

RECOVERING THE SOCIAL VALUE OF JURISDICTIONAL REDUNDANCY

Alexandra D. Lahav*

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Introduction

There is a preoccupation today with centralization in civil procedure.¹ Proceduralists don't like waste. The overlap of multiple state and federal lawsuits is largely lamented as a source of inefficiency and an opportunity for unprincipled manipulation. The articulated basis for diversity jurisdiction, fear of bias from local

*.Associate Professor, University of Connecticut School of Law. Thanks to Paul Berman, Robert Bone, Beth Burch, Robin Effron, Deborah Hensler, Richard Marcus, Francis McGovern, Martha Minow, Edward Sherman, Judith Resnik, the Hon. Lee Rosenthal, Allan Stein, participants at the symposium on the Problem of Multi-District Litigation for which this essay was written, and the editors of the Tulane Law Review. I am grateful to the University of Connecticut School of Law for generous research support.

¹ See Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5, 6 (1991).

courts, is considered weak in a nation that has become more and more homogenous culturally and economically. National litigation thrives. The Class Action Fairness Act federalized what would have been state court class actions in an attempt to centralize power over them.² Large-scale settlements of nationwide lawsuits against manufacturers appear consistently in the headlines.³ The American Law Institute's Draft Principles of the Law of Aggregate Litigation favors more centralization mechanisms in aggregate litigation.⁴ Scholars propose that courts should jettison the *Erie* doctrine or the *Klaxon* rule and develop national law for suits arising out of conduct in national markets.⁵

The pluralist values advanced by jurisdictional redundancy have been largely compromised in the attempt to resolve the troubling problems posed by aggregate litigation. We have too quickly adopted the now dominant view favoring centralization. It is time to refocus on the social value of the multiple centers of authority that jurisdictional redundancy permits. This essay presents the case for multi-centered litigation with particular focus on the potential uses of the Multidistrict Litigation [MDL] Act to realize pluralist values.⁶

This essay makes both descriptive and normative claims in favor of multi-centered litigation. The description of the current litigation landscape reminds us that disputes continue to appear in multiple, parallel and competing forums. This is not news. Multiple centers of authority are imbedded in the structure of our federalism. Our dual court system may even be said to encourage overlapping centers of decision-making power. It is particularly important to remember this political fact as the emphasis on centralization becomes more entrenched in procedural doctrine and jurisdictional

² Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (codified at 28 USCA §§ 1332, 1711-1715, 1453 (2005) [hereinafter CAFA].

³ See e.g., Alex Berenson, *Merck Agrees to Settle Vioxx Suits for \$4.85 Billion*, NY TIMES (Nov. 9 2007).

⁴ AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION - DISCUSSION DRAFT (2006).

⁵ Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1840 (2006) (propounding a "goods on the national market" theory of choice of law). This is a controversial proposal. For a contrary view see Linda S. Mullenix, *Gridlaw: The Enduring Legacy of Phillips Petroleum Co. v. Shutts*, 74 UMKC L. REV. 651 (2006) (arguing that choice of law remains a substantial barrier to class actions and aggregate litigation).

⁶ 28 U.S.C.A. § 1407.

mandates. Furthermore, we should not forget that coordination rules within our federalist system have the potential to tilt in different directions: in favor of centralization or against it and in favor of states or of the federal judicial system. For example, the MDL Act favors centralization of federal cases, at least in the pretrial phase.⁷ The Class Action Fairness Act federalized class actions and permitted MDL transfer of cases removed to federal courts when these cases are certified or sought to be certified as class actions under Rule 23.⁸ The Full Faith and Credit Act, on the other hand, favors state judgments, and the *Erie* doctrine and *Klaxon* rule favor state laws.⁹

The normative claim advanced here is that multiple centers of adjudication offer benefits that proceduralists should take more seriously. This essay reconsiders Robert Cover's thesis on the uses of jurisdictional redundancy in light of nearly thirty years of significant developments in procedure and jurisdiction.¹⁰ In the process, it calls into question some of the assumptions imbedded in the current focus on centralization. I do not suggest that we ought to resign ourselves to needless and wasteful repetition. Jurisdictional redundancy is not merely repetitive. In formulating measures for reform of our judicial systems, we should consider the ability of multiple centers of adjudication to encourage socially beneficial institutional conflict and plural conceptions of the good.

To understand the concept of multi-centered litigation, it is helpful to distinguish it from two other concepts: atomization and

⁷ *Id.* See Deborah Hensler, *The Role of Multi-Districting in Mass Torts Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 897 (2001) (presenting empirical data showing that approximately two thirds of motions for transfer under the MDL statute are granted and that "during the 1990s, the panel granted almost three-quarters of the motions for transfer in mass product defect cases that came before it, although in the previous decade it has only granted about one-third of these motions.").

⁸ 28 U.S.C.A. § 1332(d)(11)(C)(i) provides that mass actions removed under 28 U.S.C.A. § 1332(d)(11) shall not be transferred pursuant to 28 U.S.C.A. § 1407. If the cases are certified under Rule 23 or the plaintiffs request certification, the bar on multidistrict transfer will not apply. 28 U.S.C.A. § 1332(d)(11)(C)(ii).

⁹ Full Faith & Credit Act, 28 U.S.C.A. § 1738; *Erie R. Co. v. Tompkins*, 305 U.S. 64 (1938) (holding that state law governs cases heard under the federal courts' diversity jurisdiction); *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1942) (holding that a federal court must apply the conflict of laws rules of the state in which it sits).

¹⁰ See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 640 (1980) [hereinafter Cover, *Redundancy*].

polycentric disputes. Atomization is the central quality of a system that requires complete individuation of lawsuits. It is an ideal based on the individual right to be heard and participate in a process that leads to the resolution of a lawsuit. This ideal remains strong in theory if not in practice.¹¹ The most familiar antithesis to atomized litigation is the class action. Atomized litigation can exist within a decentralized system, a multi-centered system or a centralized one so long as cases are not resolved on an aggregate basis.¹² Multiple *centers* of resolution do not require that each suit be tried individually; neither does multi-centeredness dictate a collective litigation.¹³

The second useful distinction is between polycentric disputes, a term used by Lon Fuller to describe disputes he thought were not amenable to adjudication, and multi-centered litigation, which involves overlapping institutions.¹⁴ This jurisdictional argument does not require a conclusion regarding the viability of the category of “polycentric disputes” or a position on Fuller’s rejection of the possibility of adjudicating these types of disputes. Many of the cases that courts and commentators seek to centralize, such as tort cases, fall squarely within the category of cases that Fuller would have considered appropriate for adjudication. The size and scope of the litigation, however, is so large that it presents institutional problems. The most popular solution to these problems is centralization.

This essay begins by showing that jurisdictional redundancy is a function of two fundamental features of our legal system: federalism and adversarial adjudication. To understand how these key features of our system work, the first part of this essay

¹¹ 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’”(citation omitted)); Robert Bone, *Rethinking the “Day in Court Ideal” and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992).

¹² Of course, centralization through mechanisms like the MDL can create a momentum towards group treatment of similar suits.

¹³ This is analogous to the distinction between personal and subject matter jurisdiction. Personal jurisdiction relates to the court’s power over the individual. Like subject matter jurisdiction, the issue addressed here relates to the power of the courts in relation to one another.

¹⁴ See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-396 (1978). Fuller described a polycentric dispute as one in which each solution will have “a different set of repercussions and might require in each instance a redefinition of the ‘parties affected.’” He argued that adjudication was ill-suited to resolving disputes where polycentric elements predominated and that these disputes should be resolved by managerial direction or contract. *Id.* at 398.

introduces three important concepts: strategic choice, horizontal redundancy and vertical redundancy.¹⁵ This definitional section establishes two central points. First, jurisdictional redundancy enables pluralism by operating both horizontally (across court systems) and vertically (within court systems over time). Second, the strategic manipulation of procedural rules is an inherent and permanent feature of our system. The mere use of stratagems in and of itself should not be considered an evil, although it may be frustrating at times. Instead, rule makers are (and ought to be) strategists who try to predict and direct litigant behavior.

The second part of this essay describes recent developments and proposals for centralizing reforms. It presents the arguments in favor of centralization and then focuses on recent proposals to further centralize litigation and to coordinate redundancies between court systems. This part shows that the mantra of reformers over the last forty years has been centralize, centralize, centralize. This consistent theme has given short shrift to the pluralist values embedded in our federalist system.

The third part of this essay presents the benefits of multi-centered litigation. Multi-centered litigation has a role in avoiding error, limiting the deleterious effects of private interest on the system, permitting innovation, and addressing the effects of decision-maker ideology. Repetition of litigation, inevitable under a redundant system, will not prevent errors. But jurisdictional redundancy will decrease the effects of error made by any particular court. Moreover, redundancy encourages a more accurate reflection of fundamental disagreements in political and social life that the concept of “error” (implying the existence of a correct outcome) cannot quite capture.

This insight reminds us that the courts are a political branch. The same issues that arise in any political system are present there too. For this reason it is important to consider the role of private interests in litigation, the effect of innovation in different courts on the overall litigation and social landscape, and the role of ideology in legal decision-making. Interest, innovation and ideology are sources of what might be described as error, but they must also be considered necessary and useful characteristics of a liberal pluralist society such as ours.

¹⁵ Cover called horizontal redundancy “synchronic” and vertical redundancy “sequential.” These terms are explained in greater detail in the following section.

Given that deep social disagreements persist, the conclusion to this essay asks how much polycentrism our system can tolerate and then turns the question around, considering how much uniformity we should expect in a pluralist society. These are fundamental questions of political philosophy and social life. As John Rawls posed the question: “How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?”¹⁶ Political philosophers continue to search for an answer to this question.

This essay offers a defense of pluralist values in adjudication and reminds the reader what is lost in centralizing reforms. In furtherance of this goal, I suggest three factors that judges and policy-makers consider in determining the level of centralization appropriate in a given case: (i) the extent and nature of underlying substantive disagreement, (ii) the costs of inconsistency, and (iii) the role of political power in the litigation. The final sections illustrate how pluralist values can be taken into account in jurisdictional decisions by applying these factors to two case studies: a hypothetical pharmaceutical litigation and *In re National Security Agency Telecommunications Records Litigation*.¹⁷ These examples demonstrate the costs and benefits of both the multi-centered and centralizing approaches, and show how important it is for courts to take social context into account in evaluating what solution is best for a particular litigation.

I. What Is Multi-Centered Litigation?

The concept of multi-centered litigation has its roots in legal pluralism. Legal pluralism is a “situation in which two or more legal systems coexist in the same social field.”¹⁸ This concept can include

¹⁶ JOHN RAWLS, *POLITICAL LIBERALISM* xviii (1993).

¹⁷ 444 F.Supp.2d 1332 (J.P.M.L. 2006).

¹⁸ Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC’Y REV. 869, 870 (1988). Some additional thoughtful discussions of pluralism include Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983); Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J.L. & SOC’Y 296 (2000); Martha Minow, *Before and After Pierce*, 78 U. DET. MERCY L. REV. 407 (2001) (describing pluralism as basis for analyzing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925)); CAROL WEISBROD, *EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE* (2002); Paul Schiff Berman, *Global Legal Pluralism*, 80 SO. CA. L. REV. 1155 (2007); DALIAH TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF*

both formal and informal legal systems, but the focus here is on one form of juristic legal pluralism as it appears in official, state-sanctioned forums. Multi-centered litigation describes overlapping legal institutions consisting of multiple state and federal aggregated and consolidated cases, functioning in tandem with legislative institutions on the state and federal level.

In the scholarly literature on civil procedure, the idea of legal pluralism first gained traction in an influential article by Robert Cover entitled *The Uses of Jurisdictional Redundancy*.¹⁹ Cover used the term “complex concurrency” to refer to our system of courts with overlapping jurisdiction. The existence of overlapping jurisdiction allows for the creation of multiple, overlapping centers of legal decision-making. Cover suggested three characteristics of a system of complex concurrency: strategic choice, horizontal (or synchronic) redundancy and vertical (or sequential) redundancy.²⁰

Strategic choice and jurisdictional redundancy are features of our system that have come under attack by centralizing reformers. This is in part because they often result in frustration to litigants and judges. That perception ought to be reframed in light of the fact that these characteristics are the unavoidable result of the twin features of our legal system: federalism and adversarial adjudication. Later, we shall see that there is some good to be found in the structure of our legal system, despite the fact that it gives rise to these complaints. This section begins the reframing process by defining the terms for discussion.

Strategic Choice

Strategic choice is the tactical deployment of procedure to manipulate the substantive outcome of a given action. Although it is ordinarily characterized as abusive party behavior, the tactical

AMERICAN LEGAL PLURALISM (2007). This is by no means an exhaustive list of the influential work in this field. Inquiries into the benefits of dual systems along similar lines include Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

¹⁹ Cover, *Redundancy*, *supra* note 10. Many of these ideas have been further developed by Judith Resnik. See, e.g., Judith Resnik, *Normative Lessons on American Federalism from the Class Action Rule of 1966 to the Class Action Fairness Act of 2005: The Political Safeguards of Translocalism and Transnationalism*, 156 PENN. L. REV. __ (forthcoming 2008) (describing and critiquing the centralization of jurisdiction in the federal courts).

²⁰ Cover, *Redundancy*, *supra* note 10 at 646.

deployment of procedure is better understood as inherent in any procedural regime seeking to regulate adversarial litigation. It represents the expression of litigant autonomy, something that is usually considered a social good rather than a social ill.²¹ The job of the rule drafters and enforcers is to consider the possibilities for manipulating procedures in rule structure and enforcement to avoid injustice. In a sense rulemakers and judges are, or at least ought to be, game theorists. Rather than jumping to a value-laden judgment of any particular strategic manipulation of procedure, we need to unpack the meaning of that strategy for the goals of the system and the larger cultural and ideological context. The problem, of course, is that the goals of the system are many. Therefore anyone's judgment about a particular strategic manipulation will be based on an underlying set of assumptions about the purpose of the judicial system.

