

THE LAW AND LARGE NUMBERS: PRESERVING
ADJUDICATION IN COMPLEX LITIGATION

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Abstract

This Article describes the transfer of power to regulate tortfeasors from the legislature to private parties through the medium of the court system and proposes that instead of privatizing mass torts administration courts should humanize it. The federal courts are faced with large numbers of claims arising out of torts, civil rights violations, and consumer fraud. Federal judges, concerned about the transformation of their role from adjudicators to administrators, have applied various narrowing legal doctrines to avoid administering mass torts. Because courts have restricted procedures for resolving mass claims, litigants have resorted to private ordering through settlement.

The alternative to private settlement is bureaucratic administration of complex litigation. There are legitimate reasons to fear this outcome, such as concerns about litigants becoming alienated, capture by special interests, and erroneous results. These same concerns about bureaucracy animated the debate over the rise of administrative agencies in the last century. But bureaucratic administration has its virtues and serves the broader democratic goal of access to justice. When judges avoid mass claim administration, they are not deferring to the legislature. Instead, they are ceding power to private actors. To replace private ordering, courts need a method for administering large numbers of claims that is both humanized and humanizing. Such a bureaucracy should be open to public scrutiny and understood as an important, sophisticated judicial function intended to realize the widely recognized values of the judicial system.

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I. INTRODUCTION

One tragic aspect of mass torts is that individual harm becomes routinized. Take the recent regulatory failures at the Food and Drug Administration that resulted in the sale of drugs posing substantial risks of dangerous, even fatal, undisclosed side effects.¹ Two million people, mostly women, used diet drugs that had harmful side effects, such as an agonizing death from primary pulmonary hypertension or, in less egregious cases, heart valve damage.² Many of these patients sued, and

1. See David Willman, *The New FDA: How a New Policy Led to Seven Deadly Drugs*, L.A. TIMES, Dec. 20, 2000, at A1 (describing regulatory failure at the FDA); Marcia Angell, *Your Dangerous Drugstore*, N.Y. REV. OF BOOKS, June 8, 2006, at 38-40 (describing the lawsuits arising out of the problematic approval and marketing of Vioxx).

2. See *Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.) (In re Diet Drugs I)*, Nos. 1203, 99-20593, 2000 WL 1222042, at *1-2 (E.D. Pa. Aug. 28, 2000) (mem.); ALICIA MUNDY, DISPENSING WITH THE TRUTH: THE VICTIMS, THE DRUG COMPANIES, AND THE

nearly 20,000 such suits ended up in the federal courts.³ To each individual who suffered health problems as a result of taking these drugs, her case was unique. From the judicial perspective, however, there were thousands of similar claims to be administered. Eventually, these cases settled for more than four billion dollars and a bureaucratic process was created to administer the claims.⁴ The creation of such an administrative system in the shadow of the court affects the core of our conception of justice and raises the question: To what extent should justice in the federal courts be mass produced?

This Article describes the procedural limits on access to justice in complex litigation and proposes a solution to these limitations. A combination of factors that stem from a shared resistance to bureaucracy has resulted in the transfer of the power to regulate tortfeasors from the legislature to private parties through the medium of the court system. Instead of privatizing mass claims resolution, we should humanize it by increasing transparency in the claims administration process, injecting more deliberation and communication into that process, and self-consciously evaluating judicially administered resolution of mass cases based on the values of systemic justice and deterrence.

Some observers see the influx of routine tort claims into Article III courts as a problem to be avoided through jurisdictional limitations that will have the net effect of reducing the number of such cases filed in federal courts.⁵ This is the position that the Federal Judicial Conference has taken, a position criticized for bringing judicial impartiality on these very issues into question.⁶ Conversely, various scholars embrace the new reality, advocating streamlined systems for overseeing mass torts in the courts and emphasizing efficiency and deterrence as the main goals of the legal system, especially in the tort area.⁷ These scholars want courts to

DRAMATIC STORY BEHIND THE BATTLE OVER FEN-PHEN 8 (2001). The details of the diet drug litigation are discussed *infra* Part III.

3. See *In re Diet Drugs I*, 2000 WL 1222042, at *3.

4. See Elizabeth J. Cabraser, *Your Products Liability Hit Parade: A Class Torts "Top 20,"* 37 TORT & INS. L.J. 169, 216-17 (2001); see also *infra* text accompanying notes 163-76.

5. See JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS (1995), reprinted in 166 F.R.D. 49 (1995) [hereinafter JUD. CONF. OF THE U.S.] (proposing a plan developed by Federal Judicial Conference to manage increased caseload in the federal courts, including advocating substantial limitations on diversity jurisdiction).

6. The judiciary's collective advocacy for limitations on its own jurisdiction raises concerns about impartiality. Judith Resnik, *Trial As Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1026-1029 (2000) (describing the transformation of the judiciary into an administrative agency with its own interests, and advocating against that agency taking a stand on various issues affecting the courts because it infringes on the judiciary's impartiality).

7. See, e.g., David Rosenberg, *The Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 834 (2002).

adopt the administrative role that judges have been resisting. Neither of these groups is entirely correct. On one hand, in focusing on the “day-in-court” ideal, judges often neglect to recognize our historic acceptance of its limitations. Furthermore, judicial attempts to limit access to justice through various narrowing doctrines have the ironic effect of eroding the “Hart-Hand model” of adjudication and the day-in-court ideal.⁸ On the other hand, although administration has its virtues, efficiency is not the only priority.⁹ This Article proposes a third way: a humanized approach to the administration of mass torts worthy of the time, effort, and expertise of federal judges.

Part II describes the controversy at issue. Courts, inundated with mass cases and possessing scarce resources, are pushed towards claims administration rather than adjudication. This Part also sets out the abiding concerns about bureaucracy in the courts and elsewhere: alienation, capture, and error. It demonstrates that these same worries were expressed in the debate over administrative agencies in the last century. Part III presents a case study, *In re Diet Drugs Products Liability Litigation* (the *Diet Drugs* litigation), to explore how mass torts arrive at the courthouse. This case study demonstrates both the importance of opening the courthouse door to these cases and the complexity of the issues they raise.¹⁰ Some of the concerns of judges and commentators about the administrative structures that have been established to deal with complex litigation are well founded. Part IV describes how judges resist the administrative paradigm. Through the narrowing of various doctrines,

8. See Henry Paul Monaghan, *Taking Bureaucracy Seriously*, 99 HARV. L. REV. 344, 344-45 (1985) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)) (describing the Hart-Hand or traditional model of adjudication as one in which “federal appellate judges are members of a small, elite, collegial, deliberative, on-going institution: a court of appeals [that has as] its hallmark . . . an adequately reasoned result”). The term might apply equally well to the district courts. See Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC’Y REV. 371, 377-78 (1980) (describing the “traditional” model of adjudication). The day-in-court ideal grew out of “deep-rooted historic tradition.” See *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (referring to “our ‘deep-rooted historic tradition that everyone should have his own day in court’”); see also Robert G. Bone, *Rethinking the “Day in Court” Ideal and Non-Party Preclusion*, 67 N.Y.U.L. REV. 193, 196 (1992).

9. “Efficiency principles are easy to apply; more ambiguous policies such as federalism and fairness are difficult to employ.” Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 277 (1991). For a nuanced discussion of the relationship between the regulatory and adjudicatory roles of the courts, see MEIR DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR A BUREAUCRATIC SOCIETY* 125-128 (1985) (describing two prevalent models of adjudication, the arbitration and regulation models, and arguing that these models present a division of labor rather than merely a tension between opposing views of the role of the courts).

10. See *infra* Part III.

judges have avoided administering mass cases directly and pushed those cases into private claims administration facilities created by settlement. Finally, Part V sets forth an agenda for developing a humanizing administrative response to mass torts and similar types of cases.

II. THE CONTROVERSY

Mass torts, such as the *Diet Drugs* litigation, challenge judges' views of themselves as rendering handcrafted justice and overseeing the adjudication of cases, rather than merely administering claims. Judges and other constant participants in the federal court system have been bemoaning the decline of the federal courts as courts of limited jurisdiction with special stature for at least fifty years.¹¹ Judges have long been concerned that, among other things, the influx of tort cases requires an increase in the number of federal judges that is "bound to depreciate the quality of the federal judiciary and thereby adversely affect our whole system."¹² This is a lament for the legal process ideal of adjudication, which posits an impartial judge affording parties an opportunity to be heard, deciding cases by applying legal rules to the facts presented, and producing a reasoned opinion documenting the decision.¹³ When discussed

11. "The business of the courts, particularly the federal courts, is drastically unlike the business of factories. The function and role of the courts and the nature of their judicial process involve impalpable factors, subtle but far reaching, which cannot be satisfied by enlarging the judicial plant." *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring). See generally HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 31 (1973) (noting the negative impact of increased dockets on the courts of appeals); RICHARD A. POSNER, *FEDERAL COURTS: CRISIS AND REFORM* (1985) (Seventh Circuit Judge decries the negative effects of increased caseload and advocates reinvigorating traditional model of adjudication by limiting federal court jurisdiction), revised as RICHARD A. POSNER, *FEDERAL COURTS: CHALLENGE AND REFORM* (1995); Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969) (lamenting the effect of increased dockets on the courts of appeals); Patrick E. Higginbotham, *Bureaucracy – the Carcinoma in the Federal Judiciary*, 31 ALA. L. REV. 261 (1980) (United States District Court Judge, E.D. Texas, now on the Fifth Circuit Court of Appeals, argues against the increasing bureaucratization of the courts and erosion of "classic" view of judge's role); Richard B. Hoffman, *Bureaucratic Spectre: The Newest Challenge to the Courts*, 66 JUDICATURE 60, 68 (1981) (chief deputy clerk of the District of Columbia Court of Appeals writes "the function of judges is to judge, not to administer"); Wade H. McCree, *Bureaucratic Justice: An Early Warning*, 120 U. PA. L. REV. 777 (1981) (Solicitor General of the United States argues against erosion of traditional adjudication as a result of influx of cases into the federal courts).

12. *Lumbermen's Mut. Cas. Co.*, 348 U.S. at 59 (Frankfurter, J., concurring).

13. See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); see also Cavanagh & Sarat, *supra* note 8, at 378 (describing Fuller's model of judge as follows: he or she "(1) must be impartial; (2) must afford interested parties a meaningful opportunity to be heard; and (3) must decide cases by applying legal rules to facts adduced in the

from the perspective of judges, this tradition has been called the “Hart-Hand model” of adjudication.¹⁴ Litigants know it as the “day-in-court” ideal.¹⁵

The federal courts, inundated with cases and faced with limited resources, have increasingly searched for ways to exclude mass cases from the federal docket or for more streamlined methods of resolving them. Judges have regarded the latter strategy with suspicion because of the fear that administration will alienate litigants, permit interest groups to capture the administrative system, and result in errors. This disquiet echoes concerns of an earlier era about the ability and propriety of legislative delegation of tasks to administrative agencies.

A. Courts Are Inundated with Cases and Have Scarce Resources

It is now a commonplace observation that the federal court system is inundated with a large number of claims and that the basis of the day-in-court ideal—the trial—is vanishing.¹⁶ The federal judiciary has more than doubled in the last forty years, growing from 279 district judges in 1962 to 615 in 2002.¹⁷ Caseloads outstripped the growing judicial ranks, also more than doubling from 196 filings per sitting judge in 1962 to 443 in 2002.¹⁸ Civil filings rose 16% between 1990 and 2005.¹⁹ Cases awaiting trial languish.²⁰ Instead, cases are being disposed of in ways other than by

course of the proceedings.”).

14. Monaghan, *supra* note 8, at 344-45 (describing the Hart-Hand, or traditional, model of adjudication as one in which “federal appellate judges are members of a small, elite, congenial, deliberative, on-going institution: a court of appeals [that has as] its hallmark . . . an adequately reasoned result”). Monaghan was applying this term to the appellate courts, but I think it also has some resonance with respect to district courts.

15. See *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (referring to “our ‘deep-rooted historic tradition that everyone should have his own day in court’” (quoting 18 CHARLES ALLAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COUPER, *FEDERAL PRACTICE AND PROCEDURE* § 4449, at 417 (1981))); Bone, *supra* note 8, at 196.

16. See generally Patricia Lee Refo, Introduction, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD., at v (2004).

17. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 500 (2004). The federal judiciary grew more than threefold in sixty years, from 191 district judges in 1948 to 680 in 2004. See Russell R. Wheeler & Cynthia Harrison, *Creating the Federal Judicial System*, 3 FED. JUD. CENTER 1, 23, 26 (2005).

18. See Galanter, *supra* note 17, at 501.

19. Compare JUD. CONF. OF THE U.S., *supra* note 5, at 15 (stating that in 1990, 217,879 civil cases were filed), with Federal Court Management Statistics 2005, U.S. District Court-Judicial Caseload Profile, <http://www.uscourts.gov/cgi-bin/cmsd2005.pl> (stating that the number rose to 253,273 in 2005).

20. The median time from filing to trial in federal district court was 22.5 months in 2005. See Federal Court Management Statistics 2005, U.S. District Court-Judicial Caseload Profile,

a trial, such as alternative dispute resolution, settlement, or pretrial disposition.²¹

This Article explores the periodic barrages of tort suits in the federal courts such as the influx of lawsuits concerning silicone breast implants.²² Twenty percent of the cases terminated in the federal courts in the fiscal years 2002 to 2003 were tort cases.²³ Although tort cases disposed of in federal courts have fluctuated in the last twenty years, averaging around 44,770 per year, the rate of trials has declined by almost 80%.²⁴ At least in part, the low ratio of trials to tort cases filed can be attributed to settlements.²⁵ Class actions play a role in this. When the number of civil trials is low, the number of class action filings tends to increase. Likewise, when the number of civil trials is high, the number of class action filings tends to decrease.²⁶ As Marc Galanter explains, “lawyers who file claims as class actions remove a large number of claims from the possibility of being tried individually and replace them with a much smaller number of cases in a category that very rarely eventuates in a trial.”²⁷

<http://www.uscourts.gov/cgi-bin/cmsd2005.pl>. 14.9% of the civil cases were more than three years old. *See id.* In 1990, only 10.6% of the cases were over three years old. *See* U.S. District Courts Civil Cases Pending by Length of Time Pending, <http://www.uscourts.gov/judicialfacts/figures/Table411.pdf> (last visited Feb. 16, 2007).

21. *See* Galanter, *supra* note 17, at 522-31 (analyzing the decline of trials and increase in non-trial adjudication, such as summary judgment and settlement); Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 787 (2004) [hereinafter Resnik, *Migrating*] (arguing that although there is a rarity of trials in courts, adjudication is happening in other forums, many of them private, and advocating increased public access to these forums); *cf.* Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 730-31 (2004) (describing the inaccuracy of statistics concerning dispositions of cases in the federal courts and presenting tentative findings that the vanishing trials have been replaced by non-trial adjudication and, potentially, that settlements have also decreased as a result of non-trial adjudications).

22. *See* Galanter, *supra* note 17, at 491 n.63. The two largest filings with the Multi-District Litigation (MDL) Panel were asbestos (106,069 cases) and breast implant litigation (27,526 cases). *See id.*

23. *See* Thomas H. Cohen, *Federal Tort Trials and Verdicts, 2002-03*, BUREAU OF JUST. STAT. BULL., Aug. 2005, at 1, 1, *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ftv03.pdf>.

24. *See* Press Release, Office of Justice Programs, Dep't of Justice, Number of Federal Tort Trials Fell by Almost 80 Percent from 1985 Through 2003 (Aug. 17, 2005), *available at* <http://www.ojp.usdoj.gov/newsroom/2005/ftv03pr.htm>. The peak, or, depending on your point of view, nadir, of case disposition was reached in 1999 when 60,941 tort cases were concluded in the federal courts, 61% of which were products liability cases. *See id.*

25. *See* Galanter, *supra* note 17, at 466-67 (writing that the drop in tort trial rates in part reflects the arrival of mass settlements, but since “the drop in trial rates has been steady and prolonged, antedating the era of mass tort settlements, and since a comparable decrease appears in other kinds of cases as well, it presumably reflects other factors in addition to mass settlements”).

26. *See id.* at 485.

27. *Id.* at 487.

