# *ESSAY*

# A MODEL PLAN TO RESOLVE FEDERAL CLASS ACTION CASES BY JURY TRIAL

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## INTRODUCTION

IN *Amchem Products v. Windsor*[1] and in *Ortiz v. Fibreboard Corp.*,[2] the Supreme Court overturned settlements in massive federal class action cases. The *Amchem* settlement would have resolved hundreds of thousands of claims, perhaps more,[3] and the *Ortiz* settlement would have resolved an estimated 186,000 claims.[4] In *Amchem*, the Court held that the requirements of Federal Rule of Civil Procedure 23[5] for certification of class actions applied even to classes certified only for settlement.[6] According to Justice Ruth

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[1] 521 U.S. 591 (1997).

[2] 527 U.S. 815 (1999).

[3] *Amchem*, 521 U.S. at 597.

[4] *Ortiz*, 527 U.S. at 865 (Breyer, J., dissenting).

[5] Fed. R. Civ. P. 23.

[6] *Amchem*, 521 U.S. at 620. But see id. (noting one exception, that "a district court need not inquire whether the case, if tried, would present intractable management problems, [as required by Rule 23(b)(3)(D)], for the proposal is that there be no trial"). The text of Rule 23 states that all proposed class actions must meet all requirements of 23(a):

> (1) [T]he class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Once a proposed class meets the Rule 23(a) requirements, it must also meet the requirements of either Rule 23(b)(1), (b)(2), or (b)(3). Rule 23(b)(1) requires that the class prove there would be a risk, from individual suits, of "incompatible standards of conduct" and of judgments that would practically "impair or impede" the ability of those not party to the suit to protect their interests. Fed. R.

Bader Ginsburg, writing for the Court, the specifications of the Rule "demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold."[7] *Amchem* ended a growing practice among lower federal courts of certifying classes for settlement regardless of Rule 23 requirements, provided the result was fair.[8] Justice Ginsburg wrote, "Federal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted—that if a settlement is 'fair,' then certification is proper."[9] In *Ortiz*, the Court applied *Amchem* to hold that the certification of a mandatory settlement class was improper according to Federal Rule 23(b)(1)(B). The Court held, in an opinion by Justice David H. Souter, that "[t]he record on which the District Court rested its certification of the class for the purpose of the global settlement

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Civ. P. 23(b)(1)(A)–(B). Rule 23(b)(2) requires that the wrong sought to be remedied has been done to the class as a whole, "thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). In determining whether the 23(b)(3) requirements have been met, the court may consider the desire of class members to sue separately, "the extent and nature of any litigation concerning the controversy already commenced," "the desirability or undesirability of concentrating the litigation of the claims in the particular forum," and "the difficulties likely to be encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3)(A)–(D).

[7] *Amchem*, 521 U.S. at 620.

[8] See, e.g., Girsh v. Jepson, 521 F.2d 153, 157, 159 (3d Cir. 1975) (noting approvingly that the district court had evaluated the "fairness" of a proposed settlement, but remanding the case for further proceedings); City of Detroit v. Grinnell Corp., 495 F.2d 448, 468 (2d Cir. 1974) (stating that an "evaluation of a proposed settlement requires an amalgam of delicate balancing, gross approximations, and rough justice") (citing *Saylor v. Lindsley*, 456 F.2d 896, 904 (2d Cir. 1972)); Greenfield v. Villager Indus., 483 F.2d 824, 826, 830–31 (3d Cir. 1973) (noting that the district court had approved a class action to proceed for settlement purposes only, but vacating the court's order for insufficient notice by the plaintiffs to other potential class members); Georgine v. Amchem Prods., 157 F.R.D. 246, 260–61, 325, 332 (E.D. Pa. 1994) (examining the proposed settlement for fairness of the notice and of the settlement and finding the terms of the settlement fair). See generally In re A.H. Robins Co., 85 B.R. 373, 378 (Bankr. E.D. Va. 1988) (stating settlement class actions may be more readily approved than those intended for trial), aff'd, 880 F.2d 709 (4th Cir. 1989).

[9] *Amchem*, 521 U.S. at 622.

did not support the essential premises of mandatory limited fund actions."[10]

At about the same time the Supreme Court raised this procedural hurdle to settlement, critics developed major substantive objections to class action settlements. They argued that the prospects for fair settlements in large class actions were poor because of the conflicting interests between class members and class counsel inherent in the class format.[11] "The attorney's interest in securing the highest fee and the class members' interest in attaining the greatest recovery often diverge; the attorney has an incentive to settle the case prematurely, locking in a high fee without expending a lot of time or money."[12] Much of this view was confirmed in a 1999 Report by the RAND Institute for Civil Justice.[13] Based on a series of case studies, RAND reported:

> The powerful financial incentives that drive plaintiff attorneys to assume the risk of litigation intersect with powerful interests on the defense side in settling litigation as early and as cheaply as possible, with the least publicity. These incentives can pro-

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[10] *Ortiz*, 527 U.S. at 848.

[11] See John C. Coffee, Jr. & Donald E. Schwartz, The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform, 81 Colum. L. Rev. 261, 318 (1981) ("To the extent that defendants can offer a settlement involving only nominal relief or a small monetary recovery, but a substantial award of fees . . . counsel's self-interest is in conflict with that of the class of shareholders he represents, most of whom have too small an individual interest in the litigation to give it close attention."); see also Mary Kay Kane, Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer, 66 Tex. L. Rev. 385, 398 (1987) ("Courts then must resolve the divergent interests of the class attorney, who desires to maximize fees, and the class members, who prefer to maximize their awards."); Susan P. Koniak, Feasting While the Widow Weeps: *Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045, 1049–50 (1995) (asserting that the current safeguards, such as a class counsel's ethical obligations and the adequacy of representation requirement, have failed to ensure fair settlements); Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 Va. L. Rev. 1051, 1056–57 (1996) (suggesting that class counsel be held civilly and criminally liable for wrongful conduct during settlement negotiations); Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 22–25 (1991) (discussing the conflict of interests by distinguishing between the incentives based on the fee scheme namely, the incentive to settle early in cases in which the lawyer earns a percentage of the recovery and the incentive to delay reaching settlement in cases in which the lawyer is paid by the hour).