Litigant use of procedure to obtain perceived tactical advantage is most familiar in the much maligned practice of "forum shopping." Forum shopping can manifest in many ways and is not limited to a plaintiff's decision to file a lawsuit in a particular court.²² Strategic choice of forum is utilized both by plaintiffs and defendants. Plaintiffs choose to file their complaint in the forum they think will be most hospitable. Defendants may remove to federal court, a power greatly expanded by the Class Action Fairness Act which grants the federal courts jurisdiction over damages class actions valued at over 5 million dollars.²³ Either party may move to transfer multiple cases filed all over the country to a single court. Defendants may wish to centralize cases in order to drive these lawsuits to global settlement or to save the cost of defending cases in multiple forums, especially the cost of discovery. Depending on the circumstances, defendants may instead fight that consolidation because they are concerned that the fact of consolidation itself will

²¹ Thanks to Martha Minow for this insight.

²² Manipulation by plaintiffs, and particularly plaintiffs' attempts to choose certain friendly courts, has garnered much of the focus of those concerned about forum shopping. It played a significant role in spurring the passage of the Class Action Fairness Act, one of the most significant expansions of federal jurisdiction since the passage of the Multi-District Litigation Act. *See* S. Rep. No. 109-14, at 3 (2005) *as reprinted in* 2005 U.S.C.C.A.N. 3, 5-6 ("To make matters worse, current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests.").

²³ 28 USC § 1332(d)(2).

increase the number of suits filed against them. Litigants may try to refile a settlement-only class action was rejected previously in a new court that they hope will approve that settlement, or seek an anti-suit injunction barring such refiling.²⁴

Strategic deployment of procedure is not limited to litigants. Judges can tactically manipulate the timing of decisions or provide “hints” to the litigants of how they plan to decide a motion in order to spur settlement. For example, in the Agent Orange litigation Judge Weinstein issued a provisional ruling on choice of law that would have substantial effects on the outcome of the litigation. The fact that the ruling was provisional momentarily insulated his ruling from appellate review while the parties considered the consequences.²⁵

Innovations Resulting from Strategic Choice

Strategic choice can result in innovations that harness repetition. One such example is the recent decision by the Hon. Alvin K. Hellerstein, United States District Judge for the Southern District of New York to hold informal bellwether trials. All litigation arising out of the tragedy of September 11, 2001 was consolidated before Judge Hellerstein.²⁶ Six years after filing suit, the plaintiffs were frustrated at the pace of the litigation. The judge believed that many of the cases would settle if the parties could agree on a mutually acceptable value.²⁷ He ordered that prior to determining liability, the court would hold damages trials of selected

²⁴ The court may have the power to issue such an injunction under the All Writs Act, 28 U.S.C.A. § 1651.

²⁵ See PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 128-31 (enlarged ed. 1987). See also Martha Minow, *Judge For The Situation: Judge Jack Weinstein, Creator Of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2031 (1997) (discussing the problems of unreviewable discretion created by provisional rulings and the tension between the desirability of judicial innovation and the need for “fresh eyes” to review decisions).

²⁶ See *In re September 11 Litig.*, 494 F.Supp.2d 232, 236 (S.D.N.Y. 2007). For an analysis of this phenomenon see Robin Effron, *Event Jurisdiction and Protective Coordination: Lessons from the September 11th Litigation*, 81 S. CAL. L. REV. 199 (2008).

²⁷ Opinion Supporting Order to Sever Issues of Damages and Liability in Selected Cases, *In re September 11th Litigation*, 21 MC 97, at 3 (AKH) (S.D.N.Y., July 5, 2007). But see Gillian Hadfield, *Framing the Choice Between Cash and Courthouse: Experiences with the 9/11 Victim Compensation Fund*, __ LAW & SOC. REV. __ (forthcoming 2008) (a qualitative empirical study finding that for many 9/11 victims litigation represents important non-monetary civic values).

plaintiffs who would volunteer to participate. The results of these trials were to be available to other litigants in order to assist them in valuing cases for settlement. A little over two months after the Judge ordered the damages trials, fourteen of the cases settled.²⁸ It seems likely that in the absence of the bellwether procedure these cases would not have settled so quickly. One reason for the speedy settlements may have been the Judge's decision in one of the bellwether cases to grant defendant's motion *in limine* and bar certain evidence of plaintiff's earning potential and various other aspects of the events that occurred on September 11th, including events that occurred on the flight that the plaintiff was traveling on, from being introduced at trial.²⁹

The decision to push certain cases to trial for the purpose of settling others in a mass tort case is a strategic deployment of procedure, but the fact that we call it strategic does not necessarily violate the principle of reaching a just, speedy and efficient resolution of every action.³⁰ Instead, strategic choice raises fundamental questions about what strategies advance the social values the procedural system seeks to maximize. The problem is that our procedural system seeks to maximize multiple and not entirely compatible social values, among them rectitude, norm articulation, information forcing, accountability, corrective justice and dispute resolution.³¹ We lack a good theory of procedural justice to sort through these values. For instance, if the social value that the system seeks to maximize is rectitude – the correct application of law to the facts – one might prefer the deployment of procedure to determine liability before damages. Similarly, if the social value is norm articulation, Judge Hellerstein's approach of encouraging settlement may be criticized for failing to provide the publicity function of the

²⁸ See Order, *In re September 11 Litigation*, 21 MC 97 (AKH) (S.D.N.Y., September 17, 2007) (ordering fourteen cases closed due to settlement).

²⁹ See Order Regarding Defendant's Motion In Limine, *Ambrose v. American Airlines, Inc., et al.*, 02 CV 7150 (AKH) (S.D.N.Y., October 16, 2007). I do not evaluate the merits of this decision. I only intend to point out that the judge created the moment for that decision through bellwether trials and reverse bifurcation. This then spurred settlement that might have otherwise been long delayed.

³⁰ See Fed. R. Civ. P. 1 (commanding that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

³¹ See Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984) (decisions about litigation are driven by norms of citizenship and community).

trial on liability issues.³² If the social value that the system seeks to maximize is efficient closure of open cases (what might be called “pure dispute resolution”), then Judge Hellerstein’s approach was exactly right.

Synchronic Redundancy

Synchronic redundancy is the horizontal overlap of multiple forums deciding the same questions at or around the same time. Synchronic redundancy occurs when individual cases presenting similar factual and legal questions are filed in multiple federal district and state courts. Coordination rules can be employed to limit, but not eradicate, synchronic redundancy. The MDL Act was codified in an attempt to limit synchronic redundancy in federal courts with respect to discovery and other pretrial proceedings by transferring cases presenting common questions to one court.³³ The anti-suit injunction, another coordination rule, has recently engaged scholars in the context of class actions.³⁴ Settling parties can seek an anti-suit injunction preventing class members from bringing suits in any other forum.³⁵ Or they may seek a determination that a rival action is barred in the forum where a competing suit was filed.³⁶

³² For an argument that settlement erodes the norm articulation function of the courts see Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 9 (1987) (questioning whether “whether the rush to compromise, a characteristic of numerous ADR methods, will advance the important policies underlying substantive law.”); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. J. 2619 (1995); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning Of Article III*, 113 HARV. L. REV. 924, 1000-1002 (2000) (discussing normative theorist’s concerns about privatization of judging).

³³ 28 U.S.C.A. § 1407

³⁴ See Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998) (arguing in favor of an expansive ability for unnamed plaintiffs to challenge class actions in other forums); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 PENN. L. REV. __ (forthcoming 2008) (arguing in favor of a limited reading of the Anti-Injunction Act based on the passage of CAFA).

³⁵ See Monaghan, *Antisuit Injunctions*, *id.* at 1150, 1151-52 n. 13 (discussing *Brown v. General Motors’ Corp.*, 118 S. Ct. 657, 665 (1998) which distinguished between enforcement and preclusive effects of antisuit injunctions).

³⁶ See *Syngenta Crop Protection Inc. v. Henson*, 123 S. Ct. 366, 379 n.1 (2002).

Despite the courts ability to transfer cases sharing common issues of fact or law to a single forum, synchronic redundancy persists. Federal and state courts have concurrent jurisdiction over many types of cases. The Vioxx litigation is illustrative. Vioxx was a prescription pain relief drug approved by the Food and Drug Administration in May 1999. In September 2004 the drug's manufacturer, Merck, voluntarily removed it from the market when a study indicated that the use of the drug increased the risk of cardiovascular thrombotic events such as myocardial infarctions (heart attacks) and ischemic strokes.³⁷ Thousands of cases were filed against Merck and, as in many mass tort cases, they were consolidated in various forums. Over 7,000 cases were removed to or filed in federal court and aggregated in the Eastern District of Louisiana by the Judicial Panel on Multidistrict Litigation [JPML].³⁸ Large numbers of cases were also filed in New Jersey, California and Texas.³⁹ The number of cases filed in New Jersey and consolidated there was recently approximated at 15,000 suits.⁴⁰ Mass torts are ordinarily characterized by this type of procedural history: thousands of lawsuits filed in state courts, some removed to federal court and transferred to a single court under the MDL statute, then consolidated before a single judge, while other cases remain in state court and are consolidated and centralized there.

Sequential Redundancy

Sequential redundancy is the vertical overlap of decision-making or the ability of courts to revisit the decision of previous courts. We see sequential redundancy in appeals, the writ of habeas

³⁷ *In re Vioxx Products Liability Litigation*, 239 F.R.D. 450 (E.D. La. 2006)

³⁸ *See* Transfer Order, *In re Vioxx Products Liability Litigation*, MDL-1657 (Feb. 16, 2005).

³⁹ *See, e.g.,* Ledbetter v. Merck & Co., Inc., Order Granting Defendant's Motion for Partial Summary Judgment and Granting Expedited Appeal, Dist. Ct. Tx. (April 20, 2007)(granting partial summary judgment for defendant on grounds that plaintiffs' fraud on the FDA claims are preempted by federal law).

⁴⁰ *See* *In re Vioxx Litigation*, 395 N.J.Super.A.D. 358, 363 (2007); New Jersey Supreme Court Order dated May 20, 2003 (designating all pending and future litigation statewide involving the drug Vioxx as a mass tort and transferring the management of all such cases to Atlantic County to be handled on a coordinated basis) available at <http://www.judiciary.state.nj.us/notices>.

corpus, and collateral attacks on judgments.⁴¹ Sequential redundancy appears in multidistrict litigation, such as when a case is returned for trial to the transferor court.⁴² It appears in the right to interlocutory appeals of class action certification decisions,⁴³ and in collateral attacks on class action settlements. Collateral attacks have surfaced as the most significant and controversial form of sequential redundancy with respect to class actions. The right to collaterally attack a class action settlement on the basis of inadequate representation is uncontested in principle, but there is no agreement on its parameters.⁴⁴ Some scholars argue that the right to collateral attack ought to be limited and others have argued for its expansion.⁴⁵

Several doctrines prevent courts from revisiting previous decisions of the same facts or law. First, a decision by the JPML to transfer cases for pretrial litigation cannot be appealed except by extraordinary writ.⁴⁶ The reexamination clause in the 7th Amendment limits reexamination of an issue of fact determined by a jury.⁴⁷ The doctrine of *res judicata* limits litigants' ability to relitigate a claim that was or could have been raised in a prior

⁴¹ For an insightful comparison of habeas and collateral attacks in the class action context see William B. Rubenstein, *Finality In Class Action Litigation: Lessons From Habeas*, 82 N.Y.U. L. REV. 790 (2007).

⁴² *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998)

⁴³ See FED. R. CIV. P. 23(f) (permitting interlocutory appeals of certification decisions).

⁴⁴ *Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003) (an evenly divided court affirmed the judgment below on question of whether collateral attack was permitted by claimant who discovered injury after close of settlement).

⁴⁵ For arguments in favor of limiting the right to collateral attack see 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); Samuel Issacharoff & Richard Nagareda, *Class Action Settlements Under Attack*, 156 PENN L. REV. __ (forthcoming 2008). For an argument favoring an expansive right to collateral attack see Monaghan, *Antisuit Injunctions*, *supra* note 35 (arguing in favor of a broad right for absent class members to challenge preclusive class judgments in their chosen forum).

⁴⁶ 28 U.S.C.A. § 1407 (e) (limiting review of JPML orders).

⁴⁷ U.S. CONST. AMEND. VII. *Compare* *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (holding that the reexamination clause limits a court's ability to bifurcate cases in mass torts) *with* Patrick Woolley, *Mass Tort Litigation And The Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499 (1998) (arguing it does not).

action.⁴⁸ The doctrine of collateral estoppel prohibits relitigation of the same issue, and can be used offensively by a party that did not litigate the issue in the first action.⁴⁹ Preclusion is a particularly powerful tool in the class action context, where settlement of a class action in one forum will extinguish all claims, even those that could not have been brought in the settling forum.⁵⁰

II. Centralization in Context

Complex concurrency is a source of frustration for judges, litigators, legislators, and civil procedure scholars because it creates inefficiencies, is difficult to coordinate, and makes global settlement of mass cases challenging. The widespread reaction to complex concurrency since the late 1950's has been centralization. The factors driving centralization are familiar. Repetitive litigation of the same questions is costly and courts have scarce resources. It is more efficient to centralize cases in order to gain economies of scale in decision-making, avoid costly repetition of discovery and perhaps spur private settlement to resolve cases without further expenditure of court and litigant resources. This section presents the arguments in favor of centralization, describes the historical developments that led to what Richard Marcus calls a "maximalist" use of centralizing

⁴⁸ See *Rivet v. Regions Bank*, 522 U.S. 470, 474 (1998); CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, CLAIM AND DEFENSE PRECLUSION, 18 FED. PRAC. & PROC. JURIS.2d § 4406 (2007).

⁴⁹ See CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, ISSUE PRECLUSION IN GENERAL, 18 FED. PRAC. & PROC. JURIS.2d § 4416 (2007).

⁵⁰ See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) (holding that the Full Faith and Credit Act requires federal courts to give preclusive effect to state judgments even when state court judgment at issue incorporates class action settlement releasing claims solely within jurisdiction of federal courts, so long as they comply with due process). Subsequently, on remand the 9th Circuit held that the Supreme Court's decision determined that the state court judgment comported with due process. See *Epstein v. Matsushita Elec. Indus. Co.*, 179 F.3d 641 (9th Cir.), cert. denied, 120 S. Ct. 497 (1999). See also *In re Prudential Ins. Co. of America Sales Practice Litigation*, 261 F.3d 355, 366 (3rd Cir. 2000) ("It is now settled that a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action. This is true even though the precluded claim was not presented, and could not have been presented, in the class action itself."). Some state courts have been very receptive to collateral attacks for citizens of their states in nationwide class actions. See *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. Sup. Ct. 2003).

procedures⁵¹ and presents some recent proposals to centralize litigation even further.