This influx of claims has resulted in the advent of administrative rather than adjudicatory forms of structuring claims resolution, including mass tort settlements. Administration of claims in the courts is characterized by centralization of large numbers of claims in a single forum that metes out non-individualized solutions.²⁸ Contrast this with the day-in-court ideal: an individual trial in which a generalist judge (or jury) deliberates and applies legal rules to an individual case. Court business has been transformed “from cases to litigation,” changing the dynamic of the litigation process from a local, individual, and particularistic provision of justice to resolution of collective claims on a national scale.²⁹

The federal courts centralize all manner of substantive cases through various procedural mechanisms. Such cases might include the following: civil rights actions, such as employment discrimination or allegations of systemic Fourth Amendment violations based on a governmental policy or practice; torts, such as mass accidents or products liability cases; or allegations of violations of consumer protection laws. Even cases that do not cross geographic boundaries, such as most environmental tort claims, require some level of centralization by the courts because these cases address the same issues of fact and law applied to many individuals. Such cases are more efficiently brought in aggregation or as one action, rather than as a series of individual suits. I will focus on mass torts here, but these other areas of the law are equally relevant.

The procedural mechanisms for centralizing cases include the class action rule, the consolidation of trials, the Multiparty Multiforum Trial Jurisdiction statute, and the Multi-District Litigation (MDL) statute.³⁰ The centralized forum may be a court, a trust administering a claims resolution facility or less formal aggregation, and consolidation processes within law firms or groups of firms. The individual remedies for these collective claims resemble administrative agencies more than traditional adjudication.

These claims administration systems are created by the courts, private

28. An administration of claims of this type is a bureaucracy, a term that is difficult to define precisely. Owen M. Fiss “use[s] the term ‘bureaucracy’ to refer to a complex organization with three features: (1) a multitude of actors; (2) a division of functions or responsibilities among them; and (3) a reliance upon a hierarchy as the device to coordinate their activities.” Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 *YALE L.J.* 1442, 1444 (1983).

29. Judith Resnik, *From “Cases” to “Litigation,”* 54 *LAW & CONTEMP. PROBS.* 5, 51-52 (1991). This is the groundbreaking article tracing and analyzing this sea change in the work of the federal courts.

30. See 28 U.S.C.A. § 1369 (West 2007) (providing for federal diversity jurisdiction in civil actions with minimal diversity that arise out of a single accident involving the deaths of at least seventy-five natural persons); 28 U.S.C. § 1407 (2000) (providing for consolidation of pretrial proceedings in one court); FED. R. CIV. P. 23 (covering class actions); FED. R. CIV. P. 42(a) (covering consolidation).

litigants, or by consortia of counsel, not by Congress. They do not have the same powers, permanence, or accountability requirements as administrative agencies.³¹ Nevertheless, they are functionally similar. Sometimes referred to as “claims resolution facilities,”³² the mechanisms for administration of mass claims described here are “temporary administrative agencies”³³ in that they are created to last only for a fixed period, usually for a period of years or until all claims submitted within a prescribed period are resolved by the agency.³⁴ They are quasi-administrative in that they are flexible in their form and the process they provide claimants is not limited by any particular set of preexisting rules.

These systems are an administrative structure providing non-individualized resolution for mass claims. Broadly defined, such administrative structures may include the following: court-created structures for claim determination by special masters;³⁵ settlements on a class-wide basis;³⁶ the creation of schedules for claims settlement of aggregated cases, which has essentially the same effect as a class-wide settlement without the procedural protections;³⁷ or, in the rare case, creation of specialized governmental agencies.³⁸ A non-individualized

31. The Administrative Procedure Act (APA), for example, has a notice and comment requirement. *See* 5 U.S.C. § 553(b), (c) (2000); *cf.* Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005) (describing empirical data illustrating the limits of public participation in notice and comment processes under the APA).

32. Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1362 (2005).

33. Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2010 (1997) (describing Judge Weinstein’s creation of temporary administrative agencies).

34. For example, the portion of the Agent Orange claims administration that went directly to the claimants was structured to last until 1994, at which point the entire fund would be disbursed. *See* *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 253 (2d Cir. 2001), *aff’d in part, vacated in part per curiam*, 539 U.S. 111, 112 (2003). The Settlement Trust that arose out of the *Diet Drugs* litigation did not have a set deadline, but the deadline for submitting claims gave the process finality. *See generally* *Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.) (In re Diet Drugs I)*, Nos. 1203, 99-20593, 2000 WL 1222042, at *26-27 (E.D. Pa. Aug. 28, 2000) (mem.) (describing the settlement).

35. *See, e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-83 (9th Cir. 1996) (discussing class-wide determinations of compensatory damages made by statistical sample supervised by a special master).

36. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (overturning settlement of asbestos claims).

37. *See generally* Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005) (discussing the use of collective settlements to resolve non-class multi-party litigation).

38. For example, legislation is currently being considered to create an asbestos trust fund. *See USG to Settle Suits Related to Asbestos*, N.Y. TIMES, Jan. 31, 2006, at C3 (describing Senate bill to establish \$140 billion asbestos trust fund). The September 11th Victim Compensation Fund of

solution consists of the allocation of a predetermined, equal amount to every claimant;³⁹ the valuation of claims according to a matrix;⁴⁰ a combination of these;⁴¹ or a cy pres fund where damages are not directed to the claimants at all.⁴² The methods through which claims resolution facilities administer claims can be seen as a continuum that ranges from a trial, the most individualistic mechanism, to a cy pres fund, the least individualized because the money does not go to the claimants. Under the current system, the most publicly oriented means of resolving claims is also the most individualistic: adjudication by trial. Most of the non-individualized methods of claim resolution that are further along the continuum are ordinarily only found in settlements, which may or may not be overseen by the courts.⁴³

B. *The Enduring Arguments Against Bureaucracy: Alienation, Capture, and Error*

There are three central arguments against the administration of claims in the courts: alienation, capture, and error. These arguments echo the fundamental values of procedural due process: “The prevention of unjustified or mistaken deprivations and the promotion of participation and

2001 is another example of a governmental agency created to deal with a mass tort. *See* Air Transportation Safety and System Stabilization Act, 28 C.F.R. §§ 104.1-104.71 (2006); *see also* KENNETH R. FEINBERG, *WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005) (describing the work of the Fund from the point of view of its administrator).

39. This is most common in consumer litigation, but it also happens in the tort context. *See In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1018 (7th Cir. 1998) (approving a classwide settlement providing \$100,000 to each tort claimant regardless of individual demonstration of proof).

40. *See, e.g.*, *Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.) (In re Diet Drugs I)*, Nos. 1203, 99-20593, 2000 WL 1222042 at *20-23 (E.D. Pa. Aug. 28, 2000) (mem.).

41. *See, e.g.*, Anthony J. Sebok, *New York City's \$50 Million Strip-Search Suit Settlement: How a Fourth Amendment Violation Became a Mass Tort Lawsuit*, *FIND LAW*, Jan. 15, 2001, <http://writ.lp.findlaw.com/sebok/20010115.html> (stipulation of settlement on file with author) (settlement of case alleging unlawful pre-arraignment strip searches in which claimants could either obtain \$250 or fill out claim form with increasingly detailed information to receive more compensation according to a matrix, or, if they asserted damages above a certain amount, to have their damages determined by a psychologist).

42. These are generally only permitted with respect to residual, unclaimed funds. *See, e.g.*, *Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003) (citing cases approving use of cy pres doctrine to distribute class action funds); *Van Gemert v. Boeing Co.*, 739 F.2d 730, 736 (2d Cir. 1984) (considering the use of cy pres distribution for the limited purpose of distributing unclaimed funds).

43. A cy pres fund might be considered public to the extent it involves a public debate before court approval. *See, e.g.*, *In re Mex. Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1031-32 (N.D. Ill. 2000) (hearing testimony from a number of representatives of communities concerning four million dollar cy pres fund), *aff'd*, 267 F.3d 743 (7th Cir. 2001).

dialogue by affected individuals in the decisionmaking process.”⁴⁴ The alienation argument is rooted in the idea of dignity and expresses concerns about the lack of direct judicial accountability to litigants and stakeholders in a court-created quasi-administrative agency.⁴⁵ As a result of this lack of accountability, bureaucracy is a “rule by nobody.” The capture argument is based on the critique that the divorce between the affected party and the decision-maker allows for manipulation of the bureaucratic process in ways adverse to the interests of the claimants. The error argument is an instrumentalist argument rooted in the idea that process is a means to the end of accurate claim valuation. When critics of claims administration in the courts espouse the error argument they argue that in the absence of an individualized process, claim valuations will be erroneous or will not reflect the “market” value of the claim, that is, the value of the claim in light of prior settlements or jury verdicts. This is essentially an argument that bureaucratic structures are too crude to accurately value claims.

The alienation argument is based on the criticism that bureaucracy is a rule by nobody.⁴⁶ The inability of litigants to participate directly in the process, combined with the hierarchical structure of bureaucracy, results in the alienation of the judge from the litigants. This state of affairs breeds apathy in the decision-maker. Based on the work of Hannah Arendt, Owen Fiss argues that the compartmentalization of tasks and diffusion of responsibility in the courts renders bureaucracy “a social structure that makes possible, facilitates, and perhaps even causes the thoughtless use of public power.”⁴⁷

Private settlements can be a thoughtless use of public power. Most claimants in mass tort cases never enter a courtroom or appear before a judge. Because the judge need never look a plaintiff in the eye, she need not take responsibility for her actions. This is morally suspect because adjudication is not a rare form of state intervention in ordinary affairs but rather an “exercise of collective power needed on an almost continuous basis to assure that social life conforms to the public values.”⁴⁸ Fiss’s

44. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

45. For an enlightening discussion on the uses of the term “accountability” as an expression of an impulse against bureaucracy, see Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073 (2005).

46. Fiss, *supra* note 28, at 1452; see also Joel D. Schwartz, *Liberty, Democracy, and the Origins of American Bureaucracy*, 97 HARV. L. REV. 815, 830 (1984) (reviewing WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900* (1982)) (“In a ‘mon-archy’ or ‘olig-archy,’ one or a few men literally ‘rule.’ In a ‘demo-cracy’ the ‘people’ as a whole exercise ‘power’ over their lives. But in a ‘bureau-cracy’ literally no one rules, no one exercises *arete*.”).

47. Fiss, *supra* note 28, at 1453. Fiss does not distinguish between the development of bureaucratic systems of court administration and systems of claims administration. I believe his critique is relevant to both areas.

48. *Id.* at 1461.

critique of bureaucracy is similar to his critique of settlements.⁴⁹ By encouraging settlements, courts diffuse responsibility for the actions of private actors, thus diminishing the purpose of litigation as a means of conforming actions to public values. Because many claims resolution processes are created through settlement rather than engineered directly by the courts, the argument is a forceful one.

In mass torts class actions, the argument that bureaucracy is rule by nobody expresses itself in concerns over adequacy of representation and manageability. Interpretations of both these doctrines have tilted towards encouraging the exercise of individual autonomy by class members, combating the alienation of rule by nobody by injecting the process with direct claimant participation. This individualistic focus has eroded the possibilities for collective relief. For example, some courts have held that litigant autonomy requires a broad right of collateral attack based on inadequate representation.⁵⁰ For similar reasons, courts find broad-ranging class actions unmanageable because individual issues predominate.⁵¹

The capture argument is based on the observation that bureaucracy is characterized by the separation of control over bureaucratic systems from the subjects of those systems.⁵² Some examples of the separation of ownership from control include the relationship between the shareholder and the corporation or the citizen and the polity, but the critique is equally applicable to the claimant and the settlement administrator. As a result of this separation “bureaucratic managers—whether public or private—can control bureaucratic power in a manner adverse to the interests of the shareholders or citizens whom they purport to serve.”⁵³ This disconnect between administrators and claimants occurs because administrative

49. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082-83 (1984) (arguing against settlements because, among other things, they prevent law from developing through reasoned, published opinions).

50. See *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd in part, vacated in part*, 539 U.S. 111 (2003); see also Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383 (2000) (arguing in favor of traditional, broad collateral attack rule for inadequate representation to preserve autonomy of individual class members). Compare Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. M.C.A., Inc.*, 73 N.Y.U. L. REV. 765 (1998) (arguing against a broad right to collaterally attack class action settlements on the basis of inadequate representation and proposing a narrower basis for collateral attack), with Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent, Non-Resident Class Members*, 98 COLUM. L. REV. 1148 (1998) (arguing in favor of a broad right for absent class members to challenge preclusive class judgments in their chosen forum).

51. See *infra* note 106 (citing cases denying certification because of the necessity for individualized proof).

52. See Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1283 (1984).

53. *Id.* at 1284.

agencies permit discretion, allow for subjective determinations of decisions despite the existence of formal rules, and cannot be fully controlled by judicial oversight. As a result, they are subject to influence or capture. This concern is expressed in the mass tort context in worries about collusion between defendants and class counsel at the expense of the plaintiff class.⁵⁴

Both the alienation and capture arguments assume a baseline of individualized adjudication that privileges participation.⁵⁵ Any divergence from this baseline is viewed as problematic, although the baseline itself should be at issue because it assumes a world of unlimited resources or a very small, localized economy.⁵⁶ Gerald Frug contrasts bureaucracies with more democratic decision-making that values direct participation.⁵⁷ In the court context, this baseline of direct participation might be embodied in the jury trial. The jury is, in some ways, the paragon of direct democracy: Citizens are picked at random to decide the outcome of other citizens' cases. By contrast, quasi-administrative agencies decide outcomes based on judicial structuring or a negotiated resolution between the attorneys of the parties. The fear is that the attorneys will take their own interests into account at the expense of the true interests of the claimants, or that the interests of some claimants will be placed above those of others. A classic example of this latter problem involves future claimants.⁵⁸

54. See, e.g., Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69 (2004) (describing facets of the agent principal problem and proposing a competition-based solution to align the interests of class counsel and the class); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996) (describing egregious instances of class counsel taking advantage of absent class members in class action settlements).

55. Cf. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 888-89 (1987) (arguing that our understanding of rights is based on the natural or desirable functions of government as understood from common law baselines). Sunstein points out that in administrative law no constitutional violation will be found in cases of agency inaction based on the common law baseline, yet the rise of the administrative state represents a rejection of common law ordering. See *id.* at 892-93.

56. Cf. Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 689 (2004) ("There never was a regime of full trials.").

57. See Frug, *supra* note 52, at 1386 ("Acting together, we could begin to dismantle the structure of bureaucratic organizations—not all at once, but piece by piece. In their place we could substitute forms of human relationship that better reflect our aspirations for human development and equality."). Frug calls for a democratic, grassroots approach to decision-making and administration. See *id.*

58. The treatment of future claimants was one of the main criticisms of the *Georgine v. Amchem Products* settlement that was overturned by the Supreme Court. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 600, 620 (1997); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1063 (1995) (describing flaws in the *Amchem* settlement); see also George Rutherglen, *Future Claims in Mass Tort Cases: Deterrence, Compensation, and Necessity*, 88 VA. L. REV. 1989 (2002) (arguing that protecting

As compared to the day-in-court ideal, quasi-administrative agencies in the courts raise concerns beyond the inherent flaws in interest representation. The claimants' ability to participate in their own cases, to tell their own stories to their peers, to present themselves to the court, and to control their role in the litigation and the outcome with respect to their individual claims is severely limited. The result of this weakening of participation is a diminution of dignity.⁵⁹ In comparison to individualized adjudication, quasi-administrative agencies in the courts do not require that the judge face individual litigants. A trust or other entity created for the purpose of administering claims decides individual compensation based on a matrix or some other routinized form of decision-making. The place of each individual in the matrix is often determined based on documents, just as it is in administrative determinations in entities such as the Social Security Administration.⁶⁰ The day-in-court ideal requires the judge to interact directly with the people affected by the judge's decision. This interaction is absent in the mass torts settlements, and the resulting alienation of the judge from the claimant may lead to a diminished sense of decision-maker responsibility. One goal of the rationalization of decision-making in a bureaucracy is to eradicate the emotional element from decision-making.⁶¹ The very absence of this element, however, allows the judge to be more cavalier and less considered in determining outcomes, and in so doing, abdicate the deliberative role.

The third argument against quasi-administrative agencies in the courts is the error argument. There are two strands of this argument. The first contention is that administrative structures are too rough and result in error, and this rough justice is unacceptable. A second contention is that the shift from adjudication to administration opens the door to new risks of fraud as claimants attempt to take advantage of lower burdens of proof.

