

# THE YALE LAW JOURNAL

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## Inside the Agency Class Action

**ABSTRACT.** Federal agencies in the United States hear almost twice as many cases each year as all the federal courts. But agencies routinely avoid using tools that courts rely on to efficiently resolve large groups of claims: class actions and other complex litigation procedures. As a result, across the administrative state, the number of claims languishing on agency dockets has produced crippling backlogs, arbitrary outcomes, and new barriers to justice.

A handful of federal administrative programs, however, have quietly bucked this trend. The Equal Employment Opportunity Commission has 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. Similarly, the National Vaccine Injury Compensation Program has used “Omnibus Proceedings” resembling federal multidistrict litigation to pool common claims regarding vaccine injuries. And the Office of Medicare Hearings and Appeals—facing a backlog of hundreds of thousands of claims—recently instituted a new “Statistical Sampling Initiative,” which will resolve hundreds of common medical claims at a time by statistically extrapolating the results of a few hearing outcomes.

This Article is the first to map agencies’ nascent efforts to use class actions and other complex procedures in their own hearings. Relying on unusual access to over forty agencies—including agency policymakers, staff, and adjudicators—we take a unique look “inside” administrative tribunals that use mass adjudication in areas as diverse as employment discrimination, mass torts, and health care. In so doing, we unearth broader lessons about what aggregation procedures mean for policymaking, enforcement, and adjudication. Even as some fear that collective procedures may stretch the limits of adjudication, our study supports a very different conclusion: group procedures can form an integral part of public regulation and the adjudicatory process itself.



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**ARTICLE CONTENTS**

<b>INTRODUCTION</b>	1637
<b>I. AGGREGATION IN JUDICIAL AND ADMINISTRATIVE PROCEEDINGS</b>	1645
A. The Costs and Benefits of Aggregate Adjudication in Court	1649
B. The Power of Agencies To Aggregate Cases and Claims	1652
<b>II. THE EXTENT OF AGENCY AGGREGATION</b>	1657
A. Identifying Agencies that Use Aggregation	1657
B. Most Agencies Do Not Aggregate Claims	1658
<b>III. INSIDE THE AGENCY CLASS ACTION</b>	1663
A. Class Actions in the Equal Employment Opportunity Commission	1665
1. EEOC Class Actions in Administrative Proceedings	1666
2. EEOC Class Action Procedures: Similarities to and Differences from Federal Rules	1667
B. Multiparty Consolidation in the National Vaccine Injury Compensation Program	1670
C. Consolidation, Statistical Sampling, and Group Settlement in the Office of Medicare Hearings and Appeals	1674
1. OMHA's Statistical Sampling Initiative	1676
2. OMHA's Settlement Conference Facilitation Initiative	1680
<b>IV. BENEFITS AND CHALLENGES OF AGGREGATE AGENCY ADJUDICATION</b>	1681
A. Promoting Efficiency While Avoiding Diseconomies of Scale	1682
B. Promoting Consistency While Ensuring the Accuracy of Agency Decisions	1686
C. Promoting Legal Access, Generating Information, and Enhancing Legitimacy	1687
<b>V. THE FORMS AND LIMITS OF AGENCY ADJUDICATION</b>	1691
A. Aggregation Complements Rulemaking	1691
B. Aggregation as an Enforcement Tool for Agencies	1695
C. Protecting the Legitimacy of Adjudication Through Active Management and Bargaining	1701
<b>CONCLUSION</b>	1705
<b>APPENDIX</b>	1706

## INTRODUCTION

A crisis is brewing in Medicare. In 2003, Congress created the Office for Medicare Hearings and Appeals (OMHA) – a special administrative court designed to resolve billing disputes between the federal government and hospitals, nursing homes, medical providers, and others.<sup>1</sup> But after six years of relative normalcy, case filings at OMHA spiraled out of control. By 2014, OMHA’s backlog had spiked to almost 500,000 cases.<sup>2</sup> Worse yet, average wait times for decisions mushroomed to almost two years in 2015.<sup>3</sup> OMHA’s workload became so heavy that at one point it took five to six months just to enter new cases onto its docket.<sup>4</sup>

Medicare’s problems are hardly unique. Across the administrative state, the number of claims languishing in bureaucratic limbo has become a new crisis – creating significant backlogs, arbitrary outcomes, and new barriers to justice.<sup>5</sup> The Department of Veterans Affairs recently admitted that veterans face aver-

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1. OMHA was created by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 931, 117 Stat. 2066, 2396-99.
  2. See *infra* Section III.C.
  3. Nancy J. Griswold, *Appellant Forum – Update from OMHA*, U.S. DEP’T HEALTH & HUM. SERVS. (June 25, 2015), [http://www.hhs.gov/sites/default/files/omha/OMHA%20Medicare%20Appellant%20Forum/presentations\\_june\\_25\\_2015.pdf](http://www.hhs.gov/sites/default/files/omha/OMHA%20Medicare%20Appellant%20Forum/presentations_june_25_2015.pdf) [<http://perma.cc/3YC2-2NPK>].
  4. Philip Moeller, *Here’s What You Need To Know About the Serious Backlog of Medicare Appeals*, PBS NEWSHOUR (May 6, 2015, 10:30 AM), <http://www.pbs.org/newshour/making-sense/serious-backlog-medicare-claims-appeals> [<http://perma.cc/6SFZ-VNK5>].
  5. Over the past several years, problems in many different administrative courts have been described as in “crisis.” See, e.g., *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 878 (9th Cir. 2011) (“The current delays therefore constitute a deprivation of Veterans’s mental health care without due process, in violation of the Fifth Amendment.”), *vacated on reh’g en banc*, 678 F.3d 1013 (9th Cir. 2012); *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the Subcomm. on Immigration, Refugees & Border Sec. of the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Karen T. Grisez, Chair of the American Bar Association Commission on Immigration) (arguing that “our immigration court system is in crisis”); JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 6 (2009) (describing asylum applications as “a spin of the wheel of fate”); Anthony Brino, *Medicare Claims Crisis Pits Hospitals Against Feds, Auditors*, HEALTHCARE FIN. (May 27, 2014), <http://www.healthcarefinancenews.com/node/60421/73436> [<http://perma.cc/E7DP-H3AC>]; Erik Eckholm, *Disability Cases Last Longer as Backlog Rises*, N.Y. TIMES (Dec. 10, 2007), <http://www.nytimes.com/2007/12/10/us/10disability.html> [<http://perma.cc/5ADA-ZL98>] (describing 500-day waiting periods for Social Security claims as “purgatory”); Press Release, Senator Jay Rockefeller, Rockefeller Releases GAO Report on Black Lung Benefits (Oct. 30, 2009), <http://web.archive.org/web/20091202040124/http://rockefeller.senate.gov/press/record.cfm?id=319537> [<http://perma.cc/HU33-2SWV>] (describing the state of the Black Lung Benefits Program as “shameful”).

age wait times of four years to obtain their disability benefits.<sup>6</sup> In July 2016, the Department of Education reported that, nearly eighteen months after the collapse of the Corinthian Colleges, over 20,000 students were anxiously waiting for the Department to hear their claims for loan forgiveness.<sup>7</sup> Even as Congress tries to create administrative programs to resolve claims more quickly than federal courts, agencies often meet the same Kafkaesque fate.<sup>8</sup>

But what made OMHA unusual was its response. Last year, OMHA adopted a new pilot program dubbed the Statistical Sampling Initiative (SSI) that allows hospitals, doctors, and other medical providers with large numbers of

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6. Ctr. for Innovation, *Veteran Appeals Experience: Listening to the Voices of Veterans and Their Journey in the Appeals System*, U.S. DEP'T VETERANS AFF. 5 (Jan. 2016), [http://www.innovation.va.gov/docs/VOV\\_Appeals\\_FINAL\\_20160115-1.pdf](http://www.innovation.va.gov/docs/VOV_Appeals_FINAL_20160115-1.pdf) [<http://perma.cc/6HFN-KSVV>]. Last year, a veteran waited, on average, twenty-three months just for the Department of Veterans Affairs to send the required paperwork to the Board of Veterans Appeals (BVA) so that the BVA could begin adjudicating the appeal. Bd. of Veterans' Appeals, *Annual Report: Fiscal Year 2014*, U.S. DEP'T VETERANS AFF. 30 (July 2015), [http://www.bva.va.gov/docs/Chairmans\\_Annual\\_Rpts/BVA2014AR.pdf](http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2014AR.pdf) [<http://perma.cc/ACB8-NL4A>].
  7. The for-profit Corinthian Colleges collapsed under the weight of several state and federal fraud investigations. See Danielle Douglas-Gabriel, *Embattled For-Profit Corinthian Colleges Closes Its Doors*, WASH. POST (Apr. 26, 2015), <http://www.washingtonpost.com/news/business/wp/2015/04/26/embattled-for-profit-corinthian-colleges-closes-its-doors> [<http://perma.cc/HUT2-R277>] (quoting Undersecretary of Education Ted Mitchell, who promised that "as Corinthian closes its doors for good . . . , department staff will immediately begin outreach to Corinthian students to review all their options"). Since that time, the Department has received more than 26,000 claims relating to Corinthian Colleges and other schools, but as of June 24, 2016, the Department had granted discharge relief to just 3,787 borrowers. Joseph A. Smith, Jr., *Fourth Report of the Special Master for Borrower Defense to the Under Secretary*, U.S. DEP'T EDUC. 1-2 (June 29, 2016), <http://www.ed.gov/documents/press-releases/report-special-master-borrower-defense-4.pdf> [<http://perma.cc/QPP3-6JKJ>].
  8. See *Federal Compensation Programs: Perspectives on Four Programs for Individuals Injured by Exposure to Harmful Substances: Hearing Before H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Anne-Marie Lasowski, Acting Director, Education, Workforce, and Income Security Issues, Government Accountability Office) (documenting chronic backlogs in the federal Radiation Exposure Compensation Program, the Vaccine Injury Compensation Program, the Energy Employees Occupational Illness Compensation Program, and the Black Lung Program); Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1635 (2015) (questioning the ability 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" (quoting Philip K. Howard, *Just Medicine*, N.Y. TIMES (Apr. 1, 2009), <http://www.nytimes.com/2009/04/02/opinion/02howard.html> [<http://perma.cc/P9MX-S7U7>])).

similar claims to conduct “trials by statistics.”<sup>9</sup> Petitioners with more than 250 similar claims have the option to try a small sampling of those claims before an Administrative Law Judge (ALJ) and extrapolate the average result to the rest.<sup>10</sup> To do so, petitioners 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 the whole.<sup>11</sup> All of the pending claims are consolidated in front of a single ALJ who hears the sample cases. The results of the sample cases are then applied to the thousands of remaining cases.

Although OMHA’s SSI is still in its initial stages, it is notable for two reasons. First, it differs from the Supreme Court’s approach to such “trials by formula” in federal courts. Six years ago, the Court warned that the “novel” use of statistical sampling could stretch hearing procedures too far under the Rules Enabling Act by “abridg[ing], enlarg[ing] or modify[ing]” the substantive rights of the parties in such a mass action.<sup>12</sup> To the extent statistical sampling remains a problem for federal courts,<sup>13</sup> the Supreme Court’s words do not bind federal agencies. Federal agencies often enjoy discretion under their own statutes to craft procedures they deem “necessary and appropriate” to adjudicate

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9. Office of Medicare Hearings & Appeals, *Statistical Sampling Initiative*, U.S. DEP’T HEALTH & HUM. SERVS. (Aug. 10, 2016), <http://www.hhs.gov/about/agencies/omha/about/special-initiatives/statistical-sampling/index.html> [<http://perma.cc/CS7X-QECL>].
  10. Office of Medicare Hearings & Appeals, *Request for Statistical Sampling*, U.S. DEP’T HEALTH & HUM. SERVS. (June 27, 2014), [http://www.hhs.gov/sites/default/files/omha/OMHA%20Statistical%20Sampling/request\\_for\\_statistical\\_sampling\\_template.pdf](http://www.hhs.gov/sites/default/files/omha/OMHA%20Statistical%20Sampling/request_for_statistical_sampling_template.pdf) [<http://perma.cc/3XHN-JQ5F>].
  11. Office of Medicare Hearings & Appeals, *supra* note 9; *see also infra* Section III.C (detailing the OMHA aggregation procedures).
  12. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C. § 2072(b) (2006)).
  13. *Compare* *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048-49 (2016) (upholding statistical inferences from representative evidence), *and 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) (finding *Dukes* inapplicable to the calculation of wage-and-hour penalties), *with Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319-21 (5th Cir. 1998) (rejecting extrapolation judgments as inconsistent with *Erie* and Fifth Circuit precedent), *and 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 *Dukes*).

the claims that come before them.<sup>14</sup> OMHA's program thus illustrates agencies' freedom relative to federal courts to create innovative procedures that respond to problems in mass adjudication.

Second, agencies rarely exercise this freedom. As we discussed five years ago in *The Agency Class Action*,<sup>15</sup> even though federal agencies hear far more cases each year than our federal court system, they have routinely avoided tools used by courts to efficiently resolve large groups of claims, like class actions and other complex litigation procedures. Unlike federal courts—where nearly forty percent of all cases now proceed in some form of organized litigation<sup>16</sup>—most agencies and specialized courts rarely 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 stems from the perceived limits of adjudication. For years, the Supreme Court and scholars have said that legislative bodies are better than judges at responding to problems of mass harm.<sup>17</sup> Policymakers can resolve cases that raise the same

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14. Notwithstanding, agencies still must satisfy due process, which is one reason OMHA's Statistical Sampling Initiative is voluntary. See *infra* Section II.C.

15. Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2060-63 (2012).

16. Thirty-nine percent of the federal courts' entire civil caseload proceeds in multidistrict litigation. Excepting prisoner and social security cases, that number rises to 45.6%. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 2015 YEAR-END REPORT x, xi (2015); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 & nn.9-10 (2017); Judith Resnik, *Doing the State's Business: Class, Class Actions, and the Federal Courts*, 165 U. PA. L. REV. (forthcoming 2017).

17. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (“[T]his litigation defies customary judicial administration and calls for national legislation.” (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997))); *Amchem*, 521 U.S. at 598, 622 (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 (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 42 (1991) (dissenting statement of Hogan, J.))); see also RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 254 (2007) [hereinafter NAGAREDA, MASS TORTS] (setting forth a legislative proposal governing class action attorneys implemented by administrative state); Engstrom, *supra* note 8, at 1633-35 (describing proposed reforms to develop specialized health courts and other administrative alternatives to mass litigation); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 157 (2003) [hereinafter Nagareda, *The Preexistence Principle*] (“[A] class settle-

complex factual and legal issues more openly and effectively through the legislative process.<sup>18</sup> Judges, by contrast, should avoid such disputes because they lack the capacity to hear and resolve diffuse claims among large groups of people.<sup>19</sup>

That same perceived line between the appropriate roles of adjudicative and legislative bodies also exists inside administrative agencies. Before the Administrative Procedure Act (APA),<sup>20</sup> agencies combined investigation, policymaking, and adjudication in the same department.<sup>21</sup> The APA, however, separated the practice of “adjudication” from the agencies’ rulemaking and enforcement powers, establishing distinct rules for each type of agency activity.<sup>22</sup> Going forward, formal individualized adjudications would be conducted on a case-by-case basis by ALJs insulated from undue political influence.

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.<sup>23</sup> The Equal Employment Opportunity Commis-

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ment—unlike public legislation—enjoys no general mandate to alter unilaterally the rights of class members.”).

18. *Amchem*, 521 U.S. at 628-29 (acknowledging that “a nationwide administrative claims processing regime [might] provide the most secure, fair, and efficient means of compensating victims of asbestos exposure”).
19. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 371 (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) (arguing that courts should not issue the sorts of settlements contemplated in *Ortiz* and *Amchem* due to separation-of-powers concerns).
20. See Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).
21. See Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 219-20 (1986) (describing the opposition of the American Bar Association’s Special Committee on Administrative Law to “the unwholesome combination of judicial, executive, and legislative powers”).
22. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1651 (1996).
23. See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); *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*, 344 F.3d 211 (2d Cir. 2003), *certifying questions to* 818 N.E.2d 1140 (N.Y. 2004), *rev’d sub nom.* *Empire HealthChoice, Inc. v. Philip Morris USA, Inc.*, 393 F.3d 312 (2d Cir. 2004); *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 653 (E.D. Tex. 1990), *rev’d in part*, 151 F.3d 297 (5th Cir. 1998). *But see* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (casting doubts on “Trial by Formula”); MANUAL FOR COMPLEX LITIGATION § 21.5 (4th ed. 2004) (revising its position to observe that “administrative models to administer damage



sion (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).<sup>24</sup> The National Vaccine Injury Compensation Program (NVICP) uses “Omnibus Proceedings,” which resemble federal multidistrict litigation, to pool together common claims alleging a large group of vaccine-injured children.<sup>25</sup> And, as discussed above, OMHA recently began 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.<sup>26</sup>

This Article presents the first look inside the ways that federal agencies have used class actions and other complex litigation techniques in their own hearings. Building on our prior theoretical work,<sup>27</sup> we received unusual access from the Administrative Conference of the United States (ACUS) to survey and interview adjudicators, policymakers, and staff involved in aggregate proceedings across the administrative state. A year and a half later, ACUS adopted and published our recommendations in the Federal Register, proposing that all agencies consider the use of aggregate procedures.<sup>28</sup> This Article presents our findings, including the extent to which agencies aggregate claims and the types of cases in which aggregation has proven most useful. In so doing, we offer important practical and theoretical lessons for both administrative and class action law.

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awards,” like a trial-by-statistics plan, are possible, “[a]lthough not accepted as mainstream”).

24. See 29 C.F.R. § 1614.204 (2012) (establishing class complaint procedures). 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. The Federal Administrative Judiciary (Recommendation No. 92-7), 57 Fed. Reg. 61,760 (Dec. 29, 1992). Nevertheless, the “functional independence accorded to AJs varies with the particular agency and type of adjudication.” *Id.*
25. See, e.g., *Capizzano v. Sec’y of Health & Human Servs.*, 440 F.3d 1317 (Fed. Cir. 2006); *Snyder ex rel. Snyder v. Sec’y of Health & Human Servs.*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Aug. 11, 2009); *In re Ahern*, No. 90-1435V, 1993 U.S. Claims LEXIS 51 (Fed. Cl. Jan. 11, 1993).
26. See *supra* note 10 and accompanying text. OMHA also announced a “Settlement Conference Facilitation program” that encourages the settlement of large numbers of similar cases. See *infra* Section III.C.2.
27. Sant’Ambrogio & Zimmerman, *supra* note 15.
28. See *Adoption of Recommendations*, 81 Fed. Reg. 40,259, 40,260-61 (June 21, 2016).

As a practical matter, class actions and other complex procedures offer agencies important new tools to respond to rising case volumes while promoting legal access. These lessons are particularly timely inasmuch as agency aggregation appears to be on the rise. Just this past year, plaintiffs petitioned the Federal Maritime Commission to hear a multi-billion-dollar antitrust class action involving price fixing;<sup>29</sup> the federal government conceded for the first time that a veterans court could hear class action claims by veterans in “appropriate cases”;<sup>30</sup> the Department of Education adopted a process modeled on federal court class actions for students seeking loan forgiveness from predatory colleges that commit fraud;<sup>31</sup> and a prominent federal judge recommended the Federal Trade Commission itself aggregate thousands of consumer and municipal false advertising claims.<sup>32</sup>

On a theoretical level, our on-the-ground assessment opens up new lines of inquiry for the study of aggregate adjudication. Scholars have long feared that collective procedures push the limits of what judges can do to resolve big cases.<sup>33</sup> Years ago, the Supreme Court even barred federal courts from aggregating certain claims because they defy judicial resolution.<sup>34</sup> Instead, it called on Congress to establish administrative programs to provide “the most secure, fair, and efficient means of compensating victims.”<sup>35</sup> And yet, our study of those same programs supports a very different conclusion: far from pushing the limits of adjudication, aggregate procedures form an essential part of the adjudication process in any court.

The Article proceeds in five parts. Part I sets out the legal framework for adopting aggregate litigation procedures in federal courts and administrative

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29. See Notice of Filing of Complaint and Assignment, *Cargo Agents, Inc., Int’l v. Nippon Yusen Kabushiki Kaisha*, No. 16-01 (Fed. Mar. Comm’n Jan. 7, 2016), [http://www.fmc.gov/assets/1/Documents/16-01\\_not\\_of\\_flgng.pdf](http://www.fmc.gov/assets/1/Documents/16-01_not_of_flgng.pdf) [<http://perma.cc/9LKS-MX6N>].

30. See *infra* Section I.B. In the interest of full disclosure, the authors submitted an amicus brief in support of this view. See Corrected Amicus Brief and Appendix of 15 Administrative Law, Civil Procedure, and Federal Courts Professors in Support of Appellant and Reversal, *Monk v. McDonald*, No. 15-7092 (Fed. Cir. Dec. 4, 2015), 2015 WL 8485190.

31. See Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926 (Nov. 1, 2016). In March 2016, Professor Zimmerman advised the Department of Education and others as it considered this rule.

32. *Kurtz v. Kimberly-Clark Corp.*, No. 14-CV-1142, 315 F.R.D. 157 (E.D.N.Y. June 28, 2016).

33. Fuller, *supra* note 19; Gifford, *supra* note 19; Nagareda, *The Preexistence Principle*, *supra* note 17.

34. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997).

35. *Id.* at 628.

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; however, these separate lawsuits proceed in front of the same adjudicator or on the same docket in an effort to expedite cases, conserve resources, and assure consistent outcomes.<sup>36</sup> Agencies generally enjoy even more authority than federal courts to aggregate common cases, formally and informally.

Part II surveys the use of aggregation in the administrative state. We identified more than seventy administrative agencies and Article I courts with rules permitting some form of aggregation, but found that very few of them actually use those rules. Part III then looks inside agency aggregation, developing a typology of formal and informal aggregation and presenting three case studies that illustrate different approaches to aggregation in agency adjudication. This empirical work draws on our extensive interviews and surveys with high-level officials and adjudicators in many administrative programs, including the EEOC, the NVCIP, and OMHA, as well as our own independent review of their administrative dockets.

Part IV charts the costs and benefits of such programs. Our case studies show 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) increase the consequence of error; and (3) impact the perceived “legitimacy” of the process and challenge due process. Nevertheless, each program has identified best practices to ameliorate these concerns. In the process, aggregate adjudication allowed each tribunal to take

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36. The American Law Institute’s *Principles of the Law of Aggregate Litigation* 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 PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 (AM. LAW INST. 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 criminal law. See Brandon Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 388 n.17, 395 (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); and Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5 (1991).

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 decision-making process—while minimizing its potential dangers.

