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INSIDE THE AGENCY CLASS ACTION

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ABSTRACT

Federal agencies in the United States adjudicate hundreds of thousands of cases each year. Yet even with this high volume of cases, agencies have not widely deployed tools used in federal court to efficiently resolve large groups of claims, such as class actions and other complex litigation procedures.

A handful of federal administrative programs, however, have quietly bucked this trend—employing class action rules, collective claim handling, and even the kinds of "trials by statistics" once embraced by federal judges around the United States. The Equal Employment Opportunity Commission, for example, created an administrative class action procedure, modeled after Rule 23 of the Federal Rules of Civil Procedure, to resolve "pattern and practice" claims of discrimination by federal employees before administrative judges. Since the early 1990s, the National Vaccine Injury Compensation Program has used "Omnibus Proceedings," which resemble federal multidistrict litigation, to pool together common claims that allege a vaccine injured large groups of children. And facing a backlog of hundreds of thousands of claims, recently the Office of Medicare Hearings and Appeals announced a new "Statistical Sampling Initiative"—a pilot program that will use trained and experienced experts to resolve hundreds of common medical claims at a time by statistically extrapolating the results of a few hearing outcomes.

These efforts to employ the tools of aggregation in administrative proceedings have received little examination. Consequently, very little is known about: (1) how agencies choose cases or claims appropriate for aggregation, (2) which aggregation tools these agencies use, (3) the successes and failures of these programs, and (4) the other types of proceedings in which different aggregation tools might facilitate more expeditious, consistent, and fair handling of large groups of claims.

Based on our examination of recent efforts by federal agencies to aggregate administrative proceedings and dozens of interviews with the key policymakers involved, we identify the types of agency adjudications in which aggregate procedures have the greatest potential, the challenges and obstacles to greater use of aggregation, and broader lessons about what aggregation procedures mean for adjudications conducted by federal agencies.

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INTRODUCTION

A crisis is brewing in Medicare. In 2003, Congress created the Office of Medicare Hearings and Appeals (OMHA)—a specialized administrative court designed to resolve billing disputes between the federal government and hospitals, nursing homes, medical equipment providers, and others.[1] But after six years of relative normalcy, case filings at OMHA began to spiral out of control. By 2014, OMHA's backlog had spiked to almost 500,000 cases.[2] Worse yet, average wait times for benefit decisions mushroomed to over 600 days in 2015.[3] Even though OMHA is required to make such decisions, by law, in 90 days, its workload became so heavy that at one point it took almost five to six months just to enter new cases onto its docket.

Medicare's problems are hardly unique in the administrative state. The number of claims languishing on administrative dockets and in other specialized courts has become a new crisis — producing significant backlogs, arbitrary outcomes and new barriers to justice.[4] Last week, the Department of Education acknowledged that over 20,000 students with similar claims for loan forgiveness currently sit on growing waitlists with

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[1] OMHA was created by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (the Medicare Modernization Act). See Pub. L. No. 108-173, § 931, 117 Stat. 2066.

[2] *See infra* Part II.C.

[3] Nancy J. Griswold, Chief ALJ, OFF. OF MEDICARE HR'GS & APPS., APPELLANT FORUM – UPDATE FROM OMHA (June 25, 2015).

[4] Over the past several years, problems in many different administrative courts have been described as "a crisis." *See* Anthony Brino, *Medicare Claims Crisis Pits Hospitals Against Feds, Auditors,* Healthcare Finance (May 27, 2014), http://www. healthcarefinancenews. com/news/growing-claims-appeal-crisis; *see also* Veterans for Common Sense v. Shinseki, 644 F.3d 845, 878 (9th Cir. 2011) ("The current delays therefore constitute a deprivation of Veteran's mental health care without due process, in violation of the Fifth Amendment."), *vac'd on reh'g en banc* 678 F.3d 1013 (9th Cir. 2012); *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hr'g Before the S. Comm. on the Judiciary*, 112th Cong. 1 (2011) [hereinafter *Ensuring Justice in Immigration*] (statement of Karen T. Grisez, Chair of the Am. Bar Ass'n Comm'n on Immigration) (arguing that "our immigration court system is in crisis"); Erik Eckholm, *Disability Cases Last Longer as Backlog Rises*, N.Y. TIMES, Dec. 10, 2007, at A1 (describing 500 day waiting periods for social security claims as "purgatory"); Press Release, Jay Rockefeller, Senator Rockefeller Releases GAO Report on Black Lung Benefits (Oct. 30, 2009), http://rockefeller.senate.gov/press/record.cfm?id=319537 (finding Black Lung Benefits Program "shameful"); JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLDTZ, & PHILIP G. SCHRAG, REFUGEE ROULETTE, DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 6 (2009) (describing asylum applications as "a spin of the wheel of fate").

the agency,[5] a year after the for-profit Corinthian Colleges collapsed under the weight of several state and federal fraud investigations.[6] The Department of Veteran's Affairs recently admitted that veterans face average wait times of four years to obtain their disability benefits.[7] Even as Congress tries to create similar administrative programs to resolve claims more quickly than the federal courts, they often meet the same Kafkaesque fate.[8]

But what made OMHA unique was its response. Last year, OMHA announced that it would adopt a fascinating new pilot program that allows medical providers with large numbers of similar claims to conduct "trials by statistics." Dubbed the "Statistical Sampling Initiative," a medical provider with more than 250 similar claims would have the option to try a small sampling of those claims before an administrative law judge and extrapolate the average result to the rest. [9] To do so, a hospital, doctor or other medical provider would meet with one of Medicare's "trained and experienced statistical expert[s]" to develop the "appropriate sampling methodology" and randomly select the sample cases to be extrapolated to

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[5] Notice of Proposed Rulemaking on the Borrower Defense to Repayment Regulations under Title IV of the Higher Education Act of 1965, 81 Fed. Reg. 89329 (Jun. 16, 2016). The Department has received more than 23,000 claims relating to Corinthian and other schools, but as of the close of March 2016, the Department had granted discharge relief to 2,048 borrowers. Third Report of the Special Master for Borrower Defense to the Under Secretary, March 25, 2016, *available at* https://www2.ed.gov/documents/press-releases/report-special-master-borrower-defense-3.pdf.

[6] Consumer Fin. Prot. Bureau v. Corinthian Colls., Inc., C.A. No. 1:14-cv-07194 (N.D. Ill., filed Oct. 27, 2015); California v. Heald Coll., No. CGC-13-534793 (Sup. Ct. S.F. County, filed Oct. 10, 2013).

[7] The Secretary of Veterans Affairs also revealed that more than 80,000 veterans have been waiting five years or more for an appeals decision. VA Ctr. For Innovation, Veterans Appeals Experience: Listening to the Voices of Veterans and their Journey in the Appeals System 5 (2016). Last year, a veteran waited, on average, twenty-three months just for the VA simply to send the required paperwork to the Board of Veterans Affairs so that the BVA could begin adjudicating the appeal. Bd. of Veterans' Appeals, Annual Report Fiscal Year 2014 at 30 (2015), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2014AR.pdf

[8] *See* Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1635 (2015) (describing questionable goals of alternative health courts to "expedite medical malpractice adjudications, quell the adversarialism of dispute resolution, and provide consistent, rational rulings that would "restore faith in the reliability of medical justice."); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-628T, FEDERAL COMPENSATION PROGRAMS: PERSPECTIVES ON FOUR PROGRAMS FOR INDIVIDUALS INJURED BY EXPOSURE TO HARMFUL SUBSTANCES 10 (2008) (describing similar goals in the federal Radiation Exposure Compensation Program, the Energy Employees Occupational Illness Compensation Program, and the Black Lung Program, while chronicling similar backlogs in each system).

[9] Office of Medicare Hearings and Appeals, *Statistical Sampling Initiative*, http://www.hhs.gov/omha/OMHA%20Statistical%20Sampling/statistical_sampling_initiative.html (last visited February 19, 2016).

the whole.[10] Following a pre-hearing conference, all of the pending claims would be consolidated in front of a single Administrative Law Judge to hear all of the sample cases selected by the OMHA statistical expert. The results of the sample cases would then be applied to all of the remaining cases.

Although OMHA's Statistical Sampling Initiative is just in its initial stages, it is notable for two reasons. First, it diverges from the Supreme Court's approach in the federal courts, which appeared to reject such "trials by formula."[11] The Supreme Court has worried that the "novel" use of statistical sampling could stretch hearing procedures too far under the Rules Enabling Act by "abridging, enlarging or modifying" the substantive rights of the parties in such a mass action.[12] To the extent this remains a problem for federal courts,[13] the decision does not bind federal agencies. Federal agencies often enjoy more discretion under their own statutes to craft procedures they deem "necessary and appropriate" to adjudicate the claims that come before them.[14] OMHA's program thus illustrates agencies' comparative freedom over federal courts to create innovative procedures that respond to problems in mass adjudication.

Second, it is very rare that agencies exercise this freedom. Federal agencies and specialized courts in the United States adjudicate hundreds of thousands more cases each year than our federal court system. But they have long avoided tools used by courts to efficiently resolve large groups of claims, like class actions and other complex litigation procedures.[15] Unlike federal courts—where almost 40 percent of all cases now proceed in some form of organized litigation[16]—most agencies and specialized

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[10] See *infra* Part II.C.3.

[11] Wal-Mart v. Dukes, 131 S. Ct. 2541, 2561 (2011).

[12] Id. at 2561 (citing 28 U.S.C. § 2072(b)).

[13] *Compare*, *e.g.*, Tyson Foods, Inc. v. Bouaphakeo, 135 S. Ct. 2806 (2016); In re Urethane Antitrust Litig., 768 F.3d 1245, 1257 (10th Cir. 2014) ("[The defendant's] liability as to each class member was proven through common evidence; extrapolation was used only to approximate damages. Wal-Mart does not prohibit certification based on the use of extrapolation to calculate damages.") and Alcantar v. Hobart Serv., No. ED CV 11-1600 PSG (SPx), 2013 WL 146323, at *4–5 (C.D. Cal. Jan. 14, 2013) (noting that Wal-Mart was inapplicable for the calculation of wage-and-hour penalties) *with* Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319–21 (5th Cir. 1998) ("[F]ederal courts must remain faithful to Erie"); Brown v. Wal-Mart Stores, Inc., No. 5:09-CV-03339- EJD, 2012 WL 5818300, at *3 (N.D. Cal. Nov. 15, 2012) (collecting cases refusing to permit a trial-by-statistics approach after Wal-Mart).

[14] *See infra* Part I.B. Agencies still must satisfy due process, which is one reason why OMHA's Statistical Sampling Initiative is voluntary. *See infra* Part II.C.3.

[15] Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992 (2012).

[16] Removing prisoner and social security, 45.6 percent of the federal court's entire civil caseload proceeds in multidistrict litigation. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 2015 YEAR-END REPORT x, xi (2015); DUKE LAW CENTER FOR JUDICIAL STUDIES, MDL STANDARDS AND BEST PRACTICES x (2014).

courts do not use class actions or otherwise coordinate multiparty disputes. Consequently, in a wide variety of cases, such programs risk wasting resources in repetitive adjudication, reaching inconsistent outcomes for the same kinds of claims, and denying individuals access to the affordable representation that aggregate procedures promise.

Part of the reason for agencies' restrained, individualized approach to adjudication stems from the perceived limits of what courts and administrative judges can do to resolve claims brought by large groups of people. For years, the Supreme Court and scholars have said that legislative bodies—not judges—should respond to problems of mass harm.[17] Policymakers can resolve cases raising the same complicated factual and legal issues more legitimately and efficiently by relying on a legislative process to establish uniform criteria.[18] Judges, by contrast, should avoid such "poly-centeric disputes" because they lack the capacity to hear and resolve such claims among large groups of people.[19] Indeed, commentators have criticized aggregate settlements as "privatized administrative schemes" designed to compensate victims like "public administrative agencies."[20]

That same line between the appropriate role of courts and legislative bodies also exists inside administrative agencies. Before the Administrative Procedure Act (APA),[21] agencies combined investigation,

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https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf (last visited Feb. 15, 2016).

[17] *See*, *e.g.*, Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 156–57 (2003) ("a class settlement—unlike public legislation—enjoys no general mandate to alter unilaterally the rights of class members."); RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT _ (2007); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) ("this litigation defies customary judicial administration and calls for national legislation").

[18] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 628-29 (1997)("a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.").

[19] L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court's Mass Tort Jurisprudence*, 44 ARIZ. ST. L.J. 1109, 1154-56 (2012).

[20] NAGAREDA, *supra* note 17; Nagareda, *supra* note 17, at 153 ("In recent decades, many class settlements have … creat[ed] administrative bodies—private administrative agencies, in effect—to oversee the compensation of class members years into the future."); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2020 (1997) ("[C]ourt-supervised settlements that establish systems for processing individual claims create temporary administrative agencies without proceeding through the legislative or executive branches.")

[21] *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701-706, and other sections of Title 5).

policymaking, and adjudication in the same department.[22] Following a political battle over the implementation of New Deal programs, the APA separated the practice of "adjudication" from the agencies' broad policymaking powers using rulemaking and enforcement, establishing distinct rules for each type of agency activity.[23] Going forward, formal individualized adjudications would be conducted by independent administrative law judges (ALJs) insulated from undue political influence. Few rules existed in the APA, however, for ALJs to resolve cases that fell in between the formal categories of rulemaking and adjudication—such as when adjudicative proceedings systematically affected groups of people in the same way.

A handful of federal administrative programs, however, have quietly bucked this trend—employing class action rules, collective claims handling and even the kinds of "trials by statistics" embraced by innovative federal judges around the United States.[24] The Equal Employment Opportunity Commission (EEOC), for example, created an administrative class action procedure, modeled after Rule 23 of the Federal Rules of Civil Procedure, to resolve "pattern and practice" claims of discrimination by federal employees before federal administrative judges (AJs).[25] Since the early 1990s, the National Vaccine Injury Compensation Program (NVICP) has used "Omnibus Proceedings," which resemble federal multidistrict litigation, to pool together common claims

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[22] *See* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219–20 (1986) (describing ABA Special Committee on Administrative Law's desire to transfer agency judicial power to independent tribunals).

[23] George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1680-81 (1996).

[24] See, e.g., Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996); Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 653 (E.D. Tex. 1990), *rev'd in part*, 151 F.3d 297 (5th Cir. 1998); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 178 F. Supp. 2d 198, 247–62 (E.D.N.Y. 2001), *rev'd in part on other grounds and questions certified*sub nom. Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc., 344 F.3d 211 (2d Cir. 2003) certified question accepted, 801 N.E.2d 417 (N.Y. 2003) and certified question answered sub nom. Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 818 N.E.2d 1140 (N.Y. 2004) and rev'd sub nom. Empire Healthchoice, Inc. v. Philip Morris USA, Inc., 393 F.3d 312 (2d Cir. 2004). *See also* MANUAL FOR COMPLEX LITIGATION, THIRD, § 33.28 (1995) (endorsing trial-by-statistics plan in *Marcos*). *But see* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011) (casting doubts on "Trial by Formula"); MANUAL FOR COMPLEX Litigation, Fourth, § 21.5 (2004) (revising its position to observe that a trial-by-statistics plan was possible, "[a]lthough not accepted as mainstream.").

[25] *See* 29 C.F.R. § 1614.204 (2012) (establishing class complaint procedures). Administrative Judges (AJs) preside over adjudicatory hearings but are not entitled to the same statutory job protections and insulation from agency pressure as the ALJs who preside over adjudicatory hearings conducted pursuant to sections 554, 556, and 557 of the APA. Nevertheless, the "functional independence accorded to AJs varies with the particular agency and type of adjudication." ACUS Recommendation 92-7, The Federal Administrative Judiciary (1992), at 2.

that allege a vaccine injured large groups of children.[26] And, as discussed above, the Office of Medicare Hearings and Appeals (OMHA) recently began two pilot programs utilizing aggregation tools: (1) a "Statistical Sampling Initiative" that will use trained and experienced experts to resolve thousands of common medical claims at a time by statistically extrapolating the results of a few hearing outcomes; and (2) a Settlement Conference Facilitation program that provides a formal framework for encouraging the settlement of large numbers of similar cases.[27]

Although commentators and courts frequently hold up public administrative schemes as an efficient alternative to group litigation in court,[28] each of these efforts suggest agencies sometimes cannot avoid using the same aggregation procedures themselves. Indeed, such efforts appear to be on the rise. In January 2016, plaintiffs petitioned the Federal Maritime Commission to hear a multi-million dollar antitrust class action after the federal government fined several companies for violating the Shipping Act of 1984.[29] A week later, the federal government conceded for the first time that a specialized-veteran court could hear class action claims by veterans in "appropriate cases."[30] And in June 2016, the Department of Education proposed a new "group process" loosely modeled on federal class action rules to make it easier for students to obtain loan forgiveness when they attend predatory colleges that commit fraud.[31] All of these examples suggest that simply moving groups of

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[26] *See, e.g.*, Capizzano v. Sec'y, HHS, 440 F.3d 1317 (Fed. Cir. 2006); Snyder v. Sec'y, HHS, No. 01-162V, (Ct. Fed. Cl. Spec. Mstr., February 12, 2009), http://www.uscfc.uscourts.gov/sites/default/files/vaccine_files/Vowell. Snyder.pdf; Ahern v. Sec'y, HHS, No. 90-1435V, 1993 U.S. Claims LEXIS 51 (Fed. Cl. Spec. Mstr. Jan. 11, 1993).

[27] Office of Medicare Hearings and Appeals, *Statistical Sampling Initiative*, http://www.hhs.gov/omha/OMHA%20Statistical%20Sampling/statistical_sampling_initiative.html (last visited February 19, 2016).

[28] *See, e.g.*, Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625-28 (1997) (observing that "[t]he benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration" and recommending an "administrative claims procedure similar to the Black Lung legislation" developed for coal miners); Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1361 (2015) (describing proposed reforms to develop specialized health courts and other administrative alternatives to mass litigation); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 939, 944-52 (1996).

[29] See Cargo Agents, Inc, Int'l v. NYK Kaisha, et al., Compl., Federal Martime Comm'n, Dkt. 16-01 (Jan. 7, 2016), *available at* http://www.fmc.gov/assets/1/Documents/16-01_not_of_flng.pdf

[30] See *infra* Part II.A.1. In the interest of full disclosure, the authors submitted an amicus brief in support of this view. Corrected Amicus Brief and Appendix of 15 Administrative Law, Civil Procedure, and Federal Courts Professors in Support of Appellant and Reversal, 2015 WL 8485190 (Fed. Cir. 2016) (No. 15-7092).

[31] See Press Release, Department of Education, Education Department Proposes New Regulations to Protect Students and Taxpayers from Predatory Institutions (Jun. 13,

similar cases out of courts and into administrative programs cannot fix problems inherent in case-by-case adjudication. Agencies and specialized courts themselves also may require aggregate procedures to overcome long backlogs, inconsistent results, and obstacles to justice for those without access to legal and technical expertise.