[12] Rhonda Wasserman, Dueling Class Actions, 80 B.U. L. Rev. 461, 470 (2000).

[13] Deborah R. Hensler et al., RAND Institute for Civil Justice, Class Action Dilemmas: Pursuing Public Goals for Private Gain, Executive Summary (1999).

> duce settlements that . . . create little value for class members or society.[14]

One scholar has even suggested that this congruence of interests among class counsel and defendants can produce a bizarre "reverse auction" conducted by defendants among potential class counsel—with the settlement awarded to the *lowest* bidders.[15]

These two decisions, *Amchem* and *Ortiz*, and the powerful critique pointing out the risk of collusion have clouded the prospects for future settlements in major class actions and cut short plans to amend the federal class action rule to encourage settlements.[16] The procedural bar will likely diminish the number of class certifications for settlement by imposing "heightened attention" to certification requests. The substantive criticisms will likely block any future efforts to modify the Rule to facilitate certifications for settlement. Before these developments, settlement had been virtually the only process employed to resolve complex civil cases. Now the inevitable question is: How will the federal courts respond to the continuing tide of complex civil litigation[17] commenced in district courts?

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[14] Id. at 10.

[15] John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1354, 1371–73 (1995); see also John C. Coffee, Jr., Rule of Law: The Corruption of the Class Action, Wall St. J., Sept. 7, 1994, at A15 ("In short, settlement class actions permit defendants to run a reverse auction, seeking the lowest bidder from a large population of plaintiffs' attorneys.").

[16] In 1996, the Committee on Rules of Practice of the Judicial Conference published proposed changes to Rule 23(b)(4), which would have allowed parties to request certification for settlement even though the requirements of 23(b)(3) were not met. The Committee abandoned plans to submit this change to the Judicial Conference after the *Amchem* decision due to a "risk that inconsistencies may exist between what the Court intended and what the amended rule might come to mean." Judicial Conference of the United States, Minutes of the Advisory Committee on Civil Rules (Oct. 6 & 7, 1997), *in* 1997 WL 1056239, at *28.

[17] See Arsenic: Class Suit Claims Arsenic in Water Supply Caused Illness in Tennessee Plant Workers, Toxics L. Daily (BNA), May 7, 2001, LEXIS, News Library, BNA Toxics L. Daily File (reporting a class action suit filed against defeudants for allegedly failing to provide timely notice that drinking water was contaminated with arsenic); Kip Betz, Animal Waste: RICO Class Action Against Smithfield Foods Seeks Damages for Millions of Members, Toxics L. Daily (BNA), Mar. 22, 2001, LEXIS, News Library, BNA Toxics L. Daily File (reporting that a grassroots coalition has filed a class action suit under RICO alleging that defendant has intentionally violated pollution laws and passed on the cost of handling those pollution violations to the public); Gordon Fairclough, Tobacco Makers Face Suit Alleging Ads Targeted Children, Wall St. J., May 24, 2001, at B14 (reporting complaint filed in U.S. District Court in

One possibility is to turn away most of these claims at the threshold by refusing to certify class actions—leaving plaintiffs to wait, likely in vain, for individual federal adjudication. This option would follow naturally from "heightened attention"[18] to certification requirements and has been supported candidly by some critics.[19] But the option is not attractive. A failure to certify can mean that thousands and sometimes millions of persons claiming a right under established substantive law will be left with no real judicial remedy. Chief Justice John Marshall famously labeled the failure to furnish a "remedy for the violation of a vested legal right" a condemnation of our jurisprudence.[20]

The other possibility for avoiding the new procedural and substantive objections to settlement is to bring the claims to an adjudicated solution by trial. Traditionally, this option has received little consideration because these cases, with thousands or millions of parties, simply defied trial. Indeed, the first casebook on com-

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Washington seeking damages under RICO for sales to underage smokers); Lubricants: Class Actions in Florida, Illinois Raise Liability Claims Over Hip Joints, Toxics L. Daily (BNA), March 5, 2001, LEXIS, News Library, BNA Toxics L. Daily File (reporting that patients who received hip implants filed class action suits alleging that the defendant "knew of problems with some 23,000 hip implants before it voluntarily recalled the products"); PPA: Woman Files Class Action Against Makers of Cold, Flu Remedies Containing PPA, Toxics L. Daily (BNA), Apr. 2, 2001, LEXIS, News Library, BNA Toxics L. Daily File (reporting that users of nasal decongestants have filed a class action suit alleging that the pharmaceutical companies conspired to conceal that phenylpropanolamine had life-threatening side-effects); Bebe Raupe, Chemical Safety: Workers Claim Exposure to Solvents, Want Railroad to Pay for Medical Tests, Chemical Reg. Daily (BNA), May 25, 2001, LEXIS, News Library, BNA Toxics L. Daily File (reporting complaint filed on May 18, 2001, under the Federal Employer's Liability Act seeking a trust to pay for health screenings of railroad workers exposed, allegedly because of negligence, to organic cleaning solvents).

[18] *Amchem*, 521 U.S. at 620.

[19] See, e.g., Max Boot, Rule of Law: Stop Appeasing the Class Action Monster, Wall St. J., May 8, 1996, at A15 ("I suggested that they should discuss the merits of abolishing class actions altogether."); cf. Coffee, supra note 15, at 1343, 1349, 1437–39, 1445–46 (presenting a "constrained autonomy" model involving a stricter reading of the superiority requirement, a broader right to opt out of the class at a later point, a certification of only those class actions likely to be won on the merits, a "disqualifi[cation of] any attorney from serving as a lead counsel . . . if the attorney has negotiated an inventory settlement with the same defendants," and a requirement of separate counsel for present and future claimants).

