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Keynote: Before and after the Summary Judgment Trilogy

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**25TH ANNIVERSARY OF THE SUMMARY JUDGMENT TRILOGY:
REFLECTIONS ON SUMMARY JUDGMENT
SEATTLE UNIVERSITY SCHOOL OF LAW**

**Keynote: Before and After the Summary Judgment
Trilogy**

Remarks of Suja A. Thomas*

In this keynote speech for the Seattle University School of Law Colloquium on the 25th Anniversary of the Summary Judgment Trilogy: Reflections on Summary Judgment, Professor Suja Thomas discusses access to courts and juries before and after the summary judgment trilogy. Following up on debate in the academic literature on the effect of the trilogy on summary judgment, Professor Thomas explores influences on the trilogy and influences of the trilogy outside of summary judgment. She first describes Supreme Court decisions on judgment notwithstanding the verdict, remittitur, and the directed verdict, which helped set the stage for the trilogy and which decreased litigants' access to courts and juries. She then explores access after the trilogy. Professor Thomas describes how access to courts and juries continued to decline through the Supreme Court's decisions on arbitration and the motion to dismiss. Professor Thomas gives all of these procedures some context by showing their effect on one class of factually intensive cases—employment discrimination cases. She concludes by introducing the concept of “the Other Branch” and states that access to courts and juries can possibly increase if the jury is viewed in this manner.

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Thank you to Professor Coleman for the invitation to speak here and for the opportunity to spend the day with the distinguished group from whom you will hear later today. Many of you are familiar with the 1986 trilogy of Supreme Court cases on summary judgment that we are discussing in this Colloquium. Before I describe my thesis, which focuses on the demise of the civil jury in the last seventy-five years and also on the potential for the jury's rejuvenation, let me remind everyone of the decisions. There were three cases, *Matsushita v. Zenith*,¹ decided in March of 1986, and then *Anderson v. Liberty Lobby*² and *Celotex v. Catrett*,³ decided in June of 1986.

In *Matsushita*, the plaintiff U.S. television companies alleged a conspiracy among defendant Japanese firms to decrease the television prices in the U.S. to drive the U.S. companies out of the U.S. market.⁴ The Supreme Court decided five to four that the plaintiffs had not shown that the defendants had a rational motive to conspire.⁵ Despite the presence of evidence of a conspiracy, the Court decided that the plaintiffs' claim was implausible, and without additional evidence, summary judgment should be granted.⁶

In the second case in the trilogy, *Anderson*, a group sued a magazine for libel.⁷ In the past, the Court had decided that a public figure—here the group—who sued for libel needed to prove actual malice with clear and convincing evidence at trial, and the district court applied this standard on summary judgment in *Anderson*.⁸ With three justices in dissent, the Supreme Court agreed with the district court that this clear and convincing standard should be applied on summary judgment.⁹

Finally, in *Celotex*, perhaps the most prominent of the trilogy, the plaintiff, whose husband had died from exposure to asbestos, alleged that her husband was exposed to asbestos manufactured by the defendant.¹⁰ The Supreme Court decided, again, with three dissenters, that the party moving for summary judgment need not produce any

1. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

2. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

3. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

4. *Matsushita*, 475 U.S. at 577–78.

5. *Id.* at 588–97.

6. *Id.* at 588–98.

7. *Anderson*, 477 U.S. at 244–45.

8. *Id.* at 246–47.

9. *Id.* at 242.

10. *Celotex Corp. v. Catrett*, 477 U.S. 317, 319 (1986).

affirmative evidence—in this case, evidence to negate exposure to asbestos.¹¹

The trilogy of summary judgment cases is often said to have had a profound effect on the use of summary judgment and thus, a significant effect on civil litigation, decreasing the number of trials and also thus decreasing the use of juries.¹² There is disagreement about this effect of the trilogy, and I will talk more about this later. Regardless of the result of this debate, I am going to argue that prior to the trilogy significant change for civil litigation had already been set in motion by Supreme Court decisions regarding other civil motions, and those prior decisions lead to the acceptability of the jurisprudence in the trilogy. I am also going to argue that the trilogy made other significant changes in civil litigation acceptable, including the enforceability of arbitration clauses and the change in the motion to dismiss standard that we see today. And finally, I am going to argue that the most significant effect of this last seventy-five years of Supreme Court case law regarding procedure is the decrease in the use of the jury trial in civil cases. While I will not be able to prove all of these relationships in this brief speech, I will show that the trend of this change toward decision making by judges and lawyers and away from juries is remarkable and unmistakable.

