

**ANIMATING THE SEVENTH AMENDMENT IN CONTEMPORARY  
PLAINTIFFS' LITIGATION: THE RULE, OR THE EXCEPTION?**

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INTRODUCTION

The Supreme Court has long proclaimed plaintiffs' Seventh Amendment right to trial by jury<sup>1</sup> to be a "fundamental guarantee of the rights and liberties of the people."<sup>2</sup> Deeming the "justly dear"<sup>3</sup> right "an object of deep interest and solicitude,"<sup>4</sup> the Court has consistently declared that "every encroachment upon it has been watched with great jealousy"<sup>5</sup> and "should be scrutinized with the utmost care."<sup>6</sup> Given that the right's "deprivation at the hands of the English was one of the important grievances leading to the break with England,"<sup>7</sup> holding the constitutional right to trial by jury in such high esteem is sensible.

However, civil procedural innovations allegedly sharing a nebulous relationship with the right have pervaded federal courts in recent years. Scholars and litigants have raised concerns that, in practice, many popular procedural innovations—the motion to dismiss, summary judgment, and remittitur among them<sup>8</sup>—preclude affected

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1 U.S. CONST. amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved . . .").

2 *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830), *overruled on other grounds*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

3 *Id.*

4 *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 378 (1913).

5 *Id.*

6 *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

7 *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting).

8 See Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 734 (2003) ("[R]emittitur in fact does impinge the plaintiff's right to a jury trial and is thus unconstitutional."); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1890 (2008) ("The motion to dismiss is fast becoming the new summary judgment motion and with this movement, the civil jury trial continues to disappear."); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*,

plaintiffs from exercising their Seventh Amendment right to trial by jury. Two such procedural innovations have come to dominate the landscape of plaintiffs' actions: binding individual arbitration under the Federal Arbitration Act<sup>9</sup> ("FAA") and multidistrict litigation ("MDL"). However, their relationships to the trial-by-jury right have received a modicum of scholarly focus and have gone unaddressed by the Supreme Court.

Arbitral actions under the FAA have evolved from a dispute resolution method utilized by "sophisticated business entities into a phenomenon that pervades the contemporary economy."<sup>10</sup> Likewise, the current volume of MDL in the federal courts is staggering and shows no sign of abatement, as a third of all pending federal civil cases are part of an MDL.<sup>11</sup> Accordingly, both procedures are more prominent now than ever before.

Undebatably, both are formally consistent with the Seventh Amendment's command that plaintiffs be afforded an opportunity to be heard by a jury. In FAA-supported arbitration actions, claimants are thought to be subject to arbitral proceedings and consequently forfeit their trial-by-jury right only where they knowingly, voluntarily, and intelligently consent to do so. Likewise, in MDL, similarly situated plaintiffs asserting comparable legal claims have their pretrial proceedings centralized before one federal district court and are supposedly remanded to their separate courts of origin for individual trials by jury at the close of MDL's centralized pretrial proceedings.

However, whether these procedures actually afford plaintiffs an opportunity to exercise their right to trial by jury in practice is an unexamined, more uncertain prospect. Given that form and practice are often dissimilar, and that these two procedures dominate contemporary plaintiffs' actions, the issue cries out for analysis. Accordingly, this Comment evaluates whether FAA-supported arbitration and MDL are practically consistent with plaintiffs' abilities to exercise their right to trial by jury, analyzing the relationship between the substance of the constitutional right, plaintiffs' practical ability to exercise the right, FAA-supported arbitration, MDL, and the Supreme Court's Seventh Amendment jurisprudence. This analysis not only

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93 VA. L. REV. 139, 139–40 (2007) (“[N]o procedure similar to summary judgment existed under the English common law and . . . summary judgment violates the core principles or ‘substance’ of the English common law.”).

<sup>9</sup> Federal Arbitration Act, 9 U.S.C. §§ 1–16, 201–08, 301–07 (1925).

<sup>10</sup> Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1420 (2008).

<sup>11</sup> See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 762 (2013).

affords us a glimpse of the on-the-ground realities facing plaintiffs seeking to exercise their Seventh Amendment right and a comprehensive understanding of the Court's conception of this right, but, more importantly, enables us to determine if these procedures have "relegat[ed] the Seventh Amendment to insignificant words on a page."<sup>12</sup>

Part I of this Comment provides an overview of the FAA-supported arbitration and MDL processes. Part II sketches the Supreme Court's understanding of the trial-by-jury right, explicating its meaning and application to prospective consumer and mass tort plaintiffs—the plaintiffs primarily impacted by FAA-supported arbitration and MDL. Parts III and IV focus on the on-the-ground realities facing prospective consumer and mass tort MDL plaintiffs, which this Comment argues practically preclude them from exercising their Seventh Amendment right to trial by jury. Part V demonstrates the extraordinarily permissive and formalistic nature of the Supreme Court's Seventh Amendment trial-by-jury jurisprudence, which this Comment contends is behind the continued vitality of those procedures that are formally, but not practically, consistent with plaintiffs' right to trial by jury. Finally, Part VI, contends that, in light of its prior jurisprudential failings, the Court should resume an active role in the field of Seventh Amendment jurisprudence by affording the constitutional right an operative, consequential meaning. The Court's continued failure to appropriately protect or define the right not only contravenes the aims of the Framers, but also threatens the litigant and societal interests that the Seventh Amendment is thought to protect.

## I. THE FAA AND MDL: AN OVERVIEW

### A. *The FAA*

Enacted in 1925 to overrule the judiciary's longstanding refusal to place arbitration<sup>13</sup> agreements "upon the same footing as other con-

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<sup>12</sup> Peter A. Arhangelsky, *Nullifying the Constitution: Federal Asbestos Tort Reform and the Abrogation of Seventh Amendment Rights*, 40 SUFFOLK U. L. REV. 95, 121 (2006) (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51–52 (1989)).

<sup>13</sup> In arbitration, the parties present their case to a presumably neutral third-party decision-maker rather than to a judge or jury, removing the resolution of the dispute from the court system altogether. See Brian D. Weber, *Contractual Waivers of a Right to Jury Trial—Another Option*, 53 CLEV. ST. L. REV. 717, 726–27 (2006) (explaining arbitration's mechanics). The arbitrator renders a decision, which is typically final and binding on both parties. See *id.* at 727 (citing Gregory T. Alvarez & Nancy J. Arencibia, *Is Arbitration Right for Your Company?*, FIN. EXECUTIVE, Dec. 1, 2002, at 46). Arbitrators' decisions are rarely ap-

tracts,”<sup>14</sup> the FAA authorizes federal courts to enter orders to compel arbitration, suspend judicial proceedings brought by parties opposing arbitration, and enforce arbitration awards.<sup>15</sup> Applicable to contracts, adhesive<sup>16</sup> and otherwise, involving interstate and maritime commerce, the FAA provides that written arbitration agreements within these contracts will be “valid, irrevocable, and enforceable,”<sup>17</sup> like any other valid contractual provision. As scholars began shedding light on the perceived benefits of arbitration over litigation—primarily arbitration’s propensity to resolve disputes at quicker and cheaper rates than litigation, diminish the risk of disclosure of confidential information, and preserve the parties’ relationships—Congress passed the FAA to cement the enforceability of arbitration agreements and combat the judiciary’s hostility toward arbitration.<sup>18</sup>

When it became apparent that the FAA solidified the enforceability of arbitration agreements, corporations responded in kind. In most of their adhesive consumer contracts, corporations began employing arbitration clauses barring consumers from both resolving

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pealed to a judge and only in a scant few cases where arbitrators engaged in serious misconduct are their decisions overturned. *See id.* (citing Alvarez & Arencibia, *supra*).

14 *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

15 *See Adam. M. Kepper, Contractual Waiver of Seventh Amendment Rights: Using the Public Rights Doctrine to Justify a Higher Standard of Waiver for Jury-Waiver Clauses Than for Arbitration Clauses*, 91 IOWA L. REV. 1345, 1352–53 (2006) (citing 9 U.S.C. §§ 3–54, 11, 13) (explaining the FAA’s impact on judicial treatment of arbitration clauses).

16 Adhesive contracts are agreements in which one side has all the bargaining power and uses it to write the contract to his advantage. *See Sierra David Sterkin, Challenging Adhesion Contracts in California: A Consumer’s Guide*, 34 GOLDEN GATE U. L. REV. 285, 285–86 (2004) (citing *Neal v. State Farm Ins. Cos.*, 10 Cal. Rptr. 781, 784 (Ct. App. 1961)) (detailing the characteristics of adhesive contracts). A prime example of an adhesive contract is a standardized contract form that offers services to consumers on an essentially “take it or leave it” basis without giving consumers realistic opportunities to negotiate terms to further their interests. *See Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1221 (N.M. 2008) (citing *Guthmann v. La Vida Llana*, 709 P.2d 675, 679 (N.M. 1985)) (explaining the typical characteristics of adhesive contracts).

17 9 U.S.C. § 2 (2006).

18 *See Christopher R. Drahozal & Quentin R. Wittrock, Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 77–78 (2008) (citing Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 826, 840 (2008)) (discussing the reasons arbitration is favored); Scott R. Swier, *The Tenuous Tale of the Terrible Termite: The Federal Arbitration Act and the Court’s Decision to Interpret Section Two in the Broadest Possible Manner: Allied-Bruce Terminix Companies, Inc. v. Dobson*, 41 SAN DIEGO L. REV. 131, 131 (1996) (“Congress enacted the Federal Arbitration Act . . . to reverse the trend of American courts which were, at the time, reluctant to recognize arbitration provisions as legally binding agreements.” (citing Stephen P. Bedell et al., *The McMahon Mandate: Compulsory Arbitration of Securities and RICO Claims*, 19 LOY. U. CHI. L.J. 1, 2–3 (1987))).

disputes arising out of the contract in the courts and aggregating their claims in arbitration.<sup>19</sup>

In effect, these arbitration agreements—which are known as arbitration clauses and class arbitration waivers, respectively, and, thanks to the FAA, are almost always enforced by the courts—compel affected consumers seeking to resolve a dispute to relinquish the right to participate in litigation or class-based arbitration. This leaves these consumers with the sole option of individual arbitration, even when thousands or millions of claims by similarly situated consumers replicate the individual claim.<sup>20</sup> Accordingly, courts view the “loss of the right to a jury trial . . . [as] a necessary and fairly obvious consequence of an agreement to arbitrate.”<sup>21</sup>

Corporations’ affinities for arbitration clauses and class arbitration waivers are unsurprising. Not only do these provisions protect corporations from the temporal, financial, and public relations expenses attendant to public individual and class-based litigation, but evidence suggests that—due to a lack of resources or knowledge, or a fear of retaliation—very few consumers will choose to bring individual arbitration claims against a company.<sup>22</sup> For instance, affidavits submitted in one recent litigation indicated that “[f]ewer than 200 of [the de-

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19 See Benjamin Sachs-Michaels, *The Demise of Class Actions Will Not Be Televised*, 12 CARDOZO J. CONFLICT RESOL. 665, 669 (2011) (“Once it became clear that these adhesive arbitration clauses would be treated as binding, corporations widely added clauses prohibiting the aggregation of claims.” (citing Bryan Allen Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*, 45 HOUS. L. REV. 215, 224 (2008))); Robert B. Kershaw, *Mandatory Binding Arbitration—Goliath’s New Offense*, 36 MD. B.J. 28, 30 (2003) (“[C]orporate parties have widely incorporated mandatory binding arbitration clauses in virtually every conceivable type of contract that could support a class action claim.”).

20 See Steven D. Millman, *Catching the Waive: The Third Circuit Joins the Growing Trend of Circuit Courts in Voiding a Class-Arbitration Waiver in Homa v. American Express Co.*, 55 VILL. L. REV. 1033, 1034 (2010) (“A class-arbitration waiver relinquishes the right to participate in class-wide arbitration or to aggregate claims with others in any form of . . . arbitral proceeding.” (quoting Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 376 n.15 (2005)) (internal quotation marks omitted)); Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1191–92, 1234 (2001) (“In addition to losing consumer rights in arbitration, consumers lose the traditional remedies that are allowed by the judicial system.” (citing Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999))).

21 *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984).

22 See Nicholas Roxborough & Donna Puyot, *Dispelling Some Myths About Arbitration*, 34 L.A. LAW. 44, 44 (2011) (“[C]orporations would prefer to have arbitration clauses in boilerplate consumer contracts, in the belief that these clauses result in the more efficient and less costly resolution of litigation.”); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704–05 (2012) (discussing the reasons behind corporations’ affinity for arbitration clauses and class arbitration waivers).

fendant's] millions of customers brought claims in individual arbitration against the company for any reason, compared to thousands who sought help from a consumer group"<sup>23</sup> concerning their claims against the defendant in that litigation.

Accordingly, today, arbitration clauses containing class arbitration waivers pervade employment, insurance, and franchise contracts, but are particularly omnipresent in consumer contracts.<sup>24</sup> In fact, more than seventy-five percent of contemporary consumer contracts have been found to contain arbitration clauses, usually coupled with class arbitration waivers.<sup>25</sup> Consequently, a substantial majority of prospective consumer actions<sup>26</sup> are subject to FAA-supported arbitration clauses and class arbitration waivers.<sup>27</sup>

By calling for the enforcement of arbitration agreements, and thus preventing affected consumers from being heard by a jury, the FAA's relationship to the jury trial guarantee is, upon first glance, a troubled one. As further analysis reveals, a substantial majority of consumers, by virtue of their subjection to FAA-supported arbitration clauses and class arbitration waivers, are practically precluded from ever exercising their right to have their individual or class-based legal actions heard by a jury. Consequently, the FAA's relationship to the jury trial right is a deeply troubled one.

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23 Sternlight, *supra* note 22, at 723 (quoting Brief for Marygrace Coneff et al. as Amici Curiae Supporting Respondents, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), at 9).

24 See Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882-83 (2008) ("Over 75% of the consumer agreements we examined included mandatory arbitration clauses."); Theodore Eisenberg et al., *Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 92 JUDICATURE 118, 119 (2008) ("[I]n our sample, mandatory arbitration clauses appeared in more than three-quarters of consumer contracts . . ."); Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 635 (2008) ("All nine of the biggest cell phone service providers' consumer form contracts I examined included [arbitration clauses] . . . [A]nd all nine of the contracts barred consumers' access to class relief.").

25 See *supra* note 24 and accompanying text.

26 These include breach of contract, product-liability-based tort, and unreasonable charges claims against credit card companies, commercial banks, manufacturers, and service providers.

27 See *supra* note 24 and accompanying text; Gilles, *supra* note 20, at 375 ("[C]ontract-based class actions are . . . on their way to Mauritius. Corporate caretakers have concocted an antigen, in the form of the class action waiver provision, that travels through contractual relationships and dooms the class action device . . . the waiver works in tandem with standard arbitration provisions to ensure that any claim against the corporate defendant may be asserted only in a one-on-one, nonaggregated arbitral proceeding.").

Although the right to trial by jury is just that—a waivable right and not a requirement—the courts’ interpretations of the FAA, as detailed in the following sections, call for the enforcement of these arbitration agreements even when plaintiffs’ jury trial waiver is not “knowing, voluntary, and intelligent.”<sup>28</sup> Accordingly, the FAA gives ample cause for serious constitutional concern.

### B. *The MDL Process*

MDL was born out of the sort of massive litigation whose pretrial proceedings it is aimed at centralizing. In the late 1960s, the federal government successfully litigated myriad antitrust suits against electrical equipment manufacturers, and, subsequently, more than 1800 separate damages actions were filed against the manufacturers in thirty-three federal district courts.<sup>29</sup> This “unprecedented state of affairs”<sup>30</sup> led legislators and judges to recognize the need for a more efficient means of administering the parallel pretrial proceedings attendant to such massive litigation.<sup>31</sup> Thus, in 1968, § 1407 of Title 28 was enacted, creating the Judicial Panel on Multidistrict Litigation (“JPML”).<sup>32</sup>

The JPML “is neither a trial, appellate, nor (as some have called it) a . . . ‘Super Court.’”<sup>33</sup> It is a special judicial creature comprised of seven federal judges empowered to transfer civil actions individually filed around the country “involving one or more common questions of fact”<sup>34</sup> to a single district court, the transferee court, for coordinated, centralized pretrial proceedings when the transfer would “promote the just and efficient conduct”<sup>35</sup> of the action.

Formally, MDL only impacts the pretrial stages of plaintiffs’ cases; by limiting the application of § 1407 to “pretrial proceedings,” Con-

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<sup>28</sup> Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 732–33 (2001).

<sup>29</sup> See Judith Resnik, *From “Cases” to “Litigation”*, 54 LAW & CONTEMP. PROBS. 5, 31 (1991) (citing H.R. JUDICIARY COMM., 90TH CONG., REP. NO. 1130, 2 (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1899) (detailing MDL’s birth).

<sup>30</sup> Bradt, *supra* note 11, at 785 (citing DAVID F. HERR, MULTIDISTRICT LITIGATION § 2.2 (1986)).

<sup>31</sup> See Bradt, *supra* note 11, at 785–86 (citing HERR, *supra* note 30); George E. Farrell, *Multidistrict Litigation in Aviation Accident Cases*, 38 J. AIR L. & COM. 159, 159 (1972) (discussing MDL’s origins); Resnik, *supra* note 29, at 31–32 (citing Neal & Goldberg, *supra* note 29, at 623–25) (same).