Part V considers broader lessons about what aggregation procedures mean for policymaking, enforcement, and adjudication. Courts and commentators frequently raise concerns about the dangers of group litigation. Among other things, they worry that class actions and other complex procedures encourage free-form policymaking; create unaccountable “private attorneys general” who interfere with public enforcement; and stretch the very limits of judicial power and legitimacy.<sup>37</sup> However, agency adjudicators face their own legitimacy crisis when they cannot aggregate and actively manage cases. Far from undermining legitimate decision making, group procedures can form an integral part of public regulation and the adjudicatory process itself.

## 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.”<sup>38</sup> Plaintiffs in civil courts receive personalized hearings to sort out private disputes with others. Agencies similarly must provide citizens with “some kind of hearing”<sup>39</sup> to challenge government acts that threaten their lives, property, or liberty.<sup>40</sup>

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37. See *infra* Part V.

38. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (“[It is] our deep-rooted historic tradition that everyone should have his own day in court.” (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989))); 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 “must make good her ‘own’ victim’s compensable losses”).

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

40. See *Heckler v. Campbell*, 461 U.S. 458, 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 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7.02, at 413 (1958).

Both systems, however, have exceptions—grouping together and resolving large groups of similar claims, or what we call “aggregation.”<sup>41</sup> 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<sup>42</sup> and why legislators create agencies with specific missions to create rules for, and adjudicate, particular kinds of cases.<sup>43</sup> 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.<sup>44</sup>

But federal courts also use procedural rules to group together large numbers of cases. These aggregation rules vary based on at least three factors: (1) the degree to which people actively participate in adjudication, (2) the preclusive effect of any decision, and (3) the number of decision makers responsible for the final outcome. We chart the features of formal aggregation, informal aggregation, and individual adjudication in Table 1 below and the discussion that follows.

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41. See Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005).
  42. In tort law, for example, special no-duty rules limit liability for government entities, charitable enterprises, employers, and pure economic or emotional distress cases. See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1578 n.32 (2004).
  43. But see 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. 1381, 1391-92 (2011) (describing alternative theories of agency delegation).
  44. 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.”).

TABLE 1.

	Formal Aggregation	Informal Aggregation	Individual Adjudication
<b>Participation</b>	Representative	Personal, collaborative	Personal
<b>Preclusive Effect</b>	Binding	Influential	Precedential
<b>Proceedings</b>	Single decision maker or proceeding	Single or small number of non-random proceedings or decision makers	Multiple and randomly assigned decision makers
<b>Examples</b>	Class actions, <i>parens patriae</i> , statistical sampling	Bellwether trials, multidistrict litigation, specialized dockets	Idealized model of adjudication

The most famous kind of “formal aggregate” lawsuit is the class action – a single binding lawsuit that, in one representative proceeding, resolves claims or defenses held by many different people. Other kinds of formal aggregations include lawsuits by and against organizations in bankruptcy, trustee actions commenced on behalf of many beneficiaries,<sup>45</sup> statistical sampling and extrapolation,<sup>46</sup> and *parens patriae* actions by state attorneys general.<sup>47</sup> What all formal aggregations have in common is that a single person, or a single proceeding, may bind others to an outcome, even if those others never directly participate.

But courts also group together civil claims in far more informal ways.<sup>48</sup> 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 informal ag-

45. *Richards v. Jefferson Cty.*, 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. *See, e.g., Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996) (describing the use of a statistical sample of the class claims in determining compensatory damages and holding that the procedure used did not violate due process); *MANUAL FOR COMPLEX LITIGATION (THIRD)* § 33.28 (1995) (noting the use of statistical techniques to extrapolate the verdicts from representative cases and apply them to similar cases).

47. *See, e.g., 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 . . . can give rise to a quasi-sovereign interest in relief as will justify a representative action by the state.”); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 487 (2012) (“State attorneys general represent their citizens in aggregate litigation that bears a striking resemblance to the much-maligned damages class action.”).

48. *See* ALI REPORT, *supra* note 36 (describing informal aggregation); Erichson, *supra* note 36, at 386; Resnik, *supra* note 36, at 36.

gregation is the multidistrict litigation,<sup>49</sup> where a panel of 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.<sup>50</sup> Thus, even though a single case in a multidistrict litigation does not formally bind other parties like a class action, it may strongly influence the resolution of thousands of similar cases. Since its creation in 1968, the Judicial Panel on Multidistrict Litigation has centralized almost half a million civil actions for pretrial proceedings.<sup>51</sup> Other forms of informal aggregation in civil lawsuits include specialized dockets—like those designed to expedite patent claims filed in the Eastern Districts of Virginia and Texas<sup>52</sup>—or district court rules designed to ensure that a single judge hears all “related claims” in the same district.<sup>53</sup>

The traditional version of adjudication, by contrast, contemplates something very different. It imagines that each party retains a separate attorney and commences a separate case before a randomly assigned adjudicator. The end result only binds the parties (even though the decision, if published, may establish precedent for similar cases). Of course, even this model of individual

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49. See Emery G. Lee III et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, 222 (2015).
50. 28 U.S.C. § 1407 (2012); see also Andrew Bradt, *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. (forthcoming 2017) (exploring the history of multidistrict litigation); Myriam Gilles, *Tribal Rituals of the MDL: A Comment on Williams, Lee, and Borden, Repeat Players in Multidistrict Litigation*, 5 J. TORT L. 173 (2012) (examining the “specialization, relationships, and timing of appearances of attorneys who have become regulars in MDL cases”).
51. Lee, et al., *supra* note 49, at 211. 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 Panel on Multidistrict Litigation—Judicial Business 2013*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2013> [<http://perma.cc/2XRF-AMGD>].
52. J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 651-59 (2015); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 247-85 (2016); 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, 205-20 (2007); Dana D. McDaniel, *Patent Litigation on the Rocket Docket After Markman v. Westview Instruments, Inc.*, VA. LAW. 20 (Apr. 2002), [http://www.vsb.org/docs/valawyer\\_magazine/aprozmcddaniel.pdf](http://www.vsb.org/docs/valawyer_magazine/aprozmcddaniel.pdf) [<http://perma.cc/K8WV-PAHY>] (describing the increase of patent filings in the late 1990s).
53. See, e.g., *Local Rules of the U.S. District Courts for the Southern and Eastern Districts of New York*, U.S. CTS. 111, <http://www.nysd.uscourts.gov/rules/rules.pdf> [<http://perma.cc/9FJY-QRCT>] (describing procedures for assignment of “related” cases in the Southern District of New York).

adjudication obscures what happens out of court.<sup>54</sup> Plaintiffs and defendants frequently “privately aggregate” claims—settling large numbers in bunches completely outside of court.<sup>55</sup>

*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. Legal *access* is promoted through aggregate litigation in federal and state courts by enabling the resolution of claims that otherwise would not be brought individually. Formal aggregate procedures enable litigation when damages are too small for individuals to justify the high costs of retaining counsel.<sup>56</sup> Informal aggregation streamlines large-scale litigation and encourages parties to participate through bellwether trials, steering committees of plaintiffs that collect and manage claimant input, and judicial oversight of attorney conduct. In both cases, aggregation holds de-

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54. See H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 22 (1970) (finding insurance settlements for automobile accidents “individualistic mainly in theory; in practice it is categorical and mechanical, as any system must be if it is to handle masses of cases in an efficient manner”); see also David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U. L. REV. (forthcoming 2017) (manuscript at 3) (“Even as we promise people the right to their own lawyer and their own ‘day in court,’ outcomes in civil, criminal, and administrative disputes just as often turn on what happens in massive and opaque settlement bureaucracies—unseen organizations of lawyers, businesses and claim facilities—which quietly sweep together and resolve large groups of cases, swiftly and categorically.”).
55. One example is the personal injury “settlement mill,” where a single law firm bundles large numbers of claims, otherwise worth too little to represent separately, to settle with insurance adjusters, claim facilities, or other defendants. See, e.g., Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 809-11 (2011); Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1490 (2009). Similarly, corporate defendants frequently use private aggregation to create “corporate settlement mills,” resolving large numbers of similar claims commenced by plaintiffs. See Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129 (2015). Private aggregation systems, created by defendants, plaintiffs, and sometimes large intermediaries to resolve large numbers of claims outside of court, have existed for over a century. Issacharoff & Witt, *supra* note 42, at 1584-93.
56. See Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1115-20 (2010) (describing alternative goals of class action litigation); see also *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))).



fendants accountable for wide and diffuse harms that are too costly to be litigated through individual adjudication.<sup>57</sup>

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 case-by-case adjudication,<sup>58</sup> which may entail months or years of the “same witnesses, exhibits and issues from trial to trial.”<sup>59</sup>

Finally, aggregate procedures seek more *uniform* application of law. Aggregate proceedings and settlements seek consistency and distributive fairness—to treat like parties in a like manner.<sup>60</sup> Otherwise, in cases seeking injunctions or declaratory relief, a court may never hear from plaintiffs with competing interests in the final outcome, or may subject defendants to impossibly conflicting demands over time.<sup>61</sup> In addition, 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’s faithful representation of 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

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57. See 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 “discovery, retention of experts, legal research and legal fees”); see also David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t*, 37 HARV. J. ON LEGIS. 393, 393-94 (2000) (“Faced with numerous actual and potential claims presenting common questions of liability and damages . . . the defendant always . . . prepares one defense for all of those claims, litigating from the posture of a *de facto* class action.”).
58. See *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 859 (6th Cir. 2013); 1 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 1.9 (5th ed. 2015) (“Class actions are particularly efficient when . . . the courts are flooded with repetitive claims involving common issues.”).
59. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) (granting certification of a class action involving asbestos); see also 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); Weinstein, *supra* note 57 (noting that economies of scale reduce discovery and expert fees).
60. See RUBENSTEIN ET AL., *supra* note 58, § 1:10 (“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.”).
61. See David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 777 (2016) (noting that aggregation “enables public interest plaintiffs to vindicate policies in the substantive law consistent with broad, systemic remedies”).

the public interest. Thus, even as they aspire to promote legal access, efficiency, and consistency, class action lawsuits struggle to (1) ensure *legitimacy* when clients lack input and control over the outcome and when attorneys serve disparate interests (or their own); (2) promote *efficiency* when processing large volumes of cases; and (3) achieve *accuracy* 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 must overcome conflicts of interest 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.<sup>62</sup> 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: "In important respects" parties go forward "at the mercy of others . . . . [T]hey must accept services from and pay fees to lawyers and other persons they have little power to control."<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup>

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62. See ALI REPORT, *supra* note 36, § 3.16 cmts. a-c; Erichson, *supra* note 41, at 1784-95 (characterizing such conflicts as problems of claim "conditionality").

63. ALI REPORT, *supra* note 36, § 1.05 cmt. b; see also Erichson, *supra* note 36, at 465-66 ("Given the powerful drive to coordinate, evidenced by both plaintiffs and defendants in a wide variety of litigation, true litigant autonomy may be unattainable in many situations involving multiple related claims.").

64. NAGAREDA, MASS TORTS, *supra* note 17, at 231; Burch, *supra* note 16, at 111.

65. Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 351 (2014) (explaining 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—

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, agencies also enjoy power to formally and informally aggregate claims.

*B. The Power of Agencies To Aggregate Cases and Claims*

Since the dawn of the republic, Congress has created special administrative courts whose adjudicators do not enjoy the life tenure and salary protections provided to federal judges by Article III of the Constitution.<sup>66</sup> 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.<sup>67</sup> Such non-Article III courts include both administrative agencies that adjudicate cases and what are sometimes called “legislative courts.”<sup>68</sup>

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as only time spent on developing generic assets, and not individual cases, is compensable as common-benefit work” in multidistrict litigation).

66. Michele L. Landis, “*Let Me Next Time Be ‘Tried by Fire’*”: *Disaster Relief and the Origins of the American Welfare State 1789-1874*, 92 NW. U. L. REV. 967, 981-89 (1998) (describing the early Congress’s decisions to create administrative compensation funds); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE. L.J. 1256 (2006); Adam S. Zimmerman, *Presidential Settlements*, 163 U. PA. L. REV. 1393 (2015) (tracing the history of executive branch compensation funds).
67. U.S. CONST. art. I, § 8, cl. 18.
68. Wilber Griffith Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894 (1930). 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, 345 (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 346-47. Moreover, ALJs who receive evidence in formal agency adjudications are insulated from ex parte communications and agency personnel involved in investigation and prosecution, 5 U.S.C. § 554(d) (2012), and enjoy job protections similar to those of judges on Article I courts, such as the U.S. Court of Federal Claims, *compare* 5 U.S.C. § 7521 (2012) (noting that ALJs may only be removed “for good cause established . . . on the record after opportunity for hearing”), *with* 28 U.S.C. § 176 (2012) (noting that judges of the Court of Federal Claims may be removed “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”).

Most agencies and legislative courts enjoy broad authority to craft hearing procedures to help them carry out their statutory missions.<sup>69</sup> The Supreme Court has reasoned 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.”<sup>70</sup> Therefore, agencies can consolidate cases and decide “subordinate questions of procedure,” such as “the scope of the inquiry, whether [cases] should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another’s proceedings, and similar questions.”<sup>71</sup>

Moreover, agencies may exercise their discretion over procedures by promulgating general rules or by tailoring ad hoc rules to specific cases as needed.<sup>72</sup> 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.<sup>73</sup>

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69. See, e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 842 (1986) (upholding the ability of the Commodity Futures Trading Commission (CFTC) to join counterclaims under “the sweeping authority Congress delegated to the CFTC,” to “make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary” (citing 7 U.S.C. § 12a(5) (2012))); see also I.R.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 Court for the District of Columbia (emphasis added)), amended by Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 425, 129 Stat. 2242, 3125 (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.” (emphasis added))).
70. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940).
71. *Id.* at 138.
72. See *FCC v. Schreiber*, 381 U.S. 279, 289 (1965) (“The statute . . . delegates broad discretion to prescribe rules for specific investigations and to make *ad hoc* procedural rulings in specific instances.” (citations omitted)).
73. See, e.g., *Perez v. Mortg. Bankers Ass’n*, 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))); *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.”); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (“[T]his Court has for more than four decades emphasized that the formulation

For this reason, in 2004, the Office of Legal Counsel (OLC) for the Department of Justice (DOJ) rejected a Postal Service challenge to EEOC's class action rule and confirmed the EEOC's broad authority to aggregate claims in its adjudicatory proceedings, even without an express statutory provision for aggregation.<sup>74</sup> 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."<sup>75</sup>

Indeed, we are aware of only one non-Article III court that has said it expressly *lacks* authority to hear class actions under its general powers to craft rules of procedure: the Court of Appeals for Veterans Claims (CAVC) rejected class actions without more explicit authority to do so, even while recognizing the value of consolidating similar disability claims by veterans.<sup>76</sup> Nevertheless, as noted in the Introduction, the CAVC's position on class actions appears to be changing.<sup>77</sup>

Indeed, just as class actions fall "within the Supreme Court's mandate to adopt rules of 'practice and procedure' for the district courts, . . . [t]here is no

of procedures [is] basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments."); *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.").

74. 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 (July 18, 1979).
75. Office of Legal Counsel, *Legality of EEOC's Class Action Regulations: Memorandum Opinion for the Vice President and General Counsel United States Postal Service*, U.S. DEP'T JUST. 254, 261 n.3 (Sept. 20, 2004), [http://www.justice.gov/sites/default/files/olc/opinions/2004/09/31/op-olc-vo28-p0254\\_o.pdf](http://www.justice.gov/sites/default/files/olc/opinions/2004/09/31/op-olc-vo28-p0254_o.pdf) [<http://perma.cc/573S-GWJD>].
76. See, e.g., *Monk v. McDonald*, No. 15-1280, 2015 WL 3407451, at \*3 (Ct. Vet. App. May 27, 2015) (reaffirming the CAVC's "long-standing declaration that it does not have the authority to entertain class actions"); *Lefkowitz v. Derwinski*, 1 Vet. App. 439, 440 (Ct. Vet. App. 1991) (per curiam) (rejecting contention that the 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.").
77. In papers filed on January 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 conclusion that 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 has not yet rendered a decision in the case. Cf. Corrected Brief of Amici Curiae Former General Counsels of the Department of Veterans Affairs at 1, *Monk v. McDonald*, No. 15-1280 (Fed. Cir. 2016), 2015 WL 9311513.

reason why [administrative agencies] cannot use the same device” in appropriate cases.<sup>78</sup> Class actions are merely “procedural technique[s] for resolving the claims of many individuals at one time . . . , comparable to joinder of multiple parties and intervention.”<sup>79</sup>

In some ways, federal agencies enjoy more power to develop procedural rules than Article III courts. Under the Rules Enabling Act, Article III courts may only “prescribe general rules of practice and procedure” that do not “abridge, enlarge or modify any substantive right.”<sup>80</sup> By contrast, administrative agencies generally have no such limitation: Congress creates most administrative agencies precisely because Congress wants them to make substantive law.<sup>81</sup> Even legislative courts that most closely resemble the Article III courts generally are not subject to the same restrictions under the Rules Enabling Act.<sup>82</sup>

The procedural flexibility Congress generally vests administrative agencies with 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 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.

When neither an agency’s organic statute nor the APA requires or prohibits specific procedures, due process still limits the procedures that federal agencies may use. Nevertheless, while the particular process due varies from case to case,<sup>83</sup> no court has suggested that due process limits what *kinds of adjudicators* may use class actions or other tools to aggregate cases. The aggregation of

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78. *Quinault Allottee Ass’n & Individual Allottees v. United States*, 453 F.2d 1272, 1274 (Cl. Ct. 1972) (holding that the Court of Claims may certify class actions in appropriate cases).

79. *Id.*; accord *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (“Rule 23 . . . falls within § 2072(b)’s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.”).

80. 28 U.S.C. § 2072(a)-(b) (2012).

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

82. See, e.g., I.R.C. § 7453 (2012) (noting that 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 Court for the District of Columbia); *Lemire v. Sec’y of Health & Human Servs.*, No. 01-0647V, 2008 WL 2490654, at \*6 (Fed. Cl. June 3, 2008) (finding that rules promulgated by the Court of Federal Claims for the Special Masters of the Vaccine Court were not governed by the Rules Enabling Act).

83. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

common issues by both courts and administrative agencies has long withstood due process challenges. The Supreme Court has held that due process permits the use of class actions that bind absent plaintiff class members so long as the absent class members receive adequate representation, sufficient notice, and an opportunity to either participate in the litigation or “opt out.”<sup>84</sup> Moreover, the Supreme Court has long recognized that agencies may, consistent with due process, bind parties to common findings of law or fact without an individualized hearing.<sup>85</sup>

In fact, courts have approved the use of aggregation tools in the context of agency adjudications. For example, courts have consistently rejected claims that statistical sampling in the Medicare and Medicaid programs violates due process, explaining that if a sample is representative and statistically significant, the risk of error to a provider is fairly low and the private interest “at stake is easily outweighed by the government interest in minimizing administrative burdens.”<sup>86</sup>

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84. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Of course, the Court has found that class actions that bind absent plaintiffs without their consent raise different due process concerns. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (holding that applicants for class certification on the rationale of a limited fund “must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members”).

85. Compare *Heckler v. Campbell*, 461 U.S. 458, 468 (1983) (rejecting due process challenge because “the Secretary [must] determine an issue that is not unique to each claimant—the types and numbers of jobs that exist in the national economy”), and *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (rejecting due process challenge because “where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption”), with *Londoner v. City & Cty. of Denver*, 210 U.S. 373, 385–86 (1908) (holding that for individual tax assessment, “due process of law requires that at some stage of the proceedings . . . the taxpayer shall have an opportunity to be heard . . . however informal”).

86. *Chaves Cty. Home Health Serv., Inc. v. Sullivan*, 931 F.2d 914, 919–22 (D.C. Cir. 1991); see also *Ratanasen v. Cal. Dep’t of Health Servs.*, 11 F.3d 1467 (9th Cir. 1993); *Ill. Physicians Union v. Miller*, 675 F.2d 151, 157 (7th Cir. 1982) (“[I]n view of the enormous logistical problems of Medicaid enforcement, statistical sampling is the only feasible method available.”); *Bend v. Sebelius*, No. 09-3250, 2010 WL 4852230, at \*4–6 (C.D. Cal. Nov. 19, 2010) (“The sample taken by the Carrier met the requirements of the Medicare program and when combined with the inherently low risk of error and the substantial government interest in statistical sampling, [plaintiff] has not suffered a procedural due process violation in this case.”). But see *Daytona Beach Gen. Hosp., Inc. v. Weinberger*, 435 F. Supp. 891 (M.D. Fla. 1977) (holding that a sampling method that included less than ten percent of the total cases denied plaintiff due process); *Georgia ex rel. Dep’t of Human Res. v. Califano*, 446 F. Supp. 404, 409–10 (N.D. Ga. 1977) (“Audit on an individual claim-by-claim basis of the many thousands of claims submitted each month by each state would be a practical impossibility as well as unnecessary.”). The D.C. Circuit in *Chaves* distinguished the use of statistical sam-

## II. THE EXTENT OF AGENCY AGGREGATION

No one has surveyed the use of class actions or other aggregate procedures by administrative agencies. Part II bridges the gap by reviewing the extent to which agencies and other non-Article III courts aggregate cases in their adjudicatory proceedings. The virtual absence of aggregate practice from the administrative state makes the agencies that *do* aggregate all the more fascinating.

### A. Identifying Agencies that Use Aggregation

In consultation with the Administrative Conference of the United States (ACUS), we identified more than forty administrative agencies and Article I courts with rules permitting some form of aggregation. We later supplemented this list using the Federal Administrative Adjudication database, a joint project of ACUS and Stanford Law School spearheaded by Professor Michael Asimow.<sup>87</sup> The complete list of seventy-one agencies with some kind of aggregation rule is included in the Appendix.<sup>88</sup> Some have adopted formal class action rules that resemble Rule 23 of the Federal Rules of Civil Procedure,<sup>89</sup> while most merely permit the consolidation of cases or claims with common questions of law or fact. The number of agency rules that permit aggregation was surprising given how little attention has been devoted to aggregation by administrative agencies. Therefore, we sought to determine how often agencies made use of these aggregation rules. We did this in several ways.

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pling in post-payment review from individualized pre-payment claim review. 931 F.2d at 919.

87. See Press Release, Stanford Law School, ACUS and Stanford Law School Announce Federal Administrative Adjudication Database (Oct. 29, 2015), <http://law.stanford.edu/press/acus-and-stanford-law-school-announce-federal-administrative-adjudication-database> [<http://perma.cc/YCL5-YQXX>]. We reviewed the “hearing level procedures” for each “agency scheme” administered by the eighty-seven agencies listed in the database as conducting administrative adjudications. See ACUS & Stanford Law Sch., *How To Use This Website*, STAN. U., <http://acus.law.stanford.edu/how-use-website> [<http://perma.cc/49AR-44YG>].
88. We followed the APA’s definition of an agency. See 5 U.S.C. § 551 (2012) (defining an agency as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency”).
89. See, e.g., FED. R. BANKR. P. 7023 (providing that Federal Rule of Civil Procedure 23 applies in adversary proceedings in the Bankruptcy Courts); 4 C.F.R. § 28.97 (2016) (providing employees power to pursue class action with the GAO’s Personnel Appeals Board); 5 C.F.R. § 1201.27 (2016) (providing employees the power to pursue class actions with the Merit Systems Protection Board (MSPB)); 16 C.F.R. § 1025.18 (2016) (providing for the Consumer Product Safety Commission to pursue violations as a class action); 29 C.F.R. § 1614.204 (2016) (permitting the EEOC to hear class action claims involving federal employees).



