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## One Percent Procedure

Brooke D. Coleman

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# ONE PERCENT PROCEDURE

Brooke D. Coleman\*

*Abstract:* Political rhetoric about the one percent is pervasive, as those with the greatest concentrated wealth prosper and the remaining population stagnates. Because of their affluence, the one percent exercise disproportionate control over political and economic systems. This Article argues that federal civil procedure is similarly a one percent regime. The crème de la crème of the bench and bar, along with equally exclusive litigants, often engage in high-stakes, complex civil litigation. It is this type of litigation that dominates both the elite experience and the public perception of what civil litigation is. This litigation is not particularly common, however; while expensive and well known, it is in the minority. Yet this litigation and the individuals engaged in it have an incongruent influence on how the Federal Rules of Civil Procedure and procedural doctrine develop. They create one percent procedure.

This Article interrogates and connects disparate phenomena related to civil litigation, including the recent discovery amendments and the rise of multidistrict litigation. It demonstrates that the elite—those who are deeply steeped in complex, high-stakes litigation—are setting the agenda and determining the rules for how the entire civil litigation game is played. It further argues that the benefits of a one percent procedure system—notably expertise of the participants—are not worth the costs; indeed, that expertise can be detrimental to the design of a civil litigation system.

As in politics and economics, a system that gives too much control to the one percent risks undervaluing and underserving the remaining ninety-nine percent. Using social and political science, the Article argues that the homogeneous policymaking of one percent procedure creates suboptimal results. The Article concludes that the structures giving rise to one percent procedure must be modified and proposes a set of reforms intended to allow the ninety-nine percent representation in, and access to, the process of constructing our shared civil litigation system.

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\*William C. Oltman Professor of Teaching Excellence and Associate Professor of Law, Seattle University School of Law. Many thanks to Hon. Mark W. Bennett, Stephen Burbank, Kevin Clermont, Elizabeth Chamblee Burch, Charlotte Garden, Ronald Krotoszynski, Elizabeth McCuskey, David Marcus, Patricia Moore, Elizabeth Porter, Alexander Reinert, Anna Roberts, Norman Spaulding, and Elizabeth Thornburg for their indispensable comments on early and later drafts. Thanks also to Jadrian Coppieters, Mimi Lei, Ryan Lynch, Sanaa Nagi, Grace Thompson, and Emily Yoshiwara for their excellent research assistance.

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## INTRODUCTION

Those in the top one percent of income control over 40% of the country's wealth and take in a quarter of the country's income.<sup>1</sup> The effect, many argue, is that the "one percenters" exercise disproportionate control over our nation's economic and political landscape.<sup>2</sup> Meanwhile, the middle class and the poor, who have much less wealth and political access, bear the negative brunt of this distributive reality.<sup>3</sup> Although Occupy Wall Street protesters are gone from the public square, their rallying cry that "we are the 99%" continues to dominate political and social discourse.<sup>4</sup>

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1. Joseph E. Stiglitz, *Of the 1%, by the 1%, for the 1%*, VANITY FAIR (Mar. 31, 2011, 12:00 AM), <http://www.vanityfair.com/news/2011/05/top-one-percent-201105> [https://perma.cc/NU5E-E55G]. *But see* Chris Matthews, *The Myth of the 1% and the 99%*, FORTUNE MAGAZINE (Mar. 2, 2015, 10:50 AM), <http://fortune.com/2015/03/02/economic-inequality-myth-1-percent-wealth/> [https://perma.cc/Z7VQ-8S24] (arguing that the wealth disparity depicted by the ninety-nine versus one percent is much more fluid than the numbers might otherwise indicate).

2. Stiglitz, *supra* note 1.

3. *Id.*

4. The slogan became a part of the movement called Occupy Wall Street, which started in the fall of 2011. *See* John Cassidy, *Wall Street Protests: Who Are the 99% and What Do They Want?*, THE NEW YORKER (Oct. 11, 2011), <http://www.newyorker.com/news/john-cassidy/wall-street-protests-who-are-the-99-and-what-do-they-want> [https://perma.cc/6BYD-FLEC]; Ezra Klein, *Who Are the 99 percent?*, WASH. POST (Oct. 4, 2011), [https://www.washingtonpost.com/blogs/ezra-klein/post/who-are-the-99-percent/2011/08/25/gIQAt87jKL\\_blog.html](https://www.washingtonpost.com/blogs/ezra-klein/post/who-are-the-99-percent/2011/08/25/gIQAt87jKL_blog.html) [https://perma.cc/77BW-ZASV]. Since that time, it has remained a part of common political parlance. *See* Brian Stelter, *Camps Are Cleared, but '99 Percent' Still Occupies the Lexicon*, N.Y. TIMES (Nov. 30, 2011),

This Article argues that the federal civil litigation system is its own one percent regime. Certain types of litigation—class action and multidistrict, for example—have become the poster children for the civil litigation system more generally, trotted out as examples of litigation run amok—damaging for business and by extension consumers, lucrative for nobody but the lawyers, and all too common. Indeed, these cases make headlines and sustain many large law firms,<sup>5</sup> but they are not particularly common.<sup>6</sup> When put in the context of state court litigation—indeed, the place where most civil litigation happens—and in the context of the remaining types of federal civil litigation, this elite and peculiar litigation is hardly dominant.<sup>7</sup>

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[http://www.nytimes.com/2011/12/01/us/we-are-the-99-percent-joins-the-cultural-and-political-lexicon.html?\\_r=0](http://www.nytimes.com/2011/12/01/us/we-are-the-99-percent-joins-the-cultural-and-political-lexicon.html?_r=0) [<https://perma.cc/7HS2-TEN6>] (“Most of the biggest Occupy Wall Street camps are gone. But their slogan still stands.”); Justin Wedes, Opinion, *Occupy Wall Street, Two Years on: We’re Still the 99%*, THE GUARDIAN (Sept. 17, 2013, 7:00 AM), <https://www.theguardian.com/commentisfree/2013/sep/17/occupy-wall-street-99-percent> [<https://perma.cc/3A8Y-TGAM>]; WE ARE THE 99 PERCENT, [wearthe99percent.tumblr.com](http://wearthe99percent.tumblr.com) [<https://perma.cc/M6EJ-JEG7>] (a website started at the beginning of the movement, which still continues posting stories from individuals who claim to be part of the ninety-nine percent). In addition, in this presidential election year, the one percent narrative resonates even louder, with economic populist messages undergirding the campaigns of both Bernie Sanders and—ironically—billionaire Donald Trump. See Drew DeSilver, *The Many Ways to Measure Economic Inequality*, PEW RES. CTR. (Sept. 22, 2015), <http://www.pewresearch.org/fact-tank/2015/09/22/the-many-ways-to-measure-economic-inequality> [<https://perma.cc/3YWM-NQSA>]; *Bernie Sanders on Economic Inequality*, FEEL THE BERN, <http://feelthebern.org/bernie-sanders-on-economic-inequality/> [<https://perma.cc/9U4T-MKCL>] (“Ninety-nine percent of all new income generated today goes to the top 1 percent. The top one-tenth of 1 percent owns as much as wealth [sic] as the bottom 90 percent”) (quoting Bernie Sanders); Michael Lind, *Donald Trump, The Perfect Populist*, POLITICO (Mar. 9, 2016), <http://www.politico.com/magazine/story/2016/03/donald-trump-the-perfect-populist-213697> [<https://perma.cc/WRB7-G7KL>] (discussing how Donald Trump has cultivated a populist message that is stronger than many other centrist conservatives).

5. See MITT REGAN, GEO. L. CTR. FOR THE STUD. OF THE LEGAL PROF., 2015 REPORT ON THE STATE OF THE LEGAL MARKET 10 (2015), <http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/FINAL-Report-1-7-15.pdf> [<https://perma.cc/937R-JDGU>] (“[L]itigation (including patent litigation) accounts for about 36 percent of overall billable hours—35 percent for Am[erican] Law 100 firms and 37 percent for each of Am[erican] Law Second 100 and midsized firms.”); John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995, 3001 (2014); Associated Press, *Settlements Reached in 2010 Gulf Oil Spill*, N.Y. TIMES (May 20, 2015), <http://www.nytimes.com/2015/05/21/business/energy-environment/settlements-reached-in-2010-gulf-oil-spill.html> [<https://perma.cc/WRC4-EXSR>]; Bill Vlasic, *GM Will Face Further Discovery in Broader Class-Action Case*, N.Y. TIMES (Mar. 16, 2015), <http://www.nytimes.com/2015/03/17/business/gm-will-face-further-discovery-in-broader-class-action-case.html> [<https://perma.cc/5WCN-QC8M>].

6. See *infra* Part II.

7. See *infra* Part II. As will be discussed, many states adopt a version of the Federal Rules of Civil Procedure and federal procedure doctrines into their own state civil procedure practices. As a result, the federal civil litigation system has an impact much broader than just the federal courts.

Nonetheless, practitioners involved in these cases at the highest level wield a great deal of influence. Understanding why requires an appreciation of who these practitioners are: elite judges, lawyers, and parties. While not a literal one percent, the federal civil litigation system has much in common with the political rhetoric of the one percent because it is guided and controlled by such a small minority. In fact, the same judges, lawyers, and parties that participate in this high stakes, complex litigation are regularly relied upon for their expertise as to how litigation can best function.<sup>8</sup> The result is one percent procedure—a system where the metaphorical ninety-nine percent of relatively small cases that are the bread and butter of federal and state dockets are governed by a set of rules made by and for the elite.

For example, a group of fifteen individuals is largely responsible for drafting and amending the Federal Rules of Civil Procedure through the Rules Enabling Act process.<sup>9</sup> Scholars have determined that certain types of individuals are repeatedly appointed to the federal civil rulemaking bodies.<sup>10</sup> Practitioners and academics dominated the early membership of the Advisory Committee on the Federal Rules of Civil Procedure, but starting in 1971, membership shifted so that judges became majority members of the committee, with practitioners coming in second, and academics coming in a distant third.<sup>11</sup> During that same period, the practitioner members appointed shifted from multi-practice, albeit plaintiff-friendly, lawyers to attorneys that represented either corporate defendants or classes of plaintiffs.<sup>12</sup> Moreover, since 1971, a conservative Chief Justice has made all of the committee appointments.<sup>13</sup> And the appointments skew in a conservative direction: the data show that judges appointed by Republican presidents serve on the committee at a much higher rate than the number of Republican-appointed judges on the bench more generally.<sup>14</sup>

Similarly, the Supreme Court Bar consists of individuals who share like experiences and backgrounds. A recent Reuters series, *The Echo*

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8. *See infra* Part II.

9. *See* 28 U.S.C. §§ 2071–2077 (2012); Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 *NEV. L.J.* 1559, 1565 (2015).

10. Burbank & Farhang, *supra* note 9, at 1565–71 (2015).

11. *Id.* at 1567–68.

12. *Id.* at 1569–71.

13. *Id.* at 1572.

14. *Id.* at 1573. As will be discussed in Part III, Stephen Burbank and Sean Farhang have argued that this shift in committee composition has resulted in a shift toward pro-defendant proposals, at least with respect to private enforcement cases. *Id.* at 1578–79.

*Chamber*, found that from 2004 to 2012, an elite “66 of the 17,000 lawyers who petitioned the Supreme Court” were able to get their clients’ cases heard at about six times a higher rate than other private attorneys.<sup>15</sup> These particular attorneys accounted for less than 1% of the lawyers who filed petitions before the Supreme Court, but were involved in 43% of the cases that the Court decided.<sup>16</sup> The study also determined that this elite group of lawyers benefited corporate parties, with fifty-one of the sixty-six working for “law firms that primarily represented corporate interests.”<sup>17</sup> The Court has consequently heard more civil procedure cases in which businesses have an interest and has tended to decide those cases in their favor.<sup>18</sup> As this Article will demonstrate, multidistrict litigation and class action practice reflect similar patterns of homogeneity.

Thus, the Article argues that the entire civil litigation system is captured by lawyers, judges, and parties that, while participating in the rarest litigation, inevitably bend the rules of the civil litigation system toward their best interests. This is a problem for two reasons. First, social science teaches that such a homogeneous group of individuals is predisposed to act in a biased fashion.<sup>19</sup> Second, political science demonstrates that optimal results are generally not obtained when doctrine and rules are constructed by a system that functions on the basis of diffuse costs and concentrated benefits.<sup>20</sup>

The negative effects of one percent procedure on average litigants are apparent. For example, consider recent discovery amendments requiring proportionality—the idea that discovery be proportional to the needs of the case—in the definition of the scope of discovery.<sup>21</sup> These amendments were passed over vehement dissent from the plaintiffs’ bar.

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15. Joan Biskupic, Janet Roberts & John Shiffman, *The Echo Chamber: At America’s Court of Last Resort, a Handful of Lawyers Now Dominates the Docket*, REUTERS (Dec. 8, 2014), <http://www.reuters.com/investigates/special-report/scotus/#article-1-the-elites> [<https://perma.cc/GLE4-UT77>].

16. *Id.*

17. *Id.*

18. Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 314, 328, 332 (2012) (finding that the Court, in its first six terms under Justice Roberts, “heard and decided more than twenty cases in core civil procedure areas” and determining that like the Rehnquist Court, the “Roberts Court has shown similar hostility to litigation as a means of vindicating legal rights, the apparent difference being that this Court’s hostility manifests itself in general procedural doctrine”).

19. *See infra* Part II.

20. *See infra* Part II.

21. *See infra* notes 219–227 and accompanying text.

The problem of disproportionately high discovery costs is most acute in high-stakes litigation.<sup>22</sup> Yet, the rule change affects all cases—a disconnect acknowledged by the Civil Rules Committee itself.<sup>23</sup> Thousands of comments challenged the wisdom of moving the proportionality analysis into the definition of discoverable information in Rule 26(b)(1), including comments from lawyers who litigate smaller cases.<sup>24</sup> In its zeal to do something about high discovery costs in complex cases, the Rules Committee made it substantially more difficult for individual claimants in employment discrimination, consumer protection, and similar cases to get the discovery they would need to carry their burdens of proof.<sup>25</sup>

Similarly, the Court has interpreted the Federal Rules of Civil Procedure in ways that may benefit a small segment of the population and its litigation while affecting other parties quite differently. The Court's interpretation of Rule 8 under *Bell Atlantic Corp. v. Twombly*<sup>26</sup> and *Ashcroft v. Iqbal*<sup>27</sup> is an example. In these cases, the Court interpreted Rule 8 to require that a plausible claim be pleaded. The Court's interpretation, by all accounts, was motivated by a sense that discovery costs were too high to allow frivolous claims to survive.<sup>28</sup> Yet, the Court did not appear to consider how other kinds of litigation—litigation that did not involve high-stakes discovery costs—would be affected by this change. According to recent studies, individuals with civil rights and employment discrimination cases—cases that do not generally have high discovery costs—have been most negatively affected.<sup>29</sup>

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22. See *infra* Part II.A.1.

23. ADVISORY COMM. ON CIV. RULES, CIVIL RULES COMMITTEE AGENDA REPORT 79–83 (2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf> [<https://perma.cc/U6FG-537L>].

24. See CTR. FOR CONST. LITIG., PRELIMINARY REPORT ON COMMENTS ON PROPOSED CHANGES TO FEDERAL RULES OF CIVIL PROCEDURE 2 (2014), [http://www.cclfirm.com/files/Report\\_050914.pdf](http://www.cclfirm.com/files/Report_050914.pdf) [<https://perma.cc/U6FG-537L>] (noting that more than 2,300 comments were received in response to the Civil Rules Committee's proposed amendments); Email from Valerie M. Nannery, Senior Litig. Couns., Ctr. for Const. Litig., to Hon. David G. Campbell, Chairman, Civ. Rules Advisory Comm. (Apr. 9, 2014), [http://www.cclfirm.com/files/040914\\_Comments.pdf](http://www.cclfirm.com/files/040914_Comments.pdf) [<https://perma.cc/V6EP-EZS6>] (noting that most of the comments received were related to the discovery amendments).

25. See *infra* Part I.C.

26. 550 U.S. 544 (2007).

27. 556 U.S. 662 (2009).

28. See *infra* Part I.C.

29. See *id.*

In addition, the structure of aggregate litigation also benefits the elite. The repeat-player phenomenon in aggregate litigation means that the most successful plaintiff and defense attorneys control this practice.<sup>30</sup> In multidistrict litigation, for example, a handful of firms dominate plaintiff representation, and the same is true on the defense side.<sup>31</sup> The Judicial Panel on Multidistrict Litigation (JPML) is similarly exclusive, as the judges on the panel are hand-picked by the Chief Justice and serve for seven-year terms.<sup>32</sup> Moreover, the judges who ultimately handle class action and multidistrict litigation cases gain notoriety and become “expert[s]” in that kind of litigation.<sup>33</sup> In other words, aggregate litigation is a highly specialized practice that tends to benefit and be designed for the one percent. Yet, when these same judges move to the rest of their docket, it is hard to imagine that the tricks of the trade they use in aggregate litigation—limiting discovery and encouraging settlement, for example—do not “trickle down” into how they handle the rest of their caseload.<sup>34</sup> Relatedly, within these aggregate litigation practices, an additional hierarchy develops where the most exclusive attorneys control how the litigation functions, sometimes to the detriment of other lawyers and the parties.<sup>35</sup> Recent criticism of some high-profile multidistrict litigation cases like the General Motors ignition litigation and the British Petroleum oil spill bear this out.<sup>36</sup> In sum, these examples demonstrate how procedure appears to be developing in response to, and for the benefit of, a small segment of the civil litigation system without an awareness of, or perhaps concern about, how these changes will affect the rest.

Finally, and perhaps most galling, while the wealthiest litigants have the greatest influence on how the civil litigation system works, they also

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30. See *infra* Part I.B.1.

31. See *infra* Part I.B.1.

32. See *infra* Part I.B.1.

33. See *infra* Part I.B.1.

34. See *infra* Part I.B.1.

35. See *infra* Part I.B.1.

36. See John S. Baker, Jr., *The BP Gulf Oil Spill Class Settlement: Redistributive “Justice?”*, 19 TEX. REV. L. & POL. 287, 299–305 (2015) (questioning the BP settlement and whether the perverse incentives for lawyers during settlement proceedings actually achieve the best result for their clients); Erik Larson & Margaret Cronin Fisk, *How GM Ignition-Switch Plaintiffs’ Lawyer Botched His Big Case*, AUTO. NEWS (Jan. 28, 2016), <http://www.autonews.com/article/20160128/OEM11/160129852/how-gm-ignition-switch-plaintiffs-lawyer-botched-his-big-case> [<https://perma.cc/AY37-XXYJ>] (discussing how the lead lawyer arguably chose the wrong bellwether case for the GM litigation); Catherine M. Sharkey, *The BP Oil Spill Settlements, Classwide Punitive Damages, and Societal Deterrence*, 64 DEPAUL L. REV. 681, 692–709 (2015) (discussing the criticisms and potential lessons of the BP litigation and settlement).



have the ability to opt out of the system—and force their opponents out too, if necessary—by seeking private solutions such as arbitration.<sup>37</sup> In other words, the elite litigation player has the ability to dictate the rules of the game but also has the ability to refuse to play that game at all, instead substituting a different one.

To be sure, in an attempt to equalize the system, there are special rules for pro se litigants and even some concrete help in the form of legal aid representation and sample civil litigation forms.<sup>38</sup> But, like much of the public assistance we see in the socioeconomic context, these salves are rather hollow substitutes for robust and meaningful access to the civil litigation system.<sup>39</sup> A real solution should level the playing field among all litigants—large or small—to ensure that the merits, not the rules, are what decide cases in our civil litigation system.