In conjunction with discussing the effect of these procedures on the jury trial, I want to talk about two current phenomena in the American legal system. One, many individuals do not have their civil disputes resolved. And two, when disputes are resolved, often they are not resolved by laypeople. I want to start first by showing these phenomena; second, showing that these phenomena often occur in specific types of factually intensive cases including employment discrimination; third, demonstrate why these phenomena are problematic; and fourth, suggest an approach to change them—which argues for thinking about the jury in another way—as “the other branch.”

To illustrate the phenomenon that many individuals do not have their civil disputes resolved, I am going to tell you a story—a story that illustrates the problems that many of us have with our legal system. My husband and I decided to build a house a year and a half ago. Yes, this was a bad idea right there. The builder presented us with a contract with an arbitration clause, which required three arbitrators. I have never been a big fan of arbitration. I would rather have a group of regular

11. *Id.* at 317.

12. *See, e.g.,* Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897 (1998).

people hear my case than a group of lawyers. And I certainly do not want to pay them when I can have my case heard basically for free in court. However, we signed the contract with an arbitration clause. I will skip all of the gory—and they were gory—details, but finally eight and a half months later, we moved into our house. Six weeks after move-in, the sewer backed up right onto our new floors. We had a warranty so it should be fixed, right? It was not. The builder thought we should kick in fifty percent to have a working sewer. And then, there was the arbitration clause. The clause required, as I said, three arbitrators. If we could not agree on the rules, the default arbitration rules required us to pay around \$4000 simply to file a complaint without even taking into account the cost of the three arbitrators, and this was all for a dispute involving \$5600.¹³ I am a lawyer licensed to practice in Illinois so I could research the issues for free and meet with the builder's lawyer. After a month of stress and drafting a complaint, the builder agreed to fix the sewer.

For any nonlawyer, this would have been a disaster. The person would have had to pay for at least part of the fix despite the warranty, because the cost of a lawyer and arbitration to fight this would not have made any sense. Everyone—lawyer, nonlawyer—has at least one story like this—probably many—of a problem perhaps with the cable company or a telephone company. Many times, now, the cost of trying to fix an issue is higher than what the damages actually are because of things like attorneys' fees and arbitration costs. As a result, many people are being prevented from pursuing their disputes.

A recent Supreme Court case, *AT&T v. Concepcion*,¹⁴ illustrates this problem even more. The Concepcions had a thirty-dollar dispute with AT&T over their cell phone bill.¹⁵ Their “contract” with AT&T required arbitration and did not permit class actions.¹⁶ However, California law found such arbitration clauses prohibiting class actions unconscionable.¹⁷ Reviewing the case, in a five-to-four decision, the Supreme Court said that federal law encouraging arbitration preempted California law so it was okay for the parties to contract around class

13. A good argument could be made that the arbitration clause was unconscionable. For an interesting discussion of quality issues with alternative dispute resolution, including the possibility that substantive law may be compromised, see Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987).

14. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

15. *Id.* at 1744.

16. *Id.* at 1744-45.

17. *Id.* at 1746.

actions.¹⁸ As an aside, according to the agreement, the Concepcions could have pursued their individual claim in small claims court, but the filing fee would have been higher than the amount that they were claiming that AT&T owed them.¹⁹

The *Concepcion* case makes clear that people will be unable to fight small—which sometimes may not be so small to them—claims, because lawyers cannot take these cases. The \$30 claim of the Concepcions was one such case, but you could easily see that inappropriate charges even in the range of \$500 or more would not be cost effective for lawyers to take. In the meantime, the Concepcions may have their service cut off and/or their credit rating affected while they attempt to fight, and possibly cannot for cost reasons, an inappropriate charge. So this is the first phenomenon—that many individuals are being prevented from resolving their disputes.