To date, no study has examined these nascent efforts to employ the tools of aggregation in administrative proceedings. Indeed, there has been little attention to how agencies may draw upon the lessons of the federal courts in adjudicating claims by large groups of people.[32] Consequently, very little is known about: (1) which cases are appropriate for aggregation, (2) which aggregation tools these agencies use, (3) the successes and failures of these programs, and (4) the other types of proceedings in which aggregation tools might facilitate more expeditious and fair handling of large groups of claims.

Our project begins to fill this gap by taking a look inside some of the few agencies that experiment with aggregate adjudication. After examining recent efforts by federal agencies to aggregate administrative proceedings and interviewing the key policymakers involved, we identify the types of agency adjudications in which aggregate procedures have the greatest potential, the challenges and obstacles to greater use of aggregation, and broader lessons about what aggregation procedures mean for adjudication by federal agencies.

This Article proceeds in three parts. Part I sets out the legal framework for adopting aggregate litigation procedures in federal courts and administrative agencies. Federal courts have long enjoyed authority to aggregate large groups of similar cases in one of two ways. First, courts may *formally aggregate* claims by, for example, permitting one party to represent many others in a single lawsuit. Second, courts may *informally aggregate* claims. In informal aggregation, different claimants with very similar claims each retain separate counsel and advance a separate lawsuit, but in front of the same adjudicator or on the same docket in an effort to expedite cases, conserve resources, and assure consistent outcomes.[33]

2016), available at http://www.ed.gov/news/press-releases/education-department-proposes-new-regulations-protect-students-and-taxpayers-predatory-institutions. In March 2016, Professor Zimmerman advised the Department of Education and others as it considered this proposal.

[32] *But see* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992 (2012) (proposing that agencies employ aggregation to adjudicate large groups of cases with common issues of law or fact).

[33] The American Law Institute's *Principles of the Law of Aggregation* defines proceedings that coordinate separate lawsuits in this way as "administrative aggregations," which are distinct from joinder actions (which join multiple parties in the same proceeding) or representative actions (in which a party represents a class in the same proceeding). See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 (2010) [hereinafter ALI REPORT] (describing different types of aggregate proceedings.). Others have used the words "institutional systematization" to describe various forms of "administrative aggregation" phenomena in

Agencies similarly enjoy broad authority to aggregate common cases, formally and informally.

Part II describes different approaches to formal and informal aggregate adjudication with a focus on three federal programs—EEOC's use of class actions, the NVICP's use of "omnibus proceedings," which centralize many individual cases raising similar claims before the same adjudicator, and OMHA's use of consolidation, statistical sampling, and mediation to resolve thousands of similar cases in the same proceeding. Those case studies illustrate that aggregate adjudication techniques raise unique challenges. The sheer number of claims in aggregate agency adjudication may: (1) create "diseconomies of scale"—inviting even more claims that stretch adjudicators' capacity to administer justice to many people; (2) impact the perceived "legitimacy" of the process and challenge due process; and (3) increase the consequence of error. In other words, just like many kinds of administrative systems, aggregate adjudication struggles to deal with many different kinds of constituencies feasibly, legitimately, and accurately.

But, as we detail below, each program has sought to ameliorate these concerns by adopting aggregate procedures cautiously and responsibly. Among other things, they have responded to challenges of aggregation by (1) slowly rolling out aggregate procedures to avoid replacing old backlogs with new ones; (2) relying on panels of adjudicators to reduce allegations of bias or illegitimacy or providing additional opportunities for individuals to meaningfully participate in the process; and (3) allowing cases raising scientific and novel factual questions to "mature"[34]—that is, putting off aggregation until the agency has the benefit of several opinions and conclusions from different adjudicators about how a case may be handled expeditiously. As a result, aggregate adjudication has permitted agencies to take advantage of the benefits of aggregation—pooling information about recurring problems, achieving greater equality in outcomes than individual litigation, and securing expert assistance at a critical stage in its own decisionmaking process—while minimizing their potential dangers.

Part III considers the broader implications for adjudication by federal courts and agencies. Courts and commentators frequently view administrative programs as more legitimate than aggregation in federal or

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criminal law. *See* Brandon Garrett, *Aggregation in Criminal Law*, 95 Cal. L. Rev. 383, 388 n.17, 393 (2007). For convenience, we call such proceedings "informal aggregation." For other discussions of this phenomenon, *see* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 465-66 (2000); Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (1991).

[34] *Cf.* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1843 (1995) (defining "maturity" in which both sides' litigation strategies are clear, expected outcomes reach an "equilibrium," and global resolutions or settlements may be sought).

state court.[35] However, those same agency adjudicators face their own legitimacy crisis when they cannot aggregate and actively manage cases themselves. Rather than building formal walls between policymaking and court-procedures to avoid illegitimate decisionmaking, in some cases, we must do the opposite—allow adjudicators to integrate rulemaking and other managerial tools into their proceedings to promote "the presentation of proofs and reasoned argument."[36]

I. AGGREGATION IN JUDICIAL AND ADMINISTRATIVE PROCEEDINGS

Civil and administrative proceedings begin with the premise that every person deserves her or his own "day in court." Plaintiffs in civil court receive personalized hearings to sort out private disputes with others.[37] Agencies similarly must provide citizens with "some kind of hearing"[38] to challenge government acts that threaten their lives, property, or liberty.[39]

Both systems, however, have exceptions—grouping together and resolving large groups of similar claims, or what we call "aggregation."[40] In some ways, a central tenet of all legal systems is to aggregate. Policymakers and judges create and interpret substantive rules to account for recurring problems and treat "like cases in a like manner." It is the reason why common law judges must consider the precedential impact of their decisions on similar cases[41] and why legislators create agencies with

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[35] See notes 17-20 and accompanying text. See also *infra* Part III.A-B.

[36] Fuller, *supra* note 19, at 363.

[37] Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999); Martin v. Wilks, 490 U.S. 755, 762 (1989) (observing it is "our 'deep-rooted historic tradition that everyone should have his own day in court") (quoting 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1981)); JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY 16 (2001) (arguing that tort law's "structural core" is represented by "case-by-case adjudication in which particular victims seek redress" from particular defendants, each of whom "who must make good her 'own' victim's compensable losses").

[38] Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975); *see, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (requiring pre-termination hearing procedures for welfare benefit recipients).

[39] Heckler v. Campbell, 461 U.S. 453, 467 (1983) (observing that, in past decisions, people received "ample opportunity" to present evidence relating to their own claims and to show that an agency's "general guidelines" for resolving common cases "do not apply to them"); Londoner v. Denver, 210 U.S. 373 (1908); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1958).

[40] Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1784-95 (2005).

[41] In tort law, for example, special "no duty" rules limit liability for government entities, charitable enterprises, employers, pure economic or emotional distress cases. *See* Robert Rabin, Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L.REV. 1571 (2004).

specific missions to create rules for, and adjudicate, particular kinds of cases.[42] One theory posits that administrative agencies represent a public counterpart to class action lawsuits—another form of aggregation—because Congress delegates them authority to pursue ends that benefit broadly defined interest groups against those who violate the law.[43]

But federal courts use other procedures to group together large numbers of cases. As noted above, the most famous kind of "aggregate lawsuit" is the class action—a single lawsuit that includes claims or defenses held by many different people. Other kinds of formal aggregations include derivative lawsuits by a shareholder on behalf of a corporate organization,[44] lawsuits by and against organizations in bankruptcy, trustee actions commenced on behalf of many beneficiaries,[45] and *parens patriae* actions by state attorneys general.[46] What all formal aggregations have in common is that a single person, or a single proceeding, may bind others to the outcome, even if those others never directly participate.

Courts also group together civil claims in far more informal ways.[47] Courts frequently "informally aggregate" cases—channeling individually represented parties into the same courthouse, before the same judge, or onto a specialized docket. In civil litigation, the most well-known form of administrative aggregation is the multidistrict litigation,[48] where a panel of

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[42] Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 101, 110-12 (2011) (describing alternative theories of agency delegation). Of course, administrative agencies themselves may adopt rules to ensure people are treated consistently in adjudication. *See* Heckler v. Campbell, 461 U.S. 458, 467 (1983); United States v. Storer Broad. Co., 351 U.S. 192, 205 (1956).

[43] Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) ("Administrative law removes the obstacles of insufficient funds and insufficient knowledge by shifting the responsibility for protecting the interests of the individuals comprising the group to a public body which has ample funds and adequate powers of investigation.").

[44] FED. R. CIV. P. 23.1; *see also* Nathan v. Rowan, 651 F.2d 1223, 1226 (6th Cir. 1981).

[45] Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996) (observing that a judgment that "is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust").

[46] Pennsylvania v. West Virginia, 262 U.S. 553, 592 (1923); Pennsylvania v. Kleppe, 533 F.2d 668, 675 (D.C. Cir. 1976) ("[I]njury to the state's economy or the health and welfare of its citizens, if sufficiently severe and generalized, can five rise to a quasi-sovereign interest in relief as will justify a representative action by the state."); *see also* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012).

[47] *See* ALI REPORT, *supra* note 33, § 1.02 (describing informal aggregation); Erichson, *supra* note 40, at 386; Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (1991).

[48] Emery G. Lee III, Catherine R. Borden, Margaret S. Williams, Kevin M. Scott, *Multidistrict Centralization: A*n *Empirical Analysis*, 12 J. EMP. L. J. STUD. 211, 222 (2015).

judges may assign a large number of similar claims filed around the country to the same judge to streamline discovery, manage motion practice, coordinate counsel and, in many cases, expedite settlement.[49] Since its creation in 1968, the Judicial Panel on Multidistrict Litigation has centralized almost half a million civil actions for pretrial proceedings.[50] Other forms of administrative aggregation in civil law include specialized dockets—like those designed to expedite patent claims filed in the Eastern Districts of Virginia and Texas[51]—or inter-district rules designed to ensure that a single judge hears all "related claims" in the same district.

A. The Costs and Benefits of Aggregate Adjudication in Court

Aggregate procedures in federal court seek to provide more access, efficiency, and consistency than individualized litigation. Aggregate litigation in federal and state courts has long sought to provide more *legal access* by enabling the resolution of claims that otherwise would not be brought individually. Formal aggregate procedures are thought to enable litigation when damages are too small for individuals to justify the high costs of retaining counsel.[52] Informal aggregation also streamlines large-scale litigation, while encouraging parties to participate, through bellwether trials, steering committees of plaintiff that collect and manage claimant input, and judicial oversight of attorney conduct. In both cases, large cases hold defendants accountable for wide and diffuse harms that are too costly to be prosecuted through individual litigation.[53]

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[49] 28 U.S.C. § 1407 (1976); *see also* Myriam Gilles, *Tribal Rituals of the MDL*, 5 J. TORT L. 173, 176 (2012); Andrew Bradt, *The Multidistrict Litigation Act of 1968*, (July 2015), http://www.law.seattleu.edu/Documents/CivProWorkshop/Bradt_MDL.pdf.

[50] Lee, et al., *supra* note 48, at 48. By the end of 2013, 13,432 actions had been remanded for trial, 398 had been reassigned within the transferee districts, 359,548 had been terminated in the transferee courts, and 89,123 were pending throughout the district courts. Judicial Business 2013: Judicial Panel on Multidistrict Litigation, Admin. Off. U.S. Courts (2013), http:// www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-panel-multidistrictlitigation.aspx.

[51] Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631 (2015); Daniel Klerman & Greg Reilly, *Forum Selling*, S. CAL. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2538857; Dana D. McDaniel, *Patent Litigation on the Rocket Docket After Markman v. Westview Instruments, Inc.*, Va. Law., Apr. 2002, 20, 20 (describing the increase of patent filings in the late 1990s); Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH. 193, 207 (2007).

[52] *See* Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1115-20 (2010) (describing alternative goals of class action litigation); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

[53] Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 174 (2008) (observing that the procedural benefits include a substantial reduction in costs of

Aggregate procedures also seek more *efficient* resolutions than piecemeal individual adjudication. Aggregation hopes to avoid the duplicative expenditure of time and money associated with traditional one-on-one adjudications,[54] which otherwise may involve months or years of the "same witnesses, exhibits and issues from trial to trial."[55]

Finally, aggregate procedures seek more *uniform* application of law. At bottom, aggregate proceedings and settlements seek consistency and distributive fairness—to treat like parties in a like manner.[56] Otherwise, in cases seeking injunctions or declaratory relief, a court may never hear from plaintiffs with competing interests in the final outcome, or over time, subject defendants to impossibly conflicting demands.[57] And, in cases seeking monetary relief, the first claimants to bring lawsuits might receive astronomical awards, while other victims receive nothing.

But large cases also create new risks. Class actions require judicial review, for example, to ensure class counsel faithfully represent absent class members, to provide a forum to hear from dissenting interest groups, and to ensure that the final settlement adequately reflects the underlying merits and the public interest. Thus, even as they aspire to promote more efficiency, consistency, and legal access, class action lawsuits struggle to (1) promote *efficiency* when processing large volumes of cases; (2) ensure *legitimacy* when clients lack input and control over the outcome and when attorneys serve disparate interests (or their own); and (3) achieve *accuracy*

"discovery, retention of experts, legal research and legal fees"); *see also* THOMAS E. WILLGING, FED. JUDICIAL CTR., APPX. C: MASS TORTS PROBLEMS AND PROPOSALS: A REPORT TO THE MASS TORTS WORKING GROUP 20 (1999); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 393-94 (2000).

[54] *See* In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 859 (6th Cir. 2013) (citing Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1191 (2013); 1 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 9 (5th ed. 2015) ("Class actions are particularly efficient when many similarly situated individuals have claims sufficiently large that they would each pursue their own individual cases. In these situations, the courts are flooded with repetitive claims involving common issues.").

[55] Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (quoting lower court opinion) (granting certification of a class action involving asbestos). *See generally* WEINSTEIN, *supra* note 53, at 135-36 (noting that economies of scale reduce discovery and expert fees); William Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 837-38 (1995) (explaining how class actions are seen as a remedy to duplicative litigation activity).

[56] *See* 1 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 10 (5th 2015) (Class actions "reduce[] the risk of inconsistent adjudications. Individual processing leaves open the possibility that one court, or jury, will resolve a factual issue for the plaintiff while the next resolves a seemingly similar issue for the defendant.").

[57] *See* David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. _ (forthcoming 2015), http://goo.gl/nMEQev (Aggregation procedures "enables public interest plaintiffs to vindicate policies in the substantive law consistent with broad, systemic remedies . . . .").

when group-wide outcomes or settlements blur characteristics or overlook the merits of many different kinds of cases.

Informally aggregated cases may also complicate legitimacy and accuracy. First, lawyers experience conflicts when they settle individual cases in informal aggregations, particularly because the success of any one case often depends on the same lawyer or judge resolving hundreds of similar claims.[58] Informally aggregated civil cases may also compromise individual parties' control over the outcome, as a small number of lawyers, special masters, or magistrates, make decisions about common questions of discovery, motion practice, or other "common benefit work." According to the American Law Institute's *Principles of Aggregate Litigation*, informal aggregations "afford participants some important powers, but deny them others":

> For example, they continue to be represented by their own attorneys, and they can accept settlement offers or reject them. But, in important respects they are also at the mercy of others. They cannot escape aggregation, even when it occurs against their wishes, and … they must accept services from and pay fees to lawyers and other persons they have little power to control.[59]

Second, informal aggregation can compromise accuracy—particularly when the same plaintiff and defense counsel settle large groups of cases in bulk. This is sometimes a result of perverse incentives created by the ways parties must organize themselves to process large volumes of claims. For example, plaintiffs and defendants have complained that multidistrict litigation favors volume over knowledge: attorneys often receive coveted and lucrative positions on steering committees based on the sheer number of clients they retain in the litigation.[60] Those incentives may, in turn, delay and discourage lawyers from investing limited resources to develop the facts of individual cases before reaching a global settlement.[61]

In other words, like many kinds of bureaucratic systems, formal and informal aggregate litigation struggles to govern many different kinds of constituencies feasibly, legitimately, and accurately. As set forth below,

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[58] *See* ALI REPORT, *supra* note 33, § 3.16 cmts. a-c; .Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1784-95 (2005) (characterizing such conflicts as problems of claim "conditionality.").

[59] *See id.*, § 1.05 cmts. b; Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 465-66 (2000) ("Given the powerful drive to coordinate, evidence by both plaintiffs and defendants in a wide variety of litigation, true litigant autonomy may be unattainable in many situations involving multiple related claims . . . .").

[60] RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 231 (2007).

[61] Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 351 (2014) (observing that "the financial incentive is to invest as little as possible in the individual case, as any time invested will not impact their ultimate payout—as only time spent on developing generic assets, and not individual cases, is compensable as common-benefit work" in multidistrict litigation).

agencies also enjoy power to formally and informally aggregate claims. When they have exercised this power, they have sought to adopt tools that take advantage of the benefits of aggregation while minimizing the potential dangers.

B. The Legal Framework for Aggregation in Agency Adjudications

Congress regularly creates administrative courts in which the adjudicators do not enjoy the life tenure and salary protections provided to federal judges by Article III of the Constitution. When Congress vests adjudicatory power in such "non-Article III courts," it usually employs one of its enumerated powers in Article I, in combination with the Necessary and Proper Clause.[62] Such non-Article III courts include both administrative agencies that adjudicate cases and what are sometimes called "Article I"[63] or "legislative courts."[64]

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[62] U.S. CONST., art. I, § 8.

[63] Some non-Article III judges, like bankruptcy and magistrate judges, are appointed by Article III judges and work inside the Article III branch. *See, e.g.*, 28 U.S.C. § 151 *et seq*.; § 631 *et seq*. *See generally*, Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607 (2002). Other non-Article III adjudicators work outside Article III, in bodies sometimes termed "legislative courts" and in administrative agencies. *See, e.g.*, 26 U.S.C. § 7441 *et seq*. (establishing the United States Tax Court as a stand-alone court); 29 U.S.C. §§ 153, 160 (establishing the National Labor Relations Board as an independent regulatory agency and granting it authority, *inter alia*, to hear complaints regarding unfair labor practices).

[64] The line between legislative courts and administrative agencies that adjudicate cases is far from clear. Functionally, legislative courts tend to be more independent from Executive Branch policymakers and solely charged with adjudicating cases, while administrative agencies typically "use adjudication along with rulemaking and enforcement processes as tools for the articulation of policy as well as its application to particular parties." Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 342-43 (1991). But there are many exceptions to these rough distinctions. For example, Congress sometimes creates "split enforcement" regimes, whereby one agency is responsible for bringing enforcement actions and another agency is responsible for adjudicating the dispute between the enforcement agency and the regulated party. Id. at 346-347. Moreover, Administrative Law Judges (ALJs) who receive evidence in formal agency adjudications are insulated from ex parte communications and supervision by agency personnel involved in investigation and prosecution. 5 U.S.C. § 554(d) (2012) Indeed, ALJs enjoy job protections similar to those of judges that serve on Article I courts, such as the U.S. Court of Federal Claims. Compare 5 U.S.C. § 7521 (2012) (ALJs may only be removed "for good cause established … on the record after opportunity for hearing"), with 28 U.S.C. § 176 (2012) (Judges of the Court of Federal Claims may be removed by a majority of the judges of the Court of Appeals for the Federal Circuit, but "only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability" and only after "an opportunity to be heard on the charges."). Nevertheless, ALJ decisions are typically reviewed by the heads of the agency, who interpret the law in pursuit of their policy goals. Thus, separation of functions in administrative agencies does not extend to the final agency decision. Agencies remain overt policymaking institutions, while legislative courts only make policy in the way that Article III or common law courts do as an incident to deciding cases.