First, we looked for references to each of these aggregation rules in electronic databases.<sup>90</sup> We then reviewed these records to determine if they discussed the number of class members, cases, or claims aggregated in a class or consolidated proceeding. We also recorded cases involving more than forty class members, cases, or claims.<sup>91</sup>

Second, to support our results, we contacted staff at the administrative agencies with some kind of aggregate procedure identified by ACUS.<sup>92</sup> We asked each agency to identify, among other things, (1) how often it used aggregation; and (2) whether it had ever aggregated more than forty cases or claims. We followed up on our email surveys by telephone when the agency's response seemed promising – i.e., that they might make robust use of aggregation.

Third, we conducted extensive interviews with administrative judges, special masters, agency personnel, and staff at the EEOC, OMHA, and the Office of Special Masters (OSM), which hears claims from NVICP. Following these interviews, we presented our findings and solicited additional feedback from representatives of the EEOC, Medicare, and other agency officials at two open roundtables conducted by ACUS in February and March 2016.

### *B. Most Agencies Do Not Aggregate Claims*

In general, we found that very few agencies use formal class action or other complex litigation procedures. Although there were seventy-one agencies with at least one class action, consolidation, or other aggregation rule, we found that in most cases these procedures were invoked very infrequently, if at all. Our findings are presented in Table 2 and the discussion that follows.

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90. To do so, we used Westlaw's "Administrative Decisions and Guidance" database and searched for references and citations to the rule before January 1, 2016. We then narrowed the results to citations in "Administrative Decisions" and then searched for "class" "consolidat!" or "join!," depending on the type of rule.

91. Although no bright line rule exists, a proceeding with at least forty claims presumptively satisfies the "numerosity" requirement of class certification under Rule 23(a)(1). See RUBENSTEIN ET AL., *supra* note 58, § 3:12 ("[A] class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone."); see also *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) ("[N]umerosity is presumed at a level of 40 members." (citing RUBENSTEIN ET AL., *supra* note 58, § 3.05)).

92. We initially reached out to ACUS's point of contact at each agency. If they were unable to help us themselves, they directed us to the agency personnel with knowledge of the agency's adjudicative proceedings.

TABLE 2.

	Have Rule	Frequent Use <sup>93</sup>	Infrequent Use	Never Used
Class Actions	9	3	1	5
Consolidation	69	11	17	41
Other Forms of Aggregation <sup>94</sup>	1	1	0	0

In sum, we identified two “Article I courts” – the Bankruptcy Court and the Court of Federal Claims – and seven agencies – the Board of Governors of the Federal Reserve, the Consumer Financial Protection Bureau, the Consumer Product Safety Commission, the Corporation for National and Community Service, the EEOC, the Government Accountability Office Personnel Appeals Board, and the Merit System Protection Bureau – that permit class actions. But five of the agencies did not have *any* reported decisions involving the rule’s use.<sup>95</sup> Only the Bankruptcy Courts, the Court of Federal Claims, and the EEOC made frequent use of their class action rules.<sup>96</sup> The EEOC class action rule yielded over 700 reported administrative decisions involving the rule, more than any other agency.

We found far more rules permitting consolidation of cases or claims in non-Article III tribunals. Sixty-nine agencies and Article I courts have a rule permitting consolidation or joinder. But forty-one of them did not have a reported administrative decision involving the rule. Many other agencies only referenced the rule infrequently – that is, fifteen or fewer times since they began including their decisions in electronic databases. Only eleven agencies and

93. “Frequent Use” refers to agencies and legislative courts with more than fifteen reported administrative decisions in which the agency considered the use of a class action, consolidation or another aggregation procedure. “Infrequent Use” includes agencies and legislative courts with fifteen or fewer such decisions.

94. “Other Forms of Aggregation” refers to “group appeals” conducted by the Provider Reimbursement Review Board.

95. Our independent research and interviews did not locate any class action decisions involving the Federal Reserve, the Consumer Product Safety Commission, the Consumer Financial Protection Bureau, the Corporation for National and Community Service, and the Government Accountability Office Personnel Appeals Board. *See, e.g.*, E-mail from Stuart G. Melnick, Gen. Counsel, Pers. Appeals Bd., to Amber Williams (Oct. 1, 2015) (on file with authors) (reporting four consolidations, but no class actions); E-mail from Meredith Fuchs, Gen. Counsel, Consumer Fin. Prot. Bureau, to Amber Williams (June 22, 2015) (on file with authors) (observing that the “CFPB is a fairly new agency” with no class actions).

96. We found exactly fifteen reported decisions involving the Merit Systems Protection Board.

Article I courts had more than fifteen administrative decisions involving a consolidation rule.<sup>97</sup> More importantly, most efforts to consolidate involved a very small number of cases – generally far fewer than the forty cases required to certify a class action or to justify multidistrict litigation in federal court. We identified only nine agencies or Article I courts that considered aggregating more than forty cases or claims in a single proceeding through consolidation, joinder, class action, or another form of aggregation.<sup>98</sup> Moreover, many motions to consolidate or certify a class were denied, dismissed on other grounds, or reversed on appeal.<sup>99</sup>

Finally, we found a rule permitting the Provider Reimbursement Review Board to conduct “group appeals.”<sup>100</sup> The agency made frequent use of this aggregation mechanism to aggregate more than forty cases at a time.

We note that Table 2 may understate the ways that agencies use class actions and other complex procedures. Some agencies do not publish the results of their adjudications or include all of them on Westlaw. In addition, several of our interviewees noted that they could not share their decisions due to the sensitive nature of the information they contained about the parties.

Moreover, agencies and other tribunals may adjudicate cases even without a formal rule. For example, counsel at the Federal Energy Regulatory Commis-

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97. We only found more than fifteen reported administrative decisions referencing the agency’s consolidation rule for: the Bankruptcy Court, the Court of Federal Claims, the Department of Labor, the EEOC, the Federal Communications Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, the Merit System Protection Board, the Occupational Safety and Health Review Commission, the Patent and Trademark Office, and the Tax Court.

98. This includes the Bankruptcy Courts (class actions), the Court of Federal Claims (class actions), the DOJ (consolidation), the Department of Labor (consolidation), the EEOC (class actions and consolidations), the Federal Mine Safety and Health Review Board (consolidation), the MSPB (class actions and consolidations), the Office of Medicare Hearings and Appeals (consolidation), and the Provider Reimbursement Review Board (group appeals). Of those agencies with fifteen or fewer consolidated cases, only the NLRB reported formally attempting to consolidate more than forty cases. Interview with Richard Wainstein, Deputy Assistant Gen. Counsel, Nat’l Labor Relations Bd. (June 9, 2015); *see also* Press Release, Nat’l Labor Relations Bd., NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald’s Franchisees and Their Franchisor McDonald’s, USA, LLC as Joint Employers (Dec. 19, 2014), <http://www.nlr.gov/news-outreach/news-story/nlr-off-ice-general-counsel-issues-consolidated-complaints-against> [<http://perma.cc/5CG5-3NXJ>] (consolidating cases against McDonald’s franchisees). The defendants have challenged the NLRB’s decision to consolidate those cases.

99. Grant and denial rates vary from agency to agency. But, to use one example, we found that over two-thirds of all motions to certify class actions at the EEOC between 2011 and 2015 were denied. *See infra* Section III.A.

100. 42 C.F.R. § 405.1837 (2016).

sion reported that the Commission frequently aggregates cases involving the same wholesale energy practice without granting a formal motion to consolidate.<sup>101</sup> Indeed, two of our case studies – the NVICP and OMHA – involve aggregation in the absence of a formal aggregation rule or as part of a pilot program.

Finally, as noted above, the CAVC previously rejected class actions, citing its lack of authority; however, it may be in the midst of changing its opinion.<sup>102</sup>

Nevertheless, our findings reveal how rarely agencies aggregate cases compared to federal courts. The small number of reported cases that we identified is stunning when compared to the federal court system, where the volume of cases associated with class actions and multidistrict litigation almost exceeds forty percent of the entire federal caseload.<sup>103</sup>

Moreover, we are aware of only three agencies that have considered and invited public comment on the use of aggregation in their administrative proceedings. First, the Federal Communications Commission (FCC) considered and then rejected a proposal by private attorneys to hear class actions in its own adjudications for alleged violations of the Federal Communications Act.<sup>104</sup> 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, which can just as easily be filed in federal court.<sup>105</sup> If the federal court needed the agency’s expertise to resolve particular issues in the

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101. Telephone Interview with Lawrence Greenfield and Christy Walsh, Counsel, Fed. Energy Regulatory Comm’n (July 21, 2015); *see also* *City of Holland v. Midwest Indep. Transmission Sys. Operator, Inc.*, 111 F.E.R.C. ¶ 61,076, 61,351 & n.22, *order on reh’g*, 112 F.E.R.C. ¶ 61,105 (2005) (declining to use formal consolidation when case is heard on a paper record); E-mail from Richard Osterman, Deputy Gen. Counsel, Fed. Deposit Ins. Corp., to Amber Williams (June 30, 2015) (on file with authors) (observing that even though the FDIC does not typically use its authority to consolidate cases, it may commence one case against many respondents, like “multiple officers and directors of a bank for the same course of misconduct”).

102. *See supra* notes 76-77 and accompanying text.

103. *Compare* JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 2015 YEAR-END REPORT, *supra* note 16, at x, xi, *and* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 817 (2010) (identifying 304 approved class action settlements in 2006, and 384 approved class action settlements in 2007, without quantifying the number of filed class actions), *with* Burch, *supra* note 16, at 106 (observing that 39% of the federal court’s entire civil caseload proceeds in multidistrict litigation, but after removing prisoner and social security cases, that number rises to 45.6%).

104. *Solvable Frustrations, Inc.*, 29 F.C.C. Rcd. 4205 (2014).

105. *Id.* at 4205-06.

case, it could refer them to the FCC by invoking the doctrine of “primary jurisdiction.”<sup>106</sup>

Second, the Commodity Futures Trading Commission (CFTC) similarly considered and rejected the use of class actions in its proceedings involving broker-dealer disputes.<sup>107</sup> It likewise questioned whether its adjudicators could handle complex class action cases, as well as whether they needed do so, given that parties could always pursue class actions in federal court.<sup>108</sup>

Third, in November 2016, the U.S. Department of Education adopted a group process loosely modeled after Rule 23 of the Federal Rules of Civil Procedure.<sup>109</sup> The process allows the Department to hear large numbers of student claims for debt relief when they attend schools that go bankrupt or commit fraud. Under the final rule, however, only designated Department officials may commence the class proceeding, and students lack any formal right to petition the agency to do so.<sup>110</sup>

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106. *Id.* at 4206; *see also* Gilmore v. Sw. Bell Mobile Sys., L.L.C., 20 F.C.C. 15079, 15081-82 (2005) (“[T]he Federal District Court dismissed the case without prejudice, referring the Act-related issues to the Commission under the doctrine of primary jurisdiction and retaining jurisdiction to resolve any remaining issues . . . once the Commission ruled on liability.”).

107. *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) (2012)) (granting CFTC power to create a rule allowing for class action administrative procedures), *with* Rules Relating to Reparation Proceedings, 59 Fed. Reg. 9631 (Mar. 1, 1994) (rejecting such a rule).

108. Rules Relating to Reparation Proceedings, 59 Fed. Reg. at 9631 (“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.”).

109. *See* 81 Fed. Reg. 75,926 (Nov. 1, 2016); *see also* Michael D. Sant’Ambrogio & Adam S. Zimmerman, *Should the Education Department Hear Class Actions When Colleges Collapse*, REG BLOG (Oct. 10, 2016), <http://www.regblog.org/2016/10/10/zimmerman-santambrogio-education-department-hear-class-actions-when-colleges-collapse> [<http://perma.cc/M7LY-WAND>] (discussing the proposal of the “innovative new rule to streamline student claims for loan forgiveness” by offering a “group process’ modeled on class action rules in federal court”).

110. 81 Fed. Reg. at 75,968 (“We disagree that a formal right of petition for entities such as State attorneys general, advocacy groups, or legal aid organizations should be included in the regulations.”); *see also* Luke Herrine, *The Dark Side of Departmental Discretion*, REG BLOG (Jan. 5, 2017), <http://www.regblog.org/2017/01/05/herrine-dark-side-departmental-discretion> [<http://perma.cc/5ZVN-7UBZ>] (“A deep problem underlies the new group-based process: the Department, in its sole discretion, retains exclusive authority to initiate a group process. The new regulations lack any formal procedure for students, advocates, enforcement agencies, or other interested parties to argue for group treatment.”).

Thus, it appears that many federal agencies have not even begun to devote serious attention to whether or how they might benefit from aggregation in their adjudicatory proceedings.

**III. INSIDE THE AGENCY CLASS ACTION**

The relative absence of aggregate practice when compared to courts makes the *agencies that do aggregate* worthy of study. Like federal courts, agencies have aggregated cases in formal and informal ways. We chart these “agency class actions” in Table 3 and the discussion that follows.

**TABLE 3.**

	<b>Formal Aggregation</b>	<b>Informal Aggregation</b>
<b>Participation</b>	Representative	Personal, but Collaborative
<b>Preclusive Effect</b>	Binding	Influential
<b>Proceedings</b>	Single Decision Maker or Proceeding	Single or Small Number of Non-Random Proceedings or Decision Makers
<b>Examples</b>	<ul style="list-style-type: none"> <li>- EEOC Class Actions</li> <li>- OMHA’s Statistical Sampling Initiative</li> <li>- NLRB Consolidated Enforcement Actions</li> </ul>	<ul style="list-style-type: none"> <li>- Vaccine Court Omnibus Proceedings</li> <li>- Immigration “Surge Courts”</li> <li>- Coordinated EPA Settlements</li> </ul>

First, agencies such as the EEOC and OMHA,<sup>111</sup> discussed more fully below, have *formally aggregated* large groups of plaintiffs’ claims through consolidations, statistical sampling, and even class actions. In addition, the NLRB recently consolidated dozens of enforcement actions against McDonald’s franchisees for the same alleged unfair labor practices.<sup>112</sup>

Second, agencies have used different forms of *informal aggregation* to streamline categories of individually represented claims and centralize them before the same adjudicator, into the same courthouse or docket, or into a coordi-

111. See *infra* Section III.C.

112. See, e.g., Press Release, Nat’l Labor Relations Bd., *supra* note 98 (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).

nated settlement program. The Vaccine Court’s “Omnibus Proceedings,” described in more detail below, centralize similar cases involving the same scientific questions in front of the same special master. The Executive Office for Immigration Review—which hears all cases involving detained aliens, criminal aliens, and aliens seeking asylum—offers another example of this kind of informal aggregation in a courthouse. In the past year, it has created special “surge courts” to respond to over 2,000 Central American asylum cases pending in West Texas.<sup>113</sup>

Another form of informal aggregation includes coordinated settlement programs. For example, Medicare and the EPA occasionally offer “industry-wide” settlements<sup>114</sup>—whereby the agency brokers 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—a global settlement to resolve their liability under the Clean Water Act.<sup>115</sup> Each individual AFO would enter into a separate, but otherwise identical, agreement with the EPA and agree to pay a civil fine (categorically based only on the size of the AFO) to fund a nationwide study on monitoring AFO emissions. In return, the EPA agreed not to sue the participating AFOs for past and ongoing violations while the study was undertaken.<sup>116</sup>

Although we cannot address all the uses of aggregation by federal agencies, the three case studies below illustrate a range of techniques that can be used to resolve large groups of cases in administrative programs, the challenges each has faced, and potential lessons for the future.

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113. See, e.g., Wil S. Hylton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES MAG. (Feb. 4, 2015), <http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html> [<http://perma.cc/6DNK-UDG9>]; Press Release, Dep’t of Justice, EOIR Announces Change to Immigration Judges Hearing Cases out of Dilley (Apr. 14, 2015), <http://www.justice.gov/eoir/pr/eoir-announces-change-immigration-judges-hearing-cases-out-dilley> [<http://perma.cc/MN72-B6DJ>] (assigning cases originating in Dilley, Texas to Miami Immigration Court to conduct hearings by teleconference).

114. E.g., *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027 (D.C. Cir. 2007); Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 813-16 (2010) (describing industry-wide settlements).

115. See Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 40,016, 40,017 (July 12, 2005).

116. 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 Irrigated Residents*, 494 F.3d at 1028 (rejecting plaintiffs’ arguments).

### A. Class Actions in the Equal Employment Opportunity Commission

The EEOC is the nation's leading 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.<sup>117</sup> The EEOC's specific role and responsibilities depend on the nature of the employer involved.<sup>118</sup> Federal employees must first file any civil rights complaint with the EEOC office of their federal employer. When the agency's investigation is complete, the employee may either ask for a final decision from the agency or request a hearing before an EEOC AJ.<sup>119</sup>

More than 100 AJs work in EEOC regional offices to adjudicate disputes between federal employees and their federal employers.<sup>120</sup> 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 forty days to issue a final order, which either accepts or rejects the decision of the AJ. If the agency does not 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.<sup>121</sup>

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117. 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 (ADA), and the Genetic Information Nondiscrimination Act of 2008 (GINA). *Laws Enforced by the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/statutes/index.cfm> [<http://perma.cc/QL3J-ZBKU>].

118. In the case of private employers, the EEOC may file a lawsuit in federal court to protect the rights of individuals and the public interest, or provide the employee with a Notice of Right To Sue. In the case of state and local employers, the EEOC refers the matter to DOJ, which may file a lawsuit in federal court. *See* 42 U.S.C. §§ 2000e-1 to -17 (2012) (describing procedures for the investigation and enforcement of civil rights charges depending on the nature of the employer).

119. 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. *Overview of Federal Sector EEO Complaint Process*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [http://www.eeoc.gov/federal/fed\\_employees/complaint\\_overview.cfm](http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm) [<http://perma.cc/4PGJ-VHAB>].

120. AJs lack the same formal job protections that ALJs enjoy under the APA, but this lack of protection 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).

121. There are several points 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 and after the



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.<sup>122</sup> The EEOC's use of class action procedures—loosely modeled after Rule 23 of the Federal Rules of Civil Procedure—makes the EEOC something of an outlier in our federal administrative state.<sup>123</sup> 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 that a government employer's "pattern and practice" violates their rights.<sup>124</sup> A number of other agencies have promulgated rules permitting the certification of class actions in their administrative proceedings, but almost never use the power.<sup>125</sup> 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*<sup>126</sup>—which some argue severely limits class actions in federal courts—the EEOC has considered over 125 class action claims.<sup>127</sup> 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.<sup>128</sup>

Based on our review of EEOC class actions considered over the past five years, they most commonly involve workplace discrimination claims based on race, sex, disability, and age.<sup>129</sup> Of those cases, many follow the same pattern as class actions in federal court. A majority of cases were dismissed or remanded

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EEOC's decision on an employee's appeal from a final order. *Overview of Federal Sector EEO Complaint Process*, *supra* note 119.

122. See 29 C.F.R. § 1614.204 (2016); Federal Sector Equal Employment Opportunity, 57 Fed. Reg. 12,634 (Apr. 10, 1992).

123. See generally Sant'Ambrogio & Zimmerman, *supra* note 15 (describing the administrative tools different agencies use to resolve group claims).

124. See, e.g., 4 C.F.R. § 28.97 (2016) (authorizing GAO employees to file class actions with the Personnel Appeals Board); 5 C.F.R. § 1201.27 (2016) (authorizing federal employees to file class action appeals with the MSPB).

125. See *supra* Table 2.

126. 564 U.S. 338 (2011).

127. This is based on our review of EEOC decisions obtained by searching Westlaw's Administrative Decisions database for citations to 29 C.F.R. § 1614.204 (permitting federal employees to file a class complaint with an EEOC AJ containing the word "class").

128. See, e.g., 42 U.S.C.A. § 2000e-16(c) (West 2016) (permitting employees to file after 180 days); 29 U.S.C.A. §§ 1614.401(c), 1614.407 (West 2016) (permitting employees, but not employers, to file in federal court after an adverse decision by the EEOC).

129. See *supra* note 127.

as untimely filed or on the merits. At least twenty-two cases were settled. Of the twenty-six actions that adjudicators considered certifying as class actions, they rejected fifteen and certified eleven.<sup>130</sup>

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.<sup>131</sup> The employee then decides whether to appeal the final agency decision to the EEOC's Office of Federal Operations.

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

EEOC class action procedures mostly track Rule 23(a) of the Federal Rules of Civil Procedure. 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.<sup>132</sup> Before certifying a class, AJs ensure that a class action is feasible and likely to resolve the claims more efficiently than individual adjudications.<sup>133</sup> Thus, like their judicial counterparts, EEOC AJs may require class-wide discovery, appoint 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 certify sub-classes to ensure parties with distinct interests are adequately

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130. Compare *supra* note 127, with Fitzpatrick, *supra* note 103; Thomas E. Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007*, 80 U. CIN. L. REV. 315 (2012) (identifying similar patterns of dismissal, settlement, and certification of class actions in federal court).

131. 29 C.F.R. § 1614.204(j)(1) (2016) (giving the government employer sixty days to issue a "final order" stating whether it will "accept, reject, or modify the [AJ's] findings"); see also *id.* § 1614.204(d)(7) (giving agencies forty days to decide whether or not to "accept" the class action determination).

132. *Id.* § 1614.204(a)(2).

133. Telephone Interview with Enechi Modu, David Norken, & Erin Stilp, Admin. Judges, U.S. Equal Emp't Opportunity Comm'n (July 31, 2015); Telephone Interview with David Norken, Admin. Judge, Equal Emp't Opportunity Comm'n (Apr. 29, 2016).

represented at trial, or more commonly at settlement.<sup>134</sup> In addition, EEOC AJs conduct evidentiary hearings to screen out unreliable expert testimony.<sup>135</sup>

This means that EEOC class actions, like their federal court counterparts, can also be time consuming. They may take years of motion practice, class discovery, appeals, and fairness hearings to determine the reasonableness of settlements.

But EEOC class actions have no equivalent to Rule 23(b) of the Federal Rules of Civil Procedure. That has at least two important consequences. First, unlike federal damage class actions, federal employees cannot “opt out” of an EEOC class action.<sup>136</sup> 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.<sup>137</sup> Accordingly, EEOC AJs reported 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.<sup>138</sup>

Second, unlike Rule 23(b)(3) class actions, 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 in federal court.<sup>139</sup> 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 due to fear that individual issues

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134. Telephone Interview with Enechi Modu, David Norken, & Erin Stilp, *supra* note 133 (permitting class members to file written petitions challenging settlements “not fair, adequate and reasonable to the class as a whole”).