Why Centralize?

There are four reasons why scholars and policy makers favor centralization in litigation: it reduces transactions costs, produces uniformity, avoids inconsistent judgments, and reduces litigant abuse. First, centralization saves transaction costs. Many cases, such as those transferred and consolidated to a single court under the auspices of the JPML, involve similar factual and legal issues. Having multiple judges in different districts or court systems manage overlapping discovery, for example, can result in multiple depositions of key witnesses, duplicative document production and repetitive pretrial motions. Although duplicative discovery is less of an issue with the advent of electronic record keeping, multiple depositions and redundant motions impose significant costs on the court system, litigants and witnesses.

Second, a centralized system produces uniform results, reducing the costs of coordination. By contrast, competing systems generate confusion about what the law is and uncertainty about outcomes of particular cases. Coordination and uniformity will not necessarily lead to predictability in a legal system. Nevertheless, uniformity can combat the threat the multiple legal decision-makers (courts and legislatures on the state and federal level) making divergent decisions affecting the national economy.⁵²

Third, centralization avoids the risk of inconsistent judgments. If multiple forums are hearing the same type of case, then some courts may come out differently. This heterogeneity may be unacceptable with respect to some questions, such as privileges, where inconsistency results in directly contradictory court orders with respect to the exact same subject matter.⁵³ The problem is more severe where a single court is an “outlier” with respect to an issue on which all other courts agree. This phenomenon can in turn encourage forum shopping and other strategic manipulations of the system to move cases to the outlier court, perhaps giving it more power than it deserves. Centralization and coordination solve this

⁵¹ Richard Marcus, [Title], in this symposium issue.

⁵² See Samuel Issacharoff & Catherine Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1356 (2006).

⁵³ I discuss this issue in greater depth the final part of this essay. See *infra* Part IV.

problem by eliminating or controlling the outlier (unless, of course, the litigation is concentrated in the outlier court).

Fourth, centralization alleviates concerns about litigants abusing the system through strategic choices. Many have noted the potential for abuse of synchronic redundancies. For example, in the class action context, sometimes plaintiffs' class counsel have been accused of employing a "reverse auction."⁵⁴ These lawyers may take advantage of absent class members by seeking certification of a settlement that was disapproved of by a federal court in a more friendly state court. The concern is that class counsel will agree to sub-optimal global settlements because they are risk averse.⁵⁵ Defendants have an interest in buying off the class counsel with the promise of guaranteed payment in order to reduce their overall exposure and obtain global peace. There are some documented examples of this happening.⁵⁶ Synchronic redundancy allows risk averse litigants to seek out the forum that will accept such settlements. It is notable that this criticism is never levied at federal courts certifying class actions.

A related concern is the filing of class action lawsuits, for settlement or litigation, in jurisdictions that will rubber stamp class certification.⁵⁷ Some fear that by obtaining certification in a forum hospitable to class actions, plaintiffs can exercise inordinate power over defendants, forcing them to settle regardless of the merits of the underlying claim.⁵⁸ On examination, both of these problems appear

⁵⁴ See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUMB. L. REV. 1343, 1370 (1995) (describing the reverse auction phenomenon as "a jurisdictional competition among different teams of plaintiffs' attorneys in different actions that involve the same underlying allegations.").

⁵⁵ See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 390-93 (2000) (discussing risk aversion of class counsel).

⁵⁶ For example, the Third Circuit overturned a notorious settlement in the *GM Pick-Up Truck Fuel Tank Products Liability Litigation*. Undeterred, the parties re-filed the settlement in Louisiana state court, where essentially the same settlement was approved. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133, 137 (3d Cir. 1998).

⁵⁷ These are sometimes referred to as "judicial hell holes." Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates, and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. _ (forthcoming 2008)

⁵⁸ See, e.g., HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995) (Posner, J.).

to be greatly exaggerated.⁵⁹ Perhaps in response to these concerns, the Class Action Fairness Act provides that class actions removed to federal court may be subsequently transferred to another district, permitting defendants substantial leeway to manipulate forum selection.⁶⁰

Fears of abuse through strategic manipulation of multiple forums are animated by several principles. Those concerned about individual due process and process-based participation rights worry that individual class members are not getting their due. Others, concerned with the ability of the judiciary to adequately enforce legal standards and monitor lawyers in the aggregation context, express anxiety that plaintiffs' lawyers will enrich themselves at the expense of the class or innocent defendants. Still others are concerned about whether the judicial system is institutionally competent to enforce laws governing conduct that causes mass harms because this is a type of *ex post* liability that would be more optimally administered through *ex ante* regulation.⁶¹ These worries are sometimes expressed in lamentations about the deleterious effects of suits the ability of businesses to thrive.

⁵⁹Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (convincingly refuting "blackmail" thesis); Thornburg, *Judicial Hellholes*, *supra* note 58 (demonstrating that the American Tort Reform Association study misuses statistics and is misleading in other respects); Adam Liptak, *Worst Courts for Businesses? It's a Matter of Opinion*, N.Y. TIMES, Dec. 24, 2007 (describing and critiquing an American Tort Reform Association publication purporting to rank these courts); PUBLIC CITIZEN, CLASS ACTION "JUDICIAL HELLHOLES": EMPIRICAL EVIDENCE IS LACKING (2007) available at <http://www.citizen.org/documents/OutlierReport.pdf> (critiquing claims of existence of districts particularly unfriendly to defendants or corporations, and finding that even the jurisdiction that showed evidence of unsubstantiated class certification had reduced its certification rate by 30% between 2003 and 2004).

⁶⁰ 28 U.S.C. § 1332(d)(11)(C)(ii).

⁶¹The American system that largely eschews *ex ante* regulatory regimes for *ex post* liability as a means for deterrence has been the subject of significant scholarly literature in political science and economics. See, e.g. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001) (contrasting the American preference for litigated rather than legislated alternatives with the European model of greater *ex ante* regulation); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984) (presenting an economic analysis of *ex post* liability regimes). Cf. Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 378 (2007) (expressing "concern about the general tenor of tort reform and other initiatives whose effect, when examined en masse, is to circumscribe the availability of *ex post* accountability as a necessary complement to the liberalized *ex ante* economic environment in the United States.").

Historical Trends

As Richard Marcus and Judith Resnik have ably demonstrated, the minimalist policy in favor of using tools such as MDL transfer for coordination and consolidation of limited types of cases for limited purposes has been transformed into a maximalist regime of centralization.⁶² Over time, concern seems to have shifted to solving the problems posed by complex concurrency by global peace. Thus the animating assumption of scholars, policymakers and jurists has been towards aggregation, not the individual's day in court.⁶³ This shift occurred for a variety of reasons. Like any large scale historical development, it is impossible to point to a single cause. Some leading candidates include: the perception of an increase of lawsuits, a growing population, increasing economic activity, the passage of significant civil rights legislation, and the resulting sense that there was a burden on the administration of the courts that must somehow be addressed.⁶⁴

The growth of economic activity of national scope created what historian Lizabeth Cohen has called the "Consumer's Republic."⁶⁵ Advocates for consumer's rights pushed for national legislation governing standards for everything from car safety to mortgages, and in the process created individual rights so that some of those standards could be vindicated through lawsuits rather than solely through regulatory enforcement.⁶⁶ Consumer suits, of course, were the basis for the adoption of the controversial damages class action codified in Rule 23(b)(3). As Justice Douglas explained in 1974, at what was arguably the high tide of the consumer movement:

I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it.

⁶² See generally Marcus, in this symposium, Resnik, *From "Cases" to "Litigation"* *supra* note 1.

⁶³ See Resnik, *From "Cases" to "Litigation"*, *id.* at 42-43.

⁶⁴ But see Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285 (2002) (describing and debunking the critique that litigation in America has increased substantially). Galanter points out that lawsuit filings declined from 1990 to 2001.

⁶⁵ LIZABETH COHEN, *A CONSUMER'S REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* (2003).

⁶⁶ See *id.* at 345-387 (describing the rise of the consumer's movement and political responses).

Some of these are consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief. Some may be environmentalists who have no photographic development plant about to be ruined because of air pollution by radiation but who suffer perceptibly by smoke, noxious gases, or radiation. Or the unnamed individual may be only a ratepayer being excessively charged by a utility or a homeowner whose assessment is slowly rising beyond his ability to pay. The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.⁶⁷

The Justice's perception illustrates a theme discussed in the third part of this essay: the role of interest and ideology in arguments about multi-centered versus centralized litigation.

A few recent jurisdictional developments have further spurred the trend toward centralization. The biggest formal change was the passage of the Class Action Fairness Act in 2005, which expanded federal court jurisdiction to encompass essentially any class action.⁶⁸ Additionally, judges have deployed preclusion doctrine and anti-suit injunctions to prevent litigation in competing forums.⁶⁹

Informal developments have also spurred centralization. For instance, in cases that have been transferred under the MDL statute, transferee judges can arrange to sit by designation to try cases that have been transferred back to their home courts. Moreover, since both state and federal courts consolidate similar cases through mechanisms like the federal MDL statute, judges can informally coordinate different aspects of these cases, including dispositive motions, discovery decisions, summary judgment and other pretrial procedures with their counterparts in other courts. Such coordination can alter the course of the litigation and is one expression of strategic deployment of procedure. For example, several judges overseeing aggregated cases concerning a particular type of product might decide between them to hold off on deciding summary judgment motions until the most opportune time to push the parties towards

⁶⁷ *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 185-86 (1974) (Douglas, J., dissenting in part).

⁶⁸ 28 USCA § 1332(d)(2).

⁶⁹ *See In re Bridgestone/Firestone Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003) (Bridgestone/Firestone II).

settlement. Such under-the-radar practices may raise due process concerns if litigants are denied the opportunity to present their case in such discussions between judges. They may also raise concerns about judicial independence if one judge tries to inappropriately influence the decisions another. On the other hand, communication between judges avoids a gastonette, where each court waits for the other to decide.⁷⁰ Consultation allows judges learn from one another and hopefully produce better decisions as a result.

Judges are not the only ones coordinating strategies. Attorneys in different jurisdictions, within and without the confines of cases aggregated through MDL or similar state procedures, communicate with one another, sharing information, advice and coordinating strategy.⁷¹ This is not a new development,⁷² but the growth of information technology has made national and international coordination easier. As a result of informal coordination, aggregate settlements have flourished within and without the class action context. While some thought that the Supreme Court's decision in *Amchem v. Windsor*⁷³ might limit the ability of defendants to obtain global peace, it appears that aggregation techniques and strategic planning have made something like global peace possible even in the absence of class certification.⁷⁴

Proposals to Increase Centralization

History marches on, as do proposals to further the maximalist approach to multidistrict litigation and other centralizing procedures. Proposals to centralize litigation fall into two categories. One set of proposals attempts to limit synchronic redundancy. These proposals seek to consolidate in one forum cases that might otherwise proceed simultaneously in different forums. Antidotes to synchronic redundancy include revisiting the *Klaxon* rule, allowing MDL

⁷⁰ *In re McLean Indus., Inc.*, 857 F.2d 88,90 (2d Cir. 1988) (dismissing an appeal without prejudice and permitting case to go forward in Singapore court that was already considering the issues).

⁷¹ See Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863 (2005) (describing the networks between plaintiffs attorneys in mass tort cases as a replacement to the formal centralization of the class action).

⁷² See generally Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

⁷³ 521 U.S. 591, 620 (1997).

⁷⁴ The latest example is the Vioxx settlement. See Berenson, *supra* note 3.

transferee courts to retain cases through trial, expanding lawyer's capacity to reach aggregate settlements, and broadening the availability of anti-suit injunctions. Another category of proposals seek to limit sequential redundancy, such as by limiting access to collateral attacks or narrowing the appellate standard of review.

The existence of multiple legal systems within the United States is the central cause of synchronic redundancy. Coordination between these systems is costly and this cost seems more wasteful in cases alleging harms caused by products sold nationally. Some scholars have argued that CAFA's expansion of federal court jurisdiction over nationwide consumer class actions traditionally governed by varied state laws requires the implementation of a national choice of law regime.⁷⁵ For example, all "conduct that arises from mass-produced goods entering the stream of commerce with no preset purchaser or destination" could be treated as "goods on the national market" for choice of law purposes and governed by the law of the home state of the defendant.⁷⁶ Such a rule would limit synchronic redundancy by preventing multiple legal regimes from asserting the power to apply their own substantive law in a given case.

Proposals to limit synchronic redundancy have also been circulating with respect to multidistrict litigation. In *Lexecon v. Milberg, Weiss* the Supreme Court limited MDL transferee courts to adjudicating the pretrial phase of cases by reading §1407 narrowly.⁷⁷ Congress has considered several bills to permit transferee courts to retain cases through trial, though none have passed into law.⁷⁸ The passage of such a bill would complete the centralization begun by the MDL statute. The American Law Institute Project on the Principles of the Law of Aggregate Litigation has also proposed special rules governing settlement in aggregate litigation, a powerful tool for centrally resolving large-scale litigation.⁷⁹ Currently, the relevant ABA Model Rule of Professional Ethics, adopted in most jurisdictions, requires that lawyers representing multiple clients not participate in aggregate settlements "unless each client consents after

⁷⁵ See Issacharoff, *Settled Expectations*, *supra* note 5.

⁷⁶ *Id.* at 1843.

⁷⁷ 523 U.S. 26, 40 (1998).

⁷⁸ 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).

⁷⁹ PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 4.

consultation, including disclosure of the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.”⁸⁰ The ALI reform proposal permits lawyers to obtain binding waivers from clients, who agree in advance of negotiation to abide by any settlement approved by a supermajority of the other plaintiffs. The reforms concomitantly provide protections similar to those available in class settlements to aggregate settlements reached under the auspices of an MDL.⁸¹ The ALI reform would permit lawyers to curtail the synchronic redundancy enabled by the rule requiring lawyers to consult clients on an individual basis when representing “inventory” cases. It would spur centralization of settlements by making it easier for lawyers to reach an aggregate agreement.