I will add that Professor Coleman, in her work on the “vanishing plaintiff,” takes on a related issue.²⁰ She has posed the interesting question of what would have happened if cases that made important substantive law changes had instead been kicked out of court on procedure—like a motion for summary judgment or a motion to dismiss. The question is where would we be in terms of our substantive law.²¹ You will hear more about this from Professor Coleman on the panel.

Now, to the second phenomenon—that disputes that are actually resolved often are not resolved by laypeople. Currently, only approximately one percent of civil cases are tried in court by juries.²² Summary judgment,²³ the directed verdict,²⁴ the motion to dismiss,²⁵ and arbitration²⁶ all contribute to the disuse of the jury, and judgment as

18. *Id.* at 1748–53.

19. *Id.* at 1760–61 (Breyer, J., dissenting).

20. Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. (forthcoming 2012) [hereinafter Coleman, *Vanishing Plaintiff*], available at <http://ssrn.com/abstract=1908359>; Brooke D. Coleman, *What If?: A Study of Seminal Cases as if Decided Under a Twombly/Iqbal Regime*, 90 OR. L. REV. (forthcoming 2012) [hereinafter Coleman, *What If?*], available at <http://ssrn.com/abstract=1916832>.

21. Coleman, *Vanishing Plaintiff*, *supra* note 20; Coleman, *What If*, *supra* note 20.

22. See, e.g., Marc Galanter, *The One Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1259 (2005).

23. FED. R. CIV. P. 56.

24. FED. R. CIV. P. 50.

25. FED. R. CIV. P. 12(b)(6).

26. Federal Arbitration Act, 9 U.S.C. § 2 (2006).

a matter of law²⁷ and remittitur²⁸ are procedures used to second guess juries.

Summary judgment is the most prominent example. Under summary judgment, a judge decides to dismiss a case when she decides the evidence is insufficient, or a reasonable jury could not find for the nonmoving party.²⁹ As I previously stated, the summary judgment trilogy is often the focus of why federal courts now try many fewer cases. Judge Wald and many others have said that the trilogy gave the signal to the federal courts to grant more summary judgments, thus kicking cases out before juries tried them.³⁰ While there is empirical disagreement about whether the trilogy itself actually caused an increase in summary judgments³¹—and you will hear more from Professor Mullenix about the effect or noneffect of the trilogy³²—there is at least agreement that judges often (at least in certain types of cases) use the device of summary judgment to dismiss cases.³³

Today, I am asserting that this jurisprudence away from juries began outside of summary judgment and before the trilogy. Also this jurisprudence has continued past the trilogy to the present day. Let me start at the place I consider the beginning of this jurisprudence, which was fifty years earlier than the trilogy, in 1935, in a case called *Baltimore v. Redman*.³⁴ In that case, the jury rendered a verdict against the defendant for negligence.³⁵ The court of appeals reversed the jury's

27. FED. R. CIV. P. 50.

28. FED. R. CIV. P. 59.

29. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

30. *See, e.g., Wald, supra* note 12, at 1914–17.

31. *Compare, e.g.,* Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1339 (2005) (decline in trials after trilogy), and Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years after the Trilogy*, 63 WASH. & LEE L. REV. 81, 82, 86–88, 143–44 (2006) (noting trilogy of cases on summary judgment cited more often than any other cases), with Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 620–21 (2004) (decline in trials earlier in the 1970s), and Joe S. Cecil et al., *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861 (2007) (noting trilogy has not increased the grant of summary judgment to the extent scholars have previously stated).

32. Linda Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561 (2012).

33. EDWARD BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 2 (3d ed. 2006); Redish, *supra* note 31, at 1339.

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

35. *Id.* at 656.

judgment and ordered a new trial.³⁶ The Supreme Court decided that a court could decide that the evidence presented at trial was not sufficient, could find against the jury's verdict, and could find for the defendant, eliminating the need for a new trial.³⁷ The Court had already decided a case called *Dimick v. Schiedt* that same year, where the Court decided that a court could not add to a jury verdict but could reduce a jury verdict.³⁸

The Supreme Court followed up *Redman* almost ten years later with *Galloway v. United States* in 1943.³⁹ In that case, the plaintiff alleged that he was disabled at the time when his insurance policy lapsed, and thus that he was eligible for benefits under his policy.⁴⁰ The Court extended *Redman* to state that during a trial, upon a directed verdict, a court could decide that the evidence was insufficient and take the case away from the jury.⁴¹