This argument has both empirical and normative elements. The

future claimants by excluding them from settlements may leave them worse off).

59. See Deborah L. Rhode, *Class Conflicts in Class Action*, 34 STAN. L. REV. 1183, 1198 (1982) ("Respect for individual dignity, autonomy, and self-expression demands that those with rights directly at risk have an adequate means of registering their concerns."); see also Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 133-44 (Mark P. Zanna ed., 1992) (describing findings that perceived fairness of process is critical to perception of legitimacy of outcomes).

60. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 336-37 (1976) (upholding termination of social security disability benefits on the basis of review of submitted written evidence only).

61. See FROM MAX WEBER: ESSAYS IN SOCIOLOGY 216 (H.H. Gerth & C. Wright Mills, trans., 1968) ("[T]he more the bureaucracy is 'dehumanized,' the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation. This is the specific nature of bureaucracy and it is appraised as its special virtue."). Frug insightfully argues that subjectivity and objectivity in decision-making are incompatible but simultaneously present in arguments regarding administration, which seek both to ensure individual expression and apply uniform rules. See Frug, *supra* note 52, at 1289-91.

empirical claim is that the mechanisms used in administering claims in court bureaucracies lead to too many errors in compensation. But how many errors are too many? The battles over errors and allegations of fraud in the *Diet Drugs* litigation described in Part III of this Article illuminate this incompetence objection. In that case, the error rate required substantial court intervention, and critics argued that the settlement was essentially imploding as a result.⁶²

There are several ways in which rough justice can lead to errors. Collective litigation seeks to maximize efficiency by finding the likenesses in claims and treating them the same across the board. The process of line drawing may result in overinclusion or underinclusion of claimants. Some claimants who do not deserve compensation may be included either because their claims are fraudulent or because the criteria for compensation simply do not reflect the realities of the litigation landscape. For example, in the *Diet Drugs* litigation, defendants accused some claimants' attorneys of falsifying echocardiogram results to obtain undeserved compensation for their clients.⁶³ Other claimants who deserve compensation may be awarded less than they would at trial or may not be included at all, either because of the one-size-fits-all criteria for compensation that does not fit the specific case or other factors such as inadequate notice. Furthermore, the process of categorization, inherent in claims administration procedures, may treat different claimants alike, either treating different injuries similarly or treating differently situated claimants similarly. Finally, the availability of a simple, speedy, and inexpensive process will increase the numbers of claimants, increasing the risk of error by taxing the system, decreasing the amount available to all claimants, or both.

Of the possible responses to these arguments, two stand out. First, both arguments depend on a baseline of the day-in-court ideal. This is an idealized view of litigation and democracy not suited to the second-best world in which we actually live. There are plenty of counter-examples that illustrate that the individualized day in court is just an ideal, neither a historical nor contemporary description of how courts in fact operate.⁶⁴ As Stephen Yeazell showed in his study of the history of the class action and Robert Bone demonstrated in his exploration of the idea of representation,

62. See generally Alison Frankel, *Still Ticking: Mistaken Assumptions, Greedy Lawyers, and Suggestions of Fraud Have Made Fen-Phen a Disaster of a Mass Tort*, AM. LAW., Mar. 2005, at 92, 92-94 (describing the litigation as a "series of mistakes" and a guide for how not to handle mass tort cases).

63. See *Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.) (In re Diet Drugs III)*, 226 F.R.D. 498, 510 (E.D. Pa. 2005).

64. See Friedman, *supra* note 56, at 697 (describing trials as historically a "residual category . . . reserved for the unusual, the extraordinary").

the individualized trial of a single plaintiff is not the only way our court system has operated.⁶⁵

Our system has always accommodated group resolution of claims, and since the Industrial Revolution, has developed structures for mass claims resolution to fit modern society. For example, the increase of industrial accidents in the late nineteenth century gave rise to company-created workmen's compensation schemes with formal, administrative guidelines for dealing with workplace injuries.⁶⁶ Later, in the era of automobile accidents, insurance claims adjusters shaped the "settlement market" for automobile torts, creating internal, formal, systematic rules for dealing with various types of claims.⁶⁷ Private companies were not the exclusive source of aggregation and systematization in the late nineteenth and early twentieth centuries. On the plaintiffs' attorney side, lawyers created economies of scale as early as the 1890s by aggregating clients with similar types of claims, such as injuries at a particular workplace, types of property loss or mass accident.⁶⁸ Accordingly, there is a long and continuous history of management of large numbers of claims through various types of private ordering, mostly in the shadow of the court system.

Even within the court system, the day in court is not ideal. The current adjudication system has taken more and more power away from the jury, both through various procedural mechanisms—such as judgment as a matter of law⁶⁹—and by encouraging settlements.⁷⁰ The day-in-court ideal

65. See generally STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (tracing group litigation back eight centuries); Bone, *supra* note 8 (reviewing the long history of virtual representation).

66. See Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 12 AM. BAR FOUND. RES. J. 351, 361 (1987); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1585-87 (2004) (citing PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE (2000)).

67. See H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 18 (Sheldon Messinger & Howard S. Becker eds., 1970) (stating that the "key figure in the settlement of automobile bodily injury claims is the adjuster"); Issacharoff & Witt, *supra* note 66, at 1603-08.

68. See Issacharoff & Witt, *supra* note 66, at 1596-98 (describing the law practices of Samuel Evans Maires of Pennsylvania, who specialized in claims against the Philadelphia Traction Company in the 1890s, Arthur E. Clark of New York, who "developed a portfolio of more than 2,000 claims by property owners against New York telephone and telegraph companies in the late 1890s," and a single Wisconsin law firm that "signed up a large number of property damage claimants" after a dam break in 1911).

69. See FED. R. CIV. P. 50(a), (b) (establishing the standard for judgment as a matter of law during or after trial).

70. See Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 598 (2005) (describing judicial preference for settlement).

has been accepted as a subjective, inconsistent process reflecting wide disparities in the quality of lawyers, the predilection and temperament of judges, and the dynamics of juries. Trials—the sine qua non of an individualized process—are becoming a rare and expensive commodity that fewer litigants experience or can afford.⁷¹ Instead, claims are resolved by motion, through settlements, or privately through arbitration or other alternative dispute resolution mechanisms.⁷² Structural differences among litigants can skew results so that institutions are more likely to obtain redress than individual litigants.⁷³ Results of the individualized court system famously lack uniformity, so that a litigant with one lawyer before one jury may obtain a verdict that is many multiples greater than another similarly situated litigant before another jury. The same is true of settlements. A litigant with a lawyer who is a particularly good negotiator, who is a repeat player, or who otherwise has an edge in negotiation will obtain a better settlement. Finally, individual litigation results in first-come, first-served justice where limited funds available for recovery may not be allocated with any reference to the larger goals of distributive justice.

This does not mean that we should reject the value of the day in court altogether, but rather that we must recognize our historical acceptance of its real world limitations when considering this value as a basis for limiting court-created bureaucracies. Proponents of the day-in-court ideal may argue, however, that these examples are the exception that proves the rule and require us to cling ever harder to the individual trial that has characterized the courts in the public imagination and that serves as a

71. See Galanter, *supra* note 17, at 516-17, 567.

72. See Erichson, *supra* note 37 (describing the types of aggregate settlements); Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 189 (2001) (“[L]awyers who are settling large numbers of claims at a time are usually attracted to quasi-administrative schemes that do not require significant time or resources to determine damage payments.”); Francis E. McGovern, *The Alabama DDT Settlement Fund*, 53 LAW & CONTEMP. PROBS., Autumn 1990, at 61 (discussing claims resolution facilities and the mass settlement of mass torts); Resnik, *Migrating*, *supra* note 21, at 784-85 (arguing that the decline in the number of trials is in part due to adjudicatory activity occurring elsewhere).

73. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-104 (1974) (analyzing the “different kinds of parties and the effect these differences might have on the way the system works”); cf. Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1280-81 (2005) (presenting empirical data showing that institutional plaintiffs are more likely to settle cases, whereas individual plaintiffs are more likely to have their cases adjudicated by a trial). *But see* Richard Lempert, *A Classic at 25: Reflections on Galanter’s “Haves” Article and Work It Has Inspired*, 33 LAW & SOC'Y REV. 1099 (1999) (arguing that there is little empirical evidence proving Galanter’s thesis).

counterpoint to both the generalized policy-making role of the legislature and the bureaucratization of the administrative state. Nevertheless, while this distrust of bureaucracy is valid, so too should we consider whether to develop a healthy distrust of the individualized process, especially when it leads to inequitable outcomes.

A second, related response is that the scarcity of the day in court sacrifices other values. For example, insistence on an individualized process means a decrease in access to justice for litigants. The dignity value fostered by direct participation in litigation is lost if the courthouse doors are closed to litigants or recovery is not available because a limited fund has been used up by those who got there first.⁷⁴ While there will be some complex cases where individual adjudication is feasible, we must nevertheless be wary of the extent to which an insistence on perfection in the process results in the denial of a remedy, rendering participation illusory.⁷⁵ There was a time when the response to this argument could have been that another forum remains open to litigants: state courts of general jurisdiction. Various new jurisdictional statutes along with rulings from the federal courts consolidating their ability to have final say over the centralization of claims have reduced the availability of this forum.⁷⁶ In the case of national class actions, for example, one court has held that if the federal forum has heard the certification motion and denied it, the same class action cannot be re-certified in state court.⁷⁷

Normative conclusions about a tolerable error rate should depend on the answers to some empirical questions, such as whether judicially administered claims actually result in more error than individualized adjudication, just as conclusions about participation values should be based on the actual level of participation offered under the current regime. But the answer to these questions also depends on a fundamental tradeoff between liberty and equality. In the end the question must be what limits

74. This is the basis for the limited fund class action. See FED. R. CIV. P. 23(b)(1).

75. For example, in the *Diet Drugs* settlement described below, claimants with the most severe damage, primary pulmonary hypertension, were excluded from the settlement with the assumption that they would bring or settle their claims individually, or both. See *infra* text accompanying notes 154-58.

76. See *supra* note 30 and accompanying text (describing legislation expanding federal jurisdiction over mass claims).

77. See *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 769 (7th Cir. 2003) (holding that unnamed class members are bound by court's denial of certification motion in national products liability class action and are barred from filing national class action with respect to same claims in another forum); cf. *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 524-25 (1986) ("[I]nefficient simultaneous litigation in state and federal courts on the same issue. . . . is one of the costs of our dual court system . . ."). But see *Bailey v. State Farm Fire & Cas. Co.*, 414 F.3d 1187, 1190-91 (10th Cir. 2005) (upholding the district court's refusal to grant an anti-suit injunction based on comity concerns because of the extent to which the case had already been litigated in state court).

are we willing to tolerate in order to increase access to justice for cases that would otherwise remain unheard?

*C. History Repeating Itself: Roots of the Enduring Arguments
Against Administrative Justice*

The fight over the competence of the federal courts to oversee quasi-administrative agencies is a reenactment of the early twentieth century battle over the ability of the legislature to delegate tasks to administrative agencies. It is worthwhile to look briefly at the development of the administrative state in the United States to see the origins of these arguments and the similarity between the two debates. While the same fundamental concerns apply in all cases of bureaucratization, the competency issues are not substantially different in the instance of court creation of quasi-administrative agencies as compared with legislative creation of genuine administrative agencies. A major reason that the country ultimately made peace with administrative agencies is the reliance on federal courts to oversee and review administrative actions. There is no reason why, as a historical and functional matter, the federal courts are not equally well-suited to oversee quasi-administrative agencies.

Historically, American courts were considered an individualistic counterpoint to political parties.⁷⁸ As an institution, courts were particularly responsive to concerns about capture in the political arena.⁷⁹ The United States of the nineteenth century was an anomaly from the European perspective because it lacked an “insulated bureaucratic class.”⁸⁰ In the absence of a strong centralized state, the American system was characterized by a decentralized party system of government where administrative positions were political appointments, controlled and doled out by parties until the late nineteenth century.⁸¹ The courts were an individualistic institution in tension with the political parties and were the only governmental institution outside direct party control.⁸² Thus Alexis de Tocqueville’s famous observation of 1830s America that “[t]here is

78. See STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATURAL ADMINISTRATIVE CAPACITIES, 1877-1920*, at 26-27 (1982).

79. See *id.* at 28-29.

80. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 222 (1992) (quoting SKOWRONEK, *supra* note 78, at 6).

81. See SKOWRONEK, *supra* note 78, at 48; see also WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900* (1982) (describing the factors that transformed the “mid-century party system” into a bureaucratic system).

82. See SKOWRONEK, *supra* note 78, at 26-29. As Skowronek describes the interaction: “Judicial activism was a natural complement to an electoral-representative system that had a natural impulse to distribute benefits widely through a logrolling politics (like the politics of granting special corporate charters) and to avoid, so far as possible, bold declarations of winners and losers in legislation.” *Id.* at 29.

hardly a political question in the United States which does not sooner or later turn into a judicial one.”⁸³ Early forays into bureaucratization, which began under President Jackson, were a reaction to the system of courts and parties, and responsive to concerns of capture of the parties by interests that did not reflect the public good.⁸⁴

While the concerns of the nineteenth century centered on parties, “in the twentieth century the issue of legitimacy has centered on the authority of administrators and bureaucrats.”⁸⁵ The rise of administrative regulation in the twentieth century not only “represented a renewed threat to common law conceptions of legality” but also “revived older fears of redistribution, statism, and centralization that had previously been directed at legislative action.”⁸⁶ Morton Horwitz has observed that “[m]uch of the struggle over administrative justice during the past century has derived from [the] challenge posed by the rise of administration to nineteenth-century conceptions of individually oriented justice.”⁸⁷ As Jerry Mashaw has explained, “[I]n a legal culture largely oriented toward court enforcement of individual legal rights, ‘administration’ has always seemed as antithetical to ‘law’ as ‘bureaucracy’ is to ‘justice.’”⁸⁸ Before the New Deal, the reaction of judges to state regulation was the creation of procedural and substantive limits on increases in federal administrative regulation, for example, through the non-delegation of power doctrine.⁸⁹ These are the same fears expressed about the rise of administrative structures in the court system. Today, federal judges are creating procedural limitations on the possibility of building quasi-administrative agencies within the court system to administer claims in much the same way.

Legislative enactments soon became too broad to create limits on administrative power and the non-delegation doctrine came to be viewed as “too crude and formalistic to serve the function of limiting administrative discretion.”⁹⁰ As critics began to see that administrative

83. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J. P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

84. *See generally* MATTHEW A. CRENSON, *THE FEDERAL MACHINE: BEGINNINGS OF BUREAUCRACY IN JACKSONIAN AMERICA* (1975) (describing the development of early bureaucracy and administration under Jackson); Schwartz, *supra* note 46, at 827 (arguing that under President Jackson “bureaucracy was intended to impose restraint and a sense of propriety on a people that had lost its confidence that these qualities were either innate or nurtured by traditional institutions”).

85. HORWITZ, *supra* note 80, at 222.

86. *Id.*

87. *Id.*

88. JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 1 (1983).

89. *See* HORWITZ, *supra* note 80, at 222-23.

90. *Id.* at 223.

rules left open opportunities for discretion and that this discretion permitted subjective decision-making that again was subject to influence and self-interest, new legitimating theories for bureaucratic structures became necessary.⁹¹ Thus in the beginning of the twentieth century and during the rise of the administrative state as we know it, legal scholars recognized the failure of rules to contain judicial discretion as well as administrative authority, and instead, scholars turned to ideas of expertise—to faith in science and objectivity—as a check on administrative power.⁹²

These same historical struggles play out today in the realm of class actions and other aggregative litigation. Courts increasingly rely on expertise to legitimate quasi-administrative systems through the use of special masters and expert judges. Although ordinarily judges are generalists who can decide any case, certain complex cases are an exception. Cases have migrated to particular judges who are considered adept at handling these cases because of their prior experience. The Multi-District Litigation panel picks certain experienced judges to whom it assigns complex aggregations.⁹³ The increasing use of magistrates on the federal level has also been much discussed in the literature.⁹⁴ Judges assign individuals with expertise in mass tort administration to serve as special masters in large cases.⁹⁵ On the state level, some states have a complex litigation docket presided over by judges with particular expertise in class actions or other complex litigation.⁹⁶

But soon proponents of administration realized that experts' opinions were subjective, liable to capture and incompetence. Market solutions to the problem posed by the dangers of discretion followed the realization of expert subjectivity.⁹⁷ In this model, "the policing function is performed not

91. See Frug, *supra* note 52, at 1297-1317.

92. See *id.* at 1331-33; HORWITZ, *supra* note 80, at 223-24. For a brilliant treatment of the effect of the objectivity problem on democratic thought, see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* (1973).