When Congress creates non-Article III courts, it both defines their jurisdiction and typically grants them substantial discretion to prescribe rules of practice and procedure to carry out their statutory mandates.[65] For example, in *CFTC v. Schor*,[66] the Supreme Court rejected the lower court's conclusion that the Commodity Futures Trading Commission (CFTC) lacked the power to join counterclaims.[67] The Supreme Court based its holding, in part, on the "the sweeping authority Congress delegated to the CFTC."[68] In particular, the Supreme Court relied on statutory language that permits the CFTC to "make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary" to accomplish the purposes of the statute authorizing its existence.[69]

Where an agency's organic statute does not set forth any specific procedural requirements, the Administrative Procedure Act (APA) provides certain minimum procedural requirements for different types of agency action. But the Supreme Court has repeatedly prohibited courts from imposing additional procedural requirements on agencies,[70] reasoning that agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[71]

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[65] *See, e.g.*, 7 U.S.C. § 12a (2012) (authorizing the CFTC "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of" the Commodity Exchange Act); 26 U.S.C § 7453 (2006) ("[T]he proceedings of the Tax Court . . . shall be conducted in accordance with such rules of practice and procedure . . . as the Tax Court may prescribe," but consistent with the Federal Rules of Evidence for bench trials in the United States District Courts for the District of Columbia.), *amended by* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 425, 129 Stat 2242, (2015) ("inserting 'the Federal Rules of Evidence'."); 38 U.S.C. § 501(a) (2012) ("The Secretary [of Veterans Affairs] has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department . . . including . . . the manner and form of adjudications and awards."); 47 U.S.C. § 154(j) (2012) ("The [Federal Communications] Commission may conduct its [hearing] proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.").

[66] 478 U.S. 833 (1985).

[67] *Id.* at 842.

[68] *Id.*

[69] *Id.* (citing 7 U.S.C. § 12a).

[70] *See, e.g.*, Perez v. Mortgage Brokers Assoc., 135 S.Ct. 1199, 1207 (2015) ("Time and again, we have reiterated that the APA 'sets forth the full extent of judicial authority to review executive agency action for procedural correctness.'") (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009)); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524 (1978) ("[T]his Court has for more than four decades emphasized that the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.").

[71] FCC v. Pottsville Broad. Co., 309 U.S. 134, 143 (1940).

For this reason, in *FCC v. Pottsville*, the Supreme Court rejected a challenge to the FCC's authority to consolidate three licensing applications for the same facility in a single hearing so as to consider the applications "on a comparative basis."[72] The Court held that when Congress gave the Commission authority to grant, modify, or revoke broadcast licenses as "public convenience, interest, or necessity" require:

> the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising.[73]

Accordingly, the Court recognized that the Commission possessed this discretion regardless of whether it chose to promulgate a rule of procedure or created an ad hoc rule tailored to a specific case.[74]

Similarly, there is nothing in the APA that would prevent an agency from using aggregation in adjudicatory proceedings in appropriate cases. Indeed, prohibiting aggregation mechanisms under the APA would be at odds with the substantial flexibility the Supreme Court has granted agencies when choosing the best procedural format for decisions that affect large groups of people.[75]

In some ways, federal agencies enjoy more power to develop procedural rules than Article III courts. The Rules Enabling Act states that Article III courts may only "prescribe general rules of practice and procedure" that do not "abridge, enlarge or modify any substantive right."[76] By contrast, administrative agencies generally have no such limitation because Congress creates most administrative agencies

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[72] *Id.* at 140.

[73] *Id.* at 138.

[74] *See* FCC v. Schreiber, 381 U.S. 279, 289 (1965) ("The statute does not merely confer power to promulgate rules generally applicable to all Commission proceedings; it also delegates broad discretion to prescribe rules for specific investigations and to make ad hoc procedural rulings in specific instances[.]" (citations omitted)).

[75] For example, the Supreme Court has upheld the power of agencies to announce new policies in adjudications rather than using notice and comment rulemaking. NLRB v. Bell Aerospace, 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion."). And conversely, agencies are permitted to use rulemaking to resolve common factual issues that repeatedly arise in individual adjudications. Heckler v. Campbell, 461 U.S. 458, 467 (1983) ("[E]ven where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration.").

[76] 28 U.S.C. §§ 2071-72 (1988).

precisely because Congress wants them to make substantive law.[77] Even legislative courts that most closely resemble the Article III courts generally are not subject to the same restrictions under the Rules Enabling Act.[78]

The recognition by federal courts that Congress generally vests administrative agencies with considerable procedural flexibility reflects a basic feature of administrative law: agencies must have the authority to shape their own rules and, when appropriate, to adapt those rules to the types of cases and claims that they hear. This means that absent an express statutory prohibition or other clear indication of congressional intent to the contrary, administrative agencies may use aggregate procedures to handle their cases more expeditiously, consistently, and fairly than would be possible with individual, case-by-case adjudication.

II. AGGREGATE AGENCY ADJUDICATION

As we note above, most agencies have resisted using class actions and other complex procedures like federal courts. But agencies not only have power, but, on rare occasions, have used that power to aggregate claims formally and informally.[79] Relying on general grants of authority to adopt their own procedures, we have identified more than forty administrative agencies and other non-Article III courts that have promulgated rules permitting the consolidation of cases to hear claims. The complete list is included in Appendix A. Some of these non-Article III tribunals have promulgated formal class actions rules. Examples include the Bankruptcy Courts, EEOC, the Consumer Product Safety Commission (CPSC), and the Personnel Appeals Board.[80]

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[77] *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 907 (1999).

[78] *See, e.g.*, 26 U.S.C. § 7453 (1997) (the Tax Court may adopt any procedural rule "as the Tax Court may prescribe," so long as it conducts its proceedings in accordance with the rules of evidence for bench trials in the United States District Courts for the District of Columbia); Lemire v. Sec'y of Health & Hum. Servs., No. 01-0647V, 2008 WL 2490654, at *6 (Fed. Cl. June 3, 2008) ("A plain-word reading of 28 U.S.C. § 2072, noting the omission of the Court of Federal Claims from mention, leads the Court to conclude that neither § 2072, nor the second sentence of 28 U.S.C. § 2071(a), which requires that court rules maintain consistency with federal statutes and § 2072 in particular," govern the validity of the rules promulgated by the Court of Federal Claims for the Special Masters of the Vaccine Court.).

[79] EEOC, for example, created an administrative class action procedure, modeled after Rule 23 of the Federal Rules of Civil Procedure, to resolve "pattern and practice" claims of discrimination by federal employees. *See* 29 C.F.R. § 1614.204 (2012) (establishing class complaint procedures); 42 C.F.R. § 431.222 (2011) (providing "group hearings" for Medicaid-related claims); 45 C.F.R. § 205.10(a)(5)(iv) (2011) (providing "group hearing" to applicants who request hearing because financial assistance was denied).

[80] *See* Fed. R. Bankr. P. 7023 (providing that Federal Rule of Civil Procedure 23 applies in adversary proceedings in the Bankruptcy Courts); 29 C.F.R. § 1614.204 (2012) (permitting the EEOC to hear class action claims involving federal employees); 16 C.F.R.

The EEOC's experience, discussed more fully below in Section II.A., is illustrative. Congress vested the EEOC with the power to hear discrimination claims brought by federal employees and "to issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section."[81] Relying on that language, in 1992, the EEOC adopted a class action procedure.[82]

In 2004, the Postal Service challenged EEOC's class action rule. The Office of Legal Counsel (OLC) for the Department of Justice (DOJ) rejected that challenge and confirmed the EEOC's broad authority to use class actions to aggregate claims.[83] Observing that class actions were "procedural in nature," the OLC concluded that the EEOC could properly adopt class action rules under its congressional directive to issue "such rules . . . as it deems necessary and appropriate to carry out its responsibilities."[84]

In addition, like Article III courts, which aggregate with different levels of formality, many Article I courts and administrative agencies also aggregate claims and cases without adopting a formal procedure to do so. For example, the Office of Special Masters (OSM) in the NVICP has not promulgated a rule on aggregation. But, for some two decades, the OSM has relied instead on its general authority to "determine the format for taking evidence [and] . . . hearing argument[,]" and to "apply [its] expertise" from one case to another.[85] Thus, as discussed more fully below in Section II.B, when faced with large numbers of claims for compensation, the OSM developed "omnibus proceedings" to more efficiently process claims involving the same alleged vaccine-related injury.[86] In an "omnibus proceeding," a single special master hears evidence and makes a decision on a theory of general causation—for example, whether a vaccine can cause chronic arthritis and, if so, under

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§ 1025.18 (providing for the CPSC to pursue violations as a class action); 4 C.F.R. § 28.97 (providing employees power to pursue class action with Personnel Appeals Board).

[81] 42 U.S.C. § 2000e-16(b) (2012).

[82] *See* 29 CFR § 1614 (2015); *see also* 64 Fed. Reg. 37,644 (July 12, 1999); 57 Fed. Reg. 12,634 (Apr. 10, 1992).

[83] When two or more executive agencies cannot resolve a dispute between themselves, OLC may resolve the dispute. Exec. Order No. 12,146, 44 Fed. Reg. 42,657 (1979).

[84] Legality of EEOC Class Action Regulations, Memorandum Opinion for the Vice President and the General Counsel of the United States Postal Service, 28 Op. O.L.C. 254, 261 n.3 (2004), http://www.justice.gov/sites/default/files/olc/opinions/2004/09/31/op-olc-v028-p0254.pdf.

[85] Snyder ex rel. Snyder v. Sec'y of Dep't of Health & Hum. Servs., No. 01-162V, 2009 WL 332044, at *2 (Fed. Cl. Feb. 12, 2009).

[86] Cedillo v. Sec'y of Health & Hum. Servs., No. 98-916V, 2009 WL 331968 at *11 (Fed. Cl. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010).

what circumstances.[87] The "general causation" evidence is then available for application in individual cases.[88]

In addition to the techniques described above, some agencies have used their formal power to consolidate enforcement actions against large groups of defendants to efficiently dispose of common claims.[89] In other cases, administrative agencies have coordinated enforcement actions for settlement. For example, the EPA often enters what some call "industry-wide" settlements,[90] brokering coordinated individual deals as part of a systemic response to an ongoing policy or problem. In one well-known case, the EPA in 2005 offered qualified animal feeding operations (AFOs)—over 2,500 agribusinesses that produce pork, dairy, turkey and eggs across the country—to enter into a global settlement to resolve their liability under the Clean Water Act.[91] Much like a private aggregation, each individual AFO would enter into a separate, but otherwise identical, agreement with the EPA. Each AFO would agree to pay a civil fine (categorically based only on the size of the AFO) to fund a nationwide study on monitoring AFO emissions and, if requested, help the EPA to monitor emissions from the AFO. In return, the EPA agreed not to sue the participating AFOs for past and ongoing violations while the study was undertaken.[92]

Agencies also may employ many different forms of informal aggregation to streamline certain categories of claims. The Executive Office for Immigration Review—which hears all cases involving detained aliens, criminal aliens, and aliens seeking asylum—offers one example of this kind of informal aggregation. In the past year, it has created special

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[87] *Id.* at *12.

[88] *Id.*

[89] *See, e.g.*, Press Release, National Labor Relations Board, *NLRB Office of the Gen. Counsel Issues Consolidated Complaints Against McDonald's Franchisees & their Franchisor McDonald's, USA, LLC as Joint Employers*, Dec. 19, 2014 (consolidating cases against McDonald's franchisees around the country who allegedly violated the rights of employees based on their participation in nationwide protests against the terms and conditions of their employment), https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against.

[90] Ass'n of Irritated Residents v. EPA, 494 F.3d 1027 (D.C. Cir. 2007); Daniel T. Deacon, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 813-16 (2010) (describing industry-wide settlements).

[91] *See* Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 40,016, 40,017 (July 12, 2005) ("July 12 Notice").

[92] The settlement was viewed favorably by industry, as well as the EPA, which had long claimed that it lacked a precise methodology for calculating the amount of pollutants emitted by AFOs. Citizens who lived downstream from the AFOs, however, complained that they too deserved a chance to comment on what seemed to be, in effect, an entirely new regime for taxing and regulating major farming operations. Ass'n of Irritated Residents v. EPA, 494 F.3d 1027 (D.C. Cir. 2007) (rejecting plaintiffs arguments).

"surge courts" to respond to over 2,000 Central American asylum cases pending in West Texas.[93]

Although we do not address all of these forms of aggregation, the three case studies below illustrate a range of aggregate techniques used to resolve large groups of cases in administrative programs, the challenges each has faced, and potential lessons for the future.

A. The Equal Employment Opportunity Commission (EEOC)

The EEOC is the nation's lead government enforcer of federal civil rights laws prohibiting discrimination in employment based on race, color, sex, religion, national origin, age, disability, and genetic information, as well as reprisal for protected activity.[94] The EEOC's specific role and responsibilities depend on the nature of the employer involved. In the case of private employers, the EEOC has authority to file a lawsuit in federal court to protect the rights of individuals and the interests of the public. Alternatively, if the EEOC finds there is no discrimination or finds there is discrimination, is unable to settle the charge, and decides not to file a lawsuit, the EEOC will issue the employee a Notice of Right to Sue, which allows the complainant to sue the private employer in federal court. In the case of state and local employers, the EEOC refers the matter to DOJ, which has authority to file a lawsuit in federal court.

The process is somewhat different for federal government employees. Federal employees must first file a complaint with the EEO Office of their federal employer. When the agency's investigation is completed, the employee may then either ask for a final decision from the agency or request a hearing before an EEOC AJ.[95]

More than 100 AJs work in EEOC regional offices around the country in order to adjudicate disputes between federal employees and their federal employers.[96] After conducting an evidentiary hearing on the record, the AJ issues a decision and may order appropriate relief. Once the AJ hands down a decision, the agency has 40 days to issue a final order, which either accepts or rejects the decision of the AJ. If the agency does not

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[93] *See, e.g.*, Press Release, *EOIR Announces Change to Immigration Judges Hearing Cases out of Dilley*, Apr. 15, 2015 (assigning over 2,000 cases in Dilley, Texas to Miami Immigration Court to conduct hearings by teleconference); Wil S. Hylton, *The Shame of America's Family Detention Camps*, N.Y. TIMES MAG., Feb. 4, 2015.

[94] The EEOC has responsibilities for enforcing Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), the Equal Pay Act of 1963, the Americans with Disabilities Act of 1990, and the Genetic Information Nondiscrimination Act of 2008.

[95] If the employee asks the agency to issue a decision and no discrimination is found, or if the employee disagrees with some part of the decision, the employee can appeal the decision to EEOC or challenge it in federal district court.

[96] AJs lack the same formal job protections that ALJs enjoy under the APA, but it does not seem to impact their sense of independence from the agencies for which they adjudicate cases. *See* Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 278 (1994).

accept the decision or disagrees with any part of the decision, the agency may file an appeal with the EEOC's Office of Federal Operations. Similarly, an employee who is unhappy with an agency's final order may appeal the order to the Office of Federal Operations.

Although federal employees must generally go through the administrative complaint process, there are several different points during the process at which the employee may quit the process and file a lawsuit in federal court, including after the agency's decision on the employee's complaint, so long as no appeal has been filed with the EEOC, and after the EEOC's decision on an employee's appeal from a final order.

1. EEOC Class Actions in Administrative Proceedings

The EEOC's regulations grant EEOC AJs the power to certify and hear class actions against federal employers in administrative proceedings.[97] Even though Congress never explicitly conferred power on the EEOC to create a class action rule, the EEOC has long asserted authority to create a class action procedure based on its jurisdiction to hear discrimination claims against federal employers. As noted above, the Office of Legal Counsel accepted the EEOC's argument, finding the EEOC's decision to create the procedure was entitled to *Chevron* deference.

The EEOC's use of class action procedures—which are loosely modeled after Rule 23 of the Federal Rules of Civil Procedure—makes the EEOC something of an outlier in our federal administrative state.[98] Some agencies are specifically empowered to hear class actions in cases involving workplace disputes—like the Merit Systems Protections Board and the Personnel Appeals Board—where employees claim a government employer's "pattern and practice" violates their rights.[99] And a number of other agencies have promulgated rules permitting the certification of class actions in their administrative proceedings, but they almost never use the power. For example, the Board of Governors of the Federal Reserve System and the Consumer Financial Protection Bureau both theoretically may pursue class actions in their own administrative proceedings against financial businesses that violate the Equal Credit Opportunity Act,[100] but according to our correspondence with both agencies, neither has invoked that authority.[101]

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[97] *See* 29 C.F.R § 1614.204 (2012); 57 Fed. Reg. 12,634 (Apr. 10, 1992).

[98] *See generally* Sant'Ambrogio & Zimmerman, *supra* note 32.

[99] *See, e.g.,* 4 C.F.R. § 28.97 (authorizing GAO employees to file class actions with the Personnel Appeals Board); 5 C.F.R. § 1201.27 (2012) (authorizing federal employees to file class action claims with the MSPB).

[100] *See* 12 C.F.R. §§ 202.16 (2007), 1002.16 (2011).

[101] *See also* 16 C.F.R. § 1025.18 (1980) (authorizing the Consumer Product Safety Commission to commence class actions in enforcement proceedings, which it also reports, it has not done).

Three other agencies have formally considered, and rejected, class action procedures, reasoning that they lack the capacity, authority, or good reason to do so. First, just last year, the Federal Communications Commission (FCC) considered and then rejected a proposal to hear class actions in its own adjudications for alleged violations of the Federal Communications Act.[102] Among other things, the FCC worried that the procedure would "needlessly divert" the resources of its lone ALJ to adjudicating extremely "fact-intensive and complex" cases, that can just as easily be filed in federal court.[103] The FCC also believed that it could more efficiently complement federal court class action practice by resolving any outstanding legal questions referred to the FCC by invoking the doctrine of an agency's "primary jurisdiction" to settle a contested interpretation of federal statutes or regulations.[104]

Second, the CFTC similarly considered and rejected the use of class actions for its own adjudication process involving broker-dealer disputes.[105] It likewise questioned whether its adjudicators could handle complex class action cases, as well as whether it need do so, given that parties could always pursue class actions in federal court.[106]

Finally, the Court of Appeals for Veterans Claims (CAVC) recognized the value of consolidating similar disability claims by veterans, but rejected class actions without more explicit authority to do so.[107] The CAVC is the only non-Article III court we are aware of that has said it expressly *lacks* authority to hear class actions under its general powers to craft rules of procedure.[108]

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[102] Solvable Frustrations, Inc., 29 FCC Rcd. 4205, (2014), http://digital.library.unt.edu/ark:/67531/metadc407841.

[103] *Id.* at 4205.

[104] *Id.* at 4206; *see also* Gilmore v. Sw. Bell Mobile Sys., L.L.C., 20 FCC Rcd. 15079, 15081–82 (2005), http://digital.library.unt.edu/ark:/67531/metadc4091/.