<sup>32</sup> See Farrell, *supra* note 31, at 159; Resnik, *supra* note 29, at 34–35.

<sup>33</sup> Earle F. Kyle, IV, *The Mechanics of Motion Practice Before the Judicial Panel on Multidistrict Litigation*, 175 F.R.D. 589, 589 (1998).

<sup>34</sup> Multidistrict Litigation Act, 28 U.S.C. § 1407(a) (2006).

<sup>35</sup> *Id.*

gress designed JPML to transfer and centralize only those proceedings that precede trial.<sup>36</sup> Accordingly, at the close of pretrial proceedings, individual cases are, in theory, remanded for trial to the districts from which they originated.<sup>37</sup>

The MDL process is most commonly employed to centralize the pretrial proceedings attendant to “mass torts,” a label referring to “tortious conduct affecting a large number of persons and giving rise to latent injury.”<sup>38</sup> Since their emergence in 1974, mass torts have become the principal aspect of federal civil litigation; by 1990, they encompassed seventy-five percent of all new federal product liability filings and, by 2000, many jurisdictions reported that mass torts exceeded twenty-five percent of their entire civil caseloads.<sup>39</sup> Consequently, the federal courts—MDL and otherwise—have been flooded with a “rising tide of mass tort filings”<sup>40</sup>; as Chief Judge Scirica rightly observed, “It’s asbestos. It’s breast implants. It’s fen-phen.”<sup>41</sup>

Securing MDL transfer is not a challenging task for mass tort litigants. MDL’s “common questions of fact” requirement is lax, and, to authorize transfer, the panel need only find that transfer will “be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.”<sup>42</sup> MDL transfer can be initiated by motion by any party to a litigation, or sua sponte by the JPML, and the consent of the parties to the litigation is neither required nor recommended.<sup>43</sup> In fact, MDL transfer may even occur when all parties agree concerning the merits of transfer, and the

<sup>36</sup> See Farrell, *supra* note 31, at 166 (discussing MDL’s design).

<sup>37</sup> See 28 U.S.C. § 1407(a) (“Each action . . . shall be remanded . . . before the conclusion of such pretrial proceedings . . .”).

<sup>38</sup> Joseph R. Barton, *Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL RTS. J. 199, 201 (1999) (citing Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 296 n.1 (1996)); See also Bradt, *supra* note 11, at 762 (“[A] third of all pending federal civil cases are part of an MDL . . . [and] over ninety percent of those cases are [a form of mass tort] . . .” (citing Lee et al., *supra* note 11, at 2)).

<sup>39</sup> See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1363 (1995) (citing Deborah R. Hensler, *Reading the Tort Litigation Tea Leaves: What’s Going on in the Civil Liability System?*, 16 JUST. SYS. J. 139, 147 (1993)) (detailing the striking proliferation of mass torts); Karen A. Geduldig, *Casey at the Bat: Judicial Treatment of Mass Tort Litigation*, 29 HOFSTRA L. REV. 309, 309–10 (2000) (citing Hensler, *supra*, at 147) (same).

<sup>40</sup> Michael Higgins, *Mass Tort Makeover?*, 84 A.B.A.J. 52, 53 (1998) (internal quotation marks omitted).

<sup>41</sup> *Id.*

<sup>42</sup> 28 U.S.C. § 1407(a); see also Bradt, *supra* note 11, at 786 (citing 28 U.S.C. § 1407) (detailing the mechanics of MDL transfer).

<sup>43</sup> See 28 U.S.C. § 1407(c) (discussing methods of transfer).



JPML may order transfer despite any pertinent infirmities in the parties' transfer motions and briefs.<sup>44</sup>

Accordingly, although § 1407(a) provides that transfer may only occur where the JPML decides that transfer will be convenient for the parties, the JPML conducts transfer hearings with an eye toward judicial economy and efficiency, ordering transfer where doing so would reduce court dockets and costs, sometimes in the face of opposition by all parties.<sup>45</sup>

More often than not, when faced with a motion for MDL transfer, or considering one sua sponte, the JPML orders centralization; from 2003 to 2008, for instance, the percentage of cases transferred to an MDL court of those considered for such transfer ranged from seventy-two to eighty-six percent.<sup>46</sup>

Once a case is transferred, the control of the case is out of the hands of the JPML and is instead in the control of the transferee judge, the "MDL judge." The MDL judge's authority over pretrial proceedings is quite broad, ranging from coordinating discovery<sup>47</sup> to ruling on motions to remand<sup>48</sup> and dispositive motions.<sup>49</sup> Most importantly, the MDL judge has the power to govern the settlement of the cases before it.<sup>50</sup>

44 See Farrell, *supra* note 31, at 164 ("When consideration is opposed by all the parties, it should not be required. Occasionally, however, the Panel has taken the opposite position when plaintiffs and defendants agreed that consolidation was not required . . . ." (citing *In re Air Crash Disaster at New Orleans, La. (Moisant Field)*, Docket No. M.D.L.—64 (J.P.M.L. 1971))); Kyle, *supra* note 33, at 597 n.51, 599–600 ("[T]he Panel may, sua sponte consider and order transfer, despite any infirmities in a brief, or whether a motion or brief is submitted at all . . . . The Panel considers even unopposed transfer motions on their merits, and has occasionally denied unopposed transfer motions." (citing 28 U.S.C. § 1407(c)(i))).

45 See Farrell, *supra* note 31, at 164 ("Occasionally, however, the Panel has [ordered consolidation despite opposition from all parties] . . . ." (citing *In re Air Crash Disaster at New Orleans, La. (Moisant Field)*, Docket No. M.D.L.—64 (J.P.M.L. 1971))); Kyle, *supra* note 33, at 590 ("Panel 28 U.S.C. § 1407 transfer orders . . . are meant to achieve efficiency and judicial economy . . . ." (citing MANUAL FOR COMPLEX LITIGATION (THIRD) § 10.1 (1995))).

46 See John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2229 (2008) (detailing MDL transfer statistics).

47 See, e.g., *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 238 F. Supp. 2d 270 (D.D.C. 2002) (ordering production of documents at deposition).

48 See, e.g., *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 399 F. Supp. 2d 356 (S.D.N.Y. 2005) (resolving motion to remand).

49 See, e.g., *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 460 F. Supp. 2d 277 (D. Mass. 2006) (denying motion for summary judgment).

50 See, e.g., *In re Managed Care Litig.*, 246 F. Supp. 2d 1363, 1365 (J.P.M.L. 2003) ("[S]ettlement matters are appropriate pretrial proceedings subject to centralization under [28 U.S.C.] § 1407." (citing *In re Patenaude*, 210 F.3d 135, 142–44 (3d Cir. 2000))).

Once part of an MDL, individual plaintiffs retain almost no control over their cases. The MDL judge establishes a Plaintiffs Management Committee (“PMC”) responsible for a range of management functions, such as arguing motions, coordinating discovery, and negotiating settlement.<sup>51</sup> Unsurprisingly, these PMCs often come under fire for exhibiting conflicts of interests and attempting to impose inadequate settlements on plaintiffs.<sup>52</sup>

Plaintiffs before an MDL court are practically out of luck if they endeavor to escape, as the JPML retains “unusually broad discretion to carry out its functions, including substantial authority . . . to decide how the cases under its jurisdiction should be coordinated.”<sup>53</sup> Accordingly, appeal of a panel decision to transfer rarely occurs, and is available only by petition for a writ of mandamus or prohibition.<sup>54</sup>

The idea underlying MDL transfer is a sensible one. If mass torts are crowding court dockets, then it would “seem sensible to resolve the claims as efficiently as possible and to reduce the transaction costs in doing so”<sup>55</sup> through transfer. The other appeals of transfer are clear: thousands of claims can be resolved at once, while incurring minimal transaction costs, and the resolution of those claims furnishes valuable reference points for the resolutions of other claims as well.<sup>56</sup>

Although more than four decades old, the MDL statute is now more prominent than ever. A third of all currently pending federal civil cases are part of an MDL, and more than ninety percent of those cases are a form of mass tort.<sup>57</sup> Many of these MDLs are massive, comprising thousands of claims and litigants, with billions of dollars

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51 See ROBERT L. HAIG, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 14:32 (3d ed. 2012) (discussing PMCs’ functions).

52 See, e.g., *In re Diet Drugs Products Liab. Litig., Objectors Claim Settlement a Sham Benefitting Only AHP, Lawyers*, 15 NO. 12 ANDREWS PHARMACEUTICAL LITIG. REP. 12, at \*2 (May 2000) (“The . . . objectors also charge . . . [the PMC and its attorneys] entered into a contract with AHP beforehand that severely limits how they can represent their clients . . .”).

53 *In re Wilson*, 451 F.3d 161, 173 (3rd Cir. 2006) (quoting *In re Collins*, 233 F.3d 809, 811–12 (3rd Cir. 2000)) (internal quotation marks omitted).

54 See Heyburn, *supra* note 46, at 2228–29 (citing *In re Wilson*, 451 F.3d at 161, 163–64) (tracing the JPML’s development as a manager of complex litigation disputes).

55 Victor E. Schwartz et al., *Addressing the “Elephantine Mass” of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271, 280 (2003).

56 See *id.* at 281 (citing *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 187 (1999) (statement of William N. Eskridge Jr., Professor, Yale Law School)) (explaining the benefits engendered by MDL).

57 See Bradt, *supra* note 11, at 762 (citing Lee et al., *supra* note 11 (discussing MDL’s role in contemporary complex litigation)).

in liability claims at stake.<sup>58</sup> It is thus no wonder that judges and scholars deem MDL the “primary vehicle for the resolution of complex civil cases.”<sup>59</sup>

Corresponding temporally with the rise of mass torts and the development of MDL is the last several decades’ marked decline in the rate of federal tort cases resolved by jury trials: an approximately seventy-eight percent decline between 1985 and 2003, from 3600 to 800 federal tort jury trials nationally.<sup>60</sup> Many scholars—who aptly describe our civil jury system as “dying”<sup>61</sup> and “all but disappeared”<sup>62</sup>—predict that if this “historic decline”<sup>63</sup> continues, tort jury trials may soon become extinct.<sup>64</sup> This may not disturb those who hail MDL for its noted efficiency and economic benefits, but it is problematic in light of James Madison’s proclamation that “[t]rial by jury in civil cases is . . . essential to secure the liberty of the people.”<sup>65</sup> As explained in the following sections, mass tort MDL plaintiffs have been afforded a Seventh Amendment right to trial by jury that, in practice, the MDL process precludes them from exercising.

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58 See Charles Silver & Geoffrey C. Miller, *The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 108 (2010) (“[T]he biggest [MDLs] involv[e] tens of thousands of plaintiffs with billions of dollars in liability claims.” (citing *In re Diet Drugs*, 282 F.3d 220, 225 (3rd Cir. 2002))).

59 Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2324 (2008) (citing *In re Zyprexa Prod. Liab. Litig.*, 238 F.R.D. 539, 542 (E.D.N.Y. 2006)).

60 See ALAN KANNER, DAUBERT AND THE DISAPPEARING JURY TRIAL 38 (2006), available at <http://law.bepress.com/expresso/eps/1851> (citing Leonard Post, *Federal Tort Trials Continue Downward Spiral*, NAT’L L.J., Aug. 22, 2005, at 7) (noting the decline of federal jury trials).

61 Justice Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 192 (2005) (quoting William G. Young, *An Open Letter to U.S. District Judges*, FED. LAW., July 2003, at \*32 (2003)) (internal quotation marks omitted).

62 *Id.* (quoting Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 142 (2002)) (internal quotation marks omitted).

63 Royal Furgeson, *Civil Jury Trials R.I.P.? Can it Actually Happen in America?*, 40 ST. MARY’S L.J. 795, 812 (2009) (quoting Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004)) (internal quotation marks omitted).

64 See, e.g., *id.* at 797 (“If the trend continues . . . civil jury trials in America may eventually become, for all practical purposes, extinct.”); Symposium, *Relational Contracting in a Digital Age*, 11 TEX. WESLEYAN L. REV. 675, 693 (2005) (“[C]ivil jury trials are basically dead . . .”).

65 Mark W. Bennett, *Judges’ Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005) (quoting 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789)) (internal quotation marks omitted).

## II. THE MEANING AND APPLICATION OF THE SEVENTH AMENDMENT'S TRIAL-BY-JURY GUARANTEE

### A. *The Meaning of the Seventh Amendment*

Valued for its emphasis on common sense, empowerment of the common people, and check upon the power of the sovereign and the judge, the jury trial right has been recognized as a critical aspect of our governmental structure since the Founding.<sup>66</sup> As Justice Story famously proclaimed, “[the right of trial by jury] . . . is . . . the palladium of our public rights and liberties.”<sup>67</sup> This principle still rings true today; as the Seventh Circuit recently explained, “[i]t is a fundamental principle of American law that every person is entitled to his or her day in court.”<sup>68</sup>

Although we have scant direct evidence concerning the intention of the Framers of the Seventh Amendment, the founding generation clearly intended for us to “do justice with juries.”<sup>69</sup> When Thomas Jefferson drafted the Declaration of Independence, he “observed that a ‘decent respect to the opinions of mankind’ required those in rebellion to ‘declare the causes’ that impelled them to separation, including England’s ‘depriving us . . . of the benefits of Trial by Jury.’”<sup>70</sup> When Madison drafted the Bill of Rights, he likewise centered it around jury trials in civil cases, resulting in the Seventh Amendment.<sup>71</sup>

Outwardly, the Court has maintained the Seventh Amendment’s importance, proclaiming it to be “of such importance and [to] occup[y] so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”<sup>72</sup> To date, however, the Court has “artfully avoided any pronouncement of what substantive jury functions are

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<sup>66</sup> See Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 865 (2008) (“In civil cases, the preservation of the jury right was viewed at the time of the founding as almost equally critical to the preservation of liberty and democracy.” (citing 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1762 (1833))).

<sup>67</sup> Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 687 (2004) (quoting John C. Hogan, *Joseph Story on Juries*, 37 OR. L. REV. 234, 249 (1958)).

<sup>68</sup> *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 968 (7th Cir. 1998).

<sup>69</sup> Furgeson, *supra* note 63, at 798.

<sup>70</sup> See *id.* (quoting THE DECLARATION OF INDEPENDENCE paras. 1, 20 (U.S. 1776)).

<sup>71</sup> See *id.* (citing U.S. CONST. amend. VII).

<sup>72</sup> Arhangelsky, *supra* note 12, at 98 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

‘preserved’<sup>73</sup> by the constitutional right to trial by jury in civil cases. The Court’s scant holdings regarding jury functions have thus far spoken exclusively to procedure: disputed questions of fact must be submitted to the jury;<sup>74</sup> unanimity of verdict is required;<sup>75</sup> the jury must be so constituted as to be an impartial and competent tribunal;<sup>76</sup> and a jury of six is constitutionally permissible.<sup>77</sup>

Nonetheless, despite its evasiveness in the area of substantive jury functions, the Court has established a historical approach through which it not only evaluates the constitutionality of a procedure implicating the Seventh Amendment’s guarantee, but also determines whether an action affords plaintiffs a right to a jury trial.<sup>78</sup>

Because the “common law” referenced in the Seventh Amendment refers to the common law of England in 1791, the year the Seventh Amendment was enacted, a new procedure affecting the jury trial right will be constitutional under the Seventh Amendment only if the procedure satisfies the “substance” of the “English common law when the Amendment was adopted.”<sup>79</sup> The Court’s explication of the substance of the English common law jury trial in 1791 is sparse: “issues of law are to be resolved by the court and issues of fact are to be determined by the jury . . . .”<sup>80</sup> Accordingly, this proclamation is our sole tool for defining the substance of the English common law jury trial and, consequently, the Seventh Amendment’s substantive requirements.

The Court’s historical approach only calls for the preservation of the substance of the common law jury trial, not “mere matters of form or procedure.”<sup>81</sup> Thus, new procedural modifications to the jury trial are permissible so long as they leave intact the substance of the English common law trial.<sup>82</sup> Under this approach, the Court has up-

73 Paul B. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 CATH. U. L. REV. 737, 737 (1989).

74 *See id.* (citing *Baylis v. Travellers’ Ins. Co.*, 113 U.S. 316, 320–21 (1885)).

75 *See id.* (citing *Am. Publ’g Co. v. Fisher*, 166 U.S. 464, 468 (1897)).

76 *See Austin Wakeman Scott, Trial By Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 674 (1918) (detailing the substance of the Seventh Amendment trial-by-jury right).

77 *See Weiss, supra* note 73 (citing *Colgrove v. Battin*, 413 U.S. 149, 160 (1973)).

78 *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 344 (“[T]he content of the right must be judged by historical standards.”) (citing *Curtis v. Loether*, 415 U.S. 189, 193 (1974)).

79 *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935).

80 *Id.* (citing *Walker v. New Mexico*, 165 U.S. 593, 596 (1897)).

81 *Parklane*, 439 U.S. at 346 (citing *Balt. & Carolina Line*, 295 U.S. at 657).