135. *Id.* (relating experience excluding unreliable expert evidence).

136. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, MGMT. DIRECTIVE FOR 29 C.F.R. PART 1614, ch. 8, § VI.C (Aug. 5, 2015), <http://www.eeoc.gov/federal/directives/md110.cfm> [<http://perma.cc/EB5G-PWXX>] (“The class members may not ‘opt out’ of the defined class.”).

137. 29 C.F.R. § 1614.204(l)(3) (2016).

138. 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. *See supra* note 133.

139. Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1006 (2005) (observing that focusing on the “resolvability” of classwide adjudication makes class actions “more difficult to obtain”); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) (arguing that predominance does not just require 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”) (cited in *Walmart v. Dukes*, 564 U.S. 338 (2011)).

among class members will overwhelm common ones.<sup>140</sup> If common questions do not predominate, aggregation may not be more efficient than case-by-case adjudication.<sup>141</sup>

Nevertheless, EEOC class actions typically 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 that apply generally to the class.”<sup>142</sup> EEOC cases involving structural reforms or declaratory relief tend to be less controversial than those seeking money damages because an injunction usually impacts all class members in the same way.<sup>143</sup> These class actions permit the EEOC to consistently apply decisions to groups of claimants working for the same employer.<sup>144</sup>

Finally, EEOC administrative proceedings are not bound by recent Supreme Court decisions limiting the use of employment class actions in federal court. Thus, EEOC class actions remain central to implementing anti-discrimination policy in the federal government.<sup>145</sup>

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140. John C. Coffee, Jr. & Alexandra D. Lahav, *The New Class Action Landscape: Trends and Developments in Class Certification and Related Topics* 22-23, 116 (Columbia Law & Econ., Working Paper No. 435, 2012) (exhaustively collecting cases documenting class action trends in the United States); see also Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 729 (2012) (“[S]everal 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.”).

141. See Nagareda, *The Preexistence Principle*, *supra* note 17, at 132.

142. FED. R. CIV. P. 23(b)(2); see also, e.g., 29 C.F.R. § 1614.204(a)(1) (2016) (defining a class as a group that “ha[s] been or [is] being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race, color, religion, sex, national origin, age, disability, or genetic information”); *id.* § 1614.204(l)(1) (instructing that “[w]hen discrimination is found, an agency must eliminate or modify the employment policy or practice out of which the complaint arose . . .”); cf. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (“Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples [of class actions for declaratory or injunctive relief under Rule 23(b)(2)].” (citing FED. R. CIV. P. 23(b)(2) advisory committee’s note)); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967) (noting that subdivision (b)(2) “build[s] on experience mainly, but not exclusively, in the civil rights field”).

143. See *Amchem*, 521 U.S. at 614 (describing the 1966 amendments providing for money damage class actions as “the most adventuresome’ innovation” (citation omitted)).

144. See *supra* note 139; 29 C.F.R. § 1614.204(l)(1) (2013) (“When discrimination is found, an agency must eliminate or modify the employment policy or practice out of which the complaint arose . . .”).

145. Cf. Federal Sector Equal Employment Opportunity, 64 Fed. Reg. 37,644, 37,651 (July 12, 1999) (codified at 29 C.F.R. pt. 1614) (observing that class actions “are an essential mecha-

*B. Multiparty Consolidation in the National Vaccine Injury Compensation Program*

Congress created the National Vaccine Injury Compensation Program (NVICP) in 1986 to provide people injured by vaccines with a “no-fault” alternative to lawsuits in federal court.<sup>146</sup> Under the program, after filing claims for compensation with the Office of Special Masters (OSM),<sup>147</sup> a petitioner is entitled to a decision within 240 days based on a showing that the vaccine caused the injury.<sup>148</sup> 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 claims process and a reduced burden of proof. Petitioners under the NVICP, unlike those who sue, do not have to prove negligence, failure to warn, or other tort causes of action; they must only prove that a covered vaccine caused their injury.<sup>149</sup> 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.<sup>150</sup>

Generally, a petitioner can get compensation under the NVICP in two ways. In a “table” case, the petitioner has an initial burden to prove an injury listed in the Vaccine Injury Table.<sup>151</sup> Upon satisfying this initial burden, the petitioner earns a “presumption” that the vaccine caused his or her injury. The burden then shifts to the Department of Health and Human Services (HHS) to prove that a factor unrelated to the vaccination actually caused the illness, dis-

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nism for attacking broad patterns of workplace discrimination and providing relief to victims of discriminatory policies or systemic practices”).

146. National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, §§ 2110–18, 100 Stat. 3755, 3758–71 (codified as amended at 42 U.S.C. §§ 300aa-1 to -18 (2012)); see also WENDY K. MARINER, INNOVATION AND CHALLENGE: THE FIRST YEAR OF THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM (1991) (presenting a descriptive analysis of the “no-fault” system’s first year and a half of operation).

147. 42 U.S.C. § 300aa-12. For more information about the NVICP’s personnel, see MOLLY TREADWAY JOHNSON ET AL., FED. JUDICIAL CTR., USE OF EXPERT TESTIMONY, SPECIALIZED DECISION MAKERS, AND CASE-MANAGEMENT INNOVATIONS IN THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM 14–15 (1998).

148. 42 U.S.C. § 300aa-12(d)(3)(A)(ii). *But see* Engstrom, *supra* note 8 (finding that many cases exceed the 240-day window).

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

150. I.R.C. §§ 4131, 9510 (2012); 42 U.S.C. § 300aa-15(i)(2).

151. See 42 U.S.C. § 300aa-14(a); *Capizzano v. Sec’y of Health & Human Servs.*, 440 F.3d 1317, 1319 (Fed. Cir. 2006).

bility, injury, or condition.<sup>152</sup> Petitioners can also get compensation for “off-table” cases. A petitioner in an off-table case has the burden to prove the vaccination in question “caused” a particular illness, disability, injury, or condition.<sup>153</sup> The NVICP table originally covered vaccines against seven diseases: diphtheria, tetanus, pertussis, measles, mumps, rubella (German measles), and polio.<sup>154</sup> Coverage has since been extended to a total of seventeen vaccines.<sup>155</sup>

OSM adjudicators possess an interesting mix of powers—falling somewhere between Article I judges and agency adjudicators. On the one hand, Congress expressly considered—and then rejected—allowing HHS to create regional panels to hear claims arising out of NVICP.<sup>156</sup> Moreover, the OSM sits in the U.S. Court of Federal Claims, to which parties may appeal OSM’s decisions.<sup>157</sup> On the other hand, the OSM must follow special procedures created specifically for the vaccine program, rather than the Federal Rules of Civil Procedure. Similar to other agency adjudicators, OSM’s medical and scientific findings are subject to substantial weight and deference, and may only be set aside on appeal if found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>158</sup>

As in most benefit programs, many claims under the Vaccine Act proceed one at a time. However, sometimes, this small office of adjudicators has had little alternative but to find ways to streamline the disposition of large groups of cases—particularly those raising similar scientific questions. OSM relies on its inherent authority to exercise “specialized knowledge” and aims to resolve common scientific questions in a consistent and informed way. To meet this end, it has used procedures that loosely resemble multidistrict litigation, bellwether hearing procedures, and creative case management, in ways designed to simultaneously increase public participation and input.

Generally, NVICP uses two types of omnibus proceedings to handle claims raising similar scientific questions. The first type resembles an issue class action

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152. 42 U.S.C. §§ 300aa-13(a)(1)(A)-(B).

153. *Id.* §§ 300aa-11(c)(1)(C)(ii)(I) to -13(a)(1).

154. JOHNSON ET AL., *supra* note 147, at 1 n.3.

155. Health Resources & Servs. Admin., *Vaccine Injury Table*, U.S. DEP’T HEALTH & HUM. SERVS., <http://www.hrsa.gov/vaccinecompensation/vaccineinjurytable.pdf> [<http://perma.cc/E7U5-ZQ85>].

156. *Munn v. Sec’y of Dep’t of Health & Human Servs.*, 970 F.2d 863, 868 (Fed. Cir. 1992) (describing legislative history of Vaccine Act).

157. 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 John Vittone, Chair, Comm. on Adjudication (May 19, 2016).

158. *Hodges v. Sec’y of Dep’t of Health & Human Servs.*, 9 F.3d 958, 961 (Fed. Cir. 1993).

in federal court: a special master hears evidence on a general theory of causation, makes findings based on that evidence, and orders the parties to demonstrate consistency with the general findings. The second type proceeds like a bellwether trial: the adjudicator decides one or a few cases first with the goal of enabling other claimants to better understand the strengths and weaknesses of their claims.

The “issue class action” variant dates back to 1992, when Special Master George Hastings decided an omnibus proceeding involving 130 cases alleging that a rubella vaccine caused chronic arthritis and related problems.<sup>159</sup> In that case, Special Master Hastings observed early on that a large number of similar claims presented the general question whether rubella could cause chronic arthropathy.<sup>160</sup> 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.”<sup>161</sup>

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.”<sup>162</sup> Therefore, he sua sponte encouraged plaintiffs’ attorneys with such claims to form a steering committee to develop general causation evidence and coordinate its presentation.<sup>163</sup> 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.<sup>164</sup> He then entered a case management order requiring individual parties to put forward evidence consistent with his findings—acute

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159. *In re Ahern*, No. 90-1435V, 1993 WL 179430 (Fed. Cl. Jan. 11, 1993). The complaint specifically alleged that the vaccine caused “arthropathy.” Arthropathy broadly includes 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. *Id.* at \*3.

160. *Id.* at \*2 (“[E]ach 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].”).

161. *Id.*

162. *Id.* at \*4.

163. *Id.* at \*2.

164. *Id.* at \*9, \*13.

onset of arthritis, no history of pre-existing conditions, as well as other evidence – to qualify for compensation.<sup>165</sup>

The general proceeding helped expedite the evaluation of a common but still-evolving scientific question of general causation. In addition, the proceeding made otherwise “small dollar” claims for joint pain worthwhile. The Federal Claims Court later favorably recounted that “[f]ollowing the 1993 Decision, over 130 related cases were either resolved or voluntarily dismissed based upon the Special Master’s findings.”<sup>166</sup>

Moreover, by forcing the parties to pool together common scientific evidence on the issue, OSM created awareness about 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.<sup>167</sup> 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.<sup>168</sup>

The second, and more common, type of omnibus proceeding proceeds like a bellwether trial in federal district court. Cases raising similar issues are organized in front of the same or a small number of adjudicators. One or a small number of test cases are then adjudicated first, in expectation that the outcome in the bellwether cases will help similarly situated parties understand the strengths and weaknesses of their claims, facilitating the settlement of the remaining cases:

[B]y 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 . . . 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.<sup>169</sup>

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<sup>165.</sup> *Id.* at \*13.

<sup>166.</sup> *Moreno v. Sec’y of Dep’t of Health & Human Servs.*, 65 Fed. Cl. 13, 17 (2005) (citing *Moreno v. Sec’y of Health & Human Servs.*, No. 95–706V, at 5 (Fed. Cl. Special Master Dec. 16, 2003)).

<sup>167.</sup> See 60 Fed. Reg. 7678, 7695 (Feb. 8, 1995), *revised* 62 Fed. Reg. 7685, 7689 (Feb. 20, 1997) (codified at 42 C.F.R. § 100.3).

<sup>168.</sup> 42 C.F.R. § 100.3(b)(6)(i)(A)-(B) (2015).

<sup>169.</sup> *Snyder ex rel. Snyder v. Sec’y of Dep’t of Health & Human Servs.*, No. 01-0162V, 2009 WL 332044, at \*3 (Fed. Cl. Feb. 12, 2009) (emphasis omitted).



Special masters adopted this approach in the “Omnibus Autism Proceeding” (OAP), established to determine the existence of a causal link between childhood vaccines and autism. Between OAP’s adoption of the approach in July 2002 and August 2010, over 5,600 cases alleging an association between autism and the measles-mumps-rubella (MMR) vaccine—a non-thimerosal-containing vaccine, thimerosal-containing vaccines, or both were filed with the NVICP.<sup>170</sup> Three special masters structured discovery, motion practice, and expert testimony to hear three separate “test cases” on this theory of general causation.

The special masters in each case considered a wealth of scientific evidence. 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, the testimony of fact witnesses on behalf of [the injured child], and [the child’s] medical records.<sup>171</sup>

Although non-binding, the findings in those three cases—which found no causal connection between vaccines and autism—helped the remaining claimants evaluate the strength and merits of their claims in the vaccine program.

### C. Consolidation, Statistical Sampling, and Group Settlement in the Office of Medicare Hearings and Appeals

The Office of Medicare Hearings and Appeals (OMHA) operates in HHS and hears appeals involving Medicare benefits.<sup>172</sup> OMHA was created by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (the Medicare Modernization Act)<sup>173</sup> to address concerns that Social Security Administration (SSA) ALJs lacked guidance to handle the distinct issues raised

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170. See Health Res. & Servs. Admin., *About the Omnibus Autism Proceeding*, U.S. DEP’T HEALTH & HUM. SERVS. (Aug. 19, 2010), <http://www.hrsa.gov/nvicp/omnibusautism.html> [<http://perma.cc/S9W7-EYUE>].

171. *Snyder*, 2009 WL 332044, at \*8 (footnotes omitted).

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

173. Pub. L. No. 108-173, § 931, 117 Stat. 2066 (codified as amended at 42 U.S.C. § 1395ff (2012)).

in Medicare appeals.<sup>174</sup> Most of the appeals OMHA hears arise from denials of claims for reimbursement by hospitals, skilled nursing facilities, or home health care and hospice care providers, under Medicare Part A, or for doctors' services and other medical services, equipment, or supplies that are not covered by hospital insurance, under Medicare Part B.<sup>175</sup>

In 2012, OMHA began to experience significant backlogs in appeals. 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.<sup>176</sup> Put differently, the number of claims increased 700% from 2011 to 2014. Meanwhile, the number of appeals decided by OMHA only grew from 53,868 in 2011 to 61,528 in 2012, 79,377 in 2013, and 87,270 in 2014.<sup>177</sup> Thus, even as OMHA's ALJs increased their own productivity by 64.8% within the four-year period,<sup>178</sup> OMHA simply could not keep pace with the huge number of new cases coming in the door. Average pro-

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174. Medicare Program: Changes to the Medicare Claims Appeal Procedures, 67 Fed. Reg. 69,312, 69,316 (Nov. 15, 2002) ("The need for the Medicare program to establish its own regulations for these upper level appeals has been recognized by many parties.").

175. Medicare "Parts A & B or 'Original Medicare' include Hospital Insurance (Part A) and Supplementary Medical Insurance (Part B). Hospital Insurance (Part A) helps pay for inpatient care in a hospital or skilled nursing facility (following a hospital stay), some home health care and hospice care. Medical Insurance (Part B) helps pay for doctors' services and other medical services, equipment, and supplies that are not covered by hospital insurance." Office of Medicare Hearings & Appeals, *Level 1 Appeals; Description of Medicare Parts*, U.S. DEP'T HEALTH & HUM. SERVS. (Aug. 5, 2016), <http://www.hhs.gov/about/agencies/omha/the-appeals-process/level-1/index.html> [<http://perma.cc/X4QE-3LWX>].

OMHA is the third of four levels of administrative appeals available in the Medicare health-insurance program. Under Medicare Parts A and B, providers and suppliers submit bills to Medicare for a service they performed for covered beneficiaries. Medicare uses private contractors called Medicare Administrative Contractors (MACs) to determine whether the claim is covered and the amount payable by Medicare. If a claimant disagrees with the decision, the claimant can request a redetermination by the MAC. If the claimant is not satisfied with the redetermination, the claimant can initiate a Level 2 appeal, which will be reviewed by a Qualified Independent Contractor (QIC), who reconsiders the medical necessity of the services provided to the covered beneficiary. If the claimant is not satisfied with the QIC's decision, the claimant may appeal the QIC's determination to OMHA. Finally, parties may appeal OMHA's decisions to the Medicare Appeals Council. After exhausting their administrative appeals, parties may seek review in federal district court. Office of Medicare Hearings & Appeals, *The Appeals Process*, U.S. DEP'T HEALTH & HUM. SERVS. (Aug. 17, 2016), <http://www.hhs.gov/about/agencies/omha/the-appeals-process/index.html> [<http://perma.cc/9RGW-HUBQ>].

176. Griswold, *supra* note 3, at 8.

177. *Id.*

178. *See id.* at 9.

cessing times for completed appeals grew from 121 days in 2011 to 661 days in 2015.<sup>179</sup>

The dramatic surge was caused primarily by stepped-up efforts to recover excess billing under several post-payment audit programs conducted by private contractors and “more active Medicaid State Agencies.”<sup>180</sup> In addition, there was a “[l]arger beneficiary population” during this period.<sup>181</sup> It is important to note, however, that appeals by individual beneficiaries receive priority processing.<sup>182</sup> Thus, most of the parties suffering from the delays caused by the backlogs were service providers or medical suppliers—with sometimes hundreds or thousands of similar appeals on behalf of different Medicare beneficiaries.<sup>183</sup>

Facing an existential crisis, OMHA began to explore ways to reduce the backlog and process a much larger number of appeals without adding more ALJs.

### 1. OMHA's Statistical Sampling Initiative

Like many other agency heads, the Secretary of HHS has broad discretion to establish “specific regulations to govern the appeals process.”<sup>184</sup> Over the years, HHS has used that power to adopt rules authorizing OMHA ALJs to

179. Office of Medicare Hearings & Appeals, *Medicare Appellant Forum*, U.S. DEP'T HEALTH & HUM. SERVS. 22 (Feb. 12, 2014) [hereinafter Office of Medicare Hearings & Appeals, *Medicare Appellant Forum*], [http://www.hhs.gov/sites/default/files/omha/OMHA%20Medicare%20Appellant%20Forum/omha\\_medicare\\_appellant\\_forum\\_presentations.pdf](http://www.hhs.gov/sites/default/files/omha/OMHA%20Medicare%20Appellant%20Forum/omha_medicare_appellant_forum_presentations.pdf) [<http://perma.cc/8ANH-7K8R>] (noting that the average processing time for appeals closed in FY 2011 was 121 days); OFFICE OF MEDICARE HEARINGS & APPEALS, JUSTIFICATIONS OF ESTIMATES FOR APPROPRIATIONS COMMITTEE, FISCAL YEAR 2017, at 8 [hereinafter OFFICE OF MEDICARE HEARINGS & APPEALS, JUSTIFICATIONS OF ESTIMATES FOR APPROPRIATIONS COMMITTEE], [http://www.hhs.gov/sites/default/files/fy2017-budget-justification-office-of-medicare-hearings-and-appeals\\_o.pdf](http://www.hhs.gov/sites/default/files/fy2017-budget-justification-office-of-medicare-hearings-and-appeals_o.pdf) [<http://perma.cc/Y9BR-X9E5>] (noting that the average processing time for appeals closed in fiscal year 2015 was 661 days).

180. Office of Medicare Hearings & Appeals, *Medicare Appellant Forum*, *supra* note 179, at 17. The private contractors include MACs, Recovery Auditor Contractors (RACs), Zone Program Integrity Contractors, and Supplemental Medical Review Contractors. *Id.*

181. *Id.*

182. OFFICE OF MEDICARE HEARINGS & APPEALS, JUSTIFICATIONS OF ESTIMATES FOR APPROPRIATIONS COMMITTEE, *supra* note 179, at 8.

183. Office of Inspector Gen., *Improvements Are Needed at the Administrative Law Judge Level of Medicare Appeals*, U.S. DEP'T HEALTH & HUM. SERVS. 8, <http://oig.hhs.gov/oei/reports/oei-02-10-00340.pdf> [<http://perma.cc/ZG9F-SNNS>] (2012).

184. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 931(a)(2)(D), 117 Stat. 2397.

consolidate cases 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 request for hearing or hearings pending before the same ALJ.”<sup>185</sup> The purpose, as described in the regulations, is “administrative efficiency.”<sup>186</sup> After the hearing, the ALJ may issue “either a consolidated decision and record or a separate decision and record on each claim.”<sup>187</sup>

Although OMHA ALJs rarely formally consolidate appeals, they often informally combine appeals in what they refer to as “big box cases,” so named for the hundreds or thousands of appeals from the same organization, often involving overlapping facts and legal issues, arriving together literally in a large box. Such informally coordinated groups of cases might involve (1) the same appellant with distinct but related factual claims;<sup>188</sup> (2) the same appellant with a large number of claims involving common questions of law or fact;<sup>189</sup> or (3) the same legal representative appearing on behalf of multiple appellants raising common legal or factual questions.<sup>190</sup>

In addition, 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.<sup>191</sup> In

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<sup>185.</sup> 42 C.F.R. §§ 405.1044(a), (c) (2016).

<sup>186.</sup> *Id.* § 405.1044(c).

<sup>187.</sup> *Id.* § 405.1044(e).

<sup>188.</sup> For example, a large medical equipment provider may appeal the denial of separate claims for oxygen, continuous positive airway pressure supplies, and inhaled medications. Although some factual issues are distinct for each item, “there are efficiencies in having one proceeding, with procedural statements, witness introductions, oaths, and waiver of counsel done once at the beginning.” Telephone Interview with Robert Fisher & Leslie B. Holt, Admin. Law Judges, U.S. Dep’t of Health & Human Servs. (Oct. 21, 2015).

<sup>189.</sup> For example, when a lab provides DNA testing of cancer cells to determine appropriate chemotherapy treatment, there may be a question about whether the procedure is “experimental” (and therefore not covered). The case will often involve a review of medical literature and physician testimony. In such cases, an ALJ may 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.” *Id.*

<sup>190.</sup> For example, a law firm or other organization may represent hospitals in cases in which overpayments were assessed after a post-payment review. The issue in all of the cases is whether the services should have been billed as inpatient or outpatient service (outpatient services generally receive a lower payment). Other Medicare contractors may also appear as participants or parties in the same action. *Id.*

<sup>191.</sup> Currently, CMS’s statistical sampling and extrapolation methodology guidelines for overpayments appear in its Medicare Program Integrity Manual (MPIM). *Medicare Program Integrity Manual*, Pub. No. 100-08, CTRS. FOR MEDICARE & MEDICAID SERVS. ch.