[20] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

plex civil litigation, published in 1985, had no chapter on trial,[21] and recent editions of that book and other casebooks on the subject have only brief treatments of the topic.[22] The first casebook on class actions, published in 2000, begins a brief section on trial by stating that "[f]ew class actions actually go to trial; most settle, either after the certification decision or as trial approaches."[23] Indeed, these editors go on to suggest that the total number of class-action jury trials may be only "a handful."[24] In fact, one scholar has suggested that judges themselves "have devised remarkably effective ways to keep mass tort cases away from juries."[25]

Yet trial may be the best antidote to the procedural and substantive concerns about class action settlements. Access to trial would permit certification free of the "heightened attention"[26] required by *Amchem* for settlement certifications, because the trial court would have the opportunity "to adjust the class, informed by the proceedings as they unfold."[27] Similarly, access to trial would encourage certification by providing a process which is "superior"[28] and which avoids the "difficulties likely to be encountered in the management of a class action."[29] Substantive concerns about conflicts of interest between attorneys and class members would be eliminated by introducing the jury as a decisionmaker with no significant stake in the outcome. Furthermore, judicial evaluation of any future set-

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[21] See Richard L. Marcus & Edward F. Sherman, Complex Litigation: Cases and Materials on Advanced Civil Procedure (1st ed. 1985).

[22] Richard L. Marcus & Edward F. Sherman, Complex Litigation: Cases and Materials on Advanced Civil Procedure 803–69 (3d ed. 1998); Linda S. Mullenix, Mass Tort Litigation: Cases and Materials 478–651 (1996); Jay Tidmarsh & Roger H. Trangsrud, Complex Litigation and the Adversary System 1197-1384 (1998).

[23] Robert H. Klonoff & Edward K.M. Bilich, Class Actions and Other Multi-Party Litigation: Cases and Materials 362 (2000).

[24] Id.

[25] Peter H. Schuck, Judicial Avoidance of Juries in Mass Tort Litigation, 48 DePaul L. Rev. 479, 481 (1998).

[26] *Amchem*, 521 U.S. at 620.

[27] Id.

[28] Fed. R. Civ. P. 23(b)(3).

[29] Id. at 23(b)(3)(D). Virtually all mass tort claims are certified, if at all, as Rule 23(b)(3) classes. The economic benefits of certification are described in David Rosenberg, Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't, 37 Harv. J. on Legis. 393 (2000); see also Mary J. Davis, Toward the Proper Role for Mass Tort Class Actions, 77 Or. L. Rev. 157, 158 (1998) (describing the benefits of certification "against the backdrop of substantive tort law policies").

tlements would likely be enhanced by reference to jury verdicts, which customarily set the parameters for settlement.[30]

Although the trial option has been largely overlooked during recent years, a few innovative federal judges have developed a number of disparate techniques that, if combined, could permit the routine trial of federal class action cases. In this Essay, I will propose and defend a Model Plan combining these techniques, which is intended to be used as a starting point for district judges. Obviously, no model will fit all trial problems, so my proposal is intended to be an archetype, a template, intended for case-by-case modification. My proposal is tailored for federal courts, although it could be easily adopted by most states.

In Part I, I will begin by sketching the Model Plan in general and then will describe in detail each of the four key elements of the proposal. As this Part will explain, the capabilities of the Plan are clear, but two questions remain. Is the Plan normatively acceptable, and is it constitutional?

In Part II, I will respond to the normative question by comparing the Model Plan to the traditional civil jury trial. The traditional trial is, of course, viewed universally as acceptable. While the two models are certainly different, because the traditional model cannot adjudicate an unlimited number of claims in a single jury trial, further comparison shows that the two models do have similar normative qualities. In particular, I will argue that the Model Plan, like the traditional jury trial, is efficient, balanced, and democratic.

The presence in the Model Plan of the same values present in the traditional civil trial is strong evidence that the Model Plan is constitutional. Yet use of the Model would surely provoke an argument that the Plan violates the right to due process, equal protection, and jury trial. The necessary step therefore remains of connecting the virtues of the Model Plan to the language of the Constitution itself in order to answer the second question: Is the plan constitutional? In Part III, I will link the three normative values found in both models to constitutional doctrine guaranteeing due process, equal protection, and the right to jury trial and will conclude that the Model Plan is constitutional.

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[30] See James W. Jeans, Sr., Trial Advocacy § 20.6 (2d ed. 1993).

In Part IV, I will apply the Model Plan to litigation in federal court. In particular, I will describe the class certification, jurisdictional, and choice of law requirements that would shape actual use of the model. Finally, I will show how the Model Plan would encourage class certification and eliminate collusion, thus avoiding the procedural concerns the Supreme Court noted in *Amchem* and *Ortiz* and substantive objections of academic commentators to class action settlements. As a result, this Essay concludes that the Plan would be a favorable and constitutional alternative to settlements of class actions.

## I. THE MODEL PLAN

The Model Plan consists of four simple and effective elements combined in a single trial plan. I address in order (1) polyfurcation, (2) sampling, (3) deciding future claims, and (4) distribution trusts. These are the disparate techniques developed in recent years by federal judges that, in combination, would open the door to federal class action cases. The serial trial of decisive issues with sampled evidence, awards distributed by trustee, and absolute closure of all known and future claims would allow for the determination of all the significant legal issues in a complex class action suit before a single jury.

### *A. Polyfurcation*

The generic term "polyfurcation" describes the practice of dividing for trial one or more elements of the cause of action, defenses, or damages.[31] The more specific term "bifurcation" is typically used to describe the division of the trial of liability from damages.[32] The term "trifurcation" indicates a three-part division for trial—usually

[31] See Albert P. Bedecarré, Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases, 17 B.C. Envtl. Aff. L. Rev. 123, 138 (1989) (explaining that polyfurcation divides out damages and "mak[es] multiple separations *within* the general question of liability").