Part I of the Article explains one percent litigation and how procedures by and for the one percent—in federal civil rulemaking, through the influence of the Supreme Court Bar, and in aggregate litigation—dominate that picture. This Part also examines the actors in each of these litigation categories, discusses how they are responsible for how procedure develops, and examines the perils inherent in a one percent procedure regime. Part II offers a critique of one percent procedure using both social science and political science as tools. This

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37. See generally Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) (examining arbitration and the challenges in providing a fair procedure for all parties); Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793 (2014) (focusing on how arbitration has lessened the role of federal courts in adjudication and how it has affected fairness).

38. See DONNA STIENSTRA, JARED BATAILLON, AND JASON A. CANTONE, FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS 1–17, 28–35 (2011) (finding that a majority of district courts (84.4%) provide procedural assistance through the clerk’s office; that most district courts (95.5%) have permanent pro se law clerks; and that most district court judges use “broad standards” in construing pleadings and requiring compliance with deadlines); Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1891–1912 (1999) (finding that all of the courts sampled provided some sample forms accompanied with either written instructions or in-person filing assistance).

39. See Denise S. Owens, *The Reality of Pro Se Representation*, 82 MISS. L.J. SUPRA 147, 147–59 (2013) (discussing the challenges facing pro se litigants and the general lack of affordable access to legal representation); Erik Eckholm & Ian Lovett, *A Push for Legal Aid in Civil Cases Finds its Advocates*, N.Y. TIMES (Nov. 21, 2014), [http://www.nytimes.com/2014/11/22/us/a-push-for-legal-aid-in-civil-cases-finds-its-advocates.html?\\_r=3](http://www.nytimes.com/2014/11/22/us/a-push-for-legal-aid-in-civil-cases-finds-its-advocates.html?_r=3) [<https://perma.cc/J7LB-LZDJ>] (examining the lack of legal help for low-income people); Press Release, Legal Servs. Corp., House Spending Bill Cuts LSC Budget by 20% (June 3, 2015), <http://www.lsc.gov/media-center/press-releases/2015/house-spending-bill-cuts-lsc-budget-20> [<https://perma.cc/5TXB-ZKHJ>] (announcing House of Representative’s 20% reduction of the Legal Services Corporation budget).

part will expand on why the elite corner of the civil litigation system is responsible for so much procedural development and why that result is problematic. Finally, this Part provides some suggested reforms that are tailored to maintain the expert benefits of a one percent procedure regime, but critically, intended to distribute more value to the vast ninety-nine percent.

## I. CIVIL LITIGATION'S ONE PERCENT PROCEDURE

The rules governing federal civil litigation emerge from a variety of sources. Federal civil rulemaking committees draft and amend the Federal Rules of Civil Procedure.<sup>40</sup> Federal courts implement and interpret the rules; under Federal Rule of Civil Procedure 1, the rules are to be “construed, administered, and employed by the court” in order to “secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>41</sup> Finally, Congress can directly legislate procedural rules that apply in federal court—the Private Securities Litigation Reform Act and the Class Action Fairness Act are just a couple of examples.<sup>42</sup> In other words, a handful of institutions and their institutional actors produce the rules that direct how federal civil litigation works.<sup>43</sup>

Yet, a careful look at these sources of federal civil procedure raises its own set of valid questions. Who are the individuals within these institutions? Some are well known—members of Congress and Supreme Court Justices, for example. But, there are many others who directly and indirectly influence how procedural rules and doctrines develop. For example, who are the individuals who argue before the Supreme Court of the United States? Who are the judges that sit on the JPML? Who are the lawyers that litigate the bulk of aggregate litigation cases? Or, who sits on the committees that draft the Federal Rules of Civil Procedure and who most successfully influences those committees? The answers to

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40. See *infra* Part I.B.1.

41. FED. R. CIV. P. 1.

42. Private Securities Litigation Reform Act of 1995, Pub. L. 104–67, 109 Stat. 737 (prescribing various discovery limitations in securities cases); Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d) (2012) (allowing for removal of state-filed class actions to federal court provided certain requirements were met).

43. See Peter Dubrowski, *Preface*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 643 (2013) (noting about half of the states in the United States have adopted the Federal Rules of Civil Procedure at the state level). It is worth noting that many states follow the federal rules by adopting similar rules within their state-court systems. To the extent federal civil procedure serves as a bellwether to state courts, the impact of federal procedure is even greater, as most civil litigation occurs in state court.

these questions reveal that there is a distinctive pattern in the “who.” These individuals are as exclusive as the litigation in which they engage. Visibly, they are overwhelmingly elite, white, and male. Experientially, they have cut their teeth on a certain type of litigation—litigation that involves highly resourced parties disputing complex issues.

The sheer homogeneity of these individuals is interesting in and of itself. Beyond that aesthetic observation, however, this group’s composition is important because these players are responsible for both demanding and constructing much of the policy that governs all of federal civil litigation. In other words, this influential group largely dictates the rules by which litigation resolves, and looking at its composition helps to clarify how the entire federal civil litigation functions.

Indeed, the result is a system of civil procedure that is of the one percent, by the one percent, and for the one percent.<sup>44</sup> In this part, the Article will discuss the two strands of one percent procedure that emerge—the procedure that is by the one percent and the procedure that is for the one percent. The former—procedure by the one percent—examines how institutions like the federal civil rulemaking bodies and the Supreme Court Bar produce and influence rules that benefit the most elite type of litigation, leaving other litigation largely out of the equation. The latter—procedure for the one percent—are the litigation systems that are set up in large part for the benefit of the most exclusive of litigation players. Aggregation procedures—multidistrict litigation and class action—tend to dominate this category. In addition to discussing these categories, the Article will also consider the characteristics of the individuals who are the most influential within each group and how those individuals impact the way procedure develops. Finally, this Part will examine why one percent procedure is problematic by providing examples of its impact on other kinds of litigation.

Before laying out this elite litigation and the players that give rise to one percent procedure, however, there is one important caveat. The Article will not discuss at great length the ideological movements behind one percent procedure. Many of the one percent players are motivated by business or ideological interests, and this Article does not dispute that is

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44. This passage is a modification of President Abraham Lincoln’s famous line from the Gettysburg Address: “and that government of the people, by the people, for the people, shall not perish from the earth.” See Abraham Lincoln, President, United States of America, The Gettysburg Address (Nov. 19, 1863), <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm> [<https://perma.cc/MJ8R-RF4X>].

the case. However, the Article's focus is to demonstrate the existence of one percent procedure, consider whether it is problematic, and offer potential reforms, not to engage in a political debate. It is also worth noting that one percent procedure, unlike much of the rhetoric around one percent versus the ninety-nine politically, is not as clearly a liberal versus conservative dichotomy. As will be discussed, many of the one percent actors in the multidistrict litigation and class action context might be categorized as politically liberal; they are plaintiffs' lawyers after all. Yet, these same lawyers contribute significantly to the development of one percent procedure.

#### A. *Procedure by the One Percent*

In this Part, the Article examines how civil procedure is constructed by the one percent. More specifically, it looks at how a committee system comprised of one-percent players drafts and amends the Federal Rules of Civil Procedure. It also analyzes how the Supreme Court's agenda is influenced by one percenters.

##### 1. *Federal Civil Rulemaking*

The federal civil rulemaking process, which is chiefly carried out by the Civil Rules Committee, has evolved over time. Specifically, the committee's composition and its members' roles in the rulemaking process have changed. The first committee, appointed by the Court in 1934, consisted of only practitioners and academics.<sup>45</sup> The Rules Enabling Act of 1934 had just been passed, and the only process in place was the one that the members of the newly-formed committee envisioned for themselves. Thus, once appointed, the committee set to drafting the new Federal Rules of Civil Procedure.<sup>46</sup> It circulated its drafts to members of the Bar, but there was nothing official about its process—it was mostly ad hoc.<sup>47</sup>

The process has since changed. Currently, because of various modifications to both the Rules Enabling Act and the related processes that guide the committee's work, there is a standard committee structure and practice.<sup>48</sup> The Standing Committee on the Federal Rules of Practice

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45. See Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 274 (2009).

46. *Id.* at 275. They modeled their process off of the American Law Institute's approach to considering proposals.

47. *Id.*

48. *Id.* at 277.

and Procedure sits above five advisory committees, one of which is the Civil Rules Committee.<sup>49</sup> That committee consists of fifteen members, all appointed by the Chief Justice of the Supreme Court for terms of up to six years.<sup>50</sup> In addition, the rulemaking process itself now has multiple steps, including review by the Standing Committee, the Judicial Conference of the Courts, and the Supreme Court.<sup>51</sup> Moreover, the Civil Rules Committee publishes its proposals for public comment, a process that involves written comments and, when appropriate, oral testimony.<sup>52</sup> The process, however multi-layered it may be, still relies greatly on the members of the committee itself. After all, these are the individuals who decide which rules will be pushed forward—these are the individuals who set the agenda for how the Federal Rules of Civil Procedure will develop.

*a. Committee Composition*

In the early years, the Civil Rules Committee was made up of lawyers and academics, but that composition has gone through two shifts—one of slight change from the late 1950s to the early 1970s and one of major change from the early 1970s to present day.<sup>53</sup> The committee was discharged in 1956, but was reconstituted in accordance with new legislation in 1958, adding Judicial Conference oversight and giving rise to the current committee structure.<sup>54</sup> When the new committee started its work in the late 1950s, it still consisted of mostly practicing lawyers and academics, but it added three judges.<sup>55</sup> Starting in the late 1960s, the

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49. *Id.*

50. *Id.*; see also *Committee Membership Selection*, U.S. CTS., <http://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection> [https://perma.cc/82PY-MF47].

51. Coleman, *supra* note 45, at 277–78.

52. *Id.* at 278–79.

53. Burbank & Farhang, *supra* note 9, at 1563–69.

54. See Order Discharging the Advisory Committee, 352 U.S. 803 (1956), Pub. L. No. 85-313, 72 Stat. 356 (1958); REPORT OF THE PROCEEDINGS OF THE REGULAR ANNUAL MEETING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6–7 (Sept. 17–19, 1958).

55. See Albert B. Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A. J. 772, 774 (1961). In 1961, the Committee consisted of eight attorneys, four professors, and three judges. *Id.* Maris noted that the members of the Committees “constitute[d] a nationally known group of experienced judges, lawyers and law teachers” who “were carefully selected by the Chief Justice so as to be widely representative of the Bench, the Bar and the law teachers.” *Id.* He wrote that the group included “representative lawyers engaged in the various types of practice, in the legal specialties, and those active in the bar associations.” *Id.* They were “widely distributed geographically” and appointed to overlapping four-year appointments, renewable only once “thus assuring the infusion of new blood and new ideas into the program as the years pass.” *Id.*

Chief Justice began appointing an even greater number of judges to the committee, a trend that has continued to this day.<sup>56</sup> Professors Stephen Burbank and Sean Farhang have closely studied the committee's composition and determined that during the period from 1958 to 1971—before the second shift in composition began—“there were never less than seven . . . practitioners,” “never more than three . . . judges,” and “never less than three academics” on the committee.<sup>57</sup>

The committee has profoundly changed between 1971 and the present day, with judges taking up more seats than practitioners and academics combined.<sup>58</sup> Today, the committee is made up of nine judges—seven federal district court judges, one federal appellate court judge, and one state judge—four practitioners, one representative from the Department of Justice, and one academic.<sup>59</sup> Two professors serve as reporters to the committee, but they do not exercise any voting power.<sup>60</sup>

Thus, more judges, fewer academics, and a somewhat static number of practitioners now serve on the committee. This shift in composition, on its own, is worth investigating. But, there is an additional shift in composition: who the practitioners on the committee represent in their professional practice and who—a Democrat or Republican president—appointed the judge members of the committee to their Article III judgeships.

The practitioners on the committee are now disproportionately corporate defense lawyers, and the handful of plaintiffs' lawyers tend to specialize in complex litigation. For example, from 1960 to 1971, a total of twelve practitioners served on the committee at one time or another.<sup>61</sup> Of those, eight practiced law in firms that represented both plaintiffs and defendants, three were in firms that primarily represented plaintiffs, and one was in a firm that primarily represented defendants.<sup>62</sup> The

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56. Coleman, *supra* note 45, at 290.

57. Burbank & Farhang, *supra* note 9, at 1566; *see also* Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1144–52 (2015) (reviewing the current membership of the Civil Rules Committee). For an article discussing the connections between large law firms and the Committee, *see generally* Mark W. Bennett, *Essay: The Grand Poobah and Gorillas in Our Midst: Enhancing Civil Justice in the Federal Courts—Swapping Discovery Procedures in the Federal Rules of Civil and Criminal Procedure and Other Reforms Like Trial by Agreement*, 15 NEV. L. J. 1293 (2015).

58. Burbank & Farhang, *supra* note 9, at 1568.

59. *Committee Membership Selection*, *supra* note 50

60. *Id.*

61. Burbank & Farhang, *supra* note 9, at 1566–67.

62. *Id.* As the authors note, the classification system employed—categorizing a lawyer as “defendant” or “plaintiff” or “individual” or “business” only if he represented more than 75% of

practitioner committee members of today bear little resemblance to this picture. The defense bar is much more dominant in its committee membership: according to Burbank and Farhang's study, there has been "a substantial shift [away from plaintiff and] toward defense practitioners" on the committee.<sup>63</sup> In addition, the practitioner profile has shifted from lawyers with a mix of clients to lawyers that specialize in representing businesses or individuals, but rarely both.<sup>64</sup> Plaintiffs' lawyers on the early committee represented both individual and business interests, but the plaintiffs' lawyers on the modern committee represent individuals or classes almost exclusively.<sup>65</sup> On the other side, the defense lawyers on the committee represent solely business interests.<sup>66</sup>

The changes in judicial composition are also pronounced. During the 1960s, four judges served on the committee.<sup>67</sup> Two were appointed by a Democratic president and two were appointed by a Republican president.<sup>68</sup> According to Burbank and Farhang's study, this parity no longer exists. Comparing the overall number of Democratic and Republican appointed judges to the number of such judges sitting on the committees from 1970 to 2013, the authors found that, adjusting for the population of judges overall, Republican appointees served on the Civil Rules Committee at a 161% greater rate than Democratic appointees.<sup>69</sup> In other words, "[b]eing appointed by a Democratic president is significantly associated with a lower probability of serving on the Committee."<sup>70</sup> Judges who were appointed by a Republican president have a 2.3 times greater chance of being appointed to the committee than their Democratic-appointee counterparts.<sup>71</sup>

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that type of client—meant that most of the practitioners on the early committees could not be categorized. *Id.* at 1569–70. Instead, many were categorized as "both." This is in stark contrast to modern practitioners who are one category or the other. *Id.*

63. *Id.* at 1569.

64. *Id.* at 1570.

65. *Id.*

66. *Id.* As Burbank and Farhang note, this trend may be due to changes in the broader legal market, rather than the Chief Justice's preferences. *Id.* Nonetheless, the information is significant and worth noting because—no matter why the change has happened—it will have an impact on how the committee functions.

67. *Id.* at 1566.

68. *Id.*

69. *Id.* at 1573.

70. *Id.* at 1574.

71. *Id.* The data on judicial appointments is not limited to party affiliation, however. Burbank and Farhang's study also found a predisposition for the appointment of white men. *Id.* A white federal judge had a 5.1 times greater chance of being appointed to a committee than a non-white judge. *Id.* These statistics, like the party affiliation stats, are adjusted for overall population. In other words,

In sum, the committee membership is a fairly homogeneous group—a group that arguably has a conservative ideological bent and which also has a practice experience that is grounded in defending corporations.<sup>72</sup> However, even arguably non-conservative practitioner members of the committee share homogeneity with the rest of the committee members. Though they represent plaintiffs, as one commentator has put it, they “operate in the rarified world of complex litigation.”<sup>73</sup> As will be discussed later in this Article, the composition of the committee appears to deeply influence how the committee functions and what kinds of changes it makes.

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the authors found that non-white judges accounted for 11% of the “judge years” that they looked at, but only accounted for 2% of the committee service years that they observed. *Id.* This is in contrast to gender as an indicator, which seems to be insignificant to probability of committee service in this case. *Id.* at 1575.

72. See *Meeting Minutes*, U.S. CTS., <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes> [<https://perma.cc/NF6A-UKL5>] (providing links to meeting minutes for the Judicial Conference Committee on Rules and Practice and Procedure. The author reviewed the minutes to identify the names of committee members and the durations of their terms.). A final “type” of member is the academic appointment to the committee. While the number of academic appointments is down to only one, the composition of that sole member is of interest. Since 1985, there have been seven voting academic members of the committee: Professor Maurice Rosenberg (Columbia Law School, 1985–87); Professor Mark Nordenberg (University of Pittsburgh, 1988–93); Professor Thomas Rowe (Duke Law School, 1994–99); Professor John Jeffries (University of Virginia, 1999–2005); Professor Myles Lynk (Arizona State University, 1998–2004); Professor Stephen Gensler (University of Oklahoma, 2005–11); and Professor Robert Klonoff (Lewis & Clark, 2011–present). All seven are men and six out of the seven are white. The most recent appointment, Bob Klonoff, appears to have the most litigation experience, having served as the Assistant to the Solicitor General during the Reagan Administration and as a law partner at Jones Day. See *Law Faculty: Robert Klonoff*, LEWIS & CLARK L. SCHOOL, <https://law.lclark.edu/live/profiles/310-robert-klonoff> [<https://perma.cc/HM5J-3BLG>]. Others have substantial practice experience as well. Professor Myles Lynk, who worked as an associate at various law firms, became a partner at Dewey Ballantine and also served as Special Assistant to the Secretary of Health, Education, and Welfare. See *Myles V. Lynk Curriculum Vitae*, ARIZ. ST. UNIV., <https://apps.law.asu.edu/files/faculty/cvs/lynkmyles.pdf> [<https://perma.cc/9C9N-3JSM>]. Professor Maurice Rosenberg practiced law at Cravath, Swain and Moore and also served as the Assistant Attorney General during the Carter Administration. See *Legal Scholar Rosenberg is Dead at 75*, 21 COLUM. UNIV. REC. (Sept. 8, 1995), [http://www.columbia.edu/cu/record/archives/vol21/vol21\\_iss1/record2101.34.html](http://www.columbia.edu/cu/record/archives/vol21/vol21_iss1/record2101.34.html) [<https://perma.cc/4B3Y-4AJU>].

73. See also Elizabeth Thornburg, *Cognitive Bias, the “Band of Experts,” and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 762 (2016) (stating that Duke Law School’s Judicial Center Advisory Council “held an invitation-only conference in November 2014 (under Chatham House rules), whose ultimate goal is to develop a ‘best practices document, which will provide authoritative guidance on implementing the proportionality standard.’”) (citing *Implementing Discovery Proportionality Standard Conference (Invitation Only)*, DUKE L., <https://law.duke.edu/judicialstudies/conferences/november2014> [<https://perma.cc/PN7C-KCJW>]).



b. *Committee Member Roles and Unofficial Involvement*

The composition of the official committee is not the only aspect of civil rulemaking that is worth interrogating. Other aspects include the lack of turnover on the committee's composition and the fluidity between official and unofficial committee activities. Committee members often serve for periods beyond their official six-year terms, either because of changes in their roles, which lead to longer official service, or because they participate in unofficial rulemaking activities that keep them deeply engaged in the rulemaking process.<sup>74</sup>

One example is quite illuminating: scholars have scrutinized the close connection between the Duke University School of Law and the federal civil rulemaking process, which has effectively blurred the line between formal and informal rulemaking processes. In 2010, the law school hosted what came to be known as the 2010 Duke Civil Litigation Conference.<sup>75</sup> Academics, judges, and practitioners attended the conference to discuss the state of federal civil litigation.<sup>76</sup> In particular, the conference focused on why civil litigation is so expensive and how that problem could be fixed.<sup>77</sup> To that end, groups like the American College of Trial Lawyers, the Institute for the Advancement of the American Legal System, and the Federal Judicial Center reported on studies they had conducted.<sup>78</sup> These studies—and the conference as a whole—laid the foundation for the Civil Rules Committee's adoption of the most recent collection of discovery amendments, including the controversial proportionality rules.