*Chaves County Home Health Service, Inc. v. Sullivan*,<sup>192</sup> the D.C. Circuit approved the use of statistical sampling to determine Medicare overpayments. Even though the court acknowledged that the Medicare Act did not expressly authorize its use, the D.C. Circuit deferred to the Medicare program's adoption of statistical sampling as "a judicially approved procedure that can be reconciled with existing . . . requirements."<sup>193</sup> In so doing, the court also pointed to longstanding uses of statistical sampling in other contexts.<sup>194</sup>

The use of statistical sampling and other aggregation techniques in Medicare appeals—as opposed to post-payment review in the above example—emerged organically in the late 1990s.<sup>195</sup> 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 proposed the use of statistical sampling to expedite such claims. Statistical sampling benefited providers who did not want to spend the time necessary to produce documentation for every claim for which they sought reimbursement.<sup>196</sup> As a matter of policy, OMHA often required parties' consent before performing statistical sampling.<sup>197</sup>

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, particularly given limited staff and large caseloads.<sup>198</sup> OMHA also had to address concerns of DOJ and CMS

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8 (2011), <http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/pim83co8.pdf> [<http://perma.cc/AX9D-JGZS>].

192. 931 F.2d 914 (D.C. Cir. 1991).

193. *Id.* at 923 (explaining that the court will apply *Chevron* deference and defer to the agency's interpretation).

194. *Id.* at 919 (citing *Mich. Dep't of Educ. v. U.S. Dep't of Educ.*, 875 F.2d 1196, 1204-06 (6th Cir. 1989) (approving the use of statistical sampling in vocational rehabilitation programs); *Ill. Physicians Union v. Miller*, 675 F.2d 151, 155 (7th Cir. 1982) (approving the use of statistical sampling in Medicaid)).

195. *In re Apogee Health Servs., Inc.*, No. 768 (Medicare Appeals Council Mar. 15, 1999) (approving the use of aggregation and other sampling techniques in appropriate cases).

196. Telephone Interview with Robert Fisher & Leslie B. Holt, *supra* note 188.

197. *Id.*

198. *Id.* Some providers expressed similar concerns. *E.g.*, Letter from Paul E. Prusakowski, President, Nat'l Ass'n for the Advancement of Orthotics and Prosthetics, et al. to Nancy Griswold, Chief Admin. Law Judge, Office of Medicare Hearings & Appeals 3-4 (Dec. 5, 2014), [http://www.oandp.org/assets/PDF/OP\\_Alliance\\_comment\\_ltr\\_OMHA-1401-NC\(D0574905\).pdf](http://www.oandp.org/assets/PDF/OP_Alliance_comment_ltr_OMHA-1401-NC(D0574905).pdf) [<http://perma.cc/H2ND-PNBQ>] (expressing the concern of some orthotists

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 currently assigned to an ALJ or filed within a three-month period in 2013, but not yet scheduled for a hearing.<sup>199</sup>

In order to identify claims appropriate for statistical sampling, OMHA used its own database to identify large numbers of appeals from the same provider.<sup>200</sup> 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.<sup>201</sup>

Most of the participants in the pilot program were providers of medical supplies and equipment. Notably, a single diabetic supplies proceeding accounted for 17,134 claims, dwarfing the other statistical trials, which only resolved caseloads of four hundred to six hundred cases at a time. Our interviewees suggested that these cases lend themselves to sampling because the claims involved are more similar to each other than are inpatient provider care claims, which exhibit greater individual variations.

Nine ALJs volunteered to adjudicate cases in the pilot program.<sup>202</sup> They agreed to participate while continuing to maintain their regular workload to avoid interference with the existing appeals process. Creating a specialized pool of ALJs allows OMHA to take advantage of their expertise in handling such matters. One of the ALJs in the pool is randomly selected for each statistical

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and prosthetists that the program “may divert OMHA’s resources away from deciding appeals not involved in the pilot”).

199. Office of Medicare Hearings & Appeals, *Statistical Sampling Pilot Program Fact Sheet*, U.S. DEP’T HEALTH & HUM. SERVS. 1-2 (June 27, 2014), [http://www.hhs.gov/sites/default/files/omha/OMHA%20Statistical%20Sampling/statistical\\_sampling\\_fact\\_sheet.pdf](http://www.hhs.gov/sites/default/files/omha/OMHA%20Statistical%20Sampling/statistical_sampling_fact_sheet.pdf) [http://perma.cc/JNB7-ZW6Q].

200. Telephone Interview with Amanda Axen, Program Operations Branch Chief, Program Evaluation & Policy Div., Office of Medicare Hearings & Appeals, Jason Green, Office of Medicare Hearings & Appeals & Anne Lloyd, Dir. of Field Operations, Office of Medicare Hearings & Appeals (July 20, 2015). 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. *Id.*

201. Telephone Interview with Cherise Neville, Settlement Conference Facilitation Program Coordinator, Office of Medicare Hearings & Appeals (Oct. 20, 2016).

202. *Id.*

sampling case.<sup>203</sup> OMHA is guided by CMS policies on statistical sampling.<sup>204</sup> 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.

Although appellants can request statistical sampling on their own, none has done so to date.<sup>205</sup> Some appellants have worried that aggregate proceedings in front of the wrong adjudicator or with the wrong methodology could jeopardize their day in court.<sup>206</sup> Others have worried that there was not enough information about the statistical sampling methodology that would be used in the SSI.<sup>207</sup> OMHA has attempted to address these concerns and plans to do more on this front as it expands the program.<sup>208</sup> Specifically, 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.

## 2. OMHA's Settlement Conference Facilitation Initiative

In addition to statistical sampling, in June 2014, OMHA also piloted an aggregate settlement program—the Settlement Conference Facilitation (SCF) Initiative.<sup>209</sup> Once again mindful of avoiding the creation of new backlogs, the pilot program was limited to groups of at least twenty appeals, or groups of less than twenty appeals comprising at least \$10,000 in the aggregate, filed in

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203. *Id.* This, of course, is in some tension with the typical random assignment of ALJs for OMHA appeals, as it creates a smaller pool from which an ALJ is drawn.

204. The policies are described in the MPIM. *Medicare Program Integrity Manual, Pub. 100-08, supra* note 191.

205. Telephone Interview with Amanda Axeen, Jason Green & Anne Lloyd, *supra* note 200.

206. *Id.*

207. *E.g.*, Letter from Raja Sekaran, Vice President & Assoc. Gen. Counsel – Regulatory, Dignity Health, to Nancy J. Griswold, Chief Admin. Law Judge, Office of Medicare Hearings & Appeals 4 (Dec. 5, 2014) (on file with authors) (expressing concerns with the lack of published “information about the relationship between CMS and the statistical experts used to develop the sampling methodology”).

208. 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. 2368, 114th Cong. (2015); *see also* S. REP. NO. 114-177 (2015) (discussing the AFIRM Act).

209. CMS has always had discretion to settle disputes with Medicare providers and suppliers, but the SCF Pilot represents an effort by OMHA to provide a formal framework for encouraging the settlement of large numbers of cases.

2013 for the “same” or sufficiently “similar” items or services.<sup>210</sup> OMHA takes a common sense approach to the meaning of “same” or “similar.” For example, all wheelchairs—whether electronic or manual—or all 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—even if stemming from the same illness—are not related and would not be the “same” or “similar.”<sup>211</sup>

Under the pilot program, OMHA facilitates a discussion between CMS and the appellant regarding settlement. OMHA devotes one attorney trained in facilitation working full time, along with four other trained facilitators working on a rotating basis. If the parties reach an agreement, OMHA dismisses the appeal. If no agreement is reached, the appeals return to their prior positions in the appeals queue.

The initial phase of the program resolved 2,400 appeals,<sup>212</sup> which equals the number of cases typically resolved by two ALJ teams working for one year.<sup>213</sup> Most of the settlements resolved around two hundred appeals. A few resolved five hundred to seven hundred appeals. Phase I of the SCF Pilot was staffed by the attorney trained in facilitation, a program analyst, a management assistant, and five facilitators.<sup>214</sup>

#### **IV. BENEFITS AND CHALLENGES OF AGGREGATE AGENCY ADJUDICATION**

Our case studies illustrate how aggregate agency adjudication can yield many of the same benefits as aggregation in federal court discussed in Section I.A. Like federal courts, each tribunal has used aggregate adjudication to pool

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210. Telephone Interview with Cherise Neville, *supra* note 201; Office of Medicare Hearings & Appeals, *Medicare Part B Administrative Law Judge (ALJ) Appeals*, U.S. DEP’T HEALTH & HUM. SERVS. (Aug. 10, 2016), <http://www.hhs.gov/about/agencies/omha/about/special-initiatives/settlement-conference-facilitation/medicare-part-b-alj-appeals/index.html> [<http://perma.cc/Z82P-HJN7>].

211. Telephone Interview with Cherise Neville, *supra* note 201.

212. 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 were not. One request to participate in the program was still pending at the time of our interviews. *Id.*

213. Each ALJ team is composed of four to six people, including the ALJ, attorneys, paralegals, and other staff assistants.

214. Telephone Interview with Cherise Neville, *supra* note 201.



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.<sup>215</sup> They have also sought more consistent outcomes in similar cases than is possible with case-by-case adjudications. Finally, aggregation has proved to be an important method to improve access to legal and expert assistance by parties with limited resources, allowing individuals to pursue claims that would otherwise be difficult on an individual basis.<sup>216</sup>

But aggregate agency adjudication also raises some of the same challenges and costs of aggregation in federal court discussed in Section I.A: (1) creating potential diseconomies of scale—inviting even more claims that stretch agencies' capacity to administer justice; (2) undermining the perceived legitimacy of the process and challenging due process; and (3) increasing the consequence of error. In other words, like many administrative systems, aggregate adjudication struggles to deal with many different constituencies feasibly, legitimately, and accurately.

Each program has responded to these concerns in various ways. They have cautiously piloted aggregate procedures to avoid replacing old backlogs with new ones. Where appropriate, they have relied on panels of adjudicators to reduce allegations of bias and have provided additional opportunities to assure individuals' voluntary participation 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 decision maker. This Part summarizes the benefits of aggregate agency adjudication and the ways that these agencies have attempted to respond to their challenges.

#### A. *Promoting Efficiency While Avoiding Diseconomies of Scale*

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,<sup>217</sup> where appellants continually file cases involving similar legal and factual issues.

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215. See 1 RUBENSTEIN ET AL., *supra* note 58, § 1.9 (“Class actions are particularly efficient when . . . the courts are flooded with repetitive claims involving common issues.”).

216. 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.” (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004))).

217. See *Veterans Disability Compensation: Forging a Path Forward: Hearing Before the S. Comm. on Veterans Affairs*, 111th Cong. 35 (2009) (statement of Michael P. Allen, Professor of Law,

When over five thousand parents claimed that a vaccine additive called thimerosal caused autism in children, the NVICP used a national Omnibus Autism Proceeding (OAP) to pool all the individual claims that raised the same highly contested scientific questions.<sup>218</sup> In the words of one special master, omnibus proceedings were “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.”<sup>219</sup> Similarly, although OMHA pilot programs are in their early stages and any conclusions must be tentative, they have already resolved thousands of similar cases, sometimes involving the same issue for the same beneficiary with only a different service date. Indeed, OMHA’s programs have been so successful that medical providers are urging OMHA to expand opportunities to aggregate and settle large numbers of claims.<sup>220</sup>

Nevertheless, as the agencies in our case studies adopted aggregate procedures, they confronted longstanding concerns with diseconomies of scale—creating more backlogs and inviting claims that were 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 they developed a formal program to use statistical evidence to resolve large groups of common claims commenced by a single provider or supplier.<sup>221</sup> AJs with the

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Stetson University) (“[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, *supra* note 77, at 9–10 (recommending the use of class actions by the CAVC to address system-wide problems in veterans’ cases).

218. *See* Cedillo v. Sec’y of Health & Human 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).

219. *Id.* at \*12.

220. *See, e.g.*, Letter from Mark D. Polston, Partner, King & Spalding, to Nancy Griswold, Chief Admin. Law Judge, Office of Medicare Hearings & Appeals (Dec. 5, 2014) (on file with author) (calling for expansion of settlement conference initiative for a wider range of claims beyond Medicare Part B); Letter from Manaj H. Shah, President, Med. Ass’n of Ga., to Nancy J. Griswold, Chief Admin. Law Judge, Office of Medicare Hearings & Appeals, (Dec. 5, 2014), <http://www.mag.org/sites/default/files/downloads/rac-omha-letter-120514.pdf> [<http://perma.cc/GHC5-JA5G>] (calling for an expansion of OMHA’s Statistical Sampling Initiative); Letter from Robert Sowslo, Chair of the Pub. Policy Comm., Am. Acad. of Home Care Med., to Nancy J. Griswold, Chief Admin. Law Judge, Office of Medicare Hearings & Appeals, (Dec. 5, 2014), [http://c.y.mcdn.com/sites/www.aahcm.org/resource/resmgr/Public\\_Policy/American\\_Academy\\_of\\_Home\\_Car.pdf](http://c.y.mcdn.com/sites/www.aahcm.org/resource/resmgr/Public_Policy/American_Academy_of_Home_Car.pdf) [<http://perma.cc/3WQ4-LX7T>] (observing that the SCF program “provides a more expedient and in some ways straightforward process for [certain providers]”).

221. Telephone Interview with Amanda Axen, Jason Green & Anne Lloyd, *supra* note 200.

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.<sup>222</sup> Even more informal aggregation, like the NVICP's Omnibus Proceedings, has required adjudicators to invest resources tracking and closing pending individual cases long after the court resolves common questions involving a particular vaccine.<sup>223</sup>

In each case, however, adjudicators have responded by using aggregate tools cautiously, through active case management; reliance on experienced counsel and special masters to avoid duplicative motions; and encouragement of settlement where appropriate. OMHA, for example, rolled out its pilot statistical sampling program for a very limited category of claims—those filed before 2013; actively identified appellants with large volumes of identical claims in its database; and proceeded on a voluntary basis with the consent of the parties.<sup>224</sup> As OMHA expands its mediation program, it has kept in mind and actively dealt with the risk of uncommon, unclear, and cherry-picked cases. First, OMHA only invites appellants with appeals appropriate for the SCF program based on the claims' similarity. Second, the claims appealed 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, OMHA requires settlement discussions to be comprehensive. In other words, requests for mediation must include all of the party's pending appeals for the same items or services that are eligible for SCF. If an appellant has fifty pending wheelchair appeals 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.<sup>225</sup> This prevents parties from

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222. Telephone Interview with Enechi Modu, David Norken & Erin Stilp, *supra* note 133.

223. 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."

224. See Telephone Interview with Amanda Axen, Jason Green & Anne Lloyd, *supra* note 200; Telephone Interview with Cherise Neville, *supra* note 201.

225. For example, if an individual appeal has at issue ten diagnostic tests and ten drugs/biologicals, an appellant may not request that the diagnostic tests go to SCF and the drugs/biologicals go to hearing. See Office of Medicare Hearings & Appeals, *Medicare Part B Administrative Law Judge (ALJ) Appeals*, U.S. DEP'T HEALTH & HUM. SERVS. (Aug. 10, 2016), <http://www.hhs.gov/about/agencies/omha/about/special-initiatives/settlement-conference-facilitation/medicare-part-b-alj-appeals/index.html> [http://perma.cc/W4V7-U98S].

submitting their weakest appeals to the settlement process and going to hearings with their strongest appeals.

NVICP special masters and EEOC AJs rely on steering committees of experienced lawyers to organize and manage common discovery. The NVICP special masters sometimes 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.<sup>226</sup> EEOC AJs exercise active judicial management to expedite cases for trial and, in many cases, settlement.<sup>227</sup>

Still, in some cases, an overly cautious approach can limit the full value of agency aggregation. For example, OMHA’s SSI is hindered in what it can achieve by both the limited pool of eligible claims and OMHA’s decision to require the parties’ affirmative consent to participate in the program.<sup>228</sup> At this point, not enough parties have been 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.

Thus, agencies considering aggregation must evaluate whether they hear a sufficiently large number of similar cases to warrant the potential costs. To do so, agencies need a good handle on the types of claims they receive and are likely to receive in the future. Detailed case management and tracking systems are particularly helpful in this regard, as demonstrated by OMHA’s use of its own database to identify candidates for its mediation program. In addition, agencies adopting aggregation need to utilize experienced adjudicators and leverage a pool of skilled counsel to manage complex cases. Finally, when the costs and benefits of aggregation are uncertain, agencies can pilot programs before scaling up.

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226. Telephone Interview with Robert Fisher & Leslie B. Holt, *supra* note 188.

227. Telephone Interview with Enechi Modu, David Norken & Erin Stilp, *supra* note 133.

228. 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* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 569 (1993) (evaluating how statistical adjudication may “work an acceptable compromise between outcome and process values”); 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 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) (arguing that due process creates constraints by requiring consent).

*B. Promoting Consistency While Ensuring the Accuracy of Agency Decisions*

Aggregate procedures can also provide uniform and consistent application of the law,<sup>229</sup> particularly in cases seeking indivisible remedies such as injunctive or declaratory relief. Absent a class action, a tribunal may never hear from plaintiffs with competing interests in the final outcome. The EEOC, for example, has long claimed its class action procedure was important to consistently resolve “policy or practice” claims of discrimination by federal employees.<sup>230</sup> The EEOC deems the process important in light of the volume of claims it processes each year and the potential for inconsistent judgments.<sup>231</sup> Agencies also may use class procedures to avoid subjecting defendants to impossibly conflicting demands.<sup>232</sup> OMHA adjudicators, for example, have observed that aggregate procedures have been vital to ensuring that hospitals and medical suppliers with hundreds of the same claims, sometimes for the same beneficiary, are reimbursed consistently.

Nevertheless, each case study also illustrates how aggregation puts pressure on the ability of adjudicators to achieve accurate decisions, especially when many cases are concentrated before the same judge. As noted, many appellants before OMHA worried about the accuracy of any final statistical extrapolation.<sup>233</sup> 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.<sup>234</sup> 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

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229. 1 RUBENSTEIN ET AL., *supra* note 58, § 1.10 (“[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.”).

230. See 29 C.F.R. § 1614.204 (2013).

231. See, e.g., Federal Sector Equal Employment Opportunity, 57 Fed. Reg. 12,634, 12,639 (Apr. 10, 1992) (to be codified at 29 C.F.R. pt. 1614) (describing inconsistent judgments that result in the absence of class actions).

232. See Marcus, *supra* note 61, at 830-31.

233. See, e.g., Letter from Robert W. Seligson, President, Physicians Advocacy Inst., Inc., to Nancy J. Griswold, Chief Admin. Law Judge, Office of Medicare Hearings & Appeals 5 (Dec. 5, 2014) (“[A]s currently implemented, the statistical sampling pilot fails to require important standards that would ensure that any sampling be conducted correctly.”), <http://www.ncmedsoc.org/wp-content/uploads/2015/01/PAIOMHA-Comment-Ltr-12052014.pdf> [<http://perma.cc/W5LU-S55B>].

234. Telephone Interview with Enechi Modu, David Norcken & Erin Stilp, *supra* note 133.

program; and yet, in proceedings where groups allege new theories of general causation for large numbers of vaccines, decision makers warned of the importance of getting the science right in a single adjudication.

The agencies have responded to these concerns by requiring sufficient similarity between aggregated claims and 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.<sup>235</sup> Special masters in the NVICP wait for cases to mature before grouping them, which limits the adverse impact of hasty decisions on other related claims; adjudicators also afford attorneys additional time to allow their experts to better develop and understand the relationship between a vaccine and a new disease.<sup>236</sup> 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.*<sup>237</sup>

Thus, agencies that award indivisible relief or large volumes of similar types of claims are particularly ripe candidates for aggregation. But agencies that more typically award damages tailored to widely varying circumstances of individual cases may have less need for aggregation. If choosing to aggregate, agencies should develop threshold rules and actuarial tools to identify common cases and develop the evidentiary record.

### C. Promoting Legal Access, Generating Information, and Enhancing Legitimacy

Finally, our case studies illustrate how aggregate proceedings can foster legal access, while pooling information about policies and patterns that otherwise might escape detection in individualized trials.<sup>238</sup> The EEOC, for example, observed that 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.”<sup>239</sup> The class action procedure en-

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235. Telephone Interview with Cherise Neville, *supra* note 201.

236. Telephone Interview with Robert Fisher & Leslie B. Holt, *supra* note 188.

237. 509 U.S. 579 (1993); Telephone Interview with Enechi Modu, David Norken & Erin Stilp, *supra* note 133.

238. See ALI REPORT, *supra* note 36, § 1.04 (describing the central “objectives of aggregate proceedings” as “enabling claimants to voice their concerns and facilitating the rendition of further relief that protects the rights of affected persons”).

239. Federal Sector Equal Employment Opportunity, 64 Fed. Reg. 37,644, 37,651 (July 12, 1999) (to be codified at 29 C.F.R. pt. 1614).

ables counsel to pool information about employers' policies and allows EEOC AJs to 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 and leads 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 without accommodation – the State Department was alerted to a systematic problem in its hiring practices.<sup>240</sup>

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.<sup>241</sup> In one of the NVICP's first omnibus proceedings, the parties pooled common scientific evidence on 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 the focus of HHS or Congress.<sup>242</sup> 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.<sup>243</sup>

OMHA's statistical sampling initiative – though still in an early stage – has the potential to make it easier for the Secretary of HHS to coordinate the work of OMHA with other parts of HHS. Currently, OMHA may approve a payment on appeal from a denial of payment by the Centers for Medicare and Medicaid Services (CMS), while the next day CMS may deny the same provider's claim on behalf of the same beneficiary for the same medical supplies 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

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240. *U.S. Equal Employment Opportunity Commission Affirms Class Action To Open State Department to Disabled Foreign Service Officers*, MARKETWATCH (June 13, 2014, 2:31 PM), <http://www.marketwatch.com/story/us-equal-employment-opportunity-commission-affirms-class-action-to-open-state-department-to-disabled-foreign-service-officers-2014-06-13> [<http://perma.cc/G79P-WG3Q>].

241. *See, e.g., Cedillo v. Sec'y of Health & Human 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).

242. *In re Ahern*, No. 90-1435V, 1993 WL 179430, at \*3 (Fed. Cl. Jan. 11, 1993).

243. *See* National Vaccine Injury Compensation Program: Revisions and Additions to the Vaccine Injury Table – II, 62 Fed. Reg. 7685, 7688 (Feb. 20, 1997) (to be codified at 42 C.F.R. pt. 100); National Vaccine Injury Compensation Program Revision of the Vaccine Injury Table, 60 Fed. Reg. 7678, 7694 (Feb. 8, 1995) (to be codified at 42 C.F.R. pt. 100).

provides agency heads with 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.

OMHA's initiatives may also increase the ability of the political branches to ensure agency accountability.<sup>244</sup> Policymakers are rarely concerned with the outcomes of individual adjudications beyond the provision of constituent services by individual representatives.<sup>245</sup> Aggregated cases, however, like Medicare's recent billion-dollar settlement with over 1,900 hospitals,<sup>246</sup> have generated significant interest in Congress. 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.