[32] See Kenneth S. Bordens & Irwin A. Horowitz, Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions, Judicature, June–July 1989, at 22, 22 (1989) ("Bifurcation may be used to settle common issues such as liability and causation while individual determinations might be made on specific causation and damage issues.").

causation, other elements of liability, and damages.[33] The addition of the adjective "reverse" means that one of the separated matters is tried out of the usual order.[34] The reason for separation (and reversal) is practical: In some situations trial of one part of a case may prove decisive, saving the cost of trying the rest of the case. For example, the separation and initial trial of an affirmative defense would, if the verdict were for defendant, end the case. In a complex civil case this practice might save months of trial. The process, however, is controversial. The common law tradition prescribed a unified trial to correct error even if the error was limited to a single aspect of the case.[35]

Polyfurcation gained increased acceptance in twentieth-century American jurisprudence. As early as 1912, a Massachusetts court allowed retrial only of damages where the determination of liability had been free from error.[36] Federal practice developed along the same line, leading in 1931 to the Supreme Court decision in *Gasoline Products Co. v. Champlin Refining Co.*,[37] which held that a partial new trial is permitted, but only where the issue to be retried is distinct and separable. In that case, the plaintiff brought suit in the United States District Court for Maine to recover royalties alleged to be due under a contract that licensed the defendant to use two structures helpful in the process of producing gasoline from crude oil. The defendant counterclaimed, alleging breach of other related contracts between the parties. The jury returned a verdict for the plaintiff and a verdict for the defendant on the counterclaim, leaving a balance in the plaintiff's favor. The court of

[33] Id. ("Trifurcation . . . usually implies the separation or bifurcation of liability and causation.").

[34] See Joseph C. Kearfott & D. Alan Rudlin, Case Management and Health Claims in Toxic Tort Litigation, *in* Environmental and Toxic Tort Matters: Advanced Civil Litigation, ALI-ABA Course of Study (Jan. 27, 2000), WESTLAW, SE73 ALI-ABA 111, 124 (noting that reverse bifurcation can result in damages being tried before liability issues).

[35] See James A. Henderson, Jr. et al., Optimal Issue Separation in Modern Products Liability Litigation, 73 Tex. L. Rev. 1653, 1675 (1995) ("At common law, a jury trial was conceived as a unified whole. Liability and damages were not treated in separate proceedings, even upon a remand for retrial prompted by error on only one issue.").

[36] Simmons v. Fish, 97 N.E. 102, 103 (Mass. 1912). See generally Henderson et al., supra note 35, at 1685–91 (discussing a number of tort cases involving the use of polyfurcation).

[37] 283 U.S. 494 (1931).

appeals reversed because of error in instructing the jury with respect to the measure of damages for the counterclaim, directing a new trial—restricted to determination of counterclaim damages.[38] The Supreme Court granted certiorari limited to the question of whether the limited new trial was acceptable.[39]

Justice Harlan Fiske Stone began his opinion for the Court by recounting the common law rule requiring a whole new trial, but added, "we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance."[40] He continued, "the Seventh Amendment does not exact the retention of old forms of procedure."[41] The Court held that all of the issues decided with respect to the plaintiff's claim were clearly separable and need not be retried, but held that both liability and damage issues with respect to the counterclaim should be retried because these issues could not be separated.[42]

Polyfurcation was first used in a class action trial in *In re Beverly Hills Fire Litigation*.[43] The plaintiff class consisted of the legal representatives of numerous persons killed when fire destroyed a supper club, as well as others who alleged they were injured in the fire. In that case, the trial court bifurcated the trial, asking the jury first to hear and determine a causation issue and then, if necessary, to hear and determine other issues relating to liability as well as damages. After thirty-two days of trial, the jury returned a special verdict answering the causation question in the negative. The trial court then entered a judgment for the defendants. On appeal, the United States Court of Appeals for the Sixth Circuit held that the bifurcation was acceptable, because it was reasonable for the trial judge to conclude that litigation of other issues should be avoided "if they might be mooted by an adverse finding on the causation issue."[44]

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[38] Id. at 496.
[39] Id. at 497.
[40] Id. at 498.
[41] Id.
[42] Id. at 499–500.
[43] 695 F.2d 207 (6th Cir. 1982).
[44] Id. at 216–17.

Five years later, the Sixth Circuit again approved polyfurcation in a class action case, *In re Bendectin Litigation*,[45] which involved more than 800 multidistrict cases. Plaintiffs in these cases claimed they had suffered birth defects caused by their mothers' use during pregnancy of the anti-nausea drug Bendectin. The lower court trifurcated the case into causation, other liability elements, and damages. The jury returned a negative answer on the causation issue, and the court entered a verdict for the defendant. On appeal, the plaintiffs argued that the division prejudiced plaintiffs by creating a "sterile trial atmosphere"[46] and prevented the introduction of important evidence. The Sixth Circuit rejected this argument and held that "since the initial trial on the proximate causation issue was a separate issue, promoted efficiency, and did not unduly prejudice plaintiffs, trifurcating this case on the separate issue of proximate causation was proper."[47]

### *B. Sampling*

"Sampling" is the process of collecting information from fewer than all potential sources.[48] Typically, the sources selected for in-

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[45] 857 F.2d 290 (6th Cir. 1988).

[46] Id. at 315.

[47] Id. at 320. But see In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995). *Rhone-Poulenc* involved a nationwide class action on behalf of hemophiliacs who were allegedly infected with the AIDS virus by using defendants' products. The district court proposed a trial plan which bifurcated liability from damages and provided for trial by jury on common issues of negligence with a remand for determination of damages, if necessary, by other juries. The Seventh Circuit held that this proposal violated the Seventh Amendment's "reexamination clause." Id. at 1302–03. According to Chief Judge Richard A. Posner, the first jury under the proposed plan would not in fact determine liability, but would "determine merely whether one or more of the defendants was negligent under one of the two theories." Id. at 1303. Chief Judge Posner continued by holding that other juries might be required to decide issues of comparative negligence and proximate cause which, he wrote, "overlap[] the issue of the defendants' negligence." Id. Therefore, the Seventh Circuit concluded, the possibility for inconsistency between juries rendered the trial plan contrary to the Seventh Amendment. Id. Since the Model Plan would require only a single jury, Chief Judge Posner's objection to polyfurcation would not apply.