Following this conference, the Duke Center for Judicial Studies was founded. Its stated focus was “on two core areas of programming: scholarly study of the judiciary and educational programs for judges.”<sup>79</sup> As to the former, in its original announcement, the Center hoped to “host academic conferences” and to “fund graduate fellows and visiting scholars” in their judicial research.<sup>80</sup> As to the latter, the Center planned to offer a master's degree in judicial studies, a program meant to “help

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74. See *supra* notes 87–97 and accompanying text.

75. *Duke Law Hosts Conference on Litigation in Federal Courts, May 10–11*, DUKE L. NEWS (May 5, 2010), <https://law.duke.edu/news/4933/> [<https://perma.cc/659X-PKLE>].

76. John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 539 (2010).

77. *Id.* at 538.

78. *Id.* at 538–39.

79. *Duke Law Announces New Center for Judicial Studies*, DUKE L. NEWS (June 6, 2011), <https://law.duke.edu/news/6524/> [<https://perma.cc/GGR8-ETM9>].

80. *Id.*

judges better understand the institution of the judiciary, judicial systems around the world, and current research on judicial decision-making.”<sup>81</sup> This master’s program was to be offered over two summers in four to six week intensive sessions.<sup>82</sup> The original announcement also stated that “shorter, more targeted continuing education programs also will be offered, including seminars on topics of rapid legal change or areas that require a high degree of specialized knowledge such as international law, human rights law, global financial markets and regulation, and international arbitration.”<sup>83</sup>

Since the founding of the Center, it has hosted thirteen conferences.<sup>84</sup> The subjects covered by these programs range from a discussion of presidential and judicial oversight of administrative agencies to multidistrict litigation to patent law.<sup>85</sup> All of these programs include an array of distinguished speakers, including faculty and members of the judiciary.<sup>86</sup> The conferences are invitation-only and are limited to “prominent judges, lawyers, and academics” who are expected to “discuss important issues fully and frankly in a collaborative environment.”<sup>87</sup> An individual interested in attending a conference can contact the Center, and if she meets the Center’s standards, she will be invited, can pay the fee, and attend.<sup>88</sup>

The Center has an advisory council that is made up of distinguished lawyers. This advisory council includes current Civil Rules Committee members like Elizabeth Cabraser and former members such as Sheila Birnbaum, Daniel Girard, and Chilton Varner.<sup>89</sup> Finally, the Center’s Board consists of four judges, one of whom is former member and chair

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81. *Id.*

82. *Id.*

83. *Id.*

84. *The Duke Conferences*, DUKE L. CTR. FOR JUD. STUD., <https://law.duke.edu/judicialstudies/conferences/> [<https://perma.cc/2NB9-E2S3>]. As of August 2016, the Center hosted thirteen conferences, but had three additional conferences planned.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Advisory Council for the Duke Conferences*, DUKE L. CTR. FOR JUD. STUD., <https://law.duke.edu/judicialstudies/conferences/advisorycouncil/> [<https://perma.cc/P6FK-AB56>]. Members also include general counsels of major U.S. companies such as David Howard from Microsoft, Robert Hunter from Altec, Inc., JoAnn Lee from ExxonMobil, and Anthony Walsh from GE’s Power & Water. *Id.*; see also Thornburg, *supra* note 73, at 7; *Committees on Rules of Practice and Procedure Chairs and Reporters*, U.S. CTS., <http://www.uscourts.gov/file/committee-rules-practice-and-procedure-chairs-and-reporters> [<https://perma.cc/MP8G-U6FQ>].

of the Civil and Standing Committees, Judge Lee Rosenthal.<sup>90</sup> Additional judges with current ties to the rulemaking committees previously served on this council, but they have since removed themselves from council service.

Thus, the connections between the Duke Center for Judicial Studies and the federal rulemaking process are strong. This has led to some criticism of the Center's activities and how those activities may be viewed as an extension of the civil rulemaking process. At the heart of the controversy is a set of "guidelines" facilitated and developed by the Center.<sup>91</sup> These guidelines were drafted and adopted months before the new discovery rules went into effect on December 1, 2015, and are meant to provide judges with guidance as they implement the new discovery rules. Scholars have criticized the drafting of the guidelines, in part, because they appear to be part of the official civil rulemaking process.<sup>92</sup> Garnering further criticism is the Center's ongoing program, "*Hello 'Proportionality,' Goodbye 'Reasonably Calculated': Reinventing Case Management and Discovery Under the 2015 Civil Rule Amendments.*"<sup>93</sup> That program, led by former members of the rulemaking committees, has travelled to ten courthouses throughout the country to provide "training" on the recently-adopted discovery amendments.<sup>94</sup> Again, some commentators have questioned the use of privately generated guidelines in training sessions that have the appearance of an official rulemaking activity.<sup>95</sup>

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90. *Center Board*, DUKE L. CTR. FOR JUD. STUD., <https://law.duke.edu/judicialstudies/board/> [<https://perma.cc/K5MH-HS38>]; ADVISORY COMM. ON CIV. RULES, *supra* note 23.

91. *Guidelines and Practice for Implementing the 2015 Discovery Amendments to Achieve Proportionality*, DUKE L. CTR. FOR JUD. STUD. (July 20, 2016) (annotated version), [https://law.duke.edu/sites/default/files/centers/judicialstudies/civil\\_rules\\_project\\_draft-july\\_16\\_formatted.pdf](https://law.duke.edu/sites/default/files/centers/judicialstudies/civil_rules_project_draft-july_16_formatted.pdf) [<https://perma.cc/AB79-3UJ6>].

92. *See* Thornburg, *supra* note 73, at 7; Patricia W. Moore, *Law Professor Challenges the Seeming Federal Endorsement of Duke Nonbinding "Guidelines" on Proportionality Amendments*, CIV. PROCEDURE & FED. CTS. BLOG (Nov. 17, 2015), <http://lawprofessors.typepad.com/civpro/2015/11/law-professor-challenges-the-seeming-federal-endorsement-of-duke-nonbinding-guidelines-on-proportion.html> [<https://perma.cc/V78L-R2WH>]; Suja Thomas, *Via Duke, Companies are Shaping Discovery*, LAW360 (Nov. 4, 2015), <http://www.law.illinois.edu/news/article/3175> [<https://perma.cc/9E3S-NB9F>].

93. *Hello 'Proportionality,' Goodbye 'Reasonably Calculated': Reinventing Case Management and Discovery Under the 2015 Civil Rule Amendments*, DUKE L. CTR. FOR JUD. STUD. (May 9, 2016), <https://law.duke.edu/judicialstudies/conferences/proportionality/> [<https://perma.cc/FM8R-JRD3>].

94. *Id.* Judge Lee Rosenthal, a former chair of both the Civil and Standing Committees, and Professor Steven Gensler, a former Civil Rules Committee member, are listed as the leaders of these discussions. *Id.*

95. *See* Thomas, *supra* note 92.

Whether that criticism is reality or perception, what leads to further concern about the Center is that many of its strongest financial sponsors are large corporations such as Merck & Co., Pfizer Inc., and Bayer Corp.<sup>96</sup> Law firms also sponsor the Center—and those firms represent both plaintiffs and defendants—but even then, the plaintiffs’ firms, much like the lawyers who serve on the Civil Rules Committee, primarily represent classes of plaintiffs in large complex cases.<sup>97</sup> These connections have also led to renewed questions about the 2010 Duke Civil Litigation Conference and its part in the most recent discovery rule amendments.<sup>98</sup> For example, it is accepted that the conference gave rise to the discovery amendments, including the controversial proportionality rules; yet, as at least one commentator has noted, there was no consensus or demand for changes to proportionality at the conference.<sup>99</sup>

The ties between large corporate interests and the rulemaking process appear to exist at both an official and unofficial level. As already discussed, large corporations and law firms that engage in one percent litigation already have heightened access to the official rulemaking process. Similar access to these unofficial processes raises concerns over how the lines between what is official and unofficial have indeed started to blur. Moreover, committee members—past and present—tend to serve in multiple roles that are also sometimes connected to official and unofficial rulemaking activities.<sup>100</sup> Overall, the rulemaking process, while it has always been elite, is now elite in a way that skews in the direction of serving the interests of high stakes, complex litigation. As will be discussed later in Part II, there is good reason to be concerned about this homogeneity.

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96. *Duke Conference Sponsors*, DUKE L. CTR. FOR JUD. STUD., <https://law.duke.edu/judicialstudies/sponsors/> [https://perma.cc/H6G8-PPFH].

97. *Id.* For example, the two major plaintiffs’ firms are Girard Gibbs LLP and Lief Cabraser Heimann & Bernstein LLP.

98. Hatamyar Moore, *supra* note 57, at 1088–89.

99. *Id.* at 1091 (“Notably, the report specifically stated that the definition of the scope of discovery did not need to be changed.”).

100. For example, the most recent Chair of the Civil Rules Committee, Judge Campbell, continues to serve on the Civil Rules Committee in an unofficial capacity by leading a subcommittee study into court pilot programs. See ADVISORY COMM. ON CIV. RULES, COMMITTEE AGENDA REPORT 509 (2015), <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-november-2015> [https://perma.cc/CG43-JC4P]; Standing Committee Meeting Minutes, January 1, 2016, at 12–13, <http://www.uscourts.gov/rules-policies/archives/meeting-minutes/committee-rules-practice-and-procedure-january-2016> [https://perma.cc/ZR3X-TB2B]. He is doing this work on behalf of the committee even though his term with the committee has ended.

## 2. *Supreme Court Bar*

The Supreme Court generally chooses which cases it will hear, and with this discretion comes a great deal of power. The Court determines whether it or not it will decide an issue and, in that way, it heavily dictates how the law develops and in which directions it will move.<sup>101</sup> Thus, the cases that are presented to the Court for a certiorari decision are worth examining. As critical as the substantive make-up of the thousands of cases that request certiorari is who is behind those cases.<sup>102</sup> Indeed, the lawyers who bring these cases are an increasingly important part of how Supreme Court law develops.

Richard Lazarus argued in 2008 that the previous two decades had seen the re-emergence of an elite Supreme Court Bar, a select group of advocates who had and continue to have a profound impact on which cases the Court hears, and to some degree, the way the Court decides those cases.<sup>103</sup> The statistics appear to support his thesis. While the Office of the Solicitor General always had good success before the Court and gave former members of its office a stellar reputation upon their departure, the privatization of that expertise did not take hold until the mid-1980s.<sup>104</sup> At that time, large law firms like Sidley Austin and Mayer Brown & Platt hired former Solicitors General as partners in their firms to start a Supreme Court practice focused on representing well-resourced private clients.<sup>105</sup> Once those firms were successful, other firms joined in the trend, with some firms even spinning off standalone Supreme Court practice-based firms.<sup>106</sup> Finally, leading law schools like Harvard and Stanford founded Supreme Court clinics that married private

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101. Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001–2015*, VILL. L. REV. (forthcoming) (manuscript at 4), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2715631](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715631) [<https://perma.cc/Z5AW-TLT2>] (“By choosing to hear certain cases with specific facts, the Court decides which issues it will tackle and which to avoid. In doing so the Court must decide between issues that are more or less controversial and more or less salient to the general public.”).

102. *Id.* at 4–5. In the 2013 Supreme Court term, 7,326 writs of certiorari were filed, with the Court granting review of approximately 1% of those cases. *Id.* at 2.

103. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008). The first notable “Supreme Court Bar” occurred during the early nineteenth century when infamous lawyers like Francis Scott Key, Daniel Webster, and William Pinkey argued hundreds of cases. *Id.* at 1489–90.

104. *Id.* at 1492–97.

105. *Id.* at 1498.

106. *Id.* at 1499–1501.

practitioners, clinical faculty, and students in order to take on high-profile pro bono cases.<sup>107</sup>

According to Lazarus, the emergence and success of this specialized bar is due to two factors. First, a movement by corporations to obtain favorable results in the Court.<sup>108</sup> Second, Rehnquist's contraction of the Court's docket, which meant that experts would have a better chance of vying for those cherished spots.<sup>109</sup> Whatever the reasons may be, the elite Supreme Court Bar is here; moreover, it is obtaining phenomenal results for its clients. For example, in the 2006 October Term, the U.S. Chamber of Commerce won thirteen out of its fifteen cases, its "highest winning percentage [to date] in its [then] 30-year history."<sup>110</sup>

The Supreme Court game is an especially complicated one. The first measure of success is whether clients can get their case reviewed by the Supreme Court in the first place. The law firms that represent clients like the U.S. Chamber of Commerce are successful, across the board, with the leading private firms obtaining grant rates of anywhere from 1% to 25%, depending on the particular year.<sup>111</sup> For example, in the 2007 October Term, members of the elite Supreme Court Bar filed thirty-five of the sixty-five cases where the Court granted certiorari.<sup>112</sup> They appear to have some influence on what cases the Supreme Court will take.

The second measure of success is whether the attorney wins the case, which is heavily influenced by the briefing and the argument. The briefing is handled by the firms that obtained certiorari in the first place and so there again, the elite Supreme Court Bar is well in place. But, when it comes to the oral argument, it is not just firms that are dominant, it is particular individuals. In the 2007 October Term, 24% of the total oral arguments were done by individuals who had more than one oral argument during that term, and 28% of the oral arguments were done by someone who had argued ten or more times before the Court in the aggregate.<sup>113</sup>

Other studies have confirmed that the elite Supreme Court Bar exists. As noted earlier, a recent Reuters series, *The Echo Chamber*, found that from 2004 to 2012, an elite "sixty-six of the 17,000 lawyers who petitioned the Supreme Court" were able to get their clients' cases heard

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107. *Id.* at 1502.

108. *Id.* at 1503.

109. *Id.* at 1503–04.

110. *Id.* at 1490–91.

111. *Id.* at 1515–16.

112. *Id.* at 1517.

113. *Id.* at 1520.

at about six times a higher rate than other private attorneys.<sup>114</sup> These particular attorneys accounted for less than 1% of the lawyers who filed petitions before the Supreme Court, but were involved in 43% of the cases that the Court decided.<sup>115</sup> In another study looking at non-solicitor general attorneys, the cert grant rates for the top ten attorneys ranged from 18% to 28%.<sup>116</sup> This same study also looked at what happened to certiorari requests when many of these same attorneys were arguing against cert.<sup>117</sup> Here again, the statistics show that members of the Supreme Court Bar are most successful; their denial rates ranged from a low of 62.5% to a high of 94.7%.<sup>118</sup> By all accounts, the members of this elite group seem to have the ear of the Supreme Court.

The next question is: who are these individuals? The Reuters study determined that they mostly work for corporate parties, with fifty-one of the sixty-six working for “law firms that primarily represented corporate interests.”<sup>119</sup> More than half of them clerked for the Supreme Court.<sup>120</sup> They are no doubt well-educated, pedigreed, and experienced, but this translates into quite a homogeneous group. Moreover, they come from a standard group of law firms. One study found that from 2009 to 2012, a collection of just a dozen firms, including Sidley Austin and Jones Day, were the most prominent players in the certiorari stage of Supreme Court practice, with lawyers from those firms successfully garnering a cert grant 18% of the time as opposed to the average of 5%.<sup>121</sup>

Finally, the question is whether this group is actually winning cases for its clients. There too, the studies say yes. For example, between 2003 and 2006, the Court heard eleven antitrust cases.<sup>122</sup> (This is in contrast to

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114. Biskupic, Roberts, & Shiffman, *supra* note 15.

115. *Id.*

116. Feldman & Kappner, *supra* note 101, at 27. The top ten attorneys were Christopher Landau, Carter Phillips, Charles A. Rothfeld, Thomas C. Goldstein, Eric Schnapper, David C. Frederick, Theodore B. Olson, Paul D. Clement, Andrew Pincus, Seth P. Waxman, and Jeffrey Fisher. *Id.*

117. *Id.* at 29–30.

118. *Id.* at 30–31. Christopher Landau’s cert denial rate was 94.7% in the eighteen cases where he was listed as a responding attorney.

119. Biskupic, Roberts, and Shiffman, *supra* note 15 (the study also found that of the sixty-six lawyers, “[sixty-three] are white,” and “only eight are women”).

120. *Id.*

121. *Id.* A larger group of thirty-one firms was able to achieve a 44% success rate in grants of certiorari. *Id.* Feldman and Kappner’s study similarly found that the law firms housing members of the Supreme Court Bar had greater success at the cert stage. Feldman & Kappner, *supra* note 101, at 37. Between 2012 and 2015, Goldstein & Russell had a success rate of 30%, Latham & Watkins 28.3%, and Stanford Law School’s Supreme Court Litigation Clinic 25%. *Id.*

122. Lazarus, *supra* note 103, at 1532.

the two antitrust cases it heard between 1992 and 2002.)<sup>123</sup> In all eleven of the cases, the petitioners seeking certiorari were defendants, and in ten out of the eleven, counsel was a member of the elite Supreme Court Bar (the eleventh was the Solicitor General). In all ten of those cases, the petitioner won.<sup>124</sup> As one scholar noted, “[t]he private Supreme Court Bar has . . . influenced the thinking of the Court, persuaded them that certain areas of the law require their attention, and then, on that basis, secured grants of certiorari.”<sup>125</sup> Antitrust is just one area where there has been a rise in Supreme Court attention. Another area is tort liability and limits on punitive damages.<sup>126</sup>

However, the influence of the elite Supreme Court Bar is not limited to the business community. The elite Supreme Court Bar tends to work for businesses, representing them 77% of the time.<sup>127</sup> But, members of this group also represent individuals the remaining 23% of the time.<sup>128</sup> Even when representing individuals, the impact of this group of lawyers is profound. The Court accepted 30% of the individual petitions filed by members of the elite Supreme Court Bar compared to only 1% of petitions filed by other lawyers.<sup>129</sup>

Yet, even though the practice areas vary, the bulk of the cases in which the elite Supreme Court Bar is involved are those that are of great interest to the business community.<sup>130</sup> And, by all accounts, the business community is winning. Aside from the actual win rates, the Court’s willingness to take a look at such issues is a substantial advantage for the parties championing these causes. That is because, historically, the grant of certiorari is a sign. The Court does not always reverse in the case before it, but in most years, the Court’s reversal rate runs about 65%.<sup>131</sup> In other words, gaining a grant of certiorari really is a win for clients because their chances of succeeding are quite high. Beyond that, however, the win rates for the clients of the elite Supreme Court Bar have increased.<sup>132</sup> For instance, the Court reversed in favor of the petitioner-defendant in all ten of the antitrust cases discussed earlier,

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123. *Id.*

124. *Id.*

125. *Id.* at 1532.

126. *Id.* at 1534.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 1532.

131. *Id.* at 1540.

132. *Id.* at 1539–49.



notably even overruling its own precedent in order to do so.<sup>133</sup> According to another study, the Roberts Court, during its first nine years, ruled for business parties 60% of the time, in contrast to the Rehnquist Court's final nine years, which only ruled in favor of business parties 48% of the time.<sup>134</sup>

In sum, the specialized Supreme Court Bar appears to be a phenomenon that is here to stay. And, much like the individuals who dominate the rulemaking committees, members of this elite group share many of the same characteristics. There are, of course, determinative factors other than the name of lawyer filling the petition for certiorari—whether the party is a repeat player, the salience of the issue on appeal, the court from which the decision is being appealed, and the political timing of the case.<sup>135</sup> Moreover, there is an argument that the success of the elite Supreme Court Bar is due to selection bias—the idea that these specialists choose the cases that are most likely to win.<sup>136</sup> However, at least one current study has found that “litigants, in the aggregate, have considerably higher odds of success when they have Supreme Court specialists as their counsel . . . [a] difference [that] cannot simply be ascribed to selection bias.”<sup>137</sup> Even if there is selection bias or other factors affecting these studies, it appears the identity of the lawyer bringing and arguing the case has some degree of impact on what the Court looks at and what it decides. That these individuals then share similar backgrounds and experiences is worthy of consideration when determining how one percent procedure develops.

