during the twentieth century, political and social movements brought about truly radical change: an array of humanity—persons who had not heretofore been understood as juridical persons—gained rights of access to courts. More than that: these movements helped to shape new kinds of claims, and the institutions to which they came—courts—changed in their wake.

A. Inventing the Traditions of Courts

I use the federal courts of the United States as my example because they provide a readily accessible and well-documented system—even as the federal courts entertain a small fraction (under three percent) of cases filed in the United States.[28] In 1901, fewer than one hundred federal judges populated the lower courts; a single district judge worked in states as large as Indiana and Maryland.[29] In that era, many persons (including some of us writing in this symposium) had no plausible way to go to court, and none of us had the array of rights currently recognized.

A reminder of a few landmarks of the twentieth century—of which the promulgation in the late 1930s of the Federal Rules of Civil Procedure is but one—is in order. A host of new rules, statutes, and practices permitted use of the federal courts (in particular) and courts (more generally) for regulatory enforcement of rights. Federal legislation not only gave us the Civil Rights Act of 1964,[30] the Fair Housing Act,[31] the Equal Pay Act,[32] and other statutes aimed at shifting opportunity sets, but also a raft of consumer and environmental legislation

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28 The expansion of adjudication over three centuries as state, federal, and transnational courts develop is mapped in Judith Resnik & Dennis E. Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms 134–287 (2011).

29 *See, e.g.*, Table of Authorized Judgeships, USCourts.gov, http://www.uscourts.gov/JudgesAndJudgeships/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/allauth.pdf (last visited Nov. 17, 2010) [hereinafter Table of Authorized Judgeships]. The table also listed one Article I judgeship as of that date. *Id.*; *see also* 200 F., at v–vii (1913) (listing the district judges and their assignments).

30 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 5, 20, and 42 U.S.C.).

31 Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73 (1968).

32 Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

including the Truth in Lending Act,[33] the Clean Air Act,[34] the Endangered Species Act,[35] the Clean Water Act,[36] Superfund cleanups,[37] and the Employee Retirement Income Security Act.[38]

Substance and procedure, rights and remedies, and roles for courts were interrelated aspects of conceptual packages, both then and now. What I want to underscore is that such legislation did not only create "rights" in both the formalistic and practical senses. Rather, the changes generated a different understanding of the work of courts, the prospects for lawyers, and the obligations of judges. Discussions of the 2009 ALI's aggregation procedures consider whether they conform to or depart from due process "traditions."[39] My argument is that the "traditional" or "conventional" model of adjudication is neither as deeply rooted nor as long-lived as is often assumed. Rather, this set of practices (sketched below) is what David Cannadine has described in another context as the "invention of tradition"[40]—activities that come to be seen as inherited and that feel entrenched but are relatively newly crafted. We are the heirs to what J. Roland Pennock termed a "developmental theory of due process,"[41] just as we are also progenitors of the next stage of that development.

1. Independent Judges

The idea that judges ought to be free from certain types of executive control is a modern one. Pre-Enlightenment political theory presumed that judicial officers, like other state officials, were to be

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33 Truth in Lending Act, Pub L. No. 90-321, 82 Stat. 146 (1968).

34 Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401–7671 (2006)).

35 Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884.

36 Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251–1387 (2006)); Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

37 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767.

38 Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5, 18, 26, 29, and 42 U.S.C.).

39 *See, e.g.*, David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Indivisible" Remedies*, 79 GEO. WASH. L. REV. 542 (2011); Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577 (2011); Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324 (2011) [hereinafter Richard Marcus, *Reviving Judicial Gatekeeping*].

40 David Cannadine, *The Context, Performance and Meaning of Ritual: The British Monarchy and the 'Invention of Tradition', c. 1820–1977*, *in* THE INVENTION OF TRADITION 101, 101–64 (Eric Hobsbawm & Terence Ranger eds., 1983).

41 Pennock, *supra* note 3, at xv, xxiv.

obedient servants and subjects of kings. What Robert Cover termed "folktales of justice" were the unusual stories of judges "speaking truth to power" and insisting on the justice of their views in contradiction to kingly edicts.[42] During the last three centuries, however, such self-authorizing acts became part of the judicial role through political insistence on degrees of separated powers and insulated authority.

In the list of grievances set forth in the 1776 Declaration of Independence, the American colonists charged King George III with having "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[43] American revolutionaries had an alternative model, harkening back to the very government from which they sought to separate. Although judges in the colonies served at the pleasure of the King, by the early eighteenth century, English judges of certain ranks had obtained protections against the King. The 1701 Act of Settlement provided that English judges held office "during good behavior," subject to discharge only upon a vote of both houses of Parliament.[44]

That sentiment was embraced and fortified on this side of the Atlantic. The 1780 Constitution of Massachusetts insisted:

> It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.[45]

To implement these rights, judges were to be given tenured positions and "honorable salaries."[46] In addition, early constitutions afforded judges another form of protection—separation of powers, often credited to Montesquieu's *The Spirit of Laws*, first published in

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42 *See* Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 189–90 (1985).

43 THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

44 Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.) (providing that "Judges' Commissions be made Quam diu se bene Gesserint ["as long as he shall behave himself well"], and their Salaries ascertained and established but upon the Address of both Houses of Parliament it may be lawful to remove them").

45 MASS. CONST. of 1780, pt. 1, art. XXIX, *reprinted in* 1 FRANKLIN B. HOUGH, AMERICAN CONSTITUTIONS: COMPRISING THE CONSTITUTION OF EACH STATE IN THE UNION, AND OF THE UNITED STATES 619, 626 (Albany, Weed, Parsons & Co. 1872). John Adams was the primary drafter. 1 HOUGH, *supra*, at 616. New Hampshire used similar terms, calling for "impartial" judges. N.H. CONST. of 1784, pt. 1, art. XXXV, *reprinted in* SUSAN E. MARSHALL, THE NEW HAMPSHIRE STATE CONSTITUTION 227, 232 (2004).

46 MASS. CONST. of 1780, pt. 1, art. XXIX, *reprinted in* 1 HOUGH, *supra* note 45, at 626.

1748.[47] Illustrative implementation can be found in the 1776 Constitution of North Carolina, providing that the "legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other."[48] These precepts became a pillar of the 1789 United States Constitution, outlining the government's three branches (legislative, executive, and judicial) and according specific protections to judges.[49]

2. Open Proceedings

On this side of the Atlantic Ocean, the roots of a right of public access to judicial proceedings can be traced back at least to the Fundamental Laws of West New Jersey of 1676,[50] which provided that,

> in all publick courts of justice for tryals of causes . . . any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner . . . .[51]

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47 1 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (Thomas Nugent trans., Colonial Press rev. ed. 1900) (1748). Montesquieu warned:

> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Id. at 152.

48 N.C. CONST. of 1776, art. IV, *reprinted in* 2 BEN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1409, 1409 (2d ed. 2001). Many eighteenth-century state constitutions are reproduced at Yale Law Sch., *The Avalon Project*, http://avalon.law.yale.edu/ (last visited Nov. 17, 2010).

49 U.S. CONST. art. III, § 1, cl. 2.

50 CHARTER OR FUNDAMENTAL LAWS, OF WEST NEW JERSEY, AGREED UPON (1676), *available at* http://avalon.law.yale.edu/17th_century/nj05.asp.

51 *Id.* ch. XXIII. The authorship of the text is not clear. The document governed an area on the Eastern Seaboard that is now within the State of New Jersey. In Dutch possession in 1655, that land thereafter came under English control. In 1664, Charles II of England granted his brother, James, Duke of York (who later became James II, King of England), an extensive American territory encompassing the area; the Duke executed deeds of lease and release to Lord John Berkeley and Sir George Carteret. *See* EDWIN P. TANNER, THE PROVINCE OF NEW JERSEY, 1664–1738, at 2–3 (1908); *see also* THE DUKE OF YORK'S RELEASE TO JOHN LORD BERKELEY, AND SIR GEORGE CARTERET (June 24, 1664), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2533–35 (William S. Hein & Co. 2002) (Frances Newton Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS].

Of course, such customs of open processes are longstanding; Roman law had conceived of criminal proceedings as "*res publicae*"—public events. But the obligation to proceed before the public eye is of more recent vintage and intertwined with the republican idea that the state derived legitimacy not from divinity but from relationships with a body politic.

The quest for legitimacy through publicity, coupled with common law traditions of jury trials and rights to confront adverse witnesses, became engines of open court proceedings in America. The 1792 Delaware Constitution proclaimed that "all courts shall be open."[52] By the middle of the nineteenth century, many states had followed suit.[53] As of 2008, the words "all courts shall be open" could be found in

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52 DEL. CONST. of 1792, art. I, § 9, *reprinted in* 1 POORE, *supra* note 48, at 279 ("All courts shall be open; and every man, for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense . . . ."). That was Delaware's second constitution. *Accord* KY. CONST. of 1792, art. XII, *reprinted in* 1 POORE, *supra* note 48, at 647, 655 ("[A]ll courts shall be open."); VT. CONST. of 1777, ch. II, § XXIII, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 51, at 3746 ("All courts shall be open, and justice shall be impartially administered, without corruption or unnecessary delay; all their officers shall be paid an adequate, but moderate, compensation for their services; and if any officer shall take greater or other fees than the laws allow him, either directly or indirectly, it shall ever after disqualify him from holding any office in this State.").

53 The phrase "all courts shall be open" appears verbatim in each of these state constitutions. *See, e.g.*, ALA. CONST. of 1819, art. I, § 14, *reprinted in* 1 POORE, *supra* note 48, at 32, 33; CONN. CONST. of 1818, art. I, § 12, *reprinted in* 1 POORE, *supra* note 48, at 258, 259; FLA. CONST. of 1838, art. I, § 9, *reprinted in* 1 POORE, *supra* note 48, at 317, 317; IND. CONST. of 1816, art. I, § 11, *reprinted in* 1 POORE, *supra* note 48, at 499, 500; KAN. CONST. of 1855, art. I, § 16, *reprinted in* 1 POORE, *supra* note 48, at 580, 582; LA. CONST. of 1861, art. 110, *reprinted in* 1 POORE, *supra* note 48, at 739, 750; MISS. CONST. of 1868, art. I, § 28, *reprinted in* 1 HOUGH, *supra* note 45, at 745, 749; NEB. CONST. of 1867, art. I, § 9, *reprinted in* 1 HOUGH, *supra* note 45, at 824, 827; N.C. CONST. of 1868, art. I, § 35, *reprinted in* 2 HOUGH, *supra* note 45, at 110, 115; OHIO CONST. of 1850–1851, art. I, § 16, *reprinted in* 2 HOUGH, *supra* note 45, at 152, 157; PA. CONST. of 1838, art. IX, para. 11, *reprinted in* 2 HOUGH, *supra* note 45, at 222, 237; TENN. CONST. of 1870, art. I, § 17, *reprinted in* 2 HOUGH, *supra* note 45, at 321, 326; TEX. CONST. of 1869, art. I, § 11, *reprinted in* 2 HOUGH, *supra* note 45, at 356, 360. *See generally* 2 HOUGH, *supra* note 45, at 580–81 (frequently using the phrase "all courts shall be open" when discussing the right to justice in American constitutions). Other nineteenth-century state constitutions provided for public access with somewhat different wording. *See, e.g.*, MO. CONST. of 1865, art. I, para. 15, *reprinted in* 1 HOUGH, *supra* note 45, at 779, 783 ("That courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property, or character . . . ."); OR. CONST. of 1857, art. I, § 10, *reprinted in* 2 HOUGH, *supra* note 45, at 186, 189 ("No court shall be secret; but justice shall be administered openly and without purchase, completely and without delay . . . ."); S.C. CONST. of 1868, art. I, § 15, *reprinted in* 2 HOUGH, *supra* note 45, at 276, 281 ("All courts shall be public, and every person, for any injury that he may receive in his lands, goods, persons or reputation, shall have remedy by due course of law and justice administered without unnecessary delay.").

nineteen state constitutions.[54] Further, jury rights, guaranteed by the

54 *See* ALA. CONST. art. I, § 13 ("That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."); ARIZ. CONST. art. VI, § 2 ("The court shall be open at all times, except on nonjudicial days, for the transaction of business."); CONN. CONST. art. I, § 10 ("All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."); DEL. CONST. art. I, § 9 ("All courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense."); FLA. CONST. art. I, § 21 ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."); IND. CONST. art. 1, § 12 ("All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."); KY. CONST. § 14 ("All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."); LA. CONST. art. I, § 22 ("All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."); MISS. CONST. art. 3, § 24 ("All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."); NEB. CONST. art. I, § 13 ("All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay, except that the Legislature may provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution which are entered into voluntarily and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract."); N.C. CONST. art. I, § 18 ("All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."); N.D. CONST. art. I, § 9 ("All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay."); OHIO CONST. art. I, § 16 ("All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."); PA. CONST. art. I, § 11 ("All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."); S.D. CONST. art. VI, § 20 ("All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay."); TENN. CONST. art. I, § 17 ("That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay."); TEX. CONST. art. I, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."); UTAH CONST. art. I, § 11 ("All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a

original states' constitutions,[55] worked in concert to open courts to the public.

The United States Constitution of 1789 included no such generic right to "open courts." That phrase is found only in an infrequently read section on treason: "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[56] Regular criminal defendants were protected in the original Constitution by the right to a jury trial;[57] the Sixth Amendment, added in 1791, gave additional entitlements to a "speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[58] The Seventh Amendment, likewise part of the Bill of Rights, continued English

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party."); WYO. CONST. art. 1, § 8 ("All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay. Suits may be brought against the state in such manner and in such courts as the legislature may by law direct.").

55 *See* Duncan v. Louisiana, 391 U.S. 145, 153 (1968) ("The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases."); *see, e.g.*, CONN. CONST. of 1818, art. 1, § 9, *available at* http://www.sots.ct.gov/sots/cwp/view.asp?a=3188&q=392280 ("In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to demand the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his favour; and in all prosecutions by indictment or information, a speedy public trial by an impartial jury."); GA. CONST. of 1777, art. LXI, *reprinted in* 1 POORE, *supra* note 48, at 377, 383 ("Freedom of the press and trial by jury to remain inviolate forever."); MASS. CONST. of 1780, pt. 1, art. XII ("And the Legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."); N.C. CONST. of 1776, A Declaration of Rights, art. IX, *reprinted in* 2 POORE, *supra* note 48, at 1409, 1409 ("That no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used.").

56 U.S. CONST. art. III, § 3, cl. 1.

57 "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." *Id.* art. III, § 2, cl. 3.

58 *Id.* amend. VI. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id. See SUSAN N. HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2006). The phrase "speedy public trial, by an impartial jury" can also be found in the PA. CONST. of 1776, art. IX.

Criticism of the theoretical framing of the public trial as a "right" and arguments that it both imposes burdens and has no necessary effect on fairness can be found in Joseph Jaconelli, *Rights Theories and Public Trial*, 14 J. APPLIED PHIL. 169 (1997). Celebration of the "publicness" of law and its proceedings comes from Benedict Kingsbury, *International Law as Inter-Public Law*,

common law traditions through its preservation of rights to juries in civil cases "where the value in controversy shall exceed twenty dollars."[59]

These guarantees, coupled with First Amendment and Due Process Clause rights, have since been interpreted to ensure public rights of audience for both civil and criminal trials, as well as access to evidentiary pretrial hearings and to court records.[60] Further, the idea of open procedures for government was not limited to courts. Sections of the United States Constitution, for example, also imposed public disclosure obligations on Congress, requiring it to "keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy."[61] Several early state constitutions also proclaimed that legislatures should be "open."[62]

The practices of openness were somewhat more limited in equity. Common law procedures, predicated on jury trial rights, entailed public processes. In contrast, in Europe, on the equity side of the docket, in which English and Continental procedures both drew on "Romancanon tradition,"[63] masters or judges could take testimony outside the

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in NOMOS XLIX: MORAL UNIVERSALISM AND PLURALISM 167 (Henry S. Richardson & Melissa S. Williams eds., 2009).

59 U.S. CONST. amend. VII.

60 *See, e.g.*, Press-Enter. Co. v. Superior Court, 478 U.S. 1, 10 (1986) (applying right of access to preliminary hearings); Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508 (1984) (finding guarantee of open public proceedings to govern voir dire); Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 96 (2d Cir. 2004) (concluding that "docket sheets enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them" and explaining the utility of such an approach); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 358 (Cal. 1999) (holding that the First Amendment protects access to civil trial proceedings). These cases build on the United States Supreme Court decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580–81 (1980), which held that criminal trials must be open to the public unless an overriding, compelling interest is demonstrated. *See* Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987).

61 U.S. CONST. art. I, § 5, cl. 3.

62 *See, e.g.*, VT. CONST. of 1777, ch. II, § XII, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 51, at 3744 ("The doors of the house in which the representatives of the freemen of this State, shall sit, in General Assembly, shall be and remain open for the admission of all persons, who behave decently, except only, when the welfare of this State may require the doors to be shut."); *see also* N.Y. CONST. of 1777, art. XV ("That the doors, both of the senate and assembly, shall at all times be kept open to all persons, except when the welfare of the State shall require their debates to be kept secret. And the journals of all their proceedings shall be kept in the manner heretofore accustomed by the general assembly of the colony of New York; and except such parts as they shall, as aforesaid, respectively determine not to make public be from day to day (if the business of the legislature will permit) published.").

63 Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1193 (2005).

hearing of the parties and then were authorized to keep it "secret until all the witnesses had been examined."[64] Some of those practices could be found on this side of the Atlantic. Yet the new Americans were distrustful of royal judges and more generally embraced the common law tradition—albeit with some resurgence of "out-of-court, ex parte examination" for some decades during the nineteenth century.[65]

3. Procedure as Fairness

From a twenty-first-century perspective, the attributes of independent judges and open courts that I have outlined could well be termed "traditional" for the United States. But two other facets of what might be assumed as also within the "tradition"—that due process is an independent metric assessing the quality of the "fairness" of procedures and that each person is a full juridical human—are artifacts of the twentieth century. Of course, due process has a long history. Charles Miller traced its genealogy from phrases like "law of the land" and "*process de ley*" in English and French law of the thirteenth and fourteenth centuries[66] to the term "due process of law" that became ensconced both in the Fifth Amendment of the eighteenth-century Bill of Rights[67] and in the nineteenth-century Fourteenth Amendment.[68]

The word "fairness"—that today may seem to be hard-wired to constitutional interpretation of due process—does not appear in the constitutional text and was not a topic of sustained discussion by the United States Supreme Court either before the Civil War or for many decades thereafter.[69] When discussions did begin about "fair" proce-

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64 *Id.* at 1201.