A final proposal for limiting synchronic redundancy is expansion of federal court use of anti-suit injunctions. Courts have upheld the use of anti-suit injunctions under the All Writs Act both where a class has been certified and where certification was denied.⁸² For example, the Seventh Circuit upheld an injunction barring a state court from considering certification of a class that had been denied certification by the federal courts.⁸³ This decision centralized power to determine whether certification is appropriate in one court, but it also worked against centralization by barring class-wide litigation in *any* court.⁸⁴ Not surprisingly, a settlement-only class action was subsequently approved in state court.⁸⁵ The Third Circuit upheld an injunction barring parallel state proceedings after it had certified a national class action for settlement.⁸⁶ Where a class is denied certification based on inadequate representation, courts have held

⁸⁰ ABA Model Rule 1.8(g).

⁸¹ PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 4. The proposal has met with criticism. See Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149 (1999).

⁸² Manual of Complex Litigation §20.35.

⁸³ *In re Bridgestone / Firestone Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003) (*Bridgestone/Firestone II*). I should note that this decision also works against centralization, because the injunction barred any class-wide resolution of the litigation.

⁸⁴ See Elizabeth Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1520 (2005).

⁸⁵ See *Shields, on behalf of herself and all others similarly situated v. Bridgestone/Firestone, Inc.*, 2004 WL 546883 (Dist. Ct. Tx. 2004); Brenda Sapino Jeffreys, *Judge Approves \$149 Million Firestone Tire Settlement, But not all class members think it's a good deal*, Texas Lawyer, March 22, 2004.

⁸⁶ *In re Diet Drugs Products Liability Litigation*, 282 F.3d 220 (3rd Cir. 2002).

that they lack personal jurisdiction over the absent class members and therefore there can be no preclusive effect to that judgment.⁸⁷ This permits the suit to proceed elsewhere. To strengthen centralization, some scholars have argued that the use of anti-suit injunctions ought to be expanded to earlier in the litigation, before a decision on certification has been rendered, where the federal court is concerned about negative effects of strategic choice.⁸⁸

To reign in sequential (or vertical) redundancy, some scholars have advocated limiting the ability of litigants to bring collateral attacks on settlements in the class action context. The general principle is that class action settlements properly reached are binding on all absent class members regardless of the court in which the settlement was certified and approved.⁸⁹ The current rule permits absent class members to collaterally attack a settlement on the basis of adequacy of representation. But the Circuits are split as to what this means. Some courts think that a finding of adequacy in the first forum can be relitigated and reevaluated by a second forum.⁹⁰ Others have interpreted the due process requirement to be limited to an evaluation by the reviewing court of whether procedures were in place in the first proceeding to ensure adequacy, without reevaluating the substantive finding.⁹¹ This split is basically tracked in the legal scholarship, with some added nuances that are not central to the discussion here.⁹² The debate centers on the question: how many

⁸⁷ *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1243 (11th Cir. 2006).

⁸⁸ *See* Wolff, *Federal Jurisdiction*, *supra* note 34.

⁸⁹ *See* *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) (holding that a federal court must give preclusive effect to a state court judgment settling federal claims under the Full Faith & Credit Act).

⁹⁰ *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir.2001) (permitting a plaintiff whose injuries manifested themselves after the expiration of a class-wide settlement to collaterally attack the settlement on grounds of adequacy of representation), *aff'd in part, vacated in part sub nom.* *Dow Chemical Co. v. Stephenson*, 123 S.Ct. 2161 (2003) (affirmed by equally divided court); *State v. Homeside Lending*, 826 A.2d 997, 1007-18 (Vt. 2003) (permitting Vermont residents to bring suit because of inadequate representation in initial action, despite Alabama judgment purporting to resolve all claims nationwide).

⁹¹ *Epstein v. MCA, Inc.* (Epstein III), 179 F.3d 641, 648 (9th Cir. 1999) (holding that collateral attack is never available provided that procedures were in place to ensure adequacy of representation in initial proceeding)

⁹² Scholars who would limit the right to collateral attack include Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 774 (1998) (arguing for limitations on collateral attack based on adequacy of representation in light of right to opt out); Samuel Issacharoff & Richard Nagareda, *Class Action Settlements*

opportunities should litigants have to revisit the same issues in a system with scarce resources?

The obvious benefits of centralization underlying these proposals are efficiency, certainty and, in some cases, the prevention of abuse. Synchronic and sequential redundancies are often depicted as offering numerous opportunities for strategic manipulation and abuse. Rarely recognized, however, is the fact that every aspect of the procedural system, from filing through discovery, dispositive motions and finally trial, is the subject of such stratagems, whether cases are centralized or not. Moreover, centralization and the coordination it requires in a multi-layered federalist system such as ours carries with it substantial difficulties and costs.

A closer look at any particular strategic choice reveals the complexity of the system and the difficulty of curing perceived abuses through centralizing reforms. For example, forum shopping is often discussed as a reason for various centralizing reforms.⁹³ The whole picture is more complex and therefore not amenable to a simple coordinating solution. One example of this complexity is the phenomenon of “settlement shopping.” When one court rejects a settlement as fundamentally unfair to absent class members, the parties may obtain class certification of the same settlement in a

Under Attack, 156 PENN. L. REV. ___ (forthcoming 2008) (arguing in favor of process-based approach to collateral attack). Scholars favoring more expansive rights to litigate the adequacy of representation in a collateral proceeding include Monaghan, *Antisuit Injunctions*, *supra* note 34, 98 COLUM. L. REV. at 1162-78 (arguing in favor of right to litigate question of adequacy in collateral forum); Patrick J. Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 389-97 (2000) (same); David A. Dana, *Adequacy of Representation After Stephenson: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279 (2006) (arguing in favor of broad review of settlement outcomes in collateral proceedings based on fairness criteria); Susan Koniak, *How Like A Winter? The Plight Of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1862 (2004) (arguing in favor of de novo review of adequacy by reviewing court). Still others have adopted a middle ground. See Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2006) (arguing that the court reviewing the initial judgment should “constrain the judgment’s effect upon the claims not litigated in that action to the extent necessary to cure the prejudice that the absentees would otherwise suffer from the inadequate representation of their interests.”); Rubenstein, *Finality*, *supra* note 42 (presenting a multi-factored test).

⁹³ See Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006) (describing and critiquing representations of forum shopping as a form of “cheating” instead of a legitimate strategy).

second court.⁹⁴ Settlement shopping is made possible by centralization and also the subject of centralizing reforms.

The power of preclusion, combined with the availability of parallel forums, creates the possibility of global peace regardless of the previous court's assessment of the desirability of the particular arrangement at issue. In the *Bridgestone-Firestone Litigation* the Seventh Circuit denied certification of a nationwide class and barred any other court from reconsidering class certification. A rival, settlement-only class action was certified in state court.⁹⁵ Even if certification was truly barred, the resulting non-class individual cases may nevertheless be resolved as an aggregate settlement. Or, if the amount at stake is sufficiently small and certification impossible, the plaintiffs may need to withdraw their individual suits. In sum, litigant ingenuity will almost always outpace the development of tools for controlling the strategic deployment of procedure.

III. *The Benefits of Multi-Centered Litigation*

The benefits of redundancy are rarely discussed in the modern scholarship on complex litigation.⁹⁶ Some scholars have argued that centralization serves as an unwarranted limitation on state's rights, especially if national law were used rather than deferring to each state's legal regime.⁹⁷ Others have expressed concerns about the consequences of aggregation and class treatment for individuals, particularly in light of the possibilities for plaintiffs' lawyers to trade off the interests of one group in favor of another.⁹⁸ But beyond these specific concerns, there is seldom discussion of the

⁹⁴ See Koniak, *supra* note 92 at 1780 (discussing the possibility of abuse through settlement shopping); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133, 137 (3d Cir. 1998) (describing how after the 3rd Circuit rejected a settlement, "the parties to the settlement repaired to the 18th Judicial District for the Parish of Iberville, Louisiana, where a similar suit had been pending, restructured their deal, and submitted it to the Louisiana court, which ultimately approved it.").

⁹⁵ See *supra* note 85.

⁹⁶ Judith Resnik's work is an exception to this assertion. See, e.g., Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1647-51 (2006) (largely approving of multiple avenues for the adoption of foreign law into the United States legal system, including federal, state and local legal systems).

⁹⁷ See, e.g., Mullenix, *Gridlaw*, *supra* note 5.

⁹⁸ Many have written excellent work on this topic. See, e.g., Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 521-23 (1994).

social value of the institutional conflict produced by complex concurrency. A multifaceted consideration of the values of multi-centered litigation is therefore in order.

This discussion of the benefits of multiplicity is largely based on the idea that institutional conflict promotes some social values. Mass tort cases present one area for institutional conflict. Consider harms suffered by patients who took certain pharmaceutical drugs. The conflict concerns four different types of institutions: courts, legislatures, administrative agencies and corporations, and three locations for such institutions: state, federal and international. The product is regulated by the Food and Drug Administration. Some state legislatures have enacted preemption provisions; other states have robust failure to warn claims. Lawsuits are brought in both state and federal courts. What conduct the FDA fails to regulate *ex ante*, a court may regulate through the enforcement (and development) of applicable laws *ex post*. Conflicts surface when courts and administrative agencies regulate the same conduct. Some advocate using preemption doctrine to resolve this institutional conflict by placing power exclusively in the hands of the federal agency.⁹⁹ Within the purview of the courts, state and federal decisions may differ, creating circuit splits and contradictory rulings. Coordination between courts, consolidation of cases, and transfer of cases to a single district are all methods of resolving these conflicts between and within court systems.

Institutional conflict can encourage the development of new approaches to social problems. It can furthermore correct for

⁹⁹ As of this writing, the Supreme Court has not resolved this question. *See* *Wyeth v. Levine*, 128 S. Ct. 1118 (2008) (undecided as of this writing, this case presents the question of whether Court will decide whether the FDA's prescription drug labeling judgments preempt state law liability claims for failure to warn); *Warner-Lambert v. Kent*, 128 S. Ct. 1168 (2008) (an equally divided court affirmed the ruling of the Second Circuit, which had held that the FDCA does not preempt product liability claims under Michigan law against drug manufacturers that allegedly defrauded the Food and Drug Administration). *See also* *Ledbetter v. Merck & Co., Inc.*, No. 2005-59499, (Harris County, Tex. Apr. 20, 2007) (holding that plaintiff's fraud on the FDA claims are preempted); 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) (critiquing arguments in favor of preemption and proposing a consultative relationship between the FDA and courts in certain products liability suits); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Reform*, 56 *DEPAUL L. REV.* 227 (2007) (describing replacement of private enforcement by public enforcement through preemption and proposing ways to harness this development to improve transparency in regulation).

systemic errors resulting from two different types of biases: interest-based and ideological. The remainder of this section will discuss the ways that the institutional conflict supported by jurisdictional redundancy can have positive effects or at least reduce certain types of problems associated with political authority.

Encouraging Multiplicity

Judges have developed some procedures within the confines of a centralized litigation to encourage multiplicity. The bellwether trial is one such innovation. We saw earlier how bellwether trials were used to resolve some cases in the September 11th Litigation.¹⁰⁰ A similar approach resulted in multiple trials in the Vioxx litigation. Tens of thousands of Vioxx lawsuits were filed in the United States and aggregated in one federal court and several state courts. This massive litigation was eventually settled on the basis of 16 lawsuits that had been tried to verdict. Of these 16 suits, 5 resulted in verdicts in favor of the plaintiff, but one of these was slated for retrial.¹⁰¹ Juries found for the defendant in 10 lawsuits, with one additional case slated for retrial.¹⁰²

It is not clear what conclusions can be reached based on this collection of cases because we have little sense of the sampling method used and the underlying variances in the population of cases being sampled. We do not know whether the sixteen sample cases were randomly selected. It is impossible to draw conclusions from a non-random sample because strategic decisions by the parties play a role in which cases reach trial. Some cases will be removed from the

¹⁰⁰ See the discussion accompanying notes 25 to 28, *supra*.

¹⁰¹ These cases are Ernst v. Merck (Brazoria Cty, Dist. Ct. Texas, 8/9/05) (verdict of \$253 million for plaintiff reduced to \$26 million based on state law punitive damages cap); Humeston v. Merck, Atlantic Cty Superior Court, N.J. (3/12/07) (\$47 million plaintiff's verdict on retrial); McDarby v. Merck, Atlantic Cty Sup. Ct. N.J. (4/5/06) (\$13.5 million verdict for plaintiff); Garza v. Merck, Starr Cty. Dist. Ct., TX (4/21/06) (\$32 million reduced on remittitur to \$8.7 million). A new trial was ordered in Barnett v. Merck, E.D. La. (8/17/06) (\$51 million)

¹⁰² Irvin v. Merck (E.D.La.) was slated for retrial after a defense verdict. In the following cases the jury reached defense verdicts: Cona v. Merck, Atlantic Cty Sup. Ct., N.J.; Doherty v. Merck, Atlantic Cty Sup. Ct., N.J.; Hermans v. Merck, Atlantic Cty Sup. Ct., N.J.; Grossberg v. Merck, Los Angeles Sup. Ct., CA; Smith v. Merck, E.D. La.; Mason v. Merck, E.D. La.; Dedrick v. Merck, E.D. La.; Albright v. Merck, Jefferson Cty Cir. Ct., AL; Schwaller v. Merck, Madison Cty. Cir. Ct., IL; Kozic v. Merck, Hillsborough Cty Cir. Ct., FL.

sample by settlement.¹⁰³ Defendants can delay some cases and allow others to proceed more quickly by manipulating the discovery or motion process. Similarly, plaintiffs can push some cases forward through aggressive prosecution because they think they are particularly likely to win these suits. They may not pursue risky or weak cases as vigorously.

If decision-makers know the types of strategic maneuvering engaged in by the parties, they might be able to describe the ways that the sample is skewed. For example, if defendants were settling the best cases then we would expect the sample to be skewed in favor of defense verdicts. Similarly, if defendants were able to systematically delay the cases they perceived as posing the greatest risk of loss to them, the sample would also be skewed towards defense verdicts. On the other hand, if plaintiffs were successful in pushing only their best cases forward, we might expect that the sample misrepresents the potential win rate or award amounts of the larger population cases.