Nevertheless, adjudicators and staff highlighted concerns with legitimacy raised by aggregate proceedings. The model for administrative adjudication typically imagines individualized hearings where claimants enjoy their own day in court before a neutral decision maker. 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.<sup>247</sup> 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.<sup>248</sup> Even omnibus proceedings

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

245. See, e.g., *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 927 & n.3 (1983) (noting Congress's lack of attention when reviewing individual administrative proceedings).

246. When 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 sixty-eight percent 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. See Reed Abelson, *Medicare Will Settle Short-Term Care Bills*, N.Y. TIMES (Aug. 29, 2014), <http://www.nytimes.com/2014/08/30/business/medicare-will-settle-appeals-of-short-term-care-bills.html> [<http://perma.cc/N85L-RB7E>]; *Inpatient Hospital Reviews*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Oct. 18, 2016), <http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Medical-Review/InpatientHospitalReviews.html> [<http://perma.cc/E78H-44DS>].

247. Telephone Interview with Enechi Modu, David Norken & Erin Stilp, *supra* note 133.

248. See *supra* text accompanying notes 205-206; see also, e.g., Andrew B. Wachler et al., *Medicare Appeals Backlog Gives Rise to Alternative Methods for Health Care Providers To Resolve Denied Claims*, WACHLER & ASSOCIATES PC 5, [http://www.wachler.com/files/ahla\\_article\\_-\\_medicare\\_appeals\\_backlog\\_giving\\_rise\\_to\\_alternative\\_methods\\_for\\_health\\_care\\_providers\\_to](http://www.wachler.com/files/ahla_article_-_medicare_appeals_backlog_giving_rise_to_alternative_methods_for_health_care_providers_to)



raise interesting questions about the legitimacy of using an adjudication process to settle complex scientific questions. Some plaintiffs in the OAP were anxious about commencing cases together; members of the public health community “f[ound] it unsettling that the safety of vaccines must be put on trial before three ‘special masters’ in a vaccine court.”<sup>249</sup>

Each of these systems have responded to these concerns by diversifying decision-making 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 OAP to allay concerns about bias. Similarly, as OMHA expands its statistical sampling initiative, it will also consider permitting multiple adjudicators to hear different samples of claims.<sup>250</sup> For example, instead of a single ALJ hearing a sample of 100 cases, ten ALJs might each hear ten cases from the sample.<sup>251</sup> Spreading the sample among more than one randomly se-

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\_resolve\_denied\_claims.pdf [http://perma.cc/D9E6-T7VT] (“Because various ALJs may reach different decisions on a particular case, to agree to the application of one ALJ’s decision over a large volume of claims creates a significant risk for the provider.”).

249. Gilbert Ross, *Science Is Not a Democracy*, WASH. TIMES (June 14, 2007), <http://www.washingtontimes.com/news/2007/jun/14/20070614-085519-8098r> [http://perma.cc/8Z9S-B3CX]. Ross added: “[T]he truth about scientific and medical facts is not, ultimately, something that can be decided either by the whims of judges or the will of the masses.” *Id.*; see also *Statement # 11: Hearing Procedures for the Resolution of Scientific Issues*, ADMIN. CONF. U.S. (Dec. 13, 1985), <http://www.acus.gov/sites/default/files/documents/Statement%20%2311--Hearing%20Procedures%20for%20Scientific%20Issues.pdf> [http://perma.cc/LBL9-KCGM] (recommending hearing procedures for agencies to evaluate scientific studies); Paul Offit, *Inoculated Against Facts*, N.Y. TIMES (Mar. 31, 2008), <http://www.nytimes.com/2008/03/31/opinion/31offit.html> [http://perma.cc/992K-UZ9P] (“The vaccine court should return to the preponderance-of-evidence standard. But much damage has already been done . . . . Parents may now worry about vaccinating their children, more autism research money may be steered toward vaccines and away from more promising leads and, if similar awards are made in state courts, pharmaceutical companies may abandon vaccines for American children.”). Other researchers, however, found that the ability to hear common cases together fostered a “comparatively neutral exhaustive examination of the available evidence.” 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, 2020 (2011).
250. Telephone Interview with Amanda Axeen, Jason Green & Anne Lloyd, *supra* note 200.
251. Many Medicare claim appellants are repeat players who have 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. Relying on multiple adjudicators, however, may help to allay appellants’ concern that statistical sampling before a single ALJ risks a bad decision being extrapolated across the entire universe of claims.

lected 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.

Finally, the EEOC relies on many rules adopted from the Federal Rules of Civil Procedure to increase legitimacy and participation. Among other procedures, adjudicators screen class counsel to ensure they adequately represent class members; hold “fairness hearings” where class members can voice their concerns with any proposed resolution or settlement; and, in a departure from the federal rules, require mini-trials to test individual claims and defenses remaining in adjudications involving damages.<sup>252</sup>

Agencies adopting aggregation mechanisms must ensure that aggregate proceedings are transparent and legitimate. To do so, they should adopt rules to ensure diverse, independent decision making, police potential conflicts within groups, provide opportunities for parties to be heard or in some cases opt out from aggregate proceedings when they believe their interests would be served best by proceeding on their own. Such rules may do more than just improve fairness. They may enhance other forms of agency policymaking, such as rulemaking and enforcement. We take up these issues in more detail in the next Part.

## V. THE FORMS AND LIMITS OF AGENCY ADJUDICATION

Notwithstanding the challenges class actions and other complex procedures pose, the EEOC, NVICP, and OMHA demonstrate the potential of aggregation to improve agency adjudication in a variety of ways. But our study also yields broader lessons about policymaking, public enforcement, and adjudication itself. We discuss each in turn.

### A. *Aggregation Complements Rulemaking*

First, our study demonstrates how group litigation techniques offer agencies another form of decision making. Many scholars argue that Congress or agency policymakers can resolve large groups of claims more competently and openly through prospective rulemaking. However, our case studies illustrate that rulemaking does not necessarily eliminate the common issues of law and fact that must be repeatedly resolved in case-by-case adjudication.

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<sup>252</sup>. Telephone Interview with Enechi Modu, David Norken & Erin Stilp, *supra* note 133.

Scholars have long contended that Congress or administrative policymakers promote efficiency by adopting prospective rules in a legislative process.<sup>253</sup> For example, the question of whether vaccines cause autism is a general fact about the world that could certainly have formed the basis for legislation. If vaccines are dangerous and should be regulated differently, or should or should not be mandatory, that is something Congress could address through legislation. In fact, Congress has created specialized courts and compensation programs to compensate employees suffering from radiation exposure, occupational disorders, and black lung disease.<sup>254</sup>

Even inside many agencies, policymakers can resolve common questions by other means, most prominently through rulemaking. Many, if not most, agencies make prospective rules to “resolve certain issues of general applicability.”<sup>255</sup> Consider the SSA, which is “probably the largest adjudicative agency in the western world.”<sup>256</sup> Applicants for Social Security disability benefits must establish not only that they are unable to do their previous work but also that they are unable, considering their age, education, and work experience, to engage in any other kind of available gainful employment.<sup>257</sup> For many years, ALJs reviewing disputed disability claims relied on the testimony of vocational experts to determine the types and number of jobs in the national economy that could be performed by the claimant, which led to criticisms of “inconsistent treatment of similarly situated claimants.”<sup>258</sup> Consequently, the Secretary of HHS

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253. *E.g.*, JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 455 (6th ed. 2009) (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”); Nagareda, *The Preexistence Principle*, *supra* note 17, at 154–55 (describing how efficiency goals led to the creation of the September 11th Victim Compensation Fund); Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 *FLA. ST. U. L. REV.* 529, 532, 537 (2005) (comparing the efficiencies of rulemaking versus adjudication).

254. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-628T, *FEDERAL COMPENSATION PROGRAMS: PERSPECTIVES ON FOUR PROGRAMS FOR INDIVIDUALS INJURED BY EXPOSURE TO HARMFUL SUBSTANCES* (2008) (describing similar goals in the Federal Radiation Exposure Compensation Program, the Energy Employees Occupational Illness Compensation Program, and the Black Lung Program).

255. *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 612 (1991); see also M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 *U. CHI. L. REV.* 1383, 1386–90 (2004) (describing a range of policymaking tools that are generally available to an agency).

256. *Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983) (quoting JERRY L. MASHAW ET AL., *SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM* xi (1978)).

257. 42 U.S.C. § 423(d)(2)(A) (2012).

258. *Campbell*, 461 U.S. at 461.

created medical-vocational guidelines to reduce ALJ reliance upon the testimony of vocational experts.<sup>259</sup> The Supreme Court upheld the guidelines against a legal challenge, explaining that “the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration.”<sup>260</sup>

Rulemaking can thus uniformly and definitively resolve common issues of law or fact that arise consistently in adjudications, relieving adjudicators of the burden of repeatedly addressing the same issues in individual cases.<sup>261</sup> However, our case studies illustrate that shifting the resolution of cases from Article III courts to administrative tribunals with rulemaking power will not necessarily eliminate the need to aggregate common issues of law and fact that repeatedly arise in case-by-case adjudication, nor the need for parties to harness expertise and skilled counsel to represent them in complex cases.

First, rulemaking has not proved to be an effective tool for resolving all common issues of law or fact in agency adjudications. The law generally disfavors retroactive rulemaking.<sup>262</sup> Therefore, it is less effective for addressing administrative backlogs or high volumes of filed claims such as those faced by OMHA or the NVICP.

Second, just as legislation leaves gaps for agencies to fill with rules, rules leave gaps that agency adjudicators must fill. 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.”<sup>263</sup> To return to the example of the SSA’s medical-vocational guidelines, those guidelines do not address claimants with mental or psychiatric conditions.<sup>264</sup> 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 in-

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259. *Id.*

260. *Id.* at 467.

261. Sant’Ambrogio & Zimmerman, *supra* note 15, at 2017.

262. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“[R]ulemaking 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.”).

263. *SEC v. Chenery*, 332 U.S. 194, 202 (1947); see also Adam Candeub, *Network Neutrality and Network Discrimination*, 69 ADMIN. L. REV. (forthcoming 2017) (discussing some of the drawbacks of the FCC implementing net neutrality through rulemaking).

264. 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).

terpreting Title VII, is frequently confronted with new issues raising discrete civil rights claims by federal employees.<sup>265</sup>

Third, administrative program beneficiaries impacted most significantly by agency adjudications often have the least access to the rulemaking process.<sup>266</sup> 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,<sup>267</sup> 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.”<sup>268</sup> Federal employees bring to light previously unnoticed civil rights violations, 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.

Some may worry that aggregate decisions give administrative judges policymaking power beyond their authority or capacity, or even allow agencies to make an end-run around costly rulemaking procedures.<sup>269</sup> As we have argued elsewhere, however, these concerns overlook the fact that most agency heads have final say over the rules adopted in adjudicatory proceedings.<sup>270</sup> Moreover, the Supreme Court has long given agencies substantial discretion to choose the

265. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (“Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title.”), *superseded by statute on other grounds as recognized by Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 89 (1983).

266. Sant’Ambrogio & Zimmerman, *supra* note 15, at 2019–20.

267. See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53–65 (7th prt. 1977) (explaining how small, organized groups are usually more effective than larger, diffuse groups in shaping policy); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684–85 (1975) (explaining how small groups with large stakes in an agency’s decision can overwhelm larger groups’ abilities to influence agency action).

268. Sant’Ambrogio & Zimmerman, *supra* note 15, at 2022.

269. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995). *But see* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1421–22 (2012) (arguing that ossification is not a serious or widespread problem). Of course, if one believes that an agency is overly reluctant to engage in rulemaking, an “end-run” around the rulemaking process may be precisely what the administrative program needs.

270. Sant’Ambrogio & Zimmerman, *supra* note 15, at 2064–65; *see also* *NLRB v. Universal Camera, Corp.*, 190 F.2d 429, 432 (2d Cir. 1951) (Frank, J., concurring) (“The Board . . . is not bound by the examiner’s ‘secondary inferences,’ or ‘derivative inferences,’ i.e., facts to which no witness orally testified but which the examiner inferred . . .”); *infra* Section V.B (discussing agency controls over adjudicatory procedures).

best procedural format for decisions that affect large groups of people.<sup>271</sup> To that end, at least one commentator recommends agencies use adjudication when rulemaking proves infeasible or impractical.<sup>272</sup> Finally, the aggregate proceedings we reviewed often provided more procedural safeguards than informal rulemaking, which only requires notice and an opportunity to comment.<sup>273</sup> There is no reason to fear the loss of the minimal procedural requirements of informal rulemaking so long as class members and other interested parties can be heard in aggregate proceedings.

In sum, an agency with rulemaking power may still find useful the tool of aggregation in certain circumstances. Even agency adjudicators may need flexibility, in the trenches, to aggregate “all the way down.”<sup>274</sup> In particular, agencies may prefer aggregate adjudication to rulemaking when the relief sought (1) is retroactive, (2) responds to backlogs of already filed claims, and (3) involves discrete problems, and when parties’ concerns may not be easily heard or represented by sophisticated representatives or counsel.

### *B. Aggregation as an Enforcement Tool for Agencies*

Second, our study found that agencies have generally avoided using aggregation to accomplish what the Supreme Court once called “the policy at the very core of the class action” – deterring misconduct by enabling claims where the damages in each individual case are too small to justify the costs of litigation.<sup>275</sup>

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271. See, e.g., *Perez v. Mortg. Brokers Ass’n*, 135 S. Ct. 1199, 1207 (2015); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 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.”).

272. See, e.g., Arthur Earl Bonfield, *State Administrative Policy Formulation and the Choice of Law-making Methodology*, 42 ADMIN. L. REV. 121 (1990); see also *supra* note 269 and accompanying text (suggesting how aggregation may spur or provide a substitute for rulemaking).

273. 5 U.S.C. § 553 (2012).

274. Sergio J. Campos, *Class Actions All the Way Down*, 113 COLUM. L. REV. SIDEBAR 20 (2013).

275. 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.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 388, 344 (1997))); *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.”); Kalven & Rosenfield, *supra* note 44.

OMHA and the NVICP generally aggregated cases in order to *resolve* existing claims, not to *enable* more claims. To be sure, the NVICP's omnibus proceedings and OMHA's statistical sampling initiative make it easier to recover small dollar claims.<sup>276</sup> Nevertheless, the NVICP developed its omnibus proceedings in response to an influx of arthritis and autism cases; OMHA developed its pilot programs to address an existential crisis created by its mounting caseload, and was careful to roll them out slowly in order to avoid creating new backlogs. Only the EEOC explicitly uses class action to encourage suits to enforce federal anti-discrimination policies.

More importantly, in all three case studies aggregation is being used to group claims against the federal government. Agencies also adjudicate disputes between private parties. But with the exception of the NLRB<sup>277</sup> and the Department of Education,<sup>278</sup> we have not seen agencies use aggregation in the adjudication of disputes between non-governmental parties. In fact, both the CFTC and the FCC explicitly rejected the use of agency class actions in such contexts.<sup>279</sup>

Agencies' reluctance to use class actions in this way seems to reflect a broader concern about giving private parties control over how the law is enforced.<sup>280</sup> Commentators both praise and criticize aggregate litigation, particularly class actions, for enabling private attorneys to sue for mass harm much

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276. See *supra* note 166 and accompanying text.

277. See *supra* note 112 and accompanying text.

278. Some commentators argued that the Department of Education's "group borrower" process violated Article III of the Constitution by adjudicating breach of contract or other misrepresentation claims between students and schools. Such determinations are not matters of public right, but are instead matters "of private right, that is, of the liability of one individual to another under the law as defined," which cannot be delegated outside the judiciary. *Stern v. Marshall*, 564 U.S. 462, 489 (2011) (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). The Department of Education responded by emphasizing that its hearing process involved "public rights" claims between student borrowers and the government. But "[e]ven if these common law rights of the borrower and the school were to be considered simply private rights, Congress could properly consign their adjudication to the Department . . ." Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926 (Nov. 1, 2016) (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986)).

279. See *supra* notes 104-108 and accompanying text.

280. Agencies enjoy substantial discretion over their enforcement decisions, and it is a powerful way in which administrations implement policy. See Michael Sant'Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 368-70 (2014).

like “private Attorney Generals [sic].”<sup>281</sup> Several scholars have pointed out agencies’ concern that class actions or other forms of aggregate litigation will encourage private attorneys to bring cases that would upset an agency’s own carefully calibrated enforcement regime.<sup>282</sup> As noted above, the FCC rejected a proposal to hear class actions in its own adjudications out of a fear that it would “needlessly divert” the resources of its lone ALJ to adjudicating extremely “fact-intensive” and “complex” cases.<sup>283</sup> The CFTC similarly rejected the use of class actions in the adjudication of broker-dealer disputes due to fears of burdening its adjudicators.<sup>284</sup> And even after the Department of Education adopted an opt-out class action proceeding to resolve common claims by thousands of student borrowers, it emphasized that only designated Department officials could commence the class proceeding. In so doing, the Department of Education hoped to avoid creating a “cottage industry” of opportunistic attorneys attempting to capitalize on victimized students and unleash a torrent of frivolous lawsuits.<sup>285</sup> In some ways, the Department’s procedure resembles rules adopted in many European countries, which similarly give public agencies near-exclusive control over class actions in order to avoid recreating America’s infamous litigation culture.<sup>286</sup>

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281. *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated*, 320 U.S. 707 (1943); see John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); William B. Rubenstein, *On What a “Private Attorney General” Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2148 (2004) (identifying critiques against private attorney general actions where class action lawyers supplement public enforcement).

282. *E.g.*, David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 630-41 (2013); Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission’s Authority*, 107 HARV. L. REV. 961, 968-71 (1994); Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 569-82 (2016); Richard J. Pierce, Jr., *Agency Authority To Define the Scope of Private Rights of Action*, 48 ADMIN. L. REV. 1, 7-10 (1996); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 95 (2005). The Court has recognized that state enforcers can undermine federal enforcers, even when they seek to help. See *Arizona v. United States*, 132 S. Ct. 2492, 2502-03 (2012).

283. See *supra* text accompanying notes 104-105.

284. See *supra* notes 107-108 and accompanying text.

285. 81 Fed. Reg. 75,926, 75,928 (Nov. 1, 2016); see *id.* (“[B]y providing that only a designated Department official may present group borrower claims in the group processes . . . , the Department believes that the potential for frivolous suits in the borrower defense process will be limited.”).

286. See John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 344-46 (2010); Deborah H. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 307-08 (2011); Christopher Hodges, *What Are People Trying To Do in Resolving Mass Issues, How Is It Going, and*



Agencies might not just fear that aggregation will spur more frivolous litigation; they may also worry about the *good cases*. First, some argue that zealous private attorneys general may bring legitimate cases that agencies would not pursue in the exercise of their prosecutorial discretion.<sup>287</sup> An agency might dispute “the notion that all laws warrant enforcement to the letter in all instances,”<sup>288</sup> particularly when doing so leads to unnecessarily harsh punishment or undermines important regulatory goals. Second, in some cases, private attorneys general may advance innovative legal theories that conflict with the way the agency interprets the law.<sup>289</sup> Third, private attorneys may waste resources through duplicative enforcement.<sup>290</sup> Finally, there is the “who the heck are you” critique<sup>291</sup>—the perceived illegitimacy of allowing a few plaintiffs, or their attorneys, to usurp the traditional role of public enforcers in their own proceedings. As Richard Nagareda once observed, “The question here is: if 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?”<sup>292</sup>

But such fears may ignore important benefits of aggregation, while exaggerating their costs, particularly in the context of agency adjudication. First, *enabling* group litigation may help *resolve* cases more efficiently in the long run. As the Vaccine Court experience illustrated, aggregation can attract the support of skilled counsel and medical experts in early stages of the litigation, helping

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*Where Are We Headed?*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 330, 341 (2009); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 192-97 (2009).

287. See Engstrom, *supra* note 282, at 630-34; Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive To Use the Legal System*, 26 J. LEGAL STUD. 575, 578 (1997) (noting that private enforcers will litigate whenever their expected return exceeds the costs of litigation, regardless of the social benefits of the lawsuit).

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

289. Engstrom, *supra* note 282, at 637-41.

290. See John H. Beisner et al., *Class Action “Cops”: Public Servants or Private Entrepreneurs*, 57 STAN. L. REV. 1441, 1453-54 (2005); Engstrom, *supra* note 282, at 634-37.

291. Myriam Gilles, *Can John Coffee Rescue the Private Attorney General? Lessons from the Credit Card Wars*, 83 U. CHI. L. REV. 1001, 1008 (2016) (reviewing JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* (2015)); see also Beisner et al., *supra* note 290, at 1455 (“[W]hen class action lawyers file lawsuits state officials have not filed . . . [they] perform the antidemocratic function of usurping the role traditionally entrusted to expert regulatory agencies . . .”).

292. Nagareda, *The Preexistence Principle*, *supra* note 17288, at 605.

resolve both large and small claims.<sup>293</sup> Second, aggregation may save cash-strapped government enforcers money by encouraging private parties to police misconduct when they bring claims on their own. Agencies have long supported class actions in federal court—a private complement to otherwise overburdened government actors unable to respond to fraudulent investment schemes,<sup>294</sup> unconscionable consumer contracts,<sup>295</sup> and predatory for-profit colleges.<sup>296</sup> Ensuring aggregate adjudication in agencies may become even more important as judges threaten to shut down federal lawsuits under doctrines of Article III standing, primary jurisdiction, or other theories that do not apply to federal agencies.<sup>297</sup>

Moreover, in many cases, aggregate agency adjudication is less threatening to agency control over enforcement than private class actions in federal court. Agencies enjoy substantial authority to regulate private attorneys and control litigation costs. Unlike in federal court, the agency’s political appointees control an agency’s final interpretations of law.<sup>298</sup> The head of an agency may interpret the law without regard to the decision below and may even overturn the ALJ’s

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293. See *supra* Section III.B.

294. E.g., *Report Pursuant to Section 308(C) of the Sarbanes Oxley Act of 2002*, U.S. SEC. & EXCHANGE COMMISSION 20 (2003), <http://www.sec.gov/news/studies/sox308creport.pdf> [<http://perma.cc/YX7D-FJXB>] (describing the need for private litigation to complement Securities and Exchange Commission efforts at enforcement and compensation).

295. E.g., *Arbitration Agreements*, 80 Fed. Reg. 32,830, 32,855 (May 24, 2016) (“[P]ublic enforcement does not obviate the need for a private class action mechanism.”).

296. E.g., *Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program*, 81 Fed. Reg. 39,330, 39,383 (June 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.”).

297. For example, a claim that plaintiffs lacked standing to commence a class action under the Telephone Consumer Protection Act after the defendants “picked off” the lead plaintiff by offering her a full settlement, *see Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016); *id.* at 683 (Roberts, C.J., dissenting) (stating that the Court would “leave[] that question for another day”), would not prevent the FCC from hearing the same class action in its own proceedings, *see* 47 U.S.C. § 207 (2012) (permitting persons damaged by common carriers to file a complaint with the FCC or in federal district court). Unlike federal courts, which may only hear a “case or controversy” under Article III of the Constitution, no similar restrictions exist for agency adjudications.