82 *See id.* (“[T]o sanction creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment.”) (citing *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967)).

held many procedural innovations without controversy: directed verdicts,<sup>83</sup> partial new trials on separable legal issues,<sup>84</sup> judgments notwithstanding the verdict,<sup>85</sup> and summary judgment.<sup>86</sup>

Finally, under this approach, a modern plaintiff is guaranteed a jury trial if the plaintiff's claim would have been actionable, or is analogous to a claim that would have been,<sup>87</sup> in a 1791 English common law court.<sup>88</sup> Courts refer to such jury-right-affording actions as actions "at law."<sup>89</sup> An action was one "at law" in 1791 if it was one "in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized."<sup>90</sup> Importantly, when an action is one purely for monetary damages—which are, by definition, "legal" damages—the action is always one at law and, therefore, "the determination of damages must fall to a jury."<sup>91</sup>

#### *B. Prospective Consumer and Mass Tort MDL Plaintiffs Retain a Seventh Amendment Right to Trial by Jury*

Under this prevailing historical approach, the Seventh Amendment clearly guarantees prospective consumer and individual mass tort MDL plaintiffs the right to a jury trial. Each of these plaintiffs is asserting, or seeking to assert, a basic contract or tort claim against the defendant for monetary damages, and juries were impaneled for such actions at common law in 1791, when the Seventh Amendment was enacted.

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<sup>83</sup> See *Galloway v. United States*, 319 U.S. 372 (1943) (holding that directed verdict is consistent with the Seventh Amendment).

<sup>84</sup> See *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931) (upholding the partial new trial on a separable legal issue against a Seventh Amendment challenge).

<sup>85</sup> See *Balt. & Carolina Line*, 295 U.S. at 654 (holding that judgment notwithstanding the verdict is constitutional under a Seventh Amendment analysis).

<sup>86</sup> See *Fid. & Deposit Co. v. United States*, 187 U.S. 315 (1902) (holding that summary judgment is consistent with the Seventh Amendment).

<sup>87</sup> The Court has neglected to explain what, exactly, it deems a claim "analogous" to one at common law. However, in making this determination, the Court focuses on "the nature of the issue to be tried." *Ross v. Bernhard*, 396 U.S. 531, 538 (1970) (citing *Simler v. Conner*, 372 U.S. 221 (1963)).

<sup>88</sup> See *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) ("By common law . . . [the Framers] meant . . . suits in which *legal* rights were to be ascertained and determined, in contradistinction to those . . . [in which] equitable remedies were administered . . ." (internal quotation marks omitted)).

<sup>89</sup> *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 43 (1989).

<sup>90</sup> *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974) (citing *Parsons*, 28 U.S. at 447).

<sup>91</sup> *Arhangelsky*, *supra* note 12, at 114 (citing *Wooddell v. Int'l Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 97 (1991)).

Contract-law-based legal actions for monetary damages tried before juries were ubiquitous at common law.<sup>92</sup> Identifying a common law legal cause of action identical or analogous to the contract law claims seeking monetary damages asserted by nearly all prospective consumer plaintiffs is therefore an unchallenging task. Accordingly, prospective consumer plaintiffs asserting contract-based actions for monetary damages retain a Seventh Amendment right to trial by jury.

Given that the origin of trial by jury of tort actions for monetary damages against private parties at English common law dates to as early as the fifteenth century, such tort actions, too, were ubiquitous in the English common law court system.<sup>93</sup> Consequently, finding a common law legal cause of action identical or analogous to the claims asserted by mass tort MDL plaintiffs and many prospective consumer plaintiffs subject to the FAA, as the historical approach mandates, is easily realized: mass tort MDL and many consumer plaintiffs are likewise seeking to assert tort claims for monetary damages.<sup>94</sup>

The fact that the class action device alters the form in which many individual prospective consumer plaintiffs would ultimately arrive before a jury has no effect on the underlying legal action's nature as one sounding in contract or, at times, tort for monetary relief and, as a result, garnering Seventh Amendment protection. Likewise, that MDL alters the way mass tort plaintiffs would ultimately arrive before a jury does not modify the underlying nature of the legal action as one sounding in tort for monetary relief and, consequently, receiving Seventh Amendment protection. The Court has consistently held that "nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court."<sup>95</sup> Accordingly, regardless of the procedural innovation being employed, where the underlying actions are legal, the Seventh Amendment affords the plaintiffs a right to trial by jury.<sup>96</sup> Thus, by

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<sup>92</sup> See George Lee Flint, Jr., *ERISA: Jury Trial Mandated for Benefit Claims Action*, 25 LOY. L.A. L. REV. 361, 376 n.88 (1992) (citing JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 285–87 (2d ed. 1979)) (explaining why plaintiffs asserting contractual actions for monetary damages retain a Seventh Amendment right).

<sup>93</sup> See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ'S TORTS CASE AND MATERIALS 1–5 (10th ed. 2000) (detailing the origins of tort actions).

<sup>94</sup> See *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 311 (5th Cir. 1998) (“[T]ort actions for monetary damages are a prototypical example of an action at law, to which the Seventh Amendment applies.” (quoting *Wooddell*, 502 U.S. at 112) (internal quotation marks omitted)).

<sup>95</sup> *Ross v. Bernhard*, 396 U.S. 531, 540 (1970).

<sup>96</sup> See *Cimino*, 151 F.3d at 311 (“[C]lass action plaintiffs may obtain a jury trial on any legal issues they present . . . .” (quoting *Ross*, 396 U.S. at 541) (internal quotation marks omitted)).

virtue of their assertion of legal claims, mass tort MDL plaintiffs and prospective consumer plaintiffs retain a constitutional right to trial by jury.

The Court has not yet decided a case concerning the relationship between the Seventh Amendment's trial-by-jury guarantee, the impact of these FAA-supported, adhesive arbitration clauses and class arbitration waivers, and MDL. Nonetheless, the on-the-ground, practical realities detailed in the following two Parts suggest that the Court recognize that each of these procedural innovations precludes affected plaintiffs from exercising their Seventh Amendment right to trial by jury.

### III. THE JUDICIARY'S EXPANSIVE INTERPRETATION OF THE FAA PRECLUDES PROSPECTIVE CONSUMER PLAINTIFFS FROM EXERCISING THEIR TRIAL-BY-JURY RIGHT

The FAA's support for adhesive arbitration clauses and class arbitration waivers is formally consistent with the Seventh Amendment's jury trial guarantee. However, practically, the federal courts' interpretations of the FAA's pro-arbitration mandate places adhesive arbitration agreements, arbitration clauses, and class arbitration waivers alike, not "upon the same footing as other contracts,"<sup>97</sup> but on sacrosanct grounds, enabling corporations to use these agreements to bar consumers from accessing the courts. The courts' jurisprudence concerning arbitration agreements illustrates that the courts not only abide by a sweeping "federal policy favoring arbitration,"<sup>98</sup> but they seek to enforce arbitration clauses and class arbitration waivers regardless of the specific characteristics of each contract. The language or placement of adhesive arbitration agreements, consumers' degrees of knowledge, education, or sophistication, corporations' coercive or fraudulent tactics in procuring consumers' consent to these clauses, and whether consumers knowingly, voluntarily, or intelligently agreed to such clauses all drop by the wayside.

This empowers corporations to, as they do in most of their consumer contracts,<sup>99</sup> employ powerful adhesive arbitration agreements explicitly locking consumers into individual arbitration, producing the "reality that the average consumer frequently loses his/her consti-

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97 *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (internal quotation marks omitted)).

98 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

99 *See supra* note 24 and accompanying text.



tutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job.”<sup>100</sup> The striking proliferation of these court-enforced arbitration agreements has rightly prompted scholars to acknowledge the resultant “paradigmatic shift in our civil justice system”<sup>101</sup> away from the civil jury trial. Today, the widespread use of these adhesive arbitration agreements effectively compels a consumer to “yield his or her very access to the courts in order to meaningfully participate in our modern society.”<sup>102</sup>

While these adhesive arbitration agreements are said to be justified on the ground that consumers knowingly, voluntarily, and intelligently consent to them, such a justification is not grounded in reality.<sup>103</sup> Consumers have no real opportunity to choose litigation over arbitration if they want the often commonplace product or service in question.

Corporations’ propensity to employ such arbitration agreements is unsurprising. These arbitration agreements align perfectly with their interests; data show that “blindly agreeing to contract provisions is a behavior routinely exhibited by the average consumer,”<sup>104</sup> and evidence suggests that—due to a lack of resources and awareness and fear of retaliation—“very few consumers will choose to bring individual arbitration claims against a company.”<sup>105</sup> Relatedly, corporations are fully cognizant of the courts’ extraordinary deference toward adhesive arbitration agreements.<sup>106</sup> Corporate lawyers and business ex-

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100 Sternlight, *supra* note 28, at 669 (citing *In re Knepp*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999)).

101 Judge Craig Smith & Judge Eric Moye, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH. L. REV. 281, 282 (2012).

102 *Id.* (citing Chief Justice Wallace B. Jefferson, *The State of the Judiciary in Texas*, 70 TEX. B.J. 314, 315 (Apr. 2007)).

103 *See Allstar Homes, Inc. v. Waters*, 711 So. 2d 924, 929 (Ala. 1997), *rejected by Ex parte Perry*, 744 So. 2d 859, 865 (Ala. 1999) (“[An] arbitration agreement is a waiver of a party’s right under the Amendment VII of the United States Constitution to a jury trial and, regardless of the federal courts’ policy favoring arbitration, we find nothing in the FAA that would permit such waiver unless it is made knowingly, willingly, and voluntarily.”); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 6 (1997) (“[C]onsumers and employees are given no real opportunity to choose litigation or other dispute-resolution techniques over arbitration.”).

104 Millman, *supra* note 20, at 1033 n.1 (citing David W. Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971)).

105 Sternlight, *supra* note 22, at 723.

106 *See Gilles, supra* note 20, at 395–96 (citing Complaint, *Ross v. Bank of Am.*, 05 Civ. 7116 (S.D.N.Y. Aug. 11, 2005)); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV.

ecutives have long been known to regularly share their tactical insights concerning the successes of arbitration agreements “in trade journals, at conferences, and in high-level planning sessions.”<sup>107</sup>

The rise of this reality has been sped along by the Court’s jurisprudence in support of its “federal policy favoring arbitration.”<sup>108</sup> Crucially, this jurisprudence has been emphatically enforced by lower courts, which construe defenses to agreements to arbitrate particularly narrowly, interpret arbitration agreements especially broadly, and regularly mandate individual arbitration in new areas. These lower courts have also felt free to strike state consumer protection statutes and disregard the specific conditions of these adhesive arbitration agreements: consumers’ degrees of knowledge and sophistication; the clauses’ clarity and conspicuousness; corporate defendants’ coercive or fraudulent tactics in procuring consumers’ “consent” to these clauses; and whether consumers agreed to such clauses knowingly, voluntarily, or intelligently.

#### A. *The Supreme Court’s Policy Favoring Arbitration over Litigation*

In 1983, the Supreme Court enunciated a sweeping preference for binding arbitration over litigation, supporting and effectively expanding adhesive arbitration clauses and class arbitration waivers and their enforcement, scope, and impact.<sup>109</sup> The lower courts’ enforcement of this policy, as detailed in the following section, locks affected consumers into binding individual arbitration, precluding them from securing a trial by jury, individually or as a class.<sup>110</sup>

The Court’s policy favoring arbitration over litigation stems from its proclamation in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* concerning the FAA:

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593, 617–18 (2005)) (explaining corporations’ awareness of these agreements and the subsequent growth of “an ADR cottage industry”).

107 *See id.* (“Buoyed by this extraordinary judicial deference, corporate lawyers and business executives naturally sought ways to expand the reach of arbitration clauses, sharing their tactical insights in trade journals, at conferences, and in high-level, top-secret planning sessions.” (citing Complaint, *Ross v. Bank of Am.*, 05 Civ. 7116)).

108 *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

109 *See id.*

110 Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 17 (2003) (“The civil jury trial is fast disappearing from our legal landscape, and one important reason for its disappearance is the rapid growth of mandatory arbitration.” (citing Theodore Eisenberg & Kevin M. Clermont, JUDICIAL STATISTICAL INQUIRY FORM, <http://www-ilo-mirror.cornell.edu:8090/questata.htm> (last visited May 2, 2013))).

[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.<sup>111</sup>

Pursuant to this “federal policy favoring arbitration,”<sup>112</sup> the Court interprets defenses to agreements to arbitrate particularly narrowly,<sup>113</sup> interprets arbitration clauses and class arbitration waivers especially broadly,<sup>114</sup> and regularly expands the reach and impact of arbitration clauses and waivers by mandating individual arbitration in areas previously thought to be within the exclusive domain of litigation.<sup>115</sup> Although the Court has not expressly stated that binding arbitration can apply to all federal court claims, scholars have recognized that this preference for arbitration over litigation “often has the same effect.”<sup>116</sup>

The Court recently furthered its policy favoring arbitration by significantly broadening the applicability of corporations’ class arbitration waivers. In 2011’s *AT&T Mobility LLC v. Concepcion*, the Court held that the FAA preempts state laws that would hold adhesive contracts’ class arbitration waivers to be unenforceable.<sup>117</sup>

As would be typical of such state laws, the state law at issue in *Concepcion* classified class arbitration waivers contained in adhesive consumer contracts as unconscionable because a state legislature determined that such waivers so effectively insulated companies from class-based claims that they cheated large numbers of consumers out of individually small sums of money.<sup>118</sup> Nonetheless, the Court, invoking its “liberal federal policy favoring arbitration,”<sup>119</sup> held that the FAA preempts such state laws, as they “stan[d] as an obstacle to [the FAA’s] accomplishment and execution.”<sup>120</sup>

111 *Moses H. Cone*, 460 U.S. at 24–25 (citing *Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638, 643 (7th Cir. 1981)). The Court has neglected to explain this policy or its rationale.

112 *Id.* at 24.

113 See Sternlight, *supra* note 28, at 697 (citing *Moses H. Cone*, 460 U.S. at 24–25).

114 See *id.* (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995)).

115 See *id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

116 Sternlight, *supra* note 103, at 77.

117 See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); Sternlight, *supra* note 22, at 705–06 (citing *Concepcion*, 131 S. Ct. at 1748–53) (explaining *Concepcion*).

118 See Sternlight, *supra* note 22, at 705 (citing *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162–63 (2005)).

119 *Concepcion*, 131 S. Ct. at 1745 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (internal quotation marks omitted).

120 *Id.* at 1756 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted).

In the aftermath of *Concepcion*'s striking of such pro-consumer state laws, scholars expect, and are seeing, even more companies incorporating arbitration clauses containing class arbitration waivers in their adhesive consumer contracts, as “[c]hallenges to [these] waivers based on state statutory or common law will likely face greater difficulty navigating the Court’s *Concepcion* decision.”<sup>121</sup>

Consequently, for its support and expansion of adhesive contracts’ arbitration clauses and class arbitration waivers and their enforcement, scope, and impact, the Court’s policy favoring arbitration over litigation goes a measurable way toward permitting corporate and commercial entities to use adhesive, FAA-supported arbitration agreements to preclude consumer plaintiffs from being heard before a jury. However, as detailed below, it is the federal courts’ emphatic enforcement of this policy and the *Concepcion* decision that is primarily responsible for the inability of present-day consumers to exercise their constitutional right to be heard by a jury.

*B. The Federal Courts’ Emphatic Response to the Court’s Policy Favoring Arbitration*

In response to the Court’s sweeping policy preference for arbitration over litigation, the federal courts have reacted emphatically. Not only have they followed suit by likewise narrowly interpreting defenses to arbitration,<sup>122</sup> broadly interpreting arbitration clauses,<sup>123</sup> and mandating arbitration in a wide array of new areas,<sup>124</sup> but they have actually gone further.

Guided by their expansive interpretation of the Court’s policy favoring arbitration, the federal courts almost always disregard the language and placement of arbitration clauses and class arbitration waivers as well as the parties’ degrees of knowledge, sophistication, and education to conclude that an arbitration clause was sufficiently clear and conspicuous to constitute a valid, binding agreement.<sup>125</sup> For example, the federal courts routinely uphold confusingly worded and buried arbitration agreements that fail to inform consumers that by

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121 Myriam Gilles, *Procedure in Eclipse: Group-Based Adjudication in a Post-Concepcion Era*, 56 ST. LOUIS U. L.J. 1203, 1218 (2012).