93. See 28 U.S.C. § 1407 (2000).

94. See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (discussing and critiquing increased use of magistrates); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 143-45 (1995) (describing and defending the role of specialized special masters in mass tort litigation).

95. See generally Georgene Vairo, *Why Me? The Role of Private Trustees in Complex Claims Resolution*, 57 STAN. L. REV. 1391 (2005) (discussing the appointment of special masters in complex litigation).

96. For example, Connecticut has a complex litigation docket. See Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisprudence of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 211-13 (2004). Approximately 45% of the cases on this docket are non-vehicular torts. See *id.* at 213.

97. See Frug, *supra* note 52, at 1355-56 (describing the "market/pluralist" model for controlling governmental bureaucratic discretion).

through judicial surveillance but through the interjection of another form of social organization into the operation of the bureaucracy.”⁹⁸ The market discipline model creates incentives for the bureaucrats to be faithful to the interest of constituents by threatening their removal from their positions.⁹⁹ The pluralist version of this model solves the problem of capture by representing interest groups within the bureaucracy.¹⁰⁰

Relying on the market model, class action scholars have argued in favor of auctions for class counsel,¹⁰¹ various fee structures such as percentage-based fees,¹⁰² or presumptive removal of class counsel in the event a settlement is not approved,¹⁰³ to create incentives for class counsel to faithfully represent the class. In the pluralist vein, scholars have proposed the representation of sub-classes by separate attorneys¹⁰⁴ and the intervention of objectors or even appointment of objectors to represent various interests.¹⁰⁵ Courts sometimes deny class action certification on the theory that the litigation concerns an “immature tort” that needs to be fully litigated in a series of individual cases before being addressed collectively. In doing so they are relying on a similar kind of market in adjudication to determine the common issues and value of the individual claim.¹⁰⁶ This

98. *Id.* at 1356.

99. *See id.* at 1359.

100. *See id.* at 1359-60 (“The bureaucracy’s decisions will then reflect its constituents’ wishes because the same process—interest-group conflict—will occur both inside and outside the bureaucracy.”).

101. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 105-16 (1991) (describing proposals for auctioning off claims and for auctioning rights to represent the class). *But see* Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 652 (2002) (arguing that auctions are poor tools for selecting firms based on multiple criteria, that auctions compromise the judicial role, and that they are unlikely to produce reasonable fee awards as an empirical matter and proposing stronger lead plaintiffs as an alternative solution to the agent-principal problem).

102. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 889-90 (1987). In the most complex litigation, the attorneys’ fees constitute a marginally increased percentage of the fund to encourage the maximization of claimholder value. *See id.*

103. *See* Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 293 (2003).

104. *See, e.g.,* Rhode, *supra* note 59 (advocating a pluralist model of class action effectuated through sub-classification).

105. *See, e.g.,* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403 (evaluating the effect of objectors upon class action litigation).

106. *See, e.g.,* *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 749 (5th Cir. 1996) (denying class certification because individual trials would result in a more accurate definition of what individual issues predominate); *Jacobs v. Osmose, Inc.*, 213 F.R.D. 607, 618 (S.D. Fla. 2003) (denying certification because there was not a sufficient “track record” of trials for a predominance

reasoning can be pushed to the extreme. Opinions such as Judge Posner's influential *In re Rhone-Poulenc Rorer Inc.*¹⁰⁷ decision, denying certification of a medical products liability class action, rely on the idea that the courts should not try big cases that would interfere with the maturing litigation process or be devastating to the industry in question either because the source of the devastation should not be the courts or because the industry should be protected despite wrongdoing.¹⁰⁸

These types of pluralist solutions encourage the filing of more cases and increase the necessity of centralization and bureaucratization. Likewise, bureaucracy creates the foundation of its own existence by permitting rationalization of claims. The implementation of a system to administer claims and increase access to the courts encourages an influx of claims which then need to be resolved through an increase in administrative capacity, opening the door to even more cases.¹⁰⁹ Judges have responded by idealizing the individualized hearing, even as it is increasingly replaced by other ways of resolving cases.

determination). *See generally* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989) (describing mature mass torts as those where "there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions"). That a market in adjudication will lead to expected valuation of claims is the theory behind the "maturation" of a mass tort. *See id.*

107. 51 F.3d 1293 (7th Cir. 1995).

108. *See id.* at 1298. In *Rhone-Poulenc*, Judge Posner explained:

Consider the situation that would obtain if the class had not been certified. The defendants would be facing 300 suits. . . .

. . . But the defendants have won twelve of the first thirteen, and, if this is a representative sample, they are likely to win most of the remaining ones as well. Perhaps in the end, if class-action treatment is denied (it has been denied in all the other hemophiliac HIV suits in which class certification has been sought), they will be compelled to pay damages in only 25 cases, involving a potential liability of perhaps no more than \$125 million altogether. These are guesses, of course, but they are at once conservative and usable for the limited purpose of comparing the situation that will face the defendants if the class certification stands. All of a sudden they will face thousands of plaintiffs.

Id.

109. As some scholars have argued, the Federalists' theory in fact created a "self-fulfilling prophecy: The institutions erected to counterbalance factions and regulate human selfishness were also intentionally designed to multiply factions and to encourage selfishness." Schwartz, *supra* note 46, at 832. Similarly, bureaucracy itself is the cause as well as the consequence of an alienated society. *See id.* at 833. Lack of participation breeds alienation, which results in disengagement, spurring reliance on forms of ordering that do not require participation.

III. THE CREATION OF QUASI-ADMINISTRATIVE AGENCIES IN THE COURTS

This Part explains how masses of claims arrive in the courts and one common method of dealing with them: settlement and the subsequent creation of a claims administration facility. The *Diet Drugs* litigation¹¹⁰ provides an eye-opening illustration of the methods by which courts participate in the creation of quasi-administrative agencies inside and in the shadow of the court system.¹¹¹

Our society prevents and redresses mass production harms in three ways: direct government regulation through administrative agencies; individual causes of action such as tort claims or civil rights legislation; and mechanisms for aggregating claims, including class actions and multi-district litigation. Administrative agencies directly regulate and police institutional conduct. Individual causes of action allow individuals to sue institutions for misconduct and collect damages or obtain injunctive relief, thereby stopping the misconduct, punishing the perpetrator, deterring future misconduct, or all of the above. Aggregative litigation and class actions allow individuals to obtain access to justice collectively. All of these devices may be used to address a single mass production wrong. First, some kind of regulatory failure leads to an influx of large numbers of individual claims, setting the stage for aggregation or class treatment. Second, various forms of informal ordering and formal procedural mechanisms result in the creation of a temporary administrative agency to administer compensation to claimants. Finally, claims are administered outside the court system.

The *Diet Drugs* litigation arose out of regulatory failure. The Food and Drug Administration, which probably should never have approved the drugs in question, issued a warning about the drugs after receiving substantial reports of health risks associated with them.¹¹² The manufacturer, American Home Products (AHP), voluntarily took these drugs off the market.¹¹³ Individual plaintiffs brought suits in state¹¹⁴ and

110. See generally Brown v. Am. Home Prods. Corp. (*In re Diet Drugs Prods. Liab. Litig.*) (*In re Diet Drugs I*), Nos. 1203, 99-20593, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) (mem.) (certifying the class and approving the settlement for individuals seeking to recover for injuries sustained as a result of using diet drugs); MUNDY, *supra* note 2 (relaying the story of the mass settlement for individuals harmed by taking Fen-Phen).

111. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing the impact of the legal system on the bargaining process that occurs outside of the court room).

112. See *In re Diet Drugs I*, 2000 WL 1222042, at *2.

113. See *id.* The FDA also has the power to require a company to remove drugs from the market, but did not do so. See *infra* note 134 and accompanying text.

114. See, e.g., Reed Abelson & Jonathan D. Glater, *A Texas Jury Rules Against a Diet Drug*, N.Y. TIMES, Apr. 28, 2004, at C1. Prominent state court suits arising out of the marketing of Fen-

federal courts. Suits that were brought in federal court or were removed to federal court were consolidated in a Multi-District Litigation proceeding in the Eastern District of Pennsylvania.¹¹⁵ Simultaneously, several class actions were brought in state and federal courts.¹¹⁶ The aggregated claims either settled in groups or as part of a settlement-only class action.

This litigation provides a window into the complexities of court bureaucracies and the trade-offs that lawyers, judges, plaintiffs, and defendants must make. It illustrates the two main procedural mechanisms for administration of claims in the court system—informal aggregation and class actions—as well as some of the reasons why we might be distrustful of them. The administrative agency created in the *Diet Drugs* litigation, the AHP Trust, was somewhat transparent and public because the parties' perpetual fighting returned them to the court on multiple occasions. In retrospect, this transparency usefully reveals the difficult tradeoffs and complexity of administrative claims resolution.

A. *How Mass Torts Happen: A Case Study of the Diet Drugs Litigation*

The diet drugs at issue in the thousands of cases that flooded the federal courts were Redux and Pondimin, one half of the drug combination that was commonly referred to as Fen-Phen and prescribed for weight loss.¹¹⁷ The drug's record for effectiveness was minimal,¹¹⁸ but its effects on the health of its users were significant. In the worst cases, it caused primary pulmonary hypertension leading to a terrible death, and in other cases, it caused heart valve defects after only a short period of use.¹¹⁹ The drugs were manufactured by AHP and widely sold in the United States in the mid-1990s. Before the drugs were marketed, there was evidence that they could cause valvular heart damage.¹²⁰ Between June 1996, when the drugs began to be sold, and September 1997, when they were taken off the market, an estimated two million people took the drugs.¹²¹

Phen resulted in multi-million dollar verdicts and settlements. *See, e.g., id.* (describing \$1 billion jury verdict in Texas).

115. *See In re Diet Drugs I*, 2000 WL 1222042, at *3. The 18,000 suits alleging heart problems arising out of the use of Fen-Phen were consolidated under MDL Docket No. 1203 in the Eastern District of Pennsylvania. *See id.*

116. *See id.*

117. *See id.* at *7.

118. *See MUNDY, supra* note 2, at 155. The drugs were found to cause only a three percent increase in weight loss over a sugar pill. *See id.*

119. *See In re Diet Drugs I*, 2000 WL 1222042, at *14 (stating that significant risk was produced after three to six months of drug use).

120. *See id.* at *2.

121. *See id.* at *1.

At the time, and it appears to this day, the FDA saw the pharmaceutical companies—rather than the patients likely to take these drugs or the public—as its “client.” Various drugs, including Redux, were pushed through the approvals process during this period and subsequently caused numerous deaths.¹²² In the 1990s, companies succeeded in expediting their drugs through the FDA approval process as a result of that agency’s increased emphasis on cooperation with the private sector.¹²³ President Clinton told the agency that they should see pharmaceutical companies as “partners, not adversaries.”¹²⁴ As one former FDA legislative affairs staffer, Kathleen Holcombe, asserted “there has been a huge shift . . . [the] FDA, historically, had an approach of, ‘Regulate, be tough, enforce the law [and] don’t let one thing go wrong . . . the FDA [now] sees itself much more in a cooperative role.’”¹²⁵

In the rush to approve drugs, the FDA opened the floodgates to tens of thousands of lawsuits. One former member of an FDA advisory committee observed that “[u]nfortunately the public pays for this, because the public believes that the FDA is watching the door, that they are the sentry.”¹²⁶ The practice of expediting drugs that required more careful review resulted in seven drugs that had been prematurely or inappropriately approved being taken off the market between 1993 and 2000, a significant increase in such recalls.¹²⁷ Among them was Redux. The FDA effectively shifted responsibility to doctors and patients, and in so doing shifted risk regulation to the tort system. In the absence of direct governmental regulation, the tort system was called in to regulate risk, compensate patients, and deter misconduct. That is what happened in the *Diet Drugs* litigation.

Redux was approved by the FDA under suspicious circumstances and despite evidence that it had “low effectiveness and very high risk for

122. In an investigative report, the *L.A. Times* found seven drugs that were approved by the FDA in this period and posed risk to human life that far outweighed any potential benefit. See Willman, *supra* note 1, at A1. These included a gastric reflux drug that was administered to children and caused at least eight infant deaths and a total of 302 deaths of infants and adults; a flu remedy that was supposed to reduce flu symptoms by one day and is related to twenty-two deaths; an irritable bowel remedy that was only effective in 10% to 20% of the cases but caused severe colon problems in patients resulting in at least five deaths and significant surgeries in patients; an antibiotic that was duplicative of other antibiotics on the market and is linked to thirteen deaths; a diabetes drug that caused liver failure and 391 deaths but remained on the U.S. market even after it had been removed from the market in Britain; and Redux, the weight loss drug described here. See *id.*

123. See *id.* (indicating that the “demand for AIDS drugs changed the political climate”).

124. *Id.* Increasingly, government operates in this way. See MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 3 (2002).

125. Willman, *supra* note 1, at A1.

126. *Id.*

127. See *supra* note 122.

neurotoxicity and pulmonary hypertension.”¹²⁸ The director of the FDA’s endocrine and metabolic drugs division refused to sign the agency’s formal letter of approval because of his concerns over the drug, but it was nevertheless approved in 1996 without any significant warning labels.¹²⁹ An email that was at once prescient and offensive captures the company’s attitude during this period and is part of the reason they were forced to settle: “Can I look forward to my waning years signing checks for fat people who are a little afraid of some silly lung problem . . . ?”¹³⁰ Financial analysts estimated the drug would gross \$1.8 billion within four years. Instead, within two years it was withdrawn from the market.¹³¹ After Redux had been sold to millions of consumers, doctors at the Mayo Clinic in Minnesota observed a high incidence of significant heart valve problems that appeared to be caused by these diet drugs even where they had been prescribed for only a short period of time. The doctors published their findings via press release and in the *New England Journal of Medicine*.¹³² Their findings were subsequently confirmed by three epidemiological studies.¹³³ In September of 1997, AHP recalled the drug under pressure from the FDA.¹³⁴ By that time, numerous lawsuits, including a class action, had been filed against the company.¹³⁵

The lack of rigorous oversight by the FDA substantially contributed to this flood of claims. In July 1999, the FDA wrote a letter to the plaintiffs’ lawyers on the MDL Panel managing the Fen-Phen litigation stating that the FDA did not have critical information regarding the dangers of the drug at issue before the drug was approved.¹³⁶ Later that fall, allegedly under pressure from lawyers for the pharmaceutical company, the FDA retracted its July letter and issued a statement that it had had all the relevant information by May 1999—two years *after* the drug had been recalled.¹³⁷ This softening of language was more favorable to the drug

128. Willman, *supra* note 1, at A1 (quoting Dr. Leo Lutwak, a former Cornell University professor and scientist at the FDA).

129. *See id.* (stating that when the director, Dr. Solomon Sobel, refused to sign the approval letter, an FDA administrator, Dr. James Bilstad, signed it instead).

130. MUNDY, *supra* note 2, at 9 (quoting an email from Kay Anderson, Administrator, to Patty Acri, Product Labeling Director, Wyeth-Ayerst (Oct. 3, 1996) (emphasis omitted)).

131. *See* Willman, *supra* note 1, at A1.

132. *See* Brown v. Am. Home Prods. Corp. (*In re* Diet Drugs Prods. Liab. Litig.) (*In re* Diet Drugs I), Nos. 1203, 99-20593, 2000 WL 1222042, at *2 (E.D. Pa. Aug. 28, 2000) (mem.).

133. *See id.* These confirming studies were published in 1998.

134. *See* MUNDY, *supra* note 2, at 108.