[48] See John Monahan & Laurens Walker, Social Science in Law: Cases and Materials (5th ed. 2002) (containing cases and materials describing the advent of the use of sampling methodology to determine damages); Shari Seidman Diamond, Reference Guide on Survey Research, *in* Reference Manual on Scientific Evidence 229 (Federal Judicial Center ed., 2d ed. 2000) (describing the sample survey technique); Laurens Walker & John Monahan, Sampling Damages, 83 Iowa L. Rev. 545 (1998)

vestigation are chosen randomly from among all potential sources to enhance the probability that the sampled sources are representative of the whole.[49] Sampling is a fundamental aspect of scientific methodology and a standard response to the problem of prohibitive cost in data collection.[50] In civil litigation, sampling has been used in essentially the same way as it has been used in scientific research—to collect representative information and avoid prohibitive costs. However, like polyfurcation, this powerful device has also proved to be controversial.

Judicial use of sampled information began in cases involving claims of trademark infringement alleging a degree of similarity between marks that caused "consumer confusion."[51] Faced with the high cost of collecting information from many consumers, litigants turned to the sampling methodology and conducted surveys of comparatively small numbers of customers. Initially, some of these surveys were not permitted in evidence, chiefly on the ground that the perceptions of the participants incorporated in the results were hearsay. However, in the leading case of *Zippo Manufacturing Co. v. Rogers Imports*,[52] Judge Wilferd Feinberg decisively rejected a hearsay objection,[53] and today surveys are routinely employed in trademark cases.[54]

Recently, several versions of sampling have been used in federal class action trials, resulting in conflicting judicial evaluations. In *Hilao v. Estate of Marcos*,[55] the Ninth Circuit approved the use of sampling to determine damages. In that case, a class of more than 10,000 people brought suit under the Torture Victim Protection

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(suggesting that sampling be used to solve the "numbers problem" associated with determining damages in mass tort litigation involving thousands, or even millions, of claimants); Laurens Walker & John Monahan, Sampling Liability, 85 Va. L. Rev. 329 (1999) (proposing a model for adjudicating liability elements in complex civil cases via sampling).

[49] See Diamond, supra note 48, at 242–43 (cataloging the forms of sampling, beginning with simple random samples).

[50] Id. at 234–363 (presenting surveys in general as an economically efficient means of presenting evidence).

[51] See Monahan & Walker, supra note 48, at 93–126 (describing consumer confusion as an element of trademark law and the use of surveys to provide proof of such).

[52] 216 F. Supp. 670 (S.D.N.Y. 1963).

[53] Id. at 682–84.

[54] See Monahan & Walker, supra note 48, at 100–26 (collecting cases and materials showing widespread use of surveys in trademark cases).

[55] 103 F.3d 767 (9th Cir. 1996).

Act alleging they or their decedents were victims of torture, "disappearance," or summary execution during the fourteen-year regime of Ferdinand Marcos in the Philippines.[56] The trial court allowed the use of sampling to determine the amount of compensatory damages payable to each member of the class. The trial court appointed a special master to provide notice and conduct the depositions of 137 claimants selected randomly by a computer. The special master then reviewed the deposition testimony and recommended to the jury an amount of damages for each deponent and a gross recovery for each of three sub-classes. Judge Betty B. Fletcher, writing for herself and Judge Harry Pregerson, found the process acceptable. After observing that "the time and judicial resources required to try the nearly 10,000 claims in this case" would be an insurmountable obstacle, Judge Fletcher held that "the procedure used by the district court did not violate due process."[57] Judge Pamela Ann Rymer dissented. She wrote:

> Although I cannot point to any authority that says so, I cannot believe that a summary review of transcripts of a selected sample of victims who were able to be deposed for the purpose of inferring the type of abuse, by whom it was inflicted, and the amount of damages proximately caused thereby, comports with fundamental notions of due process.[58]

A quite different result was reached by the Fifth Circuit in *Cimino v. Raymark Industries*.[59] In that case, the district court determined the amount of compensatory damages in some 3,031 cases involving claims based on alleged exposure to asbestos by trying a random sample of 160 cases and extrapolating the results to the cases not tried. The trial court reviewed all of the verdicts, which included twelve zero verdicts, and ordered remittiturs in thirty-five cases. The trial judge then calculated the average actual damage award in each of five disease categories and used those average awards to enter judgment in the cases not sampled and tried. The Fifth Circuit held that all of the damage determinations were

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[56] Id. at 771–72.

[57] Id. at 786–787 (applying the balancing tests established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Connecticut v. Doehr*, 501 U.S. 1 (1991)).

[58] Id. at 788 (Rymer, J., concurring in part and dissenting in part).

[59] 151 F.3d 297 (5th Cir. 1998).

erroneous, because they were contrary to Texas substantive law, the right to a jury trial, and due process.[60] With respect to the cases actually tried, the Fifth Circuit held that the trial plan failed to provide an adequate determination of causation, an error that also applied to the judgments entered in the cases not tried.[61] However, the court went on to squarely reject the use of the results of the trial sample to determine damages in cases not actually tried. Judge William Garwood held that in these cases, "there was neither any sort of trial determination, let alone a jury determination, nor even any evidence, of damages."[62] According to Judge Garwood, the extrapolation was contrary to both Texas substantive law, which, he said, required an individual determination of damages, and the Seventh Amendment, which, he said, required that a jury determine the damages of each plaintiff.[63]

The most recent development occurred in the ongoing case of *Blue Cross & Blue Shield of New Jersey v. Phillip Morris, Inc.*,[64] where the plaintiffs sought to collect damages from the tobacco industry under the Racketeer Influenced and Corrupt Organizations Act and under New York state law. The twenty-one Blue Cross and Blue Shield plans sought recovery of money paid on behalf of plan members for tobacco-related illness. On a motion for summary judgment, the defendants complained about the anticipated use of sampling by the plaintiffs to prove liability and damages under the federal statute. Judge Jack B. Weinstein rejected the defendants' argument, holding that "the use of statistical evidence violates neither the constitutional guarantee of due process nor the constitutional right to a jury trial."[65] Subsequently, Judge Weinstein considered a similar motion directed to plaintiffs' claims brought under New York law. Again, the motion and defendants' arguments

[60] Id. at 319–21 (stating that the damages are defective for adjudicated and extrapolated plaintiffs due to Seventh Amendment and substantive legal violations).