298. See, e.g., *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865 (1984) (“In contrast [to courts], an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”).

findings of fact under certain circumstances.<sup>299</sup> Thus, agencies may have more power to stop plaintiffs from advancing unwanted legal theories or duplicative cases in their own proceedings.

An agency's control over how the law is interpreted cannot, of course, prevent plaintiffs from bringing what are in fact meritorious claims, even when agency enforcers judge them as unnecessary and possibly even counterproductive.<sup>300</sup> However, this has not been a concern of the EEOC, which cedes significant control over enforcement to the federal employees who prosecute class actions before EEOC adjudicators. Moreover, both the NVICP and OMHA have been able to adjudicate even low-dollar claims against the federal government without jeopardizing the public treasury.

Finally, unlike courts, agencies can tweak procedural rules to better accomplish their specific policy objectives without running afoul of judicial constraints like the Rules Enabling Act. Thus, when deciding whether to aggregate, administrative judges could consider the consistency of aggregation with the agency's enforcement priorities. The adjudicator could hear from the agency's enforcement arm on the question – if the agency was not already a party to the proceeding – or the agency could craft rules requiring the enforcement office's assent to any formal aggregation. If the adjudicator or enforcement officials determined that aggregation was not in the interest of the agency's enforcement goals, the members of the proposed class would have to proceed on a case-by-case basis.

The Department of Education has proposed something like this for individuals seeking debt relief from student loans under federal law. The Secretary of Education, through a recently created Student Aid Enforcement Unit, will decide whether to initiate aggregated proceedings for groups of borrowers based on the existence of common facts or claims. The Secretary's Notice of Proposed Rulemaking states that in addition to commonality, the Secretary will consider such enforcement concerns as “the promotion of compliance by the school or other title IV, [Higher Education Act] program participants.”<sup>301</sup> The Department's proposal demonstrates how agencies can craft their procedures to

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299. See Sant'Ambrogio & Zimmerman, *supra* note 15, at 2064–65.

300. Shavell, *supra* note 287, at 578 (observing that private enforcers will litigate whenever their expected return exceeds the costs of litigation, regardless of the social benefits of the lawsuit).

301. 81 Fed. Reg. at 39,347. The Notice of Proposed Rulemaking goes on to state that “the Secretary is best positioned to make a determination as to whether a group process is appropriate since the Secretary is likely to have the most information regarding the circumstances that warrant use of a group process.” *Id.* at 39,348.

avoid ceding control over their enforcement priorities to private attorneys general.<sup>302</sup>

Scholars have long examined the rise of private attorneys general and the relationship between public and private enforcement in federal and state courts.<sup>303</sup> Our study illustrates that the use of private attorneys general in agency adjudications bears further examination due to agencies' distinct institutional capacities. Federal agencies have only begun to explore the forms and limits of aggregation in their adjudicatory proceedings.

### *C. Protecting the Legitimacy of Adjudication Through Active Management and Bargaining*

Both of the preceding concerns may reflect an even more fundamental anxiety with aggregate agency adjudication: is it legitimate? Prominent legal theorists have long argued that adjudication cannot legitimately address sprawling, interconnected claims among large groups of people.<sup>304</sup> Similarly, the Supreme Court has barred federal courts from aggregating mass tort claims because they “defy” judicial resolution—calling on Congress to establish a “nationwide administrative claims processing regime [which] would provide the most secure, fair, and efficient means of compensating victims.”<sup>305</sup> And yet, our study of similar “administrative claims processing regimes” supports a different conclusion—that far from pushing the limits of adjudication, aggregate procedures form an integral part of the adjudication process.

Professor Lon Fuller long ago famously defined the “‘essence’ of adjudication” as the right of affected parties to participate in the proceeding by “pre-

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302. In the interest of disclosure, the authors have encouraged the Department of Education to permit student loan borrowers to petition for aggregated proceedings involving group claims. Letter from Michael Sant’Ambrogio & Adam Zimmerman to Jean-Didier Gaina, U.S. Dep’t of Educ. (Aug. 1, 2016) (on file with the Department of Education, docket number ED-2015-OPE-0103).

303. See, e.g., *supra* notes 281-282 and accompanying text; see also Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 14 (1974) (arguing for “specialist enforcement firms” to pursue enforcement and victim compensation in a free-market system).

304. E.g., Fuller, *supra* note 19. There are also broader attacks on the legitimacy of adjudication by administrative agencies that are beyond the scope of this article. See, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014). Concerns with the displacement of courts by federal agencies have a long history in the United States. See Noga Morag-Levine, *The History of Precaution*, 62 AM. J. COMP. L. 1095, 1116 (2014).

305. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997).

senting proofs and reasoned arguments” to the decision maker.<sup>306</sup> He suggested that adjudication was not well suited for what he described as “polycentric” problems involving large groups of people, where any one decision could have countless, unforeseeable consequences on others.<sup>307</sup> Such disputes, in his words, were like “a spider web,” in which “[a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole.”<sup>308</sup> For example, when the U.S. government regulated prices and wages during World War II,<sup>309</sup> no adjudication could have “take[n] into account the complex repercussions that may [have] result[ed] from any change in prices or wages.”<sup>310</sup> A rise in the price of aluminum could have ripple effects on the price of steel, plastic, wood, or other materials. Large, interdependent cases were better handled outside the courts, through private bargaining or by elected officials.

Scholars and judges have diverged from Fuller’s analysis by focusing on the many ways in which judges actively manage and oversee fluid forms of relief, like structural reform efforts.<sup>311</sup> However, there is no denying that Fuller’s framework has deeply influenced the way we think about when courts, Congress, or private parties may legitimately resolve disputes.

The same thinking often animates criticism of class actions in federal court. In *Amchem Products, Inc. v. Windsor*,<sup>312</sup> for example, the Supreme 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. According to the Court, settlement payouts to people already suffering from asbestos-related injuries “tugs against the interest” of those exposed plaintiffs

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306. Fuller, *supra* note 19, at 364-65; see LON L. FULLER, THE PRINCIPLES OF SOCIAL ORDER 86-124 (Kenneth I. Winston ed., 1981); see also LON L. FULLER, THE PROBLEMS OF JURISPRUDENCE 705-08 (temp. ed. 1949) (describing adjudication as a just decision-making process by a neutral arbiter after hearing the opposing parties). Fuller is frequently associated with this traditional model of adjudication. See, e.g., Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 39 (1979); Gifford, *supra* note 19, at 1154. But see Robert G. Bone, *Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273 (1995) (critiquing this view of Fuller’s work).

307. Fuller, *supra* note 19, at 371.

308. *Id.* at 395.

309. *Id.* at 400.

310. *Id.* at 394.

311. E.g., 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) (noting that trial judges can take on the role of “a policy planner and manager”).

312. 521 U.S. 591 (1997).

who had not yet manifested any injury.<sup>313</sup> Accordingly, the Court found that the global compromise lacked “structural assurance of fair and adequate representation for the diverse groups and individuals affected.”<sup>314</sup> One can almost hear the echo of the “pull” on Fuller’s spider web in the “tugs” of Justice Ginsburg’s opinion.

This framework for defining the appropriate roles of courts and legislative bodies also took hold inside administrative agencies.<sup>315</sup> Notably, Fuller himself saved his most significant criticism for adjudication inside the administrative state. “[H]owever inappropriate” it may be, said Fuller, “[i]f 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.”<sup>316</sup>

Reflecting these concerns, the APA provides distinct sets of rules and procedures for “adjudication” and agencies’ broader policymaking powers using rulemaking and enforcement.<sup>317</sup> Adjudicatory decisions are rendered after a hearing on the record conducted by neutral adjudicators insulated from agency policymakers, enforcement officers, and even the President. Policymakers often use rulemaking, by contrast, to address polycentric problems; they may hold meetings and solicit comments from the general public, informally talk to parties, officials, and others without notifying other interested parties, and form distinct views about policies and problems.

But this narrow definition of adjudication may perversely threaten the legitimacy of adjudicators who, in case-by-case adjudication, lack tools to resolve critical backlogs of similar claims consistently, efficiently, and accurately. Our study illustrates that even as cases move from the judiciary to administrative agencies, adjudicators may still need to engage in the kind of bargaining and active case management that Fuller viewed as inconsistent with adjudication.

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313. *Id.* at 626.

314. *Id.* at 626-27; *see also* *Gen. Tel. Co. of the Nw., Inc. v. Equal Emp’t Opportunity Comm’n*, 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.”).

315. Lumen N. Mulligan & Glen Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1206-12 (2013) (describing the historical shift from adjudication to rulemaking as the primary method by which agencies implement policy).

316. Fuller, *supra* note 19, at 400.

317. George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1580-81 (1996).

Without the ability to consolidate and aggregate cases, rely on steering committees, sub-class interest groups, and turn to statistical consultants, adjudicators cannot efficiently hear and consistently resolve large groups of cases within already aggregated systems. Far from being inconsistent with adjudication, 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 “presenting proofs and reasoned arguments.”<sup>318</sup>

Consider the NVICP’s no-fault alternative to federal court for vaccine injuries. Congress created the very administrative process that the Supreme Court in *Amchem* endorsed for resolving vexing scientific questions more efficiently, consistently, and openly than courts. But when confronted with a large influx of claims involving the same vaccine and the same injuries, the NVICP special masters turned to the very same tools used by courts in mass-tort cases.<sup>319</sup> The special masters created an ad hoc system to pool claims before the same adjudicator and form steering committees of claimants’ counsel, who then coordinated to offer the best expert testimony they could in support of their clients’ claims. Thus, even after Congress consolidated vaccine cases before a specialized tribunal, the tribunal still could not avoid using aggregation to resolve its caseload.

OMHA is coming to the same realization in the context of Medicare appeals. It too is a specialized tribunal with unique expertise to resolve complicated medical disputes in its jurisdiction. Yet OMHA now faces an “existential crisis,” forcing it to turn to aggregation to handle a deluge of appeals regarding similar types of claims by the same parties. Bipartisan support currently exists in Congress to expand funding for OMHA’s statistical sampling program.<sup>320</sup>

Specialized administrative courts, including the Vaccine Court, have recently come under scrutiny for failing to deliver the promised expeditious and rationalized compensation decisions.<sup>321</sup> Specialization, expertise, and informal procedures may not be enough for administrative agencies and other non-Article III courts to address these concerns. Advocates may underestimate the

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318. Fuller, *supra* note 19, at 364; see Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1691 (1992) (asserting that judges must exercise “powers traditionally assumed by” other parties to resolve the various problems presented by complex cases).

319. Snyder *ex rel.* Snyder v. Sec’y of Dep’t of Health & Human Servs., No. 01-162V, 2009 WL 332044, at \*204 n.7 (Fed. Cl. Feb. 12, 2009) (observing that “omnibus proceedings bear some resemblance to multi-district litigation in federal district courts”).

320. See S. COMM. ON FIN., AUDIT & APPEAL FAIRNESS, INTEGRITY, AND REFORMS IN MEDICARE ACT OF 2015, S. REP. NO. 114-177 (2015).

321. See, e.g., Engstrom, *supra* note 8.

expertise of Article III judges and overestimate the expeditiousness and informality of agency procedures.<sup>322</sup> Our study contributes to this debate by suggesting 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.

## CONCLUSION

Moving cases to administrative agencies does not eliminate the risks inherent in individual adjudication of large groups of similar claims: long backlogs, inconsistent results, and obstacles to justice for those without access to legal and technical expertise. But agencies have shown that 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 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.<sup>323</sup>

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322. See Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. (forthcoming 2017) (manuscript at 3), <http://ssrn.com/abstract=2892721> [<http://perma.cc/9RNU-3QRQ>] (“Though the Supreme Court has not squarely returned to the conflicts management questions it answered in *Amchem* and *Ortiz*, the lower federal courts have spent the better part of the past two decades chipping away at their foundations, limiting them to their facts, assuming away and narrowly defining the kinds of conflicts of interest that warrant subclassing, and turning to ‘alternative structural assurances’ of fairness that do not involve fostering competition among class counsel.”).

323. *Hansberry v. Lee*, 311 U.S. 32, 42 (1940); see also *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.”); 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.”).



## APPENDIX

## NON-ARTICLE III TRIBUNALS WITH AGGREGATION RULES

Non-Article III Tribunal	Aggregation Rule	Description
Agency for International Development	22 C.F.R. § 209.9(e)	“In cases in which the same or related facts are asserted to constitute noncompliance with this part [or Title VI] . . . the Administrator may, by agreements with such other department or agencies, where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedure not inconsistent with this part.”
Bankruptcy Court	FED. R. BANKR. P. 1015	“If two or more petitions by, regarding, or against the same debtor are pending in the same court, the court may order consolidation of the cases.”
	FED. R. BANKR. P. 7023	“[Fed. R. Civ. P.] Rule 23 [class actions] applies in adversary proceedings.”
	FED. R. BANKR. P. 7042	Fed. R. Civ. P. Rule 42 (consolidation) applies in adversary proceedings.
Board of Governors of the Federal Reserve System	12 C.F.R. § 263.22	“On the motion of any party, or on the administrative law judge’s own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.”

INSIDE THE AGENCY CLASS ACTION

Non-Article III Tribunal	Aggregation Rule	Description
	12 C.F.R. § 268.204	Provides for Federal Reserve employees to file “class complaint[s]” with the Board of Governors alleging discrimination on the basis of their race, color, religion, sex, national origin, age or disability. Requests for a hearing in front of an administrative judge (AJ) and appeals from the Board’s final action will be heard by the Equal Employment Opportunity Commission (EEOC).
	12 C.F.R. § 268.606	“Complaints of discrimination filed by two or more complainants consisting of substantially similar allegations of discrimination or relating to the same matter may be consolidated by the Board or the Commission for joint processing after appropriate notification to the parties.” Requests for hearing in front of an AJ and appeals from the Board’s final action will be heard by the EEOC.
Board of Immigration Appeals	BIA Practice Manual § 4.10(a)	“The Board may consolidate appeals at its discretion or upon request of one or both of the parties, when appropriate.”
Civilian Board of Contract Appeals	48 C.F.R. § 6101.2	“When cases involving common questions of law or fact are filed, the Board may: (1) Order the cases consolidated; or (2) Make such other orders concerning the proceedings as are needed to avoid unnecessary costs or delay.”
Commodity Futures Trading Commission	17 C.F.R. § 10.63(a)	“Two or more proceedings involving a common question of law or fact may be joined for hearing of any or all the matters in issue or may be consolidated by order of the Administrative Law Judge.”
Consumer Financial Protection Bureau	12 C.F.R. § 1072.112	“Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member of that class may file a class complaint.”

Non-Article III Tribunal	Aggregation Rule	Description
	12 C.F.R. § 1081.204	“On the motion of any party, or on the hearing officer's own motion, the hearing officer may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.”
Consumer Product Safety Commission	16 C.F.R. § 1025.18	Provides for the agency to pursue enforcement actions as a “class action” proceeding.
	16 C.F.R. § 1025.19	“Two or more matters which have been scheduled for adjudicative proceedings and which involve similar issues may be consolidated for the purpose of hearing or Commission review.”
Corporation for National and Community Service	45 C.F.R. § 1225.13	Permits volunteers to file a “class complaint” with the Equal Opportunity Director alleging Equal Opportunity discrimination.
	R. CT. FED. CL. 23	“One or more members of a class may sue as representative parties on behalf of all members” under certain conditions.
Court of Federal Claims	R. CT. FED. CL. 42	“If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; [or] (2) consolidate the tions . . . .”
Delaware River Basin Commission	18 C.F.R. § 401.78	“[T]o the extent that the same or similar grounds for objections are raised by one or more objectors, the Executive Director may in his discretion and with the consent of the objectors, cause a consolidated hearing to be scheduled.”
Department of Agriculture	7 C.F.R. § 273.15(e)	Permits state agencies to “respond to a series of individual requests for hearings” involving adverse determinations under a Department of Agriculture Food Stamp and Food Distribution program “by conducting a single group hearing. State agencies may consolidate only cases

INSIDE THE AGENCY CLASS ACTION

Non-Article III Tribunal	Aggregation Rule	Description
		where individual issues of fact are not disputed and where related issues of State and/or Federal law, regulation or policy are the sole issues being raised.”
	7 C.F.R. § 283.16	“Similar issues involved in appeals by two or more State agencies may be consolidated upon motion by the State agencies, FNS, or at the discretion of the ALJ if it is decided that consolidation would help to promote administrative efficiency.”
Department of Agriculture – Food and Nutrition Service	7 C.F.R. § 900.56	Permits ALJs to “consolidate[.]” hearings where there are “two or more petitions” to modify or be exempted from the same Marketing Order by the Agricultural Marketing Service.
Department of Agriculture – Forest Service	36 C.F.R. § 214.14(e)(1)	Provides for the Appeal Deciding Officer to “consolidate multiple appeals of the same decision or of similar decisions involving common issues of fact and law and issue one appeal decision.”
Department of Commerce	19 C.F.R. § 351.310(e)	“[T]he Secretary may consolidate hearings in two or more cases” challenging preliminary determinations of antidumping and countervailing duties investigations.
Department of Commerce – International Trade Administration	15 C.F.R. § 301.5(f)	Provides the Director with the ability to “issue a consolidated decision on two or more applications.”
	19 C.F.R. § 354.12(b)	Provides for “joinder or consolidation” by the International Trade Administration of hearings for “sanctions . . . proposed against more than one party” for violation of an antidumping or countervailing duty protective order.
Department of Commerce – National Oceanic and Atmospheric Administration	15 C.F.R. § 904.215	Allows the ALJ to “order two or more [administrative] proceedings that involve substantially the same parties or the same issues be consolidated and/or heard together.”
Department of Defense	32 C.F.R. § 199.10(d)(5)	“The Director, OCHAMPUS, or a designee, may consolidate any number of proceedings for hearing when the facts and circumstances are similar[,] and no substantial right of an appealing party will be prejudiced[,]” in cases involving fraud, abuse, or conflicts of interest in the

Non-Article III Tribunal	Aggregation Rule	Description
		Civilian Health and Medical Program of the Uniformed Service.
	20 U.S.C. § 7704(e)(7)	“In all actions under this subsection, the Secretary shall have discretion to consolidate complaints involving the same tribe or local educational agency.”
Department of Education	34 C.F.R. § 100.9(e)	“[T]he responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings . . . .”
	34 C.F.R. § 101.55	Provides for proceedings under Title VI of the Civil Rights Act of 1964 “to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies.”
Department of Energy	10 C.F.R. § 820.38(a)	The presiding officer is permitted to “consolidate any or all matters at issue in two or more enforcement adjudications under this part where there exists common parties or common questions of fact or law, consolidation would expedite and simplify consideration of the issues, and consolidation would not adversely affect the rights of parties engaged in otherwise separate adjudications.”
	10 C.F.R. § 1040.123	Under nondiscrimination in Federally Assisted Programs or Activities rules, cases that share “the same or related facts” and “are asserted to constitute noncompliance with this part with respect to two or more programs to which this part applies” may be subject to a consolidated hearing.

INSIDE THE AGENCY CLASS ACTION

Non-Article III Tribunal	Aggregation Rule	Description
	10 C.F.R. § 430.44	When evaluating petitions to exempt state regulation from preemption or to withdraw exemption of state regulation, the DOE “may consolidate any or all matters at issue in two or more proceedings docketed where there exist common parties, common questions of fact and law, and where such consolidation would expedite or simplify consideration of the issues.”
	42 C.F.R. § 426.510(e)(ii)-(iii)	Permits the HHS Departmental Appeals Board to consolidate complaints relating to Medicare National Coverage Determinations if they “contain common questions of law, common questions of fact, or both[; and c]onsolidating the complaints does not unduly delay the Board’s decision.”
Department of Health and Human Services	42 C.F.R. § 431.222(a)-(b)	State agencies under the Medicaid program “(a) [m]ay respond to a series of individual requests for hearing by conducting a single group hearing; (b) [m]ay consolidate hearings only in cases in which the sole issue involved is one of Federal or State law or policy . . . .”
	45 C.F.R. § 81.55	Provides for proceedings under Title VI of the Civil Rights Act of 1964 “to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies.”
	45 C.F.R. § 205.10	State “agencies may respond to a series of individual requests for hearing” related to public assistance programs “by conducting a single group hearing. Agencies may consolidate only cases in which the sole issue involved is one of State or Federal law or policy or changes in State or Federal law.”
Department of Health and Human Services – Food and Drug Administration	21 C.F.R. § 17.19(b)(15)	Granting presiding officer authority to “consolidate related or similar proceedings or sever unrelated matters.”

Non-Article III Tribunal	Aggregation Rule	Description
Department of Health and Human Services – Office of Medicare Hearings and Appeals	42 C.F.R. § 405.1044(a)	Provides for “consolidated hearing[s]” related to determinations, redeterminations, reconsiderations, and appeals by the Office of Medicare Hearings and Appeals (OMHA) under Original Medicare (Medicare Parts A and B) “if one or more of the issues to be considered at the hearing are the same issues that are involved in another request for hearing or hearings pending before the same ALJ.”
	42 C.F.R. § 423.2044(a)	Provides for “consolidated hearing[s]” related to the Voluntary Medicare Prescription Drug Benefit program “if one or more of the issues to be considered at the hearing are the same issues that are involved in another request for hearing or hearings pending before the same ALJ.”
	42 C.F.R. § 426.410(e)(ii)	Provides for ALJs to consolidate complaints relating to Medicare Local Coverage Determinations complaints if they “contain common questions of law, common questions of fact, or both . . . .”
Department of Health and Human Services – Provider Reimbursement Review Board	42 C.F.R. § 405.1837(a)	“A provider (but no other individual, entity, or party) has a right to a Board hearing, as part of a group appeal with other providers, with respect to a final contractor or Secretary determination for the provider’s cost reporting period,” under certain conditions.
Department of Homeland Security	5 C.F.R. § 9701.706	Permits the Merit Systems Protection Board to “consolidate appeals filed by two or more appellants” regarding adverse employment actions.
Department of Homeland Security – Customs and Border Protection	19 C.F.R. § 174.15	Permits the Customs and Border Protection to consolidate “separate protests relating to one category of merchandise covered by an entry . . . whether filed as a single protest or filed as separate protests relating to the same category by one or more parties in interest or an authorized agent.”