135. *See id.* at 23. For example, the first wrongful death suit relating to Fen-Phen was filed on May 5, 1997. *See id.*

136. *See id.* at 246. The letter from the FDA’s Enforcement Office director stated that “the FDA has determined to the best of its knowledge, at the time of the article’s publication [May 1999], the information alleged in your letter was not in the possession of the agency.” *Id.*

137. *See id.* at 376.

companies than the initial statement because the FDA did not directly admit that it had not been given this important information before the drug was approved. Regulators relied on the tort system to justify this retreat. When confronted with the retraction, the individual in charge of drug reviews at the agency allegedly said: “‘Surely a smart plaintiffs[’] attorney will see what we’ve done here.’ He added that it was up to the lawyers suing the companies to get their information and bring it out in court.”¹³⁸ There was no successful government investigation of the diet drugs prior to their release, of the conduct of the FDA officials, or of the pharmaceutical company after the manufacturer voluntarily recalled the drugs. According to these government officials, the court system should enforce the drug manufacturer’s product safety obligations, rather than the regulatory agency.

*B. Procedural Mechanisms for Administration in the Courts:
Class Actions and Multi-District Litigation*

The *Diet Drugs* litigation is a good example of the need for claims administration because the harms these drugs caused presented the courts with a massive number of cases to resolve. The federal courts used all the collectivization procedures available to them, including private ordering, aggregation, and class actions. About 18,000 individual lawsuits were filed against AHP.¹³⁹ Those individual cases brought into the federal court system were transferred by an MDL Panel to the Eastern District of Pennsylvania for consolidated pretrial proceedings.¹⁴⁰ These cases were overseen by a Plaintiffs’ Management Committee (PMC), acting on behalf of all plaintiffs.¹⁴¹ The PMC conducted significant discovery, some of which was repeated by state court litigants.¹⁴² Simultaneously, multiple class actions were filed in both state and federal courts seeking various personal injury damages, refunds for the cost of the drugs, and medical monitoring.¹⁴³ The medical monitoring classes were certified in individual states and nationally.¹⁴⁴

138. *Id.*

139. *See* Brown v. Am. Home Prods. Corp. (*In re* Diet Drugs Prods. Liab. Litig.) (*In re* Diet Drugs I), Nos. 1203, 99-20593, 2000 WL 1222042, at *3 (E.D. Pa. Aug. 28, 2000) (mem.).

140. *See id.* These were consolidated under MDL Docket No. 1203. *See id.*

141. *See id.*

142. *See id.* at *3-4.

143. *See id.* at *3. Among these was *Vadino v. American Home Products Corp.*, a New Jersey class action for medical monitoring and damages for unfair and deceptive trade practices. *See id.*

144. *See id.* (describing a national medical monitoring class action certified in MDL court, and medical monitoring class actions certified in West Virginia, Illinois, New Jersey, New York, Pennsylvania, Texas, and Washington).

Though product liability cases such as these would seem like the proper subject for state courts of general jurisdiction, in most cases defendants were able to remove to federal court on the basis of diversity jurisdiction, thereby permitting the cases to be aggregated under the Multi-District Litigation Act.¹⁴⁵ In 1968, shortly after the acceptance of the revised class actions rule, Congress passed the MDL statute that permits consolidation of cases from multiple districts when they involve common questions of fact.¹⁴⁶ The statute was passed in reaction to the inefficiencies caused by decentralized identical litigation in multiple forums and on the heels of an innovative judicial procedure instituted in order to deal with a flood of antitrust suits alleging price fixing of electrical equipment.¹⁴⁷ In 1959, the federal government brought criminal antitrust proceedings against electrical equipment manufacturers, which led to indictments against twenty-nine manufacturers and forty-four individuals.¹⁴⁸ In the aftermath of the criminal proceedings, more than 1,880 civil suits were filed in thirty-five federal districts.¹⁴⁹ Chief Justice Warren, concerned that the large numbers of electric equipment cases would overburden the federal courts, appointed a nine-member Coordinating Committee for Multiple Litigation to deal with pretrial issues in these cases.¹⁵⁰ Accordingly, at its inception MDL was a procedural innovation to encourage bureaucratic rationalization of a court system overburdened by an influx of claims.

This innovative procedure to address an influx of cases was the prototype of the MDL statute and spurred the creation of a complex, centralized court bureaucracy. Discovery was addressed on a national scale: pretrial orders were agreed upon by the judges of the thirty-five districts, though they retained jurisdiction and could alter the orders if so inclined; uniform interrogatories were overseen by the Committee; a central document repository was created; and a national deposition program was instituted.¹⁵¹ Trials were held in the individual district courts, but coordinated by the Committee so that groups of cases of various individual product lines would be tried at once.¹⁵² Today litigation constituting 2,000 individual claims would be a proverbial drop in the bucket. Could the Chief Justice have imagined that innovative court

145. See 28 U.S.C. § 1407 (2000).

146. See Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109 (codified at 28 U.S.C. § 1407).

147. See *Atlantic City Elec. Co. v. Gen. Elec. Co.*, 226 F. Supp. 59, 60 (1964) (utilizing a “program of national discovery” to serve plaintiffs twenty-three interrogatories).

148. See Arthur F. Staubitz, *Release of Grand Jury Minutes in the National Deposition Program of the Electrical Equipment Cases*, 112 U. PA. L. REV. 1133, 1133 (1964).

149. See Paul C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 622 (1964).

150. See *id.* at 623.

151. See *id.* at 623-27.

152. See *id.* at 627.

administration procedures would soon be needed for ten times this number?

There were two types of class action cases arising out of the diet drugs debacle. First, class actions were filed seeking medical monitoring, separate from the MDL proceedings. Second, the PMC and defendants negotiated a settlement of the *Diet Drugs* cases that was filed, and subsequently approved, as a settlement-only class action. By 1999, individual, non-consolidated cases against AHP in state court began to go to trial and resulted in large jury verdicts.¹⁵³ In late April 1999, AHP, seeking global resolution of this massive litigation, started negotiations with various plaintiffs' lawyers for state class actions and the PMC which lasted four months.¹⁵⁴ Some attorneys negotiated lump sum aggregative settlements, whereas others negotiated the class action settlement.¹⁵⁵ Ultimately, the parties agreed on a nationwide class action settlement in November 1999.¹⁵⁶ A settlement-only class action was submitted to the court and approved along with the agreement.¹⁵⁷ This agreement, which was subject to numerous amendments, was approved in 2000 after a fairness hearing.¹⁵⁸ The settlement did not include claimants with primary pulmonary hypertension, the most lethal effect of the drugs. These claimants were expected to bring individual claims because of the severity of their injuries.¹⁵⁹

When courts oversee class actions, they step into a role that looks more regulatory than judicial.¹⁶⁰ The two main substantive areas where courts step into an obviously regulatory role and create complex quasi-administrative agencies are civil rights injunctions and mass torts. Mass tort class actions, which the 1966 Rules Committee informally rejected, were more controversial from the beginning.¹⁶¹ Nevertheless, federal and

153. See *American Home Settles Fen-Phen Lawsuit*, N.Y. TIMES, Sept. 17, 1999, at C20 (describing jury verdict for \$23 million in Fen-Phen suit in Texas and subsequent settlement for amount far lower due to punitive damages restrictions).

154. See *Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.) (In re Diet Drugs I)*, Nos. 1203, 99-20593, 2000 WL 1222042, at *4 (E.D. Pa. Aug. 28, 2000) (mem.).

155. See *Erichson*, *supra* note 37, at 70.

156. See *In re Diet Drugs I*, 2000 WL 1222042, at *5.

157. See *id.* at *1.

158. See *id.* at *5.

159. See *id.* at *31.

160. See DAN-COHEN, *supra* note 9, at 125-28 (describing two prevalent models of adjudication, the arbitration and regulation models, and arguing that these models present a division of labor rather than merely a tension between opposing views of the role of the courts).

161. See Resnik, *supra* note 29, at 9-11. Resnik describes a written exchange between Benjamin Kaplan, the Reporter for the Advisory Committee on Civil Rules, and John Frank regarding mass tort class actions in which Kaplan reassured Frank that "he too was 'anxious to keep [mass accidents] out.'" *Id.* at 10. Subsequently, the Committee decided not to exclude mass torts per se within the rule, but believed that the structure of Rule 23(b)(3) would serve to keep mass

state courts certified such class actions and oversaw settlements of them. Regulatory agencies have come to rely on the tort suits. But the court's quasi-administrative role is not limited to these obvious types of cases. Even in the more accepted consumer cases, administration and, at least formally, court oversight over the disbursement of funds is required.¹⁶² The need to administer large numbers of claims lies at the heart of the class action device.

C. *The Structure of Settlement and Its Aftermath*

The quasi-administrative agency created as a result of the *Diet Drugs* settlement was privately created, subject to court approval, and then privately administered.¹⁶³ It is one particularly complex and relatively individualized model of an administrative technique for resolving a mass tort.¹⁶⁴ The terms of the settlement initially provided a trust fund (the "AHP Trust") of three and a half billion dollars in medical monitoring services and cash payments.¹⁶⁵ For those claimants who had experienced a certain level of injury, compensation was determined based on a matrix agreed upon by the parties.¹⁶⁶ The age of the claimant, duration of exposure to the drug, and severity of the symptoms intersect to form a cell in the matrix determining the individual claimant's compensation.¹⁶⁷ Matrix-level compensation ranged from \$7,389 to \$1.485 million.¹⁶⁸ An

torts out. *See id.* at 11.

162. *See* FED. R. CIV. P. 23(e)(1)(C) ("The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.").

163. For a typology of settlements in mass tort cases, with a special focus on aggregation, see Erichson, *supra* note 37. In defining his typology of settlements, Erichson sets up two conditions of settlement: conditionality and allocation. *See id.* at 1770. With respect to allocation, the *Diet Drugs* class action settlement is a lump sum settlement distributed according to a matrix. With respect to conditionality, as a result of Rule 23(b)(3) requirements, the settlement is a "walk away" settlement—meaning claimants can opt out. *See id.* at 1784-95.

164. *See* Fiss, *supra* note 28, at 1461 (discussing the "pathologies" of bureaucracy in the courts and arguing that increasing the organizational capacity of the judiciary is better than the alternatives of "constricting jurisdiction" so that claims are limited or instituting "mass-production techniques").

165. *See* Brown v. Am. Home Prods. Corp. (*In re* Diet Drugs Prods. Liab. Litig.) (*In re* Diet Drugs I), Nos. 1203, 99-20593, 2000 WL 1222042, at *27 (E.D. Pa. Aug. 28, 2000) (mem.) (allocating approximately \$1 billion to Fund A to pay non-matrix benefits and \$2.55 billion to Fund B to pay matrix benefits).

166. *See id.* at *22. These "Fund B" claimants included persons with a certain level of valvular heart disease who had taken the drugs for a prescribed period of time. *See id.*

167. *See id.* at *22.

168. *See* Nationwide Class Action Settlement Agreement with American Home Products Corp. (as amended) at 38, Brown v. Am. Home Prods. Corp. (*In re* Diet Drugs Prods. Liab. Litig.) (*In re* Diet Drugs I), 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) (No. 99-20593), available at <http://www.settlementdietdrugs.com/pdfs/AmendedSettlement%20Agreement%20.pdf>.

employee of the trust would make a determination of compensation based on review of a paper record.¹⁶⁹ Claimants did not need to show causation but were required to submit echocardiograms to prove injury.¹⁷⁰ Other claimants were only entitled to medical monitoring, or cash in lieu of monitoring, and their claims were treated similarly across the board, rather than according to a matrix.¹⁷¹ Initial determinations were made by an independent administrator of the AHP Trust, who was to periodically report to the court.¹⁷²

The complexities of the litigation increased following the settlement. After the settlement was approved, the number of claimants exceeded the parties' predictions.¹⁷³ The flood of claims created two significant problems for the court and the litigants: the sufficiency of the fund and sufficiency of the process. First, the possibility arose that the settlement fund would not be sufficient to pay the increased number of claims. To solve this problem, the parties agreed to an amendment (the "sixth amendment") to the settlement agreement, permitting claimants to opt out of the settlement if the fund became insolvent.¹⁷⁴ The opt-out limited claimant rights by forbidding claimants who had opted out from claiming punitive damages, naming additional defendants, joining other plaintiffs, or consolidating their claims.¹⁷⁵ Because there remained the real possibility that the fund would be exhausted, the parties negotiated a "seventh amendment" wherein the defendant agreed to add an additional \$1.275 billion to the fund for payment of matrix claims.¹⁷⁶ The seventh amendment also reduced awards to the least damaged claimants.

The second problem created by the influx of demand concerned the ability of the administrator to properly review claims. The original settlement provided for quarterly audits by the administrator of the AHP trust. The defendant could request an audit of up to ten percent of the claims.¹⁷⁷ As a result of evidence of echocardiogram "mills" and an

169. See *In re Diet Drugs I*, 2000 WL 1222042, at *23.

170. See *id.* at *19-22.

171. See *id.* at *19.

172. See *id.* at *26. The Trust, created to invest and pay out the funds provided by AHP under the settlement, was to be overseen by seven Trustees who were to serve through 2005. See *id.* at *27.

173. See *Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.) (In re Diet Drugs II)*, No. MDL 1203, Civ.A. 99-20593, 2002 WL 32067308, at *5 (E.D. Pa. Nov. 26, 2002).

174. See *Prods. Liab. Litig.*, 385 F.3d 386, 391 (3d Cir. 2004)

175. See *id.*

176. See *Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.) (In re Diet Drugs III)*, 226 F.R.D. 498, 510 (E.D. Pa. 2005).

177. See *In re Diet Drugs I*, 2000 WL 1222042, at *23. Originally the settlement provided that the trust administrator would audit 5% of the total matrix claims quarterly and that AHP would be entitled to submit up to an additional 10% of matrix claims and 10% of non-matrix claims for audit. See *id.*

overabundance of claims—far exceeding the amount originally predicted—the court granted a defense motion to audit all claims.¹⁷⁸ This meant that the streamlined process envisioned in the original settlement turned into a cumbersome one of universal audits and increased likelihood of appeals.¹⁷⁹

In addition to the audits, the initial settlement included a two-tiered appeal system. First a dissatisfied claimant could appeal to a court-appointed arbitrator. Thereafter, either party could appeal to the court directly, which would make a “final and binding” decision.¹⁸⁰ The seventh amendment to the settlement agreement limited the appeals process to a determinative appeal to the trust administrator rather than the multi-tiered process available in the initial settlement.¹⁸¹ The influx of claimants thus resulted in less process for the claimants with perhaps the most to lose: those whose claims were rejected. On the other hand, the claims administration process was expanded and streamlined by hiring additional reviewing cardiologists to ensure that all claims would be reviewed within a year.¹⁸²

This case study illustrates the central tensions in court-sponsored bureaucracy: between efficiency and accuracy, and between liberty and equality. The familiar tradeoff between cost, speed, and accuracy¹⁸³ was resolved in different ways at different points of the negotiation as evidenced by the changes between the first iteration of the settlement, permitting only fifteen percent of claims to be audited and allowing a two-tiered appeal system, and the final iteration, permitting only one appeal and requiring review of all claims. Whether these tensions were appropriately resolved in this litigation remains an open question. Certainly the defendants could not have felt that they received the “global peace” that they were searching for. Plaintiffs gained access to compensation and (relatively) speedy resolution, perhaps at the expense

178. See *In re Diet Drugs II*, 2002 WL 32067308, at *5; *In re Diet Drugs Prods. Liab. Litig.*, 236 F. Supp. 2d 445, 460-65 (E.D. Pa. 2002). Shortly after the court ruled that the Trust need not pay the claims from two law firms and a number of cardiologists that had been found to have submitted large numbers of medically unreasonable claims, the court granted defendants’ motion to audit all matrix claims. See *In re Diet Drugs II*, 2002 WL 32067308, at *6.

179. This approach does not seem to be the most logical, but it is the one that defendants asked for and the court approved. A better solution might have been to audit a randomly selected sample of claims. For a thoughtful discussion of the possibilities and pitfalls of such an approach, see Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993).

180. *Brown v. Am. Home Prods. Corp.* (*In re Diet Drugs Prods. Liab. Litig.*), No. 1203, Civ. A. 99-20593, 2004 WL 220982, at *1 (E.D. Pa. Jan. 7, 2004).

181. See *In re Diet Drugs III*, 226 F.R.D. at 514.

182. See *id.* at 513-14.

183. Cf. FED. R. CIV. P. 1 (requiring that the Federal Rules of Civil Procedure “be construed and administered to secure the just, speedy, and inexpensive determination of every action”).

of protections that would give them a sense of trust in the validity of the outcome.