122 See Sternlight, *supra* note 28, at 697–98 (citing *Ex parte Smith*, 736 So. 2d 604, 610 (Ala. 1999)).

123 See *id.* at 697 (citing *Webb v. Investacorp, Inc.*, 89 F.3d 252, 259 (5th Cir. 1996)).

124 See *id.* at 698 (citing *Williams v. Imhoff*, 203 F.3d 758, 763, 767 (10th Cir. 2000)).

125 See Sternlight, *supra* note 103, at 26 (citing *Scher v. Bear Stearns & Co. Inc.*, 723 F. Supp. 211 (S.D.N.Y. 1989)) (discussing the courts’ noteworthy interpretation of the Court’s policy favoring arbitration).

accepting arbitration, they have waived their right to trial by jury,<sup>126</sup> and insist that “typical investors, senior citizens, and consumers are all sufficiently knowledgeable to understand the significance of . . . arbitration provision[s].”<sup>127</sup> Some courts have even gone so far as to enforce arbitration agreements where the contract signed did not refer to arbitration, but merely incorporated it by reference to another, separate document that called for arbitration.<sup>128</sup>

Accordingly, this disregard for the clauses’ clarity and conspicuousness has led the courts to enforce legalese-filled, inconspicuous, “envelope-stuffer” amendments to adhesion contracts—“for example, the unread notice stuffed in a consumer’s monthly bill stating that, by continuing to use her credit card, or her telephone, she agrees to arbitrate any dispute that may arise.”<sup>129</sup> Increasingly, and disturbingly, these notices containing arbitration clauses and class arbitration waivers are taking the form of mass e-mails or Web site postings, and the courts have seemingly had no qualms about enforcing them.<sup>130</sup>

As a consequence of corporations’ awareness of the courts’ lack of concern for arbitration agreements’ clarity or conspicuousness, arbitration clauses’ and class arbitration waivers’ prohibitive language is now usually “buried between the fine print and legalese,” leaving consumers “unable to recognize that they have entered into an agreement that effectively waives their right to bring a class action or adjudicate the issue in anything other than an arbitral forum.”<sup>131</sup>

Additionally, the courts regularly enforce coercive and fraudulently procured agreements containing arbitration clauses and class arbitration waivers.<sup>132</sup> For instance, the courts have been so willing to enforce agreements to arbitrate that they have upheld the imposition of arbitration where a company verbally misled consumers regarding the provision, such as where a company’s agent falsely stated that

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<sup>126</sup> See *id.* at 26–27 (citing *Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442, 445–46 (S.D.N.Y. 1985)).

<sup>127</sup> *Id.* at 27 (citing *McCarthy v. Providential Corp.*, No. C94-0627 FMS, 1994 U.S. Dist. LEXIS 10122, at \*1–2 (N.D. Cal. July 18, 1994)).

<sup>128</sup> See *Sternlight*, *supra* note 28, at 701 (citing *R.J. O’Brien & Assoc., Inc. v. Pipkin*, 64 F.3d 257, 260 (7th Cir. 1995)).

<sup>129</sup> *Gilles*, *supra* note 20, at 377.

<sup>130</sup> See *id.* (citing *Marsh v. First USA Bank*, 103 F. Supp. 2d 909, 919 (N.D. Tex. 2000)).

<sup>131</sup> Christina Johnson, *Employment and Consumer Arbitration Agreements: Does It Limit Your Ability to Bring or Participate in a Class Action?*, 52 S. TEX. L. REV. 273, 277 (2010).

<sup>132</sup> See *Sternlight*, *supra* note 116, at 26 (“[R]ather than admit that an arbitration agreement is unclear, fraudulent, coercive or unfair, courts have often engaged in highly formalistic analyses that essentially reject reality and factual distinctions in favor of this mythical vision.”)

signing the arbitration clause would not compromise any rights.<sup>133</sup> The courts have likewise enforced arbitration agreements even where company representatives lulled consumers into signing the clause by stating that the clause was a “mere formality.”<sup>134</sup>

Such extraordinary deference to arbitration agreements has become pervasive among the federal courts, prompting scholars to rightly recognize that “[r]ather than admit an arbitration agreement is . . . fraudulent, coercive, or unfair, courts have often engaged in highly formalistic analyses that essentially reject reality and factual distinctions in favor of this mythical version.”<sup>135</sup>

Moreover, guided by their expansive interpretation of the Court’s policy favoring arbitration, the federal courts do not require that adhesive arbitration clauses or class arbitration waivers be entered into “knowingly, voluntarily, or intelligently,”<sup>136</sup> permitting “the pro-arbitration policy . . . [to] trum[p] [these] considerations.”<sup>137</sup> Not only is this inequitable, but this approach conflicts with the prevailing standard for permissive waivers of the right to trial by jury, which mandates that the parties knowingly, voluntarily, and intelligently waive their right to trial by jury.<sup>138</sup>

For example, courts typically do not even consider whether an arbitration agreement was entered into knowingly, voluntarily, or intelligently.<sup>139</sup> Instead, they apply standard “objective” rules for contract formation, holding that arbitration-clause-containing “adhesive contracts are valid, so long as they are not unconscionable, fraudulent, obtained under duress, or otherwise invalid.”<sup>140</sup> In an especially tell-

133 See *id.* at 31 (citing *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287 (9th Cir. 1988)).

134 *Id.* (quoting *Smith Barney Shearson, Inc. v. DeFries*, No. 94-Civ. 0020 (WK), 1994 WL 455178, at \*2 (S.D.N.Y. Aug. 19, 1994)).

135 *Id.* at 26.

136 Sternlight, *supra* note 28, at 699 (citing Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 197 (1998)).

137 Nima H. Mohebbi, *Back Door Arbitration: Why Allowing Nonsignatories to Unfairly Utilize Arbitration Clauses May Violate the Seventh Amendment*, 12 U. PA. J. BUS. L. 555, 557 (2010), (citing *Realty Trust Grp., Inc. v. Ace Am. Ins. Co.*, Civil No. 1:07CV573-HSO-JMR, 2007 U.S. Dist. LEXIS 91331, at \*9 (S.D. Miss. Dec. 11, 2007)).

138 See Deborah J. Matties, *A Case for Judicial Self-Restraint in Interpreting Contractual Jury Trial Waivers in Federal Court*, 65 GEO. WASH. L. REV. 431, 449 (1997) (citing *Nat’l Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255 (2d Cir. 1977)) (detailing this prevailing standard for jury trial waivers). Though the Supreme Court has never enunciated the precise standard courts should employ in reviewing contractual jury trial waivers, the lower courts have virtually uniformly followed *Hendrix*. See Sternlight, *supra* note 28, at 678 (citing *Hendrix*, 565 F.2d at 258).

139 See Sternlight, *supra* note 28, at 699 (citing Ware, *supra* note 136, at 197).

140 *Id.* (citing *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286–88 (9th Cir. 1988)).

ing case illustrating the court's disregard for the jury trial waiver requirements, the Seventh Circuit held that an unaware broker had voluntarily and knowingly accepted arbitration by virtue of one of his business dealings, reasoning that he could have chosen a different business endeavor if he did not want to arbitrate.<sup>141</sup>

In those few cases in which the federal courts evaluated whether plaintiffs should be compelled to engage in individual arbitration and relinquish their constitutional rights to trial by jury despite their not knowingly, voluntarily, or intelligently agreeing to do so, a few courts recognized that a contract to arbitrate necessarily waives the jury trial right. However, the federal courts neglected to explain their failure to apply the traditional jury trial waiver criteria to determine whether or not permissible waiver should be found.<sup>142</sup> Some federal courts have implicitly acknowledged the conflict between consumers' unknowing, involuntarily, or unintelligent consent to arbitration agreements and the Seventh Amendment's jury trial guarantee, but disregarded it, summarily stating that arbitration is "favored" by the Court and its interpretation of the FAA.<sup>143</sup> Finally, other federal courts have disappointingly asserted that "by 'agreeing' to arbitrate," plaintiffs consented "to have their dispute resolved in a non-Seventh Amendment forum, and that the court therefore need not apply normal waiver criteria."<sup>144</sup>

Consequently, the federal courts' stark refusal to properly mandate that adhesive arbitration clauses and class arbitration waivers be entered into knowingly, voluntarily, or intelligently in order to be enforced has prompted scholars to recognize that consumers "often do not knowingly or intelligently waive their right to a jury trial when they are *forced* to arbitrate under the FAA."<sup>145</sup>

Lastly, in the wake of *Concepcion*, and in line with the Court's policy favoring arbitration, the federal courts are not only liberally striking consumer protection laws condemning class arbitration waivers in adhesive contracts, but are, more importantly, extending *Concepcion*'s reasoning to contexts not discussed or explicitly considered by the

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141 See Sternlight, *supra* note 103, at 33 (citing *Geldermann v. Commodity Futures Trading Comm'n*, 836 F.2d 310, 317–18 (7th Cir. 1987)).

142 See Sternlight, *supra* note 28, at 675–76 (citing *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992)).

143 See *id.* at 676 (citing *Cohen*, 841 F.2d at 285, 287).

144 *Id.* (citing *Illyes v. John Nuveen & Co., Inc.*, 949 F. Supp. 580, 584 (N.D. Ill. 1996)).

145 Mohebbi, *supra* note 137, at 557 (citing Sternlight, *supra* note 103, at 7) (emphasis added).

Court.<sup>146</sup> For instance, the courts have relied upon *Concepcion* to reject arguments that denying plaintiffs their class actions would violate state law or public policy,<sup>147</sup> that class arbitration waivers prevent plaintiffs from vindicating their rights under state law,<sup>148</sup> and that class arbitration waivers are not applicable as to claims for public injunctive relief brought under state law.<sup>149</sup> Many courts have even applied *Concepcion* retroactively, permitting defendants that are currently litigating to oppose continued litigation by raising an arbitration defense, reasoning that *Concepcion*'s dramatic change in the law voids plaintiffs' claims that defendants waived the arbitral defense.<sup>150</sup>

The federal courts' expansive interpretation of *Concepcion* is truly "proving to be a tsunami that is wiping out existing and potential consumer . . . class actions."<sup>151</sup> Relatedly, if plaintiff consumers "cannot join together as a class, lack of knowledge, lack of resources, and fear of retaliation will prevent them from bringing any claims at all."<sup>152</sup> For its impediment to consumers' ability to be heard before a jury as a class, scholars have recognized that *Concepcion* and the federal courts' expansive interpretation of the decision permits "companies to use arbitration clauses to exempt themselves from class actions," thereby "provid[ing] companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued."<sup>153</sup>

Accordingly, the federal courts' expansive implementation of the Court's policy favoring arbitration and the *Concepcion* decision has morphed the class arbitration waiver into, as Professor Gilles explained, a corporate antigen, one that effectively travels through consumers' contractual relationships and, with the help of the arbitration clause, dooms consumer plaintiffs' right to trial by jury prospects.<sup>154</sup>

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146 See Sternlight, *supra* note 22, at 709 ("[J]udges are extending *Concepcion*'s reasoning to contexts not directly discussed by the Court.").

147 See *id.* at 710 (citing *Kaltwasser v. AT&T Mobility LLC*, No. C 07-00411, 2011 WL 4381748, at \*7 (N.D. Cal. Sept. 20, 2011)).

148 See *id.* (citing *Kaltwasser*, 2011 WL 4381748, at \*4-7).

149 See *id.* (citing *Meyer v. T-Mobile USA, Inc.*, No. C 10-05858 CRB, 2011 WL 4434810 (N.D. Cal. Sept. 23, 2011)).

150 See *id.* at 711 (citing *Swift v. Zynga Game Network, Inc.*, No. C-09-5443 EDL, 2011 WL 3419499 (N.D. Cal. Aug. 4, 2011)).

151 *Id.* at 704.

152 See *id.* at 704-05.

153 *Id.* at 704 (citing Myriam Gilles, *AT&T Mobility vs. Concepcion: From Unconscionability to Vindication of Rights*, SCOTUSBLOG (Sept. 15, 2011, 4:25 PM), <http://www.scotusblog.com/2011/09/att-mobility-vs-concepcion-from-unconscionability-to-vindication-of-rights/>).

154 See Gilles, *supra* note 20, at 375-76 (explaining arbitration agreements' function as a jury trial "antigen").



Consequently, consumers subject to such arbitration agreements, a majority of consumers,<sup>155</sup> are locked into individual, binding arbitration and are resultantly precluded from exercising their constitutional right to trial by jury.

#### IV. MDL PRECLUDES MASS TORT PLAINTIFFS FROM EXERCISING THEIR TRIAL-BY-JURY RIGHT

Despite its formal consistency with the Seventh Amendment's trial-by-jury guarantee, analysis indicates that the MDL process impels mass tort plaintiffs to accept pretrial settlement, precluding them from being heard by a jury. Although precise statistics concerning MDL claim resolution are unavailable, it is certain that only a small percentage of actions are remanded for individual jury trials, as virtually all are induced to settle.<sup>156</sup> Accordingly, as many litigants have argued in recent years, settlement is the only realistic option for the resolution of MDL claims.<sup>157</sup>

In enacting the MDL statute, Congress clearly prioritized efficiency and economy over individual convenience and rights: the goal and effect of MDL is clearly to produce settlements with low transaction costs.<sup>158</sup> However, in attempting to realize this goal, legislators and the courts have unjustly promoted such efficiency over mass tort plaintiffs' constitutional rights to trial by jury. In the name of this efficiency, the JPML commonly orders MDL transfer of mass tort actions involving one or more issues of common fact—*sua sponte*, or at the behest of a commercial defendant who is aware that MDL creates “the perfect conditions for an aggregate settlement,”<sup>159</sup> and often over

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<sup>155</sup> See *supra* note 24 and accompanying text.

<sup>156</sup> See Barton, *supra* note 38, at 210 (“[O]nly a small percentage of actions are remanded.” (citing Shawn Copeland et al., *Toxic Tort and Environmental Matters: Civil Litigation*, 64 ALI-ABA 33, 40 (1998))); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 593 (2008) (“[S]ettlement is currently the only realistic option for collective resolution of mass claims . . .”).

<sup>157</sup> See, e.g., Plaintiffs' Objection to Defendants' Motion to Consolidate at \*8, *Hayford v. A.W. Chesterton Co.*, No. 08CV01479 (D. Conn. Sept. 26, 2008), 2008 WL 7853952 (“[T]he interminable delay wrought by transfer to the MDL . . . effectively denies the plaintiffs their rights to trial by jury.”).

<sup>158</sup> See Carter G. Phillips et al., *Rescuing Multidistrict Litigation from the Altar of Expediency*, 1997 B.Y.U. L. REV. 821, 833 (1997) (“[I]n enacting 28 U.S.C. § 1407, Congress chose to allow judicial efficiency to outweigh individual convenience . . .” (citing Robert H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 809 (1985))).

<sup>159</sup> Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 270 (2011).

plaintiffs' objections—locking mass tort plaintiffs into a process that compels them to relinquish their trial-by-jury rights.<sup>160</sup>

Three factors conspire to preclude mass tort MDL plaintiffs from securing a post-MDL trial by jury: the prohibitive temporal and financial costs imposed on MDL plaintiffs, particularly those not engaged in contingency fee arrangements; the “settlement or nothing” approach adhered to by federal judges; and the inducement of settlement by bellwether trials.<sup>161</sup>

#### A. MDL Imposes Preclusive Costs on Mass Tort Plaintiffs

Post-MDL trial by jury is practically unavailable to mass tort MDL plaintiffs. The temporal costs imposed on plaintiffs by the MDL process, which are far more extreme than the typical temporal problems plaintiffs encounter in dealing with an overworked judicial system, effectively preclude these plaintiffs from securing a post-MDL trial by jury, compelling them to pursue pretrial settlement.

Partly due to the necessity to gear MDL proceedings to the “slowest common denominator,”<sup>162</sup> MDL pretrial preparation time following transfer is regularly delayed and incredibly long,<sup>163</sup> commonly exceeding two years<sup>164</sup> and often taking nearly a decade.<sup>165</sup> MDL courts consistently take several years to conduct discovery alone.<sup>166</sup>

Remand for trial is truly an “empty dream”<sup>167</sup> for many mass tort MDL plaintiffs—but particularly asbestos plaintiffs—unlucky enough to have their cases transferred to an MDL court. One district court recently noted that, if a case is transferred to a particular MDL, “the matter will likely be substantially delayed.”<sup>168</sup> Courts have likewise

160 See *supra* note 156 and accompanying text; Farrell, *supra* note 31, at 163 (explaining that the JPML “seldom” transfers cases to an MDL court based on considerations pertinent to the individual plaintiffs).

161 Bellwethers are carefully selected, illustrative test trials involving facts and legal issues similar to those facing MDL litigants.

162 Farrell, *supra* note 31, at 159 (citing *In re Air Crash Disaster at Greater Cincinnati Airport* (Constance, Ky.) on Nov. 8, 1965, Docket No. M.D.L.—8A (J.P.M.L. 1965)).

163 See Geduldig, *supra* note 39, at 310 (“[Mass tort MDL] litigation is invariably delayed and claims are often left unresolved.” (citing Linda S. Mullenix, *High Court Should Review Mass Torts*, NAT’L L.J., Oct. 7, 1996, at A19)).

164 See Robert Saylor & William Skinner, *Legal Lore the Mother of All Battles: The Quest for Asbestos Insurance Coverage*, 27 LITIG., no. 1, 45 (detailing a four-year-long MDL proceeding).

165 See Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 434 (1986) (“[C]ases pending eight years still have not been heard.”).

166 See Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, 24 LITIG., no. 4, 43, 44 (1998) (“[D]iscovery will not be completed for months or years.”).

167 Plaintiffs’ Objection to Defendants’ Motion to Consolidate, *supra* note 157, at 3.

168 *Hilbert v. McDonnell Douglas Corp.*, 529 F. Supp. 2d 187, 190 (D. Mass. 2008).

recognized that transfer to an asbestos MDL may result in the plaintiff “not [being] heard for many years”<sup>169</sup> and will force the plaintiff to “languish[] for a protracted period of time.”<sup>170</sup> In reference to a popular asbestos MDL, another district court aptly recognized that no “trials or discovery takes place in deference to global settlement efforts.”<sup>171</sup>

The prospect of engaging in a protracted trial following years of such time-consuming MDL proceedings is simply not an option for many plaintiffs. MDL plaintiffs are commonly ill and need monetary relief soon. Their lives very often depend on it, literally, so they likely lack years to wait for the initiation and completion of a trial following the already lengthy pretrial MDL process.<sup>172</sup> Scholars have noted the “real concern that many [mass tort MDL] plaintiffs will die before they are compensated and a great many will wait years for their awards.”<sup>173</sup> Many attorneys who represent asbestos MDL plaintiffs have voiced concern that “current trends in the [MDL] threaten payments to the truly sick.”<sup>174</sup> The situation concerning asbestos is not unique, as the MDL involving breast implants and Dalkon Shield, a contraceptive intrauterine device, imposed comparable delays on plaintiffs, raising similar concerns.<sup>175</sup>

Consequently, for many mass tort MDL plaintiffs, the temporal costs of a jury trial following the years spent languishing in the MDL court are preclusive of their ability to exercise their right to trial by jury.