[61] Id. at 319 (noting that causation requires individual determination).

[62] Id.

[63] Id. at 319–21 (applying *In re Fibreboard*, 893 F.2d 706 (5th Cir. 1990)).

[64] 133 F. Supp. 2d 162 (E.D.N.Y. 2001) (denying defendant's motion for summary judgment against plaintiff's New York common law fraud and Consumer Protection Act claims); Blue Cross & Blue Shield of N.J. v. Phillip Morris, Inc., 113 F. Supp. 2d 345 (E.D.N.Y. 2000) (denying defendant's motion for partial summary judgment on plaintiff's RICO claim).

[65] *Phillip Morris*, 113 F. Supp. 2d at 373.

against sampling were rejected. The court succinctly held that "[s]tatistical proof is available for every element of a claim in a mass tort action."[66]

A somewhat different use of sampling was approved by the Fourth Circuit in *Menard-Sanford v. Mabey*.[67] A.H. Robins Co. was the manufacturer of a contraceptive device known as the Dalkon Shield. An avalanche of claims seeking damages for harm allegedly caused by use of the device caused Robins to file for bankruptcy. In an earlier opinion in the bankruptcy case, *A.H. Robins Co. v. Piccinin*,[68] the Fourth Circuit had considered the objection of several claimants to an order of the district court transferring all pending personal injury cases to the district where the bankruptcy was pending. Judge Donald Russell observed in the earlier case that "there are very real considerations that support a centralization of all the Dalkon Shield claims,"[69] pointing to the obligation of the district court to conduct an estimation of all these claims for the purpose of determining the feasibility of a reorganization. Judge Russell signaled that the estimation process need not include individual trials: "If all these claims were to be tried, the expense of discovery proceedings and trial would likely consume all the assets of the debtor and exhaust all the resources of its executives and employees."[70] Judge Russell continued, observing that "[i]t is unlikely that all 8,000 to 10,000 claims which have been filed would have to be tried before an intelligent estimation of the claims could be made by the bankruptcy court."[71]

As described in *Menard-Sanford*, the district court responded by appointing an expert to develop a database regarding the Dalkon Shield claims.[72] The court-appointed expert was advised throughout the data collection process by experts retained by the interested parties, and the particular method was developed by consensus of all the experts. The resulting database included claim forms filed by 195,000 claimants, 6,000 responses to a fifty-page survey pro-

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[66] *Phillip Morris*, 133 F. Supp. 2d at 172.

[67] Menard-Sanford v. Mabey (In re A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

[68] 788 F.2d 994 (4th Cir. 1986).

[69] Id. at 1011 (suggesting the claims be placed in the district court holding jurisdiction over the bankruptcy).

[70] Id. at 1013.

[71] Id.

[72] *Menard-Sanford*, 880 F.2d at 694.

posed by the experts, and the medical records from a random sample of claimants.[73] After the study was completed, the district court held an estimation hearing at which the experts retained by the parties testified regarding the amount of gross compensatory damages. The district court ultimately ruled that the proper estimate was 2.475 billion dollars.[74]

The court of appeals affirmed the district court's decision without dissent.[75] Judge H. Emory Widener, Jr., described in detail the use of the data by an expert retained by an insurance company because the district court's estimate was within the range suggested by that expert: "She took a . . . random sample of the claims . . . and got three Aetna claims adjusters who had been experienced in the actual adjustment of Dalkon Shield claims and instructed those adjusters to set a value on a sample of the claims she referred to them . . . ."[76] The resulting values served as the basis for testimony estimating the gross value of damages at between 2.2 and 2.3 billion dollars. The court of appeals held that this testimony, alone, was sufficient to justify the district court's estimation of 2.475 billion dollars.[77]

### *C. Deciding Future Claims*

The term "future claims" in fact describes three significantly different types of civil claims, usually involving product liability.[78] First, there are claims that involve exposure to the product and injury, but which have not been filed. Second, there are claims that involve exposure to the product but no current injury. Finally, there are claims from future exposure to the product. The first and second categories are the most important in product liability suits, because withdrawal of the allegedly dangerous product from the market can usually eliminate liability under the third category. De-

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[73] Id. at 699.

[74] Id. at 700 (holding that the district court's damage determination was "not clearly erroneous" and noting that a higher figure may have been justified).

[75] Id.

[76] Id. at 699.

[77] Id. at 700.

[78] See Richard L. Marcus, They Can't Do That, Can They? Tort Reform Via Rule 23, 80 Cornell L. Rev. 858, 882 (1995) (discussing the authority of courts to adjudicate future claims in a class action).

fendants almost always prefer a result that determines future claims in the first two categories and thus provides closure.[79] The obvious rationale for this preference is the elimination of contingent liabilities and an enhancement of stock value.

Both the *Amchem* and *Ortiz* cases involved efforts to settle only future claims. The Court in both cases relied on the requirements of Rule 23 to decide that the settlements were faulty, thus avoiding any holding about the constitutionality of deciding future claims.[80] However, in *Amchem*, Justice Ginsburg recognized a serious question with respect to the adequacy of notice: "Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement."[81] She continued: "In accord with the Third Circuit . . . we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous."[82] Justice Ginsburg also recounted in considerable detail arguments made by objectors to the standing of future claimants: "Either they have not yet sustained any cognizable injury or, to the extent the complaint states claims and demands relief for emotional distress, enhanced risk of disease, and medical monitoring, the settlement provides no redress."[83]

The settlement of future claims fared much better in the earlier Agent Orange litigation.[84] The district court certified a national class of several million Vietnam veterans and others with claims related to the use of the defoliant Agent Orange during the Vietnam War.[85] After years of litigation, the court managed to settle most of the claims for 180 million dollars plus interest. The agreement provided that "'[t]he Class specifically includes persons who have not

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[79] Id. at 882–87.