[105] *Compare* Futures Trading Practices Act of 1992, Pub. L. No. 102-546, § 224, 106 Stat. 3590, 3617 (codified at 7 U.S.C. § 18(a)(2)(A)) (granting CFTC power to create rule allowing for class action administrative procedures) *with* Rules Relating to Reparation Proceedings, 59 Fed. Reg. 9631 (Mar. 1, 1994) (rejecting the rule).

[106] Rules Relating to Reparation Proceedings, 59 Fed. Reg. 9631, (Mar. 1, 1994) ("The parties consider class actions out of place in the reparation forum because it was designed for quick and inexpensive resolution of disputes whereas class action litigation must be conducted with formality and strict attention to procedural issues and is often lengthy . . . . The [CFTC] finds that . . . its resources would be used more effectively elsewhere.").

[107] *See, e.g.*, Lefkowitz v. Derwinski, 1 Vet. App. 439, 440 (1991) (per curiam) (rejecting contention that court had authority to adjudicate class actions); *see also* S. REP. NO. 111-265, at 35 (2009) (statement of Professor Michael P. Allen) ("[O]ne cannot avoid concluding that the absence of such authority to address multiple cases at once has an effect on system-wide timeliness of adjudication.").

[108] As we note in the introduction, the CAVC's position on class actions appears to be changing. In a recent decision, the CAVC reaffirmed its "long-standing declaration that it does not have the authority to entertain class actions." Monk v. McDonald, No. 15-1280, 2015 WL 3407451 at *3 (Vet. App. May 27, 2015). But, in papers filed on January

In contrast, the EEOC has heard petitions for class actions for over three decades. Even in the four years following the Supreme Court's decision in *Walmart v. Dukes*[109]—which some argue severely limits class actions in federal court—federal employees have filed over 125 class action claims with the EEOC. And the EEOC has kept up its practice of hearing class action claims even though, like the FCC and CFTC, federal employees may also pursue class action claims in federal court.[110]

Based on our review of EEOC class actions filed over the past four years, they most commonly involve workplace discrimination claims based on race (28), sex (26), disability (24), and age (18). Of those cases, many follow the same pattern that class actions follow in federal court. A majority of cases were dismissed or remanded as untimely filed or on the merits. Twenty-two cases have settled. Of twenty-five actions where adjudicators considered whether or not to certify them as class actions, adjudicators rejected eighteen and certified seven for trial.[111]

2. EEOC Class Action Procedures: Similarities and Differences from Federal Rules

EEOC class action procedures mostly track Rule 23(a) of the Federal Rules of Civil Procedure, with one important difference. Like federal courts, EEOC AJs hear class actions based on a petition, typically filed by lawyers from a highly specialized bar, demonstrating (1) that the proposed class is so numerous that a consolidated complaint of the members of the class is impractical; (2) that there are questions of fact common to the class; (3) that the claims of the agent of the proposed class are typical of the claims of the class; and (4) that the class or representative will fairly and adequately protect the interests of the class.[112] As a result, EEOC AJs, like their federal counterparts, may require class wide discovery; appoint

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14, 2016 with the Federal Circuit, the government characterized the CAVC's opinion as "inartful" and asserted that the CAVC may indeed hear class actions in appropriate cases. If accepted, this interpretation of the CAVC's power would be consistent with the American Bar Association Section on Administrative Law and Regulatory Practice's 2003 Report. That report concluded that, notwithstanding the CAVC's longstanding position, Congress did not intend to prevent the CAVC from hearing class actions. *See* Neil Eisner, 2003 A.B.A. SEC. ADMIN, L. & REGULATORY PRACTICE REP. 9-10 (2003). The Federal Circuit will hear arguments in *Monk v. McDonald* later this spring. *Cf.* Corrected Brief of Amici Curiae Former General Counsels of the Department of Veterans Affairs at 1, Monk v. McDonald, 2015 WL 9311513 (Fed. Cir. 2016) (No. 15-1280).

[109] 564 U.S. 338 (2011).

[110] *See, e.g.*, 42 U.S.C. § 2000e-16(c) (2014) (permitting employees to file after 180 days); 29 U.S.C. §§ 1614.401(c), 1614.407 (1992) (permitting employees, but not employers, to file in federal court after an adverse decision by the EEOC).

[111] *Compare with* Thomas Willging & Emery Lee III, *Class Certification and Class Settlement: Findings from Fed. Question Cases, 2003-2007*, 80 U. CIN. L. REV. (2012) (identifying similar patterns of dismissal, settlement, and certification of class actions in federal court); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010).

[112] 29 C.F.R. § 1614.204 (2012).

liaison counsel or certify class actions on the condition that parties obtain more experienced counsel; hear complex statistical evidence involving company-wide practices; and sometimes, sub-class to ensure parties with distinct interests are adequately represented at trial, or more commonly settlement.[113]

But EEOC class actions have no equivalent to Rule 23(b) of the Federal Rules of Civil Procedure.[114] That has at least two important consequences. First, unlike federal damage class actions, federal employees cannot "opt out" of an EEOC class action.[115] After the EEOC certifies a class, and renders a class wide decision, employees only retain an individual right to challenge damages in "mini-trials" required by federal regulations.[116]

Second, unlike some federal class actions, *see* Fed. R. Civ. P. 23(b)(3), EEOC class actions do not require that common questions "predominate" over individual issues before certifying a class action. This "predominance" requirement is often a difficult hurdle for parties to meet in federal court. Among other things, federal courts have rejected class actions that raise too many questions of law, vexing causation questions, and in rare cases, highly individualized damages because of a fear that individual issues among class members will overwhelm the common

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[113] *Id.* (permitting class members to file written petitions challenging settlements "not fair, adequate and reasonable to the class as a whole.").

[114] FED. R. CIV. P. 23(b) provides in relevant part:

> A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

[115] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, MGMT. DIRECTIVE 110, ch. 8, § V.C (Aug. 5, 2015) ("The class members may not 'opt out' of the defined class"), http://www.eeoc.gov/federal/directives/md110.cfm.

[116] 29 C.F.R. § 1614.204(l).

ones.[117] As one influential scholar has described the 23(b)(3) "predominance" requirement:

> [w]hat matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.[118]

Other EEOC class action regulations resemble federal class actions under Rule 23(b)(2), which permit class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class."[119] EEOC cases involving structural reforms or declaratory relief tend to be less controversial because an injunction usually impacts all class members in the same way.[120]

3. Values Served by EEOC Class Actions

In our conversations with EEOC AJs, they described two important values associated with the EEOC class action procedure. First, class actions permit the EEOC to consistently apply decisions to groups of claimants working for the same employer. Second, AJs saw the class action procedure as a way to pool information about employers' policies and assess their lawfulness—to identify patterns that otherwise might escape detection in an individual proceeding. In some cases, the scale and visibility of an EEOC class action itself attracts the attention of government agencies, leading to workplace reforms. For example, after an EEOC class of disabled applicants challenged the State Department's "world-wide" availability requirement for foreign-service workers—a policy that rejected candidates for promotion unless they could work

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[117] John C. Coffee & Alexandra Lahav, *The New Class Action Landscape: Trends and Developments in Class Certification and Related Topics* (2012) (exhaustively collecting cases documenting class action trends in the United States), http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 2182035; Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2012) (observing that "several of the class certification requirements (class definition, numerosity, commonality, adequacy of representation, Rule 23(b)(2), and Rule 23(b)(3)), are now considerably more difficult to establish").

[118] Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) (cited in Walmart v. Dukes, 564 U.S. 338 (2011)).

[119] *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples.") (citing FED. RULE CIV. P. 23(b)(2) advisory committee's notes); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967) ("subdivision (b)(2) 'build[s] on experience mainly, but not exclusively, in the civil rights field'").

[120] *Amchem Products, Inc.* at 614 (describing the 1966 amendments providing for Rule 23(b)(3) class actions as "'the most adventuresome' innovation" (citing Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497, 497 (1969)).

without accommodation—the State Department was alerted to a systematic problem in its hiring practices.[121]

Indeed, the design of the EEOC class action process appears to promote collaborative reform. Following an EEOC AJ's decision on the merits, the federal employer is given time to "accept, reject, or modify" the AJ's recommendations and final report.[122] The employee then decides whether to appeal to the EEOC's Office of Federal Operations from the final agency decision.

Class actions before the EEOC rarely encourage the filing of what some call "negative value" claims—claims where the cost of litigation itself outweighs any potential award.[123] There appears to be no shortage of claims filed against federal employers—and some of them are filed pro bono. The AJs we interviewed recognized that class actions can be time-consuming—observing that some class actions they had overseen had lasted for several years. However, they viewed their ability to hear class actions as important (1) to afford legal access to many similarly affected parties, (2) to enhance the EEOC's capacity to identify discriminatory policies by federal employers and consistently enforce substantive law, and (3) to assure the EEOC's continued ability to implement anti-discrimination policy in the wake of Supreme Court decisions that have limited employment class actions in federal court.[124]

4. Challenges of EEOC Class Actions

Despite the AJ's generally positive view of EEOC class actions, they also identified some of the same challenges associated with complex litigation in state and federal courts, including concerns with diseconomies of scale, accuracy, and participation. First, EEOC class action proceedings are time-intensive. They may take years of motion practice, class discovery, appeals, and fairness hearings to determine the reasonableness of settlements. This means that before certifying a class

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[121] Press Release, *U.S. Equal Employment Opportunity Commission Affirms Class Action to Open State Department to Disabled Foreign Service Officers*, MARKETWATCH, (June 14, 2014), http://goo.gl/GXdHOK.

[122] 29 C.F.R. § 1614.204(j)(1) (giving the government employer sixty days to issue a "final decision" stating whether it will "accept, reject, or modify the [AJ's] findings"). *See also* 29 C.F.R. § 1614.204(d)(7) (giving agencies forty days to decide whether or not to "accept" the class action determination).

[123] ALI REPORT, *supra* note 33, § 2.02; Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1861 (2006) ("It is well understood that aggregation is the key to the viability of many claims routinely brought as class actions, particularly what are termed the negative value claims, in which the transaction costs of prosecuting individual actions make enforcement impossible absent aggregation.").

[124] *Cf.* 64 Fed. Reg. 37,644, 37,651 (July 12, 1999) (observing that "class actions . . . are an essential mechanism for attacking broad patterns of workplace discrimination and providing relief to victims of discriminatory policies or systemic practices").

AJs must ensure that a class action is feasible and likely to resolve the claims more efficiently than individual adjudications.

Second, AJs cited accuracy concerns associated with managing complex statistical evidence and other expert testimony. As a result, EEOC AJs may rely on procedures like *Daubert* hearings to screen out unreliable expert testimony and hold workshops in which they share insights on handling complex expert testimony.

Third, some AJs expressed concern about meaningful participation, given the fact that class members cannot opt-out of the class proceeding. They worried about the due process rights of absent class members who could not directly participate in or exit the action, and accordingly, felt additional pressure to assure that counsel adequately represented their interests before certifying the class action. The EEOC AJs have addressed this challenge by making extra efforts to ensure that attorneys representing a class with absent class members have sufficient experience, resources, and skill to adequately represent large groups of similar claims.[125]

B. The National Vaccine Injury Compensation Program (NVICP)

Congress created the NVICP in 1986 to provide people injured by vaccines with a "no-fault" alternative to lawsuits in federal court.[126] Under the program, claimants file a claim for compensation with the "Office of Special Master" (OSM), established for the purpose within the U.S. Court of Federal Claims, while serving the Secretary of Health and Human Services (HHS).[127] Claimants are then entitled to a decision within 240 days based on a showing that the vaccine caused the injury.[128] By mandating that people first file their vaccine injury claims with the NVICP, Congress hoped to reduce lawsuits against physicians and manufacturers, while providing those claiming vaccine injuries an expedited claim process and a reduced burden of proof. Claimants under the NVICP, unlike those who sue, do not have to prove negligence, failure

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[125] For example, the EEOC AJs we interviewed reported requiring purported class counsel without experience with class actions to bring in experienced counsel and allowing intervention by a third party to challenge the adequacy of purported class counsel. T/c with EEOC AJs Enechi Modu, David Norken, & Erin Stilp (Jul. 31, 2015); t/c with EEOC AJ David Norken (Apr. 29, 2016).

[126] *See* National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, sec. 311(a), §§ 2101–2106, 100 Stat. 3755, 3756-58 (codified as amended at 42 U.S.C. §§ 300aa-1 to -6 (2012)). *See also* Wendy K. Mariner, *Innovation and Challenge: The First Year of the National Vaccine Injury Compensation Program*, Report for ACUS Recommendation 91-4 (1991)

[127] 42 U.S.C. § 300aa-11 (2012). For more information about the NVICP's personnel, see MOLLY TREADWAY JOHNSON ET AL. FEDERAL JUDICIAL CENTER, USE OF EXPERT TESTIMONY, SPECIALIZED DECISION MAKERS, AND CASE-MANAGEMENT INNOVATIONS IN THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM 11-12 (1998).

[128] 42 U.S.C. § 300aa-12(d)(3)(A)(ii) (2012). *But see* Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1361 (2015) (finding, among other things, that many cases exceed the 240 day window).

to warn, or other tort causes of action; they must only prove that a covered vaccine caused their injury.[129] A seventy-five cent excise tax for each dose of vaccine sold goes to a trust, which in turn, funds awards and the administrative costs of the Program.[130]

Generally a petitioner can get compensation under the vaccine injury program in two ways. In a "table" case, the petitioner has an initial burden to prove an injury listed in the Vaccine Injury Table.[131] Upon satisfying this initial burden, the petitioner earns a "presumption" that the vaccine caused his or her injury. The burden then shifts to HHS to prove that a factor unrelated to the vaccination actually caused the illness, disability, injury, or condition.[132] Petitioners can also get compensation for "off-table" cases. The petitioner in an off-table case has the burden to prove the vaccination in question "caused" a particular illness, disability, injury, or condition.[133] The NVICP originally covered vaccines against seven diseases: diphtheria, tetanus, pertussis, measles, mumps, rubella (German measles), and polio. Congress has since extended coverage to a total of sixteen vaccines.

OSM adjudicators possess an interesting mix of powers—falling somewhere in between Article I judges and agency adjudicators. On the one hand, Congress expressly considered—and then rejected—creating a new department within HHS to hear claims arising out of the vaccine program.[134] Moreover, the OSM sits in the U.S. Court of Federal Claims, and parties may appeal their decisions to the court.[135] On the other hand, the OSM must follow special procedures created specifically for the vaccine program, lacks formal authority to hear class actions or use other multi-party procedures, and receives as much weight and deference for the medical and scientific findings as other agency adjudicators—their decisions may only be set aside on appeal if found "arbitrary and capricious."[136]

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[129] *National Childhood Vaccine-Injury Compensation Act: Hearing on S. 2117 Before the S. Comm. on Labor & Hum. Res.*, 98th Cong. 290-91 (1984) [hereinafter 1984 Senate Hearing] (statement of Sen. Paula Hawkins) ("[T]hese children have an urgent need and deserve simple justice quickly.").

[130] 42 U.S.C. § 300aa-12(c)(1), (d)(2)(A) (2012).

[131] *See* 42 U.S.C. § 300aa-14(a) (1993); Capizzano v. Sec'y of Health & Hum. Servs., 440 F.3d 1317, 1319 (Fed. Cir. 2006) (citations omitted).

[132] 42 U.S.C. §§ 300aa-13(a)(1)(A)-(B).

[133] 42 U.S.C. §§ 300aa-13(a)(1) to -11(c)(1)(C)(ii)(I).

[134] Munn v. Sec'y of Health & Hum. Servs., 970 F.2d 863, 871 (Fed. Cir. 1992) (describing legislative history of Vaccine Act).

[135] The Chief Judge of the Court of Federal Claims likens them to magistrate judges attached to an Article I court. Letter from Hon. Patricia E. Campbell-Smith to Hon. John Vittone (May 19, 2016).

[136] Hodges v. Sec'y of Health & Hum. Servs., 9 F.3d 958, 961 (Fed. Cir. 1993).

Like most benefit programs, many vaccine claims proceed one at a time. However, sometimes, this small office of eight adjudicators has had little alternative but to find ways to streamline the disposition of large groups of cases—particularly those raising similar scientific questions. Relying on its inherent authority to use "specialized knowledge" to resolve common scientific questions in a consistent and informed way, the OSM has relied upon combinations of procedures that loosely resemble multidistrict litigation, bellwether hearing procedures, and creative case-management techniques to efficiently resolve cases that raise common scientific questions, in ways designed to increase public participation and input.

1. The Origins of the Omnibus Proceeding

One way that the OSM has handled large groups of claims raising similar scientific questions is through the "omnibus proceeding." In an omnibus proceeding, a single adjudicator or set of adjudicators will hear claims that raise the same general scientific question of causation. Even though the Act that created the vaccine program contains no provision for class action suits (or anything like it), special masters developed the concept of the omnibus proceeding because the "same vaccine and injury often involve the same body of medical expertise."[137] Counsel representing large groups of individual claimants often use an omnibus proceeding to answer questions of "general causation," like whether a particular vaccine is capable of causing a specific injury. The hope is that the issue of whether a vaccine did so in a specific case can then be resolved more expeditiously.

Special Masters have pointed to two sources of informal authority to justify this procedure. First, they point to the broad discretion afforded Special Masters in the adjudication of claims that arise out of the program. Among other things, the Vaccine Act permits special masters to make evidentiary findings without following the formal rules of evidence, and gives them broad license "to determine the format for taking evidence and hearing argument."[138] Second, the OSM has pointed to their expertise as a rationale to democratize and open up the hearing process when the same cases raise similar questions of scientific causation. As Chief Special Master Vowell observed:

> The Court of Federal Claims has noted that "instead of being passive recipients of information, such as jurors, special masters are given an active role in determining the facts relevant to Vaccine Act petitions," and that "the special masters have the expertise and experience to know the type of information that is most probative of a claim." The U.S. Court of Appeals for the

[137] Ahern v. Sec'y of Dep't of Health & Hum. Servs., No. 90-1435V, 1993 WL 179430 (Fed. Cl. Spec. Mstr. Jan. 11, 1993).

[138] VACCINE ACT R. 8(a).