Despite these cautionary notes, the use of statistical techniques in conducting sample trials could lead to settlements or judgments that provide a reflection of the outcome if all the cases were tried to a jury.¹⁰⁴ Such a procedure would require the court to randomly select a number of cases for trial, and then utilize the results of those cases to extrapolate outcomes for the larger population. Assuming that the variance within the population is not too great, a bellwether trial procedure could produce across a large population results approaching what a jury would find in an individual case while minimizing substantial delay costs. On the

¹⁰³ Merck had asserted that it would not settle any Vioxx cases. See Alex Berenson, *Legal Stance May Pay Off for Merck*, N.Y. TIMES, Aug. 4, 2006 at C1 (“Lawyers on both sides agree that Merck’s victories, and its stated strategy of trying every case rather than settling any, are discouraging plaintiffs with weaker claims.”).

¹⁰⁴ See Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008). For other considerations of the topic see Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 650 (1993) (concluding that under a rights-based theory sampling is an acceptable form of resolving mass tort cases only in instances of extreme process scarcity); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 851 (1992) (presenting utilitarian arguments in favor of using sample cases to resolve mass tort cases); Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545, 546 (1998) (presenting efficiency arguments in favor of statistical adjudication of damages).

other hand, if the variance between outcomes in the population is large, then such a procedure is likely to yield an unfair distribution. Distributive justice problems are most serious in extremely heterogeneous groups. This is because people with divergent characteristics will receive the same awards under a bellwether trial procedure that uses averaging as the method of extrapolation. Those with the expectation of the highest value awards will have those awards systematically redistributed to those with the lowest value awards in the averaging process.¹⁰⁵

A type of bellwether trial procedure was utilized in two cases in the early 1990s: a human rights class action and a set of consolidated asbestos cases.¹⁰⁶ The Ninth Circuit upheld the use of statistical adjudication in the human rights class action, but a similar procedure rejected by the Fifth Circuit in the asbestos context.¹⁰⁷ Since then the procedure has only been used informally, raising concerns about strategic choice in sample selection.¹⁰⁸ Formal use of bellwether trials creates opportunities for divergent outcomes to surface even within a centralized litigation. When tried to a jury in the transferor court, bellwether trials allow multiple decision-makers to consider cases and enable socially valuable redundancy.

Error and Repetition

In the sciences and social science disciplines such as statistics, reproducibility is necessary for results to be considered accurate. For example, scientific experiments must be capable of being reproduced in different laboratories. Econometricians will

¹⁰⁵ I discuss this problem at length in *Bellwether Trials, id.* See also Bone, *Statistical Adjudication, id.* at 599, n.108.

¹⁰⁶ See *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 653 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998) (use of bellwether trials in asbestos consolidation); *In re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460 (D. Haw. 1995), *aff'd*, *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (use of bellwether trials in human rights class action).

¹⁰⁷ *Ibid.*

¹⁰⁸ See, e.g., *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 359–60 (2d Cir. 2003) (affirming use of bellwether trial to assist settlement of twenty-two cases involving Legionnaires disease on a cruise ship); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1194 (10th Cir. 2000) (affirming use of bellwether trials to resolve case involving uranium contamination in a community); Opinion Supporting Order to Sever Issues of Damages and Liability in Selected Cases, *In re September 11 Litigation*, 21 MC 97, at 3 (AKH) (S.D.N.Y., July 5, 2007) (ordering sample trials of volunteer cases for damages only).

repeat analysis of data sets conducted by their peers in order to verify results.¹⁰⁹ This scientific concept is not dissimilar from the idea of the maturation of a mass tort.¹¹⁰ A mature mass tort has been defined as one “where there are sufficient data points to establish the criteria and values of legitimate claims and the amount for each category of claim can readily be established.”¹¹¹

The repetition of litigation permits observers to make distinctions between cases based on legal or factual categories, to determine the potential for legal liability in these categories, and to value various categories of claims. These categories develop by repeated trials of different cases in different jurisdictions over a period of many years. Reproducing the same results in trials in different forums can thus lead to an emerging consensus on the validity and value of claims. Lawyers and insurance companies have been engaged in similar analysis since the Industrial Revolution.¹¹² This is in many ways also the story of the tobacco and asbestos litigations.¹¹³ Over time, the process of mass tort “maturation” through the trial of individual cases in different jurisdictions appears to have become increasingly centralized and to have sped up. The recent Vioxx litigation is as an example of this combination of centralization, repetition and (relative) speed of innovation. A new term may be needed to describe its trajectory.

Judge Goodrich of the Third Circuit wrote in 1943: “[a] lawsuit is not a laboratory experiment for the discovery of physical laws of universal application.”¹¹⁴ When the same results of redundant trials in parallel forums diverge, as occurred in the Vioxx cases, we learn something more than the lack of consensus. We are

¹⁰⁹ For excellent examples of the importance of this work, see John J. Donohue III & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2006); Ian Ayers & John J. Donohue III, *Shooting Down the ‘More Guns, Less Crime’ Hypothesis*, 55 STAN. L. REV. 1193 (2003).

¹¹⁰ The concept of a “mature” mass tort was originally proposed by Francis McGovern. See Francis McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

¹¹¹ Francis E. McGovern, *A Proposed Settlement Tool for Mass Torts*, 74 UMKC L. REV. 623, 631-32 (2006).

¹¹² See generally Issacharoff & Witt, *The Inevitability of Aggregate Litigation*, *supra* note 72.

¹¹³ See Deborah Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy; Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493 (2001) (describing the settlement of the tobacco cases by state governments and discussing the complex relationship between litigation and social policy).

¹¹⁴ *Hornstein v. Kramer Bros. Freight Lines*, 133 F.2d 143, 145 (3rd Cir. 1943).

prompted to look at the potential forum and decision-maker effects that may cause large variances. That is, we must ask whether different juries reached different results because of the particular plaintiff's case or because of who the decision-maker was. Robert Cover explained that "presented with such verdicts, one cannot easily pass judgment on questions of error without first unpacking what might be called forum effects. The redundant forum causes us to focus on forum variables just as testimony causes us to focus on testimony variables."¹¹⁵ Cover argued that jurisdictional redundancy was too blunt a tool to increase accuracy with respect to specific issues of fact, but instead corresponds to more general political differences. Divergence or consensus of decisions reached in redundant forums will often be a reflection of political factors. Depending on the social and political context of the particular principle at stake, jurisdictional redundancy can be part of an emerging consensus – such as occurred in the tobacco litigation¹¹⁶ – or reflect deep social disagreements. Rather than increasing accuracy, jurisdictional redundancy offers an opportunity to examine the "types of problems associated with systematic political authority."¹¹⁷

Interest, Innovation, and Ideology

As proponents of centralization in civil procedure rightly note, jurisdictional redundancy is expensive as an institutional structure and furthermore costly to coordinate. It is important, therefore, to remind ourselves of the difficulties created by centralized political authority. Cover identified three areas where political considerations might be relevant to jurisdictional choices: interest, innovation, and ideology. He defined interest as the "self-interest of incumbent elites in a regime"; innovation as policies enacted by elites that "depart from traditional, common cultural norms and expectations"; and ideology as "the more or less unconsciously held values and ways of seeing the world, reflected in

¹¹⁵ Cover, *Redundancy*, *supra* note 10 at 656.

¹¹⁶ On the history of the tobacco litigation, particularly its early failures see Robert Rabin, *Institutional and Historical Perspectives On Tobacco Tort Liability*, in *SMOKING POLICY: LAW, POLITICS AND CULTURE* (Robert Rabin & Steven Sugarman eds., 1993).

¹¹⁷ Cover, *Redundancy*, *supra* note 10 at 657.

the governing elites, which tend to serve and justify in general and long run terms the social order which the elites dominate.”¹¹⁸

Jurisdictional redundancy matters in part because there remain relevant geographic differences in our nation. As Cover suggested, despite appearances of nationalization and an integrated economy, the United States still retains local and state-based constituencies and elites that differ from one another. Our system of multiple state, local and federal lawmakers and corporate actors at once strives for nationalization, occasionally reaches consensus, and nevertheless remains in conflict. The observation of continuing pluralism even within an increasingly nationalized economy seems intuitively correct in today’s political climate which focuses on the differences between “red” and “blue” states on numerous cultural and sometimes economic grounds. Not only can elites from different geographic areas differ from one another in terms of ideology and interests, but class stratification and the increasingly distant relationship between consumers and producers, and individuals and corporate groups in a global economy, play a role in institutional interactions and conflicts.

Conflicts may appear to diminish as federalizing doctrines such as preemption take hold, but under the surface they continue. An influx of lawsuits arising from the marketing of a drug, for example, indicates resistance to the manner in which the federal government has enacted, enforced and overseen regulation. This resistance comes from an elite consisting of plaintiffs lawyers and consumer groups. A different elite, that of defense lawyers and corporations, seeks to control this area of regulation. These large-scale suits expose the conflicts between institutions (courts, legislatures, administrative agencies) and between political entities (state, federal and local).¹¹⁹ The lines drawn between these categories are complex and evolving.

Interest

Perhaps the most ink has been spilled addressing the question of competing interests in mass litigation. These are usually understood as what I shall call private interests – the interests of

¹¹⁸ *Id.* at 657.

¹¹⁹ For an useful discussion of the relationship between the local, state, national and federal in class actions see Judith Resnik, *Normative Lessons on American Federalism*, *supra* note 19.

plaintiffs in obtaining compensation, of defendants in avoiding liability or of the courts in clearing their dockets. The line between private and public is hard to draw and not always the appropriate lens through which to view these questions. Compensation, for example, could be characterized as a public or a private purpose of litigation depending on whether its primary rationale is individual payment or deterrence.¹²⁰ Nevertheless, I maintain the distinction for purposes of this discussion. The “private” interests referred to here play out in the courts in procedural battles over jurisdiction, venue and discovery, and in the legislature over the rules that ought to govern these concepts.¹²¹ When “public” social interests are discussed in the scholarly literature, they are usually taken for granted.¹²² It is important to remember, however, that the parameters of the category of social interests is driven by politics and ultimately ideology, and is therefore contested.

Economic analysis has provided many important insights into the operation of private interests in mass litigation, particularly with respect to the divergence between the interests of lawyers representing large numbers of plaintiffs (or absent class members) and those plaintiffs themselves.¹²³ Lawyers may be tempted to trade off the interests of their clients as a group in order to obtain a faster settlement and, perhaps increase their fees. The concern engendered by the agent-principal problem in plaintiff-side representation has been a staple of class action scholarship. The issue plays out similarly in the context of aggregative litigation, as mass cases are

¹²⁰ See, e.g., David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 851 (1984) (characterizing the deterrence function of the tort system as a public function); William Rubenstein, *On What A “Private Attorney General” Is--And Why It Matters*, 57 VAND. L. REV. 2129, 2141 (2004) (discussing the relationship between deterrence and compensation).

¹²¹ For an excellent historical discussion of some of these issues see Edward A. Purcell, Jr., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000); see also Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 PENN. L. REV. ___ (forthcoming 2008) (presenting rigorous analysis of this phenomenon with respect to CAFA).

¹²² For an example of the use of the public/private distinction in this context, see Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 607 (1997).

¹²³ 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 (1987).

settled as a group or in classes.¹²⁴ If the proposed ALI rule permitting lawyers to solicit agreement to settlements in advance were adopted, the divergence of interests would be overtly the same in aggregation as in the class context. That structural conflict already exists in “inventory” cases when lawyers are put in the position to trade off the interests of some clients against others.¹²⁵

Centralization both serves some interests and creates others. For example, multidistrict litigation has created networks of plaintiffs’ attorneys who communicate with one another, share strategies and sometimes pool resources.¹²⁶ If the plaintiffs’ lawyers in charge of the Plaintiff Management Committee (PMC) do a good job, this can benefit all the participants. But if there is a divergence of interests between groups of plaintiffs, this can lead to internecine fighting. Leading lawyers stand to gain both financially and in prestige from the consolidation of power which aggregation enables and the ability to leverage that power. Lawyers on both sides are repeat players in aggregate litigation. As a result, the interest in centralization becomes entrenched, especially in particular areas of specialization such as pharmaceutical products liability litigation.

It is important, however, not to forget the role of institutional interests. Legislatures may sometimes have an interest in creating rights that will be enforced by courts rather than by administrative agencies, in order to make reforms more politically palatable.¹²⁷ Judges may wish to reduce their dockets by consolidating cases and shifting resolution to private parties.¹²⁸ If groups of judges are ideologically linked to the political power elites, there is a concern that they will decide cases according to their affiliation. As Thomas

¹²⁴ See Judith Resnik, Dennis E. Curtis & Deborah Hensler, *Individuals Within the Aggregate: Relationships, Representation and Fees*, 71 N.Y.U. L. REV. 296 (1996) (comparing class actions and other forms of aggregate litigation and finding similarities).

¹²⁵ See generally Charles Silver & Lynn Baker, *I Cut, You Choose: The Role Of Plaintiffs’ Counsel In Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998).

¹²⁶ See Byron Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863 (2005) (describing the growing informal networks among plaintiffs’ lawyers in mass tort litigation).

¹²⁷ See, e.g., R. Daniel Kelemen, *Suing for Europe: Adversarial Legalism and European Governance*, 39 COMP. POL. STUD. 101 (2006) (suggesting that to achieve regulatory goals in a liberalized environment, policy makers rely more on private enforcement).

¹²⁸ I discuss this phenomenon and its implications in Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FL. L. REV. 383 (2007).