### *B. Procedure for the One Percent*

In contrast to procedures that are made by the one percent, this section will discuss litigation procedures that have become litigation tools for the one percent. While they are available transsubstantively,

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133. *See id.* at 1548; *see, e.g.*, *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 880 (2007) (overruling Court precedent regarding per se rules in vertical agreements).

134. Biskupic, Roberts, & Shiffman, *supra* note 15.

135. Feldman & Kappner, *supra* note 101, at 18, 20.

136. Selection bias “is defined as a process through which study subjects are selected in a way that can misleadingly increase or decrease the magnitude of an association.” Bruce R. Parker, *Understanding Epidemiology and Its Use in Drug and Medical Device Litigation*, 65 DEF. COUNS. J. 35, 42 (1998) (internal quotations omitted).

137. Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 145 (2013). Fisher explains, “[e]ven holding all else constant, specialists’ clients prevail at significantly higher rates than nonspecialists’ clients. Presumably, this comparative advantage is even stronger at the certiorari stage, where expertise comes more directly into play.”

these procedures have developed in such a way that they tend to work in favor of, and be tailored to, the demands of the one percent litigation players. This Article will examine examples in the context of aggregate litigation—class action, multidistrict litigation, and the settlement mechanisms for mass litigation.

This section will also analyze how these procedures create further hierarchies within the one percent. For example, multidistrict litigation is a procedure that often works in favor of the one percent, but even within multidistrict litigation, there is a pecking order. In economics, the top 0.01% consists of roughly 14,000 families who hold 5% of the United States income.<sup>138</sup> Multidistrict litigation similarly benefits the most elite of the elite—certain lawyers who are repeat players in this kind of litigation have far more power than their outsider elite brethren.

Aggregate litigation is a large umbrella under which many overlapping civil litigation mechanisms can be covered. For ease of discussion, the Article separately discusses multidistrict litigation, class action, and settlement. Yet, there is much fluidity among these three categories. For example, in the recent litigation over the “Deepwater Horizon” oil spill, the case was consolidated into a multidistrict litigation action before Judge Carl Barbier, where pieces of it were certified for class settlement and handled by a claims administrator.<sup>139</sup> No doubt that the categories that will be discussed necessarily cross over one another and involve many of the same individuals. Yet, for ease of discussion, this section will treat the categories separately and will attempt to avoid any unnecessary redundancy while doing so.

### 1. *Multidistrict Litigation*

Multidistrict litigation (MDL) was created in 1968 by statute.<sup>140</sup> It allows for the consolidation of a set of cases to one judge for resolution of various pretrial matters.<sup>141</sup> The consolidation is ordered by a so-called Judicial Panel on Multidistrict Litigation (JPML) when and if that panel determines that the civil actions at issue “involv[e] one or more common questions of fact” and that transfer of the “proceedings will be for the

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138. Ford Fessenden & Alan McLean, *Where the 1 Percent Fit in the Hierarchy of Income*, N.Y. TIMES (Oct. 28, 2011), [http://www.nytimes.com/interactive/2011/10/30/nyregion/where-the-one-percent-fit-in-the-hierarchy-of-income.html?\\_r=0](http://www.nytimes.com/interactive/2011/10/30/nyregion/where-the-one-percent-fit-in-the-hierarchy-of-income.html?_r=0) [<https://perma.cc/4RSK-872B>].

139. See DEEPWATER HORIZON CLAIMS CENTER, <http://www.deepwaterhorizoneconomicsettlement.com/> [<https://perma.cc/5U25-872P>].

140. See 28 U.S.C. § 1407 (2012); Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5, 29 (1991).

141. 28 U.S.C. § 1407(a) (2012).

convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.”<sup>142</sup> The basic premise of the statute is that the panel can review a group of related cases and consolidate them in order to streamline the resolution of related pretrial matters. Congress intended for each of the cases to be returned to their original places of filing once that review is done. The reality is quite different, however, with about 97% of MDL cases ending in the transferee district court in settlement or dismissal.<sup>143</sup>

The multidistrict litigation statute was inspired by litigation involving private antitrust actions against electrical equipment manufacturers.<sup>144</sup> These cases arose following the successful litigation of antitrust claims by the United States government against those same manufacturers.<sup>145</sup> After that litigation, more than 1800 separate damage actions were filed in more than 30 federal district courts.<sup>146</sup> Because there was no power to consolidate all of these cases before one district judge, the Judicial Conference created a subcommittee to assist the various federal judges in coordinating, to the degree they could, resolution of much of the overlapping pretrial matters.<sup>147</sup> Once that subcommittee had done its work, the Judicial Conference set its sights on creating a statute that would allow for the kind of consolidation that could have resolved the electrical manufacturer cases more easily.<sup>148</sup>

Thus, multidistrict litigation was born. The JPML is made up of seven circuit and district court judges.<sup>149</sup> These judges are appointed by the Chief Justice of the United States Supreme Court.<sup>150</sup> The JPML can seek to consolidate cases on its own or it can consolidate cases (or not) on the basis of a motion made by one of the parties to the potentially consolidated action.<sup>151</sup> If the JPML declines to consolidate the cases, the cases remain where they are and nothing else happens.<sup>152</sup> However, if

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142. *Id.*

143. Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U.L. REV. 109, 128 (2015).

144. Resnik, *supra* note 140, at 31.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. 28 U.S.C. § 1407(d) (2012).

150. *Id.*

151. *Id.* § 1407(c)(i), (ii).

152. Resnik, *supra* note 140, at 34. There is no appeal of a decision to decline consolidation, but if the JPML grants consolidation, an appeal can be taken only by an “extraordinary writ.” 28 U.S.C. § 1407(e) (2012).

the JPML decides to consolidate the cases, the panel must then also decide on a judge, known as a “transferee judge,” to handle all of the pretrial matters in the case.<sup>153</sup> As will be discussed further, this transferee judge wields a great deal of power. While the statute envisioned that cases would return to their original places of filing following resolution of pretrial matters, the reality is that only 3% of cases return.<sup>154</sup> Many of these cases settle, and that settlement is heavily impacted by the transferee judges and the decisions they make.

In the beginning, multidistrict litigation was not used as often as one might think. The class action rule, Rule 23, had been adopted only two years earlier, and it appeared to be the mechanism of choice for those pursuing aggregate claims. But, as certification of class action cases has grown more difficult,<sup>155</sup> multidistrict litigation has increased in use and in prominence. For example, major cases such as the Vioxx litigation, the British Petroleum oil spill, and Toyota’s defective acceleration cases have been handled using multidistrict litigation.<sup>156</sup> The increase in MDL cases has been criticized, with some scholars arguing that “MDL involves something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies.”<sup>157</sup> Due in part to its newfound prominence and in part to the unique set of circumstances under which MDL functions, the players in multidistrict litigation are worth scrutinizing.

The individuals involved in multidistrict litigation fall into three general categories. First, the JPML, the body that decides whether and how cases are consolidated. Second, the transferee judge, the judge that dictates how the case proceeds pretrial and exercises an enormous amount of power over which attorneys take the lead and how the case might or might not settle. Finally, the lawyers who end up leading the

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153. 28 U.S.C. § 1407(c)(i), (ii).

154. See Redish & Karaba *supra* note 143.

155. See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 781–84 (2012) (summarizing developments that are making it harder to certify class actions); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731 (2013) (“The class action device, once considered a ‘revolutionary’ vehicle for achieving mass justice, has fallen into disfavor.”) (citation omitted).

156. Alex Berenson, *Merck Is Said to Agree to Pay \$4.85 Billion for Vioxx Claims*, N.Y. TIMES, Nov. 9, 2007, at A1, [http://www.nytimes.com/2007/11/09/business/09merck.html?\\_r=0](http://www.nytimes.com/2007/11/09/business/09merck.html?_r=0) (last visited Oct. 2, 2016); John Schwartz, *Accord Reached Settling Lawsuit over BP Oil Spill*, N.Y. TIMES, Mar. 3, 2012, at A1, <http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html> (last visited Oct. 2, 2016); Bill Vlasic, *Toyota Agrees to Deal in Suit over Speedups*, N.Y. TIMES, Dec. 27, 2012, at A1, <http://www.nytimes.com/2012/12/27/business/toyota-settles-lawsuit-over-accelerator-recalls-impact.html> (last visited Oct. 2, 2016).

157. Redish & Karaba, *supra* note 143, at 111.

case and on the so-called steering committees, who also exercise a great deal of power over how the case transpires and is resolved.

The first category, the JPML, is made up of district and circuit court judges who serve on the panel for a seven-year term.<sup>158</sup> Thus, the panel is a moving target, but a fairly stable one. As currently constituted, the JPML's current chairwoman is the Hon. Sarah V. Vance (E.D. La). The remaining panel members include Hon. Marjorie O. Rendell (3d. Cir.), Hon. Charles R. Breyer (N.D. Ca.), Hon. Lewis A. Kaplan (S.D.N.Y.), Hon. Ellen Segal Huvelle (D. D.C.), Hon. R. David Proctor (N.D. Ala.), and Hon. Catherine D. Perry (E.D. Mo.).<sup>159</sup> This particular panel includes three women, a first for a JPML.<sup>160</sup> Six of the seven members are judges who were appointed by President Clinton, with the seventh having been appointed by President George W. Bush.<sup>161</sup> As for practice experience, six of the seven judges come from private practice, with many of the judges practicing in complex litigation. The seventh member, Judge Breyer, has a background more strongly focused in public and government lawyering.

One major criticism of the panel—as well as one of its tributes—is that the panel is too quick to transfer cases. Historically, the transfer rates have been quite high, ranging from a low of 47% in 1981 to a high of 86% in 2006.<sup>162</sup> The panel sees all kinds of cases ranging from mass torts to securities cases.<sup>163</sup> Most of the judges appointed to the JPML by the Chief Justice are district court judges who have already been on the bench for about eight years at the time of appointment.<sup>164</sup> This is

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158. This seven-year term was set by custom by Chief Justice Rehnquist and has been continued by Chief Justice Roberts. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2227 (2008) (“Chief Justice William H. Rehnquist imposed some regularity and predictability on the appointment process by establishing staggered seven-year terms for each member.”).

159. *Panel Judges*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <http://www.jpml.uscourts.gov/content/panel-judges> [https://perma.cc/TTT9-B6Y5].

160. Elizabeth J. Cabraser, *Where Are All the Women in the Courtroom?*, TRIAL, Mar. 2014, at 29 (2014).

161. See *Panel Judges*, *supra* note 159. The Panel appointees are about evenly divided between judges appointed by Democrats and Republicans. Tracey George & Margaret S. Williams, *The Judges of the U.S. Judicial Panel on Multidistrict Litigation* 11 (Vand. U. L. School, L. and Econ. Working Paper No. 13-25, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2308906](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308906) [https://perma.cc/N3HT-34WQ]. This is in contrast to Judicial Conference Committee appointments, which include the Civil Rules Committee. *Id.* Those committees have been about 40% Democrat-appointed and 60% Republican-appointed. *Id.*

162. See Heyburn, *supra* note 158, at 2229.

163. *Id.* at 2229–30.

164. George & Williams, *supra* note 161, at 8.

probably because such judges are likely to have had more experience with complex litigation.<sup>165</sup> How the panel members' backgrounds inform their decision making has yet to be studied, but it does not seem beyond reasonable belief to assume that their complex litigation experience plays a part in whether they decide to consolidate a case or not.<sup>166</sup>

Yet, whether the case will be consolidated is not the JPML's greatest power. Instead, its greatest power is its decision as to which judge the entire collection of cases will be sent. This decision is entirely within the discretion of the JPML, and as the former chair of the JPML Judge Heyburn stated, "[t]his is often the most difficult decision the Panel faces."<sup>167</sup> The JPML's choice is largely unguided, but it can consider variant factors: the parties' preferences; the location of the discovery or critical witnesses; whether previous proceedings have already occurred in a location; whether there is a judge who is already presiding over a subset of cases; or whether there is a judge who, while not currently in charge of any of the cases, has pertinent experience that will allow her to better address the case.<sup>168</sup> According to Judge Heyburn, though, the "ideal transferee judge is one with some existing knowledge of one of the cases to be centralized and who may already have some experience with complex cases."<sup>169</sup>

At least one study found that the JPML is "more likely to assign cases to a district court where a current panelist sits and that is supported by at least one defendant and to a district judge who currently serves on the Panel."<sup>170</sup> In fact, current JPML members are more than "three times as likely to take an MDL assignment."<sup>171</sup> It appears that the JPML considers complex litigation experience, leadership roles, and familiarity

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165. *Id.*

166. The Federal Judicial Center study by George and Williams examined the "attributes and social background, judicial experience, and appointing President and Chief Justice for the forty-six MDL panel judges who have served from the Panel's creation in 1968 through the end of 2012." *Id.* at 3. It did not, however, attempt to link those attributes to any distinct decision making pattern.

167. Heyburn, *supra* note 158, at 2239.

168. *Id.* at 2239–40. There are additional factors the JPML considers. See DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL (2015); Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311, 321–22 (2009) (chronicling sixteen factors considered by the JPML).

169. Heyburn, *supra* note 158, at 2240.

170. Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424, 424 (2013).

171. *Id.* at 456.

when assigning these cases to judges.<sup>172</sup> The result is a fairly familiar cast of characters who serve as transferee judges such as Judge Weinstein and the asbestos cases, Judge Pointer and the breast implant litigation, Judge Fallon and the Vioxx litigation, Judge Hellerstein and the 9/11 litigation, and more recently, Judge Barbier and the British Petroleum oil spill litigation.<sup>173</sup> These judges are, no doubt, well-respected and in many cases, well known. Yet, as Judge Heyburn acknowledges, the group of judges that the JPML might consider for the transferee position is often limited to judges that have a pedigree in complex litigation.<sup>174</sup> Moreover, the transferee judges must consent to taking on the case, meaning that these cases are run by a group of judges who, to a certain degree, have sought out the MDL experience.<sup>175</sup>

Once a transferee judge is selected, the power then shifts to her. A major area over which the transferee judge has an incredible amount of power is her ability to decide who will represent this vast array of plaintiffs that are now before her.<sup>176</sup> This ability, more than any other power, is what scholars have most scrutinized.<sup>177</sup> As a result of consolidation, average plaintiffs effectively no longer have a direct say

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172. *Id.*; see also Richards, *supra* note 168, at 321–22 (discussing an array of factors cited for transferee judge selection in JPML transfer orders).

173. Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1989 (1999) (discussing how Judge Sam Pointer, handling the consolidated federal Multidistrict Litigation (MDL) in the breast implant cases, appointed a “National Science Panel” to assist the court in examining the scientific issues); Edward F. Sherman, *The BP Oil Spill Litigation and Evolving Supervision of Multidistrict Litigation Judges*, 30 MISS. C. L. REV. 237, 239 (2011) (discussing how the Panel chose New Orleans judge, Judge Carl J. Barbier, as transferee judge presiding over the BP oil spill litigation); Alison Frankel, *Vioxx Judge Steps in to Split \$350 Ml Plaintiffs Lawyer Pie*, REUTERS (Aug. 11, 2011), <http://blogs.reuters.com/alison-frankel/2011/08/11/vioxx-judge-steps-in-to-split-350-ml-plaintiffs-lawyer-pie/> [<https://perma.cc/7QE7-XADA>]; Michele Galen, *The Man Who’s Cutting Through the Asbestos Mess*, BLOOMBERG BUS. (Jan. 27, 1991), <http://www.bloomberg.com/bw/stories/1991-01-27/the-man-whos-cutting-through-the-asbestos-mess> [<https://perma.cc/X8TB-AU25>] (discussing Weinstein’s role in the Manville and Eagle-Picher asbestos cases as exemplifying his aim of crafting an efficient and fair way of handling mass torts cases); Mireya Navarro, *Empathetic Judge in 9/11 Suits Seen by Some as Interfering*, N.Y. TIMES (May 2, 2010), [http://www.nytimes.com/2010/05/03/nyregion/03judge.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/05/03/nyregion/03judge.html?pagewanted=all&_r=0) [<https://perma.cc/3EAV-FQBZ>].

174. Heyburn, *supra* note 158, at 2240.

175. *Id.* at 2242–44. See also Williams & George, *supra* note 170, at 440 (“The appointment [as a transferee judge] is seen as recognition of a judge’s skill and acumen and a sign of his or her status.”).

176. Redish & Karaba, *supra* note 143, at 122 (“Rather than deal directly with scores of attorneys, transferee courts appoint a limited number of lawyers to serve on “steering committees” to manage the litigation.”).

177. See generally Redish & Karaba, *supra* note 143; Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations*, 63 VAND. L. REV. 105 (2010); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015).

in how the litigation will move forward because their counsel is no longer individually representing them in the case.<sup>178</sup> As in the class action context, the premier academic concern is that by aggregating the litigation, the benefit might be a more efficient resolution, but the cost will be the individual plaintiff's due process right to be adequately represented.<sup>179</sup>

A secondary and related concern is focused on how counsel is selected, why that selection might be unfair to the other attorneys, and why that selection is not optimal for the bulk of the plaintiffs being represented. The charge is that the repeat-player attorneys have an advantage in the MDL context because they either know the limited number of transferee judges, their experience means that they can be trusted to do a thorough job, or there is some combination of the two. As scholars have criticized, the "MDL judge's selection of lead counsel is not subject to effective appellate review, even though the choice may turn out to be outcome-determinative in many ways."<sup>180</sup> Further, "[r]epeat MDL plaintiffs' counsel can work behind closed doors to lobby for specific attorneys to be named to the steering committee . . . mak[ing] it extremely difficult for a newcomer attorney to receive enough support to be selected for a leadership role."<sup>181</sup> Again, accusations of "smoke-filled rooms" and an artificially limited number of plaintiffs' attorneys abound.

Recent scholarship by Elizabeth Chamblee Burch has shed some much-needed light on this very issue: what is the composition of the lawyers who are appointed to leadership positions in MDL cases?

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178. Redish & Karaba, *supra* note 143, at 117–18 ("But once her case is transferred to an MDL, the district judge decides who will really represent her interests in the MDL. Suddenly, all of the decisions the claimant made about exercising her rights through litigation—which lawyer to hire, when and where to file a lawsuit, and against whom—have been replaced by decisions made by federal judges and court-sanctioned attorneys.").

179. See, e.g., *id.*; Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 539 (2013) ("Nonetheless, the harnessing of the settlement class device to MDL jurisdiction resonates in back-room deal making, blanketed with an aura of judicial legitimacy and largely liberated from the due process concerns and protections associated with the class action itself."). But see Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 627 (2011) ("This Article argues that the way to solve the puzzle is to reconceive the process-based day-in-court right. Doing so reveals that there are cases in which no one has a day-in-court right and cases where parties have only a limited right. Thus, the mismatch between justification and doctrine is reconciled by altering both justification and doctrine: a better understanding of the day-in-court right implies a broader role for nonparty preclusion. It also shows that there is more similarity between class actions and other large-scale case aggregations than is commonly supposed.").

180. Redish & Karaba, *supra* note 143, at 142.

181. *Id.*



Burch's work demonstrates that many scholars' suspicions were indeed accurate.<sup>182</sup> In Burch's study, she collected data from seventy-two product liability and sales-practices multidistrict litigation cases that were pending as of May 14, 2013.<sup>183</sup> What she found was that so-called repeat-players were regularly appointed to leadership positions in the litigation. For example, while only 31% of the individual attorneys involved in the multidistrict litigation were elevated to leadership positions, almost 64% of the individuals holding those positions were repeat players.<sup>184</sup> Indeed, 30% of those leadership roles were occupied by a select fifty attorneys who were lucky enough to be named lead attorneys in five or more multidistrict cases.<sup>185</sup> Burch found a similar pattern with respect to law firms. In her study, only roughly 41% of law firms were repeat players in the cases; yet, lawyers from those firms held almost 80% of all of the leadership positions.<sup>186</sup> She found that 16% of the law firms involved held just over a majority of the leadership positions in the cases.<sup>187</sup>

In other words, the attorneys who end up controlling the plaintiffs' side of multidistrict litigation comprise a very select group of individuals from an equally select group of law firms. This leaves many of the original individual plaintiff's counsel quite disgruntled by what they see as a system that is rigged to benefit those who sit in these elite circles.<sup>188</sup> Moreover, as discussed earlier, many scholars have worried that the composition of the leadership positions, as well as the lack of structured review of their decision making, may not lead to optimal results for all plaintiffs.<sup>189</sup>

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182. See Burch, *supra* note 177.