> Federal Circuit has commented on the "virtually unlimited" scope of the Special Master's authority to inquire into matters relevant to causation, and the deference properly accorded to their fact-finding. Notably, federal district court judges have similarly relied on their discretion to control evidence and their familiarity with complex scientific questions to justify similar forms of procedural innovation.[139]

The use of omnibus proceedings dates back to 1992, when Special Master George Hastings decided an omnibus proceeding involving 130 cases that alleged a rubella vaccine caused chronic arthritis and other related problems.[140] In that case, he observed early on that a large number of similar claims presented the general question over whether or not rubella could cause chronic arthopathy, and *sua sponte*, encouraged plaintiffs' attorneys who had filed such claims to form a steering committee to coordinate the presentation of expert evidence on the condition. Special Master Hastings found that "each case has an issue in common with the other cases, i.e., whether it can be said that it is 'more probable than not' that a rubella vaccination can cause chronic or persistent [arthropathy]."[141] The Special Master thus conducted an inquiry into this "general" question for the benefit of each of the related cases "with the hope that knowledge and conclusions concerning the general causation issue . . . could be applied to each individual case."[142]

At the time, there was "only a very, very limited amount of data directly applicable" because "this issue really ha[d] not been scientifically studied."[143] Accordingly, the Special Master gave petitioners a great deal of time to develop general causation evidence. At the general causation hearing, Special Master Hastings then evaluated a range of evidence that applied to this "general causation" question—including several isolated cases of chronic arthritis following the rubella vaccination, a study that discussed several cases of chronic joint pain, certain evidence of pathological markers, and formal expert testimony. At the end of the hearing, Special Master Hastings conceded that the evidence, while "not overwhelming" generally supported a causal link between the rubella vaccine and chronic arthritis. He then entered a case management order requiring individual parties to put forward evidence consistent with his

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[139] Snyder ex rel. Snyder v. Sec'y of Dep't of Health & Hum. Servs., No. 01-162V, 2009 WL 332044, at *2 (Fed. Cl. Feb. 12, 2009) (citations omitted).

[140] *Ahern*, 1993 WL 179430 at *3. The complaint specifically alleged that the vaccine caused "arthropathy." Arthropathy broadly includes both swelling, stiffness, and pain in the joints. It encompasses both "arthritis," where objective evidence of the condition exists, and "arthralgia," which involves only subjective pain.

[141] *Id.*

[142] *Id.*

[143] *Id.* at *4.

findings—acute onset of arthritis, no history of pre-existing conditions, as well as other evidence—to qualify for compensation.

The general proceeding helped expedite the evaluation of a common, as well as still-evolving scientific question of general causation. In addition, the proceeding made otherwise "small dollar" claims for joint pain worthwhile. "Following the 1993 Decision, over 130 related cases were either resolved or voluntarily dismissed based upon the Special Master's findings."[144] Moreover, by forcing the parties to pool together common scientific evidence on the issue, he raised the attention of an issue that, up to that time, had escaped the attention of HHS as well as Congress. Shortly after the decision, the Vaccine Injury Table was administratively modified, consistent with Special Master Hastings' decision, to include "chronic arthritis" as a Table injury associated with the rubella vaccine.[145] As a condition of establishing a table injury for chronic arthritis, a petitioner must demonstrate that a physician observed actual arthritis (joint swelling) in both the acute and chronic stages.[146]

The Vaccine Program uses two types of omnibus proceedings. The first involves hearing evidence on a general theory of causation—like whether or not, as Special Master Hastings' considered, a rubella vaccine causes chronic arthritis or other categories of joint problems. The Special Master makes findings based on that evidence and orders the parties to file papers establishing the extent to which the facts of individual cases fit within the court's general findings.[147] For example, counsel representing a large number of petitioners and counsel for respondent may file expert reports and medical journal articles to support the theory that the rubella vaccine is associated with chronic arthritis. The special master then (1) conducts a hearing in which the medical experts testify, (2) publishes an order setting forth the conclusions, and (3) files it in each of the rubella cases. If he or she finds sufficient evidence that the rubella vaccination could cause chronic arthropathy under certain conditions, the Special Master may order individual petitioners seeking compensation to establish those conditions in a separate filing. Alternatively, the omnibus proceeding applies evidence developed in the context of one individual case to other cases involving the same vaccine and the same or similar injury,[148] much like an issue class action.[149]

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[144] Moreno v. Sec'y of Dep't of Health & Hum. Servs., 65 Fed. Cl. 13, 17 (2005) (Dec. 16, 2003) (citing Moreno, No. 95–706V at 5 (Dec. 16, 2003)).

[145] *See* 60 Fed. Reg. 7678 (1995), revised 62 Fed. Reg. 7685, 7688 (1997).

[146] 42 C.F.R. § 100.3(b)(6)(A)-(B) (1997).

[147] *See, e.g.*, *Ahern*, 1993 WL 179430.

[148] *See, e.g.*, Capizzano v. Sec'y of Dep't of Health & Hum. Servs., 440 F.3d 1317 (Fed. Cir. 2006).

[149] *See* Betsy J. Grey, *The Plague of Causation in the National Childhood Vaccine Injury Act*, 48 HARV. J. ON LEGIS. 343, 414 n.254 (2011) (stating that "omnibus proceeding[s]" in the NVICP are "treated like a class action"). "Issue class actions" allow parties to

According to Chief Special Master Vowell, however, most omnibus proceedings work like bellwether trials in federal district court—organizing individual cases that raise similar issues in front of the same adjudicator, in the hopes that the outcome in one or a few cases will help other similarly situated parties understand the strengths and weaknesses of their cases, thereby facilitating the settlement of the remaining cases:

> Most omnibus proceedings . . . have involved hearing evidence and issuing an opinion in the context of a specific case or cases. Then, by the agreement of the parties, the evidence adduced in the omnibus proceeding is applied to other cases, along with any additional evidence adduced in those particular cases. The parties are thus not bound by the results in the test case, only agreeing that the expert opinions and evidence forming the basis for those opinions could be considered in additional cases presenting the same theory of causation.[150]

Special Masters adopted this approach in the "Omnibus Autism Proceeding," which was established in order to determine whether a causal link existed between childhood vaccines and autism. Between 2005 and 2006, over 5,000 cases alleging an association between autism and either the MMR vaccine (which does not contain thimerosal) or vaccines containing the preservative thimerosal, or both, have been filed with the NVICP.[151] Three special masters structured discovery, motion practice, and expert testimony to hear three separate "test cases" on this theory of general causation.

In so doing, the special masters in each case considered a wealth of scientific evidence common to every case. As Chief Special Master Vowell observed: "The evidentiary record in this case . . . encompasses, inter alia, nearly four weeks of testimony, including that offered in the Cedillo and Hazlehurst cases; over 900 medical and scientific journal articles; 50 expert reports (including several reports of witnesses who did not testify); supplemental expert reports filed by both parties post-hearing, [and] the testimony of fact witnesses on behalf of [the injured child and his] medical records."[152] Although non-binding, the findings in those three cases—which found no causal connection between vaccines and

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achieve the economies of class actions for a part of the case—like whether a defendant lied to investors—even if courts could not manageably try the remaining individual issues of causation and damages as a class. Elizabeth C. Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1894 (2015) ("[C]ourts have properly separated eligibility components such as plaintiffs' specific and proximate causation, reliance, and damages to facilitate issue classes in employment-discrimination, environmental-contamination, and consumer-fraud litigation." (collecting cases)), http://ssrn.com/abstract= 2600219.

[150] Snyder ex rel. Snyder v. Sec'y of Dep't of Health & Hum. Servs., No. 01-162V, 2009 WL 332044, at *4 (Fed. Cl. Feb. 12, 2009) (citations omitted).

[151] *See* HEALTH RESOURCES AND SERVICES ADMINISTRATION, OMNIBUS AUTISM PROCEEDING, http://www.hrsa.gov/vaccinecompensation.

[152] *Snyder*, 2009 WL 332044, at *8.

autism—helped the remaining claimants evaluate the strength and merits of their claims in the vaccine program.

2. Challenges of Omnibus Proceedings

There are drawbacks associated with omnibus proceedings. First, some agencies use ALJs who are assigned randomly to each individual case to reduce allegations of bias or gamesmanship.[153] Such agencies would have to take greater care to ensure that ALJs were randomly assigned as much as possible.

Second, omnibus proceedings raise interesting questions about the legitimacy of using an adjudication process to settle complex scientific questions. Many plaintiffs in the Omnibus Autism Proceeding were anxious about commencing cases together, as were members of the public health community, who "found it unsettling that the safety of vaccines must be put on trial before three "special masters" in an obscure vaccine court. Said one: "the truth about scientific and medical facts is not, ultimately, something than can be decided either by the whims of judges or the will of the masses."[154] Others, however, found that the ability to hear common cases together led to deliberations that represented a "comparatively neutral exhaustive examination of the available evidence."[155]

Finally, Special Masters and staff had to invest substantial resources tracking, assessing attorney's fees for, and closing individual cases still pending long after the court resolves common questions involving the Omnibus Autism Proceeding. To alleviate these problems, the Special Master's office may in the future require those who agree to participate in future omnibus proceedings to be bound by the outcome of such "test cases."

C. Office of Medicare Hearings and Appeals (OMHA)

The Office of Medicare Hearings and Appeals (OMHA) operates in HHS and hears appeals involving Medicare benefits.[156] OMHA was created by the Medicare Prescription Drug, Improvement, and

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[153] 5 U.S.C. § 3105 ("Administrative law judges shall be assigned to cases in rotation so far as practicable.").

[154] Gilbert Ross, *Science is not a Democracy*, Wash. Times. June 14, 2007, http://www.washingtontimes.com/news/2007/jun/14/20070614-085519-8098r; Paul Offit, *Inoculated Against Facts*, N.Y. TIMES. Mar. 31, 2008, http://www.nytimes.com/2008/03/31/opinion/31offit.html?_r=1&scp=3&sq=vaccination. *See also* ACUS Statement # 11: Hearing Procedures for the Resolution of Scientific Issues (1985) (recommending hearing procedures for agencies to evaluate scientific studies).

[155] Jennifer Keelan & Kumanan Wilson, *Balancing Vaccine Science and National Policy Objectives: Lessons From the National Vaccine Injury Compensation Program Omnibus Autism Proceedings*, 101 Am. J. Pub. Health 2016 (2011).

[156] OMHA is organizationally and functionally separate from the Centers for Medicare and Medicaid Services (CMS).

Modernization Act of 2003 (the Medicare Modernization Act).[157] Before 2003, ALJs in the Social Security Administration (SSA) heard Medicare appeals under a Memorandum of Understanding between SSA and HHS. The Medicare Modernization Act addressed concerns that SSA ALJs lacked guidance to handle the distinct issues raised in Medicare appeals.[158]

OMHA is the third of four levels of administrative appeals available in the Medicare health insurance program—Medicare Parts A, B, C, and D.[159] Medicare Parts A & B (or "Original Medicare") include Hospital Insurance (Part A) and Supplementary Medical Insurance (Part B). Part A helps pay for inpatient care in a hospital or skilled nursing facility (following a hospital stay) and some home health care and hospice care. Part B helps pay for doctors' services and other medical services, equipment, and supplies that are not covered by hospital insurance.[160]

The Medicare appeals process varies depending on which Part is involved, but Medicare Parts A and B are most relevant to OMHA's use of aggregation. Under Medicare Parts A and B, the reimbursement process generally begins with a provider or supplier submitting a bill to Medicare for a service they performed for a covered beneficiary.[161] In order to validate payment of the claim, Medicare uses private contractors called Medicare Administrative Contractors (MACs) to determine that the claim

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[157] Pub. L. No. 108-173, § 931, 117 Stat. 2066.

[158] Memorandum of ALJ Holt (citing 67 F.R. §§ 69312, 69316 (November 15, 2002) ("The need for the Medicare program to establish its own regulations for these upper level appeals has been recognized by many parties.")).

[159] In addition, OMHA provides the second level of review for certain Medicare decisions made by SSA. First, OMHA hears appeals of decisions from the SSA that an applicant is not entitled to be a beneficiary of the Medicare program. The local SSA office makes the initial decision about whether an applicant is entitled to Medicare benefits and on what terms. SSA may then conduct a reconsideration of that decision. *Medicare Entitlement Appeals*, OFF. OF MEDICARE HR'GS & APPS., http://www.hhs.gov/omha/Entitlement%20 Appeals/entitlement_appeals.html (last visited Feb. 26, 2016). Second, OMHA hears appeals of SSA's determination of a beneficiary's Income Related Monthly Adjustment Amount, which determines a Medicare beneficiary's total month Part B and Part D insurance. *Medicare Part B Premium Appeals*, OFF. OF MEDICARE HR'GS & APPS., http://www. hhs.gov/omha/Part%20B%20Premium%20Appeals/partb_appeals.html (last visited Feb. 26, 2016).

[160] Part C is the Medicare Advantage Plan program. Beneficiaries with Medicare Parts A and B can choose to receive all of their health care coverage through one of these Medicare Advantage plans under Part C. Finally, Part D is the Medicare Prescription Drug program, which helps pay for certain medications prescribed by doctors. *Appeals Process by Medicare Type*, OFF. OF MEDICARE HR'GS & APPS., http://www.hhs.gov/omha/process/ Appeals%20Process%20by%20Medicare%20Type/appeals_process.html (last visited Feb. 26, 2016).

[161] *Level 3 Appeals*, OFF. OF MEDICARE HR'GS & APPS., http://www.hhs.gov/ omha/process/level3/index.html (last visited Feb. 26, 2016).

is covered or reimbursable and the amount that is payable by Medicare.[162] These contractors then notify the claimant of the amount recoverable and administer payment. If the claimant disagrees with the decision, the claimant can request a redetermination by the MAC. The redetermination is processed by the same MAC, but by a different individual in the MAC than the person who processed the original claim.[163]

If the claimant is not satisfied with the redetermination by the MAC, it can initiate a Level 2 appeal, which will be reviewed by a Qualified Independent Contractor (QIC) retained by CMS, who reconsiders the medical necessity of the services provided to the covered beneficiary.[164] If the claimant is not satisfied with the QIC's decision, the claimant may appeal the QIC's determination to OMHA.[165]

Parties may appeal the decision of OMHA under any Part to the Medicare Appeals Council, which is part of the Departmental Appeals Board of HHS and independent of OMHA and its ALJs. The decisions of the Medicare Appeals Council are themselves subject to review in federal district court if the amount in controversy is at least $1,350.[166]

1. The Backlog in OMHA Appeals

The OMHA appeals process began to experience significant backlogs in 2012. The number of appeals received by OMHA grew from 59,600 in 2011 to 117,068 in 2012, 384,151 in 2013, and 473,563 in 2014. Put differently, the number of claims increased 800% from 2006 to 2014. Meanwhile, the number of appeals decided by OMHA only grew from 53,864 in 2011 to 61,528 in 2012, 79,377 in 2013, and 87,270 in 2014. Thus, despite the increased productivity of OMHA's ALJs and the total number of appeals decided each year, OMHA could not keep pace with the huge number of new cases coming in the door. As a result, average wait times for the processing of appeals grew from 121 days in 2011 to 603 days in 2015.[167]

Most of the increased number of appeals involved claims under Medicare Part A and Part B. The dramatic surge in these appeals was caused primarily by stepped up efforts to recover excess billing under

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[162] Don Romano & Jennifer Colagiovanni, *The Alphabet Soup of Medicare and Medicaid Contractors*, 27 HEALTH LAW. 1, 5 (2015).

[163] *Level 3 Appeals*, OFF. OF MEDICARE HR'GS & APPS., *supra* note 157.

[164] *Level 1 Appeal: Original Medicare (Parts A & B)*, OFF. OF MEDICARE HR'GS & APPS., http://www.hhs.gov/omha/process/level1/l1_ab.html (last visited Feb. 26, 2016).

[165] 42 C.F.R. § 405.1004 (2015) (requiring that "[t]he party files a written request for ALJ review within 60 calendar days after receipt of the notice of the QIC's dismissal. [And T]he party meets the amount in controversy requirements. . .").

[166] *Level 5 Appeals*, OFF. OF MEDICARE HR'GS & APPS., http://www.hhs.gov/omha/process/level5/index.html (last visited Feb. 26, 2016).

[167] Nancy J. Griswold, Chief ALJ, OFF. OF MEDICARE HR'GS & APPS., APPELLANT FORUM – UPDATE FROM OMHA (June 25, 2015).

several post-payment audit programs conducted by private contractors[168] and more active Medicaid State Agencies. In addition, there was a larger beneficiary population during this period.

It is important to note, however, that appeals by individual beneficiaries receive priority processing. Thus, most of the parties suffering from the delays caused by the backlogs were businesses—often service providers or medical suppliers—with sometimes hundreds or thousands of similar appeals on behalf of different Medicare beneficiaries.

Faced with an existential crisis, OMHA began to explore ways to reduce the backlog and process a much larger number of appeals without adding more ALJs. Among several initiatives, OMHA introduced two pilot programs using aggregation mechanisms to resolve large groups of claims in a single proceeding: (1) the Statistical Sampling Initiative; and (2) the Settlement Conference Facilitation.

2. OMHA's Power to Aggregate Appeals

Section 931 of the Medicare Modernization Act directs the Secretary of HHS to establish "specific regulations to govern the appeals process." The Secretary has utilized her broad discretion to develop administrative procedures to promulgate regulations authorizing OMHA ALJs to consolidate two or more cases in one hearing at the request of the appellant or on "his or her own motion," "if one or more of the issues to be considered at the hearing are the same issues that are involved in another hearing or hearings pending before the same ALJ."[169] The purpose, as described in the regulations, is "administrative efficiency."[170] After the hearing, the ALJ may issue either a consolidated decision and record or separate decisions and records for each claim.[171]

Although OMHA ALJs rarely formally consolidate appeals, ALJs often informally combine appeals to be heard in the same proceeding even without a formal consolidation order or process, when the appeals involve the same organization, issues of law or fact, or the same representative. Consider the following three examples:

> (1) ***Same appellant and related issues.*** A large durable medical equipment provider appeals claims for oxygen, continuous positive airway pressure supplies, and inhaled medications. Although an ALJ may hear separate fact specific arguments on each case, "there are efficiencies in having one proceeding, with procedural statements, witness introductions, oaths, and waiver of counsel done once at the

[168] The private contractors include MACs, Recovery Auditor Contractors RACs, Zone Program Integrity Contractors, Supplemental Medical Review Contractors.

[169] 42 C.F.R. § 405.1044.

[170] *Id.*

[171] *Id.*

beginning."[172] Also, there are common arguments that can be made at the start of the hearing or in the first case with that particular issue and not repeated. The documents are often common and can be explained once if there are any questions.

(2) ***Same appellant and common issues of law and fact.*** When a lab provides DNA testing of cancer cells to determine appropriate chemotherapy treatment, there may be a question about whether the procedure is "investigational" or "experimental" (and therefore not covered by Medicare). The case will often involve the review of medical literature and physician testimony. The entire group of appeals assigned to the ALJ can be heard together. The ALJ may review the records in a few files, but there are typically no individualized factual determinations. In such cases, an ALJ may still offer the appellant the right to present on all of the cases, but the parties "typically rest on the more general arguments and waive the right to separate hearings in each case."

(3) ***Same representative appearing on behalf of multiple appellants with no testimony or participation by the appellant's employees***. A law firm or other organization represents hospitals in cases in which overpayments were assessed after a RAC review. The issue in all of the cases is whether the services should have been billed as inpatient (Part A) or outpatient/observation (Part B, which generally have a lower payment). The RAC will often appear as a party (they are paid a contingent fee based on the recovery), and other Medicare contractors may also appear as participants or parties. OMHA would typically schedule these cases in groups by representative and RAC.