The financial costs engendered by pretrial MDL proceedings are likewise extremely high, forcing the substantial number of individual plaintiffs who do not retain counsel under a contingency fee arrangement—such as the many plaintiffs compensating counsel at an

169 *Madden v. Able Supply Co.*, 205 F. Supp. 2d 695, 702 (S.D. Tex. 2002).

170 *Rosamond v. Garlock Sealing Techs., Inc.*, No. 3:03CV235, 2004 WL 943924, at \*4 (N.D. Miss. Apr. 5, 2004).

171 *In re Me. Asbestos Cases*, 44 F. Supp. 2d 368, 374 n.2 (D. Me. 1999).

172 *See* Barton, *supra* note 38, at 203 (citing 1990 REPORT OF THE UNITED STATES JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2, 34–35 (Mar. 1991)) (“The asbestos litigation produced the real and present danger that transaction costs would exhaust available assets before plaintiffs could collect for judgments, if obtained.”).

173 *Id.* (citing JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 141 (1995)).

174 Schwartz et al., *supra* note 55, at 274 (citing Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36, *available at* 2001 WL 30366341).

175 *See* Higgins, *supra* note 40, at 53 (“[M]ass torts are the legal system’s version of a nuclear exchange: Thousands of complex claims. Huge potential damages. Massive discovery and expense. The litigation over silicone breast implants has been all of that and more . . . for every dollar the plaintiffs finally recover, experts estimate that litigation expenses will have eaten up another 60 to 75 cents . . .”).

hourly rate—to settle their claims and skip an expensive post-MDL trial.<sup>176</sup> These plaintiffs, many of whom simultaneously face steep medical bills,<sup>177</sup> are thus effectively prohibited from pursuing post-MDL jury trial by MDL proceedings' sizable costs.<sup>178</sup> This is news to no one, as judges have long acknowledged MDL pretrial proceedings' prohibitive costs, particularly in the asbestos realm.<sup>179</sup>

The exorbitant expense of MDL proceedings engenders “the real and present danger that transaction costs w[ill] exhaust”<sup>180</sup> the parties' funds, forcing them into bankruptcy and stifling litigation. In fact, those few successful mass tort plaintiffs expend nearly twice the amount they recover on consolidated pretrial proceeding transaction costs, sending a clear signal to other mass tort plaintiffs to seek an economical resolution in the form of a convenient, net-positive settlement.<sup>181</sup> Much of this stems from the expenses associated with MDL's particularly protracted discovery proceedings; in MDL, it is

176 See ROXANNE BARTON CONLIN & GREGORY S. CUSIMANO, 1 LITIGATING TORT CASES § 8:31 (2012) (noting that some mass tort plaintiffs compensate their attorneys at an hourly rate, and “[w]here counsel are compensated based on an hourly rate, the expenses associated with MDL practice are ultimately passed on to the client”); Farrell, *supra* note 31, at 161 (“[C]onsolidation has imposed a financial burden on plaintiffs in the aviation disaster cases by increasing the time and cost of preparation.”); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 8 (1996) (noting that rising civil litigation costs are “driv[ing] [parties] to skip all these expensive procedures and settle”). Although precise data concerning the portion of mass tort MDL plaintiffs retaining counsel pursuant to a contingency fee arrangement relative to those compensating counsel at an hourly rate, or pursuant to another scheme, are unavailable, it is certain that a substantial portion—likely a minority—are not operating under a contingency fee arrangement. As a result, they bear all the costs of MDL's pricey, protracted procedures. See CONLIN & CUSIMANO, *supra* (noting that some mass tort plaintiffs compensate counsel at an hourly rate); Herbert M. Kritzer, *Fee Arrangements and Negotiation*, 21 LAW & SOC'Y REV. 341, 343 (1987) (“The alternate method of fee calculation . . . is the so-called lodestar system in which the lawyer is compensated with an hourly rate, perhaps adjusted by some multiplier to reflect the quality of the work or the element of risk involved.”); Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 304 (1996) (implying that a portion of mass tort plaintiffs eschew contingency fee arrangements by asserting that “[s]ome claimants may have entered into contingency-fee contracts with individual lawyers.” (emphasis added)).

177 See Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685, 720 (2005) (stating that mass tort plaintiffs may owe “thousands of dollars in medical bills” allegedly stemming from the defendants' negligence).

178 See *supra* note 176 and accompanying text.

179 See, e.g., *In re Asbestos Sch. Litig.*, 104 F.R.D. 422, 433 (E.D. Pa. 1984), *rev'd in part, aff'd in part*, 789 F.2d 996 (3rd Cir. 1986) (“The bench, bar and public at large are only too well aware of the staggering costs that the asbestos personal injury litigation has generated.”).

180 Barton, *supra* note 38, at 203 (citing 1990 REPORT OF THE UNITED STATES JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2, 34–35).

181 See *id.* at 202–03 (“[T]ransaction costs exceed the victims' recovery by nearly two to one . . .” (citing 1990 REPORT OF THE UNITED STATES JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 3)).

not uncommon, for instance, for “[e]xpenses for a single deposition . . . [to] exceed \$10,000.00,”<sup>182</sup> a price often “passed on to the client.”<sup>183</sup>

In the breast implants MDL, for example, for every dollar plaintiffs recovered, pre-trial expenses consumed another sixty to seventy-five cents.<sup>184</sup> Unsurprisingly, as a result of costs engendered by MDL, at least one implant maker filed for bankruptcy not long after the initiation of the implants MDL.<sup>185</sup>

Further, in the asbestos MDL, successful plaintiffs recover “considerably less than a third”<sup>186</sup> of the “tens of billions that will be expended”<sup>187</sup> by the litigants on MDL’s transaction costs. The transaction costs associated with litigating asbestos suits in the MDL court leave the successful asbestos plaintiffs “only thirty-nine cents of every asbestos dollar paid.”<sup>188</sup>

Accordingly, for many mass tort MDL plaintiffs, the prospect of proceeding to post-MDL trial with its “attendant expense and unpredictability”<sup>189</sup> after already costly MDL proceedings is prohibitively uneconomical, if not financially impossible.

#### *B. The MDL Judiciary Abides by a “Settlement or Nothing” Approach*

The federal MDL judiciary’s pervasive “settlement or nothing” approach also contributes to MDL plaintiffs’ practical inability to exercise their right to trial by jury.<sup>190</sup>

The past several decades have seen the culture of federal judging shift toward “an ideal of the managerial judge and away from a more neutral, judicial umpire and trial model.”<sup>191</sup> Pursuant to this new model, judges prioritize expediting and resolving parties’ disputes over affording litigants access to an impartial forum to manage their litigation.<sup>192</sup> To do so, judges “experiment with schemes for speeding

182 CONLIN & CUSIMANO, *supra* note 176, § 8:31 n.1.

183 *Id.* § 8:31.

184 *See* Barton, *supra* note 38, at 203 (citing Higgins, *supra* note 40, at 53).

185 *See id.* (citing Higgins, *supra* note 40, at 53).

186 JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 23 (1995).

187 *Id.*

188 *Id.*

189 Erichson & Zipursky, *supra* note 159, at 270.

190 *See id.* (“[MDL] creates the perfect conditions for an aggregate settlement: . . . judicial encouragement for a global settlement . . .” (citing Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 *TEMP. L. REV.* 1013, 1056–66)).

191 *See* KANNER, *supra* note 60, at 23 (citing Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374 (1982)) (explaining this shift in judicial ideology).

192 *See id.* (citing *MANUAL FOR COMPLEX LITIGATION*, *supra* note 45).

the resolution of cases and for persuading litigants to settle rather than try cases whenever possible.”<sup>193</sup>

This shift toward settlement as the ideal is particularly pervasive in the MDL courts; MDL judges—district court judges presiding over MDL proceedings—more so than those not overseeing MDL proceedings, consistently prioritize and push for plaintiffs to settle before the MDL court by verbally encouraging settlement and highlighting post-MDL trial’s substantial costs.<sup>194</sup> They direct discovery to focus on information pertinent to settlement, prolong the already slow and expensive MDL proceedings to induce settlement, refer the parties to magistrate judges for settlement negotiations, appoint special managers and settlement counsel to support settlement, and aggressively utilize settlement conferences and firm trial dates to realize expeditious settlement.<sup>195</sup> This “settlement or nothing” attitude is “ingrained”<sup>196</sup> in many MDL judges, who view their role as “getting the parties to a claims process—a settlement—as quickly as possible.”<sup>197</sup> Accordingly, scholars and judges have begun to recognize that MDL judges treat “the MDL process . . . only as a mechanism for reaching a settlement,”<sup>198</sup> and those litigants who acted lawfully and desire adjudication before a jury, but are nonetheless before an MDL court, can “no longer hope to prevail.”<sup>199</sup> While the MDL judiciary’s “settlement or nothing” approach bolsters efficiency and economy, it is repug-

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<sup>193</sup> Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379 (1982).

<sup>194</sup> See ANNOTATED MANUAL FOR COMPLEX LITIGATION § 13.11 (David Herr ed., 2009) (“[T]he judge can focus the parties’ attention on the likely cost of litigating the case to conclusion, in fees, expenses, time, and other resources. Other helpful measures include scheduling settlement conferences, directing or encouraging reluctant parties, insurers, and other potential contributors to participate, suggesting and arranging for a neutral person to assist negotiations, targeting discovery at information needed for settlement, and promptly deciding motions whose resolution will lay the groundwork for settlement.”); Richard J. Arsenault & J.R. Whaley, *Multidistrict Litigation and Bellwether Trials: Leading Litigants to Resolution in Complex Litigation*, 39 BRIEF 60, 61 (2009) (detailing MDL judges’ “various techniques to promote settlement” (citing ANNOTATED MANUAL FOR COMPLEX LITIGATION, *supra*, § 13.1-15)); Herrmann, *supra* note 166, at 45 (“Many [MDL] judges view their role as ‘getting the parties to a claims process’—a settlement—as quickly as possible . . . [T]he MDL process serves only as a mechanism for reaching a settlement.”); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2277–79 (2008) (discussing the MDL judiciary’s role in “settlement promotion” (citing *In re Novak*, 932 F.2d 1397, 1404 (11th Cir. 1991))).

<sup>195</sup> See *supra* note 194 and accompanying text.

<sup>196</sup> Herrmann, *supra* note 166, at 45.

<sup>197</sup> *Id.* (internal quotation marks omitted).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

nant in that it is partially responsible for many mass tort plaintiffs' inability to exercise their constitutional right to trial by jury.

Many who have recognized the judiciary's overwhelming support of MDL's function "as a means of achieving final, global [settlement] of mass . . . disputes"<sup>200</sup> have decried this "unfortunat[e]"<sup>201</sup> reality as productive of coercive "blackmail settlements."<sup>202</sup> Chief Judge Frank Easterbrook, for example, denounced what he perceives as the "model of the central planner"<sup>203</sup> underlying attitudes toward the settlement of aggregate litigation. The MDL courts' aggressive use of the judicial settlement conference to realize settlement, for instance, has been criticized as using "[t]he most controversial of all judicial management tools . . . stray[ing] furthest from the judiciary's traditional adjudicative role"<sup>204</sup> by those opposed to MDL's current role as a "settlement promotion"<sup>205</sup> device. That nearly all MDL cases conclude in pretrial settlement<sup>206</sup> thus comes as no surprise.

Accordingly, despite its furtherance of economy and efficiency, the federal judiciary's pressuring and prioritizing settlement is worrisome and should be critically addressed; this pervasive "settlement or nothing" approach works in tandem with the substantial costs associated with MDL proceedings and bellwether trials' inducement of settlement to practically preclude MDL plaintiffs from exercising their right to be heard by a jury.

### C. *Bellwether Trials Induce and Accelerate MDL Settlement*

Bellwether trials, a practice pervasive in MDL and unique to aggregate litigation, facilitate, accelerate, and "supply a strong impetus for"<sup>207</sup> pretrial MDL settlement. Bellwethers afford parties to an MDL real world, settlement-inducing jury data concerning claim valuation, strategies and novel issues in the litigation, parties' strengths and weaknesses, probabilities of success, and the answers to important questions otherwise only answerable through the lessons of years of

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200 *In re Zyprexa Prods. Liab. Litig.* 238 F.R.D. 539, 542 (E.D.N.Y. 2006).

201 Herrmann, *supra* note 166, at 45.

202 *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973)).

203 *In re Bridgestone/Firestone, Inc., Tire Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002).

204 Marcus, *supra* note 194, at 2277 (quoting Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 *YALE L.J.* 27, 43 (2003)) (internal quotation marks omitted).

205 *Id.* at 2278–79 (citing Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 *U. CHI. L. REV.* 337, 358 (1986)).

206 *See supra* note 156 and accompanying text.

207 Fallon et al., *supra* note 59, at 2366.

mass tort litigation.<sup>208</sup> Bellwethers thus create a particularly “favorable environment for global resolution through settlement,”<sup>209</sup> enable corporate defendants and MDL judges to employ particularly influential data and information to pressure plaintiffs and their PMCs to settle their tort claims, and, consequently, work in tandem with MDL proceedings’ exorbitant costs and the MDL judiciary’s “settlement or nothing” approach to effectively prohibit MDL plaintiffs from securing a trial by jury.

Given that a test run can never faultlessly duplicate a trial, a court management technique common to MDL is to try a small number of selected cases, affording the parties “an accurate picture of how different juries would view different cases across the spectrum of weak and strong cases that are aggregated.”<sup>210</sup> Such a case typically involves “facts, claims, or defenses that are similar to [those] presented in a wider group of related cases.”<sup>211</sup> These “test cases” are known as bellwether trials. While the parties to an MDL can consent to be bound by the bellwether jury trial’s verdict, doing so is uncommon.<sup>212</sup> Almost always, bellwether cases’ judgments are only legally binding on those particular litigants involved.<sup>213</sup> The MDL court can select the cases that will serve as bellwether cases, or the MDL court may permit the parties to select a certain number of cases to serve as bellwethers.<sup>214</sup> Given the prevalence of bellwethers, “[s]ecuring parties’ consent for these trials is now an important aspect of the MDL courts’ management of cases.”<sup>215</sup>

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208 See *id.* at 2325 (“[B]y injecting juries and fact-finding into multidistrict litigation, bellwether trials assist in the maturation of disputes by providing an opportunity for coordinating counsel to *organize* the products of pretrial common discovery, *evaluate* the strengths and weaknesses of their arguments and evidence, and *understand* the risks and costs associated with the litigation.”).

209 Arsenault & Whaley, *supra* note 194, at 61. See Bradt, *supra* note 11, at 790 (“[B]ellwether trials . . . provide important data about the value of the claims, perhaps leading to settlement discussions.” (citing Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1485 (2005))); Fallon et al., *supra* note 59, at 2325 (“[T]he bellwether process can precipitate global settlement negotiations and ensure that such negotiations do not occur in a vacuum, but rather in light of real-world evaluations of the litigation by multiple juries.”).

210 Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 697 (2006).

211 Fallon et al., *supra* note 59, at 2325.

212 See Sherman, *supra* note 210, at 696–97 (citing *In re Air Crash Disaster at Stapleton Int’l Airport*, 720 F. Supp. 1505 (D. Colo. 1989) (explaining the effects of bellwether judgments), *rev’d on other grounds*, 964 F.2d 1059 (10th Cir. 1992)).

213 See *id.* at 697.

214 See *id.*

215 Bradt, *supra* note 11, at 789 (citing Lee et al., *supra* note 11, at 5).



The appeal, and vice, of bellwether trials stems from their inducement and acceleration of pretrial MDL settlement,<sup>216</sup> a function that bellwether trials are aimed at realizing.<sup>217</sup> Because bellwether trials comprise a representative sample of an MDL's cases, they yield important, reliable information concerning the strengths and weaknesses of the sides' cases and potential trial strategies, claim valuation, and probabilities of success before a jury, and enable the working through of novel issues in individual litigation "before either an aggregate trial or, much more likely, a global settlement."<sup>218</sup>

Bellwethers thus permit mass torts to "mature" without years of expensive litigation otherwise required for such maturity, providing the parties with informed answers to the questions that one must consider when evaluating settlement: "What does the liability picture look like? Are there comparative negligence issues? Is preemption or the exclusion of experts going to be in play? What are the ranges of damages? Will punitive damages be a factor? How long will it take to try cases, and at what cost? How many and what types of experts will be required? Will the cost to litigate any single case exceed potential recoveries?"<sup>219</sup>

Consequently, these "real-world evaluations of the litigation by multiple juries"<sup>220</sup> not only "anchor litigants' otherwise speculative and overly hopeful settlement claim valuations"<sup>221</sup> and "se[t] the stage for . . . global resolution,"<sup>222</sup> but they, more importantly, enable corporate defendants and MDL judges to employ particularly accurate, influential data and information to pressure plaintiffs and their PMCs to settle their mass tort claims.<sup>223</sup> Accordingly, since bellwethers' emergence, scholars, litigants, attorneys, and judges commonly at-

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216 See Stier, *supra* note 190, at 1059–61 (citing Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience*, 54 DRAKE L. REV. 621, 625 (2006)) (detailing bellwethers' inducement of settlement).