Quasi-administrative agencies can provide a privatized version of the legal system or a process that differs radically from traditional adjudication. One of the ways that some consider the *Diet Drugs* settlement a failure is the continued fighting between the parties that the settlement engendered during the course of its administration. A partial response to these criticisms that merits exploration is whether this conflict was a good thing. Although disorder is not inherently good, here the disorder meant that the inner workings of the private settlement administration were exposed and that the court could intervene at various stages to guarantee fairness.

IV. COURT RESISTANCE TO THE ADMINISTRATIVE PARADIGM

Regulatory failure increases risk in the market place that is likely to be regulated through the tort system. At the same time, Congress has been expanding the jurisdiction of the federal courts over these same tort cases.¹⁸⁴ Such changes include the Class Action Fairness Act of 2005 (CAFA),¹⁸⁵ which might better have been called the “Class Action Federalization Act” because it opened federal court jurisdiction to class actions valued at over five million dollars where minimal diversity is met,¹⁸⁶ and the Multiparty Multiforum Trial Jurisdiction Act of 2002,¹⁸⁷ which granted the federal courts jurisdiction over tort cases arising out of accidents involving the death of at least seventy-five people.¹⁸⁸ Some view the agenda behind these changes to be tort reform-driven, based on the assumption that the federal courts will be less sympathetic to mass tort and innovative tort claims than the state courts.¹⁸⁹

184. At the same time, suggestions have been made to limit the tort system by permitting FDA determinations of product safety to preempt it. For a critique of such proposals see Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. (forthcoming 2007) (exploring the recent trend of judicial deference to agency preemption determinations); Catherine T. Struve, *The FDA and the Tort System: Postmarketing Surveillance, Compensation, and the Role of Litigation*, 5 YALE J. HEALTH POL'Y L. & ETHICS 587 (2005) (concluding that product liability claims should be tried in federal court with the FDA handling the technical questions).

185. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C.A. §§ 1, 1332, 1335, 1453, 1603, 1711-1715, 2071, 2074 (West 2007)).

186. *See id.* (amending 28 U.S.C. § 1332 (2000)).

187. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11020, 116 Stat. 1758, 1826 (codified as amended at 28 U.S.C.A. §§ 1369, 1687, 1785 (West 2007)).

188. *See id.*

189. *See* 151 CONG. REC. S450 (daily ed. Jan. 25, 2005) (statement of Sen. Kohl).

The debate about greedy plaintiffs' lawyers and individuals not getting their due that the passage of the CAFA engendered is, at bottom, an expression of distrust of bureaucracy as subject to alienation, capture, and error. For example, Senator Kohl opened the debate on the CAFA by evoking fear of alienation: "Right now, people across the country can be dragged into lawsuits unaware of their rights and unarmed on the legal battlefield. What our bill does is give back to regular people their rights and representation."¹⁹⁰ Kohl's comments also reveal a fear of capture: "[M]ore and more frequently, some are taking advantage of the system and, as a result, consumers are getting the short end of the stick, recovering coupons or pocket change, while the real reward is going to others."¹⁹¹ As Senator Hatch put it:

Unfortunately, the injuries caused by these abuses are not confined to the parties who are named in the class action complaint. Rather, they extend to everyday consumers who unwittingly get dragged into these lawsuits as unnamed class members simply because they purchased a cell phone, bought a box of cereal, drove a car fitted with a certain brand of tires, or rented a video. What we are really talking about is a system that impacts the vast majority of people who live in this country¹⁹²

The procedural innovations of the 1960s allowed plaintiffs to bring large-scale litigation and as a result increased the volume of mass production litigation in the courts.¹⁹³ More recently, we have seen a diction as federal courts limit the use of class actions, especially at the certification stage.¹⁹⁴ The federal courts, concerned about being overloaded with cases and resistant to taking on the administration of vast numbers of claims, have interpreted procedural rules narrowly to restrict litigated class actions in federal courts. This might be described as the "proceduralization" of tort law. By interpreting the class action rule narrowly, judges have limited plaintiffs' access to the courts. The number of lawsuits that bring the ideal of an individualized trial and the court's limited resources into a crash course with one another are thereby diminished. Because mass production wrongs continue, injured parties will still bring suits. If the courts cannot or will not adjudicate these lawsuits,

190. *Id.*

191. *Id.*

192. 150 CONG. REC. S7563 (daily ed. July 6, 2004) (statement of Sen. Hatch).

193. Some examples include the 1966 revision to Rule 23 and the passage of the Multidistrict Litigation Act in 1968. *See supra* notes 145-50 and accompanying text.

194. *See* Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1478 (2005).

either litigants will be denied access to justice, or the cases will be diverted from the courts to private ordering such as aggregative settlements. As one proponent of class actions warned, “[I]t is far easier to curb class actions than to avoid or reduce the mass frauds and disasters that create mass misery and the need for workable aggregate litigation mechanisms.”¹⁹⁵

A. Certification: Manageability and Predominance as Barriers to Suit

Certification is the greatest barrier to bringing a class suit. In class actions for money damages under Rule 23(b)(3), the two main ways that courts limit certification are by finding the class unmanageable¹⁹⁶ or holding that common issues do not predominate.¹⁹⁷ The manageability inquiry “encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit.”¹⁹⁸ The types of considerations that govern manageability include differing state laws, different damages inquiries, and the need to conduct multiple trials. Manageability limits on class actions are most prevalent in classes certified for litigation. Courts have treated settlement-only class actions differently, often permitting variations in damages or in state laws that they would not countenance in the certification of a litigation class.¹⁹⁹ Ostensibly this is because in a settlement-only class the settlement in itself renders the litigation manageable.²⁰⁰ In reality, however, the tensions that give rise to the manageability problems are still present. After all, if different state laws apply to different claimants, should they all be treated similarly in a settlement? Presumably, some claimants will be getting less compensation than they would if the negotiated settlement was based solely on the laws of their home state. In this case, to what extent should we permit equality to trump individualism?

195. *Id.* at 1477.

196. *See, e.g., Andrews v. AT&T Co.*, 95 F.3d 1014, 1018 (11th Cir. 1996) (“Because we conclude that the district court erred in determining that the proposed class actions would be manageable under Rule 23(b)(3), we reverse the court’s order certifying the classes and removal for further proceedings.”).

197. *See, e.g., Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1367 (11th Cir. (2002) (“Thus, the class must be decertified . . . because individual issues will overwhelm any common issues.”).

198. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974); *see also* FED. R. CIV. P. 23(b)(3)(D).

199. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3d Cir. 2004) (“[W]hen dealing with variations in state laws, the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus those variations are irrelevant to certification of a settlement class.”).

200. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (providing that in a settlement-only class certification, “a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial”). The exception to this general trend in favor of settlements is the case of future claimants.

The preference for settlement-only classes is a strong indication of judicial distrust of administration.²⁰¹ The different approach to settlement-only and litigation classes creates, at least sometimes, an incentive for plaintiffs' attorneys to settle cases. Settlement creates a privatized bureaucracy that does not require the level of court oversight and direct management that a litigated class action might. Although courts formally retain jurisdiction over settlements, they generally do not participate actively in their administration and often do not call attorneys to account after the settlement administration is complete. Because manageability standards with regard to settlement-only classes need not be the same as those applied to a litigated class action, it is considerably easier to obtain certification for an existing settlement than for a litigation class action. This means that class action litigation is driven in the direction of private settlements presented to the courts for approval rather than thoroughly litigated before the court and requiring a judicially created administrative system to resolve claims. It is important to remember, however, that both litigated class actions and settlements carry the imprimatur of the court system.

Additionally, in order for a money damages class action to be certified, the plaintiff must show that the common issues in the class action predominate over those issues requiring individualized proof.²⁰² Even when all the potential class members suffered the same wrong at the hands of the same defendant, common issues may not predominate. Damages determinations may be too individualized, or may require the application of different state laws resulting in different liability standards or damages for each individual claimant. Predominance is a question of degree; where the line is drawn is up to an individual court's discretion and depends in part on the judge's analysis of the substantive claims. Courts have often stringently applied the predominance requirement.²⁰³

201. Positing that judges simply want to reduce their caseload is not a satisfying explanation, in part because it gives judges too little credit. As Judge Lee H. Rosenthal of the Southern District of Texas told me, judges are looking for interesting, challenging cases. Interview with Lee H. Rosenthal, U.S. Dist. Court Judge, S.D. Tex., in Kansas City, Mo. (Apr. 7, 2006). Instead, they are faced with many repetitive, routine, and simplistic cases. There is something deeper going on, and I believe that this deeper concern is a distrust of bureaucracy. The judicial preference for settlements is a strong indicator of this because settlements still require some judicial involvement, as the *Diet Drugs* litigation illustrates. See *supra* notes 178-80 and accompanying text. The difference is that as a formal matter, the parties, not judges, create the settlement administration.

202. See *Amchem Prods.*, 521 U.S. at 623 ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.").

203. See, e.g., *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005) (denying class certification in antitrust case involving genetically modified seeds because of the individualized proof required); *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004) (denying class certification in Title VII case on grounds that plaintiffs failed to establish pattern and practice of discrimination); *Ball v. Union Carbide Corp.*, 385 F.3d 713 (6th Cir. 2004) (denying certification in toxic tort case

The story of *In re Rhone-Poulenc Rorer Inc.*²⁰⁴ provides a particularly extreme example of the push towards settlement of collective litigation.²⁰⁵ In that case, the Seventh Circuit overturned certification of a class of hemophiliacs who alleged that the defendant's blood products had been tainted with HIV.²⁰⁶ The court relied on two rationales for denying certification. First, the court held that because the individuals were governed by different state laws and suffered different degrees of harm, plaintiffs could not meet the predominance and manageability requirements.²⁰⁷ The concern regarding individualized damages has also been the catalyst for denying certification in tort cases such as *Rhone-Poulenc* where the tort is considered "immature"—the idea being that more individual litigation will provide a better guide to what the projected damages determinations might be.²⁰⁸ Second, the opinion expressed concern that certification of a class action would be devastating to the blood products industry.²⁰⁹ This highly influential rationale is an extremely problematic reason to deny certification in a mass tort. Not only is the effect of certification on an industry not a justifiable consideration under Rule 23,²¹⁰ the rationale provides immunity from suit for defendants that engage in mass production harms on a grand scale.

In the aftermath of the denial of certification, the plaintiffs in the *Rhone-Poulenc* case settled for a set amount per claimant.²¹¹ In reviewing the approval of the settlement, the court of appeals noted that payment of the same amount to each claimant given their differing injuries was "downright weird," but nevertheless affirmed.²¹² Why would a court be disinclined to permit litigation of a mass production claim as a single case yet approve a settlement of that same series of claims? Should not the heterogeneity of claims that was the basis for denial of certification require rejection of a settlement based on homogeneous awards? One plausible explanation is that the court rejected the class as a result of resistance to

in part on the basis of individualized remedies sought, including medical monitoring); *George Lussier Enters., Inc. v. Subaru of New England, Inc.*, 286 F. Supp. 2d 86 (D.N.H. 2003) (denying certification based on different legal standards applicable to plaintiffs in different states).

204. 51 F.3d 1293 (7th Cir. 1995).

205. The story of this case is ably retold in DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS 293-312 (2000).

206. See *Rhone-Poulenc*, 51 F.3d at 1295, 1304.

207. See *id.* at 1296-1304.

208. See Cabraser, *supra* note 194, at 1481-82 (citing cases denying class certification on the basis of immature tort theory).

209. See *Rhone-Poulenc*, 51 F.3d at 1298-1300.

210. See Cabraser, *supra* note 194, at 1482 (citing *Klay v. Humana*, 382 F.3d 1241, 1272 (11th Cir. 2004)).

211. See *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1018 (7th Cir. 1998).

212. *Id.* at 1018.

overseeing the administration of masses of claims, whereas the court felt comfortable with private resolution that did not require it to do the administrating. Some judicial oversight is required because settlements are subject to the requirements of Rule 23(e), but that oversight may be limited to the fairness hearing.²¹³ According to the court's logic, if the representatives of the parties have privately come up with a resolution, even one that does not take into account the actual amounts plaintiffs might obtain under differing state laws, it is more acceptable than the courts being directly involved in the creation of a similar type of bureaucratic resolution to the litigation. The court preferred that the difficult tradeoffs be made by someone else. Such privatizing pushes bureaucracy to the margins, but does not eliminate it.

The concern with institutional competence—that is, the argument that the legislature, not the courts, should be policing massive private wrongdoing of this type—ignores the problem rather than addressing it. We can hope that the legislature would prevent the harm before it happens through strong regulation, but advocating that approach does not mean one should not think about what courts ought to do with large numbers of claims that arise out of a mass production harm. Where the regulation has failed, refusal to certify a class is an abdication of the courts' proper role. If we unpack the concern about institutional competence, it is at bottom a concern about administration in the court system. The root of the competence argument must be that the courts are not the appropriate place to mete out a large-scale remedy because courts are competent only to try individualized cases. But as Justice Breyer wrote in his dissent in *Ortiz v. Fibreboard*,²¹⁴ “when ‘calls for national legislation’ go unanswered, judges can and should search aggressively for ways, within the framework of existing law, to avoid delay and expense so great as to bring about a massive denial of justice.”²¹⁵ The question remains what the outlines of such aggressive searches for justice ought to look like.

B. *After Certification: Antisuit Injunctions, Appellate Review, and Collateral Attack*

The manageability and predominance limits set by the federal courts matter more after the passage of CAFA. Permitting removal puts the certification decisions in the jurisdiction of the federal courts because the federal courts have given denials of certification preclusive effect—even though the absent class members had no opportunity to opt out or receive

213. See FED. R. CIV. P. 23(e) (requiring all settlements to be approved by a judge only after a hearing and a finding that the settlement is fair, reasonable, and adequate).

214. 527 U.S. 815 (1999).

215. *Id.* at 867 (Breyer, J., dissenting).

notice—because these due process protections do not attach until a class action is certified.²¹⁶ On the other hand, federal court decisions to reject settlements as unfair are not preclusive, permitting reverse auctions in state court.²¹⁷

The availability of appellate review of the predominance and manageability inquiries, as well as other aspects of certification, is another way of limiting the class action mechanism for redressing mass production wrongs in the courts. The rules permit interlocutory review of any district court decision either denying or granting class certification.²¹⁸ Although the standard of review of the factual findings giving rise to certification orders is the deferential abuse of discretion standard,²¹⁹ appellate courts applying that standard have reviewed the factual basis for granting certification so closely as to be accused of reviewing decisions *de novo*.²²⁰ But even where appellate review is properly deferential, the mere availability of interlocutory review may create a litigation dynamic that encourages settlement (because of the added transaction costs that appeals pose), or encourage the district courts to be more reticent to grant certification. This is not meant to disparage a less deferential, more searching standard of review of district court certification decisions or fairness hearings.²²¹ Nevertheless, the availability of appeal and application of the standard of review can result in curbing administration in the courts as district court judges seek to avoid being reversed.

The greatest concerns over the proper administration of mass torts arise when the claims being administered are those of future claimants. These are individuals who have yet to suffer the harm at issue, may not even

216. See *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 769 (7th Cir. 2003). But see *Bailey v. State Farm Fire & Cas. Co.*, 414 F.3d 1187 (10th Cir. 2005) (approving district court's denial of injunction where case had been actively litigated in state court).

217. For example, the Third Circuit rejected a coupon settlement in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, but that settlement was subsequently re-filed and approved with some changes in Louisiana state court. See *In re Gen. Motors Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998); Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 79 n.56 (2004) (describing the history of the General Motors lawsuit).

218. See FED. R. CIV. P. 23(f) (stating that “[a] court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule.”).

219. See *Simon II Litig. v. Phillip Morris U.S.A. Inc. (In re Simon II Litig.)*, 407 F.3d 125, 132 (2d Cir. 2005) (describing the standards of review of district court certification decisions as requiring either a clear error of law or fact, or a decision that “cannot be located within the range of permissible decisions” (quoting *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001))).

220. See *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 630-31 (1997) (Breyer, J., dissenting) (accusing majority of reviewing district court's findings of fact improperly).