3. OMHA's Statistical Sampling Initiative

(a) Background on Statistical Sampling in the Medicare Program

Aside from the kinds of group procedures described above, the Medicare program has used statistical sampling since 1972 to estimate Medicare overpayments in light of the enormous administrative burden of auditing businesses on an individual claim-by-claim basis.[173] In *Chaves County Home Health Servs. v. Sullivan*,[174] the U.S. Court of Appeals for the District of Columbia Circuit approved the use of statistical sampling to determine Medicare overpayments, reasoning that even though the Medicare Act did not expressly authorize its use, the D.C. Circuit would defer to the Medicare program's adoption of statistical sampling as a

[172] T/c with ALJ Fisher & Holt.

[173] Currently, CMS's statistical sampling and extrapolation methodology guidelines for overpayments appear in its Medicare Program Integrity Manual (MPIM), Pub. 100-08.

[174] 931 F.2d 914 (D.C. Cir. 1991).

"judicially approved procedure that can be reconciled with existing requirements" under the principles set forth in *Chevron U.S.A. Inc. v. NRDC*.[175] In so doing, the D.C. Circuit also pointed to longstanding uses of statistical sampling in other contexts.[176] Nevertheless, the D.C. Circuit distinguished the use of statistical sampling in post-payment review from individualized pre-payment claim review.[177]

Courts have also consistently rejected claims that statistical sampling in the Medicare and Medicaid programs violates due process under the *Mathews v. Eldridge* balancing test, reasoning that the private interest "at stake is easily outweighed by the government interest in minimizing administrative burdens."[178]

The use of statistical sampling and other aggregation techniques in Medicare appeals, as opposed to the CMS auditing program, emerged "organically" in the late 1990s.[179] SSA ALJs began using them to manage Medicare disputes that involved large numbers of similar claims before the same adjudicator. Both ALJs and the parties themselves would propose the use of statistical sampling to expedite such claims. Statistical sampling was advantageous to providers who did not want to spend the significant time necessary to produce documentation for every claim for which they sought reimbursement.[180] As a matter of policy, OMHA often required that parties consent before performing statistical sampling, reasoning that the use of statistics could save time and resources from re-litigating similar issues at OMHA.

(b) Statistical Sampling Pilot Program

As the number of Medicare Part A and Part B appeals spiked, OMHA formally adopted the Statistical Sampling Initiative (SSI) as a way to formalize and systematize the process that had begun with individual ALJs. OMHA proceeded cautiously in designing the pilot program, concerned that its backlog elimination efforts might create new backlogs.

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[175] 467 U.S. 837 (1984) (directing courts to defer to agencies' reasonable interpretations of ambiguous statutes).

[176] *See, e.g.*, Illinois Physicians Union v. Miller, 675 F.2d 151 (7th Cir. 1982) (use of statistical sampling in Medicaid); Michigan Dept. of Educ. v. United States, 875 F.2d 1196 (6th Cir. 1989) (use of statistical sampling in vocational rehabilitation programs).

[177] *Chaves*, 931 F.2d at 919.

[178] *Id.* at 922 ("In light of the 'fairly low risk of error so long as the extrapolation is made from a representative sample and is statistically significant, the government interest predominates.'"); Ratanasen v. Cal. Dept. of Health Servs., 11 F.3d 1467 (9th Cir. 1993); *Illinois Physicians Union*, 675 F.2d at 157 ("[I]n view of the enormous logistical problems of Medicaid enforcement, statistical sampling is the only feasible method available."); Bend v. Sebelius, 2010 WL 4852230 (C.D. Cal. Nov. 19, 2010). *But see* Daytona Beach General Hosp., Inc. v. Weinberger, 435 F. Supp. 891 (M.D. Fla. 1977) (sampling method that included less than ten percent of the total cases denied plaintiff due process).

[179] *In re Apogee Health Serv., Inc.*, No. 769 (Medicare Appeals Council Mar. 15, 1999).

[180] T/c with ALJs Fisher & Holt (Oct. 21, 2015).

OMHA also had to address concerns of DOJ and CMS about allowing companies with a history of fraud or wrongdoing to participate in the pilot program.

OMHA attorneys, ALJs, and statisticians developed criteria for piloting the new program on a limited basis. The pilot program was restricted to appellants with at least 250 claims on appeal that fell into certain specified categories of Part A or Part B claims and were currently assigned to an ALJ or filed within a 3-month period in 2013, but not yet scheduled for a hearing.[181] Although appellants may request statistical sampling of their own accord, none have done so to date. Rather, OMHA has invited certain appellants to participate in the program. In order to identify claims appropriate for statistical sampling, OMHA used its own database to identify large numbers of appeals from the same provider.[182] Based on these "data runs," OMHA made offers to eight providers to participate in the sampling program. Seven parties agreed to participate in the program and one party declined.

Most of the eligible participants in the program to date are providers of medical supplies and equipment. Notably, a single diabetic supplies proceeding would account for 17,134 claims, dwarfing the other statistical trials, which only resolve caseloads of 400 to 600 cases at a time. Our interviewees suggested that these cases lend themselves to sampling because the claims involved are more similar than inpatient provider care, which is more varied and individualized.

Although OMHA ALJs rotate randomly, a small number of ALJs have committed to be randomly selected within the statistical sampling program. This allows OMHA to take advantage of their expertise in handling such matters. OMHA is guided special policies on statistical

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[181] The full eligibility criteria are as follows:

1. They have at least 250 claims on appeal, all of which fall into only one of the following categories: (i) pre-payment claim denials; (ii) post-payment (overpayment) non-RAC claim denials; or (iii) post-payment (overpayment) RAC claim denials from one RAC.
2. The claims must be currently assigned to an ALJ or filed between April 1, 2013 and June 30, 2013, but no hearing on the claims has been scheduled or conducted.
3. The appellant must be a single Medicare provider or supplier, but providers or suppliers with multiple National Provider Identifiers (NPIs) owned by a single entity may proceed under one provider number by agreement of the appellant's corporate office.
4. There can be no outstanding request for Settlement Conference Facilitation for the same claims.

[182] OMHA uses the same Healthcare Common Procedure Coding System (HCPCS) billing code used by medical providers. Providers use the HCPCS code to identify the specific items or services for which they are seeking reimbursement under Medicare, like wheelchairs or other kinds of durable medical equipment.

sampling.[183] In short, a statistician selects the sample from the universe of claims, the ALJ makes decisions based on the sample units, and the statistician then extrapolates the results to the universe of claims.

(c) Challenges of the Statistical Sampling Initiative

Although OMHA plans to expand the statistical sampling program, OMHA identified a number of challenges. First, OMHA adjudicators and staff were mindful that aggregation risks creating diseconomies of scale—they strongly hoped to avoid aggravating backlogs and claims by creating an unmanageable aggregate litigation process, particularly given limited staff and large caseloads.[184] Second, OMHA sought to ensure adjudicators possessed sufficient expertise to hear large complex disputes, given that ALJs ordinarily hear individual cases. Third, service providers and other appellants expressed legitimacy concerns; they worried that aggregate proceedings in front of the wrong adjudicator or with the wrong methodology could jeopardize their day in court.[185] Finally, some worried that there was not enough information about the statistical sampling methodology that would be used in the SSI.[186]

OMHA addressed the question of efficiency by taking a very conservative approach to the pilot program so as not to create a new backlog while attempting to deal with its existing backlog. The pilot program was initially confined to appeals already assigned to ALJs or filed during a single quarter of 2013. In addition, the ALJs participating in the pilot did so on a voluntary basis, and their work in the pilot program is in addition to their regular workload.[187]

The pilot program addressed the challenge of expertise by selecting ALJs to participate with experience in statistical sampling. This, of course, is in some tension with the random assignment of ALJs, as it creates a smaller pool from which an ALJ is drawn.

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[183] The policies are described in in the Medicare Program Integrity Manual (CMS Pub. 100-08, Ch. 8)

[184] Some providers expressed similar concerns. Letter from Paul E. Prusakowsky, President, National Association for the Advancement of Orthotics and Prosthetics, to Nancy Griswold, Chief Administrative Law Judge, Office of Medicare Hearings and Appeals (Dec. 5, 2014) (supporting the SSI program, but expressing its concern that the program may "divert OMHA's resources away from deciding appeals not involved in the pilot."), http://www.oandp.org/assets/PDF/OP_Alliance_comment_ltr_OMHA-1401-NC (D0574905).pdf.

[185] T/c with Amanda Axeen, Jason Green, & Anne Lloyd, OMHA (July 20, 2015).

[186] Letter from Raja Sekeran, Vice President and Associate General Counsel – Regulatory, to Nancy Griswold, Chief Administrative Law Judge, Office of Medicare Hearings and Appeals (Dec. 5, 2014) (expressing concerns with the lack of published information about the "relationship between CMS and the statistical experts used to develop the sampling methodology"), http://www.regulations.gov/#!documentDetail; D=HHS-OMHA-2014-0007-0093.

[187] To date, nine ALJs volunteered to participate in the program.

After providers expressed concern with having one ALJ hear large numbers of their claims, OMHA began outreach efforts to bolster the legitimacy of the pilot program, but it plans to do more on this front in the future. In addition to addressing the "all eggs in one basket" concern, OMHA may want to be mindful of other challenges as it expands the program.

(d) Expansion of the Statistical Sampling Initiative

OMHA is currently considering expanding the program beyond the limited universe of appeals eligible to participate in the pilot program.[188] In connection with the expansion, OMHA is weighing additional outreach efforts, increased staffing levels, and restructuring the adjudication process to make the program more appealing to medical providers who are otherwise unfamiliar with the use of sampling.

An expanded statistical sampling program may use multiple ALJs to hear different parts of a sample of claims. For example, instead of a single ALJ hearing a sample of 100 cases, ten ALJs might each hear ten cases from the sample. This would help to allay appellants' concern that statistical sampling before a single ALJ risks a bad decision being extrapolated across the entire universe of claims. Many Medicare claims appellants are repeat players who have positive or negative opinions about particular ALJs. Indeed, our interviewees suggested that some appellants already try to exploit the power of ALJs to consolidate appeals to "ALJ shop." For example, an appellant with multiple appeals pending before different ALJs might request that all its cases be consolidated with the ALJ the appellant believes will provide it with the most favorable decision. Spreading the sample among more than one randomly selected ALJ will help alleviate the concern that the entire universe of claims will be decided by an ALJ that the party hopes to either avoid or obtain.

Expanding the statistical sampling program may also help overcome challenges faced by many mass government benefits programs. Agencies frequently struggle to consistently hear cases in mass adjudication systems, like OMHA, where appellants continually file appeals involving similar legal and factual issues, and even on the same issue for the same beneficiary with a different service date. However, consolidating large numbers of appeals in a smaller number of proceedings using statistical sampling may make it easier to track these decisions.

Moreover, aggregating large numbers of appeals in a smaller number of proceedings using statistical sampling may make it easier for the Secretary to coordinate the work of OMHA with other agencies and departments. The relationship between CMS and OMHA can make it difficult to implement uniform policy. OMHA may approve a payment on

[188] Congress is also currently considering expanding funding for the statistical sampling program under the proposed 2015 Audit & Appeal Fairness, Integrity, and Reforms in Medicare (AFIRM) Act. *See* S. REP. NO. 114-177 (2015).

appeal and the next day CMS can deny the same provider's claim on behalf of the same beneficiary for the same DME, with only a different date of service. Indeed, even the Medicare Appeals Council, which issues the Secretary of HHS's final decision in these appeals, does not bind OMHA and CMS beyond the appeals that it reviews. Aggregate adjudication provides agency heads with an opportunity to take a thoughtful first crack at important questions of law and policy by the agency's most experienced and expert adjudicators, with the benefit of a fully developed record and competent counsel.

Along the same lines, agency aggregation may een increase the ability of the political branches to ensure agency accountability.[189] Policymakers are rarely concerned with the outcomes of individual adjudications beyond the provision of constituent services by individual representatives.[190] But aggregated cases, like Medicare's recent billion dollar settlement with over 1,900 hospitals,[191] can generate significant interest in Congress.

4. OMHA's Settlement Conference Facilitation Initiative

In addition to statistical sampling, OMHA has begun to experiment with an aggregate settlement initiative. CMS has always had discretion to settle disputes with Medicare providers and suppliers, but the Settlement Conference Facilitation (SCF) Pilot represents an effort by OMHA to provide a formal framework for encouraging the settlement of large numbers of cases.

The SCF Pilot began in June 2014. Once again mindful of avoiding the creation of new backlogs, the SCF Pilot was limited to groups of at least 20 appeals or appeals comprising at least $10,0000 in the aggregate filed in 2013 and that met certain specified criteria.[192] To qualify for the

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[189] Of course, in some cases political scrutiny may make it more difficult for the agency to reach an accommodation with injured parties.

[190] *See*, *e.g.*, INS v. Chadha, 462 U.S. 919, 927 & n.3 (1983) (noting Congress' lack of attention when reviewing individual administrative proceedings).

[191] For example, facing an estimated backlog of over 800,000 appeals from medical providers, hospitals, doctors, and Medicare beneficiaries, in October 2014, Medicare offered to resolve hundreds of thousands of billing disputes by globally offering to pay hospitals with pending claims 68% of their value. By June 2015, Medicare executed serial settlements with almost 2,000 hospitals, representing approximately 300,000 claims, for over $1.3 billion. Reed Abelson, *Medicare Will Settle Short-Term Care Bills*, N.Y. Times (August 29, 2014), http://www.nytimes.com/2014/08/30/business/medicare-will-settle-appeals-of-short-term-care-bills.html; Press Release, Centers for Medicare and Medicaid Services, Inpatient Hosp. Reviews, (last checked August 12, 2015), https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/ Medical-Review/InpatientHospitalReviews.html.

[192] The full criteria for eligibility are as follows:

1. groups of at least 20 appeals or appeals comprising $10,000 in aggregate claims;
2. filed by a Part B provider or supplier in 2013;
3. under the same NPI;

program, claims must be part of the Medicare Part B program, which usually involves durable medical equipment (DME), but also can involve outpatient therapy, physical services, and other more individualized forms of treatment. Appeals run the gamut of Part B DME claims (e.g., prosthetics, robotics), skilled nursing services (these are usually under Part A, but appellants can get a reduced amount under Part B), outpatient rehabilitation services (Part B or Part A), and even some drugs and biologicals.

The claims must be for the "same" or sufficiently "similar" items or services to qualify for the SCF pilot program. OMHA takes a "common sense" approach to the meaning of "same" or "similar." For example, all wheelchairs, whether electronic or manual, or nutritional supplies for people with digestive troubles, including both the nutritional supplements and the device to deliver them, would be the "same" or "similar" items. But wheelchairs and diabetes test strips are not related, even if stemming from the same illness, and would not be the "same" or "similar."

Under the pilot program, OMHA facilitates a discussion between CMS and the appellant regarding potential resolution through settlement. OMHA devoted one attorney trained in facilitation, working full-time along with four other trained facilitators working on a rotating basis. This attorney and a second mediator attend each settlement conference as a team. If the parties reach an agreement, a settlement agreement is drafted by OMHA and signed by the parties. OMHA then dismisses the appeals. If no agreement is reached, the appeals return to their prior status and positions in the appeals queue.

OMHA has found that many appellants are more comfortable with mediation, particularly given the plethora of courthouse programs designed to promote alternative dispute resolution. OMHA received twenty-five requests for settlement conferences in connection with the pilot project. OMHA did not itself invite any parties to participate in the pilot program (in contrast to the statistical sampling initiative) because enough parties applied on their own, and OMHA has limited resources to devote to the pilot.

Phase I resolved 2,400 appeals.[193] Most of the settlements resolved something in the range of 200 appeals. A few resolved 500 to 700 appeals. This is equal to the number of cases typically resolved by two ALJ teams working for one year. Each ALJ team is composed of four to

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4. that have not yet been assigned to an ALJ for a hearing; and
5. are not the subject of an outstanding request for statistical sampling.

[193] Of the twenty-five requests to participate in the SCF Pilot, five appellants were deemed ineligible because they did not meet the criteria for the program. Another five appellants were rejected due to objections by CMS. Fourteen cases went to settlement conferences. Of these, ten cases were settled and four did not. One request to participate in the program was still pending at the time of our interviews.

six people, including the ALJ, attorneys, paralegals, and other staff assistants. Phase I of the SCF Pilot was staffed by the attorney trained in facilitation, a program analyst, a management assistant, and five facilitators.

As OMHA expands the cases eligible for the SCF program, it has sought to eliminate the risk of uncommon, unclear and cherry-picked cases that undermine aggregation. First, only after determining that the appellant has appeals appropriate for the SCF program based on their similarity, does OMHA invite the appellant to apply to participate in the program. Second, the claims appealed must be ascertainable. They may not involve items or services billed under unlisted, unspecified, unclassified, or miscellaneous healthcare codes. These claims are difficult to settle because they do not have an approved reimbursement amount.

Third, settlement discussions must be comprehensive. The request must include all of the party's pending appeals for the same items or services that are eligible for SCF. For example, if an appellant has fifty wheelchair appeals pending that meet the SCF requirements, the appellant must request SCF for all fifty wheelchair appeals. In addition, appellants may not request SCF for some but not all of the items or services included in a single appeal.[194] This prevents parties from submitting their weakest appeals to the settlement process and going to hearings with their strongest appeals.

D. Challenges and Benefits of Aggregate Agency Adjudication

Each case study illustrates the unique benefits and challenges offered by aggregate agency adjudication. Like federal courts, each tribunal has used aggregate adjudication to pool information about common and recurring problems, as well as to eliminate the duplicative expenditure of time and money associated with traditional one-on-one adjudication.[195] They have also sought more consistent outcomes in similar cases than possible with case-by-case adjudications. Finally, aggregation has proved to be an important method to improve access to legal and expert assistance

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[194] For example, if an individual appeal has at issue 10 diagnostic tests and 10 drugs/biologicals, an appellant may not request that the diagnostic tests go to SCF and the drugs/biologicals go to hearing. *Settlement Conference Facilitation*, OFF. OF MEDICARE HR'GS & APPS., http://www.hhs.gov/omha/OMHA%20Settlement%20Conference%20Facilitation/settlement_conference_facilitation.html (last visited March 3, 2016).

[195] *See* In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 859 (6th Cir. 2013) (citing Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1191 (2013)); 1 WILLIAM B. RUBENSTEIN, ET AL., NEWBERG ON CLASS ACTIONS § 9 (5th ed. 2015) ("Class actions are particularly efficient when many similarly situated individuals have claims sufficiently large that they would each pursue their own individual cases. In these situations, the courts are flooded with repetitive claims involving common issues.").

by parties with limited resources, so that individuals can pursue claims that otherwise would be difficult to pursue on an individual basis.[196]

But, as also illustrated above, aggregate agency adjudication raises unique challenges and costs of its own by: (1) potentially creating "diseconomies of scale"–inviting even more claims that stretch courts' capacity to administer justice to many people; (2) impacting the perceived "legitimacy" of the process and challenging due process; and (3) increasing the consequence of error. In other words, just like many kinds of administrative systems, aggregate adjudication struggles to deal with many different kinds of constituencies feasibly, legitimately, and accurately.