65 *Id.* at 1204–06. Sometimes "masters" took evidence. *Id.* at 1208–10, 1218–29. By 1842, the Federal Equity Rules codified the authority to take oral evidence before the parties. *Id.* at 1229. By 1893, the courts, sitting in equity, were authorized to take evidence "in open court." *Id.* at 1232 (citing FED. R. EQ. 67 (1893) (as amended by the Supreme Court in 149 U.S. 972, 972 (1892)); *see also* FED. R. EQ. 46 (1912); Kessler, *supra* note 63, at 1243.

66 *See* Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, *in* NOMOS XVIII: DUE PROCESS, *supra* note 3, at 3, 4–5.

67 U.S. CONST. amend. V. The Fifth Amendment also includes rights against government in the form of indictments by grand juries (rather than a prosecutor alone) for alleged felonies, plus prohibitions on being placed "twice . . . in jeopardy." *Id.* In addition, under the Fifth Amendment, no person's "private property" can "be taken for public use, without just compensation." *Id.*

68 *Id.* amend. XIV, § 2. ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

69 One imperfect metric is the number of times the Supreme Court has used words and phrases over time. (Given that caseloads and decisions rendered vary a great deal, a reference

dures, what was generally meant by "fair" was that the procedures provided comported with those prescribed,[70] an approach akin to that taken in England.[71] For example, in an 1878 decision about the legality of a state tax assessment, the Supreme Court concluded that a claimed deprivation of property could be lawful if a person had been provided with "a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."[72] Following regular procedures, required by law, was what due process then entailed.

During the twentieth century, however, a new term of art—the "opportunity to be heard"—gained prominence as members of the United States Supreme Court debated what kinds of government decisions required "due process" and what quantum of process was "due."

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count is only suggestive of the role that terms play in legal discourse.) A data search of all United States Supreme Court cases between 1789 and 2008 found the word "fair" or "fairness" relatively infrequently in Supreme Court opinions until the addition of the Fourteenth Amendment in 1868, after which usage expanded. Some 428 opinions used "fair" or "fairness" during the first two-thirds of the nineteenth century; more than double that number invoked those words during the last third of the century. Thereafter, usage generally increased steadily each decade before taking a large jump in the 1970s. Between 1981 and 1990, the Supreme Court used those words in 930 cases, followed by a decline to 521 cases between 1991 and 2000.

70 *See, e.g.*, Thirty Hogsheads of Sugar v. Boyle, 13 U.S. 191, 198 (1815) (declining to reexamine the "justice or fairness of the rules established in the British Courts," given that they were "decided on ancient principles" and were not "very unreasonable" or "founded on a construction rejected by other nations"); Davy's Ex'rs v. Faw, 11 U.S. 171, 174 (1812) ("That judges . . . ought to be fair, and their proceedings regular, so as to give the parties an opportunity to be heard . . . are propositions not to be controverted.").

71 *See generally* Ian Langford, Fair Trial*: The History of an Idea*, 8 J. HUM. RTS. 37 (2009). Through searching a range of sources, Langford concluded that the word "fair" moved from a reference to how one looked (fair as in "beautiful") to, in the context of law, regularized, as in "free from blemish." *Id.* at 38, 40, 42. The term "fair trial" was not common until the nineteenth century. *Id.* at 44.

72 Davidson v. New Orleans, 96 U.S. 97, 105 (1878). As the complainant had had a "full and fair hearing," no violation of due process existed. *Id.* at 105–06. The term "fair trial" or "fair" referring to a proceeding can be found in a few other cases of that era. *See, e.g.*, Kohl v. United States, 91 U.S. 367, 378 (1876) (Field, J., dissenting) (finding that for proceedings involving eminent domain, what is "required is that the proceeding shall be conducted in some fair and just mode, . . . opportunity being afforded to parties interested to present evidence as to the value of the property, and to be heard thereon"). Similarly, a well-known nineteenth-century case defined due process as "the application of the law as it exists in the fair and regular course of administrative procedure." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 127 (1873) (Swayne, J., dissenting). This decision is viewed as a turning point in limiting the ability to dismantle segregation through enforcement of the Privileges or Immunities Clause of the Fourteenth Amendment. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1259 (1992); Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 71, 73 (1989); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 342 (1949); *cf.* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 686–87 (2000).

The question was no longer only whether a government entity had conformed to a set of extant procedures. Rather, the doctrine shifted to encompass a role for the court to assess the quality and kind of procedural opportunities prescribed.[73] By the 1970s, the Supreme Court developed both its understanding that various forms of statutory "entitlements," such as government benefits, tenured jobs, and licenses, were kinds of property and, therefore, that process was due as a predicate to their deprivation.[74] Moreover, while ceding a good deal of the definition of entitlements to positive law, the Court took it upon itself to define what such "fair" hearings entailed.

Phrases such as "an opportunity to be heard" and "fundamental fairness," as well as the term "fairness," became fixtures of the jurisprudence, appearing in hundreds of decisions rendered after the 1960s.[75] Occasionally invoking the ancient Latin maxim *audi alterem*

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73 When imposing substantive content to the process due in the early twentieth century, the Court relied on a formulation that the "essential elements of due process of law" were "notice and opportunity to defend." Simon v. Craft, 182 U.S. 427, 436 (1901); *see also* Louisville & Nashville R.R. Co. v. Schmidt, 177 U.S. 230, 236 (1900). Within a few decades thereafter, the Supreme Court settled on the description that the "fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914); *see also* Dusenbery v. United States, 534 U.S. 161, 173 (2002) (quoting *Grannis*, 234 U.S. at 394); Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (quoting *Grannis*, 234 U.S. at 394); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (quoting *Grannis*, 234 U.S. at 394).

Another line of analysis focuses on the historical lineage of "rights of redress," and looks to law both before and after the Fourteenth Amendment to analyze how "a law for the redress of private wrongs" has long been a feature of Anglo-American law. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005); *see also* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

74 *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 739–42 (1964). In the landmark decision of *Goldberg v. Kelly*, 397 U.S. 254, the United States Supreme Court applied these due process obligations to administrative agencies determining whether to terminate welfare recipients' benefits. *Id.* at 266–67. Requiring due process did not, however, require that all such hearings be held prior to a deprivation or the provision of in-person oral proceedings rather than paper exchanges.

75 As discussed earlier, the Court's use of "fair" and "fairness" increased dramatically after the Civil War and became more frequent during the twentieth century. *See supra* notes 69–70 and accompanying text. In a search of Supreme Court cases through 2008, the phrase "opportunity to be heard" also gained currency after the Civil War and the Fourteenth Amendment, with 554 of the 556 opinions using the phrase issued from 1866, when the Amendment was proposed. In contrast, the Court did not turn to the phrase "fundamental fairness" until the 1940s, when concluding that the "denial of due process" in a criminal trial "is the failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236 (1941). After the 1960s, "fundamental fairness" was a more frequent referent, with 212 of 235 opinions invoking the phrase issued since 1960.

Tracking the number of uses does not capture the changing understanding of the content of "fairness." By the 1970s, the Supreme Court had retreated from its *Goldberg* approach through limiting constructions of what the constitutional words "property" and "liberty" meant, thereby

partem ("hear the other side"), the Court imposed rules of conduct on judges, prohibited from "ex parte" (or one-sided) contacts with disputants.[76] Statutes and ethical rules disqualified judges who gained information outside the "hearing" (via papers or orally) of an opponent. In short, in the United States (as well as abroad[77]), social movements and legal ideologies imbued "fairness" with a meaning that entailed assessing whether the state had properly discharged its obligations to accord disputants equal and dignified treatment.

4. Equality in Courts

Due process theory is interlaced with developments in equality theory. The precept that *all* persons are endowed with dignity and equally entitled to access to the various roles in courts—lawyers, judges, jurors, litigants, witnesses—is barely sixty years old. Recall that, in the nineteenth century, a Canadian provision permitted only "qualified persons" to practice law and to be members of the Senate.[78] In 1905, Mabel Penery French said she was so qualified, but a Canadian court ruled otherwise, that the term "persons" did not include women.[79] Legislation and eventually the Judicial Committee of the Privy Council reversed such judgments, and women started to trickle into the bar.[80] That today the Canadian Supreme Court's Chief Justice is a woman (joined by other women Justices on that bench) and that the United States Supreme Court includes women and men also diverse on other demographics is not happenstance but purposeful, the result of political and legal battles over the meaning of equality, the right to work in all professions, and the function of courts.

In 1934, Florence Allen was the first woman to serve as a federal judge in the United States; in 1937, William Hastie was the first Afri-

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reducing the occasions on which process was due. Further, even when entitlements to due process attached, the Court determined that more minimal kinds of decisionmaking procedures sufficed. *See* Mathews v. Eldridge, 424 U.S. 319, 349 (1976); *see also* Judith Resnik, *The Story of* Goldberg*: Why This Case Is Our Shorthand*, *in* CIVIL PROCEDURE STORIES 455, 473 (Kevin M. Clermont ed., 2d ed. 2008).

76 Caritativo v. California, 357 U.S. 549, 558 (1958) (Frankfurter, J., dissenting). The majority opinion was per curiam; the dissent was joined by Justices Douglas and Brennan; Justice Harlan filed a separate concurrence, *id.* at 550–52 (Harlan, J., concurring).

77 *See* Geoffrey Marshall, *Due Process in England*, *in* NOMOS XVIII: DUE PROCESS, *supra* note 3, at 69, 70; *see also* Langford, *supra* note 71, at 44–48. Langford used the development of theories of fairness as an example of a human rights norm, and then argued that one ought not conceive of such norms as universal or atemporal but as culturally embedded. *Id.* at 38.

78 *See* HEATHER MACIVOR, WOMEN AND POLITICS IN CANADA 78 (1996).

79 *See id.* at 78–79.

80 *See* Edwards v. Canada (1930) A.C. 124 (P.C.); Baroness Hale of Richmond, *The House of Lords and Women's Rights or Am I Really a Law Lord?*, 25 LEGAL STUD. 72 (2005).

can-American.[81] Thurgood Marshall joined the Supreme Court in 1967, and Sandra Day O'Connor was the Court's first female Justice, in 1981.[82] Courts themselves gained awareness of their own potential for bias through commissioning of task forces on gender, race, ethnicity, and religion that reported on the experiences of litigants, lawyers, and judges.[83] As a result, canons of ethics and doctrine changed, shaping rules mandating equal treatment of participants—be they litigants, witnesses, lawyers, judges, or staff.[84] Even some judgments changed, upon demonstrable "bias" by jurists in their behavior towards litigants or their lawyers.[85]

The result of the twentieth-century efforts can be found in twenty-first-century efforts to cope with the numbers of persons asserting rights and unable to afford to do so. In 2010, California enacted a pilot effort on the right to counsel in civil cases. The imperative to do so came from the state's commitment to "equal justice under the law" that was predicated on two principles—that "substantive protections and obligations of the law shall be applied equally to everyone, no matter how high or low their station in life," and that such "true equality before the law will be thwarted if people cannot invoke the laws for their protection."[86] All branches of the (often contentious) California government came together, as they agreed that access to justice was required.

This rapid overview aims to make plain that, while familiar, these four facets of courts—independent judges, public rights of observation, fair hearings entailing limits on what judges could know and how they could learn it, and the equality of all persons to participate in all roles of courts—are not ancient nor heretofore assumed to be intrinsic to courts. The term "reflexivity" from social theorist Pierre Bourdieu[87] is apt here to capture that the practices have come to de-

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81 *Milestones of Judicial Service*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/judges_milestones.html (last visited June 28, 2010). Hastie was initially appointed to serve in the Virgin Islands; in 1950, he became an appellate judge on the Court of Appeals for the Third Circuit. *Id.*

82 *Id.*

83 *See* Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952, 953 (1996) [hereinafter Resnik, *Asking About Gender in Courts*]; Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L.J. 237, 258–64 (1989).

84 *See* Vicki C. Jackson, *What Judges Can Learn from Gender Bias Task Force Studies*, 81 JUDICATURE 15, 15–20 (1997); Resnik, *Asking About Gender in Courts*, *supra* note 83, at 953; Schafran, *supra* note 83, at 258–64.

85 *See, e.g.*, Catchpole v. Brannon, 42 Cal. Rptr. 2d 440, 446–54 (Ct. App. 1995).

86 *Legislative Digest to Assem. B. No. 590*, *supra* note 7, § 1(f).

87 *See* PIERRE BOURDIEU & LOÏC J. D. WACQUANT, AN INVITATION TO REFLEXIVE SOCI-

fine an institution as a court. Moreover, that understanding has moved beyond the arena occupied by lawyers and judges and has come to be shared by nonprofessionals as well. Coupled with Lon Fuller's injunction for rationality and reasoning, adjudication has taken on its distinctive character as a discrete activity and a specific kind of "social ordering."[88] Courts have come to be seen not only as instruments of social order and economic stability, but also as fundamentally embodying practices respectful of all persons' dignity and materializing forms of public discourse essential to deliberative democracies.

B. Aggregation's Predicates: Access and Equipage

Both the need for and the perceived desirability of aggregation is embedded in these efforts that reconfigured courts. The core ideas of the 1966 version of Rule 23 are access and equality. The dryness of the text may make this reading less than vivid. Yet the memoranda and debate that produced the 1966 revisions, as well as explanations thereafter, make plain that the Rulemakers believed they needed to provide access to court for those lacking either the knowledge of rights or the resources to pursue them. As Benjamin Kaplan, the Harvard Law School professor who served as Reporter for the 1960s Rule revisions, later explained, the class action rule "was not neutral: it did not escape attention at the time that it would open the way to the assertion of many, many claims that otherwise would not be pressed; so the rule would stick in the throats of establishment defendants."[89]

In terms of those claims "that otherwise would not be pressed,"[90] the explanatory Notes written by the drafters, as well as some of their published commentary and archival exchanges, focused on two sets of claimants.[91] Plaintiffs in school desegregation cases were one concern;

OLOGY 36–46, 235–36 (1992); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 838 (Richard Terdiman trans., 1987); Pierre Bourdieu, *Participant Objectivation*, 9 J. ROYAL ANTHROPOLOGICAL INST. 281, 284–85 (2003).

88 Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363 (1978) (a posthumously published essay based on materials written in the late 1950s).

89 Benjamin Kaplan, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2126–27 (1989). Thanks to Stephen Subrin for pointing me to this commentary.

90 *Id.* at 2127.

91 One can learn about the goals of the drafters from the minutes of the 1960s Rulemaking committee, the articles written by Benjamin Kaplan and Charles Alan Wright, and the Rulemakers' correspondence. I detail the archival sources in Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 6–15 (1991) [hereinafter Resnik, *From "Cases" to "Litigation"*]. A good deal of the published information comes from Benjamin Kaplan, *Continu-*

after children graduated, no plaintiff remained to pursue enforcement.[92] By creating one kind of class action for plaintiffs in need of declaratory or injunctive relief (what today we call "23(b)(2) classes") and another for plaintiffs identified as subjected to common treatment by a defendant (known as "23(b)(1) classes"), the Rule drafters enabled courts to oversee implementation of injunctions during the decades required to bring about change. The 1966 reforms that empowered federal judges to deal with school desegregation through class action lawsuits paved the way for parallel structural remedies for violations of rights in jails, prisons, and mental hospitals, and by social welfare agencies.

A second group of claimants whom the drafters sought to help was consumers with low-value claims. As a pioneering article by Harry Kalven and Maurice Rosenfield explained, "[m]odern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive."[93] The view was that, were lawyers able to bundle relatively low-value claims, they would have monetary incentives to bring cases to enforce federal statutory rights in areas such as securities and antitrust law. The utility of class actions in this regard relied on the equitable theory of awarding attorney's fees because a client's lawyer had, through pursuing an individual claim, conferred a "common benefit" on a group.[94] Cases involving small claims but large enough classes would be sufficiently lucrative for law-

ing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 HARV. L. REV. 356, 386–400 (1967).

92 *See* FED. R. CIV. P. 23 advisory committee's note, *reprinted in* 39 F.R.D. 69, 102 (1966) (explaining that civil rights actions are "[i]llustrative" of the purpose of Rule 23(b)(2) and listing several school desegregation cases as examples). The archival materials make plain Charles Alan Wright's efforts to help craft this Rule. Letter from Charles Alan Wright to Benjamin Kaplan 5–7 (Feb. 6, 1963), *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935–1996. A thoughtful examination of the history and concerns that prompted interest in using class actions to implement school desegregation comes from David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. (forthcoming 2011).

93 Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941). Examples included that the "'single and isolated security holder [was] usually . . . helpless in protecting his own interests or pleading his own cause.'" *Id.* at 684 (quoting U.S. SEC. & EXCH. COMM'N, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, pt. II, at 1 (1937)).

94 For details, see Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 304, 337–38 (1996).

yers to take the risk of filing, serving as "champions of semi-public rights," and thereby augmenting administrative regulatory oversight.[95]

Many of the proposed beneficiaries of aggregate reforms in the 1960s were then new to the federal courts. As Theodore Eisenberg and Stephen Yeazell have detailed, school children, prisoners, and social welfare recipients had not received protections under federal law, nor did they have lawyers or other resources to pursue their claims.[96] Some of these innovations enabled private enforcement of federal rights, often against state and local defendants, subjected not only to court but to public scrutiny. Other aspects of the class action rule focused on consumer, securities, and antitrust cases that put federal judges to the task of enforcing regulations aimed at limiting corporate misbehavior.

That access was a central goal of the Rulemakers can also be gleaned from considering potential claimants the drafters did not seek to include under their 1966 Rule 23 umbrella. As is familiar (even if now quaint), the 1960s Rules Advisory Committee members thought that their new class action rule did not and should not cover torts.[97] In a once-famous comment to 23(b)(3), the drafters advised against tort class actions, effectively "ruling" them out for about two decades:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[98]

As this text suggests, the 1960s drafters had three reasons why class actions did not fit tort cases. First, the drafters thought that tort plaintiffs had little need for the equipage provided by their new procedures.[99] Unlike many consumers whose small-damage claims were not attractive to lawyers, the system of contingent fees enabled tort plaintiffs to obtain legal assistance.[100] In contrast, when individuals were

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95 Kalven & Rosenfield, *supra* note 93, at 717.

96 *See* Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

97 I detailed the interaction and development of this approach and its reflection in the minutes and letters of the Advisory Committee in Resnik, *From "Cases" to "Litigation," supra* note 91, at 6–15.

98 *See* FED. R. CIV. P. 23 advisory committee's notes, *reprinted in* 39 F.R.D. 69 (1966).