Forty years after *Galloway*, in the trilogy, when the Supreme Court compared the standard for summary judgment to the directed verdict, the Court made acceptable a judge's evaluation of the sufficiency of the evidence on a paper record.⁴² The trilogy made it acceptable, even at times, desirable, for judges to dismiss cases, without a jury hearing any evidence, and for that matter, without a judge hearing any live evidence.⁴³

We see an extension of this concept of cases being decided without juries—by non-laypeople—five years after the trilogy in *Gilmer v. Interstate/Johnson Lane Corp.*⁴⁴ There, an employer required an employee to register with securities exchanges.⁴⁵ When the employee filled out his registration application, he agreed to arbitrate any claims that he had against the employer.⁴⁶ The employee sued for age discrimination in court, and the Supreme Court decided that it was acceptable for an employer to require an employee to give up his right

36. *Id.*

37. *Id.* at 656–61.

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

39. *Galloway v. United States*, 319 U.S. 372 (1943).

40. *Id.* at 372.

41. *Id.* at 388–96.

42. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

43. *Id.*

44. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

45. *Id.* at 23.

46. *Id.*

to bring a case against the employer for age discrimination in court.⁴⁷ Unsurprisingly, ten years later in *Circuit City Stores, Inc. v. Adams*, the Court decided that an employer could require a potential employee to give up his right to litigate in court just to apply for a job.⁴⁸

More recently, in *Bell Atlantic Corp. v. Twombly*⁴⁹ and *Ashcroft v. Iqbal*,⁵⁰ the Supreme Court made it easier for courts to dismiss a case before any discovery was had, and the Court said that courts are to use their judicial “experience and common sense” to decide whether to dismiss a case.⁵¹ The standard is whether the claim is “plausible,”⁵² a standard that was used in *Matsushita*,⁵³ one of the cases in the summary judgment trilogy. As I have said in the past, the motion to dismiss is the new summary judgment motion,⁵⁴ so we have come full circle to a point since the trilogy that even at the motion to dismiss stage, judges make judgments about the sufficiency of the facts.

I want to mention a final area where laypeople have a say but not the final say. A judge can decide that damages rendered by a jury are excessive, and the judge can remit or reduce those damages unless the plaintiff agrees to try the case again.⁵⁵ And Congress itself has set damages caps on some types of claims that it has created.⁵⁶ In these circumstances, Congress, not a jury, decides the maximum damages that the jury can find.

So let me give these procedures some context. Many of these procedures, including summary judgment, motions to dismiss, remittitur, and arbitration, are used in everyday cases including factually intensive cases that involve people’s lives and jobs. The procedures are used most often in certain categories of cases including employment discrimination cases. Let me summarize how these procedures have affected this category of cases.

47. *Id.* at 24–35.

48. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

49. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

50. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

51. *Id.* at 1950.

52. *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 556.

53. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 574, 587 (1986).

54. Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010).

55. *Hetzel v. Prince William Cnty.*, 523 U.S. 208, 211 (1998).

56. *See, e.g.*, Civil Rights Act of 1991, 42 U.S.C. § 2000e (2006) (setting caps on employment discrimination claims).

The Federal Judicial Center has found that summary judgment is ordered more often in employment discrimination cases than most other types of cases, with seventy-three percent granted in employment discrimination cases in comparison to sixty percent granted in other types of cases.⁵⁷ Now, we also see some effect, though somewhat uncertain, of the motion to dismiss in these same types of cases. The rules committees, including Judge Lee H. Rosenthal at the helm,⁵⁸ were interested in the effect of *Iqbal* and *Twombly*. Heeding this call, the Federal Judicial Center, with help from Professor Gensler,⁵⁹ found, among other results, a 5.6% increase in the percentage of motions to dismiss granted with leave to amend in employment discrimination cases.⁶⁰ As the Federal Judicial Center has stated, more study is needed to see whether cases dismissed with leave to amend are ultimately dismissed.⁶¹ It is clear though that everyone is getting used to *Iqbal* and *Twombly*, and lawyers may file more motions to dismiss in the future.⁶² That is summary judgment and the motion to dismiss.