Nevertheless, each program has responded to these concerns by adopting aggregate procedures responsibly. They have cautiously piloted aggregate procedures to avoid replacing new backlogs with old ones. Where appropriate, they have also relied on panels of adjudicators to reduce allegations of bias and provided additional opportunities to assure individuals voluntarily participate in the process. Finally, some have developed guidance to standardize the use of statistical evidence, while others require cases raising novel factual or scientific questions to mature before centralizing claims before a single decisionmaker. This part summarizes the benefits of aggregation and the ways that these agencies have attempted to respond to their challenges.

1. Aggregate Adjudication Can Pool Information, Reach Consistent and Efficient Outcomes, and Improve Legal Access

As set out above, when used effectively, aggregate agency adjudication may fulfill important goals of efficiency, consistency and access in adjudication.

Promoting Efficiency. The efficiencies afforded by aggregation can be especially helpful in the administration and review of large benefit programs, such as those reviewed by the NVICP and OMHA.[197] For example, when over 5,000 parents claimed that a vaccine additive called thimerosal caused autism in children, the NVICP used a national Autism Omnibus Proceeding to pool all the individual claims that raised the same

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[196] *See, e.g.*, Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013) (Posner, J.) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30" (emphasis in original) (citation omitted)), cert. denied, 134 S. Ct. 1277 (2014).

[197] S*ee* S. REP. NO. 111-265, at 35 (2009) (statement of Professor Michael P. Allen) ("[O]ne cannot avoid concluding that the absence of such authority to address multiple cases at once has an effect on system-wide timeliness of adjudication."); *see also* Neil Eisner, 2003 A.B.A. SEC. ADMIN, L. & REGULATORY PRACTICE REP. 9-10 (2003) (recommending the use of class actions by the CAVC to address system-wide problems in veteran's cases).

highly contested scientific questions.[198] In the words of one Special Master, omnibus proceedings have "turned out to be a highly successful procedural device," facilitating settlement of individual cases and allowing those cases that proceed to a hearing to be resolved "*far more efficiently* than if we had needed a full blown trial, with multiple expert witnesses, in each case."[199] Similarly, both of OMHA's programs have been so successful that medical providers are urging OMHA to expand opportunities to aggregate and settle large numbers of claims.[200]

Promoting Consistency. Aggregate procedures can provide uniform and consistent application of the law,[201] particularly in cases seeking indivisible relief, like injunctions or declaratory relief. Absent a class action, a court may never hear from plaintiffs with competing interests in the final outcome, or over time, subject defendants to impossibly conflicting demands.[202] The EEOC, for example, has long claimed its class action procedure was important to consistently resolve "pattern and practice" claims of discrimination by federal employees.[203] The EEOC deems the process important in light of the volume of claims it processes each year, the potential for inefficient and inconsistent judgments, and the otherwise limited access to counsel.[204] OMHA adjudicators have similarly observed that aggregate procedures have been vital to ensure hospitals and

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[198] Cedillo v. Sec'y of Health & Hum. Servs., No. 98-916V, 2009 WL 331968, at *11 (Fed. Cl. Feb. 12, 2009), *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010).

[199] *Id.* (emphasis in original).

[200] *See, e.g.*, Letter to Nancy J. Griswold, Chief Administrative Law Judge, Office of Medicare Hearings and Appeals, from Medical Association of Georgia (Dec. 5, 2014) (calling for an expansion of OMHA's Statistical Sampling Initiative), http://goo.gl/U5NJIS; Letter to Nancy J. Griswold, Chief Administrative Law Judge, Office of Medicare Hearings and Appeals, from American Academy of Home Care Medicine (same), https://goo.gl/OeqE9n; Letter from Mark D. Polston, Partner, King & Spalding, to Nancy Griswold, Chief Administrative Law Judge, Office of Medicare Hearings & Appeals (Dec. 5, 2014) (calling for expansion of settlement conference initiative for a wider range of claims beyond Medicare Part B), http://goo.gl/bC8G2t; Letter from Robert Sowislo, Chair, Public Policy Committee, American Academy of Home Care Medicine, to Nancy Griswold, Chief Administrative Law Judge, Office of Medicare Hearings and Appeals (Dec. 5, 2014) (observing that the SCF program "provides a more expedient and in some ways straightforward process for [certain providers]").

[201] 1 WILLIAM B. RUBENSTEIN, ET AL., NEWBERG ON CLASS ACTIONS § 10 (5th ed. 2015) (Class actions "reduce[] the risk of inconsistent adjudications. Individual processing leaves open the possibility that one court, or jury, will resolve a factual issue for the plaintiff while the next resolves a seemingly similar issue for the defendant.").

[202] *See* David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. _ (forthcoming 2016), http://goo.gl/nMEQev ("Class action procedure enables public interest plaintiffs to vindicate policies in the substantive law consistent with broad, systemic remedies . . .").

[203] *See* 29 C.F.R. § 1614.204 (2012).

[204] *See, e.g.*, 57 Fed. Reg. 12,634, 12,639 (Apr. 10, 1992) (describing inconsistent judgments that result in the absence of class actions).

medical suppliers with hundreds of the same claims, sometimes for the same beneficiary, were reimbursed consistently.

Promoting Legal Access and Generating Information. Finally, aggregate agency adjudications illustrate how aggregate proceedings can foster legal access, while pooling information about policies and patterns that otherwise might escape detection in individualized trials.[205] The EEOC, for example, observed its "class actions . . . are an essential mechanism for attacking broad patterns of workplace discrimination and providing relief to victims of discriminatory policies or systemic practices."[206] In some cases, the scale and visibility of an EEOC class action itself attracts the attention of government agencies, leading to workplace reforms. [207]

Similarly, the NVICP's omnibus proceedings allow any party alleging a vaccine-related injury to benefit from the record developed in test cases and general causation hearings by the most qualified experts and experienced legal counsel.[208] In one of the NVICP's first omnibus proceedings, the parties pooled common scientific evidence on the issue of whether a rubella vaccine caused chronic arthritis. As a result, the proceeding raised the profile of an issue that, up to that time, had not been in focus for the HHS as well as Congress.[209] As noted above, shortly after the decision, the Vaccine Injury Table was administratively modified, consistent with the decision, to include chronic arthritis as an injury generally associated with the rubella vaccine.[210]

As these examples illustrate, aggregation procedures may offer agencies another way to efficiently and consistently expand access to agency tribunals, while improving the caliber of representation and information provided to them.

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[205] ALI REPORT, *supra* note 33, § 1.04 (describing the central "object of aggregate proceedings" as "enabling claimants to voice their concerns and facilitating the rendition of further relief that protects the rights of affected persons").

[206] *See* 64 Fed. Reg. 37,644, 37,651 (July 12, 1999).

[207] Press Release, U.S. Equal Employment Opportunity Commission Affirms Class Action to Open State Department to Disabled Foreign Service Officers (June 14, 2014), http:// goo.gl/GXdHOK.

[208] Cedillo v. Sec'y of Health & Hum. Servs., No. 98-916V, 2009 WL 331968, at *8 (Fed. Cl. Feb. 12, 2009) (noting how a select group of petitioners' counsel is charged with obtaining and presenting evidence in the omnibus proceedings).

[209] Ahern v. Sec'y of the Dep't of Health and Hum. Servs., No. 90-1435V, 1993 WL 179430 at *3 (Fed. Cl. Spec. Mstr. Jan. 11, 1993).

[210] *See* 60 Fed. Reg. 7678 (Feb. 8, 1995), revised 62 Fed. Reg. 7685, 7688 (Feb. 20, 1997).

2. Addressing Concerns of Efficiency, Legitimacy, and Accuracy in Aggregate Agency Adjudication

Even as agencies adopt aggregate procedures, they confront long acknowledged concerns about aggregation in federal court, including fears of inefficiency, legitimacy and accuracy.

Efficiency. First, agency adjudicators and staff observed that aggregating claims raises the possibility of diseconomies of scale—inviting more backlogs and claims difficult to manage with limited staff and large caseloads. OMHA adjudicators and personnel acknowledged they hoped to avoid creating "a backlog to another backlog" when it developed a formal program to use statistical evidence to resolve large groups of common claims commenced by a single provider or supplier. AJs with the EEOC, all with decades of experience hearing class actions, observed that class action proceedings involved substantial time and resources, sometimes requiring extensive motion practice and complex statistical proofs to establish unlawful patterns of discrimination. Even more informal aggregation, like the NVICP's Omnibus Proceedings, has required adjudicators to invest resources tracking and closing individual cases still pending long after the court resolves common questions involving a particular vaccine.

In each case, however, adjudicators have responded to concerns about inefficiency by using aggregate tools cautiously, through active case management; relying on experienced counsel and special masters to avoid duplicative motions; and where appropriate, by encouraging settlement. OMHA, for example, rolled out its pilot statistical sampling program for a very limited category of claims, those filed before 2013; actively identified cases, using its database, to find appellants with large volumes of identical claims; and proceeded on a voluntary basis, with the consent of the parties. Special Masters in NVICP rely on steering committees of private lawyers to organize and manage common discovery. They also often allow evolving scientific and novel factual questions to "mature"—putting off centralizing novel cases involving a single vaccine until receiving the benefit of several opinions and conclusions from different Special Masters about how a case should be handled expeditiously. EEOC AJs similarly rely on experienced bar and active judicial management to expedite cases for trial and, in many cases, settlement.

Still, an overly cautious approach can also limit the full value of agency aggregation. For example, OMHA's Statistical Sampling Initiative is hindered in what it can achieve by both the limited pool of eligible claims and its decision to require the parties' affirmative consent to participate in the program.[211] At this point, not enough parties have been

[211] We take no position about whether due process would require consent—a much-debated topic in literature discussing the use of such actuarial tools. *See generally* Matthew J.B. Lawrence, *Procedural Triage*, 84 FORDHAM L. REV. 79 (2015) (arguing that OMHA's sampling initiative does not require affirmative consent under the Due

willing to consent to statistical sampling for it to make a significant dent in the backlog. As long as it remains an entirely voluntary program, OMHA will need to build greater trust among appellants to realize the program's full potential as an aggregation mechanism.

Legitimacy. Adjudicators and staff also highlighted concerns about legitimacy—particularly given that the model for administrative adjudication typically imagines individualized hearings in which each claim has its day in court before a neutral decisionmaker. EEOC AJs, for example, noted that the inability of parties to opt-out of class actions seeking damages was an additional source of "pressure" for adjudicators to make appropriate decisions and narrowly define the class. Some hospitals and medical suppliers reported that they resisted OMHA's statistical sampling program out of a fear that a single adjudicator's view about the medical necessity of a small sampling of claims would be extrapolated to thousands of others. Even omnibus proceedings raise interesting questions about the legitimacy of using an adjudication process to settle complex scientific questions. Many plaintiffs in the Autism Omnibus Proceedings were anxious about commencing cases together, as were members of the public health community, who as noted above "found it unsettling that the safety of vaccines must be put on trial before three 'special masters'" in an obscure vaccine court. [212]

Each of these systems have responded to these concerns by diversifying decisionmaking bodies, assuring adequate representation, and increasing opportunities for individual participation and control in the aggregate proceeding. Special Masters in the Vaccine Program, for example, relied on a panel of three adjudicators in the Autism Omnibus Proceeding to allay concerns about bias. As OMHA considers expanding its statistical sampling initiative, some of its members have said they will consider permitting multiple adjudicators to hear sampled cases. Finally, the EEOC relies on many rules adopted from the Federal Rules of Civil Procedure to increase legitimacy and participation, scrutinizing and screening class counsel to ensure they adequately represent class members; holding "fairness hearings" where class members can voice their concerns with any proposed resolution or settlement; and, in a departure from the federal rules, requiring mini-trials to test individual claims and defenses remaining in adjudications involving damages.

Process Clause); Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 MINN. L. REV. 1459 (2015) (collecting cases and literature involving whether statistical sampling offends due process); Laurens Walker & John Monahan, *Essay, Sampling Liability*, 85 VA. L. REV. 329, 345-50 (1999); Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993).

[212] Gilbert Ross, *Science is not a Democracy*, Washington Times. June 14, 2007, http://www.washingtontimes.com/news/2007/jun/14/20070614-085519-8098r; Paul Offit, *Inoculated Against Facts*, N.Y. TIMES. March 31, 2008, http://www.nytimes.com/2008/03/31/opinion/31offit.html?_r=1&scp=3&sq=vaccination&st=nyt&oref=slogin.

Accuracy. Finally, each case study illustrates how the efficiency with which aggregation resolves large numbers of claims puts pressure on the ability of adjudicators to achieve accurate decisions, when concentrating many cases before the same judge. As noted, many appellants before OMHA worried about the accuracy of any final statistical extrapolation. EEOC AJs observed that unlike federal judges, who benefit from the Reference Manual of Scientific Evidence, no similar guidance exists for EEOC judges tasked with deciding statistical or other technical evidentiary questions frequently raised in EEOC proceedings. Special Masters in the NVICP exist precisely because Congress assumed that over time they would develop expertise in the complex medical and scientific questions frequently raised in the program; and yet, in proceedings where groups allege new theories of general causation for large numbers of vaccines, decisionmakers warned of the importance of getting the science right in a single adjudication.

Agencies have responded to these concerns, as well, by requiring that aggregated claims are sufficiently similar to avoid distorting outcomes and by developing guidelines and screens to address complex statistical evidence. OMHA, for example, relies on its database of billing codes to ensure that claims are sufficiently similar to warrant aggregation, and uses statistical experts along with detailed guidelines for statistical evidence. Special Masters in NVICP wait for cases to mature before treating them in groups, which helps assure that hasty decisions do not adversely impact other related claims; adjudicators also afford attorneys additional time to assure their experts have time to develop and understand the relationship between a vaccine and a new disease. EEOC AJs, like the federal courts, still carefully screen complex evidentiary issues common to the class, relying on guidelines long-established in federal court under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[213]

III. THE FORMS AND LIMITS OF AGENCY ADJUDICATION

The EEOC, NVICP, and OMHA demonstrate the potential of aggregation to improve agency adjudication in a variety of ways. But most administrative proceedings remain highly individualized. Even most informal adjudications, which are not governed by any of the structural protections of the Administrative Procedure Act, often proceed in a traditional, individualized, case-by-case manner.[214] Our own surveys and interviews with lawyers, adjudicators and staff from more than 25

[213] 509 U.S. 579 (1993).

[214] Michael Asimow, Adjudication Outside the Administrative Procedure Act, Draft Report for the Administrative Conference of the United States, March 28, 2016, at _ (noting that many agencies adopt procedures in informal adjudication that mirror procedures used in formal adjudication).

agencies found very few ever considered the use of class actions or other multiparty procedures.

So what explains the limited use of aggregation by federal agencies to date? And what, if anything, can it tell us about how agencies and policymakers view the relationship between adjudication, rulemaking and enforcement?

We explore three explanations below. First, agencies may resist aggregate adjudication because they believe Congress or agency policymakers may better resolve large groups of claims through prospective legislation or a rulemaking process. Second, and related, agencies may resist aggregate procedures to avoid stretching adjudication beyond their appropriate limits. Third, agencies may resist aggregation in order to insulate adjudication from renegade private attorneys general. All of these explanations arise out of perceived limits of what courts and administrative judges can do to resolve claims brought by large groups of people.

A. Congressional Legislation and Rulemaking Constitute a Form of Aggregation

The resistance of some agencies to aggregation might stem from the fact that adjudicatory agencies themselves already represent a form of aggregation. When policymakers channel cases raising similar legal and scientific issues into a specialized system, before adjudicators with expertise in the area, and resolve them according to uniform criteria, they aggregate cases in ways that resemble class actions settlements. Indeed, commentators often call class action settlements a privatized, administrative system" that compensates victims like "public administrative agencies."[215]

Yet shifting the resolution of certain categories of cases from the Article III courts to administrative tribunals does not eliminate the common issues of law and fact that must be repeatedly resolved in case-by-case adjudication, nor the need for parties to harness expertise and adequate counsel to represent them in complex cases.

To be sure, when agencies have the authority and the ability, they can resolve common questions by other means, most prominently rulemaking.[216] Rulemaking can resolve common issues of law or fact that arise in adjudications uniformly and definitively in a single proceeding,

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[215] RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT _; Richard A. Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L. Rev. 149, 153 (2003) ("In recent decades, many class settlements have … creat[ed] administrative bodies—private administrative agencies, in effect—to oversee the compensation of class members years into the future.").

[216] *See, e.g.*, M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383, 1386-90 (2004) (describing a range of policy-making tools that are generally available to an agency).

relieving adjudicators of the burden of repeatedly addressing the same issues in individual cases.[217]

Nevertheless, rulemaking has not proved to be an effective tool for resolving all common issues of law or fact in agency adjudications. First, the law generally disfavors retroactive rulemaking.[218] Therefore, it is less effective for addressing administrative backlogs or high volumes of filed claims such as those faced by OMHA or the NVICP discussed above.

Second, as the Supreme Court has observed, "problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant rule."[219] Just as legislation leaves gaps for agencies to fill with rules, rules leave gaps that agency adjudicators must fill. For example, the Social Security Administration's medical-vocation guidelines—an example of rulemaking used to address inefficiency and inconsistency in repeated fact finding concerning the same issues in SSA adjudications—does not address claimants with mental or psychiatric conditions.[220] Similarly, the NVICP was confronted with claims that were not anticipated by the Vaccine Injury Table, but nevertheless had to be resolved. And the EEOC, which has no power to issue substantive regulations interpreting Title VII, is frequently confronted with new issues raising discrete civil rights claims by federal employers.

Third, the beneficiaries of many administrative programs most impacted by agency adjudications often have the least access to the rulemaking process.[221] While rulemaking is often a "top-down" proceeding, initiated and managed by the agency's political leaders and influenced by organized interests with significant resources,[222] aggregation can provide a "bottom-up" remedy, in which the individuals most impacted by adjudications play a role in crafting discrete, retrospective forms of relief.[223] Federal employees bring previously unnoticed civil

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[217] Sant'Ambrogio and Zimmerman, *supra* note 32, at 2017.

[218] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

[219] SEC v. Chenery, 332 U.S. 194, 202 (1947).

[220] See Jon C. Dubin, *Overcoming Gridlock:* Campbell *After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs*, 62 ADMIN. L. REV. 937, 942-44 (2010).

[221] Sant'Ambrogio & Zimmerman, *supra* note 32, at 2019.

[222] See Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups 53-65 (7th prtg. 1977) (explaining how small, organized groups are usually more effective than larger groups in shaping policy); Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1669, 1684-85 (arguing that small groups with large stakes in an agency's decision can overwhelm larger groups' abilities to influence agency action).

[223] Sant'Ambrogio & Zimmerman, *supra* note 32, at 2022.

rights violations to light, persons injured by vaccines provide evidence on whether a particular vaccine causes a particular type of injury, and medical service providers highlight common problems in reimbursement

In sum, aggregating certain cases or claims within an agency, even one with rulemaking power, does not eliminate the usefulness of aggregation as a tool in certain circumstances. Even agency adjudicators may need flexibility, in the trenches, to aggregate "all the way down."[224] In particular, agencies may prefer aggregate adjudication to rulemaking when the relief sought is (1) retroactive, (2) responds to backlogs of already filed claims, (3) involves discrete problems, and (4) where parties' concerns may not be easily heard or represented by sophisticated representatives or counsel.