99 *Id.*

100 Benjamin Kaplan stated that "where the stake of each member bulks large and his will

"without effective strength to bring their opponents into court at all," class actions were needed to vindicate rights.[101] Second, the drafters thought that the distinctions among tort victims (even if involved in the same incident)—as to fact and to law—made aggregation inappropriate or very difficult. In Kaplan's words, "individual questions of liability and defense will overwhelm the common questions."[102] This discussion was framed by a presumption of resolution by law, rather than negotiated settlement.[103]

Third, drafters of the 1960s class action rule thought that class treatment of tort cases was problematic given their views on federalism, respecting jurisdictional boundaries. Recall that *Erie Railroad Co. v. Tompkins*[104] was in its heyday in the 1960s,[105] as *Hanna v. Plumer*[106] was decided before the 1966 Rule was finalized.

The 1960s rulemaking project was integrative, in that the drafters addressed multiparty rules as a related packet—involving intervention and the joinder of parties and claims as well as a new class action rule. Coupled with opportunities for discovery and other statutory innovations, the leaders of the bench and bar who wrote those Rules saw the social utility of bringing lawsuits to regulate behavior. Equipage to equalize access to justice was decidedly their object. Discovery rules were, to borrow my colleague Owen Fiss's term, the poor person's "FBI,"[107] and class actions permitted private lawyers to function akin to attorneys general, pursuing regulatory rights enforcement through courts.

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and ability to take care of himself are strong," class treatment was not necessary. Kaplan, *supra* note 91, at 391.

101 Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

102 Kaplan, *supra* note 91, at 393.

103 The paradigm tort cases were personal injuries from a car accident or medical malpractice, and hence the sense of individualization was strong. At the time, large cases (then called "mass accidents") were exemplified by a train wreck or a plane crash or a fire at a circus or in a hotel. Not in sight were what has come to be: mass consumer tort cases involving harms from asbestos, smoking, pharmaceuticals, and environmental hazards.

104 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

105 Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2015 (2008) ("[T]he federal courts in these class action choice of law cases felt bound under *Erie* . . . to adopt the choice of law approach of the respective states in which they sat, and thus were limited as to how they might expressly shape choice of law to accommodate aggregate litigation.").

106 Hanna v. Plumer, 380 U.S. 460 (1965). That decision, which concluded that the state method of service need not be used, underscored the authority of federal procedural rules to govern diversity cases. *Id.* at 473–74.

107 Owen M. Fiss, *The New Procedure*, 54 REV. JUR. U.P.R. 209, 212 (1985).

Several Supreme Court decisions joined the effort to widen court access. The decision of *United Mine Workers of America v. Gibbs* affirmed federal constitutional power over pendent state claims and thereby outlined the contours of a doctrine—now called supplemental jurisdiction—that welcomed plaintiffs to court.[108] Reform of administrative agencies to improve their adjudicatory decisionmaking came through the 1970 *Goldberg v. Kelly* decision, requiring hearing officers to provide "rudimentary due process" with procedures modeled after what courts did.[109]

Further, the Supreme Court recognized new rights to counsel in criminal cases,[110] and in civil litigation, the Court relied on the interaction of the evolving ideas of fairness and equality to recognize Gladys Boddie as a rights-holder, for whom Connecticut was obliged to waive its filing fee so that she could get a divorce.[111] In her wake, the Supreme Court also decided that disputants at risk of losing the status of being a parent could, upon an exacting showing of the utility of a lawyer's appointment, be entitled to a state-funded lawyer[112] and, if such persons could not afford it, to court-paid transcripts for appeal.[113]

Moving from federal constitutional rights to statutory provisions, Congress created the Legal Services Corporation (LSC) in 1974,[114] and authorized fee shifting so that successful lawyers could recoup expenses and be paid under the Civil Rights Attorney's Fees Awards Act of 1976.[115] Indeed, when the Supreme Court cut back on the class action rule in *Eisen v. Carlisle & Jacquelin* by requiring that plaintiffs identify, send to, and pay for notice to all members of (b)(3) class actions, a great deal of criticism followed about how that undercut the rule's function as access-enabling.[116] Further, at the urging of Chief

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108 United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 727–29 (1966). The Court explained that, if "a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." *Id.* at 725. In the era of *Gibbs*, the terminology used was "pendent" and "ancillary" claims and parties, and legislative provisions addressing these ideas speak of "supplemental jurisdiction." *See* 28 U.S.C. § 1367 (2006).

109 Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

110 *See* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

111 Boddie v. Connecticut, 401 U.S. 371 (1971).

112 Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 32–34 (1981).

113 M.L.B. v. S.L.J., 519 U.S. 102, 128 (1996).

114 *See* Legal Services Corporation Act of 1974, Pub. L. No. 93-355, § 1003, 88 Stat. 378, 379.

115 Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2006)).

116 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175 (1973); *see, e.g.*, Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 98. As this Article was on its way to press,

Justice Earl Warren, the ALI completed an overview of federal and state court jurisdiction in 1969.[117] The report proposed making access to federal courts for federal claims easier by eliminating the amount in controversy requirement of 28 U.S.C. § 1331[118]—a statutory change put into place by 1980.[119] A successor ALI effort, the 2004 *Federal Judicial Code Revision*,[120] also sought to simplify boundaries and access provisions.

Thus, Congress, the courts, and the drafters of the Federal Rules of Civil Procedure shared a vision for the federal courts as public sites instrumentally engaged in forwarding national regulatory policies. From the 1960s through the early 1980s, those policies embodied substantive commitments to increasing the rights of racial minorities, to responding to some of the inequalities predicated on gender, and to equipping consumers with mechanisms to enforce fair practices in commerce. Aggregation—with the class action as the iconic embodiment—is central to that vision.

Caseload pressures also justified the expansion of the federal judiciary. In 1901, fewer than 120 authorized life-tenured district judgeships were provided by Congress.[121] By 2001, Congress had licensed more than 650, supported by a like number of statutory judges when

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the Supreme Court granted certiorari in *Dukes v. Wal-Mart Stores, Inc.*, a Title VII case in which a large class was certified under Rule 23(b)(2). *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir.) (en banc), *cert. granted*, 79 U.S.L.W. 3128 (U.S. Dec. 6, 2010) (No. 10-277). In addition to the first question presented by the petition ("Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and, if so, under what circumstances."), the Court directed the parties to brief the following question: "Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a)." Petition for a Writ of Certiorari at i, Wal-Mart Stores, Inc. v. Dukes, No. 10-277, 2010 WL 3358931, at *1 (U.S. Dec. 6, 2010); *Wal-Mart Stores, Inc.*, No. 10-277, 2010 WL 3358931, at *1. The *Dukes* case offers another opportunity for the Court to consider the function of aggregation.

117 AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 172–76 (1969).

118 *Id.* The ALI study explained that the "stated requirement of an amount in controversy in fact has relatively little impact on the volume of federal question litigation. The few cases there are, however, that must satisfy the § 1331 requirement are likely to involve matters particularly deserving of a federal forum." *Id.* at 172.

119 Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 4, 94 Stat. 2369, 2370.

120 AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT (2004). That focus was on supplemental jurisdiction, removal, and venue. Background on this project is provided by its Reporter, John B. Oakley, in Kroger *Redux*, 51 DUKE L.J. 663 (2001).

121 In 1901, appellate and trial judges nationally numbered 116; 70 served on the district courts. *See* Table of Authorized Judgeships, *supra* note 29. The table also listed one Article I judgeship as of that date. *Id.*

both full-time magistrate and bankruptcy judges are counted.[122] By then, these judges worked in more than 550 federal courthouse facilities. Further, under the brilliant leadership of Chief Justice Rehnquist, the federal government invested some eight to ten billion dollars, the largest federal building program since the New Deal, in courthouses—producing designer structures aiming to turn those courts into emblems of the national government.[123] The federal judiciary tripled the amount of space it occupied,[124] with construction projects sited around the United States.[125] In the decade between 1996 and 2006, the judiciary gained "46 new courthouses or annexes (17 million square feet) at a cost of $3.4 billion," with more underway.[126]

C. Enabling, Managing, and Regrouping

1. Aggregate Forms

Federal courthouse construction and the ALI's decision to organize principles of aggregation are but two of many measures of the support that was shared across branches of government and segments of the private sector for the due process model. Between the 1960s and the 1990s, Congress enacted legislation creating more than 400 new

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122 *Id.*

123 *Status of Courthouse Construction, Review of New Construction Request for the U.S. Mission to the United Nations, and Comments on H.R. 2751, to Amend the Public Buildings Act of 1959 to Improve the Management and Operations of the U.S. General Services Administration: Hearing Before the Subcomm. on Pub. Bldgs. & Econ. Dev. of the H. Comm. on Transp. & Infrastructure*, 105th Cong. 22 (1998) (testimony of Robert A. Peck, Comm'r, Pub. Bldgs. Serv., Gen. Servs. Admin.) [hereinafter *1998 Status of Courthouse Construction Hearings*].

124 *The Future of the Federal Courthouse Construction Program: Results of a Government Accountability Office Study on the Judiciary's Rental Obligations: Hearing Before the Subcomm. on Econ. Dev., Pub. Bldgs. & Emergency Mgmt. of the H. Comm. on Transp. & Infrastructure*, 109th Cong. 269 (2006) (statement of David L. Winstead, Comm'r, Pub. Bldgs. Serv., Gen. Servs. Admin.) [hereinafter *2006 Future of the Federal Courthouse Construction Program Hearings*]; *see 1998 Status of Courthouse Construction Hearings*, *supra* note 123, at 22.

125 *See The Renaissance of the Federal Courthouse*, 34 THIRD BRANCH: NEWSL. FED. CTS. (Admin. Office of the U.S. Courts, Wash., D.C.), Dec. 2002.

126 *2006 Future of the Federal Courthouse Construction Program Hearings*, *supra* note 124, at 269 (statement of David L. Winstead, Comm'r, Pub. Bldgs. Serv., Gen. Servs. Admin.). Between 1985 and 2000, fifty-two court projects "totaling $3.5 billion" had been completed—producing a courthouse-building program that was the "largest in U.S. history" and was listed among the "major accomplishments" of the Administrative Office. A HISTORY OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: SIXTY YEARS OF SERVICE TO THE FEDERAL JUDICIARY 113 (Cathy A. McCarthy & Tara Treacy eds., 2000). As of 2005, the Government Accountability Office (GAO) reported that the actual outlays between 1993 and 2005 had been $4.5 billion for seventy-eight courthouse projects. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-673, COURTHOUSE CONSTRUCTION: INFORMATION ON PROJECT COST AND SIZE CHANGES WOULD HELP TO ENHANCE OVERSIGHT 1 (2005).

federal causes of action,[127] and during those decades, the federal court caseload tripled. Through new procedures, mechanisms, and doctrines, the possible meanings of the word "case" changed—such that tens of thousands of people came to be understood as somehow together (individually aggregated or, as David Shapiro instructs, as an "entity"[128]) in something called a "litigation" that can result, on occasion, in institutional reform or in millions of dollars distributed to thousands of individuals as compensation for injuries.

Contributing to this shifting presumption towards aggregation was another mechanism for case collection—multidistrict litigation. During the 1960s, the Judicial Conference of the United States (the policymaking body of the federal judiciary) became concerned about redundant procedural work; several parallel antitrust cases, pending in different districts, spawned parallel discovery. The Conference proposed a managerial response, a statute that created multidistrict litigation, authorizing interdistrict transfers so as to bring all the cases together for pretrial processing to gain economies of scale.[129]

In later decades, provisions of the multidistrict litigation statute provide an umbrella for various kinds of cases, including mass torts. Coupled with the bankruptcies in the 1980s of Johns-Manville and A.H. Robins, the grouping of cases via the MDL process helped to make plausible the bundling of mass torts. Over time, the Rule 23 drafters' warning against using the 1966 class rule for such disputes was superseded by practice.[130] By the 1980s, the diversity of aggregates had grown through a range of methods. As I outlined in an article called "From 'Cases' to 'Litigation,'"[131] and as Howard Erichson examined in more recent work,[132] both formal and informal methods of aggregation became commonplace. Authority came from Rule 23, rule-based joinder and consolidation, and diverse statutory provisions for group processes, such as the pioneering Fair Labor Standards Act,[133] as well as via the MDL statute, bankruptcy, and the more re-

127 Memorandum from the Admin. Office of the U.S. Courts on the Revision of List of Statutes Enlarging Fed. Court Workload (Sept. 18, 1998) (on file with author and the Harvard Law School Library).

128 David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998).

129 28 U.S.C. § 1407 (2006).

130 *See* Resnik, *From "Cases" to "Litigation," supra* note 91, at 28–35 & n.103.

131 *Id.*

132 Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000).

133 Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2006).

cent Class Action Fairness Act.[134] Informal methods relied on judicial aggregation by means of "related" case procedures, designated dockets, or the appointment of special masters, as well as on lawyer aggregation, some but not all of which is visible to courts, the public, or clients. Indeed, the ALI's judgments in 2009 are predicated on the view that informal modes of aggregation are both commonplace and in need of regulation.

The development of various modes of aggregation also reframed the judicial role. In the 1960s, federal judges created new and, initially, special procedures for what were then termed "protracted cases"—with the initial prototype being the MDL antitrust actions and then the class actions spawned by Rule 23. In the 1970s, the rise of "public interest litigation" put judges at the center (as Abram Chayes pointed out[135]), for the adjudication of liability was not the end of a case, but a phase in an ongoing process in which a judge entered into long-term relationships with disputants, who returned to court to seek enforcement of future-looking reform decrees.

All decisions to aggregate are value laden, but aggregation can be enlisted in pursuit of different goals. The 1966 Rule 23 was frankly "enabling"—a self-consciously ideological view of the moral propriety of using law to recognize the dignity and rights of groups, and a political view that law should be used to bring new claimants, otherwise unable to make their way, into court.[136] The 1968 MDL statute was emphatically managerial, focused on "economy" and aiming to rationalize cases that were already in the system. Yet economies of scale are not achieved only by focusing on pending cases but also require looking forward—to cases that could be filed.

Note that when the paradigm of the class action was a lawsuit about schools or prisons, the question of "futures" was dealt with by defining a class in the present tense that resulted in a current and always replenishing class—all students at The George Washington University Law School or prisoners at the Federal Correctional Facility at Alderson, West Virginia. Those lawsuits focused on defendants' subsequent treatment of class members and entailed no need to bring in all future claimants; indeed the point was to keep the courthouse door open through having continuingly available class members to enforce injunctions. But once tort and consumer plaintiffs came into view, the

134 Class Action Fairness Act, 28 U.S.C. § 1332 (2006).

135 *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

136 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997).

group mechanism became preoccupied with bringing plaintiffs in to move toward global resolution (typically by settlement) so as to permit corporate defendants to structure future business arrangements secure in the knowledge of what liabilities have resulted from prior action. And of course, class actions seeking monetary relief produced a dramatic change in the market for lawyers, whose compensation grew with the size of a class. The agendas of enabling and economizing thus came to be intermingled, and, during the 1990s, efforts to bind future tort victims prompted the Supreme Court to record concerns—in the language of due process.[137]

Over time, interest in forcing individuals into aggregation has grown. Exemplary is the prior effort of the ALI to generate a regime for aggregation. In the 1980s, the ALI commissioned Professor Arthur Miller (who had also served as a Reporter for the Advisory Committee on Civil Rules) to undertake a "Preliminary Study" of how the ALI might usefully be involved in what it described as "the complex litigation problem."[138] The paradigm of the referenced "problem" had become mass tort litigation, exemplified by Agent Orange and asbestos cases, and seen (in the words of one commentator) as "debilitating" for the inefficient imposition of redundancies that overtaxed the resources of courts and litigants alike.[139]

By then, judges and lawyers had begun to work around the Rule 23 Advisory Committee Notes admonishing against the use of class actions for mass accidents. In the Agent Orange litigation, Judge Jack Weinstein had certified a class of individuals exposed to those chemicals.[140] Some of the asbestos manufacturers had gone into bankruptcy, and their tort claimants trailed along, forcing group-based handling of mass torts.[141] Commentators pointed to the impositions

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137 *See id.* at 626–27. The other major Supreme Court discussion of mass tort class actions, again in the context of asbestos and again concerned about procedural fairness, is *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 818–19 (1999).

138 AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY: A MODEL SYSTEM FOR STATE-TO-STATE TRANSFER AND CONSOLIDATION 1 (1993) (adopted at the ALI's annual meeting, held on May 13, 1993).

139 *See* Gene R. Shreve, *Reform Aspirations of the Complex Litigation Project*, 54 LA. L. REV. 1139, 1140–41 (1994).

140 *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 729–31 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145, 163–67 (2d Cir. 1987). The litigation has been chronicled by Peter H. Schuck in his 1986 book *Agent Orange on Trial: Mass Toxic Disasters in the Courts*. More recent decisions, addressing whether the resolution was preclusive, include *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *vacated and remanded in part, aff'd in part by an equally divided Court*, 539 U.S. 111 (2003).

141 *See, e.g.*, *In re* Johns-Manville Corp., 36 B.R. 727, 729 (Bankr. S.D.N.Y. 1984).

that asbestos litigation placed on state and federal courts, even as some judges were hesitant to take a group of manufacturers and plaintiffs with various and overlapping sets of illnesses and treat them in the aggregate.[142]

The ALI's undertaking became its "Complex Litigation Project," resulting in 1993 in "statutory recommendations and analysis" approved by the ALI.[143] Unlike the 2009 aggregation approach that shaped novel rules for aggregate settlements as well as for in-court aggregations, the 1993 Complex Litigation Project termed itself "limited in scope to judicial dispute resolution and matters of procedure," and explained that it deliberately eschewed "reshaping existing legal theories or forms of relief."[144] The focus was on finding new ways to transfer and to consolidate cases within the federal system, across state courts, and between state and federal systems.

Yet, despite the disclaimer of not breaking new ground, the 1993 Complex Litigation Project did propose national choice of law standards[145] stemming in part from the proposals for consolidation.[146] Moreover, while initially focused on mass torts, the final version did not specifically limit its proposals to that template. The Complex Litigation Project did, however, stay true to its commitment to courts, as it sought to offer structures for what judges, operating under formal legal provisions, could be authorized to do.

The 1993 project (narrow or not) was met with a good deal of controversy.[147] Praised by one commentator as the "most innovative,

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142 *See, e.g.*, Cimino v. Raymark Indus., Inc., 151 F.3d 297, 315–20 (5th Cir. 1998), *rev'g* 751 F. Supp. 649 (E.D. Tex. 1990). An overview of those efforts can be found in DEBORAH R. HENSLER, WILLIAM L. F. FELSTINER, MOLLY SELVIN & PATRICIA A. EBENER, ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS (1985); *see also* Bone, *Statistical Adjudication*, *supra* note 18; Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967 (1992).