Remittitur—the reduction of jury verdicts by judges—also has had a significant effect on employment discrimination. Some years ago, I did

57. Memorandum from Joe Cecil and George Cort to Hon. Michael Baylson 2, 6 tbl.3 (June 15, 2007), [http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/\\$file/sujufy06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf).

58. Lee H. Rosenthal, *The Summary Judgment Rule Changes that Weren't*, 43 LOY. U. CHI. L.J. 471 (2012).

59. Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment: We Need to Talk*, 43 LOY. U. CHI. L.J. 517 (2012).

60. JOE S. CECIL ET AL., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), available at <http://ssrn.com/abstract=1878646>. Other studies on the effect of *Twombly* and *Iqbal* have been conducted by Joseph Seiner, Kendall Hannon, Lonny Hoffman, and Patricia Hatamyar. See, e.g., Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603 (2012); Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2012); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011; Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95 (2010). For the most recent FJC study on *Iqbal*, see Joe S. Cecil, *Of Waves and Water: A Response to Comments on the FJC Study Motions to Dismiss for Failure to State a Claim After Iqbal* (Mar. 19, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2026103>.

61. Cecil, *supra* note 60.

62. Cf. Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215 (discussing that while *Iqbal* and *Twombly* are the law that will be applied in all cases, they were odd factually—different than the vast majority of cases in federal court, including employment discrimination cases).

a study of remittitur.⁶³ In the study over ten years, I found that judges ordered remittitur more often in civil rights cases, including employment discrimination cases, than many other types of cases, with sixty-three percent of the remitted cases in the last five years of the study being civil rights cases.⁶⁴

In addition to summary judgment, the motion to dismiss, and remittitur, arbitration has also caused a significant effect on employment discrimination cases. The Supreme Court has decided significant cases that support arbitration in the employment discrimination context, and this is a continuing growing area of arbitration.⁶⁵ Estimates state that more than one third of nonunion employee/employer disputes are in arbitration as opposed to in court.⁶⁶ Moreover, in a recent study, Professor Colvin found that plaintiffs had less of a chance to win in arbitration than in court and won less damages in arbitration than in court.⁶⁷ Part of the reason, the professor found, was because employers and arbitrators are repeat players in arbitration.⁶⁸ All of this shows that juries are having less of a chance to decide certain types of cases, including employment discrimination cases—some of the most factually intensive cases.

Thus far, I have asserted that many people do not have their everyday disputes resolved, that often when they are resolved, they are resolved by lawyers or judges instead of laypeople, and this happens particularly in certain types of factually intensive cases including employment discrimination cases. I think that all of this contravenes the right to a jury trial that is set forth in the Seventh Amendment.⁶⁹ And in addition to a constitutional problem, we have a social problem. It does not make sense in our society to have one group of people deciding our disputes.

First, I want to say a few words about the constitutional problem. I want to make an analogy to the game of telephone. Justice Brennan actually did this in the *Anderson* case when he discussed the changing

63. Suja A. Thomas, *Re-examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003).

64. *Id.* at 746.

65. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); see, e.g., Edward Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 BERKELEY J. EMP. & LAB. L. 107 (2002) (discussing arbitration in employment contracts with highly skilled employees).

66. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 2 (2011).

67. *Id.* at 4–8.

68. *Id.* at 11–17.

69. U.S. CONST. amend. VII.

standard for summary judgment,⁷⁰ and I think this telephone analogy also aptly applies to the changing right to a jury trial in civil cases. We have all played the game of telephone. Someone gives one person a message, and then, it gets repeated over and over. Pretty soon, the message is not even close to what was first stated. In 1791, when the Seventh Amendment was adopted, the message was a right to a jury trial exists in civil cases. Now, the message has changed dramatically. We can waive the jury trial right by simply wanting to apply for a job.