[80] See *Ortiz*, 527 U.S. at 842; *Amchem*, 521 U.S. at 622–28.

[81] *Amchem*, 521 U.S. at 628.

[82] Id.

[83] Id. at 612.

[84] In re "Agent Orange" Prod. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993).

[85] In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 169 (2d. Cir. 1987) (referencing the 2.4 million veterans of the Vietnam War).

yet manifested injury'"[86] and barred future litigation against defendants based on Agent Orange exposure. Nonetheless, two groups of veterans and their family members later sued the defendants in a Texas state court alleging exposure and harm from Agent Orange. The complaint in both actions alleged that the injuries "did not manifest themselves or were not discovered" until after the settlement date.[87] The cases were removed to federal court and transferred to the district court where the settlement had taken place. The district court dismissed the veterans' claims as barred by the settlement and enjoined future suits by class members. The Second Circuit affirmed.[88] After deciding that the veterans were members of the settlement class, the court held that notice in the settlement class had been sufficient as a matter of due process.[89] According to the Second Circuit, "[i]n the instant case, society's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best."[90]

### *D. Distribution Trust*

The distribution trust is a novel version of the traditional trust format. A trust is created by the transfer of property by one person to another person to hold for the benefit of some third person in order to achieve a variety of goals.[91] In the distribution trust, a defendant in a civil case transfers property to a non-party to hold for the benefit of claimants in order to provide an independent mechanism for tailoring individual payments over time. Thus far, the distribution trust has only been used in bankruptcies, but very similar distribution techniques have been used in class actions.

The first distribution trust was established in the reorganization of the Johns-Manville Corporation following a bankruptcy caused

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[86] Id. at 1429 app. A (Settlement Agreement) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 865 (E.D.N.Y. 1984)).

[87] *In re "Agent Orange,"* 996 F.2d at 1430.

[88] Id. at 1428.

[89] Id. at 1435.

[90] Id.

[91] See Restatement (Second) of Trusts § 2 (1959) (defining a trust as "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person").

by thousands of asbestos-related personal injury and property claims.[92] According to the bankruptcy judge, "[o]ne of the most innovative and unique features of the Manville Plan of Reorganization . . . is the establishment of two Trusts out of which all asbestos-related claims will be paid."[93] The Asbestos Health Trust was created with 815 million dollars in cash receivables and insurance proceeds. Also, the Trust was to receive 75 million dollars a year from the corporation for twenty-four years beginning three years after inception, and the Trust was to own up to 80 percent of Manville stock and have the right, after four years, to call on up to 20 percent of Manville profits.[94] The Property Damage Trust was initially funded with 125 million dollars and was provided additional contingent payments.[95] The Plan of Reorganization required an injunction by the bankruptcy court channeling all asbestos-related claims away from the reorganized Manville and toward the two trusts.[96]

The bankruptcy court commented in approving the plan that "an effort to determine the number and amount of [Asbestos Health] claims with exactitude is not imperative."[97] The court explained that "[t]he imperative rather, is to ensure to the greatest degree possible the continuing viability of the reorganized corporation, which will fund the Trust, whatever the number and amount of claims happen to be."[98] Apparently a more accurate estimation was in fact necessary, because it soon became clear that the personal injury claims were depleting the Asbestos Health Trust. By 1990, "the Trust was effectively out of money to pay its current and short term obligations."[99] Resulting litigation continued for years, shut-

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[92] In re Johns-Manville Corp., 68 B.R. 618, 638 (Bankr. S.D.N.Y. 1986) (confirming the plan).

[93] Id. at 621.

[94] Id. at 621–22.

[95] Id. at 622.

[96] Id. (noting that an injunction is needed "[t]o protect and preserve the Manville operating entity, to help ensure the Trust's ability to honor its commitments, and to enhance the market value of the Trust's stock").

[97] Id.

[98] Id.

[99] In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 726 (2nd Cir. 1992) (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 120 B.R. 648, 652 (Bankr. E. & S.D.N.Y. 1990)).

ting off payments for a time and adding to the administration cost of the Trust.[100]

A distribution trust was used with much better results in the A.H. Robins Co. bankruptcy.[101] The plan of reorganization provided that Robins be merged into a subsidiary of another pharmaceutical company and also provided for the creation of a Claimants' Trust funded in an amount of more than 2.3 billion dollars.[102] The Trust was created to assess the value of individual claims as accurately as possible, with the lowest possible transaction costs. Any funds remaining after all claims were paid were required to be paid to claimants, removing any incentive by the Trust to pay less than fair value.[103] After a decade of work, the Trust had resolved over 200,000 claims and paid out almost 3 billion dollars, with transaction costs of less than 6 percent of total payments.[104]

A closely related distribution device was established by the district court in the Agent Orange litigation.[105] As part of the process of approving the settlement, the court ordered a mechanism for distributing the proceeds. The Agent Orange Fund was established as an unincorporated, tax-exempt, charitable organization.[106] The Fund's officers were court-appointed special masters who were authorized to contract with organizations to assist in making payments to class members. The special masters contracted with a commercial insurance company who agreed to serve as claims administrator. By 1997, the Fund had made payments of 196.5 million dollars di-

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[100] See Marianna S. Smith, Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust, Law & Contemp. Probs., Autumn 1990, at 27, 33–34 (discussing "the Trust's inundation with active litigation").

[101] In re A.H. Robins Co., 88 B.R. 742 (Bankr. E.D. Va. 1988) (confirming the plan); see also George Rutherglen, Distributing Justice: A Case Study of the Dalkon Shield Claimants Trust, Law & Contemp. Probs. (forthcoming 2002) (describing the Robins plan and its results in depth); Georgene M. Vairo, *Georgine*, The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution, 31 Loy. L.A. L. Rev. 79, 123–64 (1997) (describing the Robins Trust).

[102] In re A.H. Robins Co., 880 F.2d 769, 771 (4th Cir. 1989).