143 AM. LAW INST., *supra* note 138, at 1. Professors Miller and Mary Kay Kane served as Reporters. *Id.*

144 *Id.* at 3.

145 *Id.* at 305–09.

146 "[T]he use of consolidation for combined disposition . . . is the principal objective of the Project." Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. REV. 879, 881 (1995); *see also* Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1, 2 (1990).

147 An earlier, related effort, the 1991 ALI's *Reporters' Study on Enterprise Liability for Personal Injury*, was part of the backdrop. That project addressed liability rules for various enterprises, as well as the procedural mechanisms (from workers compensation boards to courts, insurance, and regulation) to respond. *See* Geoffrey C. Hazard, Jr., *Foreword* to 1 AM. LAW INST., REPORTERS' STUDY ON ENTERPRISE LIABILITY FOR PERSONAL INJURY, at xi (1991). Thereafter, the ALI concluded a RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) that also was surrounded by debate about whether it was evenhanded or particular of

resourceful, and ambitious work ever undertaken in the United States on the subject of multistate complex litigation,"[148] others objected to its emphasis on consolidation (in part through "coercive" intervention encouraged by claim preclusion)[149] and the proposal to federalize choice of law rules.[150] Others faulted the 1993 project for failing to address federal jurisdictional authority, the changes underway in bankruptcy and through then-innovative claims processing facilities, and a host of informal aggregation packages.[151] One critic termed the effort an "assault on state sovereignty,"[152] and another objected that "the 700 pages of this Project" resulted in only an enhancement of MDL and an elaboration of choice of law rules.[153]

The conflict about the project resulted in the ALI declining to take a formal vote on the Reporters' proposed model statute for a uniform transfer system.[154] Seen, however, from the vantage point of the ambitions of the ALI's decisions in 2009, the 1993 Complex Litigation Project appears modest. It honed to the model of the decades that preceded it, as it looked to judges, to formal rules, and to public procedures of adjudication to legitimate decisions and then applied these precepts in a quest for more conglomerates of cases.

2. Commitments to Contract

The judge-centric model of adjudication, authorizing judges to control the shape and pace of litigation and elaborated initially as special process for unusual cases (such as antitrust, public law litigation,

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certain interests at the expense of others. *See, e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *The Politics of the Products Liability Restatement*, 26 HOFSTRA L. REV. 667, 667 (1998) (aiming, as the Reporters put the point, to "set the record straight" and rejecting the view that the result should be seen as political in a pejorative sense).

148 Symeon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 844 (1994).

149 AM. LAW INST., COMPLEX LITIGATION PROJECT § 5.05 & cmt. a (1993). That Comment notes that the "scheme is . . . designed to be coercive, not compulsory; the individual retains the option to join the suit or not, but is confronted with a risk of being bound to an adverse judgment should he decide to stay away." *Id.*

150 Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules*, 54 LA. L. REV. 907 (1994); Shreve, *supra* note 139, at 1146–52; *see also* Epstein, *supra* note 146, at 60–61.

151 Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 LA. L. REV. 977, 999–1000 (1994).

152 Robert A. Sedler, *The Complex Litigation Project's Proposal for Federally-Mandated Choice of Law in Mass Torts Cases: Another Assault on State Sovereignty*, 54 LA. L. REV. 1085, 1086 (1994).

153 Mullenix, *supra* note 151, at 999.

154 *See* Hazard, *supra* note 147, at xvii.

and then mass torts), migrated to become the expected procedures in ordinary cases—resulting in the managerial judge.[155] Rule revisions in the 1980s and 1990s gave trial judges more discretionary control over pretrial procedures and licensed them to focus on settlement.[156] Through the enactment in 1990 of the Civil Justice Reform Act,[157] Congress encouraged the shift toward judicial control.[158] Further, Congress and the courts embraced alternative dispute resolution, encouraging party-negotiated settlements, mediation, and private arbitration.[159]

Moreover, the Supreme Court insisted that contracts agreed upon before disputes arose and that mandated use of private dispute resolution systems were enforceable, as long as the alternative system adequately vindicated statutory rights.[160] Over complaints from consumers and employees, the Court applied that rule to contracts proffered by manufacturers or employers.[161] The public, "day in court" model that had come to be equated with "due process of law" gained a competitor—"procedure as contract"—in which judges encouraged litigants in private to contract with each other either to anticipate or to conclude their disputes.[162]

Like the due process model, the contractual approach also has constitutive elements. Its political underpinnings are that individuals, entities, and groups know their own preferences and capacities and are better able to structure agreements that meet those needs than can third parties. Given various transaction costs, bargained-for agreements to resolve disputes are likely to be better—in the sense of more

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155 *See* Resnik, *Managerial Judges*, *supra* note 17, at 376–80. In addition, congested dockets in the Southern District of New York and in Washington, D.C., had produced interest in pretrial masters. *See* Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 651 & n.185 (2002). The role of judges in aggregation is addressed in *Reviving Judicial Gatekeeping*, by Richard Marcus, *supra* note 39.

156 Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1155 (2006); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340–41 (1994).

157 Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

158 *See id.* That Act had a sunset provision. *Id.* § 804, 104 Stat. at 5136. For evaluation of some of its impact, see JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL F. MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VAIANA, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT, at xvii–xxxv (1996).

159 *See, e.g.*, Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified as amended at 28 U.S.C. §§ 651–658 (2006)); FED. R. CIV. P. 16(a)(5), (c)(1).

160 *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123–24 (2001).

161 *See, e.g.*, *id.*; Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 82 (2000).

162 Resnik, *Procedure as Contract*, *supra* note 23.

accurate, less expensive, and hence more efficient—than external mandates. In the context of filed or potential lawsuits, legal rights create bargaining power; the assumption is that negotiated conclusions will reflect the relative strength of such entitlements, given the uncertainty of establishing both liability and damages. Courts, judges, and lawyers are thus admonished to pursue settlements that will minimize the costs of disputing while maximizing the utility of the resolutions.

The enthusiasm for settlement has prompted the Supreme Court to permit an expanded understanding of courts' powers, reaching at times beyond (or trumping) their formal jurisdiction. Through the alchemy of settlement, for example, state courts settling securities cases are able to include cases they could not try, because the claims fall within the exclusive jurisdiction of the federal courts.[163] Similarly, federal district courts may be able to superintend final resolutions by settlements in multidistrict cases when those judges do not have the authority to preside at trials of the MDL aggregate.[164] Further, in the few cases entailing structural remedies against states, federal courts are able to impose obligations on state officials by way of settlement that they could not order by decree.[165]

Given the skepticism about the utility of third-party intervention in bilateral negotiations, the contractual model places no special value on public oversight or involvement. Indeed, contractual models are praised for providing a confidentiality otherwise unavailable. Courts have enforced clauses in settlements precluding third-party access on the rationale that "honoring the parties' express wish for confidentiality may facilitate settlement."[166]

Yet the due process model has still served to impose some constraints upon lawyers and judges. In monetary class actions, absent plaintiffs must be given notice of the pendency of an action before a court can exercise jurisdiction.[167] Neither the desire to settle nor the fact of being part of a potential settlement is sufficient to create "common" law or fact under Rule 23, and future plaintiffs cannot necessa-

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163 *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 386–87 (1996).

164 *Compare* 28 U.S.C. § 1407 (2006) (authorizing transfer of actions), *with* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998) (finding no authority to transfer).

165 *See, e.g.*, Frew v. Hawkins, 540 U.S. 431, 442 (2004).

166 *See* Gambale v. Deutsche Bank AG, 377 F.3d 133, 143 (2d Cir. 2004).

167 Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 811–12 (1985).

rily be represented by current litigants.[168] Objectors, if appearing even if not intervening, are to be accorded opportunities to bring appeals of settlements.[169] Moreover, capped settlements are not to be approved based only on parties' agreements that funds are limited.[170]

The rise of rules and doctrine endorsing court-based contracts reflected social and political movements focused on deregulation and in retreat from the government initiatives of the 1960s. These critics argued that prior efforts redefining procedural opportunities had opened the door too wide, resulting in too many filings and too capacious a process. Interest in exclusion and preclusion of certain kinds of federal filings gained impetus over the course of the twentieth century.[171] In the 1920s, concerns had been expressed that Prohibition had brought the "wrong" kinds of claims to federal courts.[172] In the 1940s and 1950s, the Judicial Conference of the United States recorded distress about too many prisoner filings, and it proposed limitations.[173] Given the 1938 decision in *Erie Railroad Co. v. Tompkins*, which took federal judges out of the lawmaking business for diversity cases, attention turned to walling off some of those cases.[174] By 1977, under Chief Justice Warren Burger, the Judicial Conference an-

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168 Ortiz v. Fibreboard Corp., 527 U.S. 815, 849 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628–29 (1997).

169 Devlin v. Scardelletti, 536 U.S. 1, 14 (2002). That case held that a member of a certified class who was not the named representative and who had objected to the fairness of a settlement could appeal the district court's approval of the settlement without first intervening. *Id.* at 4, 14. Some lower courts have construed *Devlin* narrowly. *See, e.g.*, Gautreaux v. Chi. Hous. Auth., 475 F.3d 845, 851–52 (7th Cir. 2007) (holding that an organization that was not a class member and that represented a group of class members and nonclass members could not appeal the district court's approval of a settlement because the organization was not "bound" by the final judgment); *In re* Gen. Am. Life Ins. Co. Sales Practice Litig., 302 F.3d 799, 800 (8th Cir. 2002) (questioning whether *Devlin* applies where objectors had opt-out rights, such as in 23(b)(3) class actions). *But see* Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund, 582 F.3d 30, 39–40 & n.8 (1st Cir. 2009) (holding that *Devlin* applies to all class actions, not only class actions with no opt-out rights, and citing Sixth, Ninth, and Tenth Circuit cases reaching the same conclusion).

170 *Ortiz*, 527 U.S. at 821.

171 Burbank, *supra* note 2, at 751–52.

172 *See, e.g.*, Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917, 920, 976–77 (1926).

173 *See Hearings Before Subcomm. No. 3 of the H. Comm. on the Judiciary on H.R. 5649: A Bill to Amend Section 2254 of Title 28 of the United States Code in Reference to Applications for Writs of Habeas Corpus by Persons in Custody Pursuant to the Judgment of a State Court*, 84th Cong. 3 (1955) (statement of the Hon. John Parker, C.J., United States Court of Appeals for the Fourth Circuit). Chief Judge Parker discussed the federal judiciary's "collaboration with the representatives of the State chief justices and the State attorneys general" to prepare a proposed statute to limit prisoners' habeas corpus filings. *Id.* at 7.

174 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938).

nounced its support for the abolition of diversity jurisdiction, as the Conference began to shape arguments that Congress had turned too much and too often to the federal courts.[175] By the end of the twentieth century, the Judicial Conference had issued its first ever *Long Range Plan*, campaigning against congressional expansion of its authority as it objected to what it perceived to be undue "federalization" of civil claims and of crimes.[176]

Rulemaking, statutes, and doctrine complemented the view of a broader role for contract and a narrower role for federal jurisdiction. In the 1990s, Congress changed underlying rights and remedies through major legislation that limited liability rules for securities transactions,[177] reduced access for prisoners filing cases challenging their convictions[178] and their conditions of confinement,[179] and for migrants.[180] In 2005 and 2006, Congress sought to limit access for individuals detained in the wake of 9/11.[181] And, through interpretations of pleading rules (in *Bell Atlantic Corp. v. Twombly*[182] and in *Ashcroft v. Iqbal*[183]), the Court gave a good deal of discretion to district judges to assess the "plausibility" of plaintiffs' complaints and if not plausible, to grant motions to dismiss. In addition, the Court narrowed the remedial powers of judges through interpreting their equitable authority as dependent on affirmative congressional grants.[184]

Yet even within this confining approach, commitments to aggregation are robust. The ALI's 2009 proposals are one example, making plain that aggregation, once thought to be the exception delineated

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175 JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 8–9 (Mar. 10–11, 1977).

176 COMM. ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS, 6–7, 15 (1995), *reprinted in* 166 F.R.D. 49 (1996).

177 Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101(b), 109 Stat. 737, 743–49 (codified in relevant part as amended at 15 U.S.C. § 78u-4 (2006)).

178 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–106, 110 Stat. 1214, 1217–21 (codified as amended in scattered sections of 8, 15, 18, 22, 28, 40, 42, and 50 U.S.C.).

179 Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 803–804, 110 Stat. 1321, 1321-70 to -71, 1321-73 to -75 (1996) (codified in relevant part as amended at 28 U.S.C. § 1915 (2006) and 42 U.S.C. § 1997).

180 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009–546 (codified in scattered sections of 8 U.S.C.).

181 Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(e), 120 Stat. 2600, 2636 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

182 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

183 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 1952 (2009).

184 *See* Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 216–18 (2002); Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 328–39 (1999).

for specific kinds of remedies, has gained acceptance as an ordinary form of procedure.[185] Administrative regimes—from sentencing guidelines to Social Security determinations—are a related part of the aggregation landscape.[186] Thus, like the procedural modeling of the twentieth century, views of desirable framings are shared across institutional actors. Codification of aggregation can thus also be found in the Class Action Fairness Act of 2005,[187] comprehending group litigation—when appropriately authorized—as a desirable means of resolution. The Supreme Court's decision in 2010 in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[188] likewise marks a reading of Rule 23 that assumes the normalcy of group-based actions.[189] The plurality, joined by Justice Stevens, divested states from interposing an individualized procedural approach for particular claims if litigated in federal court.[190]

III. The Process Due in Twenty-First Century Procedural Forms

A. Provisioning and Precluding: The 2009 ALI Aggregation Principles

The sketch of the currents of twentieth-century procedure—with its expansionist, judge-centered and then its more recent constraining modes iterated through two procedural models—provides a baseline from which to consider the 2009 ALI approach toward adjudication's work. Who are the claimants to which these precepts attend? What attitudes can be found about enabling or limiting adjudication? Where are the independent judges, fair hearings, public access, and equal treatment of all persons of the due process model? What provisions are made for bargaining and settlement, the key elements of the procedure-as-contract model?

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185 An empirical overview of a decade of class actions and of multidistrict litigation is provided by Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. Kan. L. Rev. 775 (2010). The shift there documented to "nonclass settlements" is part of the landscape the ALI sought to address and, as noted, to regulate as well as to license. *Id.* at 806.

186 *See* Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 Cornell L. Rev. 918, 934–37 (1995).

187 *See* 28 U.S.C. § 1332(d)(6) (2006).

188 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010).

189 *Id.* at 1437–39, 1442.

190 *See* Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a* Shady Grove, 79 Geo. Wash. L. Rev. 448, 449 (2011).

As I noted at the outset, the ALI frames its project with "general principles" to promote the "[p]ursuit of justice under law."[191] The means are through the enforcement of rights, with efficient uses of "litigation resources" by judges, lawyers, and litigants so as to facilitate "binding resolutions" and "accurate and just resolution of civil disputes by trial and settlement."[192] This opening statement embraces both the due process model (enforcement of rights through opportunities for a public trial) and the contractual model (welcoming settlement mechanisms, as efficient for and intrinsic to courts).

In furtherance of both modalities, the 2009 ALI's efforts chart new methods of enabling litigation by endorsing a wider array of aggregates and new methods of settling in the aggregate, with attention paid to regulating both forms. What is less engaged by the 2009 aggregation principles is the function of public adjudication in contributing to norm development and in policing judges and lawyers. The project puts professionals at the helm, protects little space for outsiders to participate, and gives no mechanisms by which ordinary disputants can counterbalance the power of their lawyers.

B. What Claimants? What Remedies?

What problems did the ALI set out to solve? The ALI drafters were, like their 1960s and 1990s counterparts, responding to real-world practices and problems. As addressed by others in this symposium, aggregation had become the lynchpin to certain kinds of claims, rendered economically viable by pooled resources.[193] Yet critics worried that some judges were too ready to certify groups and thereby to give undue leverage to plaintiffs, able to extract settlements when they would not have been able to establish liability.[194] Reforms of Rule 23 in 2003 and the Class Action Fairness Act of 2005 mix endorsement of that modality with efforts to impose constraints. As to informal mechanisms, lawyers were packaging deals for groups of clients, sometimes outside the parameters of what ethical rules provided.[195] Moreover, as

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191 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.03, at 37 (2010).

192 *Id.*

193 *See* Lester Brickman, *Anatomy of an Aggregate Settlement: The Triumph of Temptation over Ethics*, 79 GEO. WASH. L. REV. 700 (2011); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011); Nancy J. Moore, *The Absence of Legal Ethics in the ALI's* Principles of the Law of Aggregate Litigation*: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 729–30 (2011); Thomas D. Morgan, *Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements*, 79 GEO. WASH. L. REV. 734, 739–40 (2011).

194 *See* Brickman, *supra* note 193, at 704.

195 *See id.* at 703–08.

the ALI commentary noted, some defendants insisted on group agreements in search for "complete peace," and some claimants held out, trying to extract "premiums" for agreeing to join a group.[196] What the ALI offers in response is regularization and some forms of regulation of both adjudicated and contractual aggregations.

1. Maximizing Value and Distributing Relief

Economic remedies are at the center of the ALI aggregation principles, which makes that point when moving from the general goals to what are called "Internal Objectives."[197] The first listed objective is "maximizing the net value of the group of claims"[198]—"[u]nless otherwise agreed by the claimants."[199] Thereafter detailed (in order) are the objectives of "compensating each claimant appropriately," "obtaining a judicial resolution of the legality of challenged conduct and stopping unlawful conduct from continuing," "obtaining the broadest possible nondivisible remedies for past misconduct," and, as a last-mentioned point, "enabling claimants to voice their concerns" as well as "facilitating the rendition of further relief that protects the rights of affected persons as defined by substantive law."[200]

The Comments also note that "claimants may rank compensation ahead of voice and legal vindication or behind them."[201] The objectives presumed for an aggregation of respondents are parallel to those of claimants. Respondent aggregates are seen as seeking to minimize "the total loss attributable to litigation of the claims the group faces," to "allocat[e] financial responsibility appropriately," to obtain a "judicial resolution of the legality of challenged conduct," to "enable[ ] lawful conduct to continue," and to restrict "nondivisible remedies for prior wrongful acts as narrowly as possible."[202] And, like the objectives for claimants, respondent aggregate proceedings enable participants to "voice their concerns" as they "enjoy the benefits of their substantive legal rights."[203]

Who are the claimants and the respondents on behalf of whom these objectives are stated? One finds few of the highly visible plaintiffs who animated the work of Ben Kaplan and others drafting Rule

196 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17 cmt. b, at 265 (2010).

197 *Id.* § 1.04, at 45.