The Seventh Amendment provides “[i]n Suits at common law, where the value in controversy shall exceed twenty-five dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”⁷¹ The Seventh Amendment specifically refers to the common law, unlike any other part of the Constitution. And the Supreme Court has said that common law in the Seventh Amendment is the English common law in 1791, the date when the Seventh Amendment was adopted.⁷² As a result, the Court has said that the right to a jury trial should be governed by the substance of the English common law in 1791.⁷³ With respect to the civil procedure motions I have mentioned—summary judgment, the motion to dismiss, the directed verdict, judgment as a matter of law, and remittitur—all of these motions permit a judge to decide the sufficiency of the evidence or facts.⁷⁴ However, under the English common law in 1791, a court could determine that the evidence was insufficient only after a jury trial, and then, the court could send the case to a new trial.⁷⁵ The court could not decide to dismiss the case. There were no determinations of the sufficiency of the evidence on paper records, and where there was a determination that the evidence was insufficient, there was a new trial. So I have stated in the past that these procedures of summary

70. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 264–65 (1986) (Brennan, J., dissenting).

71. U.S. CONST. amend. VII.

72. *See, e.g.*, *Colgrove v. Battin*, 413 U.S. 149, 155–56 (1973); *see also* *Parsons v. Bedford*, 28 U.S. 433, 446–47 (1830); *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812).

73. *Wonson*, 28 F. Cas. at 750.

74. *See, e.g.*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (motion to dismiss); *Anderson*, 477 U.S. 242 (summary judgment); *Dimick v. Schiedt*, 293 U.S. 474 (1935) (remittitur); *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935) (judgment notwithstanding the verdict); *Galloway v. United States*, 319 U.S. 372 (1943) (directed verdict).

75. Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 157–58 (2007) [hereinafter Thomas, *Why Summary Judgment is Unconstitutional*]; Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 742–48 (2004).

judgment,⁷⁶ the motion to dismiss,⁷⁷ and remittitur⁷⁸ are unconstitutional, and by analogy so too are the directed verdict and judgment as a matter of law.⁷⁹

What I assert about these procedures is not radical despite how it sounds. In *Slocum v. New York Life Insurance Co.*, before this trend away from the jury, the Supreme Court had recognized that pursuant to the Seventh Amendment, a court could not dismiss a case if the court thought the evidence was insufficient.⁸⁰ There must be a new trial.⁸¹ Also, in the dissent in *Galloway*, Justice Black, with Justices Douglas and Murphy joining, emphasized that the jury trial right was violated when judges dismissed cases upon finding the evidence insufficient.⁸² Moreover, in the trilogy, justices expressed concern about the violation of the jury trial right. In *Matsushita*, the four dissenters stated that the new standard invaded the factfinder's province.⁸³ And in *Anderson*, Justice Brennan emphasized the impingement of the right to a jury trial, because judges weighed evidence under the summary judgment standard created in that case.⁸⁴ Thus, the Seventh Amendment is the constitutional problem with judges and lawyers deciding our cases.

There is also a social problem with judges and lawyers deciding our cases. Judges and lawyers do not represent the views of our society as a whole. Judges and lawyers are not the people whom a lawyer would choose to be on the jury. First, there is more diversity, including gender and racial diversity, in the general population than in the judiciary and in the lawyer population. And we know that diversity can affect decision-making. For example, in their article in the *Washington University Law Review*, Professors Chew and Kelley discussed how judges viewed racial harassment cases differently based on their races.⁸⁵

76. Thomas, *Why Summary Judgment is Unconstitutional*, *supra* note 75.

77. Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

78. Thomas, *supra* note 63. When a judge remits a verdict, she offers a new trial as an alternative. However, the new trial is not a real choice, because the judge has already stated the maximum amount a reasonable jury can find.

79. *Cf.* Thomas, *Why Summary Judgment is Unconstitutional*, *supra* note 75, at 176–77 (comparing summary judgment, directed verdict, and judgment notwithstanding the verdict).

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

81. *Id.*

82. *Galloway v. United States*, 319 U.S. 372, 396–411 (1943) (Black, J., dissenting).

83. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 598–607 (1986) (White, J., dissenting).

84. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257–68 (1986) (Brennan, J., dissenting).

85. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009).