221. See Lahav, *supra* note 217, at 138 (proposing alternative standards of review).

know they were exposed to harm, and are therefore unable to opt out or object. Future claimants embody the conflict between the backward-looking purpose of adjudication as traditionally understood and the forward-looking purpose of regulation.²²² Damages litigation is backward-looking because it attempts to provide redress for wrongs that have already occurred. Courts cannot turn back the clock, so they compensate victims for the harm they have already experienced with money.²²³ Regulation, by contrast, attempts to prevent harms from occurring in the first place, and in this sense is forward-looking. In class action settlements of future claims, the individuals who are to be compensated have not yet been harmed or are not yet aware of their harm, and therefore cannot come before the court. The court is asked to approve a settlement that provides for compensation in the future, when these future claimants' harm actually emerges. The problem is that these future claimants cannot represent themselves before the court, and this rightfully triggers concerns that their interests will be compromised in favor of current claimants.²²⁴ This was the U.S. Supreme Court's fear in *Amchem Products, Inc. v. Windsor*,²²⁵ which attempted to set limits on settlement class actions where future claimants were involved.²²⁶ As a result, future claimants can disturb settlement through collateral attack.²²⁷

The possibility of collateral attack makes "global peace" more difficult for defendants to obtain. This may not be such a bad thing in cases where there is suspicion of collusion between class counsel and defendants or where side deals put the integrity of class counsel in question. But at the same time, it may hinder mass settlement in cases where there is sufficient individual stake to bring a collateral attack. Furthermore, it may encourage settlement of existing cases through aggregation rather than the class mechanism, a practice that is not subject to judicial supervision in the same way that a class action settlement is. One question that bears asking

222. *But see* DAN-COHEN, *supra* note 9, at 128-35 (questioning the dichotomy between regulation and arbitration functions of adjudication and arguing that because "organizations augment the social ramifications of judicial decisions, they incline the judge toward the regulatory mode").

223. There are of course exceptions to this, such as injunctive remedies.

224. *See* Alan B. Morrison & Brian Wolfman, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 451-56 (1996). This was the concern in the *Georgine* settlement. *See supra* note 58.

225. 521 U.S. 591 (1997).

226. *See id.* at 626-29.

227. The possibility of collateral attack makes settlements less appealing to defendants and may also make approval of settlements less appealing to judges because it disturbs global peace. For example, although the temporary administrative agency created by Judge Weinstein in the Agent Orange litigation was ostensibly closed in 1994, two collateral attacks reopened that litigation. *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 257-59 (2d Cir. 2001), *aff'd in part and vacated in part*, 539 U.S. 111, 112 (2003) (per curiam).

is whether individual suits would be a better form of addressing the problem of future claimants than an administrative solution offering the possibility that future claimants will be treated with some measure of equality as compared with present plaintiffs.

C. *Some Limitations Outside the Class Action Context*

Finally, there has also been some retrenchment in aggregation outside of class actions. Judges are increasingly wary of aggregating cases before them for consolidated trials.²²⁸ The provision of 28 U.S.C. § 1407 permitting the MDL Panel to transfer cases to a central court for pretrial proceedings has also been curbed. After the passage of the MDL legislation, it was the practice of the transferee district court to either assign itself jurisdiction to hear the trial portion of the litigation or, at its discretion, remand the cases back to their original courts. This practice ended in 1998 when the U.S. Supreme Court, interpreting the statute strictly, held that such a “self-assigning” practice required a revision of the statute and was not within the powers of the courts.²²⁹ Since that time, several bills have been presented to permit transferee courts to retain jurisdiction over the trial phase of such cases, but none have been enacted into law.²³⁰ Finally, commentators have noted increased resort to “alternatives to traditional, formal class certification to accomplish at least some of its aggregative and preclusive advantages,” including joinder and partial issue certification.²³¹ While these approaches may have some advantages, they encourage settlement and privatization of claims resolution rather than robust judicial involvement. The trend, therefore, is towards limitations on court-created claims administration and the expansion of privately created claims administration systems.

V. TOWARD A HUMANIZING THEORY OF COMPLEX LITIGATION

Judges’ perception that the courts are not the appropriate place to administer resolution of mass claims is a significant barrier to the development of a theory of humanized claims administration in the courts.²³² Judicial concerns about the competence of the courts to

228. See Deborah Hensler, Judge John W. Ford Professor of Dispute Resolution, Stanford Law School, Address at the University of Connecticut School of Law (Nov. 3, 2005).

229. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (holding that the plain language of 28 U.S.C. § 1407 authorizes transfer for pretrial purposes only).

230. See Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. (2005); Multidistrict Litigation Restoration Act of 2004, H.R. 1768, 108th Cong. (2004); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. (2001).

231. Cabraser, *supra* note 194, at 1478.

232. One prominent exception is Judge Jack Weinstein of the Eastern District of New York. See WEINSTEIN, *supra* note 94.

administer mass claims have resulted in the narrowing of doctrines to limit court oversight and encouraged private administration of claims through settlement. Accordingly, the first step to solving the problem of claims administration in the courts must be an argument in favor of judicial competence to administer claims. After the appropriateness, adequacy, and necessity of court administration of claims is accepted, we can start to think about what a humanized administration of mass torts might look like.

A. *Judicial Competence to Administer Claims*

Is it a problem when a court engages in something that resembles administration, as court-created quasi-administrative agencies do, without direct participation or legislative mandate? This question is at heart one of judicial competence. As Alexander Bickel described it: “The search must be for a function which might (indeed, must) involve the making of policy . . . ; which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it”²³³ Some have argued that the courts ought to embrace Bickel’s “passive virtues” and use procedural techniques to avoid decisions.²³⁴ In a similar vein, judges have argued in favor of structural judicial restraint to avoid usurping power from other branches of government.²³⁵ These types of arguments are unconvincing for two reasons. First, the power to resolve claims is at the heart of the courts’ role. Second, the function of adjudicating torts is “not likely [to] be performed elsewhere if the courts do not assume it.”²³⁶

Although the trend is toward limiting access to the courts by narrowing procedural doctrines, alternative interpretations exist and may even be experiencing a resurgence.²³⁷ Judges have the discretion to bifurcate liability from damages in order to accommodate certification.²³⁸ They may

233. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 24 (2d ed., Yale Univ. Press 1986) (1962).

234. Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 *BROOK. L. REV.* 685, 690 (2001) (“[T]he courts of appeals are urged to explore Alexander Bickel’s ‘passive virtues’—techniques for the avoidance of premature law-making—as a means of relieving institutional pressures”).

235. See *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (noting that the benefits of a “grand-scale compensation scheme is a matter fit for legislative consideration but it is not pertinent to the predominance inquiry”); POSNER, *supra* note 11, at 318 (advocating that the power of the court system, relative to other branches of government, be reduced but noting that this principle is contextual and dependent on time and place).

236. BICKEL, *supra* note 233, at 24.

237. See Cabraser, *supra* note 194, at 1478-79.

238. See, e.g., *Wal-Mart Stores v. Visa (In re Visa Check/Mastermoney Antitrust Litig.)*, 280 F.3d 124, 139 (2d Cir. 2001) (“[C]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues.”); Krell

create subclasses based on choice of law or type of injury.²³⁹ Judges could interpret the predominance and manageability requirements more loosely to permit certification.²⁴⁰ In sum, courts have it within their discretion to make judicial administration of mass torts possible.

The difference between mass cases and ordinary cases is in scale, not in kind.²⁴¹ If the question is whether the courts have the skills and the wisdom to determine or oversee the determination of liability and compensation, clearly that is within their competence. Arguably, however, the difference in scale results in a difference in the kind of justice that can be provided because we live in a world of process scarcity. The scale of the problem requires some type of administrative solution, and it is not surprising, given the strength of the day-in-court ideal, that courts might balk at this. For this reason the competence argument retains some power. If judges decide to avoid administration of mass claims for structural reasons, they are not ceding power to legislatures, either state or federal. Instead, they are ceding power to private actors who, history has proven, harm masses of individuals in the absence of regulation.²⁴² As Chief Judge Parker explained in the context of the asbestos litigation, “It is not enough to chronicle the existence of this problem and to lament congressional inaction. The litigants and the public rightfully expect the courts to be problem solvers.”²⁴³ The structural separation of powers argument presents a corollary to the false comparison between the day-in-court ideal and

v. Prudential Ins. Co., 148 F.3d 283, 315 (3d Cir. 1998) (“[C]ourts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws together and applying them as a unit. This Court has affirmed a class certification based on a ‘credible showing, which apparently satisfied the district court, that class certification [did] not present insuperable obstacles’ relating to variances in state law.” (quoting *Sch. Dist. of Lancaster v. Lake Asbestos*, 789 F.2d 996, 1010 (3d Cir. 1986))).

239. See FED. R. CIV. P. 23(c)(4). Of course, subclasses also must meet the typicality and commonality requirements of Rule 23(a).

240. See, e.g., *Klay v. Humana, Inc.*, 382 F.3d 1241, 1272-73 (11th Cir. 2004) (finding that certifying a class action of 600,000 physicians against health insurers would not cause manageability problems), discussed in *Cabraser*, *supra* note 194, at 1478-84.

241. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 867 (1999) (Breyer, J., dissenting) (“It is the number of these cases, not their nature, that creates the special judicial problem.”).

242. Private forms of ordering, such as arbitration, can provide due process protections or may be a complete barrier to claims. Compare Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963, 983-87 (2005) (describing the types of procedural protections available through private mechanisms such as arbitration), with Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 414-17 (2005) (arguing that the prevalence of arbitration clauses in consumer products will eradicate class actions and, as a result, leave consumers without redress).

243. *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 652 (E.D. Tex. 1990), *rev'd and remanded in part, vacated and remanded in part, and rev'd and rendered in part*, 151 F.3d 297 (5th Cir. 1998).

administrative justice. A comparison between courts and idealized versions of other institutions is equally flawed.²⁴⁴ The question is in part empirical and in part normative: Which institutions are doing—or have the capacity to do—a better job than the courts?²⁴⁵

Another way of reading the socio-political developments that have caused the rise of mass claims in the federal courts is that Congress is delegating the power to administer claims to the courts. The courts, as part of the dialogue between the branches, may choose to accept the challenge. Collective procedural devices such as the class action, multi-district litigation, and consolidation are part of a larger legal structure that permits the legislature to defer regulatory responsibility to the courts. When the FDA fails to act, it invites the tort system to regulate risk.²⁴⁶ When these tort claims are pursued individually through the court system and languish for lack of access to adjudication, the courts must act one way or another. Courts faced with this decision may deny access to justice to the individuals and groups before them, but they also have the discretion to provide access to justice through administrative approaches.

Both the argument that the courts are not competent to administer mass torts because such a role constitutes administration rather than adjudication in some essential way and the argument that in doing so, the courts are usurping power properly held by the legislature, are weak.²⁴⁷ There are, however, legitimate concerns about court administration of mass torts. These concerns are the same ones that would be raised with respect to the creation of administrative structures in any branch of government, and they are the abiding concerns regarding bureaucracy generally: alienation, capture, and error.

Distrust of bureaucracy is legitimate. Bureaucracy in the courts, as elsewhere, is potentially dehumanizing, subject to abuse, and prone to error. The modern world of mass production harms, weak regulation, and a relatively robust tort system practically requires the acceptance of a form of adjudication that is antithetical to our historically individualistic view

244. See *supra* notes 64-65 and accompanying text; see also POSNER, *supra* note 11, at 324 (making the point that the comparison between “real courts, warts and all, with an ideal vision of other governmental institutions” is flawed, but also stating that “[j]udges rarely have enough information to be justified in bringing about far-reaching changes in the settled practices and institutional arrangements of the society”).

245. See generally Cavanagh & Sarat, *supra* note 8 (explaining that proponents of judicial restraint need to demonstrate whether courts do it better or worse than other institutions, not just assume it).

246. At least so long as individual causes of action are not preempted. See Sharkey, *supra* note 184 (discussing recent trend of agency approval of legislature preempting state law).

247. See Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 663-64 (2003) (arguing that judges should and do make much the same determinations as legislators in structural reform litigation).

of litigation. Although greater regulatory oversight would have prevented the type of mass production harms caused by Fen-Phen, so long as we regulate risk through the tort system, we must accept that court administration of mass claims is both inevitable and necessary.

Having accepted the necessity of claims administration in the courts, at least under current conditions, a healthy distrust of the type of bureaucracy needed to administer mass claims is both warranted and valuable. Fear of alienation, capture, and error will most likely spur us to reform administration. That fear should be used to our advantage. Rather than allowing fear to drive claims administration to private ordering, courts should harness it to humanize bureaucracy. I propose that judges do so by making court administration publicly oriented.²⁴⁸ This points to a need for envisioning publicly oriented claims administration within a theoretical framework. What would a humanized bureaucracy look like? In this closing section, I offer some modest proposals.

B. *Building a Better Bureaucracy*

In this section, I offer some preliminary thoughts on realizing a humanized bureaucracy in the courts. Public values are critical to a humanized bureaucracy in the courts. The elements of a public-regarding claims administration structure include transparency, a commitment to deliberation and communication with the persons affected, and a systemic approach to justice and accuracy. Each of these elements is responsive in various ways to each of the abiding criticisms of bureaucracy: alienation, capture, and error.

A publicly oriented approach to administration of claims is both necessary and valuable because a public orientation responds to the most forceful criticisms of judicial bureaucracy and ensures that these worst-case scenarios are never realized. What is at stake in claims resolution is substantive. The outcome of claims administration, because it is enabled by the courts and disposes of claims that would otherwise be tried, implicates the fundamental goals of the justice system. Claims administration may be seen as a trust that the legislature has placed in the courts. Privatization has a greater potential to erode legitimacy and fairness in the court system than any administrative structure set up to resolve mass claims within the court system. The deliberative value in adjudication is lost when claims administration procedures are privatized because judges are loath to interfere in private settlements once they are approved, and because the illusion of consent allows judges to abdicate

248. See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003) (using the term “publicization” to describe the introduction of public law values into privatization of governmental functions).

responsibility for settlement outcomes.²⁴⁹ Judges are required to accept or reject settlements as they are presented, and nothing in the Federal Rules requires judges to oversee settlement administration, nor do judges often require attorneys to report back on the administration of settlements.²⁵⁰ Thus, privatization results in the loss of a quintessential element of adjudication: the “judicial obligations of conducting a reasoned inquiry, articulating the reasons for decision, and subjecting those reasons to appellate review.”²⁵¹

The structure of quasi-administrative agencies is important because bureaucracy is not merely a way to resolve claims; it implicates the substance of justice. In other words, bureaucracies are not only a system of organization, but also a system of social formation.²⁵² The bureaucracy of claims administration encourages the conditions of its own existence. As claims are rationalized and streamlined, more claims are brought, requiring greater bureaucratization, which in turn permits the assertion of more claims. Even as the conditions for the institution of bureaucratic structures in the courts flourish, the fear of bureaucracy causes the courts to pass the buck to private parties, an endpoint that creates more potential for abuse and reason for distrust. Distrust of administrative structures in the courts stands in the way of creating a humanizing and deliberative form of bureaucratic claims administration because fear encourages a reification of bureaucracy.

Accordingly, it is doubly important that bureaucracy be structured in a manner that is consonant with our vision of our government and ourselves. Courts should foster a form of administration that allows access to justice, and at the same time is humanizing, thoughtful and deliberative. This approach keeps in mind Owen Fiss’s statement that “[t]he function of adjudication is to give meaning to public values, not merely to resolve disputes.”²⁵³ Bureaucracy should be understood as a dynamic set of relationships that can be influenced, changed, and humanized to lead to a

249. Outcomes can be just as important an indicator of fairness as process. See David A. Dana, *Adequacy of Representation After Stephenson: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279, 281 (2006) (“[A]lthough the adequacy of representation inquiry certainly entails an examination into the presettlement structure of representation and the content of the proceedings, the inquiry also has, or at least should have, something to do with *ex post* substantive outcomes—about what the settlement actually delivers in the way of relief to individual class members.”).

250. See Lahav, *supra* note 217, at 91 nn.107 & 109.

251. Resnik, *supra* note 94, at 425-31 (arguing against managerial judging because it gives judges vast power, undermines traditional constraints on the use of this power, and threatens judicial impartiality by encouraging private and informal ordering).