198 *Id.* § 1.04(b)(1), at 45.

199 *Id.* § 1.04(b), at 45. The list describes itself as not limiting other objectives. *Id.*

200 *Id.* § 1.04(b)(2)–(5), at 45.

201 *Id.* § 1.04 cmt. c, at 46.

202 *Id.* § 1.04(c)(1)–(4), at 45–46.

203 *Id.* § 1.04(c)(5), at 45–46.

23 in the 1960s, and who once embodied the phrase "class action." Amidst dozens of examples (termed "illustrations") and explanatory comments that follow the various segments of the 282-page printed volume, a handful relate to civil rights.[204] Women and men of all colors are not much present;[205] prisoners, school children, and structural reform are not in sight; and relatively few illustrative cases involve injunctive relief.[206]

Indeed, the category "injunction" is subsumed under a discussion of "indivisible remedies."[207] A good deal of that segment focuses on the "limited fund"[208] with examples such as retirement fund beneficiaries,[209] persons at risk of future diseases and in need of medical monitoring,[210] and employees seeking both hiring remedies and damages for discrimination.[211] The people whose problems concern the ALI drafters are, by and large, tort claimants, some consumers, and victims of asbestos, other toxic substances, environmental pollutants, or of corporate misbehavior, some of whom are in search of remedies for employment discrimination.[212] As for respondents, the institutions

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204 *Id.* § 1.02 illus. 5, at 12–13 (discussing a housing discrimination case, where the remedy included $100 million in housing benefits); *see also id.* § 2.07 cmt. f, at 153 (discussing employment discrimination or other civil rights claimants who may, if provided notice, have "important information and . . . considerable stakes in the outcome").

205 *See, e.g.*, *id.* § 2.02 illus. 1, at 91 (using a pattern-and-practice, sex-discrimination, disparate-treatment case to explain whether a court should authorize aggregate treatment or whether a defendant needed to be able to rebut that inference in individual cases). Pregnant women are also represented in an illustration involving tort claims against a pharmaceutical company. *See id.* § 3.13 illus. 4, at 252 (discussing the potential need to adjust attorney's fees upward because of information withheld about risks of a drug to pregnant victims who suffered injuries from an arthritis medication). One general note is in order: in the analysis, I refer to illustrations provided in the ALI text and not to the citations to various cases and law review articles in the Reporters' Notes that accompany the text.

206 *See, e.g.*, *id.* § 1.01 illus. 6, at 5–6 (considering the question whether injunctive relief precluded other employees from seeking to enjoin wrongful deductions from wages); *id.* § 1.02 illus. 2, at 12 (discussing citizens seeking to enjoin the building of a cellular tower); *id.* § 2.03 illus. 10, at 111 (focusing on aggregation for damages in an antitrust case for which injunctive relief might also be proper).

207 *Id.* § 2.04 cmts. a & b, at 117–19.

208 *Id.* § 2.04 cmt. a, at 118.

209 *Id.* § 2.04 illus. 1, at 120.

210 *Id.* § 2.04 illus. 2, at 120.

211 *Id.* § 2.04 illus. 5, at 122–23.

212 *See, e.g.*, *id.* § 1.02 illus. 1, at 11 (addressing kinds of aggregations and preclusion, and using as an example that "ten employees sued their common employer" claiming a discriminatory denial of promotions); *id.* § 1.01 illus. 8, at 6 (involving whether individual suits are precluded by a government agency's pursuit of discrimination claims); *id.* § 2.04 illus. 5, at 122–23 (employees alleging race discrimination in employment and seeking hiring and backpay); *id.* § 3.07 illus. 2, at 220 (discussing a proposed settlement of an employment discrimination suit,

in focus are largely private sector businesses rather than government entities.

Further, while the "internal objectives" include either "stopping unlawful conduct" or "enabling lawful conduct to continue,"[213] the bulk of the ALI 2009 precepts are organized around how to allocate money. As noted, injunctions are mentioned under a discussion of "indivisible remedies,"[214] defined to be "the distribution of relief to any claimant [that] as a practical matter determines the application or availability of the same remedy to other claimants."[215] Distribution is not the word that comes readily to mind for mandates directing equal treatment, school desegregation, or reduction of environmental hazards.

Rather, distribution fits what a significant portion of what the commentary addresses—"a limited fund."[216] Continuing the concerns about monetary damages, the volume's index offers categories such as "damage averaging," "fluid recovery," and "future claims," but not "injunctive relief," "civil rights," or "institutional reform."[217] Thus, the ALI teaches that twenty-first-century aggregation is aimed at the resolution of economic claims and that what is to be indivisible is likely the limits on a proposed recovery fund, capped perhaps along the kind of parameters that the Supreme Court (rightly or wrongly) rejected in *Ortiz v. Fibreboard Corp*.[218]

The ALI is not, of course, inventing this shift in focus toward economic recovery through aggregation, although the proposition that victims seek money as their primary goal is contested. [219] Decades of

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distributing $5 million to class members, and the residue at the end of the claims period to the NAACP, through a cy pres fund).

213 *Id.* § 1.04(b)(3), (c)(2), at 45.

214 *Id.* § 2.04, at 116–29. The initial Comment discusses, for example, "a prohibitory injunction or a declaratory judgment with respect to a generally applicable policy or practice maintained by a defendant." *Id.* § 2.04 cmt. a, at 117.

215 *Id.* § 2.04(b), at 116.

216 *Id.* § 2.04 cmt. a, at 118.

217 *Id.* at 293–305.

218 Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999). The discussion of limited funds in the 2009 ALI principles describes its provisions as "[i]n keeping with existing law," in that the "limited nature of the fund must preexist aggregate treatment itself. It must not be the creation or consequence of the decision to aggregate." PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07 cmt. i, at 157 (2010). The Reporters' Notes to that section reference *Ortiz*. *Id.* § 2.07 reporters' notes cmt. i, at 165–66. As noted in the discussion of settlement remedies, limited funds are a means for aggregation. *See infra* Part III.B.3.

219 *See* Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645, 647–48 (2008). The certiorari grant in the *Dukes v. Wal-Mart* litigation also raises questions about how to concep-

Supreme Court doctrine coupled with legislation have made the obtaining of injunctive relief more difficult for plaintiffs of various kinds.[220] Moreover, Congress has precluded the Legal Services Corporation from bringing class actions.[221] During those same decades, courts developed the common benefit doctrine, authorizing fees to lawyers conferring remedies on groups of plaintiffs, and class actions came to be used in various kinds of cases seeking dollars.[222]

The 2009 ALI aggregation principles are also not the first rulemaking provisions to reflect the receding import of civil rights and structural-reform class actions. The 1993 Complex Litigation Project was focused on mass torts.[223] Similarly, the 2003 revisions of Rule 23 assumed money to be at aggregation's core when they set up a structure in which judges choose among lawyers competing to be named lead counsel in class actions.[224] The intense market for representation—in need of judicial oversight[225]—stems from the potential for profit in cases seeking damages. In contrast, in injunctive class actions, lucrative fee recoveries are increasingly rare. Fees come, if at all, from statutes such as the Civil Rights Attorney's Fees Awards Act of 1976,[226] which (as noted earlier) authorizes successful plaintiffs to recoup fees.[227] But over the years, the Supreme Court has limited the amount of recovery by imposing exacting measures of what consti-

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tualize the gravamen of a claim seeking redress for employment discrimination, in that the questions to be addressed by the parties include whether monetary damages are "incidental" to the declaratory and injunctive relief, and therefore whether 23(b)(2) certification is appropriate. *See supra* note 116.

220 *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. 8, 100 Stat. 1321, 1321–66 (1996) (codified in scattered sections of 11, 18, 28, and 42 U.S.C.). Other contexts in which injunctive relief has become less available include employment discrimination claims and language equality efforts. *See* Ricci v. DeStefano, 129 S. Ct. 2658 (2009); Horne v. Flores, 129 S. Ct. 2579 (2009).

221 *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, 1321–53 ("None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . that initiates or participates in a class action suit."); *see also* 45 C.F.R. § 1617 (2009). Other aspects of the restrictions were held unconstitutional in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001).

222 *See* DEBORAH R. HENSLER, NICHOLAS M. PACE, BONITA DOMBLEY-MOORE, BETH GIDDENS, JENNIFER GROSS & ERIK K. MOLLER, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 104–05 (2000).

223 *See supra* text accompanying notes 143–46.

224 *See* FED. R. CIV. P. 23(g), (h).

225 *See* Resnik, *Money Matters*, *supra* note 11, at 2155–63.

226 Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2006)).

227 *See supra* note 115 and accompanying text.

tutes "success," by requiring calculations through a "lodestar method" (hours worked times a reasonable billing rate), and virtually precluding "multipliers" either for risk or unusual challenges.[228]

2. Opportunities for Voice

Another of the ALI "internal objectives" is enabling claimants and respondents "to voice their concerns."[229] The Comments explain that point briefly—that "[p]articipants . . . often value the opportunity to express themselves and to participate in the legal process of vindication."[230] Expressive values are given no further elaboration but caveats come immediately thereafter. The commentary continues: "However, the cost and value of expression may vary from one proceeding to another. When regulating opportunities for expression, it is appropriate to take account of both their costs and their benefits."[231] Unexplained is what regulation of expressive opportunities the drafters had in mind. As discussed below, the ALI proposes to limit collateral attacks on adjudicated aggregation outcomes made after settlements and to authorize nonadjudicated aggregate settlements, both of which have the effect of limiting expressive opportunities.

Other voices—of judges, class members, objectors, public officials, and ad hoc court appointees—come into play in subsequent principles. In Chapter II, "Aggregate Adjudication," judges are called to account for their decisions to form aggregations for dispositions of common issues of fact or law.[232] Judges are to explain why "aggregation will resolve fairly and efficiently the common issues identified and materially advance the resolution of any remaining issues or claims."[233] Judges must also explain choices of law.[234] Moreover, the

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228 Burlington v. Dague, 505 U.S. 557, 565–66 (1992) (holding that multipliers for risk were not generally appropriate); *see* Perdue v. Kenny A. *ex rel.* Winn, 130 S. Ct. 1662, 1669 (2010) (holding that federal fee-shifting statutes create a strong presumption that attorney's fees were to be based only on lodestar calculations and that additional multipliers should be applied only in "extraordinary circumstances"); *see also* Astrue v. Ratliff, 130 S. Ct. 2521, 2524 (2010) (holding that under the Equal Access to Justice Act, fees go to the litigant as the "prevailing party" and therefore the government could seek funds from that award for unrelated debt, precluding recovery of the money by the lawyer who provided representation).

229 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04(b)(5), (c)(5), at 45–46 (2010).

230 *Id.* § 1.04 cmt. g, at 48.

231 *Id.*

232 *Id.* § 2.02 cmt. a, at 91–92 (discussing appellate review); *id.* § 2.02 cmt. e, at 90 (discussing common issues and preclusion). *See generally* Richard Marcus, *Reviving Judicial Gatekeeping*, *supra* note 39 (discussing the development of judicial gatekeeping in class actions).

233 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.02(e)(2), at 83 (2010).

234 *Id.* § 2.05, at 129.

2009 ALI project calls for interlocutory appeals to be available (sometimes on a discretionary basis) on issues of class certification and on merits decisions on other common issues.[235] One could also interpret exit rights as a form of voice, as members of aggregates are empowered to opt out (including a second opportunity in certain settlements[236]) and on occasion, perhaps to opt in[237] as part of a process of notice.[238] Further, the commentary supporting widespread notice explains that mandatory aggregation proceedings can create "a forum in which all interested persons may voice their views concerning the practice or policy."[239]

The ALI puts another voice on the stage: that of potential objectors. When requiring hearings on settlements, the ALI permits attorney fee shifting, for or against objectors, that gives incentives for raising concerns even as it also prices outsider entry.[240] As the commentary explains, the purpose is both to "fill a serious gap" in current law that does not compensate objectors and to ensure that "side deals" (in essence buying off objectors) be disclosed to courts.[241]

The ALI also invites in others, including state officials and court appointees. One provision authorizes judges (at their discretion) to solicit the views of state or federal officials and then structure opportunities for parties to respond.[242] In addition, the ALI details how

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235 *Id.* § 2.09, at 168.

236 *Id.* § 3.11, at 242 ("In any class action in which the terms of a settlement are not revealed" during an initial opt-out period, "class members should ordinarily have the right to opt out after the dissemination of notice of the proposed settlement."). The Comment explains that the purpose is to encourage such a practice, but, as noted in the 2003 revisions to Rule 23, the rule has not had a "substantial impact." *Id.* § 3.11 cmt. a, at 242.

237 *Id.* § 2.10 & cmt. a, at 176–77.

238 The ALI's 2009 precepts elaborate a typology of the interaction among "exit," "voice," and representatives' "loyalty," in relationship to opportunities to be heard. *See, e.g.*, *id.* § 2.07 cmt. f, at 154 ("As with the right of exit, [§ 2.07](a)(3) casts the right of voice in general terms, leaving subconstitutional questions about the precise operation of that right for judicial treatment on pragmatic terms."); *see also id.* § 2.07 reporters' notes cmt. e, at 162.

239 *Id.* § 2.07 cmt. h, at 156.

240 *Id.* § 3.08, at 223–26. Objectors who "demonstrate that a settlement should be rejected in its entirety," or who reconfigure a classwide judgment, are entitled "to recover reasonable fees" upon a showing that their work was "instrumental in laying a basis for the ensuing benefit enjoyed by the class." *Id.* § 3.08(a), at 223. If a court decides that objections were "insubstantial," and "not reasonably advanced," objectors can be sanctioned. *Id.* § 3.08(d), at 224. Sanctions can also be imposed on proponents of settlements who "misrepresent the benefits." *Id.* § 3.08(c), at 224.

241 *Id.* § 3.08 cmt. a, at 224–25. Alan Morrison has described these provisions (and others) within the project as improvements over the prior practice. *See* Alan B. Morrison, *Improving the Class Action Settlement Process: Little Things Mean a Lot*, 79 GEO. WASH. L. REV. 428, 442–43 & n.36 (2011).

242 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.09(c), at 228 (2010). Further, as

courts can appoint an "adjunct court officer" such as a special master or expert, to enlarge the circle of discussants.[243] Further, the ALI recognizes the external benefits of settlements, as it authorizes the potential to use funds in a settlement for others through a cy pres remedy, which could be conceived to give third-party beneficiaries a form of voice.[244]

3. Precluding by Contract and Law

If one series of provisions locates the ALI project within a due process model, with participatory values and public action entailed, another sequence marks the embrace of contract, of judicial discretion, and of the privatization of decisionmaking. Focused on efficiency, the ALI offers to expand the preclusive reach of judgments as well as of mass settlements, whose parameters may not become public. The underlying assumption is that claimants will be more likely to obtain remedies if respondents can be assured some measure of protection ("global peace") through cutting off future access to court on related issues and by permitting the packaging of group deals. To get to such preclusive agreements requires power—given by the 2009 ALI precepts to lawyers and to judges.

In the provisions directed at aggregate adjudication, the discussion of "Ensuring Adequate Representation" authorizes judges to "limit" party "control" and to "enforce parties' agreements."[245] Judges may therefore empower "certain parties or attorneys to control litigation," and judges can reward such lawyers and litigants for doing so.[246] Judges can also create partial class actions by having authority to deal with "common issues" in the aggregate[247] as well as by authorizing "aggregation by consent."[248] Further, as noted, judges can permit aggregation based on the view that indivisible remedies—limited funds—require mandatory participation.[249]

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explained in Comment c, the section echoes the Class Action Fairness Act's welcoming of state officials, but does not rely solely on volunteers. *Id.* § 3.09 cmt. c, at 228. The court may in appropriate cases solicit such involvement. *Id.*

243 *Id.* § 3.09(d), at 228.

244 *Id.* § 3.07, at 217–20.

245 *Id.* § 1.05, at 55.

246 *Id.* § 1.05 cmt. b, at 56. Judges have some oversight role, with a series of recommendations for its exercise, such as encouraging lawyers to use electronic communications with large numbers of clients. *Id.* § 1.05 cmt. i, at 63.

247 *Id.* § 2.02, at 82–83; *id.* § 2.03, at 104–05.

248 *Id.* § 2.10 & cmt. a, at 176–77. Each "affected claimant" must provide "affirmative consent" for aggregate treatment of related claims or a common issue. *Id.* § 2.10, at 176.

249 *See infra* notes 253–54 and accompanying text.

What animates the decision to give judges such supervisory authority? Two concerns are at the core. First, the ALI explains that certain forms of conflicts of interest are intrinsic to aggregation; the issues are what forms of conflicts are tolerable and which impermissible. Second, the point of aggregation is to obtain binding judgments. Because claimants are rights-holders, entitled as a matter of due process to some participation by means of representatives who are loyal and by means of the ability to exercise their own voices through information or by exit, the "[s]trictures of constitutional due process comprise the most significant constraints on the preclusive effect of the aggregate proceeding."[250] Judges solve those concerns by their oversight, and thus the phrase "the court shall" forms the predicate to "aggregate treatment of related claims."[251] Such "judicial scrutiny" of representatives' "loyalty" can suffice to support differential terms within a settlement.[252] Also noted are mitigating strategies, such as the availability of exit rights,[253] except when a "mandatory aggregation" is based on indivisible remedies. In addition, the ALI provides for wider notice than under Rule 23, and hence more opportunities to communicate, if not to participate in other fashions.[254]

Class settlements are a subject of their own, and some of what the ALI codifies is familiar given Rule 23. But freed from the constraints of rule promulgation through the Supreme Court, the ALI offers several additions. Plainly welcomed by the ALI are settlements that "include remedies not available in contested lawsuits," as long as a settlement is "fair, reasonable and adequate."[255] Further, under court supervision, "future claims" can also be settled.[256] Plainly disfavored are postsettlement challenges, to be "limited" as long as procedures exist for "contemporaneous challenge."[257] Rather, given the "[n]eed for finality,"[258] "collateral challenges" are restricted—leaving claimants who believe that they were not adequately represented to remedies of malpractice against their lawyers.[259] This provision takes up a much debated issue in both caselaw and commentary about the requi-

250 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07 cmt. b, at 148 (2010).

251 *Id.* § 2.07(a), at 147.

252 *Id.* § 2.07 cmt. d, at 149.

253 *Id.* § 2.07 cmt. e, at 151.

254 *Id.* § 2.07 cmt. f, at 152–54.

255 *Id.* § 3.01(b), at 187–88.

256 *Id.* § 3.10, at 231.

257 *Id.* § 3.01(c), at 188.

258 *Id.* § 3.14 cmt. a, at 254.