217 See Fallon et al., *supra* note 59, at 2343 (explaining that bellwethers trials' goals are to serve as "indicators of future trends and catalysts for an ultimate resolution").

218 Sherman, *supra* note 210, at 698; see also Bradt, *supra* note 11, at 790 ("Even though the results of these bellwether trials are not binding on parties who are not participants in the trials, they provide important data about the value of the claims, perhaps leading to settlement discussions." (citing Cabraser, *supra* note 209, at 1485)).

219 See Arsenaault & Whaley, *supra* note 194, at 61 (citing ANNOTATED MANUAL FOR COMPLEX LITIGATION, *supra* note 194, at § 22.314) (detailing the important pre-settlement legal questions for which bellwethers furnish reliable, informative answers).

220 Fallon et al., *supra* note 59, at 2366.

221 Stier, *supra* note 190, at 1059 (citing *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995)).

222 Arsenaault & Whaley, *supra* note 194, at 61.

223 See *id.* at 61 (explaining how bellwethers are "used in mass torts to value cases and encourage settlement").

tribute the realization of cases' global resolution to bellwethers' settlement-inducing efforts.<sup>224</sup>

Bellwethers also facilitate the settlement of those comparable claims not yet before an MDL court, as mass tort lawyers “keep careful track of verdicts and settlements in other cases, and this information provides the basis for considerable agreement as to the settlement value of individual cases.”<sup>225</sup> By “bringing fact-finding to the forefront of multidistrict litigation,”<sup>226</sup> bellwethers facilitate the realization of settlement—both today and, in the case of comparable future cases, tomorrow.

Thus, despite the federal judiciary's admiration of bellwethers for the mechanism's support of judicial economy and efficiency,<sup>227</sup> there exists at least one reason to be critical of the practice. Namely, bellwethers—by affording litigants real jury data concerning claim valuation, parties' strengths and weaknesses, probabilities of success, trial strategies, novel issues in the litigation, and answers to important questions otherwise only answerable through the lessons of years of litigation—accelerate and support defendants' and MDL courts' inducement of pretrial settlement. These bellwethers work in tandem with MDL's exorbitant costs and the MDL judiciary's “settlement or nothing” approach to practically preclude mass tort MDL plaintiffs from securing a post-MDL trial by jury.

#### V. THE COURT'S PERMISSIVE SEVENTH AMENDMENT JURISPRUDENCE ENABLES THESE PRACTICES TO RELEGATE PLAINTIFFS' TRIAL-BY-JURY RIGHT

That a substantial majority of consumer and mass tort MDL plaintiffs are practically unable to exercise their constitutional right to trial by jury raises a number of serious questions and concerns. Principal, however, is the question of how the Court permitted the Seventh Amendment's jury trial guarantee to play second fiddle to the judiciary's preference for FAA-supported arbitration and MDL's efficiency and economy benefits.

This Part explores this question, analyzing the Court's Seventh Amendment trial-by-jury jurisprudence, a cluster of five cases in

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<sup>224</sup> See Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2378 (2008) (“[I]n the absence of the bellwether procedure these cases would not have settled . . .”).

<sup>225</sup> Sherman, *supra* note 210, at 701 n.37.

<sup>226</sup> Fallon et al., *supra* note 59, at 2341–42.

<sup>227</sup> See, e.g., *In re Chevron U.S.A. Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (regarding bellwethers as a “sound” practice).

which the Court considered five civil procedural innovations against the Seventh Amendment's trial-by-jury guarantee.<sup>228</sup> This Comment pays particular attention to the Court's mode of analysis concerning the meaning and substance of the Seventh Amendment's jury trial guarantee and how the contested procedures impact the guarantee.

This Part also provides an answer to this question: the Court has demonstrated a striking willingness to accept modern civil procedural innovations' impacts on the civil jury trial through formal rather than pragmatic Seventh Amendment analyses, focusing primarily on the threshold issue of power-shifting between the judge and jury and declining to craft a meaningful trial-by-jury jurisprudence that would provide us with an operative understanding of the right. Consequently, we lack a Seventh Amendment vocabulary with which to analyze procedures implicating or, in the case of FAA-supported arbitration agreements and MDL, conflicting with plaintiffs' exercise of their constitutional trial-by-jury rights, permitting the continued vitality of such procedures and their attendant infringements upon plaintiffs' right.

#### A. *Dimick v. Schiedt and Additur*

In 1934's *Dimick v. Schiedt*, the sole case in which the Court struck a procedure as inconsistent with the trial-by-jury guarantee, the Court considered whether the guarantee was consistent with additur, a judge's unilateral increase of a jury's damages award.<sup>229</sup> After the jury awarded the plaintiff five hundred dollars, the plaintiff moved for a new trial on the ground that the jury rendered an inadequate verdict.<sup>230</sup> The judge granted plaintiff's motion but stated that he would not enforce it if the defendant consented to an increase of the jury's damages award.<sup>231</sup> After the defendant consented to the increase and

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228 The Court decided several other cases interpreting the Seventh Amendment's reexamination clause and rendered one other decision dealing exclusively with the court's interpretation of complex patent claims. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996) (holding that New York's law controlling compensation awards for excessiveness or inadequacy can be given effect, consistent with the Seventh Amendment's reexamination clause, if the review standard set out in the New York statute is applied by the federal courts with appellate control of the trial court's ruling limited to review for "abuse of discretion"); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) (holding that patent claim construction is a matter of law to be determined by the court). However, because these cases shed no further light on, and are largely impertinent to, the meaning and substance of plaintiffs' trial-by-jury right, they are not included in this analysis.

229 See *Dimick v. Schiedt*, 293 U.S. 474 (1934).

230 *Id.* at 475.

231 *Id.* at 475–76.

the Court resultantly denied plaintiff's motion, the plaintiff appealed.<sup>232</sup> The appellate court reversed, deeming the trial-by-jury guarantee inconsistent with additur.<sup>233</sup>

In evaluating and ultimately affirming the unconstitutionality of additur, the Court launched a brief analysis of, first, whether additur or an analogous procedure existed at common law. It found that an "authoritative decision sustaining the power of an English court to [employ additur]"<sup>234</sup> or an analogous procedure did not exist. In fact, the common law rules "forbade the court to *increase* the amount of damages awarded by a jury."<sup>235</sup> Consequently, the court explained that, because the Seventh Amendment's trial-by-jury right "has in effect adopted the rules of the common law,"<sup>236</sup> additur must be stricken, as "[t]o effectuate any change in these rules is not to deal with the common law, *qua* common law, but to alter the Constitution."<sup>237</sup>

Despite its conclusion condemning additur, the Court declined to discuss its meaning or substance, any trial-by-jury policy concerns, or even how, exactly, additur infringed upon the right such that the procedure was unconstitutional. The Court's only statement concerning additur's practical inconsistency with the trial-by-jury guarantee was that, when additur is employed, "no jury . . . ever passe[s] on the increased amount."<sup>238</sup> From this, we can infer that the Court reasoned that an increase to a jury's damages award, an issue of "fact," is impermissible because the jury never considered awarding an amount more than it actually awarded in damages. A court-ordered increase in the damages award would therefore constitute a court impermissibly serving as finder of fact by independently determining damages.

Not only is this reasoning unconvincing, as the Court fails to substantiate why it is valid to assume that a jury never considered a damages award larger than it actually awarded, but it sheds no light on the meaning or substance of the trial-by-jury guarantee that additur supposedly infringes upon.

The Court then focused on "the controlling distinction between the power of the court and that of the jury,"<sup>239</sup> though it spoke exclusively to the former. In a relatively lengthy discussion, the Court de-

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<sup>232</sup> *See id.* at 476.

<sup>233</sup> *See id.*

<sup>234</sup> *Id.* at 476-77.

<sup>235</sup> *Id.* at 482.

<sup>236</sup> *Id.* at 487.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 485.

<sup>239</sup> *Id.* at 486.

tailed the contours of a judge's authority concerning a jury's damages award, which is quite expansive: judges are empowered to, for example, decrease, but not increase, a jury's damages award, as such a practice was permitted at common law.<sup>240</sup>

However, the Court, again, failed to delineate or even allude to the substance or meaning of the trial-by-jury right, nor did the Court address the jury's substantive powers or their preservation, stating only that "the jury . . . [has] the power . . . to determine the facts,"<sup>241</sup> such as damages. Nonetheless, despite the Court's formidable authority and its failure to lay out how additur infringed upon the trial-by-jury right, the Court reiterated that, because courts were prohibited from increasing damages awards at common law, additur was an unconstitutional practice, and struck it accordingly.<sup>242</sup>

*B. Gasoline Products Co. v. Champlin Refining Co. and a Partial New Trial on Separable Legal Issues*

In 1931's *Gasoline Products Co. v. Champlin Refining Co.*, the Court considered whether the Seventh Amendment's trial-by-jury guarantee was consistent with a court's ordering of a partial new trial to determine damages following a jury's verdict on damages and liability.<sup>243</sup> The plaintiff brought suit against the defendant to recover contractual royalties.<sup>244</sup> After the jury rendered its verdict, the appellate court reversed and ordered a new trial, but restricted it to the determination of damages, not liability, as the first jury had properly decided the latter.<sup>245</sup> The plaintiff appealed, arguing that the withdrawal from consideration by the new jury of his liability was a denial of his right to trial by jury.<sup>246</sup>

The Court began its brief evaluation of a partial new trial on separable legal issues by employing its historical approach, finding that, although the practice did not exist at common law, several eighteenth-century state legislatures codified the practice.<sup>247</sup> Given this inconsistency, the Court proceeded to examine whether this practice left intact the substance of the Seventh Amendment, as "the Constitu-

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240 *Id.*

241 *Id.*

242 *Id.* at 487–88.

243 283 U.S. 494 (1931).

244 *Id.* at 495.

245 *Id.* at 496–97.

246 *Id.* at 497.

247 *Id.* at 497–98.

tion is concerned, not with form, but with substance.”<sup>248</sup> As expected, however, the Court said almost nothing about the substance of or policies underlying the Seventh Amendment’s trial-by-jury guarantee, except that “[a]ll of vital significance in trial by jury is that issues of fact be submitted”<sup>249</sup> to the jury, and the issue of damages is one of fact.<sup>250</sup>

Unsurprisingly, without detailing the partial new trial’s impact on the right to trial by jury, the Court proceeded to uphold the partial new trial as consistent with the trial-by-jury right. “[W]here the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact”<sup>251</sup> and a separable issue must be retried, the Seventh Amendment does not require the entire case to be retried, but permits the Court to submit to a new jury just the separable issue. The Court reasoned that, in such cases, all of the “issues of fact”<sup>252</sup> are inevitably submitted to a jury.

The Court’s analysis is unsatisfying. Not only did the Court again decline to define or even discuss the substance of or policies behind the right to trial by jury, but it failed to consider how a partial new trial on a separable legal issue may practically impact or interact with the Seventh Amendment’s jury-trial guarantee and the jury’s ability to serve as finder of fact. For example, the Court did not offer any guidelines concerning when courts may, consistent with the trial-by-jury guarantee, usurp a jury’s verdict by ordering a new trial on a particular issue, and instead simply noted that the practice may be employed where the issue to be retried is “distinct and separable.”<sup>253</sup>

Relatedly, and perhaps of greater consequence, the Court did not consider the potential for liberal employment of this practice to lead to judicial abuse or overreaching—namely, a court’s using this practice to effectively dispose of jury verdicts concerning separable issues with which it disagreed. Given that this practice affords courts measurable latitude concerning the practical impact of jury verdicts, one would reasonably expect the Court to grapple with such issues instead of focusing exclusively on whether the practice formally respected the Seventh Amendment’s command that “issues of fact be submitted”<sup>254</sup> to the jury. However, clearly, one would be disappointed.

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248 *Id.* at 498.

249 *Id.*

250 *Id.* at 498–99.

251 *Id.* at 499.

252 *Id.* at 498.

253 *Id.* at 500 (citing *Norfolk S. R.R. v. Ferebee*, 238 U.S. 269, 274 (1915)).

254 *Id.* at 498 (citing *Herron v. S. Pac. Co.*, 283 U.S. 91 (1931)).

### C. Fidelity & Deposit Co. v. United States *and Summary Judgment*

In 1902's *Fidelity & Deposit Co. v. United States*, the Court considered the constitutionality of the predecessor to summary judgment.<sup>255</sup> The plaintiff brought suit against the defendant to recover a sum owed to the plaintiff pursuant to a contract.<sup>256</sup> Plaintiff filed a motion "for judgment, under the seventy-third rule, for failure of the defendant to file with his plea a sufficient affidavit of defence."<sup>257</sup> This motion permitted the court to enter judgment for the plaintiff if two conditions were met: the plaintiff filed an affidavit stating the cause of action and recovery owed, and the defendant failed to, with his plea, file an affidavit in response detailing why plaintiff should not be permitted to recover.<sup>258</sup> The defendant argued that this practice deprived him of his right to trial by jury.<sup>259</sup>

In upholding the summary-judgment-like practice, the Court embarked on yet another brief, formalistic Seventh Amendment analysis. Expectedly, the Court quickly established that the practice was consistent with the courts' historical practice, presaging the Court's decision to deem it constitutional.<sup>260</sup>

However, in an initially promising move, the Court proceeded to analyze the relationship between the trial-by-jury guarantee and the summary-judgment-like practice.<sup>261</sup> Disappointingly, though, this analysis consisted entirely of the following three perplexing, uninformative assertions:

[The summary-judgment-like procedure] prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the . . . [procedure] is to preserve the court from

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255 See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) ("[S]ummary judgment does not violate the Seventh Amendment." (citing *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 319–21 (1902))). But see Thomas, *Why Summary Judgment Is Unconstitutional*, *supra* note 8, at 164 ("The Supreme Court and scholars were wrong to have cited *Fidelity* as the case that established the constitutionality of summary judgment, because the procedure in *Fidelity* did not resemble summary judgment.").

256 See *Fid. & Deposit Co.*, 187 U.S. at 316.

257 *Id.* at 318 (internal quotation marks omitted).

258 See Thomas, *Why Summary Judgment Is Unconstitutional*, *supra* note 8, at 165 (citing *Fid. & Deposit Co.*, 187 U.S. at 318–19) (explaining this motion). Like its progeny, the summary judgment motion, this motion asks for the court to issue a verdict, rather than proceed to trial by jury, where the court determines that no dispute of material fact exists in the case.

259 See *Fid. & Deposit Co.*, 187 U.S. at 318.

260 See *id.* at 319 ("The rule was formerly number 75 and has existed a long time. The Court of Appeals of the District has sustained its validity in a number of cases. This court also sustained its validity in *Smoot v. Rittenhouse*, decided January 10, 1876.").

261 See *id.* at 319–20.

frivolous defences [sic] and to defeat attempts to use formal pleading as means to delay the recovery of just demands.<sup>262</sup>

The Court's analysis indicates that it was seemingly moved to uphold the summary-judgment-like practice because it determined that the practice protected the courts from frivolous defenses and merely framed, rather than permitted the court to decide upon, the issues, thus remaining formally consistent with the Seventh Amendment's mandate that issues of fact be submitted to the jury.<sup>263</sup>

This reasoning defies logic. Permitting courts to enter judgments where they deem a party's defense "frivolous" is not a framing of the issues, but an effective judicial determination of them based on a court's assessment of the facts in dispute. It is also strikingly reminiscent of the superficial reasoning underlying MDL's continued vitality—namely, that MDL furthers judicial and litigant economy and efficiency while remaining formally consistent with the trial-by-jury guarantee, as cases are theoretically, but not actually, remanded to their home districts at the close of centralized pretrial proceedings.

Disappointingly, as is indicated by the Court's silence concerning the import of the trial-by-jury right and the summary-judgment-like practice's impact on the right, the Court failed to offer us any understanding, operative or otherwise, of the trial-by-jury right or its underlying policy concerns. That the Court was not even perturbed by the summary-judgment-like practice is surprising, as the practice clearly affords the courts discretion to enter judgment for one of the parties exclusively based on its determination of the facts, constituting a clear deprivation of plaintiffs' right to secure a jury to serve as fact-finder. Nonetheless, the Court seemingly had no qualms about unconditionally deeming the practice consistent with the trial-by-jury guarantee, paving the way for summary judgment to become the procedural mainstay that it is today.

*D. Baltimore & Carolina Line, Inc. v. Redman and Judgment Notwithstanding the Verdict*

The Court, in 1935's *Baltimore & Carolina Line, Inc. v. Redman*, considered the relationship between the trial-by-jury guarantee and judgment notwithstanding the verdict, the practice of reserving legal questions arising during trials and subjecting the jury verdict to the court's ultimate ruling on the legal questions reserved. The plaintiff

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262 *Id.* at 320 (alteration in original). The Court supplemented its analysis by detailing the rule's historic employment by the courts. *See id.* at 319–20.