Also, in their article in the *Harvard Law Review*, Professors Kahan, Hoffman, and Braman discussed how our views of facts are shaped by our experiences.⁸⁶ This article helps us realize, probably unsurprisingly, that all of us can think differently about the same occurrence; you will hear more about the Kahan article from Professor Stempel.⁸⁷

The second problem with judges and lawyers deciding our cases is judges and lawyers are said to think differently than those with different backgrounds. I would say just ask my non-lawyer husband, but we have other evidence. Professor Daicoff summarized studies on judges, lawyers, and laypeople, and these showed that judges and lawyers can indeed think differently than laypeople.⁸⁸

Finally, judges face some of the same difficulties that laypeople face in evaluating evidence. Professor Robbennolt summarized studies comparing decision making of juries and judges. While these showed many similarities in the decision making of judges and juries, these also showed that some of the same problems that affect juries affect judges,⁸⁹ including, as an example, problems with ignoring inadmissible evidence, a finding by Professors Wistrich, Guthrie, and Rachlinski.⁹⁰

Now, the response to all of this is cost. The response is that it is necessary to kick out bad cases early, at summary judgment or the motion to dismiss stage, or have arbitration—an alternative, cheaper method of dispute resolution. The Supreme Court has talked about cost in its decisions. It has discussed the cost of discovery, including the possibility of companies being forced to settle bad cases to prevent the costs of litigation, and the Court has discussed the cost of increased caseloads to courts.⁹¹ There certainly is a cost to bad cases. With the general American rule of everyone pays their own way, in some ways it does not seem fair to permit cases with no merit to proceed. Indeed, if these cases are not thrown out early on, it would make sense, as the

86. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

87. Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627 (2012).

88. SUSAN SWAIM DAICOFF, LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY TRAITS AND WEAKNESSES 25–49 (2004).

89. Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging*, 32 FLA. ST. U. L. REV. 469 (2005).

90. See Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323–24 (2005).

91. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59, 567 n.12 (2007); *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 313 (2007).

Supreme Court said, for companies to settle these cases before they incur the greater cost of trial.

The plaintiff too is engaging in a significant cost unless the lawyer takes the case on a contingency fee basis. And putting aside attorneys' fees, the plaintiff has to pay costs in any case that she loses.⁹² Thus, there is cost to both sides of a bad case.

The question, then, is what properly incentivizes the parties. Courts generally would say summary judgment for one. It is said that summary judgment prevents trials from occurring, and summary judgment encourages the settlement of cases before the procedure is used.⁹³ Additionally, the grant or denial of summary judgment encourages the settlement of cases.⁹⁴ The argument goes that without the possibility of summary judgment, these cases would not settle and would go to trial.⁹⁵ Also some contend that without summary judgment, lawyers would bring more cases with weak evidence, because courts could not eliminate these cases on summary judgment.⁹⁶ Professor Brunet will talk more about these incentives later on the panel.⁹⁷

Despite these conventional views, it may be that the federal docket would not be significantly affected by the elimination of summary judgment.⁹⁸ Parties would continue to settle, because they can lose at trial.⁹⁹ Also lawyers might not bring additional cases with weak evidence, because they may not have the resources to bring such cases.¹⁰⁰ Moreover, courts themselves could have less cost by not being forced to review the inches, and many times, boxes of evidence in support of motions for summary judgment, and instead going to trial directly.¹⁰¹

Regardless of these incentives, there is no cost exception to the jury trial right. The jury was not the efficient choice of the founders.¹⁰² It was the choice of the founders. Period. Any attempt to merge

92. See, e.g., FED. R. CIV. P. 54(d)(1).

93. Thomas, *Why Summary Judgment is Unconstitutional*, *supra* note 75, at 177.

94. *Id.*

95. *Id.*

96. *Id.*

97. Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689 (2012).

98. Thomas, *Why Summary Judgment is Unconstitutional*, *supra* note 75, at 177–79.

99. *Id.*

100. *Id.*

101. *Id.*

102. See, e.g., Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767, 779–82 (2005).

efficiency and the jury ignores the decision that the founders made—to have a jury trial right.