259 *Id.* § 3.14(b), at 254. Also called for is a presumption of preclusion for decisions on whether or not to accord class treatment to aggregates. *Id.* § 2.11 cmt. b, at 179.

site "process due," but the commentary explaining its parameters is sparse, with little elaboration of whose "need for finality" trumps the participatory values otherwise in play.[260]

A yet more ambitious aspect of expansionist aggregation is the decision to create "non-class aggregate settlements."[261] As the ALI project discusses, that reference is intended to embrace a diverse set of aggregations created through formal mechanisms such as MDL and joinder or through informal processes.[262] Recognizing that lawyers are already functioning outside the purview of judges on behalf of aggregates, the 2009 ALI precepts seek to impose a layer of regulation, while also legitimating the practice and hence making it more plausible.[263] (Indeed, as Richard Marcus notes, the nonclass aggregations may have sufficient appeal as to become more common than court-based aggregations.[264]) Under the ALI's approach, lawyers for both potential plaintiffs and defendants are authorized to bargain for a group delineated by settlements that are "interdependent."[265] Interdependency comes from defendants who condition a proposed settlement on either "a number or specified percentage of the claimants" agreeing to accept the resolution.[266] As the ALI explains, interdependency flows because claimants' cases are not valued "based solely on individual case-by-case facts and negotiations" but rather as part of a set.[267]

One way to understand these provisions is by reference to the two Supreme Court cases that, in different ways, forbade those forms for court-based class actions. In *Amchem Products, Inc. v. Windsor*, the Supreme Court held that the fact that a group was joined together by a "common interest" in a settlement could not serve as a basis for finding commonality and certifying a class.[268] Further, in *Ortiz v. Fibreboard Corp.*, the Court prohibited party agreements from stipulating the boundaries of, and thereby creating a limited fund to pro-

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260 *Id.* § 3.14, at 254–56. For criticism, see generally Patrick Woolley, *The Jurisdictional Nature of Adequate Representation in Class Litigation*, 79 GEO. WASH. L. REV. 410, 411–15 (2011).

261 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. §§ 3.15–.18, at 257–62 (2010).

262 *Id.* § 3.15 cmt. a, at 257.

263 *Id.* § 3.15 cmt. a, at 257–58.

264 Richard Marcus, *Reviving Judicial Gatekeeping*, *supra* note 39, at 108.

265 *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.16(c), at 258 (2010) ("In determining whether claims are interdependent, it is irrelevant whether the settlement proposal was originally made by plaintiffs or defendants.").

266 *Id.* § 3.16(b)(1), at 258.

267 *Id.* § 3.16(b)(2), at 258.

268 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997).

duce a mandatory class action, which is a point (as noted earlier) that the ALI invokes when discussing court-certified classes.[269] In contrast, for out-of-court, law-legitimated aggregation, the ALI's 2009 principles permit the use of a shared settlement opportunity to justify aggregate treatment that could entail a capped fund.[270] Moreover, as detailed below, courts may implicitly affirm such predicates to settlement by rejecting challenges to them.

Unlike court-based classes, in which judges are to ride herd, non-court-based aggregations are creatures of contracts. To impose some constraints on the power accorded, the ALI obliges lawyers either to inform clients in writing of the agreements and the "total financial interest of claimants' counsel," or to get ex ante agreements before settlement offers are made that "each participating claimant" will be "bound by a substantial-majority vote of all claimants" on a settlement proposal.[271] In other words, the current obligation of lawyers to be loyal to their individual clients can be superseded through a contract in which a client transfers loyalty rights to a group. That form of agreement likely would take place when a lawyer is first retained, and hence, entered into individually. And, while "informed consent" is required, lawyers may also decline to represent individuals with whom they do not have a preexisting relationship, if those potential clients do not agree to be part of future collective bargaining.[272]

The discussion also recognizes the possibility that sophisticated claimants might find means to engage in collective action vis-à-vis their own counsel—for example by appointing "certain members to act on behalf of the group by receiving communications and overseeing the day-to-day conduct of the lawsuit."[273] Moreover, Elizabeth Burch has argued that "obligations of solidarity or loyalty" ought to flow to those giving consent to formulate methods of exchange to de-

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269 Ortiz v. Fibreboard Corp., 527 U.S. 815, 821, 857 (1999); *see* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.07 cmt. i, at 165 (2010); *supra* note 218 and accompanying text.

270 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17, at 262 (2010).

271 *Id.* § 3.17(a)–(b), at 262. Details in the Comments offer content to what constitutes informed consent. *Id.* § 3.17 cmt. b, at 265–67. For example, claimants could be informed of a method of distribution, but need not be. *Id.* The Comments note that what constitutes a "substantial majority" is a question for "legislative drafting," with models offered such as the Bankruptcy Code's requirement of seventy-five percent of certain classes of creditors' approval. *Id.* § 3.17 cmt. c(2), at 269. The ALI provision does not preclude the all-or-nothing settlements that have drawn criticism, but does offer the alternative to the "substantial majority" model. *See* Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1019–20 (2010) [hereinafter Erichson, *All-or-Nothing Settlements*].

272 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17 cmt. b, at 267–68 (2010).

273 *Id.* § 3.17 cmt. c(2), at 268–69.

velop group consensus.[274] While the ALI commentary recognizes the desirability of delaying the request for client consent until after group settlements are known or members may have opportunities to know each other,[275] the 2009 precepts do not require lawyers to help their coclients communicate with each other nor insist that the group sprout its own methods for doing so. One outsider is proffered as a potential participant; either clients or the lawyers representing groups could engage a "neutral" who, if validating the agreements reached, would serve as a means of defending against any later challenges that might emerge.[276]

The formal outside protection created is a provision for "limited judicial review" of such settlements if, within a prescribed period of time, a claimant brings a challenge that the settlement was not negotiated under the procedural framework the ALI envisions for such collective settlement bargaining.[277] Further, if successful, a challenger can obtain fees from a wayward representative if a court finds that a settlement was procedurally or substantively unfair.[278]

The criteria for a court to use in assessing a challenge to a nonclass settlement are in some respects familiar, given the factors relied upon when court approval is sought in in-court class action settlements. Under the new ALI procedures, judges would ask in a challenged, nonclass settlement whether, given the facts and circumstances, the "costs, risks, probability of success, and delays in achieving a verdict" rendered a settlement sufficient.[279] The added questions for a challenge after a nonclass aggregate is settled are whether the treatment among claimants was equitable and whether a particular claimant was "disadvantaged" when the settlement is "considered as a whole."[280] The "safety valve" (a nonwaivable protection[281]) of being able to bring a postsettlement challenge could be understood, in the language of class actions, as a judicially authorized "second opt-out."[282] The result of not opting out through mounting such a challenge is that one is bound.

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274 Burch, *supra* note 22, at 520. She thus argues that the ALI provisions could generate a "claimant-based governance" model. *Id.* at 531.

275 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17 cmt. d(1), at 269–70 (2010).

276 *Id.* § 3.17 cmt. d(4), at 270.

277 *Id.* § 3.18(a), at 276.

278 *Id.* § 3.18(d), at 277.

279 *Id.* § 3.17(e), at 264.

280 *Id.*

281 *Id.* § 3.18 cmts. a & b, at 277.

282 *See id.* § 3.11, at 242.

Given that the ALI built in structural controls in the person of the judge for court-based aggregates,[283] the non-court-based collectives look sparsely protected. As noted, the ALI mentioned that sophisticated clients might attempt monitoring of their lawyers, but no mechanisms to ensure equity among those subject to the package settlement are detailed.[284] But the 2009 aggregation principles do not provide ways for ordinary claimants to coordinate so as to cabin their attorney's powers ex ante, nor has the ALI offered a means (absent a claimant's ex post challenge) for the public to learn about either the processes or outcomes. Confidentiality agreements are common features of many settlements, yet the possibility of respondents conditioning settlement on confidentiality is not squarely addressed. Were a good many challenges filed and adjudicated, one might find development of the meaning of equitable treatment across a group of noncertified class claimants and of how the concept of loyalty to a group, as contrasted to an individual client, is tested.

C. Procedural Analogues: Package Pleas, Mandatory Arbitration Contract Clauses, Assignment of Claims, Vanishing Settlements, and Jurisdictional Freedom

Five analogues help to illuminate facets of the proposed new mode of aggregate nonclass settlements. The first is that settlements entailing what the ALI calls "collective conditionality"[285] exist, on a smaller scale, on the criminal side of the federal court docket. These "package pleas" contain various contingent offers by prosecutors.[286] Some are what on the civil side are called "all-or-nothing settlements," requiring that all codefendants must accept the proffered bargain, while others can entail leniency for some family members in exchange for others pleading guilty.[287]

The rationales resemble those for aggregate civil settlements—the conservation of resources to obtain finality and the desirability of

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283 *See supra* notes 245–54 and accompanying text.

284 *See supra* note 273 and accompanying text. In contrast, certification of a class and approval of its $21 million settlement in a mandatory limited-fund class action was recently reversed, in part because the agreement had failed to clarify how it would achieve intraclass equity and had, instead, left the compensation question for a wide array of injuries to a special master. *See In re* Katrina Canal Breaches Litig., Nos. 09-31156, 09-31188, 2010 WL 5128640 (5th Cir. Dec. 16, 2010).

285 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.16 cmt. b, at 259 (2010).

286 *See, e.g.*, United States v. Wilson, 429 F.3d 455, 459–60 (3d Cir. 2005) (discussing the validity and voluntariness of package pleas).

287 *See* Bruce A. Green, *"Package" Plea Bargaining and the Prosecutor's Duty of Good Faith*, 25 CRIM. L. BULL. 507, 548–59 (1989).

encouraging cooperation.[288] Even if several defendants enter a guilty plea, they do not save the state all the costs of trial if one holdout insists on undergoing the full process. Yet, the prosecutorial power is seen by some as so coercive as to be banned.[289] Indeed, in 1975, the ALI warned about such offers inducing inaccurate pleas.[290] But support for the practice comes from most jurisdictions that have addressed it and concluded that such agreements are not "invalid per se."[291]

The ALI project is in some sense aiming to respond to the power imbalance represented by the prosecutor offering plea bargains. By enabling either judges or lawyers to collect clients, the resources of the claimant class may grow—if their representative is loyal, energetic, and able. But despite the literature replete with concerns about self-interested lawyers and collusion,[292] the 2009 ALI aggregation principles rely on a good deal of self-policing by the participants and do not build in public dissemination or judicial review, absent the happenstance of an unhappy claimant raising a challenge after a settlement.[293] In contrast, package pleas are (like other plea bargains) subjected ex ante to a modicum of judicial oversight. Courts have required disclosures of the terms of package pleas and have called for heightened scrutiny of such agreements.[294] Some jurisdictions go fur-

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288 *See* Melanie D. Wilson, *Prosecutors "Doing Justice" Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67, 100 & n.162 (2008).

289 State v. Solano, 724 F.2d 17, 22 (Ariz. 1986) (Gordon, J., dissenting) (arguing that package plea deals should be disallowed in all cases).

> If we tie people together in a plea bargain package, however attractive the wrapping . . . we detract from the individuality of the persons involved, and force the trial judge to determine whether the end justifies the means. In these days of overcrowded calendars, it is unrealistic to believe that a harried trial judge would not be tempted to yield to a slightly unfair package in order to reduce his case load. This is simply not a desirable procedure and is designed solely to put undue leverage on the defendants and trial court.

Id. at 22.

290 AM. LAW INST., A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § 350.3 intro. cmt., at 614–15 (1975).

291 *See* Howell v. State, 185 S.W.3d 319, 334 (Tenn. 2006); *see also* Green, *supra* note 287, at 512–14.

292 *See, e.g.*, John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice,"* 30 CARDOZO L. REV. 407, 414 (2008); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370 (1995); John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 853–54 (1995); Erichson, *All-or-Nothing Settlements*, *supra* note 271, at 1007, 1020–22.

293 *See, e.g.*, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.09 cmt. b, at 169–72 (2010).

294 *E.g.*, State v. Danh, 516 N.W.2d 539, 542 (Minn. 1994); Shepersky v. Minnesota, No. A07-1525, 2008 Minn. App. Unpub. LEXIS 1017, at *15–16 (Ct. App. Aug. 26, 2008).

ther, holding that a plea is not likely to meet the constitutional standard of voluntariness "if the court finds that a promise of leniency to a third party was a significant consideration in the defendant's decision to plead guilty."[295]

The lessons from the criminal side serve as a reminder of the limits of what judges can do. In practice, oversight has proved relatively thin. Courts have declined to overturn convictions on the grounds of insufficient disclosure of packages.[296] Indeed, the United States Supreme Court recently refused to find "plain error" when a prosecutor concededly failed to adhere to a plea agreement in which the government agreed to request a reduction in a guideline sentence.[297] But the public process of plea bargaining does enable knowledge of the frequency of its use and the terms (including package pleas) that are proffered and tolerated—sparking a normative debate about what law should require when an individual or a group agrees to plead guilty. Thus, although "judging consent" is a task that puts the judge in a particularly party-dependent mode,[298] likely to defer to the proponents of agreements, the public gains insight into the practices of lawyers, litigants, and the courts.

A second analogy to the aggregate settlement procedures fashioned by the ALI comes from contract clauses that oblige mandatory arbitration. Beginning in the 1980s, the Supreme Court reread federal statutes to permit, rather than to prohibit, enforcement of arbitration contracts that, in advance of a dispute, waive rights of access to court, even when federal or state statutory rights were at stake.[299] A first wave of cases dealt with consumer contracts, but in 2001, the Court applied an expansive approach to endorse mandatory arbitration despite an employee's claim of violations of the right to be free from

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295 *See* People v. Sandoval, 43 Cal. Rptr. 3d 911, 921 (Ct. App. 2006) (citing earlier California law).

296 *See, e.g.*, Butala v. State, 664 N.W.2d 333, 340 (Minn. 2003), *superseded by statute on other grounds*, 2005 Minn. Laws 197–98.

297 *See* Puckett v. United States, 129 S. Ct. 1423, 1428 (2009). The Court held that Federal Rule of Criminal Procedure 52(b)'s plain error review applied and affirmed the conviction and sentence.

298 *See* Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 101–02.

299 *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). The Court reaffirmed its approach in Green Tree Fin. Corp.–Ala. v. Randolph, 531 U.S. 79, 89–92 (2000). The lower courts followed suit. *See, e.g.*, Guyden v. Aetna, Inc., 544 F.3d 376, 384 (2d Cir. 2008) (holding that claims under the Sarbanes-Oxley Act's whistleblower protection provisions are subject to arbitration and concluding that "the loss of a public forum in which to air allegations of fraud does not undermine the statutory purpose of a whistleblower protection provision").

discrimination based on sexual orientation under state law.[300] The constraint imposed under the doctrine is that, so long as the alternative provides an adequate opportunity to vindicate statutory rights, such contracts are enforceable.[301] Objections go, by and large, to the arbitrator. This proposition was reiterated emphatically at the end of the 2010 Term in *Rent-A-Center, West, Inc. v. Jackson*, when the Supreme Court held that a challenge to the enforceability of the entire agreement (which the Ninth Circuit had held unconscionable because of the lack of meaningful consent) is a judgment to be made, initially at least, by an arbitrator.[302]

Unlike the ALI 2009 precepts that impose detailed requirements on how lawyers are to obtain "informed consent,"[303] the waivers of court access in employment and consumer contracts often come in the small print.[304] Indeed, in some instances, prospective employees are required to sign waivers before becoming eligible for a job interview.[305] Further, under the 2009 decision of *14 Penn Plaza LLC v. Pyett*,[306] these provisions can be part of contracts entered into by unions rather than by employees personally; a union's agreement to arbitrate claims bound individual employees.[307]

But like mandatory arbitration contracts, a more powerful party (in this instance, a lawyer) proffers a form and can refuse to provide services if the client does not waive rights of the duty of individual loyalty and acquiesce to this form of alternative dispute resolution. While the ALI provisions insist that the clients remain in control of final settlement decisions,[308] the ALI has not specified means for clients (unless sophisticated ex ante negotiators with lawyers) who have transferred loyalty to the group to exercise effectively that control. Both mandatory arbitration contacts and the ALI aggregation agree-

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300 *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001), *remanded to* 279 F.3d 889 (9th Cir. 2002). On remand, the Ninth Circuit concluded that, under California law, the contract was not enforceable because it was a contract of adhesion. *Circuit City Stores, Inc.*, 279 F.3d at 893.

301 *See, e.g.,* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2778–80 (2010).

302 *Id.* at 2778–79.

303 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(a), at 262 (2010).

304 *See, e.g.*, PUB. CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 1–3 (2007), http://www.citizen.org/documents/ArbitrationTrap.pdf.

305 *See, e.g.*, *id.*; *cf.* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251 (2006).

306 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009).

307 *Id.* at 1466.

308 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17, at 262 (2010).

ments forego judicial process and authorize private actors to make judgments that—absent litigants with the ability to mount court-based challenges to such contracts—will render binding conclusions on what are otherwise legally enforceable claims.

An ongoing challenge to mandatory arbitration clauses illuminates the potential problems in the ALI model. Many of the current form contracts for mandatory arbitration include clauses prohibiting "class arbitrations."[309] But just as the ALI has underscored the importance of aggregate processing to enhance the pursuit of justice through enforcing rights, so too have advocates for consumers and employees argued that clauses banning class arbitrations are fundamentally unfair.[310] The Second Circuit concluded in a case involving shipping companies that, when a contract was silent on the issue, arbitrators had the power to infer the ability to proceed as a class.[311] But in the spring of 2010, the Supreme Court reversed, holding that silence could not be read by a panel of arbitrators to permit them to hear a class arbitration.[312] As for express bans, some courts have found that preclusion of class arbitration renders a contract unconscionable. That issue is before the Supreme Court, which granted certiorari in *AT&T Mobility v. Concepcion* to decide whether the Federal Arbitration Act preempts state law finding unconscionable a contract that prohibits class arbitrations.[313]

Although the 2009 ALI precepts insist that "under no circumstances" may a client assign a claim,[314] a third analogue to the ALI aggregate settlement provisions is the assignment of claims. While not a formal assignment (because of the stated retention of control and voting rights), the ALI aggregation principles offer lawyers means to obtain clients individually yet to negotiate for them as a group, and

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309 *See* PUB. CITIZEN, *supra* note 304, at 9.

310 *E.g.*, *id.* (noting a recent decision of the Washington Supreme Court which struck down an agreement prohibiting class actions and concluded that such a requirement prevented consumers from vindicating their rights).

311 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 548 F.3d 85, 97 (2d Cir. 2008).

312 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1777 (2010).