263 *See id.* at 320.



sued the defendant to recover damages for personal injuries.<sup>264</sup> At trial, the defendant moved for dismissal of the action and a directed verdict.<sup>265</sup> The trial court reserved its decisions on both motions and submitted the case to the jury, whose verdict would be subject to the court's rulings on the legal issues in the motions reserved.<sup>266</sup> The jury subsequently returned a verdict for the plaintiff, and the court denied both reserved motions.<sup>267</sup> The appellate court reversed and ordered a new trial, questioning the constitutionality of the practice of judgment notwithstanding the verdict.<sup>268</sup>

Sustaining the constitutionality of the practice in yet another brief decision, the Court quickly determined that “[a]t common law there was a well-established practice of [employing judgment notwithstanding the verdict].”<sup>269</sup> Thus, the Court emphatically upheld the practice, holding that it “undoubtedly was well established when the Seventh Amendment was adopted.”<sup>270</sup>

This time, however, the Court supplemented its formalistic opinion upholding the practice of judgment notwithstanding the verdict with a modicum of coherent reasoning.<sup>271</sup> The Court explained that, pursuant to the practice, courts only determine questions of law, such as “whether the evidence was sufficient or otherwise,”<sup>272</sup> not questions of fact, so, as a result, the practice is respectful of plaintiffs’ “right to have the issues of fact determined by a jury.”<sup>273</sup> This is the Court’s sole pronouncement of the trial-by-jury right’s meaning.

Nonetheless, the Court’s opinion is once again disappointing; it declined to detail the substance or policy behind the trial-by-jury right, simply noting, again, that juries are responsible for determining facts,<sup>274</sup> a vague assertion that the Court often reiterates. Instead, the Court chose to return to its focus on “the common-law distinction between the province of the court and that of the jury,”<sup>275</sup> though on-

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264 *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 656 (1935).

265 *Id.*

266 *Id.*

267 *Id.*

268 *Id.*

269 *Id.* at 659.

270 *Id.* at 660.

271 The Court also dedicated a substantial portion of its opinion to distinguishing the legally significant facts of the instant case from those of *Slocum v. New York Life Insurance Co.* See *id.* at 657–59, 661.

272 *Id.* at 659.

273 *Id.* at 658.

274 *Id.* The Court also made several impertinent assertions concerning the reexamination clause. See *id.*

275 *Id.* at 657.

ly detailing the former, explaining, in sum, that courts have ample authority to determine all questions of law regardless of the form in which they emerge or when the Court decides to render such determinations, including, as was the case in *Baltimore & Carolina Line*, after the jury rendered its findings of fact.<sup>276</sup>

Relatedly, the Court afforded no attention to the pragmatic impact of the practice being upheld, focusing instead on the practice's formal consistency with the notion that it only enables the court to rule on questions of law, leaving questions of fact to the jury.<sup>277</sup> For example, the Court failed to define or discuss if or when this practice's employment would infringe upon a jury's ability to determine questions of fact. Given that the practice permits courts to effectively overrule jury verdicts by deciding that, after the jury renders its verdict, the party for whom the jury ruled failed to supply sufficient evidence, such a concern seems warranted. Nonetheless, the Court was evidently unconcerned by such prospects, convinced, instead, to enshrine the practice by virtue of its formal consistency with the Seventh Amendment's command that "issues of fact [be] determined by a jury."<sup>278</sup>

#### E. *Galloway v. United States and Directed Verdict*

Finally, the Court, in 1943's *Galloway v. United States*, evaluated the directed verdict, the procedure by which a court orders a verdict before the jury renders its own, employed where a court determines that a party has produced insufficient evidence such that no reasonable jury could find in his favor.<sup>279</sup> The plaintiff sued the government, and the trial court issued a directed verdict in the defendant's favor.<sup>280</sup> The appellate court affirmed, rejecting the plaintiff's argument that the directed verdict violated his trial-by-jury right.<sup>281</sup>

The Court took little time to unconditionally uphold the directed verdict, finding that several analogous procedures, through which the

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<sup>276</sup> *Id.* at 657–60.

<sup>277</sup> *See id.* at 658–59 (“The trial court expressly reserved its ruling on the defendant’s motions to dismiss and for a directed verdict, both of which were based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court . . . . At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved . . . .”).

<sup>278</sup> *Id.* at 658.

<sup>279</sup> This procedure is commonly known as judgment as a matter of law.

<sup>280</sup> *Galloway v. United States*, 319 U.S. 372, 373 (1943).

<sup>281</sup> *Id.*

court “weighed the evidence, not only piecemeal but *in toto* for submission to the jury,”<sup>282</sup> existed at common law. Consequently, pursuant to its historical approach, the Court deemed the practice constitutional, stating that the plaintiff’s “objection therefore comes too late.”<sup>283</sup>

Despite this, the Court, in an initially promising move, embarked upon an evaluation of the relationship between the trial-by-jury guarantee and the directed verdict.<sup>284</sup> However, yet again, the Court failed to offer any insight concerning the substance, meaning, or policy behind the Seventh Amendment’s trial-by-jury guarantee, instead supporting its conclusion that the right to trial by jury and the directed verdict are consistent by detailing historical evidence for its assertion that “[t]he jury was not absolute master of fact in 1791. Then, as now, courts excluded evidence for irrelevancy and relevant proof for other reasons.”<sup>285</sup> The Court likewise, though expectedly, failed to define or even discuss what qualified as “fact,” nor did it delineate why “evidence” was somehow a non-factual issue over which the courts, and not the jury, possessed authority.

The rest of the Court’s analysis consisted primarily of discussion concerning the costly, perverse results that would stem from prohibiting the courts from rendering a judgment where they determine that a party has produced insufficient evidence such that no reasonable jury could find in his favor, and, unsurprisingly, the power of the courts—particularly their ability to enter judgments for a party where the court is unsatisfied with “the legal sufficiency” of the evidence supporting one side’s case.<sup>286</sup> The Court concluded that because, now and at common law, a court could issue a directed verdict where it determined that a party failed to produce sufficient evidence to support his or her case such that a reasonable jury could not rule in his or her favor, a court’s issuance of a directed verdict reflected its determination of a legal, rather than factual, question and was consequently consistent with the Seventh Amendment.<sup>287</sup>

The Court’s reasoning is unsatisfyingly formalistic and shortsighted, as it ignores the practical realities and dangers engendered by affording the courts free reign to issue decisions on “legal ques-

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282 *Id.* at 390. The Court spent nearly the entirety of the opinion preceding this determination by detailing the factual issues in dispute.

283 *Id.* at 389.

284 *Id.* at 389–96.

285 *Id.* at 390.

286 *Id.* at 389–90, 392–93.

287 *Id.* at 389–93, 396.

tions” that, in effect, preclude juries from deciding facts. For instance, a court may assert that because the evidence is allegedly “insufficient,” no reasonable jury would rule for a particular party and, accordingly, issue a directed verdict preventing the jury from exercising its authority to rule on any of the case’s factual issues. A court may even be tempted to issue a directed verdict if it believes further litigation to be wasteful or unnecessary. The Court did not even address this deleterious practical reality, or any others, but was seemingly secure in its decision that the practice’s constitutionality was evinced by its analogous common law antecedents and formal consistency with the Court’s holding that the jury is the trier of fact. Accordingly, the Court noted that, concerning such abuse stemming from its refusal to craft “standards of proof”<sup>288</sup> defining when courts may employ directed verdicts and effectively prevent juries from serving as fact-finders, “the obvious remedy is by correction on appellate review.”<sup>289</sup>

This conclusion is an unconvincing one, especially given the delay, costs, and uncertainty of appellate review weighed against the constitutional nature of the right being infringed. Conversely, what is truly “obvious” is that, as illustrated by its consistent refusal to define or detail the trial-by-jury right, the Court is unconcerned with plaintiffs’ Seventh Amendment right, paving the way for procedural innovations that are formally but not practically consistent with preserving plaintiffs’ ability to secure a jury to serve as finder of fact—such as MDL and FAA-supported individual arbitration agreements—to compel plaintiffs to relinquish their constitutional right to trial by jury. This contravenes the “fundamental principle of American law that every person is entitled to his or her day in court.”<sup>290</sup>

## VI. THE COURT SHOULD RESUME AN ACTIVE ROLE IN THE FIELD OF SEVENTH AMENDMENT JURISPRUDENCE

### A. *A Critical Glance at the Court’s Conception of the Constitutional Right to Trial by Jury*

Consumer and mass tort MDL plaintiffs’ practical inability to exercise their Seventh Amendment right to trial by jury should have sparked a discussion among the members of the federal judiciary on, at a minimum, two consequential issues: whether (1) corporations’

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288 *Id.* at 395.

289 *Id.*

290 *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 968 (7th Cir. 1998).

use of deceptively worded and inconspicuous adhesive arbitration agreements binding unknowing, unsophisticated consumers to individual arbitration and (2) the courts' employment of a pretrial centralization process that effectively compels nearly all mass tort plaintiffs to settle their claims are consistent with consumers' and mass tort plaintiffs' "fundamental"<sup>291</sup> constitutional right to trial by jury. However, the reality is that it has not. Neither courts, nor legislators, nor policymakers have acknowledged the tension between binding, FAA-supported individual arbitration agreements, MDL, and consumer and mass tort plaintiffs' compulsively relinquished right to trial by jury, and, instead, remain content with these practices' formal—rather than practical—consistency with the Seventh Amendment.<sup>292</sup>

A principal reason why courts, legislators, and policymakers have failed to address this tension is clear: the Court's scant Seventh Amendment jurisprudence is extraordinarily permissive of civil procedural innovations' impacts on the jury trial right, consistently upholding procedures provided that they are formally consistent with the Court's undefined conception of the jury's role as decider of "issues of fact."<sup>293</sup> In none of its trial-by-jury cases has the Court defined or detailed the substance of the trial-by-jury right, the meaning of "fact," or any trial-by-jury policy concerns. Instead, it has focused almost exclusively on practices' formal consistency with the Seventh Amendment—the idea that they leave intact some chance that a jury be permitted to determine issues of fact—and the expansive powers of the trial judge. Operating under such a guise, the Court has upheld nearly all procedural innovations against trial-by-jury challenges, signaling to legislators, policymakers, jurists, and the public that the constitutional right to trial by jury is not a consequential, substantive one, but an illusory, formal one that need not concern, in the case of FAA-supported arbitration agreements and MDL, corporate defendants or MDL courts.

Consequently, we also have no operative Seventh Amendment vocabulary with which to evaluate procedural innovations that impact

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291 *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (citing *Hodges v. Easton*, 106 U.S. 408, 412 (1882)).

292 *See Sternlight*, *supra* note 28, at 670 ("[C]ourts, legislators, policymakers, and the public have paid very little attention to the direct tension between mandatory binding arbitration and the right to a jury trial."). Jurists' and legislators' failure to acknowledge the tension between MDL and the trial-by-jury right is evinced by the absence of scholarly, congressional, and jurisprudential attention to the issue.

293 *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 498 (1931) (identifying the "vital significance" in trial by jury of ensuring that issues of fact are submitted to the jury with instructions and guidance (citing *Herron v. S. Pac. Co.*, 283 U.S. 91 (1931))).

plaintiffs' trial-by-jury rights. Despite rendering numerous decisions concerning the constitutional right to trial by jury, the only pertinent jurisprudential proclamation in our arsenal is that juries are to determine "issues of fact;" yet the Court has failed to define or detail its sole statement of consequence. Thus, the Court has given us no method of critically evaluating whether the practical impact of any given procedural innovation leaves intact plaintiffs' constitutional right to trial by jury, and has instead signaled that procedures are permissible where they formally permit plaintiffs some chance that a jury will be able to determine "issues of fact."

The question of why the Court decided to go down the path of diluting and ignoring plaintiffs' Seventh Amendment right to trial by jury is a more difficult one with which to grapple. However, this analysis of the Court's right-to-trial-by-jury jurisprudence suggests a likely reason for the Court's longtime retreat to its formalistic, largely undefined conception of the jury trial guarantee: if the Court resumed an active role in the field and afforded us an operative understanding of plaintiffs' constitutional right to trial by jury, it would be forced to strike many, if not most, of the civil procedural innovations pervasive among federal courts today.

Many of these procedural innovations, even aside from FAA-supported adhesive arbitration agreements and MDL, share a tenuous connection with plaintiffs' right to trial by jury as is, one that would certainly deteriorate if the Court was forced to define and afford substance to plaintiffs' jury trial right. Although not the subject of this Comment, these procedures undoubtedly include the motion to dismiss, summary judgment, and remittitur; as for their practical impacts on plaintiffs' trial-by-jury rights, these procedures have garnered substantial scholarly criticism.<sup>294</sup>

Alternatively, the Court could attempt to craft distinctions concerning the extent to which a practice may, consistent with the constitutional right to trial by jury, impede plaintiffs' access to a jury that would preserve many of its procedural innovations. However, such an endeavor would be untenable and incredibly challenging to effec-

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<sup>294</sup> See Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, *supra* note 8, at 1890 ("The motion to dismiss is fast becoming the new summary judgment motion and with this movement, the civil jury trial continues to disappear." (citing Thomas, *Why Summary Judgment Is Unconstitutional*, *supra* note 8, at 141)); Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, *supra* note 8, at 734 ("[R]emittitur in fact does impinge the plaintiff's right to a jury trial and is thus unconstitutional."); Thomas, *Why Summary Judgment Is Unconstitutional*, *supra* note 8, at 139–40 ("[N]o procedure similar to summary judgment existed under the English common law and . . . summary judgment violates the core principles or 'substance' of the English common law.").

tuate, as several of these procedures, such as FAA-supported arbitration agreements and MDL, preclude most affected plaintiffs from ever exercising their trial-by-jury right. In any case, the prospects of striking centuries of judicial approval and practice or crafting a new body of trial-by-jury jurisprudence are dim, and are the likely culprits behind the Court's permissive, formalistic trial-by-jury jurisprudence.

However, upon directly confronting the tension between FAA-supported arbitration agreements, MDL, and consumer and MDL mass tort plaintiffs' Seventh Amendment right to trial by jury, one sees that the tension must be taken seriously: the Seventh Amendment's trial-by-jury guarantee should play an operative role in consumer and mass tort MDL litigation, particularly in the majority of cases in which unclear, inconspicuous FAA-supported adhesive arbitration agreements lock unknowing, uneducated, and unsophisticated consumer plaintiffs into binding individual arbitration, preventing them from exercising their trial-by-jury right, and in those cases in which MDL's costs, the MDL judiciary's "settlement or nothing" approach, and the impact of bellwethers preclude mass tort plaintiffs from securing a trial by jury.

The monumental importance of the Seventh Amendment to the Framers demands this result.<sup>295</sup> The Framers, who remembered that the jury was the hard-fought "choice of the founders,"<sup>296</sup> recognized the prospect that the "fundamental"<sup>297</sup> jury trial right may, in some cases, be inefficient or cumbersome but nevertheless "felt that jury rights were of central importance,"<sup>298</sup> and included them in the Bill of Rights accordingly. To permit the Court to circumvent this critical constitutional right through its extraordinarily formalistic, permissive trial-by-jury jurisprudence is to effectively relegate the Framers' constitutional mandate, an ironic move for a Court that is seemingly so deeply concerned with preserving the Seventh Amendment status quo as of 1791.

Moreover, and perhaps more importantly, ignoring this tension and effectively marginalizing consumer and MDL mass tort plaintiffs' trial-by-jury rights engenders a number of practical dangers. Princi-

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<sup>295</sup> See *supra* Part II.A.

<sup>296</sup> Suja A. Thomas, Professor of Law, Before and After the Summary Judgment Trilogy, Keynote Speech at the Seattle University School of Law Colloquium on the 25th Anniversary of the Summary Judgment Trilogy: Reflections on Summary Judgment, Univ. of Ill. Coll. of Law (April 11, 2012), in 43 LOY. U. CHI. L.J. 499, 512.

<sup>297</sup> *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (citing *Hodges v. Easton*, 106 U.S. 408, 412 (1882)).

<sup>298</sup> Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1007 (1992).

pally, it threatens many of the litigant and societal interests that the Seventh Amendment is thought to protect, a more tangible reason mandating that the Court take an active role in the field of Seventh Amendment jurisprudence by affording the trial-by-jury right a substantive meaning and properly addressing the tension between FAA-supported arbitration agreements, MDL, and consumer and MDL mass tort plaintiffs' Seventh Amendment right.

*B. The Practical Dangers of Marginalizing Prospective Consumer and Mass Tort Plaintiffs' Seventh Amendment Right*

That prospective consumer and mass tort MDL plaintiffs lack the leverage that a genuine threat of trial provides is chief among the practical dangers sparked by the Court's failure to address the tension between FAA-supported arbitration agreements, MDL, and affected plaintiffs' Seventh Amendment right.<sup>299</sup> In the absence of such leverage, these plaintiffs lack the threat necessary to bring about fairer, more even-handed settlements from corporate defendants,<sup>300</sup> as MDL settlements are negotiated with the mutual understanding that, per the court's encouragement, global settlement, not a protracted public trial, will result, and private arbitral settlement discussions pursued by those few consumer plaintiffs who pursue individual binding arbitration are guided by all parties' certainty that a public trial cannot occur.<sup>301</sup> Consequently, corporate defendants have less incen-

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299 See Lahav, *supra* note 156, at 593 ("The significance of the reliance on settlement to resolve mass tort litigation is twofold. First, individual litigants will not have the leverage that a realistic threat of trial provides." (citing Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 607 (1997))).