Jefferson, who had reason to worry about combinations of judicial and political power in the hands of a single bloc, explained: "...we all know that permanent judges acquire an *Esprit de corps*" and may be tempted by bribery and misled "by a spirit of party, a devotion to the Executive or the Legislative" and "[i]t is left therefore to the juries, if they think the permanent judges are under any bias [sic] whatever in any cause, to take upon themselves to judge the law as well as the fact."¹²⁹

The overlap and allocation of jurisdiction between judge and jury in the Bill of Rights, for example, was not only a matter of tradition or natural rights, but a political artifact driven by local and state debtor interests in conflict with the federal government's interest in repaying British creditors.¹³⁰ In recent memory, the transfer of jurisdiction over national class actions from state to federal courts seems to have been driven by a hope that the federal courts will be more friendly to defendants and a belief that the state courts favored plaintiffs too strongly.¹³¹ Similarly Rule 23(f), which permits interlocutory appeal of class certification decisions, can be considered a form of strategic choice created to curb the power of particular interests. Evidence shows that appellate judges are more likely to reverse certification decisions.¹³² This type of interest is more aptly described as "ideology," a concept addressed in the next section.¹³³

¹²⁹ *Letter from Thomas Jefferson to Abbe Arnoux* (July 19, 1789) in 5 THE FOUNDERS' CONSTITUTION 364 (Philip B. Kurland & Ralph Lerner eds., 1987). Jefferson's concerns may have been a product of his rivalry with Justice Marshall, a staunch Federalist. For an excellent treatment of this relationship see R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* (2001).

¹³⁰ See Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 169–76 (2002) (describing the role of the politics of debt before and after the Revolution in the establishment of the jury right).

¹³¹ For a description of the lobbying efforts in CAFA see Purcell, *The Class Action Fairness Act in Perspective*, *supra* note 121.

¹³² There is evidence that appellate courts reverse certification decisions more often than they affirm them and that some circuits are more inclined to reverse than others. See Richard Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, __ WESTERN STATE L. REV. __ (forthcoming 2008).

¹³³ Cover usefully presents interest as a continuum. Interests such as individual financial gain are represented at one end of the spectrum. The "bonds of ideological identification" which may drive some institutional interests are on the other end. Cover, *Redundancy*, *supra* note 10 at 660.

Can multiplicity provide a counterpoint to the entrenchment of interests represented by centralization? The existence of multiple centers for litigation, as occurred in the Vioxx cases, could result in multiple centers for power both in the court system and the plaintiff's bar. The risk of collusion may be reduced by multi-centeredness because competition will make it more difficult for defendants to buy off plaintiffs' counsel at the expense of the class. Compare multiple multidistrict litigations (in state and federal court) with the class action. Under certain conditions, the class action could allow defendants to purchase global peace at a reduced rate if they are able to negotiate classwide settlement with a given class counsel. Global peace is harder to obtain in the aggregation context, though, as the Vioxx settlement illustrates, not impossible.

Next consider the possible negative effects of informal coordination between several multidistrict litigations. This can happen when judges communicate with one another about the timing of discovery and decisions regarding dispositive motions. These types of strategic manipulations may lead to settlement. Instead of having multiple centers of decision-making, such coordination may result in *de facto* centralization and the entrenchment of power in the hands of a limited set of players. Such unchecked power opens up the potential for abuse because settlements in aggregate litigation require no judicial approval. Perhaps this is why judges sometimes evaluate settlements even in a non-class setting. The perception is that parties will not agree to settlements of which the presiding judge disapproves, even if the judge lacks formal power over the settlement.¹³⁴

Additional monitoring is the natural solution to the potential for abuse created by centralization.¹³⁵ But monitoring is only as good as the monitors themselves, which is why some scholars have focused largely on incentive-based changes to the class action regime, and particularly on attorney's fees.¹³⁶ In the multidistrict litigation setting, the ability of litigants to strategically choose

¹³⁴ Statement of United States District Judge Eldon Fallon, February 16, 2008 at Tulane Law Review Symposium on the Problem of Multidistrict Litigation.

¹³⁵ See Alexandra D. Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 107 (2003).

¹³⁶ See, e.g., Coffee, *Class Action Accountability*, *supra* note 55. For an innovative fee regime see Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection And Monitoring Of Class Counsel*, 22 YALE L. & POL'Y REV. 69 (2004) (proposing a system of auctioning off the right to represent a class that included a fee structure imposing substantial penalties on class counsel, thus guaranteeing loyalty).

different forums to the extent they can do so will not solve the problem of biased judges or incentives to reach a sub-optimal settlement. Instead it will lead to different decisions in different courts and thereby provide counterpoints to the bias of a particular set of judges or lawyers. If a litigant believes that the judge in a particular forum is biased, the ability to file or transfer the case to another forum to receive a fair hearing is significant.¹³⁷ This assumes, of course, that there is some variation of players in different aggregate settings.

Multiplicity is not a cure for the problems caused by the prevalence of private interests in litigation. It merely destabilizes the ability of some interests to completely control the litigation, and in this way is a weapon against control by particular interests. As Cover explained in his consideration of the subject: “This structure is not in general useful for the imposition of determinate solutions.... It is an approach of suspicion and uncertainty, not a formula for clear cut answers.”¹³⁸

Innovation

The ability of states to innovate new approaches to law is one of the basic arguments in support of our federalist system. As Justice Holmes lamented in *Truax v. Corrigan*: “There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, . . . even though the experiments may seem futile or even noxious to me.”¹³⁹ Or as Justice Brandeis famously explained: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁴⁰ That argument has not been a vigorous one since the New Deal.¹⁴¹

¹³⁷ See Cover, *Redundancy*, *supra* note 10 at 661.

¹³⁸ *Id.* at 662.

¹³⁹ 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

¹⁴⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also David Marcus, *Erie, The Class Action Fairness Act and Some Federalism Concerns*, 48 WM. & MARY L. REV. 1247, 1271 (2007) (describing the Progressive preference for state rather than federal regulation and the reasons therefore).

¹⁴¹ For a rich discussion of the decline of localism following the New Deal and the potential for reinvigorating it, see Richard Schragger, *The Anti-Chain Store*

This is the case in part because increasing interdependence has reduced the number of experiments that can be engaged in “without risk to the rest of the country” to a very few.

The threat of instability in the national economy that may result from competing legal regimes has been the subject of both substantive legislation and procedural reform. Samuel Issacharoff and Catherine Sharkey have shown that the application of jurisdictional doctrines has centralized decision-making in the federal government and federal courts.¹⁴² As these authors point out, centralizing cases in a particular forum in the absence of a uniform law causes instability.¹⁴³ To resolve this instability, courts need to coordinate the substantive law within the centralized forum.¹⁴⁴

Centralization is not the only means for reaching consensus. In a multi-centered system consensus may be reached through “confirmatory redundancy.”¹⁴⁵ When multiple sources of authority articulate the same norms, those norms obtain additional power. The theory of maturation of a mass tort is an example of the development of confirmatory redundancy over time.¹⁴⁶ Bellwether trials are another model for creating confirmatory redundancy in a collapsed time frame.

But bellwether trials are not as good a tool for resolving cases where substantial disagreement persists. If juries reach widely varying results, then the averaging process will result in systematic wealth transfer from the highest value cases to the lowest value cases. This criticism assumes that the size of the verdict is related to the quality of the case. If those plaintiffs most harmed would lose the most value in the process of averaging, this outcome is indeed unfair. If the variance is due to factors only tangentially related to entitlement, such as preexisting prejudice against classes of claimants, then redistribution may be acceptable. The fairness of a bellwether trial procedure will depend, therefore, on the degree of societal agreement and the effects of ideology on the decision making process.

Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940, 90 IOWA L. REV. 1011 (2005).

¹⁴² Issacharoff & Sharkey, *Backdoor Federalization*, *supra* note 52.

¹⁴³ *Id.* at 1429.

¹⁴⁴ *Id.* at 1420.

¹⁴⁵ Cover, *Redundancy*, *supra* note 10 at 675.

¹⁴⁶ See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 688–94 (1989).

The problem with relying on confirmatory redundancy in many cases is a lack of consensus. Disagreement, especially on issues of social importance that cross state lines, is what drives the proponents of centralization. But disagreement is unavoidable. And although centralization promises uniformity, it cannot promise the best decisions. Consider for a moment the regulation of pharmaceuticals. Ostensibly, pharmaceuticals are regulated *ex ante* by the Food and Drug Administration. In recent years, the FDA has increasingly come under fire for failing to regulate and therefore permitting drugs to be administered in ways that cause patients harm.¹⁴⁷ This regulatory failure led to substantial numbers of lawsuits. For instance, the harms caused by the diet drug Phen-Fen resulted in 18,000 lawsuits.¹⁴⁸ Some were transferred under the auspices of the JPML.¹⁴⁹ Other individual tort cases proceeded in state courts. Yet more cases sought class certification in state and federal courts.¹⁵⁰ The result of *ex ante* regulatory failure at the agency level, where the greatest potential for centralization was to be had, led to large-scale litigation around the same drug and a proliferation of cases in state and federal courts brought on an aggregated, class and individual basis. Ultimately, the *Diet Drugs Litigation* settlement ballooned to 20 billion dollars and was heavily criticized.¹⁵¹ At the same time, courts and legislatures have expanded preemption doctrine to limit certain types of claims in pharmaceutical litigation, such as failure to warn claims, further consolidating agency power.¹⁵² This litigation illustrates that

¹⁴⁷ See generally MARCIA ANGELL, *THE TRUTH ABOUT THE DRUG COMPANIES: HOW THEY DECEIVE US AND WHAT TO DO ABOUT IT* (2005). In an investigative report the LA Times found seven drugs that were approved by the FDA posed risk to human life that far outweighed any potential benefit. David William, *The New FDA: How a New Policy Led to Seven Deadly Drugs*, L.A. TIMES, Dec. 20, 2000, at A1. See also ALICIA MUNDY, *DISPENSING WITH THE TRUTH: THE VICTIMS, THE DRUG COMPANIES AND THE DRAMATIC STORY BEHIND THE BATTLE OVER FEN-PHEN* (2001) (describing the events that led to the *Diet Drugs* litigation).

¹⁴⁸ *In re Diet Drugs I*, 2000 WL 1222042, at *2 (E.D. Pa. Aug. 28, 2000).

¹⁴⁹ These were consolidated under MDL Docket No. 1203.

¹⁵⁰ *Id.* at *3. (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).

¹⁵¹ Alison Frankel, *Still Ticking: Mistaken Assumptions, Greedy Lawyers, and Suggestions Of Fraud Have Made Fen-Phen A Disaster Of A Mass Tort*, THE AMERICAN LAWYER, March 2005, at 92.

¹⁵² See *Buckman v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001) (holding that "fraud-on-the-FDA" claims are preempted); *Ledbetter v. Merck & Co., Inc.*, No. 2005-59499, slip op. at 9 (Harris County, Tex. Apr. 20, 2007) (holding that

centralization of decision-making is subject to capture and abuse not less than multi-centered decision-making. Disagreement and inconsistency may also reflect the inherent instability of economic and social life, rather than being its cause.

To say that neither centralization nor multiplicity guarantee good policies tells us very little. The specific virtue of pluralism is that it offers multiple solutions, increasing the chances of getting some outcomes right. Cover called these multiple norms “nonconfirmatory redundancy.”¹⁵³ The problem with a state of nonconfirmatory redundancy is in the purchase of variety. What are we to do with the different results reached in different labs?¹⁵⁴

One answer is to continue with plural decision-making and hope that consensus emerges over time. Such consensus might emerge because courts communicate with one another. Direct coordination of decisions in multiple courts may work against pluralism. But encouraging communication will permit courts to reevaluate decisions and perhaps reach consensus in this manner. Multi-centered litigation may, over time, create a “density of experience that produces information quickly with simultaneous, interactive effects of decision and environment.”¹⁵⁵ Dialogue between courts could result in better decisions, in part because dialogue helps judges determine what questions to ask in addition to what answers to give.¹⁵⁶ A decision on electronic discovery or the admissibility of expert testimony in a state court overseeing aggregated cases, for instance, will be known to other courts overseeing a set of similar cases. The one court may not necessarily adopt the decision of the other (nor should it merely for the sake of uniformity) but it could learn from it. Such near simultaneous

plaintiffs in Vioxx lawsuits may not assert fraud on the FDA claims under Tex. Civ. Prac. & Rem. Code Sec. 82.007(b)(1), which permits plaintiffs to rebut a presumption against liability if a warning was approved by the FDA if the plaintiff can show that the defendant misled the FDA).

¹⁵³ Cover, *Redundancy*, *supra* note 10 at 675.

¹⁵⁴ The “social laboratory metaphor does not tell us how the results of ‘experiments’ in one lab come to claim the attention and deliberative energies of another.” *Id.* at 676.

¹⁵⁵ *Id.* at 678.

¹⁵⁶ This point was brought out at the Problem of Multidistrict Litigation symposium, February 16, 2008, in the remarks of the Hon. Carol Higbee, a New Jersey trial judge in whose courtroom the New Jersey Vioxx cases were consolidated. She was describing her positive interactions with Judge Eldon Fallon, the federal MDL judge in the Vioxx cases.

decision-making could make second thoughts and reevaluation more likely, and perhaps in so doing increase fairness to litigants.

The balance between collaboration and independent judgment is a delicate one. Due process requires judges to retain their independence and permit litigants to be heard in the process of making decisions. At the same time, paying attention to what other judges are doing can provide counterpoints to the judge's own preconceptions and increase the possibility of reaching the most just outcome.

Ideology

The term "ideology" as used here refers to the unarticulated assumptions about the world adopted by different groups.¹⁵⁷ For example, prominent scholars have shown that across a range of controversial issues, there are some systematic differences in voting patterns between federal appeals judges appointed by Democratic Presidents and those appointed by Republican Presidents.¹⁵⁸ Scholars of cultural cognition have provided empirical evidence of differences of opinion among individual members of various social groups.¹⁵⁹ These different world views can cause mistrust and form the basis of social conflict among these groups. Adjudication is one space where these social conflicts are worked out. As Robert Cover explained: "adjudication can always become a ritualized enactment of the epistemological chasms between one class and another, one race and another, one gender and the other; between different generations, different nations; and between city and country, town and gown."¹⁶⁰ And, one might add in the context of many mass torts, between consumer and corporation.

¹⁵⁷ This is admittedly a rather simplistic view of ideology, a subject the immense complexity of which is beyond the scope of this work. For the limited purpose of the thesis of this essay, however, I think the reader will find that this simple definition suffices.

¹⁵⁸ See CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006)

¹⁵⁹ Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes are You Going to Believe? An Empirical (and Normative) Assessment of Scott v. Harris*, unpublished manuscript dated January 6, 2008, available at SSRN: <http://ssrn.com/abstract=1081227> (documenting differences of opinion regarding legally relevant facts along cultural, ideological and other lines).