313 Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom.* AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010). Judge Bea, writing for the Ninth Circuit, held that California law made the contract unenforceable and that the Federal Arbitration Act neither expressly nor implicitly preempted California unconscionability law. The Second Circuit reached a similar conclusion in July 2010, holding that the arbitration clause of a student loan consolidation contract was unconscionable under California law, and that the Federal Arbitration Act did not preempt California contract law. *See* Fensterstock v. Educ. Fin. Partners, 611 F.3d 124 (2d Cir. 2010).

314 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(b)(1), at 262 (2010).

thus to move into mass markets.[315] This new mode of lawyer services is responsive to the shift in the market of injuries. A custom-tailored (or as an English commentator put it, "bespoke"[316]) system of lawyer-client relations may be a form of craft that, as in other industries, is fast becoming obsolete or only available to clients with substantial resources.[317] As Howard Erichson and Benjamin Zipursky observe, the ALI offer to clients of the option to shop for lawyers who do not proffer contracts committing clients to aggregate settlement possibilities may be illusory, in that clients will want to have lawyers who represent others similarly situated, and hence have or gain knowledge and bargaining clout.[318] Thus, Erichson and Zipursky see the ALI provisions as unduly lawyer-empowering.

Fourth, mention needs to be made of the concerns attendant to "vanishing trials," the term Marc Galanter helped to imbue with meaning as he headed a research project, sponsored by the Section on Litigation of the American Bar Association, to map the declining number of trials.[319] In the federal courts, of one hundred cases filed, fewer than two start trials.[320] The ALI has created new methods to obtain the benefits of law—sanctioned aggregate settlements without the necessity of filing a lawsuit and seeking class certification. As the ALI explains: "Aggregate proceedings may resolve claims that have not ripened into lawsuits and that are held by persons who are not represented persons. For example, a settlement proposal extended to persons with unfiled claims may accomplish this result," namely through the development of the ideas of "nonparty claimants" and of

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315 The ability of "repeat players"—of whom lawyers are an example par excellence—to shape rules to their benefit is explored in a classic essay by Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW AND SOC'Y REV. 95, 97 (1974). Some 150 years earlier, Jeremy Bentham made a similar point, complaining that "Judge & Co." (judges and lawyers) had created a system that suited their interests but not the populace. *See, e.g.*, Jeremy Bentham, *An Introductory View of the Rationale of Evidence*, *in* 6 THE WORKS OF JEREMY BENTHAM 1, 351 (John Bowring ed., 1843) [hereinafter Bentham, *Rationale*].

316 *See* RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES 271 (2008).

317 *See* RICHARD L. ABEL, ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM (2003).

318 Erichson & Zipursky, *supra* note 193, at 301–03. They also argue that the consent under such conditions would be "inauthentic" and that lawyers would functionally end up "adjudicating clients' claims vis-à-vis each other." *Id.* at 300; *see also* Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 419–20 (2008).

319 *See generally* Galanter & Cahill, *supra* note 156; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) [hereinafter Galanter, *Vanishing Trial*].

320 Galanter, *Vanishing Trial*, *supra* note 319, at 461.

"nonparty respondents."[321] The ALI project thus raises the potential for "vanishing settlements," in that the less regulated, less visible, private out-of-court regime could have more appeal than the requirements of justification and public disclosures of in-court aggregate settlements.

Finally, the ALI's shaping of non-court-based settlements frees negotiators from dealing with the jurisdictional boundaries that are currently at the core of the current federal system. In this respect, the ALI project is in sync with the Supreme Court's embrace of court-based settlements that do not rely on delineations between state and federal authority. The ALI provisions share the enthusiasm that prompted the Supreme Court's expansive understanding of courts' powers that, as noted, mean that state courts can settle securities cases they have no authority to try.[322] The ALI can also find support in aspects of the congressional enactment of the Class Action Fairness Act,[323] bringing cases arising solely under state law, if aggregated, into federal courts.

D. An Alternative: Shared Lawyers and Redundant Procedures

In contrast to the ALI's focus on preclusion and finality, the 2008 decision of *Taylor v. Sturgell* affirms the potential that certain kinds of claims could be brought repeatedly, even if against the same defendant and even if a second litigant has the same lawyer as did a first, unsuccessful claimant.[324] For a unanimous Court, Justice Ginsburg insisted that Brent Taylor could have his "day in court" to pursue a Freedom of Information Act ("FOIA") request.[325] The opinion has been criticized by commentators enthusiastic about the ALI model, as they argue that the FOIA action fits neatly within concepts such as a mandatory class action or other forms of aggregation.[326] Yet, one can draw a different conclusion: that the *Taylor* case represents the value of redundancy because, had a first judgment been preclusive, impor-

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321 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.01 cmt. d, at 6 (2010) (developing the ideas of "nonparty claimants" and of "nonparty respondents").

322 Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 385–87 (1996).

323 28 U.S.C. § 1332 (2006).

324 Taylor v. Sturgell, 553 U.S. 880, 904 (2008).

325 *Id.* at 892–93 (quoting Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996)) (internal quotation marks omitted).

326 *See* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 201; *see also* Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1109 (2010).

tant legal questions about access to information would have remained unaddressed.

The facts are necessary for analysis of the ruling's implications. Taylor, a mechanic and the president of the Antique Airplane Association,[327] sought technical documents about how to make an F-45, "a vintage model" airplane that was manufactured in the 1930s by the Fairchild Engine and Airplane Corporation.[328] Taylor's lawsuit was not the first attempt to get that information. According to the record, Greg Herrick (whom Taylor knew[329]) had made such a request, pursued thereafter through litigation in the District Court of Wyoming.[330] In doing so, he had relied on 1955 materials from the manufacturer, which had authorized public disclosure of documents it had submitted to the government when initially obtaining manufacture and sale permission from the Civil Aeronautics Authority, the predecessor to the Federal Aviation Administration ("FAA").[331]

Herrick lost in the administrative proceedings and then at the district court on the grounds that trade secret status has been restored to the 1930s plans following the company's objections to the disclosure by the FAA.[332] The Tenth Circuit affirmed that ruling, as it also explained that because Herrick had not challenged the trial court ruling on the issues, the court had not reached the legal questions of whether trade secret status could attach after a FOIA request was made or whether it could be "restored," and if so, how or when.[333]

Represented by the same lawyer who had brought Herrick's unsuccessful claim, Taylor filed in the District of Columbia, where he advanced arguments about why the 1930s plans were no longer trade-secret protected.[334] Taylor lost at the district and circuit levels on the grounds that Herrick had been his "virtual" representative, sharing

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327 Taylor v. Blakey, No. 03-0173, 2005 WL 6003553, at *1 (D.D.C. May 12, 2005). The attorney listed as counsel of record, Michael John Pangia, had represented Herrick as well.

328 *Taylor v. Sturgell*, 553 U.S. at 885–86.

329 *Id.* at 885.

330 *Id.* at 886.

331 *Id.* at 886–87.

332 Herrick v. Garvey, 200 F. Supp. 2d 1321, 1328–29 (D. Wyo. 2000). The court commented that "only sixteen" of the F-45 planes were ever built. *Id.* at 1323. That court noted that the documents had not in fact been released and, further, that reasserting the private right reversed its waiver. *Id.* at 1329.

333 *Taylor v. Sturgell*, 553 U.S. at 887; *see* Herrick v. Garvey, 298 F.3d 1184, 1194 n.10 (10th Cir. 2002).

334 Taylor v. Blakey, No. 03-0173, 2005 WL 6003553, at *1 (D.D.C. May 12, 2005).

"the same incentive" to obtain disclosure.[335] As the appellate decision explained, permitting the lawsuit to continue would enhance the potential for "tactical" manipulation by a second litigant able to get "multiple bites at the litigatory apple."[336] Such a lawsuit could only occur if a "later plaintiff" who had connections to a prior litigant and lawyer could establish that the second plaintiff had no interest in the earlier litigation.[337]

The Supreme Court disagreed with the D.C. Circuit in a decision outlining the parameters of federal common law while also engaging the constitutional import of due process. The Supreme Court concluded that friendship, shared lawyers, shared membership in the Antique Aircraft Association, the sharing of documents, and the shared goal of getting disclosure of design details of a vintage airplane from the FAA were not proper bases on which to preclude Taylor from going forward.[338] In its discussion, the Court provided an overview of when preclusion of individuals not formally parties to lawsuits could occur.[339] The methods recognized as permissible are several, including contracts (such as the ALI proposes) that authorized representation; law that recognized relationships such as assignee and assignor, proxy relationships, or those in privity; law that structured relationships through mechanisms like class actions or trusteeship, or by means of special statutory schemes, such as bankruptcy;[340] and factual control over a lawsuit that resulted in practical participation.

But the Court refused a federal common law rule that would have added new grounds for preclusion. Instead, it reiterated its adherence to the "fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party."[341] The Court imposed parameters on the permissible forms of preclusion: preclusion can only occur if "at a minimum . . . the interests of the nonparty and her representative are aligned" and "either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty."[342] Sometimes, no-

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335 *See* Taylor v. Blakey, 490 F.3d 965, 972 (D.C. Cir. 2007); *Taylor v. Blakey*, 2005 WL 6003553, at *6.

336 *Taylor v. Blakey*, 490 F.3d at 975 (internal quotation marks omitted).

337 *Id.* at 976–77.

338 *Taylor v. Sturgell*, 553 U.S. at 905–07.

339 *Id.* at 892–96.

340 *Id.*

341 *Id.* at 898.

342 *Id.* at 900.

tice was required as well.[343] The Court specifically rejected the idea of a "common-law" class action,[344] in part on grounds of practicality and burden and in part because of vagueness; "no clear test" enabled assessment of when "virtual" representation existed or sufficed.[345]

Taylor embodies not only concerns about day-in-court rights but also the particular nature and importance of the underlying claim—the statutory right of free information. FOIA harkens back to the constitutional commands (discussed at the outset) that courts be open and that legislatures make regular accountings.[346] As the Tenth Circuit explained in the first case, *Herrick v. Garvey*,[347] "FOIA's purpose is 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.'"[348] Congress updated and translated those norms through a statute according "any person" the power to request records from federal agencies and obligating those agencies either to provide the information or explain why it is withheld.[349] Further, Congress put courts inside the process by charging them with policing refusals either by the government alone or (as illustrated in *Taylor* itself) resulting from a joint effort by government agencies and industry, seeking to keep information from the public realm.[350]

Taylor also offers an example of the role played by lawyers, who can miss as well as identify claims, whose sophistication can grow over time through repeated involvement with issues during a series of cases (what Francis McGovern called "mature" in the context of mass torts[351]), and whose resources can be augmented because, as the profile of the case grows, other lawyers become involved. Initially, Brent Taylor was represented by a lawyer who had expertise in aviation law

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343 *Id.*

344 *Id.* at 901 (citing Tice v. Am. Airlines, Inc., 162 F.3d 966, 972–73 (7th Cir. 1998)).

345 *Id.* (internal quotation marks omitted) (citing Tyus v. Schoemehl, 93 F.3d 449, 455 (8th Cir. 1996)).

346 *See, e.g.*, U.S. CONST. art. I, § 5, cl. 3; DEL. CONST. of 1792, art. I, § 9, *reprinted in* 1 POORE, *supra* note 48, at 279; KY. CONST. of 1792, art. XII, *reprinted in* 1 POORE, *supra* note 48, at 647; VT. CONST. of 1777, ch. II, § XXIII, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 51, at 3746.

347 Herrick v. Garvey, 298 F.3d 1184 (10th Cir. 2002).

348 *Id.* at 1189 (quoting Anderson v. Dep't of Health & Human Servs., 907 F.2d 936, 941 (10th Cir. 1990)).

349 5 U.S.C. § 552(a)(3)(A), (a)(6)(A) (2006).

350 *See id.* § 552(a)(4)(B).

351 Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989).

and had worked for the FAA.[352] On appeal in the D.C. Circuit and then before the Supreme Court, additional assistance came from Public Citizen, expert in class actions, procedure, and appellate practice.[353]

Some commentators (including Professors Samuel Issacharoff and Richard Nagareda, who also served as Reporters for the ALI aggregation project) have questioned the Supreme Court's *Taylor* decision for failing to appreciate the degree to which the FOIA claim was a public, rather than a personal, right.[354] While not endorsing the unspecified contours of the D.C. Circuit's virtual representation theory, Issacharoff and Nagareda saw the commonality across claimants such that, for example, a mandatory class action could be the response.[355] Others, such as Professor Martin Redish and William Katt, have praised the *Taylor* ruling as demonstrating the "foundational American political commitment to democracy" that recognizes individual autonomy and participatory rights.[356]

For me, *Taylor* not only represents the confluence of statutory information-forcing rights and courts' capacity to engender participatory parity, but also the utility of redundancy and judicial articulation of legal precepts. Do trade secrets lapse? How might they be resuscitated? Who wants to protect the plans of a 1930s vintage plane and why? Given that Congress has specifically crafted a statute giving "any person" rights to pursue these questions,[357] courts should be hesitant to assume that collective processing that would result in broad preclusive effects is a preferred method of implementing this congressional directive. Imagine that an initial lawsuit had been certi-

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352 *See Trial Lawyers: Michael J. Pangia*, ANDERSON PANGIA & ASSOCS., PLLC, http://www.andersonpangia.net/mjpangia.html (last visited Nov. 17, 2010) ("Michael Pangia leads the firm's aviation practice . . . . Mr. Pangia is a licensed commercial pilot, has a long experience with air crash disasters. As the former chief trial lawyer for the Federal Aviation Administration . . . Mr. Pangia is a nationally recognized expert in aviation law . . . .").

353 As its own description explains:

> Public Citizen Litigation Group is the arm of the organization that functions as a public interest law firm. Our attorneys litigate cases at all levels of the federal and state court systems. We specialize in health and safety regulation, access to courts, consumer rights, open government, and the First Amendment, including Internet free speech . . . .

About Our Congress Watch Division, PUB. CITIZEN, http://www.citizen.org/congress (last visited Oct. 8, 2010).

354 *See* Issacharoff, *supra* note 326, at 17; Nagareda, *supra* note 326, at 19–20.

355 *See, e.g.*, Issacharoff, *supra* note 326, at 21–23.

356 Martin H. Redish & William J. Katt, Taylor v. Sturgell*, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1917 (2009).

357 5 U.S.C. § 552(a)(3)(A) (2006).

fied as a mandatory class, lawyers had not pursued arguments of lapsed trade secrets, and the courts had held the issue waived. *Taylor* offers the law and fact pattern counseling against too-ready certifications,[358] given statutory opportunities for repeated exploration of the public and private rights entailed in delineating the secret from that which can be revealed in documents filed with the government or produced by the government.[359]

IV. The Pressures to Aggregate, the Plasticity of Norms, and the Role of Public Processes

This skim of decades of procedural changes permits one to see how procedural frameworks are both deeply embedded in political visions and historically contingent. Currently in the United States (and elsewhere), two models—due process procedure and procedure as contract—intersect. Both can be explained in terms of enabling rights enforcement. One relies to a significant degree on public exchanges, while the other embraces more private routes.

What are the arguments for the public facets of the due process model? Answers come in part by way of Jeremy Bentham, who was a remarkable procedural reformer and whose commitment to "publicity"[360] still echoes in contemporary opinions explaining why open courts are required. Bentham wanted to constrain a wide range of actors, including "Judge & Co."—common law judges and English lawyers whose self-interest resulted, he believed, in a cumbersome procedural system that worked to their, but not to the populace's, benefit.[361]

Publicity was a primary means, operating to enhance accuracy,[362] a view one can also find espoused in contemporary analyses of the impact of public trials.[363] Bentham also believed that public courts

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358 As for published decisions in the case, on remand, the district court denied discovery on the maintenance of the record prior to the request as a trade secret and whether the Fairchild Corporation was the true owner of record. The decision on discovery left open the possibility of returning to the issue. Taylor v. Babbitt, 673 F. Supp. 2d 20, 24 (D.D.C. 2009). As of this writing, the parties had briefed cross motions for summary judgment, pending before the court.

359 *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 Wm. & Mary L. Rev. 639, 649 (1981); *see also* Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 Tul. L. Rev. 2369, 2372 (2008).

360 *See* Bentham, *Rationale*, *supra* note 315, at 359.

361 *See generally id.*

362 *Id.* at 355. As Twining quoted Bentham, "Falsehood—corrupt and wilful falsehood—mendacity, in a word—the common instrument of all *wrong*," was the "irreconcilable enemy of justice." William Twining, Theories of Evidence: Bentham and Wigmore 90 (1985).

363 *See* Ezra Friedman & Abraham L. Wickelgren, *Chilling, Settlement, and the Accuracy of*

would generate a desirable form of communication between citizen and the state.[364] While not legally obliged to deliver opinions, Bentham thought judges would want their audience to understand their actions.[365] Thus, it would be "natural" for judges to gain "the habit of giving reasons from the bench."[366] Providing a stage for such dialogic exchanges, courts were "schools" as well as "theatres of justice."[367]

Another function of publicity is disciplinary; "the more strictly we are watched, the better we behave."[368] Recall that Bentham was a fierce critic of judges and their common law. "Publicity is the very soul of justice . . . . It keeps the judge himself, while trying, under trial."[369] Bentham proposed that ordinary spectators (whom he termed "auditors"[370]) be permitted to make notes that could be distributed widely. These "minutes" could serve as insurance for the good judge and as a corrective against "misrepresentations" made by

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the Legal Process, 26 J.L. ECON. & ORG. 144, 152 (2010). They offered a model to demonstrate that pressures toward settlements, in lieu of public trials, reduce accuracy because, under certain circumstances, "allowing settlement either increases chilling of legitimate activity or reduces deterrence of harmful activity."

364 *See* Bentham, *Rationale*, *supra* note 315, at 355–56.

365 *Id.* at 356–57.

366 *Id.* at 357.

367 *Id.* at 354. This imagery has currency in both France and the United States. *See* Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* HABERMAS AND THE PUBLIC SPHERE 110–11 (Craig Calhoun ed., 1992). Fraser described Habermas's public sphere as a

> theater in modern societies in which political participation is enacted through the medium of talk. It is the space in which citizens deliberate about their common affairs, and hence an institutionalized arena of discursive interaction. This arena is conceptually distinct from the state; it is a site for the production and circulation of discourses that can in principle be critical of the state.

Id. The function of courts as a form of theater has been explored by many commentators. *See generally* KATHERINE FISCHER TAYLOR, IN THE THEATER OF CRIMINAL JUSTICE: THE PALAIS DE JUSTICE IN SECOND EMPIRE PARIS (1993); Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81 (1975).