The question, then, is how do we go back in time and recognize this authority of the jury. I argue we need to think of the jury in another way—a way that it has not been thought of. We need to treat the jury as what I call “the other branch.” I am going to limit my comments to the civil jury today, but this concept also applies to the grand jury and the criminal jury, and I am developing all of this in a book that I am writing.¹⁰³

I argue that the other constitutional actors, including the judiciary and legislature, have not exercised sufficient restraint in relationship to the jury.¹⁰⁴ Instead of judges and the legislature limiting themselves to their own power domains, judges and legislatures have encroached on the authority of the jury.¹⁰⁵ Think about it this way. Any time the judiciary acts to limit the authority of the jury, it gives itself more power.¹⁰⁶ Thus when a judge decides a case on summary judgment, the jury has less power, and the judge has more power, the judge being permitted to decide the result in the case.¹⁰⁷ Any time the legislature acts to limit the authority of the jury, it also gives itself more power.¹⁰⁸ Thus when the legislature decides to limit the damages in a particular type of case, the authority of the jury to decide the damages is lessened.¹⁰⁹ Whenever the judiciary or legislature acts to take power from the jury, then, it simultaneously gives itself power.¹¹⁰ In other words, the judiciary and the legislature can compete with the jury for power.¹¹¹ This competition for authority is different than other competition for authority, for example, between the states and the

103. SUJA A. THOMAS, *THE OTHER BRANCH* (unpublished manuscript) (on file with author) [hereinafter *Thomas, THE OTHER BRANCH*]; see also *Thomas, supra* note 102.

104. THOMAS, *THE OTHER BRANCH*, *supra* note 103. Prominent judges and scholars have written about the shift of decision-making from juries to judges or legislatures. See, e.g., Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 *DUKE L.J.* 597 (2010); Arthur R. Miller, *The Pre-Trial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 *N.Y.U. L. REV.* 982 (2003); Jack Weinstein, *The Role of Judges In a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 *CARDOZO L. REV.* 1 (2008).

105. THOMAS, *THE OTHER BRANCH*, *supra* note 103.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

federal government.¹¹² If the Supreme Court decides that states cannot legislate in a certain way regarding abortion, states can continue to legislate to further their policy objectives.¹¹³ The jury, on the other hand, is in a particularly perilous position with no ability to protect its own authority.¹¹⁴ If authority is taken from the jury, the jury cannot recover this authority.¹¹⁵

With this type of imbalance, the question is how the jury trial right can be maintained.¹¹⁶ A reason that the jury's authority has been improperly restricted is that the jury has never been considered an essential part of the constitutional structure like the other constitutional actors, including the judiciary and the legislature.¹¹⁷ It has been at best considered a subordinate to the judicial branch.¹¹⁸ Despite this assumed lower position in the Constitution, the jury occupies as significant of a position as any constitutional actor having specific authority.¹¹⁹ In order to give effect to this authority, the other constitutional actors must recognize the jury in its proper position as the other branch.¹²⁰ And because of the position of the jury—as unable to protect its own authority—the judiciary and the legislature must act with what I term structural modesty.¹²¹ What this means is that the other branches must narrowly interpret their own power in relationship to the jury's competing power using the text of the Constitution.¹²² And I argue that this means that they must use the English common law.¹²³ So you might ask why the English common law and not an evolving common law as nonoriginalists would encourage? This is a place where the Founders believed originalism was necessary.¹²⁴ If judges could decide to dismiss cases whenever they wanted under an evolving common law, then jury authority would be meaningless.¹²⁵ The English common law gives a set point in time at which to evaluate the propriety

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

of procedures.¹²⁶ The English common law was developed and consistent, and Justice Story recognized that the Founders intended common law in the Seventh Amendment to be the English common law.¹²⁷

Thus, I argue that the judiciary and the legislature should act with structural modesty using the English common law when they interpret their own power in relationship to the authority of the jury.¹²⁸ What this means, for example, is that the judiciary would act with structural modesty when it looks at summary judgment and see that summary judgment and nothing like it existed under the common law and thus that the judiciary cannot use this procedure to take a case from a jury.¹²⁹

If the judiciary and the legislature can recognize the jury in this role as the other branch, the jury right, with juries in only approximately one percent of civil cases, can change. More individuals can have their cases heard in the first instance and have them heard by juries in the second instance. We will be closer to what the founders envisioned, and members of our society can participate in deciding how our society is to function on a day to day basis. In this world, the Concepcions would be able to resolve their dispute and have it determined by a jury, and you will too.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*