¹⁶⁰ Cover, *Redundancy*, *supra* note 10 at 664. As Paul Schiff Berman explains: "trials, with their elaborate procedures and formal rules, create a mythic arena for expressing the great tensions and moral battles of the community." Paul S.

Conflict can arise along many different lines within the court system. For example, the decision to allocate power to the judge or the jury in a given trial can be seen as a function of assumptions about the abilities of lay jurors to understand complex information, which may or may not be based in fact. There may be differences in decisions of state and federal judges on the same legal issues that arise out of different assumptions about the world based on life experience, social status or other factors. There may be systematic differences, as well, between district and appellate court judges in federal or state court.

Consider first the judge and the jury. Judicial and jury functions present an example of sequential redundancy. A judge may determine that there are no material issues of fact in dispute on a motion for summary judgment, thereby taking the power to determine those facts away from the jury.¹⁶¹ After a jury has reached its verdict, a judge may invoke the doctrine of remittitur to require that the plaintiff accept a lower amount or proceed to a new trial.¹⁶² Because trials are costly, plaintiffs rarely opt to retry these cases,¹⁶³

Berman, *Rats, Pigs and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288, 293 (1994).

¹⁶¹ See FED. R. CIV. P. 56; EDWARD BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE (2006). The fact/law distinction is notoriously slippery. One might argue in response that because there are no disputes of material fact there is really nothing for the jury to decide. However, the very question of whether there are disputes or not can be considered a question of fact. Compare *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) with *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996). See Arthur R. Miller, *The Pretrial Rush To Judgment: Are The "Litigation Explosion," "Liability Crisis," And Efficiency Clichés Eroding Our Day In Court And Jury Trial Commitments?* 78 N.Y.U. L. REV. 982, 1062 (2003) (discussing and critiquing the fact/law distinction in the summary judgment trilogy).

¹⁶² See *Dimick v. Schiedt*, 293 U.S. 474, 485 (1935) (upholding remittitur); FED. R. CIV. P. 59; 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2815 (3d ed. 1998) (describing remittitur as "a practice, now sanctioned by long usage, by which the court may condition a denial of the motion for a new trial upon the filing by the plaintiff of a remittitur in a stated amount.").

¹⁶³ See Suja A. Thomas, *Re-Examining The Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 793 (2003) (presenting evidence that "plaintiffs take the remittitur or settle in 98% of the cases in which a judge grants a remittitur.").

effectively permitting the judge to dictate the verdict where he finds it is unreasonable.¹⁶⁴

Judges may also essentially determine case outcomes by their evidentiary rulings. In cases where expert testimony is central to one or the other party's case, the outcome may hang on how the judge exercises her "gatekeeping" function of determining admissibility of expert testimony.¹⁶⁵ This observation is not limited to cases involving scientific evidence. Recall that in the *September 11th Litigation*, Judge Hellerstein ordered that several of the bellwether cases to be tried for damages only in order to assist the parties in reaching settlement.¹⁶⁶ The judge's early ruling on defendant's motion *in limine* spurred many of the cases to settlement. Discovery orders may also influence the outcome of a case, especially in light of the expense of electronic discovery. Thus judicial control of the pretrial phase of a case is critical to its outcome. As we shall explore in a moment, this fact underscores the power of multidistricting to centralize power in transferee courts.

The popular conception is that there is a difference between judges and juries.¹⁶⁷ Large jury verdicts are often the subject of

¹⁶⁴ The legal standard for remittitur under federal law is whether the jury award "shocks the conscience." *See, e.g., Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 165 (2d Cir. 1998) (a compensatory damage award may be set aside if "the award is so high as to shock the judicial conscience and constitute a denial of justice"). However, federal judges sitting in diversity must apply the standard dictated by state law, which may give the judges more power. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430–31 (1996) (requiring federal courts to apply the more restrictive New York standard of whether the jury's award "deviates materially from what would be reasonable compensation.").

¹⁶⁵ *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596-97 (1993) (only "good" scientific evidence should reach the jury). *See also* Edward J. Imwinkelreid, *Trial Judges--Gatekeepers Or Usurpers? Can The Trial Judge Critically Assess The Admissibility Of Expert Testimony Without Invading The Jury's Province To Evaluate The Credibility And Weight Of The Testimony?* 84 MARQ. L. REV. 1 (2001); Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263 (2007) (discussing the significance of *Daubert* and arguing that reform of the judicial function is needed).

¹⁶⁶ *See* Opinion Supporting Order to Sever Issues of Damages and Liability in Selected Cases, *In re September 11th Litigation*, 21 MC 97, at 3 (AKH) (S.D.N.Y., July 5, 2007).

¹⁶⁷ *See* Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1126 (1992)(describing the differences between litigant perceptions and reality about judges and juries); Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About The Legal System? Win Rates And Removal Jurisdiction*, 83 CORNELL L.

press accounts and, in the case of punitive damages, increasingly the subject of Supreme Court review.¹⁶⁸ Some think that jurors hold a different set of assumptions and values than judges by virtue of the fact that jurors are not members of a professional judicial class, mostly not trained as lawyers, and have different cultural and economic backgrounds than most judges. Nevertheless, empirical evidence indicates that jurors are at least as educated as the general population.¹⁶⁹ Over the last fifty years, studies have consistently shown that judges and juries agree on outcomes in civil cases most of the time.¹⁷⁰

The real differences may be between legislators and actors in the judicial branch, including juries and judges. Consider the case of *Garza v. Merck*, tried in Texas state court. The jury reached a verdict of 7 million dollars in compensatory and 25 million in punitive damages. The judge remitted the punitive damages award to 1.6 million dollars to bring the verdict into line with local statutory limits on punitive damages. Perhaps the divergence was not between judge and jury but the legislative and judicial branches. Given that the remittitur was legislatively driven, perhaps the professional class and the rest of the population in a given geographical area operate on a set of assumptions that are not so different after all. We may see mostly a divergence on socially contested issues between legislative and judicial institutions because juries are faced with a concrete case whereas legislators deal in abstractions. The conflict between these

REV. 581, 584 (1998) (discussing this perception and showing that differences in win rates between judges and juries are the product of case selection).

¹⁶⁸ See *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (holding that \$4 million punitive damages award was “grossly excessive” and violated the due process clause); *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003) (holding that \$145 million punitive damages award was grossly excessive in light of \$1 million compensatory damages award); *Phillip Morris USA v. Williams*, 127 S.Ct. 1057 (2007) (holding that punitive damages award based in part on juries desire to punish defendant for harm to nonparties violated the takings clause).

¹⁶⁹ See Hillel Y. Levin & John Emerson, *Is There a Bias Against Education in the Jury Selection Process?* 38 CONN. L. REV. 325, 328 (2006) (empirical study finding that Connecticut jurors are not less educated than the general population, and perhaps are even better educated than the population).

¹⁷⁰ See Theodore Eisenberg et. al., *Juries, Judges, And Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002) (empirical study showing that juries and judges largely agree on punitive damages awards); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 117 (1986) (citing study that judges and juries agreed on outcome 78% of the time, and that the remaining 22% of the time their disagreement was balanced between plaintiff and defendants).

institutions seems to me necessary to stimulate a societal debate about these important issues. It may also be that if there divergence between jury verdicts and judicial decisions, disagreement exists where the social conflict is most likely to arise, such as the awarding of punitive damages or the determination of causation. Both of these doctrines present significant social issues and it is not surprising that they might be the subject of conflict.

If judges and juries mostly agree, does the jury add anything to the adjudication process? The jury has what some have termed the “pluralist” function of representing a cross section of the community.¹⁷¹ Juries can be a microcosm of societal disagreements. Jury service can lead to consensus through deliberation. Or it can lead to conflict, the surfacing of insurmountable differences and even a mistrial. Moreover, juries in different jurisdictions may reach different results from one another on very similar cases. It is difficult to measure these differences because the facts of even similar cases can differ, and local factors, such as the extent to which the plaintiff is likeable or her advocate more talented than average, can explain some differences. It is nevertheless plausible to say that different juries may reach different conclusions with regard to the same case if it were presented the same way. These conclusions may, in turn, be the result of fundamental differences between the juries as to basic assumptions about the world, in other words, differences in ideology.

Multiple juries hearing similar cases present an instance of synchronic redundancy. When jury verdicts in aggregate cases are collected, they may yield an emerging consensus about liability and/or damages. Or the verdicts may reflect substantial social conflict. Recall the spread of the Vioxx verdicts: 5 verdicts in favor of the plaintiff, 10 defense verdicts, and three retrials.¹⁷² Differences in state laws could account for some divergence, but even cases tried in the same jurisdiction reached widely varying results. The four New Jersey Vioxx trials were equally split between substantial plaintiff’s awards and defense verdicts.¹⁷³ Of course, this split could mean a lot of different things. But one potential meaning is that society is undecided about basic issues of responsibility for adverse outcomes in patients prescribed pharmaceuticals.

¹⁷¹ Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125 (1998).

¹⁷² See *supra* notes 100-101 (listing cases)

¹⁷³ *Ibid.*

Synchronic redundancy as between multiple juries and sequential redundancy between judges and juries may correct ideological bias by testing out premises in different forums. Different outcomes in different forums may not be an example of mere error in the sense of a failure to accurately apply the law to the facts at hand or an incorrect finding of fact. Instead, divergence may represent different ways of viewing the world and different assessments of value based on cultural context and background assumptions.¹⁷⁴ Jury verdicts will come out differently more often in cases where there is social conflict over the issue presented. Judges and juries may differ more often over issues where social conflict is at its apex, such as punitive damages and causation. We should expect to see divergence most when redundancy is at its most useful.

Differences in decisionmaking between state and federal judges may also be the product of ideology. One empirical study appears to show that “win” rates for plaintiffs were lower in cases that had been removed to federal court than cases that remained in the initially filed state court.¹⁷⁵ Another study showed that federal judges were more likely to deny certification of class actions, although state and federal judges were equally likely to certify a class.¹⁷⁶ The reason for these differences may be that state court will

¹⁷⁴ Cultural historians have convincingly shown that ideas about value change over time. *See, e.g.,* VIVIANA ZELIZER, *PRICING THE PRICELESS CHILD* (1994) (describing the changing views of the value of children over the 19th and 20th centuries). *See also* Bassett, *The Forum Game*, *supra* note 92 at 333 (“The notion of ‘one proper result’ is an erroneous premise in light of the potential differences in the applicable law, the vagaries of fact investigation and discovery, the potential for lawyer error or poor tactical choices, and the necessity in fully litigated cases for formal factfinding--factual determinations that shape both liability and damage outcomes.”).

¹⁷⁵ Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About The Legal System? Win Rates And Removal Jurisdiction*, 83 *CORNELL L. REV.* 581, 607 (1998). This study found that removal reduced plaintiff’s win rate by approximately 50%. In non-removed diversity cases plaintiff’s win rate was 71% whereas in removed cases it was 34%. The study attempted to disaggregate the case selection effect from the forum selection effect, and found that when controlling for the case selection effect, plaintiffs win rate was still 11% lower, a reduction attributable to forum effects. The study was based on an assumption of a win rate of 50%.

¹⁷⁶ *See* THOMAS E. WILLGING & SHANNON R. WHEATMAN, *ATTORNEY REPORTS ON THE IMPACT OF AMCHEM AND ORTIZ ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION, A REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES REGARDING A CASE-BASED SURVEY OF ATTORNEYS* 4-5, 7-8, 18, 29-31 (2004). The study shows that defense attorneys believe that in class action cases

sit on certification motions, leaving them in limbo, whereas certification is more often adjudicated and appealed in the federal system. There is empirical evidence that state judges are less likely than federal judges to entertain preemption claims, although these are gaining some traction in state courts.¹⁷⁷ These studies seem to support the contention that there are, in some cases, differences between the treatment of similar cases in state and federal court.

Not all of these differences can be attributed to different procedural regimes, as many states have adopted Federal Rule of Procedure 23 as well as other provisions of the Federal Rules. Some of these differences between state and federal judges are likely due to ideological factors. Assume for the moment that case selection is not the deciding factor in these divergent outcomes, recognizing that this cannot be conclusively proven. If there is an ideological divergence between state and federal judges, then jurisdictional redundancy will increase fairness by limiting the ability of a particular group to wield power over litigants.

IV. How Much Multiplicity Can a System Tolerate?

Our national commitment to jurisdictional pluralism and to intra-institutional competition is embedded in our Constitution, which creates two competing court systems with jurisdiction over the same cases and retains power to the local civil jury within the federal system.¹⁷⁸ Our system of adversarial litigation ensures that litigants will utilize jurisdictional redundancy to their advantage. The question facing judges, scholars and policy makers now is not whether we will have such a system, but how much pluralism we are willing to tolerate. Lately the most prevalent view has been that pluralism ought to be minimized in favor of centralization. In light of that movement, this question might also be put another way: how much centralization should we tolerate in a pluralist society?

the federal forum is more beneficial to their clients' interests and that they remove cases based on state law to the federal courts for that reason. *Id.*

¹⁷⁷ See Catherine M. Sharkey, *Federalism In Action: FDA Regulatory Preemption In Pharmaceutical Cases In State Versus Federal Courts*, 15 J.L. & POL'Y 1013, 1018-1020 (2007) (discussing unpublished study and potential explanation for differences between state and federal courts, including closer relationship between federal courts and federal administrative agencies such as the FDA).

¹⁷⁸ See U.S. CONST. ART. III (inferior federal courts and diversity jurisdiction), AMEND. VII (civil jury right).

Weighing Costs and Benefits

The value of multi-centered litigation is that it preserves competition between institutions and recognizes the legitimacy of different points of view. As a result, society retains access to multiple visions of what constitutes beneficial social policy, alternative outcomes with respect to contested social issues, and the potential for rethinking assumptions and strongly held ideals that may, on reflection, be flawed. Multi-centered litigation promotes innovation and critical thinking, two important criteria for creating good policies. Finally, multiplicity prevents error from taking hold.