368 BENTHAM PROJECT, UCL FACULTY OF LAWS, THE MORE STRICTLY WE ARE WATCHED, THE BETTER WE BEHAVE 1 (2007), *available at* http://www.ucl.ac.uk/Bentham-Project/who/panopticon_leaflet. The quote comes from 1 WRITINGS ON THE POOR LAWS 277 (Michael Quinn ed., 2001). The website and the project's pamphlet also provide a copy of Bentham's emblem, which included an "all seeing eye, framed by the words Mercy, Justice, Vigilance." BENTHAM PROJECT, UCL FACULTY OF LAWS, *supra*, at 2.

369 Jeremy Bentham, *Draught for the Organization of Judicial Establishments, Compared with That of the National Assembly, with a Commentary on the Same*, *in* 4 THE WORKS OF JEREMY BENTHAM, *supra* note 315, at 316; Bentham, *Rationale*, *supra* note 315, at 355; *see also* NEIL ANDREWS, ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM 79 (2003).

370 Bentham, *Rationale*, *supra* note 315, at 356.

"an unrighteous judge."[371] More generally, "notification" of decisions[372] enabled the public to exercise its authority to "enforce the will of the people by means of the moral sanction."[373] Bentham's enthusiasm for openness did not render him insensitive to the burdens of public processes and the need for privacy. Bentham's list of circumstances for closure, like his arguments for openness, parallel those made in contemporary courts.[374]

Bentham's views on the importance of publicity were not limited to courtrooms, for he believed publicity's benefits—truth, education, interaction, and superintendence—to be useful in diverse settings across a vast swath of social ordering. The "doors of all public establishments ought to be, thrown wide open to the body of the curious at large—the great *open committee* of the tribunal of the world."[375] Bentham's invocation of door opening was more than a metaphor; he described in detail how to design structures to ensure that a host of activities, including legislative and executive functions, took place before the public.[376] These many and varied plans used architecture as

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371 *Id.*; *see also* Jeremy Bentham, *Constitutional Code*, *in* 9 THE WORKS OF JEREMY BENTHAM, *supra* note 315, at 158 (writing of "Public Opinion": "To the pernicious exercise of the power of government, it is the only check; to the beneficial, an indispensable supplement. Able rulers lead it; prudent rulers lead or follow it; foolish rulers disregard it."). Here, Bentham also linked publicity with his utilitarian philosophy, continuing that,

> Even at the present stage in the career of civilisation, [publicity's] dictates coincide, on most points, with those of the *greatest happiness principle*; on some, however, it still deviates from them: but, as its deviations have all along been less and less numerous, and less wide, sooner or later they will cease to be discernible; aberration will vanish, coincidence will be complete.

Id.

372 PHILIP SCHOFIELD, UTILITY AND DEMOCRACY: THE POLITICAL THOUGHT OF JEREMY BENTHAM 261 (2006).

373 *Id.* at 263.

374 For example, the European Convention on Human Rights provides:

> Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 222. Examples of debates about closure in the context of national security can be found in *Botmeh v. United Kingdom*, App. No. 15187/03, 46 Eur. Ct. H.R. Rep. 659 (2008).

375 Jeremy Bentham, *Panopticon*, *in* 4 THE WORKS OF JEREMY BENTHAM, *supra* note 315, at 37, 46.

376 One was direct observation: he called for a debating chamber that was "'nearly circular' with 'seats rising amphitheatrically above each other.'" SCHOFIELD, *supra* note 372, at 258 (quoting POLITICAL TACTICS 45 (Michael James et al. eds., 1999)).

"a means of securing publicity, while publicity was a means of securing responsibility."[377] Because he did not want government officials to be the sole sources of such accounts, Bentham devised various information-forcing methods. For example, he wanted to build designated spaces for newspaper reporters "to produce unofficial records of the proceedings, and thereby 'prevent negligence and dishonesty on the part of the official reporters.'"[378]

Moving beyond Bentham to contemporary critical theorists concerned about democratic discourse and the public sphere brings other justifications for open adjudicatory processes to the fore.[379] Adjudication can itself be a democratic practice—an odd moment in which individuals can oblige others to treat them as equals, as they argue in public about their disagreements, misbehavior, wrongdoing, and obligations. Litigation forces dialogue upon the unwilling (including the government, as *Taylor v. Sturgell* illustrates[380]) and, momentarily, alters configurations of authority. Social practices, etiquette, and a myriad of legal rules shape what those who enter courts are empowered to do.[381]

Courts can be a great leveler, in that participatory parity[382] is an express goal, and one that the ALI embraced in 2009 when it aimed to use aggregates to alter power disparities. Moreover, when government officials are parties to litigation, they are forced, either as plaintiffs or defendants, to comply with court rules, divulging information and responding to questions posed by opponents or judges. Depending on rule regimes such as discovery, disclosure, and statutes like FOIA, government litigants can be obliged to produce documents, files, e-mails, and other records.

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377 *Id.* at 259. Bentham is (in)famous for promoting the "panopticon," a prison that was designed to subject incarcerated inmates to continual observation. Bentham, *Panopticon*, *supra* note 375, at 46; *see also* SCHOFIELD, *supra* note 372, at 255–56.

378 SCHOFIELD, *supra* note 372, at 258 (quoting POLITICAL TACTICS, *supra* note 376, at 40).

379 *See generally* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger & Frederick Lawrence trans., The MIT Press 1991) (1962) (describing the "public sphere" as a place where citizens can interact and discuss common affairs); Fraser, *supra* note 367, at 112–37 (arguing against "the bourgeois conception of the public sphere").

380 *See supra* notes 346–50 and accompanying text.

381 This understanding of law as a social practice can be seen in the work of Robert M. Cover. *See generally* Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17 (2005).

382 Fraser argued that such parity was requisite to the proper functioning of Habermasian public spheres. Fraser, *supra* note 367, at 118.

Open courts and published opinions permit individuals who are neither employees of the courts nor disputants to learn, firsthand, about processes and outcomes. Indeed, courts—and the discussions that their processes produce—are one avenue through which private persons come together to form a public,[383] assuming an identity as participants acting within a political and social order. Courts make a contribution by being what could be called nondenominational or nonpartisan, in that they are one of relatively few communal spaces not organized by political, religious, or social affiliations. Open court proceedings enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power.

Thus, while Bentham stressed the protective side of adjudication (policing judges as well as witnesses), I want to emphasize its democratic capacities. The developmental theory of due process has generated public facets of adjudication that engender participatory obligations and enact democratic precepts of equality. Courts provide opportunities to make meaningful the democratic aspirations to locate sovereignty in the people, to constrain government actors, and to insist on the equality of treatment under law. As a consequence, the vanishing trials and vanishing court-based settlements can entail lost democratic opportunities for public debate and input about law's entailments. Courts serve not only as a segment of the regulatory apparatus but as contributors to democracy by enacting its precepts.

Of course, courts can also be a place for the manipulation of popular opinion and for a few atypical events to become unduly salient.[384] Moreover, one should not romanticize spectatorship. A 2010 decision by the United States Supreme Court about what it determined to be the unconstitutional exclusion of the public arose from a trial judge asking the "lone courtroom observer" to leave the room.[385] Locating judgment in courthouses with windows to the streets and open doors makes publicity possible, but a question remains about how to secure an audience whose members understand themselves as participatory

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383 *See generally* Craig Calhoun, *Introduction* to HABERMAS AND THE PUBLIC SPHERE, *supra* note 367.

384 Those problems are discussed at length in Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 4 LAW & ETHICS HUM. RTS. (forthcoming 2011). Further, as David Luban has noted, publicity itself can be used to undercut the legitimacy of the very institution making the knowledge public. All "actions relating to the right of other human beings are wrong if publicizing their maxim would lead to self-frustration by undercutting the legitimacy of the public institutions authorizing those actions." David Luban, *The Publicity Principle*, *in* THE THEORY OF INSTITUTIONAL DESIGN 154, 192 (Robert E. Goodin ed., 1996).

385 Presley v. Georgia, 130 S. Ct. 721, 722, 725 (2010).

observers, functioning politically as responsible "auditors"[386] rather than indifferent viewers or as partisans. Watching state-authorized processes could prompt celebration, action, or dialectic exchanges that develop new norms of diverse kinds, but boredom can also result.

Bentham saw this problem of obtaining "an audience for the 'judicial theatre,'"[387] and offered both moral and economic incentives. He considered whether to have public authorities require attendance as a matter of duty, provide compensation for attendance, or devise some other "factitious means" to bring people into the audience.[388] Another method was the printed word; Bentham advocated that permission be liberally granted for the publication of information obtained, and for its republication as well.[389]

In short, a host of problems haunt the project of publicity. Viewers may be episodic or distracted and neither interested in nor able to see full proceedings, nor to understand and accurately put their knowledge into the public stream of information. Further, while one set of problems stems from getting an audience and sustaining its attention, others relate to getting attention of the wrong kind. Yet, through litigation (as well as other modalities), authority is relocated. Whether the results are distributionally, morally, and politically desirable depends on views about the underlying social norms interacting with the conflicts put before the public through court processes.

Whatever the outcomes, the public and the immediate participants can see that law varies by contexts, decisionmakers, litigants, and facts, and they gain a chance to argue that the governing rules or their applications are wrong. Through democratic iterations—the backs-and-forths of courts, legislatures, media, public and private actors, and their audiences—norms can be reconfigured. But to insist on courts as vital facets of democratic functioning is also to acknowledge that, like the democratic output of the legislative and executive branches, adjudication does not always yield wise or just results. What it offers are opportunities for democratic norms to be implemented through the millions of exchanges in courts among judges, audiences, and litigants. Courts are an important component of functioning democracies seeking to demonstrate legitimacy through per-

386 *See* Bentham, *Rationale*, *supra* note 315, at 356.

387 SCHOFIELD, *supra* note 372, at 310.

388 *See* Bentham, *Rationale*, *supra* note 315, at 354.

389 *Id.* at 356.

mitted disciplined exchanges among disputants, and thereby displaying the quality of governance.[390]

Others, including the ALI drafters, have argued at length the utilities of the contract model, which prizes outcomes negotiated through private ordering as it assumes that efficiencies will result. Yet the ALI's approach to aggregation embodies some market skepticism, stemming from an appreciation of imbalances in access and authority and intervening by generating power through group formation. A puzzle is thus presented by the ALI proposals, which are committed to aggregation and insistent on the need for judicial regulation of in-court aggregations. The ALI has generated an individualized system for clients to waive obligations of loyalty to become a group for settlement purposes. Further, the ALI provides no method for clients to obtain the benefits of aggregation in that very negotiation with their lawyers and no oversight by a judicial officer before agreements close.[391] Moreover, despite the ALI's understanding that aggregation is central to enabling access to courts, the postsettlement objector finding his or her way to court is not offered a means by which to aggregate such complaints nor able to use that challenge to permit (or require) reopening the agreement structured for the group of which the objector is a part.

The reason I began this Article by rehearsing a history of the development of the due process and contract models of procedure is to underscore that what courts do, who enters them, what due process entails, and what constitutes "fairness" are defined by social practices as well as by abstract political legal theory. The changing content of these norms makes their shape dependent on social and political expectations of governments' relationship to the public and of interactions among members of polities. Conflicts over the process due to those detained in the wake of 9/11 or those put on "no fly" lists are

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390 Various political theorists have moved from a focus on elections to examining sources of legitimacy such as public confidence, the quality of government, impartiality, non-self-dealing by decisionmakers, and decisionmaking through the aggregation of interests present. *See, e.g.*, Bo Rothstein & Jan Teorell, *What Is Quality of Government? A Theory of Impartial Government Institutions*, 21 GOVERNANCE: INT'L J. POL'Y & ADMIN. 165, 165 (2008); *see* BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY (2004); Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument*, *in* HAS LIBERALISM FAILED WOMEN?: ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES 19 (Jytte Klausen & Charles S. Maier eds., 2001).

391 Burch, supportive of the ALI proposal, sees the structure as permitting claimants to "exchange settlement autonomy for collective representation" that begets "increased bargaining power." Burch, *supra* note 22, at 539. But no such exchange is provided for clients to have such bargaining power against the lawyers proffering the arrangement.

but two of many examples in which the words "due process" are being defined and redefined.[392] Fairness could entail entitlements to a measure of individuality, could entail ideas of hearings, could constrain judges not to deal with disputants ex parte, and could put them before the public—or not.

The questions on the table are whether the efforts of California and New York to shape a "civil *Gideon*," insistent on equipping individuals to come to court, and the Supreme Court's decision in *Taylor v. Sturgell*—with its fight about whether 1930s airplane specifications are to be kept secret—are themselves "vintage," embodying the waning moments of due process obligations to scrutinize relationships among disputants and their lawyers as well as to insist on court access. Alternatively, the provisioning efforts of states and the regulatory impulse presented in *Taylor* may come to be seen as part of a resurgence of an interest in adjudication and in state-articulated rule of law requirements. (This is, after all, a moment in which governments are faulted for undersupervising large institutions, now spilling assets and oil.)

One other aspect of the interaction between the due process and contract models bears examining. To paint a picture that only puts settlement in tension with adjudication is not only to miss the interaction between the two but also to miss that claims for settlement made in the name of the public values of rights enforcement and distributional equity. It is not settlement that is problematic but the conditions under which it is reached and how it can be used after agreements are had. What the ALI has not fashioned in its proposed aggregate nonclass settlement rules are opportunities to bridge divides by creating procedures to accomplish what one of the nation's most prominent practitioners of settlement, Ken Feinberg, has called the center of his work: "transparency, outreach, notice, and opportunity to be heard."[393] The nonclass aggregate settlements do not rely on

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392 *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (applying the *Mathews v. Eldridge* test to determine the process due for a citizen detained at Guantánamo); Complaint for Injunctive and Declaratory Relief, Latif v. Holder, No. 10-750 (D. Or. June 30, 2010) (lawsuit challenging the process to determine those banned from flying); Scott Shane, *A.C.L.U. Sues over No-Fly List*, N.Y. TIMES, July 1, 2010, at A18 (describing the *Latif* suit). The interaction in treatment across sets of detainees is explored in Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579 (2010).

393 Kenneth R. Feinberg, *Reexamining the Arguments in Owen M. Fiss,* Against Settlement, 78 FORDHAM L. REV. 1171, 1174 (2009).

these four facets Feinberg described as central to gaining legitimacy for the agreements he helps to shape.[394]

What will, fifty years hence, seem to be settled facets of what due process of law requires and what will be controversial and in need of special justifications? I have argued that we should be leery of assuming that what we think of as fixtures are deeply embedded and hence invulnerable. In 1850, fewer than forty federal judges worked at the trial level in the United States, and no building owned by the federal government had the sign "U.S. Courthouse" on its front door.[395] By 2000, more than 1700 trial-level judges worked in more than 550 federal courthouse facilities.[396]

That trend line seems to predict unending expansion. Indeed, in 1995, leaders of the federal judiciary undertook to make a *Long Range Plan* to deal with what they assumed was an unendingly mounting pile of federal cases.[397] In that year, they predicted that more than 600,000 cases would, as of 2010, be pending.[398] But the number of filings—both civil and criminal—over the last decade has been relatively flat. Aside from bankruptcy filings, the numbers have gone up and down a bit, but average around 325,000 filings—about which they did a decade ago. (Criminal cases run around 62,000 to 68,000, and in 2009, the number of cases rose somewhat.[399]) The transformation in the role of the courts came during the same era in which the national postal system and the press were also expanding. More dramatic than

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394 *See* Resnik, *Money Matters*, *supra* note 11, at 2127. Whether class action outcomes themselves are sufficiently transparent is the subject of William B. Rubenstein & Nicholas M. Pace, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data*, *in* CAN INCREASED TRANSPARENCY IMPROVE THE CIVIL JUSTICE SYSTEM? (forthcoming 2011).

395 *See* Table of Authorized Judgeships, *supra* note 29.

396 *Id.*

397 *See* COMM. ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., *supra* note 176.

398 *See* ADMIN. OFFICE OF THE U.S. COURTS, IMPLEMENTATION OF THE LONG RANGE PLAN FOR THE FEDERAL COURTS: STATUS REPORT, at I-18 (2008), *available at* http://host4.uscourts.gov/library/Implementation_the_Long_Range_Plan.pdf.

399 *See Judicial Caseload Indicators: 12-Month Periods Ending March 31, 1999, 2004, 2007, and 2008*, USCOURTS.GOV, http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2008/front/IndicatorsMar08.pdf (last visited Dec. 29, 2010); *Judicial Caseload Indicators: 12-Month Periods Ending March 31, 2000, 2005, 2008, and 2009*, USCOURTS.GOV, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/front/IndicatorsMar09.pdf (last visited Dec. 29, 2010). *See generally Federal Judicial Caseload Statistics*, USCOURTS.GOV, http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx (last visited Nov. 15, 2010) (follow hyperlinks to Tables).

the flattening numbers of filings in federal courts are the falling fortunes of post offices and newspapers.[400]

Procedures, laws, and norms have great plasticity. Practices that seemed unimaginable only decades ago (from the mundane examples of the new reliance on court-based settlement programs to the stunning assertions by the U.S. government of the legitimacy of according little or no procedural rights to individuals at Guantánamo Bay) are now parts of the collective landscape. In the 1970s, consumers of goods and services and employees were not required to sign form contracts that imposed bars to bringing claims to court. In that era, those who did file federal lawsuits were not greeted by judges instructed in rules to implore litigants to explore alternatives to adjudication.[401]

As currently formatted, the ALI's aggregation procedures for non-court-based aggregate settlements do not insist on communicative obligations outside the circle of lawyers for claimants, respondents, and the clients on both sides. Such procedures undermine the discipline to be imposed on decisionmakers, be they lawyers or judges. But just as the reconfiguration of processes in courts to produce private settlements makes plain that court-based procedures are not necessarily public ones, one ought not assume that secrecy is an essential characteristic of various methods of resolution, now denominated ADR. Law can build in a place for the public ("sunshine," to borrow the term that legislators have used[402]) or wall off proceedings from the public.

Whatever the places constituted as authoritative, opportunities exist to engender or to preclude communal exchanges. Or, as Bentham put it:

> Considered in itself, a room allotted to the reception of the evidence in question . . . is an instrument rather of privacy than of publicity; since, if performed in the open air . . . the number of persons capable of taking cognizance of it would bear no fixed limits.[403]

The ALI has thus served us well in making plain that choices of the construction of adjudication and its alternatives are upon us.

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400 These issues are explored in RESNIK & CURTIS, *supra* note 28.

401 *See, e.g.*, AM. BAR ASS'N, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 78 (5th ed. 1991).

402 *See* FLA. STAT. ANN. § 69.081 (West 2009) (the "Sunshine in Litigation Act").

403 *See* Bentham, *Rationale*, *supra* note 315, at 354.