300 See Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring A Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401 (2011) ("Without the realistic possibility of a trial, settlements in large measure reflect and discount the costs of discovery and trial. As a result, some plaintiffs receive less than the value of their cases if tried on the merits . . . ." (citing ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL*, 40-68, 112-35 (2009)); Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CALIF. L. REV. 965, 989 n.112 (1988) ("The backdrop of trial—and the likely outcome there—is a significant influence on the negotiation-settlement process." (citing Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 32-34 (1983))); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 192-93 (1987) (explaining the economics behind the settlement-encouraging effect that the backdrop of potential litigation has on settlement negotiations); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 607 (1997) ("[T]he most important justification for . . . trials is . . . to provide victims with the threat necessary to induce settlements.").

301 See *supra* Part IV; *supra* note 22 and accompanying text.



tive to offer consumer and mass tort plaintiffs the sizable settlements that they would have considered if negotiations occurred against the backdrop of a public, costly, and protracted trial.<sup>302</sup> This is not only antidemocratic,<sup>303</sup> but it has a propensity to produce fewer, smaller settlements that may inadequately compensate consumer plaintiffs and mass tort victims.<sup>304</sup>

Moreover, arbitrations' and MDL's reliance on settlement and private arbitral proceedings, respectively, are also consequential. When binding arbitration and MDL are employed, the twin principles behind the right to trial by jury, democracy and impartiality, are violated.<sup>305</sup>

These practices violate the principles of democracy underpinning the trial-by-jury right because, when arbitration or MDL is employed, arbitrators or lawyers—not jurors, whose verdicts are thought to constitute the exercise of democracy within our judicial system—reach settlement or determine liability privately, with limited judicial oversight, and records of their discussions or proceedings are inaccessible to the public.<sup>306</sup> Consequently, these practices are practically inconsistent with the jury trial right's democracy principle.<sup>307</sup> Although seemingly intangible, the antidemocratic nature of these practices is consequential because, “[s]ince the founding of our country, trials in open court resulting in decisions by either a judge or jury have been thought to be constitutive of American democracy.”<sup>308</sup> The democra-

302 See *supra* note 300 and accompanying text.

303 See *infra* note 306 and accompanying text.

304 See *supra* note 300 and accompanying text.

305 See Lahav, *supra* note 156, at 593 (“The significance of the reliance on settlement to resolve mass tort litigation is twofold . . . [T]he current regime violates both of the principles that animate the right to a jury trial.”).

306 See 2 WILLIAM M. HANNAY, *LAW OF INTERNATIONAL TRADE*, § 70:15 (2013) (“[A]rbitration is a private process. Unlike court proceedings, arbitration proceedings do not become part of the public record and are generally not public events.”); Burbank & Subrin, *supra* note 300, at 401 (“Since the founding of our country, trials in open court resulting in decisions by either a judge or a jury have been thought to be constitutive of American democracy . . . This right to be heard, the core of due process of law, has been integral to democratic thought and institutions at least since the English Magna Carta in the thirteenth century.” (citing BURNS, *supra* note 300, at 40–68, 112–35); Lahav, *supra* note 156, at 593 (“[J]uries do not determine damages in settled cases and individual plaintiffs are not ordinarily involved in negotiations. Instead, lawyers (in some cases with judicial oversight) determine damages awards privately. Settlement is undemocratic because lawyers reach settlement privately with limited judicial or client oversight.”); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 511 (1994)) (“[I]t is almost impossible to settle many mass tort cases without a secrecy agreement.”).

307 See *supra* note 306 and accompanying text.

308 Burbank & Subrin, *supra* note 300, at 401 (citing BURNS, *supra* note 306, at 40–68, 112–35).

cy principle ensures that “each of us has had the opportunity to see that the laws our representatives have chosen to replace the state of nature are more than empty promises (or threats),”<sup>309</sup> so their curtailment by FAA-supported arbitration agreements and MDL is not a phenomenon to be ignored.

Furthermore, these practices contravene the trial-by-jury right’s impartiality underpinning by supporting bias and facilitating corruption, as MDL’s decision makers—lawyers and judges—as well as arbitration’s decision makers—individual arbitrators—often have systemic interests at odds with those of the individual plaintiffs.<sup>310</sup> For instance, MDL judges have “the interest of reducing their dockets and may become inured to the plight of plaintiffs.”<sup>311</sup> MDL lawyers, too, often have their own interests that conflict with those of plaintiffs; for instance, these lawyers have been known to “be tempted to trade some clients off against others to resolve large numbers of cases collectively.”<sup>312</sup> Likewise, because corporations will attempt to select an arbitrator who is “at least unconsciously biased toward the company,”<sup>313</sup> arbitral decision makers are often biased toward corporate interests and, consequently, decrease plaintiffs’ potential payout, where they choose to find corporate liability at all.<sup>314</sup> To realize this end, corporations’ adhesive arbitration agreements “frequently provide that the arbitrator shall be a current or former manager from the company’s field of business.”<sup>315</sup> Expectedly, consumer efforts to prove bias and overturn partial arbitrators’ decisions have been met with judicial opposition, as federal courts have repeatedly held that even the selection of a manager from a particular industry does not constitute evidence of bias.<sup>316</sup>

This bias and partiality is not only repugnant to the democracy and impartiality principles underlying our Seventh Amendment right, but, as they are facilitative of corrupt decision making, they

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309 *Id.*

310 *See* Lahav, *supra* note 156, at 593 (citing Weinstein, *supra* note 306, at 521–23) (explaining the conflicts of interest present among MDL attorneys and judges).

311 *Id.*

312 *Id.* (citing Weinstein, *supra* note 306, at 521–23).

313 Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 684 (1996).

314 *See id.* (“Large companies will also attempt to select a decision maker likely to decrease their likely payout.”).

315 *Id.* (citing *Bakri v. Cont’l Airlines, Inc.*, No. CV92-34876 SVW(K), 1992 WL 464125, at \*1 (C.D. Cal. Sept. 24, 1992)).

316 *See id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991)).

stand as measurable impediments to the fair adjudication of victims' and consumer plaintiffs' claims.

Furthermore, FAA-supported arbitration agreements and MDL are also obstacles to the development of legal and normative contract and mass tort standards. Legal and normative standards concerning negligence, evidence, punitive damages, and other issues at play in contract and mass tort actions, the subject of most FAA-supported arbitral and mass tort MDL actions, develop "based on the experience of trials,"<sup>317</sup> through litigants' successes and failures before a judge and jury.<sup>318</sup> The loss of contract and mass tort trials stemming from FAA-supported arbitration agreements and MDL "removes this grounding experience, leaving the standards open."<sup>319</sup> However, we need trials to ground contracts' and mass torts' legal and "normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs."<sup>320</sup> Consequently, the repercussions of the absence of trials' "standard-setting effect[s],"<sup>321</sup> although likely unseen and intangible today, will result in a profound legal and normative gap tomorrow, largely to the detriment of those consumer and mass tort plaintiffs fortunate enough to exercise their jury trial right.

Additionally, FAA-supported arbitration agreements and MDL, by nullifying the threat of an individual or class-based jury trial, also reduce the incentive for corporate defendants to minimize reckless behavior.

Corporate defendants employing adhesive, FAA-supported arbitration agreements or before an MDL court know they do not need to be concerned with a protracted, public, individual or class-based trial, which scholars and jurists have found play a vital role in deterring corporate wrongdoing.<sup>322</sup> They can, instead, rest assured know-

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<sup>317</sup> Patrick Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1419 (2002).

<sup>318</sup> See Burbank & Subrin, *supra* note 300, at 401–02 (“[L]egal norms need community input for the decisions applying them to be accepted by that community. Issues such as negligence, intentional discrimination, material breach of contract, and unfair competition are not facts capable of scientific demonstration . . . . [T]hey are concepts mixing elements of fact and law that become legitimate behavioral norms when the citizenry at large, acting through jury representatives, decides what the community deems acceptable.”).

<sup>319</sup> Higginbotham, *supra* note 317, at 1419.

<sup>320</sup> *Id.* at 1423.

<sup>321</sup> Gross & Syverud, *supra* note 176, at 4.

<sup>322</sup> See Gilles, *supra* note 20, at 378 (“[T]he threat of class action liability plays a vital role in deterring corporate wrongdoing . . . . [S]ound public policy requires collective litigation be available for small-claim plaintiffs who would not have the incentive or resources to . . . deter wrongdoing in one-on-one proceedings.” (citing David Rosenberg, *Decoupling*

ing that, if victims or consumer plaintiffs seek to hold them responsible, the most they reasonably have to fear is a private settlement. Because arbitration occurs privately and mass tort MDL attorneys cloak settlement discussions and discovery with comprehensive protective orders, arbitral and MDL proceedings' findings are not subject to public scrutiny, so the public will never know whether the victims' or consumer plaintiffs' allegations are meritorious and whether the defendants truly engaged in reckless, harmful, or illegal behavior,<sup>323</sup> measurably diminishing corporations' motivation to curb such behavior.<sup>324</sup> Consequently, not only is the status quo's absence of trials harmful to future plaintiffs, victims, and society at large, but it contravenes a primary principle underlying America's civil justice system: our civil justice system seeks not only to compensate the victim, but also to "deter companies from harming in the first place."<sup>325</sup>

Finally, corporations are able to use adhesive, FAA-supported arbitration agreements as a claim-suppression device, inhibiting consumers from seeking legal adjudication and redress for the wrongful acts undertaken by corporate defendants. Evidence not only shows that mandatory arbitration stifles consumer plaintiffs' claims,<sup>326</sup> but also that FAA-supported adhesive class arbitration waivers, by effectively

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*Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1906 n.62 (2002))).

323 See HANNAY, *supra* note 306, at § 70:15 ("[A]rbitration is a private process. Unlike court proceedings, arbitration proceedings do not become part of the public record and are generally not public events."); Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge's Lament Over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99, 116 (2010) ("The time for the public to scrutinize what actually happened in this case is after the facts have been developed in the process of adversary litigation. Unfortunately, if this case plays out as most cases do, the public will never know if [litigant's] sensationalized allegations are true. This is because the attorneys will attempt to shroud discovery in secrecy with a comprehensive protective order and any settlement will likely be kept secret." (alteration in original)); Weinstein, *supra* note 306, at 511 ("[I]t is almost impossible to settle many mass tort cases without a secrecy agreement.").

324 See DONALD C. LANGEVOORT, SECURITIES LAW REVIEW § 1.2 (2012) ("[L]itigation helps to deter corporate misconduct."); 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, 678 (1986) ("[O]ur legal system has long accepted, if somewhat uneasily, the concept of the plaintiff's attorney as an entrepreneur who performs the socially useful function of deterring undesirable conduct."); Gilles, *supra* note 27, at 378 ("[S]ound public policy requires collective litigation be available for small-claim plaintiffs who would not have the incentive or resources to . . . deter wrongdoing in one-on-one proceedings." (citing Rosenberg, *supra* note 322, at 1906 n.62)).

325 KANNER, *supra* note 60, at 39.

326 See *supra* note 22 and accompanying text.

barring consumers from securing class actions, serve as perhaps the ultimate, most potent claim-suppression device available.<sup>327</sup>

By banning consumer class actions and funneling consumers into binding, individual arbitration, class arbitration waivers make disputing individual consumer cases uneconomical.<sup>328</sup> Consumer class actions are dominated by those cases in which corporations use low-dollar-value rip-offs that engender substantial revenues because they are practiced on a wide scale.<sup>329</sup> However, by prohibiting the aggregation of such low-value claims, adhesive class arbitration waivers produce a reality in which it is uneconomical for individual consumer plaintiffs to expend the substantial time and resources called for by an individual arbitration action against a corporate defendant over a low-value claim.<sup>330</sup> As a result, consumers are often compelled to permit their individual, low-value claims to go entirely unremitted.<sup>331</sup> This not only forces consumers to internalize the costs stemming from corporations' wrongdoing, but, in effect, permits corporations to "simply opt out of exposure to collective litigation,"<sup>332</sup> a result not only repugnant to the ideals underlying plaintiffs' trial-by-jury right, but also one that is "no more defensible than a system in which corporations may decide whether they wish to be exposed to federal antitrust, securities, or civil rights laws"<sup>333</sup> at all.

#### CONCLUSION

Despite the Court's repeated proclamations deeming plaintiffs' Seventh Amendment trial-by-jury right "justly dear to the American people"<sup>334</sup> and "an object of deep interest and solicitude,"<sup>335</sup> the Court has, in practice, disregarded this right entirely, as analysis reveals that it has unconditionally permitted procedures, such as FAA-supported arbitration agreements and MDL, to compel and coerce consumer and mass tort plaintiffs into relinquishing their right to trial by jury.

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<sup>327</sup> See David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 242 (2012) ("Nothing is more claim-suppressing than a ban on class actions, particularly in cases where the economics of disputing make pursuit of individual cases irrational.").

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> Gilles, *supra* note 27, at 430.

<sup>333</sup> *Id.*

<sup>334</sup> *Teamsters Local No. 391 v. Terry*, 494 U.S. 558, 581 (1990) (quoting *Parsons v. Bedford*, 28 U.S. 433, 434 (1830)).

<sup>335</sup> *Id.* (quoting *Parsons*, 28 U.S. at 446).

Though the Court has not explicitly approved of either procedure or the resultant diminution of plaintiffs' constitutional right, the Court has rubber-stamped each through its decision to effectively exit the field of Seventh Amendment jurisprudence. Its formalistic, permissive trial-by-jury jurisprudence affords the constitutional right no meaning, substance, or policy backing, signaling to the public, federal courts, and legislators that plaintiffs' constitutional right to trial by jury is not a substantive, consequential protection, but a minor formal requirement that can be easily overridden by a procedure's nominal consistency with the vague notion that it permits the jury some chance at rendering a verdict on "issues of fact."<sup>336</sup>

The Court's decision to exit the field of Seventh Amendment jurisprudence is a profoundly problematic, untenable one. There are no "exception[s] to the jury trial right."<sup>337</sup> The jury was not just the "efficient choice of the founders;"<sup>338</sup> the Founders considered the right to a jury trial to be "a central figure in the administration of justice."<sup>339</sup> Accordingly, the Framers, whose interpretations the Court ironically claims to honor, recognized the pitfalls of the jury-trial right, but "nevertheless tenaciously insisted upon its inclusion in the Bill of Rights."<sup>340</sup> More tangibly, the practical dangers of marginalizing consumer and mass tort plaintiffs' constitutional trial-by-jury rights are manifold, as the absence of jury trials threatens the very litigant and societal interests the Seventh Amendment is thought to protect. Thus, that returning to the field of Seventh Amendment jurisprudence will be a daunting task likely calling for the Court to overturn several of its past decisions is an unavailing justification for the Court's continued failure to adequately define, detail, or protect plaintiffs' constitutional right to trial by jury.

Consequently, we—scholars, policymakers, legislators, judges, lawyers, and students alike—cannot remain idle onlookers in the field of Seventh Amendment jurisprudence. Each step we permit the Court and corporate defendants to take in permitting and employing procedures inconsistent with plaintiffs' practical ability to be heard by a

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<sup>336</sup> *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 498 (1931) (citing *Herron v. S. Pac. Co.*, 283 U.S. 91 (1931)).

<sup>337</sup> Thomas, *supra* note 296, at 512.

<sup>338</sup> *Id.* (citing Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767, 779–82 (2005)).

<sup>339</sup> Jon P. McClanahan, *The 'True' Right to Trial by Jury: The Founders' Formulation and its Demise*, 111 W. VA. L. REV. 791, 793–94 (2009) (citing AKHIL REED AMAR, *THE BILL OF RIGHTS* 96, 96–98 (1998)).

<sup>340</sup> Weiss, *supra* note 73, at 764 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting)).

jury is a step toward a judicial administrative method of handling legal disputes, a step toward a system in which the right to a civil jury trial is not a constitutional right to be exercised by plaintiffs, but a devalued, neglected relic of the past. As is illustrated by its striking willingness to accept modern civil procedural innovations' impacts on the jury-trial right through its permissive, formalistic Seventh Amendment jurisprudence, the Court is unlikely to affect change in the absence of an externally supplied impetus to do so. Thus, any Court-ordered solution to this constitutional dilemma will stem from our actions—scholars' critical focus on the tension between modern civil procedural innovations and plaintiffs' trial-by-jury rights, policymakers,' legislators', and judges' directives and holdings concerning plaintiffs' access to juries, lawyers' efforts to convince the Courts to focus and act on this issue, and students' activism on behalf of those prospective plaintiffs unable to exercise their constitutional rights. Accordingly, only by taking such action can we vindicate the continued vitality of the Seventh Amendment and the interests it protects and ensure that neither FAA-supported arbitration, MDL, nor any other procedural innovation effectively, as many corporate defendants would certainly like them to, "relegat[e] the Seventh Amendment to insignificant words on a page."<sup>341</sup>

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<sup>341</sup> Arhangelsky, *supra* note 12, at 121 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51–52 (1989)).