183. *Id.* at 95.

184. *Id.* at 96.

185. *Id.*

186. *Id.*

187. *Id.* at 96–97.

188. See Hon. John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38.3 *LITIG.* 26 (2012). Heyburn and McGovern cite a survey of roughly ninety MDL attorneys that found that “[a] substantial group of local plaintiffs’ counsel resent the panel’s role in facilitating national plaintiffs’ counsels’ ‘takeover’ of their cases. They criticize a repeat-player syndrome in the selection of plaintiffs’ MDL counsel.” *Id.* at 30. Judge Heyburn, former Chair of the JPML responded, “[w]e know that our orders can effectively disenfranchise some local plaintiffs’ counsel. In every case, we ask ourselves whether centralization sufficiently promotes justice and efficiency, so much so that we should inconvenience some for the benefit of the whole.” *Id.*

189. Burch, *supra* note 177, at 119 (arguing that transferee judges should encourage dissent and modify their fee awards in order to incentivize plaintiffs’ lawyers to adequately represent all of the plaintiffs).

As will be discussed further in Part II, there are certainly reasons to be concerned about the composition of the lawyers leading multidistrict litigation cases. For the purpose of this section, however, the point is that from the top to the bottom, the multidistrict litigation system is comprised of an elite and narrow group of individuals. Starting with the JPML all the way down to the lead lawyers representing plaintiffs' consolidated cases, the players are individuals who have similar pedigree and experience.

## 2. *Class Action*

As noted earlier, there is considerable overlap between the practitioners in class action and those in multidistrict litigation because, in many modern cases, class action certification is sought in the context of an MDL. Thus, this section will only briefly focus on some of the traits of current class action practitioners, with the caveat that these same lawyers have to some degree already been discussed above as members of the elite MDL leadership.

Today's class action attorneys are largely more elite than they once were. Historically, the image of the class action attorney was that of a scrappy, somewhat greedy, solo practitioner who put it all on the line for his one big case.<sup>190</sup> Or, it was the specter of a civil rights attorney seeking justice for those most marginalized. While some of those caricatures might still be true, the class action plaintiffs' lawyer of today is more complicated. Today's plaintiffs' class action attorney most likely comes from a relatively large and well-resourced firm.<sup>191</sup> For example in Legal 500's 2015 ranking of the five top plaintiffs' firms for labor and employment, three had more than 25 attorneys.<sup>192</sup> For the same ranking for plaintiffs' firms engaged in toxic tort litigation, all four of the top four firms had more than 25 attorneys.<sup>193</sup> The class action bar cannot be painted with one broad brush, but suffice to say the prominent class action lawyer of today's era has much more in common with his adversary's counsel than in the past. They are elite, well resourced, and well organized.

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190. Morris Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 REV. LITIG. 757, 764–66 (2012).

191. *Id.* at 773.

192. *See Mass Tort and Class Action: Plaintiff Representation—Labor and Employment*, THE LEGAL 500 UNITED STATES, <http://www.legal500.com/c/united-states/litigation/mass-tort-and-class-action-plaintiff-representation-labor-and-employment> [<https://perma.cc/G8J5-6YBN>].

193. *See id.* Weitz & Luxenberg PC was listed in the top five, but has since disbanded.

Indeed, one of the major criticisms of the current class action plaintiffs' bar is that the mechanisms in which they now operate—multidistrict litigation leading to court-approved or contractual settlement—have led them to identify more with their adversaries than with their clients. As Linda Mullenix has argued, “[a]gainst th[e] backdrop [of MDL], the interests of plaintiffs’ counsel and defense counsel converged. Both sought to exploit the favorable MDL environment to forge favorable deals, resolving massive liabilities.”<sup>194</sup> As critics have noted, the freedom from “the threat of irksome objectors seeking to derail accomplished arrangements,” as well as the freedom from the class action rule requirements, have made complex litigation plaintiffs’ and defendants’ counsel look more and more alike.<sup>195</sup>

### 3. *Settlement*

Settlement is a reality of civil litigation and one that is especially true in aggregate litigation. Settlement rates for civil litigation have been pegged at over 90% by some sources,<sup>196</sup> and while the exact number is not necessarily known, the overwhelming sense of the bench, bar, and the academy is that settlement is common, and it is here to stay. In aggregate litigation, settlement is just as complex as the litigation that creates the need for it. Judges and litigants have responded by crafting different solutions to these challenges.

Judge Weinstein, as one of the first judges to confront such complexity, utilized an innovation that has become standard fare for litigation of this type—the appointment of special masters. In the Agent Orange Litigation of the 1980s, Judge Weinstein appointed a young Ken Feinberg to oversee the settlement as a “special master.”<sup>197</sup> That litigation was a federal class action brought against Agent Orange manufacturers by Vietnam veterans who had allegedly suffered from exposure to the gas.<sup>198</sup> The settlement was lauded as a success, as it was

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194. Mullenix, *supra* note 179, at 540.

195. *Id.*

196. Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotions and Regulation of Settlement*, 46 STAN. L. REV. 1339, 1340 (1994) (“Often-cited figures estimating settlement rates of between 85 and 95 percent are misleading; those figures represent all civil cases that do not go to trial.”).

197. See Mike Sacks, *Who You Gonna Call? Ken Feinberg: In His Latest Role, Mediator-in-the-Spotlight Sets Sights on Troubled Pension Plans*, NAT’L L. J. (Oct. 5, 2015). Special masters are private lawyers, former judges, or law professors that serve as adjuncts to the judge under FED. R. CIV. P. 53.

198. *Id.*

the largest mass tort settlement at the time.<sup>199</sup> Once that settlement was achieved, the use of special masters became much more common in complex cases.<sup>200</sup>

Ken Feinberg is the king of special masters. Indeed, he is nothing short of a household name for those who follow litigation of this type. He has overseen the resolution of settled claims for myriad cases, including the General Motors' faulty-ignition-switch settlement and the British Petroleum Gulf Coast Claims Facility.<sup>201</sup> He has also been enlisted by the federal government to manage other funds and settlements, including the World Trade Center Victim Compensation Fund and the Multiemployer Pension Reform Act of 2014.<sup>202</sup>

Feinberg is not alone, however. He is part of a larger trend of judges and government officials calling on outsiders to help formulate and implement resolution of complex claims. The group of individuals called upon to be special masters is decidedly and necessarily small. Feinberg does not do it all himself, but the other individuals who do look a lot like him. For example, Professor Francis McGovern served as a special master on the DDT toxic exposure litigation, the Dalkon-Shield controversy, and a dispute over fishing rights in the Great Lakes of Michigan.<sup>203</sup> By definition, the special masters come from a small group of people who share similar backgrounds and pedigree—successful lawyers, professors, and former judges who all have a certain level of legal education and law practice in common.

For example, in the current Volkswagen emissions scandal litigation, the JPML consolidated hundreds of class action suits and transferred the cases to the Northern District of California.<sup>204</sup> The JPML assigned the case to Judge Charles Breyer, a current member of the JPML.<sup>205</sup> While Judge Breyer was not sitting on the panel that made the assignment decision, he was still a part of the seven-member JPML.<sup>206</sup> Since his

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199. *Id.*

200. Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 397–98 (1986).

201. Mullenix, *supra* note 179, at 515–16; *see also* Sacks, *supra* note 197.

202. *Id.*

203. Brazil, *supra* note 200, at 399–403, 410.

204. Jessica Karmasek, *MDL Established for Class Actions Filed Over Volkswagen Emissions Scandal*, LEGALNEWSLINE (Dec. 9, 2015), <http://legalnewsline.com/stories/510652111-mdl-established-for-class-actions-filed-over-volkswagen-emissions-scandal> [<https://perma.cc/3VRR-49K8>].

205. *Id.*

206. United States Judicial Panel on Multidistrict Litigation Transfer Order, In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation (Dec. 8, 2015),

appointment, Judge Breyer has announced his plans to appoint a special master to oversee the settlement negotiations: former FBI Director Robert Mueller.<sup>207</sup> A number of contenders vied for the spot, including former judges like Judge Layn Phillips and Judge Edward Infante, and professional special masters like Ken Feinberg, but Breyer went in a different direction.<sup>208</sup> Mueller is currently a partner at Wilmer Cutler Pickering Hale & Dorr. There, he focuses on crisis management and cybersecurity.<sup>209</sup> Interestingly, Mueller's firm represents Volkswagen's auditor, PricewaterhouseCoopers A.G., and has been retained by Volkswagen specifically for advice regarding the tax implications of the emissions controversy.<sup>210</sup> Apparently Mueller has been "walled off" from this ongoing work within his own firm.<sup>211</sup> Perhaps in response to any misgivings about the appointment and the connection to a firm that represents one of the parties, Breyer stated that "[t]here are few, if any, people with more integrity, good judgment, and relevant experience than Mr. Mueller."<sup>212</sup> Breyer's impression may indeed be true. There is no doubt that there are benefits to expertise; yet a singular focus on expertise—excluding important factors like the value of diversity, the danger of unconscious bias, and the downside of a repeat-player phenomenon—has also led to a fairly small special master pool where there are many repeat players splashing around.

The settlement that involves special masters is often one that is public, in the sense that the judge monitors and approves the settlement agreement. Recent trends in settlement have taken that process out of the public and have made settlement a matter of private contract. One version of this involves contractual aggregate non-class settlement. Here again, the cases are consolidated under the MDL statute, but once there, the parties enter into a private agreement without seeking class

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<http://www.jpml.uscourts.gov/sites/jpml/files/MDL-2672-TO-2015-12-08.pdf>  
[<https://perma.cc/72BU-GWV2>].

207. Amanda Bronstad, *Wilmer's Robert Mueller Named VW Settlement Master*, NAT'L L. J. (Jan. 11, 2016), <http://www.nationallawjournal.com/id=1202746760712/Wilmers-Robert-Mueller-Named-VW-Settlement-Master?slreturn=20160818160347> [<https://perma.cc/G4HD-TCWA>]. As of September 2016, some aspects of the litigation had been settled while others were ongoing. See *In re Volkswagen "Clean Diesel" MDL*, U.S. D. CT., N.D. CAL., <http://www.cand.uscourts.gov/crb/vwmdl> [<https://perma.cc/G5B8-JHSW>].

208. Bronstad, *supra* note 207.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

certification or otherwise needing the approval of the court.<sup>213</sup> Instead of waiting the months necessary to consolidate the cases, the plaintiffs' attorneys involved meet with defense counsel to create a private settlement deal.<sup>214</sup> This deal applies not to a class, because one has not even been certified, but instead applies to all individual claims.<sup>215</sup> The settlement must still be presented to the MDL judge, but the judge will most often approve the deal. Because the parties reached it amicably, and the class action rules do not apply unless a class is certified within the MDL, there is no requirement to scrutinize the agreement.<sup>216</sup> The structure of this kind of settlement means that the plaintiffs' attorneys who wield the most power among their ranks and who have the most access to defense counsel are the ones most likely to strike these deals. As the discussion in the MDL section above makes clear, these attorneys are, in a word, elite.

### C. *Perils of One Percent Procedure*

A procedural system created by and for the one percent is not problematic simply because it is a one percent product. It is problematic because it underestimates, and perhaps even undervalues, other types of litigation. In this Part, the Article will focus on the bottom line of one percent procedure by delineating some examples of how one percent procedure does not work for the ninety-nine.

First, procedures designed by the one percent are concerning because they fail to account for how such procedures will affect different kinds of litigation. Examples of these procedures include the recent discovery amendments and the interpretation of Rule 8 pleading by the Court in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. These changes came from the federal civil rulemaking committee and the Supreme Court, respectively. They are examples of how procedures that emerge from a group of one percent players can be detrimental to other kinds of cases.

Rule 26(b)(1) was amended to include certain "proportionality" factors in the definition of the scope of discovery.<sup>217</sup> Most of those factors were previously located in Rule 26(b)(2)(C)(iii), which was a part of the rule that would be implicated when the producing party

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213. Mullenix, *supra* note 179, at 541.

214. *Id.*

215. *Id.*

216. *Id.*

217. *See* FED. R. CIV. P. 26(b)(1).

requested relief from the burden of discovery.<sup>218</sup> While the rulemakers repeatedly argued that moving the factors from Rule 26(b)(2)(C) to the definition of the scope of discovery in Rule 26(b)(1) was not a significant change, plaintiffs' and defense attorneys vehemently disagreed on that point.<sup>219</sup>

Many commentators agreed with plaintiffs' lawyers' aversion to this rule change. In cases where the discovery was already proportional, this rule change encourages parties to consider holding back discovery that they believe might not be proportional.<sup>220</sup> If the party does indeed hold back from either searching for or producing the requested information on the basis of proportionality, the opposing party has no choice but to bring a motion to compel.<sup>221</sup> This will likely create additional motion practice and work for the courts, as well as delay.<sup>222</sup> As one commentator explained, "[t]he effect of including proportionality into the initial scope of discovery will likely be to place the burden on the party moving to compel to show that its discovery request was proportional."<sup>223</sup> This means that run-of-the-mill cases might now have higher discovery costs and burdens associated with them—costs that they would not have had absent this rule change. In other words, "plaintiffs in certain typical cases—for example, employment discrimination cases—may be affected more than others."<sup>224</sup> As will be discussed in Part II, the stated motivation for this rule change was to decrease discovery costs; yet, the cases that rulemakers focused on were the cases with which they were most familiar—the one percent. While the actual effect of amended Rule 26(b)(1) remains to be seen, there is a

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218. ADVISORY COMM. ON CIV. RULES, *supra* note 23, at 84.

219. *See* CTR. FOR CONST. LITIG., PRELIMINARY REPORT ON COMMENTS ON PROPOSED CHANGES TO FEDERAL RULES OF CIVIL PROCEDURE 2–4 (2014) (noting that more than 2,300 comments were received in response to the Civil Rules Committee's proposed amendments); Letter from Valerie M. Nannery, Senior Litig. Couns., Ctr. for Const. Litig., to Hon. David G. Campbell, Chair, Civ. Rules Advisory Comm. 2 (Apr. 9, 2014), [http://www.cclfirm.com/files/040914\\_Comments.pdf](http://www.cclfirm.com/files/040914_Comments.pdf) [<https://perma.cc/V6EP-EZS6>] (noting that most of the comments received were related to the discovery amendments).

220. *See* Suja A. Thomas & Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process*, 15 NEV. L.J. 1141, 1156 (2015)

221. *Id.*

222. *Id.* (arguing that the changes to proportionality might encourage parties to under-produce and could result in more motion practice and delay in the courts).

223. Hatamyar Moore, *supra* note 57, at 1116.

224. Thomas & Price, *supra* note 220, at 1156.

good argument that it will have a negative impact on non-one-percent cases.<sup>225</sup>

Another example of procedure by the one percent is the Court's interpretation of Rule 8 pleading under *Twombly* and *Iqbal*. In those cases, the Court introduced the concept of plausibility pleading, the idea that courts must assess the plaintiff's complaint for plausibility. Numerous commentators attacked these decisions for a variety of reasons, ranging from the departure from established "notice" pleading principles to the argument that the Court had circumnavigated the federal civil rulemaking process.<sup>226</sup> Whatever the veracity of these criticisms, defendants have certainly taken advantage of the cases, as motion to dismiss filing and grant rates have increased since the decisions came down.<sup>227</sup>

What is most troubling about this change, however, is that individual plaintiffs with particular kinds of claims are bearing the brunt of *Twombly* and *Iqbal*'s effect. For example, one study found that grant rates in motions to dismiss in civil rights cases increased by 19%.<sup>228</sup> The same study found that individual parties fared far worse than organizational parties, with the dismissal rates for corporate claimants' complaints increasing from 32% to 37% under *Twombly* and *Iqbal*, while individual claimants' dismissal rates increased from 40% to 58%.<sup>229</sup> As that commentator explained, "although one might expect individuals to fare worse than organizations as a general matter in our legal system, the data also suggest that plausibility pleading has

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225. *See id.* at 1142 ("[A]rguing that advisory committees should refrain from proposing and adopting rule amendments that are motivated by atypical cases.").

226. *See, e.g.,* Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189, 1191–93 (2010) (discussing the effect of *Twombly* and *Iqbal* on notice pleading); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 18, 22 (2010) ("[P]lausibility pleading [has] undone the relative simplicity of the Rule 8 pleading regime and the limited function of the Rule 12(b)(6) motion.").

227. Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2121 (2015) ("The data presented here strongly support the conclusion that dismissal rates have increased significantly post-*Iqbal*, and in addition suggest many other troubling consequences of the transition to the plausibility standard."). *See also* JOE S. CECIL ET AL., FED. JUD. CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES vii (2011); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 601–02 (2010); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 603–09 (2012).

228. Reinert, *supra* note 227, at 2146.

229. *Id.* at 2155.



increased the extent of the inequality.”<sup>230</sup> This point is important because in both *Twombly* and *Iqbal*, the defendants were large organizations—a large telephone conglomerate and the United States government. As will be discussed in Part II, the concerns animating this kind of litigation—that involving large entities and the potential for complex and costly discovery—reflect the experience of the decision makers. The effect, however, is felt by all kinds of litigants in the civil litigation system, even those with cases that are quite unlike the situations presented in *Twombly* and *Iqbal*.<sup>231</sup>

Beyond the negative impact of one percent procedure that is created by the most elite, there is also a negative effect from procedures created for the one percent. For example, there is something of a “trickle-down” effect from this kind of litigation where the procedures that may work best in one context are not necessarily the best fit for other types of litigation.<sup>232</sup>

As to this effect, there are a few examples. Judges who see aggregate litigation cases and rulemakers who mostly practice in complex cases tend to paint the entire system with a broad brush. In other words, the procedures that develop—perhaps even rightfully so—in the context of aggregate litigation have a tendency to trickle down into other kinds of litigation. This is because the judges or rulemakers focus on what they know, even when a different situation might be present. For example, while the focus on settlement has many origins, at least one of those origins is the complexity of aggregate litigation. Judges who see settlement working well in complex cases might tend to focus the parties on settlement in less complex cases.<sup>233</sup> The value of settlement is one

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230. *Id.*

231. See Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 465–518 (2014) (discussing the impact of these cases on pleading and the negative impact of recent procedure changes in areas including class actions, discovery, and summary judgment); Thomas, *supra* note 220, at 992 (arguing for an “atypical doctrine” where “the Court should not make legal change motivated by atypical or oddball facts when the change will affect typical cases”); Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 215 (2011) (arguing that pleading cases *Iqbal* and *Twombly* were “oddball” cases that should not have been used to make transsubstantive changes to pleading standards).

232. See Moore, *supra* note 57, at 1139. With respect to the Advisory Committee, Moore argues that “it failed to observe (explicitly, at least) the dominance of MDL cases when proposing changes to the rules: what may be appropriate for an MDL may not be appropriate for a smaller, single case.”

233. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984) (“In fact, most ADR advocates make no effort to distinguish between different types of cases or to suggest that ‘the gentler arts of reconciliation and accommodation’ might be particularly appropriate for one type of case but not for another. They lump all cases together.”); Edward F. Sherman, *Segmenting*

that can be vigorously debated, but there are at least some kinds of litigation and litigants who would value a day in court over settlement.<sup>234</sup> To the degree that judges cannot see those distinctions, it is problematic for the civil litigation system.