B. The Law's Resistance to Aggregation in Adjudication

The fact that most agencies have not adopted aggregate procedures to manage large groups of common claims may reflect the conceptual line that the law has long drawn between the adjudication of bi-lateral disputes, on the one hand, and policymaking in response to more diffuse harm, on the other.

Lon Fuller famously defined the "essence" of adjudication as the right of affected parties to participate in the proceeding by "presenting proofs and legal arguments" to the decisionmaker.[225] He suggested that adjudication was not well suited to handling what he described as "polycentric" problems. He was not particularly precise about what made problems polycentric.[226] "[I]t is not merely a question of the huge number of affected parties, significant as that aspect of the thing may be."[227] Rather, polycentric disputes might have different repercussions on different sets of parties depending on how they are resolved. He analogized to a spider web, in which

> [a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example if the doubled pull caused one or more of the weaker strands to snap. This is polycentric situation because it is "many centered" – each crossing of strands is a distinct center for distributing tensions.[228]

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[224] Sergio J. Campos, *Class Actions All the Way Down*, 113 Colum. L. Rev. Sidebar 20 (2013).

[225] Fuller, *supra* note 19, at 364-65.

[226] Fuller, *supra* note 19, at 398 ("It is not, then, a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.").

[227] Fuller, *supra* note 19, at 395.

[228] Fuller, *supra* note 19, at 395.

Fuller cited the example of the U.S. government's regulation of prices and wages during World War II by the War Manpower Commission, the Office of Price Administration and the War Production Board.[229]

> [T]he forms of adjudication cannot encompass and take into account the complex repercussions that may result from any change in prices or wages. A rise in the price of aluminum may affect in varying degrees the demand for, and therefore the proper price of thirty kinds of steel, twenty kinds of plastics, an infinitude of woods, other metals etc. Each of these separate effects may have its own complex repercussions in the economy. In such a case it is simply impossible to afford each affected party a meaningful participation through proofs and arguments.[230]

Fuller believed that such polycentric problems—involving many different parties with interdependent interests—were better handled outside the courts, through private bargaining or political elections. Nor did he see a solution in assigning such disputes to administrative agencies to be resolved through adjudication:

> If we survey the whole field of adjudication and ask ourselves where the solution of polycentric problems by adjudication has most often been attempted, the answer is: in the field of administrative law. The instinct for giving the affected citizen his 'day in court' pulls powerfully toward casting exercises of governmental power in the mold of adjudication, however inappropriate that mode may turn out to be.[231]

Fuller's framework turned out to be very persuasive in administrative law. Formal rulemaking under the APA, which shares many of the characteristics of adjudication, fell out of favor in the post-war period for the reasons Fuller suggested.[232] It is neither necessary nor practical to use formal adjudicatory procedures to resolve issues that require more fluid negotiation and politically accountable policy choices.[233] At the same time, there was a marked shift in regulatory decisionmaking from formal adjudication to informal rulemaking, with scholars and courts routinely

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[229] Fuller, *supra* note 19, at 394, 400.

[230] Fuller, *supra* note 19, at 394-95.

[231] Fuller, *supra* note 19, at 400.

[232] United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 237–38 (1973); AM. BAR ASS'N, SECTION OF ADMIN. LAW & REGULATORY PRACTICE, COMMENTS ON H.R. 30101, THE REGULATORY ACCOUNTABILITY ACT OF 2011, AT 21, at 21 (Oct. 24, 2011)(failing to identify a "a single scholarly article written in the past thirty years that expresses regret about the retreat from formal rulemaking"), available at http://www.americanbar.org/content/dam/aba/administrative/administrative_law/commentson3010_final_nocover.authcheckdam.pdf. *But see* Aaron Nielsen, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J 2 (2014).

[233] *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 107 (1998).

criticizing agencies that used adjudication rather than informal rulemaking to decide policy questions.[234] Indeed the negative view of policymaking through adjudication was so strong that the Supreme Court had to repeatedly remind the lower courts that agencies were not precluded from deciding broad policy questions in the context of adjudication.[235]

This division is reflected in the APA itself, which provides distinct sets of rules and procedures for "adjudication" and agencies' broader policymaking powers using rulemaking and enforcement.[236] Adjudicatory decisions are rendered after a hearing on the record conducted by ALJs insulated from agency policymakers, while policymakers using rulemaking operate in a distinct and much less procedurally constrained world. The APA does not seem to contemplate cases falling in between the formal categories of rulemaking and adjudication—such as when agency proceedings systematically affected groups of people in the same way.

Fuller's concern with judicial handling of polycentric disputes also underlies some of the criticism of the federal class action. It manifests itself in concerns over the ability of courts to adequately protect absent class members whose interests may diverge from those of the named plaintiffs before the court.[237] In *Amchem Products, Inc. v. Windsor*, for example, the Court was troubled by the impact of a proposed settlement on parties who had not yet filed claims, had distinct interests, and did not have their own representatives:

> [T]he interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. … The settling parties … achieved a global compromise with no structural assurance of fair and

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[234] Lumen Mulligan & Glen Staszewski, *An Agency Approach to the Supreme Court's Interpretation of Procedural Rules*, 59 U.C.L.A. L. Rev. 1188, 1206-1212 (2013) (describing the historical shift from adjudication to rulemaking as the primary method by which agencies implement policy); Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 532, 537 (2005); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386-90 (2004); JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM (6TH ED. 2009) 455 (noting that rulemaking prevents "the disposition of individual cases from altering [the agency's] policies or (which is much the same thing) from implicitly generating policies that agency managers view as undesirable").

[235] SEC v. Chenery, 332 U.S. 194, 203 (1947) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency"); NLRB. v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) ("the choice between rulemaking and adjudication lies in the first instance within the Board's discretion").

[236] Shepard, *supra* note 23, at 1680-81.

[237] *See, e.g.*, Amchem Products, Inc. v. Windsor, 521 U.S. 591, 626-27 (1997).

> adequate representation for the diverse groups and individuals affected.[238]

One can almost hear the echo of the "pull" on Fuller's spider web in the "tugs" of Justice Ginsburg's opinion.

Although the courts' concern with adequate representation of absent class members may be less acute in the context of injunctive relief,[239] skepticism remains over the judiciary's ability to resolve these types of polycentric disputes.[240] Particularly when class actions attempt to reform federal government programs, the Supreme Court has exhibited discomfort with allowing courts to decide what it views as essentially political decisions.[241] Even though scholars and judges have critiqued Fuller's analysis for failing to capture the many ways that judges actively managed and oversaw fluid forms of relief, like structural reform efforts,[242] there is no denying that Fuller's framework has deeply influenced the way we think about when courts, Congress or private parties should resolve disputes.

The response to Fuller's concerns is often to re-direct these types of polycentric issues to the administrative state. The rationale is that agencies can more efficiently and legitimately handle these types of mass adjudicatory problems and are more politically accountable than courts and entrepreneurial plaintiffs' attorneys.[243] Among other things, agencies are not bound by Article III "case or controversy" requirements or the Federal Rules of Evidence; can develop more expertise in specialized areas; and can rely on "notice and comment" rulemaking to resolve

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[238] *Amchem*, 521 U.S. at 626-27. *See also* General Telephone Co. of Northwest v. EEOC, 446 U.S. 318, 331 (1980) ("In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes.").

[239] Rule 23(b)(2) class actions, for example, do not require opt out provisions.

[240] Gifford, *supra* note _ at 1154-56 (describing how recent court decisions on regulatory issues have impacted the separation of powers between the branches); James A. Henderson, Jr., The Lawlessness of Aggregative Torts, 34 Hofstra L. Rev. 329, 338 (2005) ("In exercising these extraordinary powers, courts arguably exceed the legitimate limits of both their authority and their competence.")

[241] *See, e.g.,* Heckler v. Day, 467 U.S. 104, 119 (1984) ("it would be an unwarranted judicial intrusion into this pervasively regulated area for federal courts to issue injunctions imposing deadlines with respect to future disability claims"), *and id.* at 119 n.33 (contrasting class-wide relief with individual relief for delays in the adjudication of disability claims).

[242] Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. Rev. 469, 476- 77 (1994); see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1302 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 39 (1979).

[243] *See, e.g.*, Richard A. Nagareda, Turning from Tort to Administration, 94 Mich. L. Rev. 899, 939, 944-52 (1996)

common issues of fact or law.[244] For this reason in *Amchem* the Court suggested that "a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure."[245]

What our study illustrates, however, is that even as cases move from the judiciary to administrative agencies, adjudicators must continue to engage in the kind of bargaining and active case management that Fuller viewed as inconsistent with adjudication. Without the ability to consolidate and aggregate cases, rely on steering committees, subclass interest groups, and turn to statistical consultants, agency adjudicators could not efficiently hear and consistently resolve large groups of cases within already aggregated systems. Far from being inconsistent with adjudication—as the APA and legal process theorists like Lon Fuller have long posited—tools that allow judges to actively organize and manage cases have proven to be an essential part of an adjudicative process that must rely on "the presentation of proof and reasoned argument."[246] Adjudicators may rely on such tools to encourage litigants to invest resources developing information needed to resolve the underlying dispute and resolve persistent questions in a "just, speedy, and inexpensive" manner.[247]

Consider the NVICP, which Congress established to create a no-fault alternative for children injured by a particular vaccine. This represents a policy choice by Congress allocating costs and benefits stemming from vaccination in a polycentric system, where many bilateral disputes between injured parties and vaccine manufacturers have repercussions for public health writ large. Congress also believed that a group of specialized adjudicators could resolve difficult questions of causation more efficiently, consistently, and fairly than courts. But when confronted with an influx of claims that the same vaccine caused the same type of injury among a large group of claimants, the NVICP special masters turned to the very same tools used by the courts in mass-tort cases. The NVICP special masters created an ad hoc system to pool claims before the same adjudicator and form steering committees of claimants' counsel, who

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[244] *See* Heckler v. Campbell, 461 U.S. 458, 467 (1983); United States v. Storer Broad. Co., 351 U.S. 192, 205 (1956).

[245] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 628-29 (1997).

[246] Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 Geo. Wash. 1683, 1693 (1992) ("[C]omplex cases initially involve at least one of four different modes of complexity: the attorneys have difficulty in amassing, formulating, or presenting relevant information to the decisionmaker; the factfinder has difficulty in arriving at an acceptably rational decision; the remedy is difficult to implement; or there exist procedural and ethical impediments tojoinder. The unifying attribute of these four modes is that the dispute can be resolved rationally only through the accretion to the federal judiciary of powers traditionally assumed by the other "actors"…")

[247] Fed. R. Civ. P. 1.

then coordinated to offer the best expert testimony they could in support of their clients' claims. Even after Congress consolidated vaccine cases before a specialized tribunal under the Vaccine Act, the tribunal could not avoid using aggregation to meaningfully resolve its own large influx of similar claims.

OMHA is coming to the same realization in the context of Medicare appeals. In 2003, Congress moved all Medicare disputes from the Social Security Administration to OMHA, another specialized tribunal with unique expertise resolve very complicated medical disputes. Now facing an "existential" test, OMHA has turned to aggregation to handle a deluge of appeals regarding similar types of claims by the same parties.

Specialized administrative courts, including the Vaccine Court, have recently come under scrutiny for failing to deliver the promised expeditious and rationalized compensation decisions.[248] Our study similarly finds that specialization, expertise, and informal procedures may not be enough for administrative agencies and other non-Article III courts to address these concerns. In some sense, advocates may underestimate the expertise of Article III judges and overestimate the expeditiousness and informality of agency procedures. But our study suggests that just like Article III courts, when confronted with large numbers of similar cases, agencies may need to turn to aggregation to resolve similar claims consistently, rationally, and legitimately.

C. The Resistance of Policymakers to Enabling Litigation

With the possible exception of the EEOC, the turn to aggregation by the agencies we studied was motivated primarily by a desire to resolve rather than enable claims. The NVICP developed its omnibus proceedings in response to an influx of cases, not to make it easier for injured parties to file cases. OMHA was established to resolve the inevitable disputes that arise in the administration of a mass benefits program while affording beneficiaries due process. The EEOC, by contrast, turned to the class action in order to enhance the ability of plaintiffs to act as private attorneys general in furtherance of federal anti-discrimination policy. It was not responding to any type of backlog. It is noteworthy that the EEOC's administrative class action mimics the class actions brought by employees against private employers in federal court.

Indeed, other agencies that have specifically considered and rejected using aggregate adjudication have cited concerns with enabling more claims. As noted above, the FCC rejected a proposal to hear class actions in its own adjudications of alleged violations of the Federal Communications Act because, among other reasons, it would "needlessly divert" the resources of its lone ALJ to adjudicating extremely "fact-intensive and complex" cases, that can just as easily be filed in federal

[248] *See, e.g.*, Engstrom, supra note 128, at _.

court.[249] The CFTC similarly rejected the use of class actions in the adjudication of broker-dealer disputes due to fears of burdening its adjudicators as well as the availability of class actions in federal court.[250] Finally, the Department of Education recently proposed creating an opt-out class action proceeding to resolve thousands of claims by student borrowers, but declined to allow private parties to aggregate themselves. Under the proposed rule, only the DoE would be able to commence the action.[251]

This is interesting because one function of the class action is to enable claims that would otherwise not be brought in individual litigation because the damages are too small for individuals to justify the costs of litigation.[252] Even with the money at stake in OMHA appeals and vaccine injury claims, the low value of many individual Medicare claims and the challenges to recovery faced by plaintiffs suing for vaccine injuries suggests that aggregation could have some effect as a device to enable claims that might otherwise not be brought or not succeed. Indeed, it seems even more likely that aggregation could play such a role in the contexts in which agencies have specifically rejected it, such as the types of consumer claims regulated by the FCC and CFTC.

Perhaps agencies are disinclined to use aggregation to enable litigation because agencies typically have their own enforcement powers and worry that an unaccountable private attorney general might upset an agency's carefully calibrated enforcement regime.[253] The Court has recognized that state enforcers can undermine federal enforcers.[254] Perhaps agencies avoid promoting private litigation for the same reason.

This seems inconsistent with the way that many agencies have recently touted class actions in federal court—a private complement to

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[249] *See supra* notes 102-104 and accompanying text.

[250] *See supra* notes 105-106 and accompanying text.

[251] *See supra* note 31 and accompanying text.

[252] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (citation and internal quotations omitted); *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government."); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941)

[253] Margaret Lemos, *Privatizing Public Litigation*, Geo. L. J. (2016); David F. Engstrom, *Agencies As Litigation Gatekeepers*, 123 Yale L.J. 616 (2013); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 95 (2005); Richard J. Pierce, Jr., *Agency Authority to Define the Scope of Private Rights of Action*, 48 Admin. L. Rev. 1 (1996); Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 Harv. L. Rev. 961 (1994).

[254] Arizona v. United States, 132 S. Ct. 2492, 2502-2503 (2012).

otherwise overburdened, government actors unable to respond to fraudulent investment schemes,[255] unconscionable consumer contracts,[256] and predatory for-profit colleges.[257] And certainly, in many cases, aggregate agency adjudication represents less of a threat to control of enforcement by federal authorities than private class actions in federal court. Unlike in federal court, the agency's political appointees typically have final decisionmaking authority in the cases adjudicated by ALJs and other agency adjudicators. The agency head may interpret the law without regard to the decision below and may even overturn the ALJ's findings of fact under certain circumstances.[258] This should enable agencies to block plaintiffs from successfully advancing overly innovative legal theories.

Yet again, an agency might dispute "the notion that all laws warrant enforcement to the letter in all instances."[259] An agency's formidable control over a proceeding may not be enough to prevent plaintiffs from bringing what are in fact meritorious claims, but which agency enforcers nevertheless judge as unnecessary and possibly even counter-productive.[260] As Richard Nagareda once observed, "the question here is: [I]f the function of the class action today is indeed to operate in parallel with public regulation, then can that function achieve fruition without supplanting the institutional boundaries on regulatory power?"[261]

We do not take a position on whether agencies should make greater use of aggregation as a tool to complement their own enforcement regimes

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[255] See, e.g., U.S. SEC. & EXCH. COMM'N, REPORT PURSUANT TO SECTION 308(C) OF THE SARBANES OXLEY ACT OF 2002 19–20 (2003) [hereinafter SECTION 308(C) REPORT], available at http://www.sec.gov/news/studies/sox308creport.pdf (describing need for private litigation to complement SEC efforts at enforcement and compensation)

[256] Consumer Financial Protection Bureau, Arbitration Agreements, 80 FR 32830, 32855 (May 24, 2016)(" public enforcement does not obviate the need for a private class action mechanism"). The CFPB noted in its study that government enforcement authorities brought some 1150 administrative or judicial enforcement actions during the 2010-2012 survey period, of which some 133 address the same conduct as that on which consumers had brought a class action lawsuit; in 71 percent of these instances, the private class action preceded the government enforcement action. CFPB ARBITRATION STUDY, March 2015, §9.1.

[257] Notice of Proposed Rulemaking on the Borrower Defense to Repayment Regulations under Title IV of the Higher Education Act of 1965, 81 Fed. Reg. 89329 (Jun. 16, 2016)("We believe that class action lawsuits … create a strong financial incentive for both a defendant school and other similarly situated schools to comply with the law in their business operations.")

[258] *See* Sant'Ambrogio & Zimmerman, *supra* note 32, at 2064-65.

[259] Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 606 (2008).

[260] Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. Legal Stud. 575 (1997) (observing that private enforcers will litigate whenever their expected return exceeds the costs of litigation, regardless of the social benefits of the lawsuit).

[261] *Id*. at 605.

with private attorney generals. But, agency resistance to using private attorney generals in their adjudicatory proceedings may underscore the power of aggregation as an enforcement mechanism. Just as scholars have long examined the rise of "private attorney generals" in our federal and state courts, the use of private attorneys general in agency adjudications is an issue that bears examination. Federal agencies have only begun to explore the forms and limits of aggregation in their adjudicatory proceedings.

CONCLUSION

Moving cases involving large groups of people to administrative agencies does not solve the risks inherent in individual adjudication of such cases: long backlogs, inconsistent results, and obstacles to justice for those without access to legal and technical expertise. But agencies have shown they can respond to such problems by using their existing authority to aggregate cases themselves—with proper attention to avoiding diseconomies of scale and ensuring the legitimacy and accuracy of their decisions.

More broadly, aggregate agency adjudication raises broader questions about the way we think about the nature of adjudication. Rather than building formal walls between policymaking and adjudication to make adjudication legitimate—which we have done in both class action law and within the administrative state—some judicial proceedings require integrating rulemaking and other managerial tools to ensure the legitimacy of adjudication itself. The central question raised by such cases turns not on any abstract concept of adjudication or policymaking, but instead, how to best adapt procedure to "fairly insure[] the protection of the interests" at stake.[262]

[262] Hansberry v. Lee, 311 U.S. 32, 42–43 (1940; Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) ("The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.") *See also* William B. Rubenstein, *Procedure and Society: An Essay for Steven Yeazell*, 61 UCLA L. Rev. Discourse 136, 141 (2013) ("[L]itigation is properly structured when its shape is the same as the shape of the underlying societal events.")