Centralization has many benefits as well. Courts are, or claim to be, strapped for resources and many cases are repetitious or routine.¹⁷⁹ In some cases, uniformity is necessary to protect important governmental powers and interests, although this too comes at a cost.¹⁸⁰ Producers in a global economy seek legal certainty and consistency, values that are fundamentally inconsistent with a pluralist legal regime that allows different jurisdictions to reach different outcomes.¹⁸¹ Finally, litigants are manipulative and manipulated. Multiple forums can permit reverse auctions in class actions and other strategic manipulations of the rules and potentially lead to unfair results.

How can courts weight the relative value of these costs and benefits? Whether centralization or multi-centeredness is the best approach can only be determined in context. When entities such as the JPML have the discretion to decide whether to centralize, they should decide whether multiple centers of litigation are preferable to a single center by considering the following factors: (i) the extent of underlying substantive disagreement, (ii) the costs of inconsistency, and (iii) the role of political power in the dispute.

First, to what extent is there disagreement as to the substance of the law? If there is substantial disagreement, then allowing multi-centered litigation will be valuable to the development of the law. If there is largely consensus, centralization is more appropriate and

¹⁷⁹ See Galanter, *supra* note 54 (presenting evidence that calls assumptions about increasing docket size into question).

¹⁸⁰ But see Amanda Frost, *(Over)valuing Uniformity*, 94 VA. L. REV. ____ (forthcoming 2008) (debunking arguments in favor of uniformity and arguing courts should avoid expending resources to standardize federal law merely for the sake of achieving uniformity).

¹⁸¹ But cf. Berman, *Global Legal Pluralism*, *supra* note 18 at 1162 (discussing and critiquing attempts to “solve” problem of hybridity through harmonization).

perhaps even desirable to prevent the “outlier” problem. Second, are the questions to be decided of the type that inconsistent adjudication will result in substantial harm to the litigants or the legal system? If inconsistent adjudication will cause significant harm, centralization is more appropriate than in a case where inconsistent adjudications will not have far reaching negative consequences. Third, is there a legitimate concern that judicial or jury decisions in the particular legal area will be influenced by ideology in ways that will be unfair to particular sets of litigants? Ideological tilt will favor multiplicity in order to prevent error from taking hold and to mitigate the problem of political authority.

To understand how these factors might be applied in practice, let us consider two hard cases. These cases are hard because they present controversial substantive questions and conflicting values. The factors described above will either help resolve these conflicts in favor of a single forum or show that the continuation of these conflicts is in fact desirable. The three factor test may not resolve the value conflict that is at the heart of the debate about centralization, but it brings to the surface what is really at stake in eliminating redundancy. In so doing, the test forces judges and policymakers to consider the costs of centralization and the benefits of pluralism.

FDA Preemption of State Failure to Warn Claims

Preemption is a controversial issue that is the subject of substantial debate. Several cases considered by the Supreme Court this term present this issue, though it is unlikely to be definitively resolved soon.¹⁸² In *Warner Lambert v. Kent*, an equally divided Court affirmed the ruling of the Second Circuit, which had held that the FDCA does not preempt product liability claims under Michigan

¹⁸² See *Warner-Lambert Co. LLC v. Kent*, 128 S.Ct. 1168 (2008); *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (2008); *Wyeth v. Levine*, 128 S.Ct. 1118 (2008). For some different views on the issue see David Kessler & David Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims*, ___ GEO. L. J. 461 (2008) (arguing against FDA preemption); Catherine Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008) (proposing an agency reference model whereby courts will look to agencies to provide data as to whether preemption is appropriate); Peter Schuck, *FDA Preemption of State Tort Law in Drug Regulation: Finding the Sweet Spot*, ___ ROGER WILLIAMS U. L. REV. ___ (forthcoming 2008) (arguing in favor of preemption with some caveats).

law against drug manufacturers that allegedly defrauded the FDA.¹⁸³ The case has no precedential value except in the Second Circuit, from whence it came.¹⁸⁴ There is a circuit split on this contentious issue of law, public policy and public health which the Court failed to resolve. As a result, failure to warn cases brought in some circuits are preempted and will be dismissed (if they are brought at all), while cases brought in other circuits will be permitted to go forward.¹⁸⁵

Since tort suits arising out of the use of pharmaceuticals are often filed in large numbers, it is likely that numerous suits arising out of similar facts and raising similar claims will be brought. Sooner or later, the JPML will be asked to transfer these many cases to a single court. Then the Panel will be faced with a choice of where to transfer the cases: to the circuit that has ruled in favor of preemption and would dismiss the claims, to the circuit that has ruled against preemption and would let the claims go forward, or to a circuit that has yet to rule on the issue.¹⁸⁶ The Panel's choice will determine what happens to the cases because the transferee court is empowered to apply the law of its own circuit to all pretrial rulings, theoretically including motions to dismiss.¹⁸⁷

In *In re Korean Air Lines Disaster*, the case that articulated the rule that the transferee court apply the law of its own circuit, then Judge Ruth Bader Ginsburg gave three reasons for allowing the transferee court's law to apply: (1) "[a]pplying divergent interpretations of the governing federal law to plaintiffs, depending solely upon where they initially filed suit, would surely reduce the efficiencies achievable through consolidated preparatory proceedings"; (2) "because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory"; and (3) the parties could always seek review by the Supreme Court for an authoritative and final interpretation.¹⁸⁸ That

¹⁸³ Warner-Lambert Co. LLC v. Kent, 128 S. Ct. 1186 (2008).

¹⁸⁴ See *Plaut v. Spendthrift Farm*, 514 U.S. 211, 215 n.1 (1995).

¹⁸⁵ Compare *Garcia v. Wyeth-Ayerst Labs.* 385 F.3d 961 (6th Cir. 2004) with *Desiano v. Warner-Lambert*, 467 F.3d 85 (2d Cir. 2006), *aff'd*, *Warner-Lambert v. Kent*, 128 S.Ct. 1168 (2008).

¹⁸⁶ This discussion is inspired by the analysis of Mark Hermann and Jim Beck, available at <http://druganddevicelaw.blogspot.com/2008/03/there-oughta-be-law-odd-implication-of.html> (last checked March 6, 2008).

¹⁸⁷ *In re Korean Air Lines Disaster*, 829 F.2d 1171 (D.C. Cir. 1987),

¹⁸⁸ *Id.* at 1156.

last condition, of course, was not met in this case because the Supreme Court had the opportunity to decide and instead preserved the circuit split. Since the *Korean Air Lines* case, at least one district court has reviewed the issue and held that questions that are not “merely pretrial” issues should be decided based on the law of the transferor court.¹⁸⁹ The judge explained: “Neither party should be prejudiced in preparing for trial because the case was removed and transferred to another district in a different circuit.”¹⁹⁰ But there has been no final pronouncement on the question of which circuit’s law applies to cases transferred under the auspices of the MDL.

Consider how the three factor test might apply if the JPML were to consider transferring cases raising state law failure to warn claims. To what extent is there disagreement as to the substance of the law in this case? This is a situation where the substance of the law is hotly contested. Disagreement is substantial and the issue is one of significant importance to patients, drug companies, and the FDA. The disagreement at its root is about important structural issues: to what extent will states have the power to regulate pharmaceutical companies? It also implicates economic issues, such as to what extent permitting states to regulate this national industry damages the national economy.

Second, is the question to be decided such that inconsistent adjudication will result in substantial harm to the litigants or the legal system? Arguably the preemption question is not of the type that substantial harm would be caused by inconsistent adjudication. In fact, our legal system is quite able to tolerate multiple outcomes of the same type of case in different states. If substantial harm was forthcoming, it is likely that the Supreme Court would have found a way to agree on a uniform principle. Inconsistency is an inconvenience for defendants and some plaintiffs, but is unlikely to do substantial harm to the national economy. We know this because the circuits have been operating under different rules for some time.

Finally, is there a legitimate concern that judicial decisions will be influenced by ideology in ways that will be unfair to either side with respect to this issue? There is no clear answer to the question in this case. The circuit split in itself points to ideological differences. Where, as here, the direction of the law is contested and

¹⁸⁹ In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, 241 F.R.D. 185 (S.D.N.Y. Feb 20, 2007) (applying the law of the transferor court to the question of certification under Rule 23(b)(3)).

¹⁹⁰ *Id.*

subject to widely differing interpretations, the unarticulated assumptions of judges about the usefulness of regulation, pharmaceutical innovation and the legitimacy of the jury system will more likely influence the decision-making process. Therefore, it seems possible that ideology would influence the outcome if the cases were to be transferred to a single court in a circuit that had yet to rule on the preemption issue. This would be unfair to some litigants.

This analysis militates in favor of permitting the litigation to proceed in multiple forums. But it need not proceed as a completely decentralized and atomized litigation. That is, cases need not remain all over the country where they were filed. Instead, the MDL Panel could decide to allocate cases to regional centers. Cases that are brought in circuits adopting preemption may be transferred to a single region and dismissed or they will not be brought at all. Cases brought in circuits rejecting preemption will be permitted to proceed, having been transferred to a single court within one of those circuits. Finally, cases brought in circuits that have yet to decide the matter may be consolidated in a third region. This pluralist solution would not resolve the problem of forum shopping, but it would provide a *modus vivendi* to accommodate concerns about political authority and reflect the very real social and political differences among different regions expressed in the appellate court opinions.

The NSA Litigation

Another conflict of values is illustrated by a particularly difficult recent case, the litigation arising out of allegations that telecommunications companies illegally wiretapped individuals, often referred as the *National Security Agency [NSA] Litigation*.¹⁹¹ This litigation illustrates the simultaneous need for and costs of centralization and uniformity. Some of these wiretapping cases were brought in state court and others in federal court. The state court actions consisted of claims under state privacy law rather than any federal law. In order to consolidate all cases relating to the underlying facts – the wiretapping of individuals by a number of telecommunication companies – in MDL-1791, the state cases had to be removed to federal court. The state plaintiffs claimed that their

¹⁹¹ *In re National Security Agency Telecommunications Records Litigation*, 444 F.Supp.2d 1332 (J.P.M.L. 2006) (transferring cases to the Northern District of California as MDL 1791).

cases were not properly removed to federal court because, under the well-pleaded complaint rule, their claims were purely state law claims.¹⁹² The court found that the state secrets privilege “requires dismissal if national security concerns prevent plaintiffs from proving the *prima facie* elements of their claim.”¹⁹³ For that reason, the court held that federal jurisdiction was appropriate. The court ruled that the scope of the privilege is a substantive federal issue and there is ““a serious federal interest in claiming the advantages thought to be inherent in a federal forum.””¹⁹⁴ All related cases were transferred to the Northern District of California.

The three factor test helps us determine whether pluralism or centralization is the better approach for responding to this litigation. First, to what extent is there disagreement as to the substance of the law in this case? Like the preemption scenario, the issues underlying the *NSA Litigation* are contentious and overtly politicized. The disagreement here has not resulted in a circuit split providing direct proof of the disagreement. The public debate on the issue makes clear, however, that the underlying question of when the state secret privilege should apply, as well as the extent to which private companies should be held liable for complying with governmental orders, is hotly contested.

Second, is the question to be decided such that inconsistent adjudication will result in substantial harm to the litigants or the legal system? In this case, alternative decisions may result in substantial harm to the government and the public interest because of the national security risks in revealing the information claimed to be privileged. Furthermore, there is a risk that if litigation is brought in multiple forums, one outlier judge will permit access to materials that other judges deemed privileged. That proverbial bell could not be unrung. On the other hand, the safety valve of an appeal, combined with the fact that it is unlikely that an outlier decision would be upheld, weighs against finding substantial harm, at least with respect to the federal courts. A court’s finding on this question would likely depend on the judge’s reading of the facts, but it would

¹⁹² *In re National Security Agency Telecommunications Records Litigation*, 483 F.Supp.2d 934, 937 (N.D.Cal. 2007).

¹⁹³ *Id.* at 942.

¹⁹⁴ *Id.* at 943 (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005)). Although the U.S. Government had not yet intervened at the time of the decision, it had declared its intention to intervene and assert the state secret privilege.

be reasonable to find that inconsistency could cause substantial harm in a case like this one.

Finally, is there a legitimate concern that judicial decisions will be influenced by ideology in ways that will be unfair to either side with respect to this issue? This is a substantial concern in a case such as this, because of the political nature of the question at hand. This fact is evidenced by the decision to remove the cases to federal court despite the fact that removal seems to violate the well-pleaded complaint rule. State court judges could be more skeptical of the federal government's motives and the potential for using the state secret privilege to chill legitimate litigation.

In a case such as this, the factors seem to me to tilt in favor of centralization largely on the basis of the second factor. Disagreement must come in the political area, rather than the judicial one, because of the difficulty that would be caused by inconsistent judgments on the privilege issue. This conclusion favoring centralization raises serious political concerns. The outcome of a single court's ruling on the state secret privilege will be dispositive of these cases. Applying the privilege will prevent the plaintiffs from any discovery, leaving them with no proof, and thus will require dismissal of their claims. The court's ruling on this pretrial motion could deny the only available opportunity for the public to learn what its government is doing and for plaintiffs' case to be decided on the merits.

Conclusion

Litigation has many purposes: to resolve disputes, make litigants whole, create norms, and force information. Information is power. The ability to force information or to curtail its dissemination is a critical component of a group or government's ability to maintain the existing power structure or destabilize it.¹⁹⁵ For this reason, it is risky for a society to place such power in the hands of a single court. In a case such as the *NSA Litigation*, silence may be advisable given the national security issues at stake. To centralize

¹⁹⁵ See Owen M. Fiss, *Why the State?* 100 HARV. L. REV. 781, 786-87 (1987) (arguing that regulation of information, whether by the government or new agencies, limits political debate); Yochai Benkler, *Free As The Air to Common Use: First Amendment Constraints On Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 355 (1999) (arguing that the increase in privatization of information reinforces the existing power structure and hinders society's information production and exchange process).

this decision, however, requires a lot of faith in the transferee court to make the right decision. Centralization of decisions such as these may result in fundamental unfairness and the perpetuation of Constitutional violations by the government and private entities.

Centralization can result in silence. By contrast, pluralism and the institutional conflict that it permits may spur either a useful conversation or a cacophony. Having a real debate over social issues on which there is no consensus requires a variety of voices of authority. This means overlapping institutions remain in conflict while a consensus is developed, if consensus is even possible on the contentious issues of our day. Inevitably, it will be the socially contentious issues that are worth litigating.