The Court's interpretation of, and the rulemakers' drafting of, the Federal Rules of Civil Procedure present another trickle-down effect. For example, one commentator has argued that the Court's interpretation of Federal Rule of Civil Procedure 23 and its subcategories of class action have been misguided.<sup>235</sup> This is because courts treat Rule 23 solely as a device for Rule 23(b)(3) or "aggregated-damages" class actions, which leads to myopia when interpreting and revising the rule.<sup>236</sup> Courts and the rulemakers appear to fail to consider how changes to Rule 23 will affect all aspects of the rule, including the other types of class action, such as injunction class actions.<sup>237</sup> The Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*,<sup>238</sup> for instance, arguably interpreted Rule 23(a)'s commonality requirement to require a predominance analysis in every type of class action, even though predominance is only expressly required in Rule 23(b)(3) class actions.<sup>239</sup> In essence, the Court interpreted commonality and predominance as if all class actions were the same; yet, there are different types of class actions, and they have different express requirements.<sup>240</sup> The Court seemed unmoved by these differences, seeing all class action as one monolithic procedural

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*Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 692–93 (2006) ("The case management movement, as particularly reflected in the 1969 *Manual for Complex Litigation*, prescribed a protracted litigation process divided into various segments en route to ultimate resolution not so much by a single-event trial as through such means as motions, summary judgments, partial disposition of claims or parties, and settlement at various stages.").

234. See, e.g., Fiss, *supra* note 233, at 1075 ("Settlement is for me the civil analogue of plea bargaining: [c]onsent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done.").

235. See Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 843 (2016) (arguing that interpretations of Rule 23 fail to appreciate the differences between all four of the class action mechanisms).

236. See *id.*

237. See *id.*

238. 564 U.S. 338, 131 S. Ct. 2541 (2011).

239. See *id.* at 2556.

240. See Carroll, *supra* note 235, at 889.

device.<sup>241</sup> Thus, the view of one type of litigation trickles down into other kinds of litigation.

In sum, there are perils to one percent procedure. Whether the procedures are by or for the one percent, there are downsides. Cases where a procedure might work differently—and in some cases, badly—go unnoticed and unconsidered because there is a myopic view of procedure that is informed and reinforced by a homogeneous group of judges, rulemakers, and lawyers. In other words, procedures produced by and for those engaged in the most exclusive kinds of litigation simply may not work—and in some cases may do direct harm—to the “regular” cases that populate federal and state court dockets. In Part II, the Article will address the why behind the negative results using social and political science as tools.

## II. RETHINKING ONE PERCENT PROCEDURE

Blockbuster litigation like class actions and MDL capture the attention of the public. Similarly, the Supreme Court docket garners a great amount of coverage. It is not surprising, then, that this type of litigation tends to affect how society collectively thinks about civil suits. Yet the attention this litigation gets is outsized; these cases are not the most common.

From September 2013 through September 2014, roughly 18% of the civil cases filed were MDL cases.<sup>242</sup> Class action numbers are more difficult to estimate both because many class actions are already

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241. See *Wal-Mart*, 564 U.S. at 375 (Ginsburg, J., dissenting) (“The Court blends Rule 23(a)(2)’s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer ‘easily satisfied.’”) (quoting 5 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 23.23[2] (3d ed. 2011)).

242. See ADMIN. OFF. OF THE U.S. CTS., *STATISTICAL TABLES FOR THE FEDERAL JUDICIARY*, tbl.C-1 (2014), <http://www.uscourts.gov/statistics/table/c-1/statistical-tables-federal-judiciary/2014/06/30> [https://perma.cc/4P8Z-Z3TP] [hereinafter Table C-1]; ADMIN. OFF. OF THE U.S. CTS., *JUDICIAL BUSINESS*, tbl.S-20 (2014), <http://www.uscourts.gov/statistics/table/s-20/judicial-business/2014/09/30> [https://perma.cc/CZJ4-T9US] [hereinafter Table S-20]. This is not an exact science because the information provided by the Administrative Office of the U.S. Courts uses different timelines for its statistics regarding civil actions more generally and MDL civil actions. For the twelve-month period ending on June 30, 2014, a total of 298,713 civil cases were filed in federal district courts. Table C-1, *supra*. For the twelve-month period ending on September 30, 2014, a total of 53,103 civil cases were either transferred to a transferee court under § 1407 (6,120 cases) or were originally filed in transferee district courts (46,983 cases). Table S-20, *supra*. I divided 53,103 (total MDL cases filed) by 289,713 (total cases filed) to reach approximately 18%. This percentage appears to correspond to other scholars’ estimates as well. See, e.g., Patricia Hatamyar Moore, *Confronting the Myth of “State Court Class Action Abuses” Through an Understanding of Heuristics and a Plea for More Statistics*, 82 *UMKC L. REV.* 133, 175 (2013) (finding that in 2012 “22% of all pending civil cases were subjected to MDL proceedings.”).

captured by the MDL numbers and because the Administrative Office of the U.S. Courts does not separately track them.<sup>243</sup> One study determined that 2.4% of federal court civil cases filed in 2012 were class actions.<sup>244</sup> Even these statistics may be double-counting, because the data did not separate out class actions that were independent of MDL. Giving the numbers a generous bent, however, 20% of federal court civil litigation, as filed and at most, is aggregate litigation.

Pending litigation paints a bit of a different picture. Between September 2013 and September 2014, approximately 38% of pending cases were MDL cases.<sup>245</sup> That means that more than a third of pending cases in the federal civil litigation system were MDL cases. While that seems like a large number, there are a couple of important considerations. First, the MDL cases tend to occupy the docket for longer periods of time, thus explaining the difference between the filing and pending rates.<sup>246</sup> In other words, the cases take up more space on the docket once filed, but they are still a smaller number of cases on the federal docket when filed.

Second, a closer look at the kinds of cases reveals that the types of cases brought under MDL rules are quite narrow. Nearly 50% of the MDL cases pending as of January 2016 were antitrust and products

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243. See Hatamyar Moore, *supra* note 242, at 133 (“In other words, courts in the United States offer no data on such basic questions as the number of cases filed as class actions, the percentage of cases designated as class actions that are eventually certified as such, or the ultimate disposition of such cases.”) (emphasis omitted); Robert J. Herrington, *The Numbers Game: Dukes & Concepcion*, ABA SEC. OF LITIG. (Nov. 20, 2012), <http://apps.americanbar.org/litigation/committees/classactions/articles/fall2012-1112-numbers-game-dukes-concepcion.html> [https://perma.cc/W8XL-JSKW].

244. See Herrington, *supra* note 243 (estimating that the number of federal court class actions filed in 2012 was 6,369). The total number of federal civil cases filed in 2012 was 267,990. ADMIN. OFF. OF THE U.S. CTS., STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, tbl.C-1 (2012), <http://www.uscourts.gov/statistics/table/c-1/statistical-tables-federal-judiciary/2012/12/31> [http://perma.cc/WB6M-4WZQ].

245. The number of cases pending subject to MDL proceedings as of September 30, 2014 was 127,704. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2014 (2014), [http://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Statistical%20Analysis%20of%20Multidistrict%20Litigation\\_2014.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical%20Analysis%20of%20Multidistrict%20Litigation_2014.pdf) [http://perma.cc/F5SV-MGFA]. The total number of pending civil cases during that same time period was 337,302. *U.S. District Courts—Judicial Business 2014* tbl.3, U.S. CTS. (2014), <http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2014> [https://perma.cc/U9A6-M6LR].

246. Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1202 (2015) (“In addition, changes in the overall median time can be misleading. Like the moon’s gravitational pull on the tides, cases consolidated in MDL litigations exert a massive influence on terminations and disposition times each year.”).

liability cases.<sup>247</sup> The next largest categories of cases were “Miscellaneous” at 17%, “Sales Practices” at 12%, and “Securities” at 8%.<sup>248</sup> While there is certainly a large number of antitrust and products liability cases in the civil justice system overall, the number of cases in MDL seems to be overrepresentative.<sup>249</sup> In addition to underrepresenting other types of litigation, MDL also overrepresents corporate defendants. Looking at the parties in the cases pending reveals a list of the veritable who’s who of corporations, including Time Warner, American Express, Aetna, General Motors, Bank of America, Amazon.com, and Ford Motor Company.<sup>250</sup> In other words, this litigation for the one percent indeed takes up a great amount of space on the federal civil docket, but it is hardly representative of all of the litigation that is filed in federal court.

It is difficult to determine the exact content of the rest of the litigation filed in federal court because the statistics providing the nature of the suit do not indicate how many of those cases are filed as class actions or MDL. However, looking at the Administrative Office’s nature-of-suit statistics provides some sense of what the “other” litigation might be. For example, of the cases filed in the twelve-month period ending June 30, 2014, approximately 16% were cases involving the United States as a party, 9% were private contract cases, 11% were private civil rights cases, 16% were prisoner litigation (not involving the U.S. as a party), about 4% were private intellectual property cases, and 6% were private labor cases.<sup>251</sup> About 25% of the cases were private personal injury

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247. See U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT (2016), [http://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MD\\_L\\_Dockets\\_By\\_Type-January-15-2016.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_Type-January-15-2016.pdf) [https://perma.cc/MD7L-5UKU].

248. See *id.*

249. For example, as of June 30, 2015, 15% of the federal district court cases filed were product liability and antitrust cases. See ADMIN. OFF. OF THE U.S. CTS., STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, tbl.C-2 (2014), <http://www.uscourts.gov/statistics/table/c-1/statistical-tables-federal-judiciary/2014/06/30> [https://perma.cc/4P8Z-Z3TP]. This table includes cases that may have been or will be transferred into MDL as well, so this percentage might even be slightly overstated.

250. See *id.*

251. See ADMIN. OFF. OF THE U.S. CTS., STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, tbl.C-3 (2014), <http://www.uscourts.gov/statistics/table/c-3/statistical-tables-federal-judiciary/2014/06/30> [https://perma.cc/G4LW-28LK]. The total number of civil cases was 298,713. *Id.* The total number of U.S. civil cases was 46,759; the total number of private contract cases was 26,202; the total number of private civil rights cases was 33,277; the total number of prisoner litigation cases was 49,015 (16,914 habeas corpus, 141 death penalty, 31,359 conditions and civil rights, and 601 mandamus and other); the total number of private intellectual property cases was 13,175; and the total number of labor cases was 18,272. *Id.* As an aside, there were 25,346 “All Other” private suits, which accounted for roughly 8.5% of all cases. See *id.*

cases, an amount that is likely also reflected in the number of MDL and class action cases.<sup>252</sup>

Thus, the civil docket includes cases involving prisoners, contracts, intellectual property, civil rights, and labor. It also involves the United States as a party in many cases, whose engagement in different types of litigation reflects the private civil litigation picture. In other words, the more common civil litigation might be a ho-hum, middle class kind, or it might involve a well-resourced employer against an employee, or it might be of the poverty-stricken variety like prisoner litigation. The picture varies, of course, but the picture is certainly not one that is all complex, high-stakes litigation all of the time.

Moreover, the Federal Rules of Civil Procedure and the procedural doctrine that emerges from the Supreme Court reach beyond the federal civil litigation system. About half of the states have adopted the Federal Rules of Civil Procedure verbatim.<sup>253</sup> However, even in states where the Civil Rules have not been formally adopted, at least one study has determined that procedural practice in those state courts often lines up with federal court practice.<sup>254</sup> Stated differently, the influence of federal practice and procedure reaches far beyond the federal courthouse doors. More important, within these state courts—where federal practice and procedure is often the bellwether of state practice and procedure—is where the vast majority of civil cases in the United States are litigated. Approximately fourteen million civil cases were filed in state courts in 2014,<sup>255</sup> compared to 303,820 cases in federal courts during the same period.<sup>256</sup>

Yet, as the discussion above shows, one percent litigation drives how procedural rules and doctrines are created and reformed. More specifically, the individuals and institutions who participate in this one percent litigation are deeply invested in how civil litigation works. They

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252. *See id.* The total number of personal injury cases was 75,585 (1,150 marine personal injury; 3,449 motor vehicle personal injury; and 70,986 “Other” personal injury). *Id.* The “Other” personal injury cases include cases filed in previous years as consolidated cases that were later severed into individual cases. *Id.* at n.2.

253. Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 319 (2001).

254. *Id.* at 326–79.

255. *CSP: Court Statistics Project, Civil Cases, 2014*, NAT’L CTR. FOR ST. CTS., [http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Intro](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro) [<https://perma.cc/V63D-YQBR>].

256. *Federal Judicial Caseload Statistics 2014, Civil Filings*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014> [<https://perma.cc/S47X-GPEN>].

are necessarily the policymakers—deciding how multidistrict litigation will function, controlling the class action, heavily influencing the Supreme Court docket, and dictating how the Civil Rules will be reformed.

In this Part, the Article will interrogate why this overall homogeneity is problematic. Using both social and political science, the Article concludes that while there are some advantages to relying on elite experts to decide what rules of procedure should govern civil litigation, there are even greater disadvantages to this approach. As with politics and economics, a one percent regime—while good for the one percent—leaves the great ninety-nine percent far behind.

### A. *Critique of One Percent Procedure*

In this section, the Article will address how scholarship in social science and political science bears on one percent procedure. Providing an overview of the critical theories in both of these areas, the Article shows how the institutions and players in one percent procedure are particularly vulnerable to the pitfalls inherent in group decision-making and in legislative processes.

#### 1. *Flawed Decision Making*

Social science studies in group decision-making sheds light on why one percent procedure is of concern.<sup>257</sup> Group decision making is when a group of individuals collectively make a choice from a set of alternatives they are presented with, thus making the decision attributable to the “group” instead of to each individual member. While group decision making has its advantages, it can also be problematic. As described in Part I, the one percent procedure players are quite homogeneous, sharing a legal pedigree and sophisticated experience in complex litigation. This expertise is no doubt useful for the areas in which these players practice their craft—as either judge, practitioner, or rule maker—but it also has its risks. That is because group decision making by like-minded individuals does not necessarily lead to optimal results.<sup>258</sup> There are

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257. The academic leader in this area is Irving Janis, whose book *Groupthink* spawned a great deal of work on group decision making and dynamics. IRVING JANIS, *GROUPTHINK* (1982).

258. At least one study has shown that “identification and social attraction,” the things that make a group homogeneous, diminish the value of group decision making. Michael A. Hogg & Sarah C. Hains, *Friendship and Group Identification: A New Look at the Role of Cohesiveness in Groupthink*, EUR. J. SOC. PSYCHOL. 28, 337 (1998). This in contrast to friendship, which actually appeared to augment how well groups made decisions. *Id.* This is of interest because the groups

many schools of thought on why this kind of group decision making is problematic. In this section, the Article will explore a few of the most prominent critiques and will provide examples of how these critiques manifest in one percent procedure.

First, group decision making without meaningful dissent is especially susceptible to cascade and conformity effects.<sup>259</sup> Cascade effect arises when a few members of a group signal that a decision is correct and the other members of the group accordingly fall in line.<sup>260</sup> These latter group members agree even when they might have ethical or analytical reasons for otherwise disagreeing.<sup>261</sup> They might even fall in line due to self-doubt because the rest of the group is going in one direction or because they fear retribution if they were to disagree.<sup>262</sup>

A specific area where the cascade effect has particular salience is in the context of multidistrict litigation and the attorney steering committees. There, the lead attorneys have the greatest power, and they are deferred to for their expertise. If an attorney in the leadership group happens to disagree with the leaders' approach, she could be taking a huge risk in voicing that concern for a variety of reasons. For example, she could be viewed as "wrong" by the rest of the group and therefore seen as unqualified in future cases.<sup>263</sup> Or, even if she were correct (or perceived as correct), she could nevertheless gain a reputation for being contrarian or uncooperative—and risk being left out of the mix for the next big multidistrict case.<sup>264</sup>

Cascade effect also arguably impacts the way the Supreme Court selects its cases. Of course the Court is motivated by critical issues of law that are in dispute and, thus, need resolution. But the degree to which the Court takes certiorari on cases by elite members of the Supreme Court Bar also evidences cascade effect. The Court is undoubtedly prone to presumptions about the cases that elite members of the bar bring. If one of these lawyer's first cases was meritorious and important, the Justices might be more likely to assume that the second,

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discussed in this Article are not necessarily friends, but they certainly share many interpersonal and identifiable characteristics.

259. CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 10–11 (2003).

260. *Id.* at 11.

261. *Id.*

262. *Id.* As Sunstein explains, "[w]hen cascades occur, the key problem is that the followers are failing to disclose or to rely on their private information." *Id.*

263. *Id.* at 74. This is also referred to as a "reputational cascade," the idea that "people think that they know what is right, or what is likely to be right, but they nonetheless go along with the crowd in order to maintain the good opinion of others." *Id.*

264. Burch, *supra* note 177, at 98.



third, and even fourth cases are equally salient without being as skeptical as they might be of a case brought by an outsider.<sup>265</sup> As Justice Kennedy stated in reference to the elite Supreme Court Bar: “[t]hey basically are just a step ahead of us in identifying the cases that we’ll take a look at . . . . They are on the front lines and they apply the same standards [as we do].”<sup>266</sup> Justice Kennedy’s sentiment profoundly encapsulates the degree to which the Supreme Court might be vulnerable to the cascade effect in cases brought by the elite Supreme Court Bar.<sup>267</sup>

A second risk of a homogeneous decision making body is its vulnerability to confirmation bias. Confirmation bias occurs when group members discount views that are contrary to the group’s view or otherwise interpret information in a way that benefits the group’s overall perspective.<sup>268</sup> In other words, members simultaneously disbelieve information that is contrary to their worldview and overestimate information that is supportive.<sup>269</sup> This is because they either give the information that supports their position more weight or because they can simply recall that supportive information more readily.<sup>270</sup>

Federal civil rulemaking is an example of where confirmation bias occurs, most recently with the amendments to the discovery rules to include proportionality. As already discussed, the proportionality provision is now part of how the scope of discovery is defined under Fed. R. Civ. P. 26(b)(1).<sup>271</sup> Proponents argued that rampant discovery abuse within the system required this rule change. Yet, the studies conducted in the lead up to this rule change showed, in general, that discovery was actually going pretty well in most cases. One study by the Federal Judicial Center (FJC) found that the median costs for plaintiffs

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265. See SUNSTEIN, *supra* note 259, at 59 (discussing precedential cascades, which similarly involve courts relying on previous court decisions even in the face of new or different information that might bear on their decision making).

266. Biskupic et al., *supra* note 15.

267. As noted in Part 1.A.2., selection bias may also be a factor, among others.

268. Thornburg, *supra* note 73, at 26. “Confirmation bias leads us to find and interpret information in a way that supports pre-existing hypotheses, and to avoid information and interpretations that support alternative possibilities.” *Id.* Thornburg also discusses availability bias, an individual bias, which means that “when examples are easy to retrieve from memory, people will estimate that the category is large or the event frequent.” *Id.*

269. *Id.*

270. *Id.*

271. See FED. R. CIV. P. 26–37, *Notes of Advisory Committee on Rules*, <http://uscode.house.gov/view.xhtml?path=/prelim@title28/title28a/node85/titleV&edition=prelim> [<https://perma.cc/TQP4-D9KA>].

were \$15,000, and the median costs for defendants were \$20,000.<sup>272</sup> The study did not find that discovery is never expensive. To the contrary, a related study determined that higher costs are associated with cases where the parties have more at stake.<sup>273</sup> More specifically, for both plaintiffs and defendants, the study found a 1% increase in stakes was associated with a 0.25% increase in total discovery costs.<sup>274</sup> In other words, the increase in discovery costs was tied to the stakes of the case. However, there were other studies that showed that discovery was problematic. For example, a survey of corporate counsel by the Institute for the Advancement of the American Legal System revealed that 90% of the time these counsel believe that discovery costs in federal court are not proportional to the value of the case.<sup>275</sup>

Yet, as scholars have noted, there are reasons to be skeptical of normative assessments of discovery costs.<sup>276</sup> That is because lawyers will inevitably fall back on their own “sense” of litigation as a whole, which as scholars like Danya Reda have argued, is informed by a “cost-and-delay narrative.”<sup>277</sup> As Reda points out in the exact context of the discovery studies, the study design itself demonstrated the degree to which one’s own narrative may not be reflective of reality.<sup>278</sup> For example, the FJC study referenced above reviewed actual cases that had been litigated and closed and then asked the attorneys about their assessment of that closed case.<sup>279</sup> The study then asked those same

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272. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUD. CTR. NAT’L, CASE-BASED CIVIL RULES SURVEY, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf) [<https://perma.cc/F32M-68FJ>]. This study surveyed more than 2,000 lawyers (half plaintiff and half defense) for its study and looked at all cases terminated in federal court during the fourth quarter of 2008.