252. See CLAUDE LEFORT, *THE POLITICAL FORMS OF MODERN SOCIETY: BUREAUCRACY, DEMOCRACY, TOTALITARIANISM* 120 (1986).

253. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 44 (1979).

more satisfactory form of legal decision-making. This is a very difficult task because it requires resolving the tension between access to justice and the right to be heard. This tradeoff exists because there are not enough resources to provide a traditional, individualized hearing to every claimant.

The problems posed by court bureaucracies are deep and abiding problems that we have been struggling with since the founding of our Republic, and that political philosophers struggled with long before that.²⁵⁴ What is the appropriate tradeoff between liberty and equality? What is the effect of the pursuit of self or group interest, or both, on the polity, and what, if any, possibility is there to rely on our better nature? To what extent is it possible to create structures for administration in society that limit, if not eradicate, alienation, capture, and error?

A legal process approach does little to help the problems created by court bureaucracies because, based as it is on the day-in-court ideal, it has already declared itself willing to give up access to justice in favor of individualism. Thus it assumes a resolution to the tension between liberty and equality that is at the heart of the matter. It is the resolution to this tension we need to unpack, discuss, and debate. In resolving this tension, process will not be the only consideration because the method of process necessarily implicates substance. Take, for example, the *Diet Drugs* settlement described earlier. Recall that it is ordinarily the trust, not the courts or the public, that pays the costs of administering claims as well as the value of the claims themselves.²⁵⁵ If the defendants are given the right to appeal every claim, then administrative costs increase, the fund is depleted, and there is less money to go to individual claimants. If the claimants are given a back-end opt-out, as they were in the *Diet Drugs* litigation, the claims administration facility may be driven to give more to individuals in order to keep them from exercising their opt-out, and this may deplete the fund, leaving other claimants with less, or this may require the parties to secure additional funding.²⁵⁶

In evaluating the function of court bureaucracy, we must look both at the manner in which these bureaucracies resolve claims and at the substantive results that they reach. It will likely mean different types of process for different types of claims.²⁵⁷ For example, there will be some

254. For a wonderful survey of intellectual history on these issues, see ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* (1977).

255. See *Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.) (In re Diet Drugs I)*, Nos. 1203, 99-20593, 2000 WL 1222042, at *26 (E.D. Pa. Aug. 28, 2000) (mem.).

256. See McGovern, *supra* note 32, at 1386 (“Back end opt-outs can put pressure on a facility to raise individual compensation beyond existing resources or to secure additional funding beyond what was originally viewed as a final amount.”).

257. This suggestion is analogous to the suggestion made by Jerry Mashaw, that a qualitative view of what is at stake in administrative hearings is necessary to determine how much process is

cases where uniform compensation to every claimant, that is, an emphasis on equality, will be fair from a distributional perspective. In other cases, such as when individuals have suffered radically different damages, a matrix with compensation calibrated to each individual's loss, that is, an emphasis on liberty values, will be necessary. There will be similarities in analysis even if the construction of the actual administrative system will be different. In overseeing the formation of claims administration facilities, judges always ought to be concerned with reinforcement of public process values such as openness, deliberation, and communication, as well as with substantive values such as compensation to individuals, distribution among claimants, and deterrence.

Initially, the difficult tradeoffs between justice in the individual case and access to justice for large numbers of claimants ought to be made publicly rather than shunted off to a system that is more convenient because it is run by private parties. While a public-regarding quasi-administrative agency in the courts could theoretically be created either by judges or by parties, I call it "public" because I mean to invoke the idea of openness that the word implies, in contradiction to a "private"—that is, hidden—type of resolution. Because of this requirement of openness, judges play a critical role in the development of these quasi-administrative agencies bearing the imprimatur of the courts. This suggestion is in line with the legal process tradition, emphasizing the value of public adjudication leading to reasoned opinions.²⁵⁸

Transparency is critical to a humanized bureaucracy because it makes claimant responses to the claims administration facility possible. Control over information is power, and by allowing all the players to have access to information and to the decision-making process of the bureaucracy, that power is dispersed. This distribution of power does some work towards the goal of preventing capture because it allows for the possibility of opposition to specific interests taking advantage of the litigation. Without access to information, the possibilities for opposition are severely limited. Additionally, a fundamental aspect of legitimacy is that decisions are visible. Even perfectly just decisions are suspect if hidden. Part of the fear engendered by bureaucracy is of what goes on behind closed doors or in the darkened corridors of a Kafka novel.

On a similar note, deliberation is critical to the approval of claims administration facilities. As Justice Brandeis put it, judges are respected

due. See Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 57-59 (1976).

258. See generally Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003) (arguing in favor of Lon Fuller's conception of adjudication as applied to the complex litigation context).

“because we do our own work.”²⁵⁹ Judicial approval of quasi-administrative agencies should never be automatic, and this principle should probably extend to aggregative settlements, as well as class actions and bankruptcies.²⁶⁰ Instead, in approving the creation of claims administration facilities, judges should look at these facilities as an extension of their own work and as a kind of public entity.

One concrete proposal for realizing the values of openness and deliberation could be to mandate that critical functions of claims administration be publicly managed rather than managed by parties. For example, in the *Diet Drugs* litigation, a publicly managed echocardiogram program could have been implemented to prevent abuses. Such a program would both have prevented errors and reduced the possibility of capture of the echocardiogram process by one party or another. Furthermore, judges could use the requirement under Rule 23(e) to provide a reasoned opinion in approving a settlement that sets forth the structure and goals of the settlement administration facility and reasons for its approval.²⁶¹ This requirement could be made more robust by the inclusion of specific goals for the quasi-administrative agency against which the performance of the agency can be judged. Such judicial approval should also be required in aggregative settlements under the auspices of MDL judges, which is not currently the case. For example, judges should determine maximum acceptable error rates.²⁶² Furthermore, pursuant to their continued oversight of settlements, judges should be required to oversee an audit of the performance of the agency and publish an evaluation of the extent to which the agency is meeting the goals set forth in the settlement. Early judicial involvement and the public management of various aspects of claim collection and administration are more likely than audits to prevent the situation from reaching a crisis point requiring extreme measures that change the balance reached in the settlement, as was the case in the *Diet Drugs* litigation.

259. McCree, *supra* note 11, at 778. Similarly, D.C. Circuit Judge Wald has written that the “historic strength” of the courts is “having a personalized judiciary make decisions through the application of impersonalized rules.” Patricia M. Wald, *Bureaucracy and the Courts*, 92 *YALE L.J.* 1478, 1483 (1983) (arguing that this approach is endangered by bureaucracy in the court system).

260. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1999) (holding that limited fund class actions require showing that the fund was limited by more than agreement of the parties and that conflicting interests of present and future class members require sub-classification and separate representation); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (affirming denial of certification for settlement of current and future asbestos claims); *In re Combustion Eng'g*, 391 F.3d 190, 201 (3d Cir. 2004) (rejecting prepackaged bankruptcy).

261. I am grateful to Martha Minow for this suggestion.

262. See McGovern, *supra* note 32, at 1387 (describing minimal goals for potential claims resolution facilities including horizontal equity; longitudinal equity; finality; erring on the side of fixed terms; empirical confidence in the projections of the parties; independence, neutrality, and experience of the entities or persons administering the facility; defined error rates; and continued judicial supervision).

So far, this theory is very dependent on judges. If we cannot rely on process to produce good results, we are left to rely on the discretion and judgment of judges. One criticism of judicial oversight is that it depends on the virtue and talents of the judges.²⁶³ This may be a problem if we fear that judges will be elitist, inept, or dictatorial.²⁶⁴ The problem of mistrust of decision-makers, be they judges, legislators, or administrators, is ubiquitous. Demanding more virtue on the part of private actors, judges, and legislators, rather than encouraging interest competition, is no solution because the other side of this coin is elitism and capture.²⁶⁵ On the other hand, as compared to bureaucrats or legislators, federal judges are less subject to capture because they have life tenure and a professional ethos of neutrality. If judges deliberate on their decisions and publicly announce them, as is traditionally required, many of these concerns can be alleviated. While informal decision-making may be necessary to bring some settlements of collective litigation to fruition, this does not mean that the settlements should not be publicly debated and discussed, and the judges' thoughtful reasoning in favor, or against, be publicized to the persons affected and the public at large.

The second value that a theory might emphasize is communication. Much has been written on public deliberation as a democratic value²⁶⁶ and a judicial one.²⁶⁷ Communication and transparency are linked in that transparency requires the dissemination of information through communication. Dialogue in this context is a messy business because there

263. Another criticism may be that this type of reliance on judges is inquisitorial. See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1184-85 (2005) (describing resistance to and criticisms of inquisitorial practices, particularly the appointment of special masters, in the federal courts). But see Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1985-86 (1999) (hailing the trend towards inquisitorial justice in mass tort cases as "salutary").

264. See Minow, *supra* note 33, at 2028 ("Outside the sphere of the adversary process and the rule-bound trial system, the settlement process permits room for personal persuasion, input, or pressure by the judge."); see also PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* 128-31, 158-59 (1987) (describing Judge Jack Weinstein's creation of a "new choice-of-law doctrine . . . that he could use to shape . . . the outcome of the case" and his insistence upon the settlement amount he deemed most fair); Lahav, *supra* note 217, at 114-15 (describing criticisms of judicial oversight of class actions).

265. Neo-republican theorists argued in favor of virtue in public life, but were criticized for basing their arguments on ideologies that had at their origin been based on exclusion on the basis of wealth, color, and gender. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 175-77 (1996) (describing criticisms of neo-republicanism as a historical, archaic, "elitist and patriarchal," and "reactionary").

266. See, e.g., Amy Gutmann & Dennis Thompson, *Deliberative Democracy Beyond Process*, in *CONTEMPORARY POLITICAL THEORY* 233, 233 (Colin Farrelly ed., 2004) (arguing for the inclusion of both substantive and procedural principles in a deliberative democratic theory).

267. See *supra* note 14 and accompanying text (discussing the Hart-Hand model of judging).

will be disagreement over the structure of the administrative agency and its substantive goals. This disagreement is necessary and valuable. It is in this sense that the *Diet Drugs* litigation provides a beneficial example. That litigation and settlement was by no means streamlined. Its evolution involved multiple amendments, applications to the court, and a complicated system for administering claims that required increasing oversight as the enormity of the settlement was realized. All of this was costly and required substantial time and effort by the court and the litigants. Nevertheless, this messiness should also be seen as the result of a productive dialogue between the court, parties, and claimants in which errors and fraud were exposed and values of access and compensation affirmed.

Courts might realize communication values by ascertaining that all the affected parties—trustees, defendants, future claimants, present claimants, and administrators of the facility—are involved in the negotiations, for example.²⁶⁸ Various interested parties, especially claimants, should also have the opportunity to communicate with the court about their dissatisfaction with aspects of the administration for auditing purposes as the settlement is administered over time.²⁶⁹ If it were possible, the court would also solicit the opinions of qualified potential future claimants, although this scenario is difficult to imagine because the nature of the future claimants is that they do not yet know that they have a claim. After the settlement administration is underway, the judge can meet with randomly selected claimants who have been through the process to determine the extent to which the administrative agency is meeting expectations. Such a proactive approach may be especially warranted in light of empirical evidence that objections to class action settlements are extremely uncommon.²⁷⁰ The claimants need not be randomly selected, but should not be selected in a manner that raises concerns about capture. That is, they should not represent or be coached by one side or the other. Such meetings would serve the dual purpose of providing information about the administration of claims and putting a human face to the claimants to

268. See McGovern, *supra* note 32, at 1388.

269. So far, the structure I am describing has some similarities to the methods for overseeing informal rulemaking in the administrative context, which requires notice, comment, and a published statement of the basis and purpose alongside the rules. Cf. Verkuil, *supra* note 242 (describing the types of process provided by private entities and advocating in favor of a Private Administrative Procedure Act requiring certain minimal informal adjudication procedures).

270. See Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1533-34, 1550 (2004) (showing that the objection rate is low across case types). The study does not seem to have been controlled for talent or tenacity of objectors. It is possible that even one objector who is very ably represented can have an effect larger than the numbers would show. The findings did indicate a very small number of rejected settlements, at least in published opinions. See *id.* at 1558-59.

mitigate the extent to which claimants are alienated from the judge because they are invisible to her.

Finally, the substantive accomplishment of this bureaucracy must be evaluated based on its ability to achieve systemic justice rather than focusing on justice in the individual case.²⁷¹ This means very openly favoring equality over liberty. Thus, for example, adjudication by sampling could be used.²⁷² The sample could be historical cases that have been adjudicated or settled, or a group of concurrent cases. The total compensation would be determined by extrapolating the sample cases over the claimant population. Each claimant could receive an amount that represents an average of the sample awards, perhaps taking into account relevant variables. The same limitations could be set on defendants by permitting statistical sampling of claims to determine whether the error rate of a given administrative agency was meeting the goal accepted at the outset, rather than permitting universal audits of individual claims as happened in the *Diet Drugs* litigation. This proposal essentially mandates a lottery for process rights.²⁷³ Such a lottery may be justified on the basis of the common good.

There are several problems with this proposal, however. First, the devil is in the details. How exactly would a sampling system work? Who would decide what cases are sampled; how would those cases be found; and who would get to litigate them? Second, one court has held that sample trials violate the defendant's Seventh Amendment right to have liability and damages determined by a jury.²⁷⁴ Whether this challenge is fatal is beyond the scope of this Article, but while it has not been broadly endorsed, neither have statistical trials been much used. Third, even if the constitutional problem could be overcome, either as a matter of interpretation or by agreement of the parties, it would still mean tolerating a level of acceptable error that might make proponents of the day-in-court ideal feel uncomfortable.

I suggest two responses to this discomfort. The first is that a full blown trial often does not lead to just individual results, such that the alternative to which bureaucratic systems are being compared sets an illusory standard that the ideal itself cannot meet.²⁷⁵ Second, the benefit of a systemic

271. See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 247-48 (2004) (defining systemic accuracy as "whether a given procedure will produce more or less accurate results for all future cases" and noting that the term accuracy is ambiguous).

272. See generally Bone, *supra* note 179 (addressing the normative arguments for sampling in mass tort litigation and suggesting guidelines for when sampling is appropriate).

273. See *id.* at 642-43.

274. See *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 320-21 (5th Cir. 1998). *But see* *Hilao v. Estate of Marcos*, 103 F.3d 767, 785-87 (9th Cir. 1996) (upholding sample damages in human rights case against defendant's due process challenge).

275. See Michael J. Sacks & Peter David Blanck, *Justice Improved: The Unrecognized*

approach to mass cases is that it privileges the central democratic value of access to justice. There are ways other than trials for the courts to recognize the importance of deliberation and participation values, such as holding hearings at various stages of the settlement and providing well-reasoned opinions as to the legitimacy of the process. Yet another difficult argument against acceptance of bureaucracy in the courts is that individual claims should be adjudicated consonant with the day-in-court ideal, and that by doing otherwise, the courts are breaching their trust with the legislature. As a co-equal branch of government, faced with the necessity to do justice and a scarcity of process, the judiciary is left with little choice but to pursue an administrative strategy. The question is not whether there will be bureaucratic structures in the courts, but what those structures will be like.

VI. CONCLUSION

Judicial concern about the pervasive rise of bureaucracy in the courts has led to a fearful pushing of mass claims into private settlements, which in turn has led to a greater likelihood of the realization of the ills that we fear from bureaucracy: that it alienates litigants from the court system, increases judicial apathy, and can lead to unacceptably erroneous results. The goal of this Article was to explore why there is bureaucratization in the courts and how it operates. Now that we have achieved this, the next step is to develop a theory of claims administration in the courts or in the shadow of the law that is responsive to the problems described here. This Article has begun that work by proposing a theory of publicly oriented claims administration based on transparency, communication, and systemic justice. Overseeing humanized and publicly oriented administration of claims is a valuable goal for the federal courts. It may not be handcrafted justice of the Hand-Hart variety, but administration does not mean that the courts need to become an industrial sweatshop or to send claimants to its equivalent.

Benefits of Aggregation and Sampling in the Trial of Mass Torts, 44 STAN. L. REV. 815, 830-32 (1992) (arguing that the values of equality, predictability, transparency, rationality, and revelation are well served by sampling, while autonomy and dignity values seem less well served by comparison to the ideal of an individual trial, but perhaps less so in comparison to the reality).