INSIDE THE AGENCY CLASS ACTION

Non-Article III Tribunal	Aggregation Rule	Description
Department of Homeland Security – Coast Guard	33 C.F.R. § 20.403(a)	“A presiding ALJ may for good cause, with the approval of the Chief ALJ and with all parties given notice and opportunity to object, consolidate any matters at issue in two or more administrative proceedings docketed under this part.”
Department of Homeland Security – Transportation Security Administration	49 C.F.R. § 1503.613	Permits the Chief ALJ at the Transportation Security Administration to consolidate “two or more” investigative or enforcement proceedings where there are common questions of law or fact.
Department of Housing and Urban Development	24 C.F.R. § 7.33	“Complaints of discrimination filed by two or more Complainants consisting of substantially similar allegations of discrimination or relating to the same matter may be consolidated by the Department or the EEOC for joint processing after appropriate notification to the parties.”
	24 C.F.R. § 180.415	“The ALJ may provide for non-Fair Housing Act proceedings at HUD to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies.”
Department of the Interior	43 C.F.R. § 4.820	“[T]he Secretary may provide for proceedings in the Department” related to nondiscrimination in federally-assisted programs “to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies.”
	50 C.F.R. § 452.09(b)	When the Secretary of the Interior, or the Secretaries of the Interior and Commerce are considering two or more endangered species exemption applications “they may consider them jointly and prepare a joint report if doing so would expedite or simplify consideration of the issues.”
Department of the Interior – Bureau of Indian Affairs	25 C.F.R. § 2.18	In appeals from administrative actions under the Bureau of Indian Affairs, “separate proceedings pending before one official under this part and involving common questions of law or fact may be consolidated by the official conducting such proceedings . . . .”



Non-Article III Tribunal	Aggregation Rule	Description
Department of the Interior – Board of Land Appeals	43 C.F.R. § 4.404	The special rules applicable to public land hearings and appeals, as related to general appeals, provide that the board may consolidate appeals “if the facts or legal issues in two or more appeals pending before the Board are the same or similar.”
Department of the Interior – Board of Land Appeals	43 C.F.R. § 4.1113	“When proceedings involving a common question of law or fact are pending before an administrative law judge or the Board, such proceedings are subject to consolidation pursuant to a motion by a party or at the initiative of an administrative law judge or the Board.”
Department of the Interior – Board of Land Appeals	43 C.F.R. § 4.474(d)	The special rules applicable to public land hearings and appeals, as related to grazing procedures, provide that an ALJ “consolidate two or more appeals for purposes of hearing and decision when they involve a common issue or issues.”
Department of Justice	28 C.F.R. § 68.16	“When two or more hearings are to be held,” regarding allegations of unlawful employment of aliens, unfair immigration-related employment practices, or document fraud, “and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Administrative Law Judge assigned may, upon motion by any party, or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings may be made and the evidence introduced in one matter may be considered as introduced in the others, and a separate or joint decision shall be made at the discretion of the Administrative Law Judge.”
Department of Labor	20 C.F.R. § 702.345(a)	“When one or more additional issues are raised by the administrative law judge pursuant to § 702.336, such issues may, in the discretion of the administrative law judge, be consolidated for hearing and decision with other issues pending before him.”

INSIDE THE AGENCY CLASS ACTION

Non-Article III Tribunal	Aggregation Rule	Description
	20 C.F.R. § 725.460	<p>“When two or more hearings are to be held” regarding claims under the Federal Coal Mine Health and Safety Act, “and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings shall be made and the evidence introduced in one claim may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate.”</p>
	29 C.F.R. § 18.43	<p>“If separate proceedings before the Office of the Administrative Law Judges involve a common question of law or fact, a judge may: (1) Join for hearing any or all matters at issue in the proceedings; (2) Consolidate the proceedings; or (3) Issue any other orders to avoid unnecessary cost or delay.”</p>
Department of Transportation	14 C.F.R. § 302.13	<p>In aviation proceedings, “[t]he Department, upon its own initiative or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings that involve substantially the same parties, or issues that are the same or closely related, if it finds that such consolidation or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings.”</p>
Department of Transportation—Maritime Administration	46 C.F.R. § 201.73	<p>Formal proceedings under Maritime administration allow that, “two or more matters which have been set for hearing by the Administration, and which involve similar issues, may be consolidated for the purpose of hearing.”</p>
Department of Transportation—Federal Railroad Administration	49 C.F.R. § 209.13	<p>In matters set for a hearing under the railroad safety enforcement procedures, “the Chief Counsel may consolidate the matter with any similar matter(s) pending against the same respondent or with any related matter(s) pending</p>

Non-Article III Tribunal	Aggregation Rule	Description
		against other respondent(s) under the same subpart.”
Department of Transportation— National Highway Safety Administration	49 C.F.R. § 511.18	National Highway Traffic Safety Administration adjudicative procedures permit “[t]wo or more matters which have been scheduled for adjudicative proceedings, and which involve one or more common questions of law or fact, may be consolidated for the purpose of hearing.”
	49 C.F.R. § 535.9	“On the request of a party, or at the Hearing Officer’s direction, multiple proceedings [for civil penalties for violation of the heavy-duty vehicle fuel efficiency program] may be consolidated if at any time it appears that such consolidation is necessary or desirable.”
Department of Transportation— National Transportation Safety Board	49 C.F.R. § 821.35(b)	“Powers of law judge. Law judges shall have the following powers . . . (1) To give notice of, and to hold, prehearing conferences and hearings, and to consolidate proceedings which involve a common question of law or fact . . . .”
Department of the Treasury— Office of the Comptroller of the Currency	12 C.F.R. § 19.22	“On the motion of any party, or on the administrative law judge’s own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.”

INSIDE THE AGENCY CLASS ACTION

Non-Article III Tribunal	Aggregation Rule	Description
	12 C.F.R. § 109.22	“On the motion of any party, or on the administrative law judge’s own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.” Provides for ALJs to consolidate adjudicatory proceedings related to federal savings associations where there is a “material common question of law or fact.”
Department of the Treasury – Office of Thrift Supervision	12 C.F.R. § 509.22	“On the motion of any party, or on the administrative law judge’s own motion, the administrative law judge may consolidate, for some or all purposes, any two or more [Office of Thrift Supervision] proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.”
Department of Veterans Affairs	38 C.F.R. § 18b.34	Provides for administrative proceedings before the Department of Veterans Affairs under Title VI of the Civil Rights Act of 1964 to be “consolidated” with proceedings in other federal agencies upon agreement by the agencies.
Environmental Protection Agency	40 C.F.R. § 164.32	“The Chief Administrative Law Judge, by motion or sua sponte, may consolidate two or more proceedings” regarding pesticide programs “whenever it appears that this will expedite or simplify consideration of the issues.”
	40 C.F.R. § 209.13	“The Administrator or the administrative law judge may consolidate two or more proceedings to be held” under section 11(d) of the Noise Control Act of 1972 “for resolving one or more issues whenever it appears that such consolidation will expedite or simplify consideration of such issues.”

Non-Article III Tribunal	Aggregation Rule	Description
	40 C.F.R. § 22.12(a)	“The Presiding Officer or the Environmental Appeals Board may consolidate any or all matters at issue in two or more proceedings subject to these Consolidated Rules of Practice where: there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.”
	40 C.F.R. § 222.11(c)	Provides for the Administrator or Region Administrator to “order consolidation of any adjudicatory hearings [regarding ocean dumping permits] whenever he determines that consolidation will expedite or simplify the consideration of the issues presented.”
	40 C.F.R. § 305.11(a)	“The Presiding Officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more proceedings” related to denial of claims against the Hazardous Substance Superfund “where: (1) There exist common parties or common questions of fact or law; (2) Consolidation would expedite and simplify consideration of the issues; and (3) Consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.”
	40 C.F.R. § 78.8	“The Environmental Appeals Board or Presiding Officer has the discretion to consolidate, in whole or in part, two or more proceedings” under the agency’s air programs “whenever it appears that a joint proceeding on any or all of the matters at issue in the proceedings will be in the interest of justice, will expedite or simplify consideration of the issues, and will not prejudice any party.”
	40 C.F.R. § 89.513(g)	“The Administrator or the Presiding Officer in his discretion may consolidate two or more proceedings” regarding nonroad compression-ignition engines “for the purpose of resolving one or more issues whenever it appears that consolidation will expedite or simplify consideration of these issues.”
	40 C.F.R.	“The Administrator or the Presiding Officer in

INSIDE THE AGENCY CLASS ACTION

Non-Article III Tribunal	Aggregation Rule	Description
	§ 90.513(g)	his discretion may consolidate two or more proceedings” regarding production line testing programs for nonroad spark-ignition engines “for the purpose of resolving one or more issues whenever it appears that consolidation will expedite or simplify consideration of these issues.”
	40 C.F.R. § 91.513(g)	“The Administrator or the Presiding Officer in his or her discretion may consolidate two or more proceedings” regarding production line testing programs for marine spark-ignition engines “for the purpose of resolving one or more issues whenever it appears that consolidation will expedite or simplify consideration of these issues.”
	40 C.F.R. § 92.514(g)	“The Administrator or the Presiding Officer in his or her discretion may consolidate two or more proceedings” regarding locomotive manufacturer production line testing and audit programs “for the purpose of resolving one or more issues whenever it appears that consolidation will expedite or simplify consideration of these issues.”
	40 C.F.R. § 94.514(g)	“The Administrator or the Presiding Officer in his or her discretion may consolidate two or more proceedings” regarding production line testing programs for marine compression-ignition engines “for the purpose of resolving one or more issues whenever it appears that consolidation will expedite or simplify consideration of these issues.”
	40 C.F.R. § 86.614–84	Two or more hearings on suspension, revocation, and voiding certificates of conformity under the standards for emissions from new and in-use highway vehicles may be consolidated “for the purpose of resolving one or more issues whenever it appears that such consolidation will expedite or simplify consideration of such issues.”
	40 C.F.R. § 86.1115– 87(g)(1)	Under the nonconformance penalties for gasoline fueled trucks, the presiding officer at a hearing may “consolidate two or more proceedings to be held under this section for the pur-

Non-Article III Tribunal	Aggregation Rule	Description
Equal Employment Opportunity Commission	29 C.F.R. § 1603.206(a)	pose of resolving one or more issues whenever it appears that such consolidation will expedite or simplify consideration of such issues.” “The administrative law judge may, upon motion by a party or upon his or her own motion, after providing reasonable notice and opportunity to object to all parties affected, consolidate any or all matters at issue in two or more adjudications docketed under this part where common parties, or factual or legal questions exist; where such consolidation would expedite or simplify consideration of the issues; or where the interests of justice would be served. For purposes of this section, no distinction is made between joinder and consolidation of adjudications.”
	29 C.F.R. § 1614.204	Provides for federal employees to file a “class complaint” with an AJ to adjudicate agency personnel management policy or practice regarding race, color, religion, sex, national origin, age, disability, or genetic information.
	29 C.F.R. § 1614.606	“Complaints of discrimination filed by two or more complainants [against a federal employer] consisting of substantially similar allegations of discrimination or relating to the same matter may be consolidated by the agency or the Commission for joint processing after appropriate notification to the parties.”
Federal Communications Commission	47 C.F.R. § 1.227(a)	“The Commission, upon motion or upon its own motion, will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing: (1) Any cases which involve the same applicant or involve substantially the same issues, or (2) Any applications which present conflicting claims, except where a random selection process is used.”
	47 C.F.R. § 14.52(a)	“Complaints may generally be brought against only one named defendant; such actions may not be brought against multiple defendants unless the defendants are commonly owned or controlled, are alleged to have acted in concert, are alleged to be jointly liable to complainant,

INSIDE THE AGENCY CLASS ACTION

Non-Article III Tribunal	Aggregation Rule	Description
Federal Deposit Insurance Corporation	12 C.F.R. § 308.22(a)(1)	or the complaint concerns common questions of law or fact. Complaints may, however, be consolidated by the Commission for disposition.”
Federal Energy Regulatory Commission	18 C.F.R. § 385.503(a)	“On the motion of any party, or on the administrative law judge’s own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.”
Federal Energy Regulatory Commission	18 C.F.R. § 385.502(c)	“The Chief Administrative Law Judge may, on motion or otherwise, order proceedings pending” before the Federal Energy Regulatory Commission “consolidated for hearing on, or settlement of, any or all matters in issue in the proceedings, or order the severance of proceedings or issues in a proceeding.”
Federal Energy Regulatory Commission	18 C.F.R. § 385.602(b)(3)	“Any notice or order under this section may direct consolidation of proceedings, phasing of a proceeding, or severance of proceedings or issues in a proceeding.”
Federal Housing Finance Agency	12 C.F.R. § 1209.27(a)	“If an offer of settlement pertains to multiple proceedings that are in part pending before the Commission and in part set for hearing, any participant may by motion request the Commission to consolidate the multiple proceedings and to provide any other appropriate procedural relief for purposes of disposition of the settlement.”
Federal Housing Finance Agency	12 C.F.R. § 1209.27(a)	“On the motion of any party, or on the presiding officer’s own motion, the presiding officer may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would



Non-Article III Tribunal	Aggregation Rule	Description
		cause unreasonable delay or injustice.”
Federal Labor Relations Authority	5 C.F.R. § 2429.2	Provides for regional directors in the Federal Labor Relations Authority to “consolidate” representation proceedings and unfair labor practice proceedings arising in their region where “it appears necessary in order to effectuate the purposes of the Federal Service Labor-Management Relations Statute or to avoid unnecessary costs and delays.”
	5 C.F.R. § 2422.27(d)	“When appropriate, and under § 2422.33, a Regional Director may consolidate objections and/or determinative challenged ballots with an unfair labor practice hearing. An Administrative Law Judge conducts these consolidated hearings,” with certain exceptions.
Federal Maritime Commission	46 C.F.R. § 502.79	“The Commission or the Chief Administrative Law Judge (or designee) may order two or more proceedings which involve substantially the same issues consolidated and heard together.”
Federal Mediation and Conciliation Service	29 C.F.R. § 1440.1(b)	Adopts the FIFRA arbitration rules of the American Arbitration Association, which permit consolidation, for the mediation of pesticide disputes.
Federal Mine Safety and Health Review Commission	29 C.F.R. § 2700.12	“The Commission and its Judges may at any time, upon their own motion or a party’s motion, order the consolidation of proceedings [under the Federal Mine Safety and Health Act] that involve similar issues.”
Federal Trade Commission	16 C.F.R. § 3.41(b)(2)	“When actions involving a common question of law or fact are pending before the Administrative Law Judge, the Commission or the Administrative Law Judge may order a joint hearing of any or all the matters in issue in the actions; the Commission or the Administrative Law Judge may order all the actions consolidated . . . .”
Foreign Service Labor Relations Board	22 C.F.R. § 1429.2	“[W]henever it appears necessary in order to effectuate the purposes of the Foreign Service Labor-Management Relations Statute or to avoid unnecessary costs or delay, Regional Directors may consolidate cases within their own

INSIDE THE AGENCY CLASS ACTION

Non-Article III Tribunal	Aggregation Rule	Description
		region or may transfer such cases to any other region, for the purpose of investigation or consolidation with any proceedings which may have been instituted in, or transferred to, such region.”
Government Accountability Office	4 C.F.R. § 22.3(e)	“The [Office Contract Appeal] Board, in its discretion, may consolidate cases involving common issues of law or fact.”
	4 C.F.R. § 28.29(a)(1)	“Consolidation may occur where two or more parties have cases which should be united because they contain identical or similar issues or in such other circumstances as justice requires.”
	4 C.F.R. § 28.97	Permits employees to file “class action[s]” with the Personnel Appeals Board.
International Trade Commission	19 C.F.R. § 201.7(a)	“In order to expedite the performance of its functions, the Commission may engage in investigative activities preliminary to and in aid of any authorized investigation, consolidate proceedings before it, and determine the scope and manner of its proceedings . . . .”
	19 C.F.R. § 207.44	“The Commission may, when appropriate, consolidate continued investigations under section 704(g) or section 734(g) of the Act with investigations to review agreements for the elimination of injury under section 704(h) or section 734(h) of the Act.”
	19 C.F.R. § 207.46(g)(2)	“Should the administering authority, after consulting with the Commission, determine to initiate a section 751(c) review, the Commission shall conduct a consolidated review under sections 751(c) and 753 of the Act of the orders involving the same or comparable subject merchandise. Any such consolidated review shall be conducted under the applicable procedures set forth in subparts A and F of this part.”
	19 C.F.R. § 210.14(g)	“The Commission may consolidate two or more investigations. If the investigations are currently before the same presiding administrative law judge, he or she may consolidate the investigations.”

Non-Article III Tribunal	Aggregation Rule	Description
Merit Systems Protection Board	5 C.F.R. § 1201.27	Permits employees to file “class action” appeal of agency decisions in circumstances where it would be appropriate to treat proceedings as a class action under the Federal Rules of Civil Procedure.
	5 C.F.R. § 1201.36(b)	“A judge may consolidate or join cases on his or her own motion or on the motion of a party if doing so would: (1) Expedite processing of the cases; and (2) Not adversely affect the interests of the parties.”
National Credit Union Administration	12 C.F.R. § 747.22	“On the motion of any party, or on the administrative law judge’s own motion, the administrative law judge may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.”
National Endowment for the Humanities	45 C.F.R. § 1110.9(e)	“In cases in which the same or related facts are asserted . . . , the Chairman of the Endowment concerned may . . . provide for the conduct of consolidated or joint hearings . . . .”
National Labor Relations Board	29 C.F.R. § 102.33	Permits the General Counsel of the National Labor Relations Board (NLRB) to “consolidate[]” any proceedings “instituted in the same region” under section 10(a)-(i) of the Act for the Prevention of Unfair Labor Practices when he “deems it necessary in order to effectuate the purposes of the [A]ct.”
	29 C.F.R. § 102.54(c)	“Whenever the Regional Director deems it necessary in order to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and notice of hearing issued pursuant to § 102.15 a compliance specification based on that complaint.”
	29 C.F.R. § 102.72	Permits the General Counsel of the NLRB to “consolidate[]” any proceedings instituted in the same region under section 9(B)-(C) of the

INSIDE THE AGENCY CLASS ACTION

Non-Article III Tribunal	Aggregation Rule	Description
National Science Foundation	45 C.F.R. § 672.6	<p>Act for the Determination of Questions Concerning Representation of Employees when “it appears necessary in order to effectuate the purposes of the [A]ct.”</p> <p>“The Presiding Officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more proceedings docketed [under the Antarctic Conservation Act] where (1) there exists common parties or common questions of fact or law; (2) consolidation would expedite and simplify consideration of the issues; and (3) consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.”</p>
Nuclear Regulatory Commission	10 C.F.R. § 2.316	<p>“[T]he Commission or the presiding officer may order any parties in a proceeding who have substantially the same interest that may be affected by the proceeding and who raise substantially the same questions, to consolidate their presentation of evidence, cross-examination, briefs, proposed findings of fact, and conclusions of law and argument. However, it may not order any consolidation that would prejudice the rights of any party.”</p>
	10 C.F.R. § 2.317(b)	<p>“On motion and for good cause shown or on its own initiative, the Commission or the presiding officers of each affected proceeding may consolidate for hearing or for other purposes two or more proceedings [under the Atomic Energy Act], or may hold joint hearings with interested States and/or other Federal agencies on matters of concurrent jurisdiction, if it is found that the action will be conducive to the proper dispatch of its business and to the ends of justice and will be conducted in accordance with the other provisions of this subpart.”</p>
	10 C.F.R. § 4.64	<p>“[T]he Commission may, by agreement with such other departments or agencies, where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedure not inconsistent with this subpart. Final decisions in such cases, insofar as this regulation is con-</p>

Non-Article III Tribunal	Aggregation Rule	Description
		cerned shall be made in accordance with § 4.72.”
	10 C.F.R. § 110.105(a)	“The presiding officer in any oral hearing shall conduct a fair hearing, develop a record that will contribute to informed decisionmaking, and, within the framework of the Commission’s orders, have the power necessary to achieve these ends, including the power to: . . . (4) Order consolidation of participants . . . .”
	10 C.F.R. § 110.113(e)	“The Commission may: . . . (2) Consolidate applications for hearing . . . .”
Occupational Safety and Health Review Commission	29 C.F.R. § 2200.9	“Cases may be consolidated on the motion of any party, on the Judge’s own motion, or on the Commission’s own motion, where there exist common parties, common questions of law or fact or in such other circumstances as justice or the administration of the [Occupational Health and Safety] Act require.”
Office of Navajo and Hopi Indian Relocation	25 C.F.R. § 700.305	“When multiple Applicants claim interest in one benefit, determination, or question of eligibility, their hearings may be consolidated at the Presiding Officer’s discretion.”
Patent and Trademark Office	35 U.S.C. § 325(c)	“If more than 1 petition for a post-grant review under this chapter is properly filed against the same patent and the Director determines that more than 1 of these petitions warrants the institution of a post-grant review under section 324, the Director may consolidate such reviews into a single post-grant review.”
Pension Benefit Guaranty Corporation	29 C.F.R. § 4003.56(a)	“Whenever multiple appeals are filed that arise out of the same or similar facts and seek the same or similar relief, the Appeals Board may, in its discretion, order the consolidation of all or some of the appeals.”
Postal Regulatory Commission	39 C.F.R. § 3001.14	“The Commission, with or without motion, may order proceedings involving related issues or facts to be consolidated for hearing of any or all matters in issue in such proceedings.”
Securities and Exchange Commission	17 C.F.R. § 201.201	“By order of the Commission or a hearing officer, proceedings involving a common question of law or fact may be consolidated for hearing of any or all the matters at issue in such proceedings.”

INSIDE THE AGENCY CLASS ACTION

Non-Article III Tribunal	Aggregation Rule	Description
Social Security Administration	20 C.F.R. § 404.952	“A consolidated hearing may be held if” (1) the party has requested a hearing under multiple laws administered by the agency, (2) one or more of the issues being heard at the hearing requested is the same as in another claim pending before the agency, or (3) the ALJ decides to hold consolidated hearings. Permits the ALJ to make separate or consolidated decisions, but the record shall be consolidated.
	20 C.F.R. § 405.365	“A consolidated hearing may be held if” (1) the party has requested a hearing under multiple laws administered by the agency, (2) one or more of the issues being heard at the hearing requested is the same as in another claim pending before the agency, or (3) the ALJ decides to hold consolidated hearings. Permits the ALJ to make separate or consolidated decisions, but the record shall be consolidated.
	20 C.F.R. § 416.1452	“A consolidated hearing may be held if” (1) the party has requested a hearing under multiple laws administered by the agency, (2) one or more of the issues being heard at the hearing requested is the same as in another claim pending before the agency, or (3) the ALJ decides to hold consolidated hearings. Permits the ALJ to make separate or consolidated decisions, but the record shall be consolidated.
Tax Court	TAX CT. R. 141	“When cases involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue, it may order all the cases consolidated, and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs, delay, or duplication.”
Tennessee Valley Authority	18 C.F.R. § 1302.9(e)	“In cases in which the same or related facts are asserted to constitute noncompliance with this part [or Title VI] . . . , the TVA Board may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedure not inconsistent with this part.”

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Non-Article III Tribunal	Aggregation Rule	Description
	18 C.F.R. § 1307.11	“In cases in which the same or related facts are asserted to constitute noncompliance with this part [or Title VI] . . . the TVA Board may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedure not inconsistent with this part.”

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