273. EMERY G. LEE III & THOMAS E. WILLGING, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/FJC,%20Litigation%20Costs%20in%20Civil%20Cases%20%20Multivariate%20Analysis.pdf> [<https://perma.cc/9ETN-JUJF>].

274. *Id.*

275. ADVISORY COMM. ON CIV. RULES, *supra* note 23, at 79–80, 83. One study by the American College of Trial Lawyers Task Force on Discovery found that almost half of the respondents “believed that discovery is abused in almost every case, with responses being essentially the same for both plaintiff and defense lawyers.” *Id.*

276. Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1107–08 (2012). *See also* Thomas & Price, *supra* note 220, at 1154–55.

277. Reda, *supra* note 276, at 1091–102.

278. *Id.*

279. *Id.* at 1107.

attorneys to reflect and estimate discovery costs of discovery in all of their cases.<sup>280</sup> In the actual cases, the plaintiffs' and defendants' attorneys estimated that their median costs of discovery and total litigation were 20% and 27% respectively.<sup>281</sup> When it came to those same attorneys' normative assessments of the system overall, their estimates increased to 33% and 40% respectively.<sup>282</sup> In other words, the normative assessment exceeded the assessment that was informed by the attorneys' experience in an actual case.

When the Civil Rules Committee received all of these studies, however, it did not pay as much attention to the FJC study's empirical data.<sup>283</sup> Instead, it paid a great amount of attention to lawyers' normative assessments of the overall system.<sup>284</sup> Confirmation bias may very well be contributing to how the committee works. After all, as discussed in Part I, much of the committee membership has experience in complex cases.<sup>285</sup> There, the stakes are higher and, as a result, the discovery costs are higher. Even though the FJC study stated that the higher costs were due to many variables—namely, the stakes of the case—the committee membership did not discuss discovery costs that way. To the contrary, the narrative of high discovery costs was confirmed by the experience of the larger group. The data was read to support that assumption, and any potentially contrary data—like the median cost of discovery study—was largely ignored.<sup>286</sup>

A similar risk of confirmation bias is inherent in settlement proceedings in aggregate litigation. The appointment of a homogeneous (and repeat-player) group of special masters to monitor and administer

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280. *Id.*

281. *Id.* (citing EMERY G. LEE III & THOMAS E. WILLGING, FED. JUD. CTR., PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2009)).

282. *Id.*

283. As Reda points out, the Committee ignored four decades of similar findings by other studies. *Id.* at 1111. Reda states, “[n]early every effort to quantify litigation costs and to understand discovery practice over the last four decades has reached results similar to the 2009 FJC study.” *Id.*

284. *Id.*

285. *See also* Thomas & Price, *supra* note 220, at 1155. Thomas and Price noted that the “current Advisory Committee includes many individuals who . . . have complex litigation experience,” including both the practitioners and judges, such that “[f]or many on the Committee, the ‘typical’ litigation experience appears to be the atypical case.” *Id.*

286. ADVISORY COMM. ON CIV. RULES, *supra* note 23, at 79–139, 82–83. The Committee used surveys of lawyers from the American College of Trial Lawyers (“ACTL”), the ABA Section of Litigation, and the National Employment Lawyers Association (“NELA”) to support the need for changing the rule rather than considering the findings from the FJC study. *See also* Thornburg, *supra* note 73, at 27–31 for a discussion of the group and individual decision making dynamics involved in the recent discovery amendments.

settlement creates this risk. Judges who must then approve, or at the very least scrutinize, proposed settlements might necessarily underestimate information that runs counter to the settlement and overestimate information that supports the settlement. This is, in part, because of the familiarity and expertise of the special master, but it is also due to the lack of any meaningful dissent to the settlement. Outside of certified class actions, there is no real mechanism for creating this potential dissent, and thus the danger of confirmation bias is quite pronounced.

In addition to cascade effect and confirmation bias, a third type of concern in group decision making is group polarization. Group polarization occurs when a group of homogeneous individuals makes a decision as a group that is far more extreme than they all would have made otherwise as individuals.<sup>287</sup> It is when “like-minded people, after discussions with their peers, tend to end up thinking a more extreme version of what they thought before they started to talk.”<sup>288</sup> While cascade and group polarization are closely related, the “key difference is that group polarization refers to the effects of deliberation, and cascades often do not involve discussions at all.”<sup>289</sup>

There are multiple explanations for the group polarization effect. The first is the “social comparison” theory, which holds that individuals are either pressured or enabled to adopt positions that they would not have reached on their own.<sup>290</sup> “Once we hear what others believe, some of us will adjust our positions at least slightly in the direction of the dominant position, simply in order to be able [to] present ourselves in the way we prefer.”<sup>291</sup> Second, the persuasive argument theory states that where a group has a tendency to hold one position, the arguments then made in that group setting overstate the weight of that position.<sup>292</sup> This is because there are no counterarguments to be made. A third explanation is the self-categorization theory. This theory states that a member’s own awareness of their place in the group makes them work even harder to close the gap between their own thoughts and that of the group.<sup>293</sup> This results in a consensus that may actually be more extreme than what the

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287. SUNSTEIN, *supra* note 259, at 11.

288. *Id.* at 112.

289. *Id.* at 113.

290. *Id.* at 122.

291. *Id.*

292. *Id.* Sunstein argues that this is all about information. *Id.* at 120–21. “People respond to arguments made by other people—and the argument pool in any group with some predisposition in one direction will inevitably be skewed toward that predisposition.” *Id.*

293. *Id.*

group's original view might have been because the member's perception of where the group is going and where he sits as an individual guides his decision making instead of his objective assessment of the facts.<sup>294</sup>

Whatever the explanation, group decision making is susceptible to group polarization effect, and the one percent players are not immune. For example, in the multidistrict litigation context, plaintiffs' lawyers in leadership positions may not be willing to dissent even when they have reasons to do so. This is likely because of the social comparison theory. Lawyers who seek leadership positions in future multidistrict litigation cases are exactly the kind of individuals who might be subject to this effect. In social comparison theory, people tend to focus on what the group collectively knows and believes, and to disregard different perspectives or new information.<sup>295</sup> Group members may do so because they fear "group rejection" or they want "general approval."<sup>296</sup> "Group members who care about one another's approval or who depend upon one another for material or nonmaterial benefits will suppress highly relevant information."<sup>297</sup> Lawyers might not share their concerns about a current litigation strategy with the group because they fear it will inhibit their chances at a leadership position the next time around. This might lead the group to adopt a suboptimal settlement or strategy.

Other aspects of multidistrict litigation are similarly susceptible. The JPML is a small and closely knit group of judges who serve for seven-year terms. They may feel social pressure to impress one another for future types of service. As already discussed, they are prone to favoring each other, as evidenced by the appointment of their own panel members as transferee judges such as the appointment of Judge Breyer to the VW litigation over other non-JPML district judges.<sup>298</sup>

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294. *Id.* See also James H. Davis, *Introduction to the Special Issue on Group Decision Making*, 52 ORGANIZATIONAL BEHAV. AND HUM. DECISION PROCESSES 1, 1–2 (1992). Group polarization has also been described as an explanation of something called the "choice shift" effect. James H. Davis, *Some Compelling Intuitions About Group Consensus Decisions, Theoretical and Empirical Research, and Interpersonal Aggregation Phenomena: Selected Examples, 1950–1990*, 52 ORG. BEHAV. AND HUM. DECISION PROCESSES 3, 10 (1992). "However, it is difficult to discern which is the chicken and which is the egg. Do individuals change positions as a result of discussion . . . ? Does a group reach consensus on other grounds, such as a minority yielding to a majority?" *Id.* at 12. Cass Sunstein discusses similar effects: ideological amplification and ideological dampening. See SUNSTEIN, *supra* note 259, at 4. In each respective case, being in a group with like-minded or differently-minded individuals will either amplify or dampen ideological preferences. *Id.*

295. SUNSTEIN, *supra* note 259, at 123.

296. *Id.*

297. *Id.*

298. See *infra* Part I. See also Williams & George, *supra* note 170.

Members of the civil rulemaking body are also institutional actors who appear to be vulnerable to group polarization. As discussed earlier, this group is quite homogeneous. The few potential dissenters—such as the plaintiffs’ attorneys or the Democratic-appointed judges—no doubt experience the social comparison effects of group decision making. They have concerns about their reputation and an interest in being seen as team players. Moreover, these “dissenters” are not really that different from the rest of the committee because they share a complex, high-stakes litigation experience. Due to the group polarization, the Civil Rules Committee is also susceptible to developing an “us versus them” attitude about some of their proposals. “If members of the group think that they have a shared identity and a high degree of solidarity, there will be heightened polarization.”<sup>299</sup> This means that the group is also less likely to hear critiques from groups that they view as “other.”<sup>300</sup> The recent discovery amendment process showed that the civil rulemaking body adopts this approach. The alleged predictability of plaintiffs disputing the proposals and defendants supporting it motivated, to a large degree, the committee to disregard the comments altogether.<sup>301</sup>

In spite of the risks, group decision making is not an absolute negative. There is a certain amount of cohesiveness that these effects achieve, and that cohesiveness allows for groups to function civilly and effectively.<sup>302</sup> Yet, the downside of these effects cannot be denied. The challenge is to acknowledge that these effects are, in fact, possible and then create mechanisms to counter the negative impacts while augmenting the positive.

## 2. *Imperfect Decisions*

The creation of the Federal Rules of Civil Procedure and how they are used and interpreted is a product of a series of decisions made by rulemakers, lawyers, and judges. Like all decisions, these are often imperfect ones. One reason may be that the structure for such decision

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299. CASS R. SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* 42 (Oxford University Press 2009).

300. *Id.* “[P]eople are less likely to shift if the direction advocated is being pushed by unfriendly group members or by members who are in some sense ‘different.’” *Id.*

301. *Advisory Committee on Civil Rules, April 2014, supra* note 286, at 80. The comments were identified as “reflecting pro-plaintiff or pro-defendant views, divided sharply between strong opposition and strong support.” *Id.* The proposals were also said to have “drawn widespread protest by those who commonly represent plaintiffs, and widespread support by those who commonly represent defendants.” *Id.* at 116.

302. SUNSTEIN, *supra* note 259, at 12.

making encourages the most heavily-resourced and interested parties to bring their weight to bear. Relatedly, the costs of these decisions are not born by this narrow group of actors, but are instead spread across a large swathe of actual and potential litigants. Social science theories on lawmaking and regulation help to explain why the Civil Rules—and how those rules are used and interpreted—are particularly susceptible to imperfect decision making.

James Q. Wilson developed a well-known four-quadrant typology of law-making and regulation, which demonstrated that the viability of a law depended on the distribution of costs and benefits.<sup>303</sup> He theorized four types of laws based on these potential distributions: “majoritarian politics” (diffuse benefits and costs), “client politics” (diffuse costs and concentrated benefits), “entrepreneurial politics” (concentrated costs and diffuse benefits); and “interest-group politics” (concentrated costs and benefits).<sup>304</sup> According to Wilson, the laws in the category of entrepreneurial politics are very difficult to pass.<sup>305</sup> The costs are concentrated, and the incentives for a counter-movement are quite strong.<sup>306</sup> In contrast, the laws in the majoritarian and interest-group politics categories were easier than entrepreneurial laws.<sup>307</sup> In majoritarian politics, laws with costs and benefits widely distributed would ultimately depend on political will, so if the political will was

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303. THE POLITICS OF REGULATION 357–94 (James Q. Wilson ed., 1980). Most of this literature focuses on agency regulation and democratic politics and has developed into the public choice theory. “Public Choice [is] the economic study of nonmarket decisionmaking or simply the application of economics to political science.” Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878 (1987) (quoting DENNIS C. MUELLER, PUBLIC CHOICE 1 (1979)). See generally Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 99 (1983) (“[W]idely dispersed costs or benefits are less effectively represented in policymaking than concentrated costs or benefits. Thus we would expect error-correction to favor interests championed by enforcers and regulated firms and to undervalue interests of unorganized beneficiaries of government programs.”); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 890–901, 906 (1987) (concluding that the influence of special interest groups is overstated, but quite real); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 229–33 (1986) (“Because the benefits of such legislation are spread among everyone in the population, individual members of the public lack sufficient incentives to promote public interest laws since all the costs of such promotion must be absorbed by the promoters themselves.”).

304. *Id.* at 367–72.

305. *Id.* at 370.

306. *Id.* An example of successful entrepreneurial politics includes Ralph Nader and The Auto Safety Act of 1966. *Id.*

307. See *id.* at 367–68.

strong, the law would pass.<sup>308</sup> If not, then there would be no new law. With interest-group politics, Wilson theorized that with both concentrated costs and benefits, each side of a particular issue had the same incentive to organize, leaving much of the rest of the populace out of the equation.<sup>309</sup> This meant these kinds of laws would only pass in cases where the legislature was most amenable.<sup>310</sup>

The easiest of laws to pass, however, is the client politics category. There, the diffuse costs of the law mean broader constituents are less motivated to organize against it while the concentrated benefits mean that a narrow group of individuals have strong incentives to see the law through. Because the costs of the change are spread across a broad group, the resistance to the change is diluted.<sup>311</sup> Yet, the incentives for those who stood to benefit were quite high because that benefit would be concentrated on them.<sup>312</sup> As Wilson explains, “[s]ome small, easily organized group will benefit and thus has a powerful incentive to organize and lobby; the costs of the benefit are distributed at a low per capita rate over a large number of people, and hence they have little incentive to organize in opposition—if, indeed, they even hear of the policy.”<sup>313</sup>

Wilson’s examples of client politics laws included what he referred to as “less conspicuous regulatory programs, such as state laws that license (and protect) occupations[,]” as well as instances “where the government is supplying a cash subsidy to an industry or occupation.”<sup>314</sup> This theory, though not a perfect fit, can be adapted to demonstrate how procedure is developing in civil litigation today.<sup>315</sup> While these changes are not taking place purely legislatively, the framework still works when applied across the areas this Article discusses—aggregate litigation, Supreme Court

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308. *See id.* at 368. Wilson cites the Sherman Antitrust Act as an example of this kind of law. *Id.* at 367.

309. *Id.* at 368. Wilson cites labor legislation as examples of this kind of law.

310. *See id.*

311. *Id.* at 369.

312. *Id.*

313. *Id.*

314. *Id.*

315. *See, e.g.*, Patrick Luff, *Captured Legislatures and Public-Interested Courts*, 2013 UTAH L. REV. 519, 548 (2013) (arguing that “the factors suggesting private-interest capture of the judiciary are unconvincing”); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 10–11 (1990) (limiting the usefulness of public choice theory and other social science methods).



practice, and the federal civil rulemaking process.<sup>316</sup> Civil procedure is important to those that are paying attention, but it does not garner attention to the degree that many substantive legal developments do. Indeed, it is an area that, while not completely veiled, is less prominently considered by the public. In this way, procedure is much like Wilson's client politics laws. It is "less conspicuous"<sup>317</sup> than other legal topics; those who stand to gain the most are behind, and receive the concentrated benefits of, many procedural developments, while the rest of the civil litigation system and its players are together bearing the diffuse costs.

A salient critique of client politics is that it allows for normatively bad legislation to be passed simply because it is easiest to do so.<sup>318</sup> This leads to legislation that serves a well-resourced minority at the expense of a less-resourced majority.<sup>319</sup> That is because "smaller groups with aligned preferences (industry and trade groups, for example) are better able to organize than diffuse groups (the general public)" and thus are better "able to exert disproportionate influence on [policymakers]."<sup>320</sup> There are certainly many critiques of the public choice theory of politics that are largely beyond the scope of this Article.<sup>321</sup> The point of using the theory here is to create yet another access point for considering whether the way procedure develops is optimal. When this lens is used, it demonstrates that many recent procedural developments are for the benefit of the few.

For example, the Civil Rules Committee discovery reform agenda has been pushed by individuals who are heavily involved in high-stakes litigation. As previously discussed, the lawyers who sit on the committee have unique complex litigation experience, with many further representing business interests in practice.<sup>322</sup> Further, the judges who sit on the committee have a conservative ideological bent, having been

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316. The federal civil rulemaking process has some legislative or administrative law flavor, but it is not legislative in the purest sense of the word. *See infra* Part II.

317. THE POLITICS OF REGULATION, *supra* note 303, at 369.

318. Susan Block-Lieb, *Congress' Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 ARIZ. L. REV. 801, 838 (1997).

319. *See id.* at 837–38.

320. Luff, *supra* note 315, at 529.

321. One such critique is that it is sometimes in the public interest for a minority to obtain legislation that benefits it. Block-Lieb, *supra* note 318, at 837. The argument is that when non-monetary costs and benefits are accounted for, it is indeed in the public interest for this type of legislation, in some cases, to pass. *Id.*

322. *See supra* Part I.A.1.

mostly appointed by a Republican president.<sup>323</sup> What this means is that these individuals are inherently more attuned to, and more concerned about, what they see as high discovery costs. Cognitive biases aside, the reality of the rulemaking process is that the individuals sitting on the committee have a fundamental interest in lowering discovery costs both because of their own litigation experiences and also because the individuals and institutions who have access to the committee—and the power to organize as well—are also likeminded. There were influential groups and individuals who opposed the discovery amendments, such as the Center for Constitutional Litigation and various well-known plaintiffs’ attorneys.<sup>324</sup> Yet, their firepower pales in comparison to organizations like the Chamber of Commerce and DRI—The Voice of the Defense Bar—or general counsel’s offices from Microsoft, Bayer, and GlaxoSmithKline.<sup>325</sup> Moreover, as already discussed, the institutions that are helping to draft and execute the rules are equally in a concentrated-benefit stance. The Duke Center for Judicial Studies is but one example of how those who have high-stakes litigation experience are concentrating their efforts toward achieving reform that will most benefit them.

Civil rulemaking is an obvious example because it is quasi-legislative. But it is not the only example of how concentrated benefits and diffuse costs give rise to one percent procedure. The experience of judges and litigants in aggregate litigation is also subject to this effect. The experience in that litigation has led many to consider settlement as the most viable option. Such complex litigation, it is argued, is more easily resolved without adjudication.<sup>326</sup> This ethos around settlement has transformed all of civil litigation, however. The goal of judges is often not to adjudicate, but to manage the litigation toward settlement.<sup>327</sup> Thus,

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323. *Id.*

324. See Hatamyar Moore, *supra* note 57, at 1140–44; *CCL Files Comments Opposing Proposed Amendments to the Federal Rules of Civil Procedure*, CTR. FOR CONST. LITIG. (February 18, 2014), <http://www.cclfirm.com/blog/12283/> [<https://perma.cc/TA5U-42NA>].

325. *Id.* See also ADVISORY COMM. ON CIV. RULES, *supra* note 23, at 181, 224.

326. Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 41 (1996) (discussing in detail the public policy for supporting settlements and criticizing the Supreme Court’s failure to consider these policies in three specific cases).

327. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982) (discussing how judges often manage cases toward settlement); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981) (discussing how Rule 16 and other changes to the Civil Rules provide opportunities for judges to manage cases toward settlement). It is not just settlement for the sake of settlement that is troubling. Indeed, the focus on settlement takes the focus off of merits discovery for the purpose of trial. This

when judges who have more experience with such complex cases either end up on rulemaking bodies or even just addressing cases in their own chambers, it is easy to see how they begin to focus on settlement as the objective.

Similarly, the advent of the Supreme Court Bar exemplifies client politics in practice. A small minority of individuals and entities has access to the elite Supreme Court Bar, and they are using that advantage to influence the Supreme Court's agenda. The issues in which they have the greatest interest are then litigated at that level, while issues that may be of interest to the rest of the population are not. Again, it is not as if the lawyer seeking certiorari is the only deciding factor dictating what cases the Supreme Court hears. But it is another example of how a small percentage of individuals and entities have heightened access to one critical fulcrum of how procedure develops. This is demonstrated in cases like *Twombly* and *Iqbal*, two cases that arguably heightened pleading standards; *J. McIntyre Machinery v. Nicastro*,<sup>328</sup> a case that made it easier for large corporations to have a national customer base without subjecting the company to any such national personal jurisdiction; and *AT&T Mobility LLC v. Concepcion*<sup>329</sup> and *DirectTV, Inc. v. Imburgia*,<sup>330</sup> two cases that have solidified the validity of the class action waiver in arbitration agreements. These are some examples of how the procedure agenda of the Supreme Court has benefited a concentrated group of litigants while putting a diffuse group of litigants in a lesser position. Yet, that larger group of litigants is so diffuse that it does not otherwise have the incentive (or resources) to engage the Supreme Court and what civil procedure cases it hears.

In other words, many of the ways in which procedural rules and doctrine develop—through Supreme Court litigation, through doyen litigation like MDL, or through the civil rulemaking process—adhere to a client politics model. The result is that a minority of the players in civil litigation—the one percent—dictate the rules for the rest. Yet, these rules are not optimal because they do not account for much of the litigation that makes up our civil litigation system.

One of Wilson's goals in critiquing the regulatory state using categories, including client politics, was not to necessarily put an end to that kind of regulation, but instead to focus on how those regulations

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means that the parties' positions going into settlement might be negatively affected because they were unable to get the discovery necessary to augment their bargaining position.

328. 564 U.S. 873 (2011).

329. 563 U.S. 333 (2011).

330. \_\_ U.S. \_\_, 136 S. Ct. 463 (2015).

came to be.<sup>331</sup> By understanding the politics and economics behind a law, we can better structure the system so that the benefits are maintained, but the negatives are lessened. As Wilson argued, “ideas” are important, and they largely influence how any system works.<sup>332</sup> Thus, when members of a decision making body share all of the same ideas, the system works as such. Yet, when members of that same body come to the table with different ideas, the resulting system is altered.

As will be discussed in the next Part, changing how procedural reform occurs will go a long way toward dulling the negative effects of a one percent regime, while still allowing for the benefits of such expertise to remain.

### *B. Procedure for the Ninety-Nine Percent*

The individuals responsible for how procedure develops are the most elite among us. Their expertise and experience is undoubtedly a benefit to the civil litigation system as a whole. These individuals are, after all, some of the best and the brightest. Yet, there are inherent costs in leaving policy making to such a homogeneous group of individuals. They necessarily have blind spots, are subject to various biases, and, as a consequence, are not capable of producing an optimal set of procedures and doctrines to govern a civil litigation system that is far more varied than their experience. These frailties in the current one percent procedure regime are demonstrated by the social science that interrogates group decision making and by the political science theories around regulatory lawmaking.<sup>333</sup> Thus, knowing that the current one percent procedural regime has some benefits but also suffers from some critical weaknesses, the question then becomes how to reform the system to make it better. In this section, the Article will elaborate on how to achieve this heterogeneity by proposing specific reforms tailored to maintain the benefits of expertise bestowed in a one percent procedure regime, but also meant to distribute more of the benefit to the vast ninety-nine percent.

#### *1. Redressing By-the-One-Percent Procedure*

In order to address the negative impact of one percent procedure, structural changes to the institutions responsible for creating procedural

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331. THE POLITICS OF REGULATION, *supra* note 303, 391–93.

332. *Id.* at 393–94.

333. *See* Part II *infra*.

doctrine are required. As the previous section demonstrated, the homogeneity that dominates these institutions leads to flawed decision making and suboptimal decisions. There is no complete panacea for this problem; as with many complex problems, the proffered solutions are neither satisfying nor complete. Yet, there are some structural modifications that would at least begin to right the procedural machine back toward the ninety-nine percent by requiring more heterogeneity in the decision making bodies and the decision making process.

More specifically, in the context of federal civil rulemaking, there are a number of changes that could be implemented. One suggestion is to take the appointment power away from the Chief Justice. Scholars have argued that the Chief Justice's ideology and agenda necessarily infects the kind of appointments that he makes.<sup>334</sup> There is nothing in the Rules Enabling Act that requires the Chief Justice make the appointments, so it is possible to change this custom. Instead of the Chief, perhaps the Judicial Conference or some combination of the Justices, the Judicial Conference, and representative litigation groups could make the appointments instead.<sup>335</sup>

If the appointment process must remain with the Chief, another option would be to require more diversity on the Committee and to enforce the self-stated term limits. When Congress amended the Rules Enabling Act in 1988, the House version of the bill required that the rules committees have a "balanced cross section of bench and bar, and trial and appellate judges."<sup>336</sup> No one seemed to outwardly dislike this language, yet the final version of the bill did not retain the "balanced cross section" language.<sup>337</sup> It might be time to resurrect the ethos of this language and require greater balance among the committee members, not just in terms of ideological perspective, but also in terms of the kind of litigation that they practice.<sup>338</sup> For example, Elizabeth Cabraser is the sole plaintiffs'

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334. Hatamyar Moore, *supra* note 57, at 1087.

335. James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the "Court of Law" Requirement*, 107 NW. U. L. REV. 1125, 1178-79 (2013) (noting that the Chief makes appointments in other contexts where perhaps a "collegial designation process" would be more appropriate).

336. H.R. REP. NO. 100-889, pt.1, at 3 (1988).

337. Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1662 (1995).

338. Coleman, *supra* note 45, at 293-97 (discussing various proposals for restructuring federal civil rulemaking); Jeffrey Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 637 (2001) ("On a longer term, but perhaps more elusive level, policymakers should consider fine-tuning the generally wise Rules Enabling Act process to ensure that the various committees are more evenly balanced in socio-political makeup.").

attorney on the current Civil Rules Committee, which in itself is a problem. Compounding the problem, however, is the fact that Cabraser practices the one percent litigation this Article discusses: she is one of the most successful complex litigation lawyers in the world. Thus, in addition to increasing the presence of plaintiffs' attorneys, a better structure would also ensure that lawyers with small to mid-size practices served on the committee as well. This would encourage the Committee to focus on how changes might impact lower-stakes litigation. In addition to requiring this diversity, the Chief Justice could also be required to articulate the reasons for his appointments—an account of why he chose a particular person and what her qualifications are.<sup>339</sup> Doing so would increase the transparency regarding who is chosen to serve on the committees and would also give the public a sense of what qualifications are viewed as critical to such appointments.

For the elite Supreme Court Bar, the solutions are harder to imagine. After all, the best and the brightest come through the ranks of law school and into judicial clerkships that then feed the Supreme Court clerkship, which then lead to prestigious opportunities like the Solicitor General's office. Changing the nature of the individuals coming through these pipelines is the most obvious solution, but that requires changes to the way law students and clerks are accepted and mentored. Moreover, to a large degree, the composition of the Bench itself has to change—or become more enlightened—in order to allow for a more diverse population to obtain clerkships and opportunities. Thus, the changes necessary to equalize the influence of the Supreme Court Bar might require a different approach than simply changing the Bar's composition.

As already discussed, the elite Supreme Court Bar has a great deal of influence in the kind of cases that the Court takes. This is true in the context of procedure, as the Court continues to take cases and make decisions intended to stem the tide of out-of-control litigation. Yet, the litigation that the Court is looking at in those cases is not as common as the everyday litigation in federal court. There are at least two ways to minimize the effect of one percent influence in this context.

One way is to somehow focus the Court on how its procedure decisions are skewing the civil litigation system for the vast majority of

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339. See Maxwell Palmer, *Does the Chief Justice Make Partisan Appointments to Special Courts and Panels?*, 13 J. EMPIRICAL L. STUD. 153, 166 (2016) (suggesting that “[i]f the Chief Justice is concerned about this appearance of partisanship, the solution is easy and obvious: the Chief Justice could release a simple statement explaining the qualifications of his appointees and the basis for his choices, just as the president does when appointing judges.”).

cases. So, for example, when the Court was deciding cases like *Twombly* and *Iqbal*, perhaps there was a way to focus the Court on how changes in pleading that might have made sense in a large antitrust case might make less sense in the mine run of cases. This may take the form of dedicated and respected amici that the Court would look to for this kind of discussion. Or, perhaps the Court could ask the parties to devote some amount of their argument to the effect that changes in the rules would have on the entire system. One critique of the Court is that it is hostile to litigation and, to some degree, out of touch with how litigation really functions.<sup>340</sup> Many of the Justices never practiced at the trial-court level, nor did they sit as a District Court judge. In order to counter the Court's trial court blind spot, an educational program might serve a good purpose. The point here is not to argue that the Court should come up with rules specific to each kind of litigation that exists in our system today, but to argue that making policy decisions with a blind eye to those other forms of litigation is not going to result in the best policy overall.

A second way in which the one percent effect of the Supreme Court Bar might be lessened is to change how much access and influence members of this bar have. As already discussed, figuring out how to better diversify such an elite group of lawyers is no small task. The problem of homogeneity starts in the education system, seeps up through law school, and continues with biased mentorship and opportunities. To be sure, the composition of the bar is slowly shifting, but again, there is great value placed on expertise in law practice and the most elite and influential type of law practice necessarily includes one percent litigation. However, there are still ways to dull the influence, even if the elite Supreme Court Bar comes from and continues to represent a certain type of practice. Private funding could create opportunities by building on the law school models of Supreme Court litigation at places like Stanford Law School. Perhaps there are private individuals who would fund a specialized practice providing greater Supreme Court access to

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340. See, e.g., Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation As an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006) (“[O]ne cannot understand the Rehnquist Court's complicated intellectual matrix without taking account of its profound hostility toward the institution of litigation and its concomitant skepticism as to the ability of litigation to function as a mechanism for organizing social relations and collectively administering justice”); Brooke Coleman, *Civil-izing Federalism*, 89 TUL. L. REV. 307, 310–11 (2014) (arguing that in procedural cases, some individual Justices' hostile views of civil litigation are better predictors of their position than their alleged commitments to federalism); Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1139 (2012) (finding in an empirical study of the Roberts Court that the “Justices have less courtroom experience (as lawyers or trial judges) than prior Justices”).

the ninety-nine percent litigants. Another approach might be to require members of the elite Supreme Court Bar to take on a certain amount of pro bono cases. A final idea might be to publicly fund lawyers who are performing at this level so that they can take on cases without demanding a high price from their clients. Given the resistance to funding legal aid, this final suggestion seems the least unlikely of an already unlikely cast of characters. However, the bottom line is that with awareness that the elite Supreme Court Bar appears to have disproportionate influence and access, some structural changes must be made to ensure the integrity of that elevated influence and access.

The influence of one percent players in the construction of procedure is out of line with the kind of litigation that makes up our civil justice system. In other words, the procedures created by the one percent are a disservice to the remaining ninety-nine. In order to mitigate the amount of influence exercised by the most elite litigation and its participants, structures like the federal civil rulemaking process and the Supreme Court Bar must be reexamined and reformed. The changes suggested in this Part are certainly not the only answers, but they go a long way towards righting the system.

## 2. *Righting For-the-One-Percent Procedure*

In addition to the procedures created by the one percent, there are also procedures such as multidistrict litigation that are largely created for the one percent. As already discussed, these systems suffer similar frailties in their decision making. Thus, like the procedures by the one percent, the simple answer in the for-the-one-percent category is to create greater heterogeneity within these powerful institutions. The details of this simple answer prove to be a bit more elusive.

Elizabeth Burch has effectively probed multidistrict litigation and its structure.<sup>341</sup> Burch studied the homogeneity of the lawyers who litigate multidistrict cases and argued for a number of reforms, including allowing for outsiders to more readily object and dissent from lead plaintiffs' lawyers actions, as well as appointing a more representative group of attorneys to actually lead the case.<sup>342</sup> Burch also suggested reforming how attorneys' fee awards are calculated.<sup>343</sup> She argued for a quantum-meruit theory of fee awards that would allow judges to tailor

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341. See Burch, *supra* note 177.

342. *Id.* at 120–23.

343. *Id.* at 128–38.



the fees to the actual benefit the lawyers obtained for their clients.<sup>344</sup> Burch's reforms get to the heart of the one-percent problem at the micro-level of multidistrict practice. Her suggested structure requires more heterogeneity among decision makers, fosters dissent, and rewards participants for the work they actually do.

These changes would then mitigate the potential downfalls inherent when group decision making is done by a homogeneous group. As one scholar has argued, "[i]f big rewards come to those who conform, bad cascades will increase, simply because the incentive to be correct is strengthened or replaced by the incentive to do what others do."<sup>345</sup> Yet, these changes also balance the benefit of expertise in this context. It would be a mistake to vary the composition of these lawyer groups so much that such expertise is lost. Instead, solutions must bring more diversity without sacrificing the benefits of repeat players. Other solutions might include a requirement that for each MDL, a new entrant be appointed to the plaintiffs' steering committee. These types of changes would allow voices into the process so that they could gain the experience without sacrificing the efficiencies and benefits of having experienced lawyers running the litigation. These kinds of changes to the structure of multidistrict litigation, including those suggested by Burch, would go a long way toward combatting the negative effects of homogeneity in the context of multidistrict litigation.

Additional changes might include more frequent turnover on the JPML membership. That body chooses whether to consolidate cases and decides to where they should be transferred. Those decisions are heady ones and a seven-year term may be too long to allow for the kind of heterogeneity of opinions that would lead to better decision making. The Chief Justice also makes these appointments. As discussed in the previous section, the JPML is another area where perhaps a different selection process and decision maker is worth considering. Even without these changes, there is some evidence that diversity in the JPML changes results. As discussed, Judge Vance recently became the first female chairwoman of the Panel. Under her leadership, the consolidation grant rate decreased to 40%, making this the first year that the panel denied more motions than it granted.<sup>346</sup> It could be that greater diversity in

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344. *Id.* at 128–29.

345. SUNSTEIN, *supra* note 259, at 76.

346. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., CALENDAR YEAR STATISTICS 6-7 (2015), [http://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Calendar\\_Year\\_Statistics-2015.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2015.pdf) [<https://perma.cc/6424-ATUF>].

terms of leadership and membership is already affecting the JPML's practices.

Finally, the increasing appointment of special masters in these complex cases should be examined. The concern is that repeat-player special masters might be more concerned about their reputations as settlement-makers and less concerned about making sure the settlement process is fair to all involved.<sup>347</sup> One way to combat this instinct is to change the structure around special master involvement in settlement by making all interactions on the record or by requiring more judicial oversight and involvement in the settlement process.<sup>348</sup>

Beyond changes to the internal functioning of these procedures, there is the lingering question of how these one percent procedures impact other kinds of litigation. That is, we must understand how this kind of litigation influences the development of procedure overall. Judges who oversee many of these kinds of cases must somehow keep in mind that there are other types of cases on their docket. When they develop case law specific to aggregate litigation and multidistrict litigation, they must endeavor to keep it there.<sup>349</sup> Moreover, when lawyers who practice primarily in these areas have the opportunity to effect policy in civil litigation, those lawyers must also be aware that there are other types of civil litigation. We can educate judges and lawyers and hope that they can be aware of their own biases and blind spots. But the reality is that education and self-awareness only go so far. The deeper answer is to introduce more heterogeneity into the elite bench and bar—to make space for lawyers and judges with different kinds of experiences to influence how procedure develops. Given that specialization in the practice of law is here to stay, the chance of changing the lawyer population is unlikely. But judges can certainly be more varied, and perhaps there are ways to appoint judges with more variety of legal experiences, such that even if they come to handle a number of complex cases, their prior experience will balance that bias. Judges have a great deal of power when it comes to defining the contours of civil procedure—the Civil Rules provide judges with discretion and the interpretation of procedural doctrine depends on policy decisions that the

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347. Margaret G. Farrell, *The Function and Legitimacy of Special Masters*, 2 WIDENER L. SYMP. J. 235, 266 (1997).

348. See Brazil, *supra* note 200, at 421–22.

349. See, e.g., Thomas, *How Atypical*, *supra* note 231, at 992 (arguing that the Court should adopt an “atypical doctrine”).

judge must make.<sup>350</sup> While it may be difficult to insulate judges from the political pressures that are becoming all too familiar in modern times, varying the actual experience of our bench may go a long way toward balancing the way procedure is implemented.

This leads to a final point. It may be that heterogeneity is not enough. The civil litigation system may, like our economic system, be too different in its extremes. Thus, no matter how much diversity one introduces into these structures, it may not change the fact that complex litigation is distinct from other kinds of litigation. If high-stakes litigation is so different in kind, then it may be time to question the transsubstantive nature of our system of procedure—the idea that all civil cases are governed by one set of rules.<sup>351</sup> Much has been written about the pros and cons of transsubstantive procedure, and this Article does not want to duplicate that effort.<sup>352</sup> Setting aside the benefits or disadvantages of a transsubstantive system, this Article has demonstrated that there is indeed a one percent problem. If the structural changes suggested will not eradicate those challenges, then all that is left is to accept the one percent system as it is and attempt to create separate rules for the separate systems.<sup>353</sup> Whatever the solution, however, one

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350. Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 120 (2009) (“The Federal Rules necessarily confer substantial discretion on Article III judges. The discretion they confer entails the power to make policy choices that, although they may be buried in the obscurity of technical language, are increasingly likely to be exposed by those who have come to recognize the power of procedure, often in recent years aided by systematic empirical data.”).

351. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 370 (2013) (“For example, consideration should be given to abandoning the transsubstantive principle requiring that the Federal Rules be ‘general’ and applicable to all cases—a notion that supposedly is embedded in the Rules Enabling Act.”).

352. See, e.g., Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 324, 333–34 (2008) (advocating against transsubstantivity as an “independent value” of the Federal Rules); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1940 (1989) (“[U]niformity and trans-substantivity . . . are a sham.”); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 373 (2010) (discussing the history and precarious existence of transsubstantivity).

353. Miller, *supra* note 351, at 371 (arguing that serious consideration should be given to the idea of “putting cases on different litigation tracks and devising different procedures that are deemed appropriate for the characteristics of the cases posted to each track”); Richard McMillan, Jr. & David B. Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431 (1985) (proposing a formal fast-track litigation for certain disputes); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENVER U. L. REV. 377, 398–405 (2010) (proposing a simple track for cases involving low-value disputes).

percent procedure will not go away on its own. It is something that we must address.

## CONCLUSION

Much like the need to bridge the economic gap between the one and ninety-nine percent, the civil procedure system governing all of federal civil litigation must similarly be rethought. Procedures designed for the one percent and by the one percent fail to account for the average litigation that occurs in federal civil court. This is because the individuals responsible for creating this procedure are too deeply steeped in high-stakes, complex litigation. Both social and political science provide evidence that decision making by such homogeneous actors often creates a suboptimal product. Indeed, the one percent procedure we have today is not doing right by the ninety-nine percent, as demonstrated by the recent discovery amendments and the influence of multidistrict litigation. The structures that create one percent procedure must be reconsidered. More heterogeneity within the institutions that create federal civil procedure would go a long way toward ensuring that the federal civil litigation system is governed by a set of rules meant for more than just the one percent.