[103] Vairo, supra note 101, at 129.

[104] See Rutherglen, supra note 101.

[105] In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1396 (E.D.N.Y. 1985) (confirming the settlement fund plan).

[106] See Harvey P. Berman, The Agent Orange Veteran Payment Program, Law & Contemp. Probs., Autumn 1990, at 49, 51.

rectly to veterans or their families and had distributed 71.3 million dollars to various programs aiding veterans and their families.[107]

### *E. The Elements Combined*

These four elements offer complementary devices that can surely resolve the significant issues raised by the trial of a federal class action case before a single jury. Although they are not without controversy, these elements, combined in the Model Plan, offer a method to use jury trials for the resolution of federal class actions. Polyfurcation (with reversed order of elements, as appropriate) may bring the matter to an early end. This element divides issues for trial and brings potentially decisive issues forward for early decision. If a longer trial is necessary, sampling would limit evidentiary costs by collecting information from fewer than all potential sources, and deciding future claims would provide closure by ensuring that present costs constitute total costs. Distribution by trust adds a desirable element of precision to the remedy stage and to the entire Plan by permitting a good fit between verdict and reward.

## II. NORMATIVE APPEAL: THE MODEL PLAN AND THE TRADITIONAL JURY TRIAL

The positive capabilities of the Plan are indisputable. In combination, the four elements described above would permit the routine trial of any federal class action case. But two questions remain: Is the Plan normatively acceptable, and is it constitutional? Perhaps the best way to examine the normative acceptability of the Model Plan is to compare it to the values and judgments embodied in the traditional civil jury trial. After all, the model of the traditional civil jury trial is well known to lawyers and judges[108] and is univer-

[107] Daniel Wise, 52,000 Veterans Received Agent Orange Payments, N.Y. L.J., Sept. 30, 1997, at 1.

[108] The origins of this process are ancient, dating to thirteenth-century England. Before that time, the process of trial involved an ordeal, with the result determined by assessing litigant response to holding a hot iron or submersion in cold water. A priest typically inspected the litigants after the ordeal and announced the verdict. In 1215 Pope Innocent III banned further participation by clergy, and the process was abandoned. See T.F.T. Plucknett, Origins of Methods of Trial in England and on the Continent, *in* C.J. Hamson & T.F.T. Plucknett, The English Trial and Comparative

sally accepted. How does the Model Plan compare with the traditional civil jury trial? The traditional jury trial is only capable of individual claim adjudication and can be modified to adjudicate a limited number of additional claims. The fact that, to date, most federal class action cases have been settled and only a handful have been tried is proof itself of this limited capability.[109] In contrast, the Model Plan is capable of providing a jury trial for an unlimited number of related claims.[110] Thus, the capabilities of the two models are dramatically different. Yet, the difference in capability does not determine the normative question concerning the Model Plan. The important question to ask is whether the two models are similar from a normative point of view. In particular, does the Model Plan incorporate the traditional model's normative virtues of being efficient, balanced, and democratic? After discussing these normative values of the traditional jury trial, this Part explains that the Model Plan also incorporates the values of efficiency, balance, and democracy.

### *A. Efficiency*

The traditional common law jury trial reflects a commitment to minimizing transaction costs. Typically, the interested parties and their attorneys meet before judge and jury and present evidence

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Law: Five Broadcast Talks 37 (1952). The central government lacked any replacement proposal, and the trial process was simply left to the discretion of the judges. Id. at 37–38. At this time juries were commonly used throughout England for a variety of tasks, but none involved trial. The judges, required to decide cases but left without a process, began to ask jurors questions about local cases, and by the late thirteenth-century, trial by jury was regularly employed. But these jurors did not hear evidence in court; rather, they announced a verdict based, necessarily, on local gossip. Id. at 38–39 (noting that the local jurors were habitually summoned only to comment on the character of the accused). As the years passed, and particularly in civil cases which often turned on facts not likely to be widely known, juries heard evidence, but not, as we might expect, in court, but in private and chiefly from the parties. By the mid-fifteenth-century the process of jury investigation was constrained but not eliminated. Id. at 44 (explaining that witnesses and parties could tell jurors "what [they knew] about a case" outside of the court, though this function was limited in 1450 to require that the juror go to the witness seeking information, rather than allowing the witness to approach the juror). It was not until 1563 that a statute required a witness to testify before the jury in court. Id. at 46.

[109] See supra text accompanying notes 21–25.

[110] See supra Part I.

"in the shortest possible period of time."[111] After the evidence is related the judge instructs the jury and a verdict is rendered, often on the same day the trial was set. The presence of the jury apparently explains the concentration of events. "The lay jury cannot easily be convened, adjourned, and reconvened several times in the course of a single action without causing a great deal of inconvenience and expense."[112] These requirements explain in part the limited evidentiary discourse of traditional trial procedure. Rules requiring that evidence be "of consequence to the determination of the action"[113] provide a narrow focus for the dialogue, and the requirement that only "relevant"[114] evidence be admitted limits the dialogue still further to reports that bear on the outcome. Beyond these formal rules, the judge at a common law trial has inherent power to limit the evidence in order to finish the trial in a reasonable time.[115]

Efficiency is also promoted by the final judgment rule. The work of the trial court must be completed before the quality of that work can be reviewed by another court.[116] In 1830, Justice Joseph Story described the practical basis for the rule, observing that "[i]t is of great importance to the due administration of justice . . . that causes should not come up here in fragments, upon successive appeals."[117]

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[111] Mauro Cappelletti & Bryant G. Garth, Introduction—Policies, Trends and Ideas in Civil Procedure, *in* 16 International Encyclopedia of Comparative Law § I-7, at 11 (Mauro Cappelletti ed., 1987).

[112] John Henry Merryman, The Civil Law Tradition 121 (1981).

[113] Fed. R. Evid. 401.

[114] Fed. R. Evid. 402 (stating that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority").

[115] See, e.g., Robert P. Burns, Some Realism (And Idealism) About The Trial, 31 Ga. L. Rev. 715, 730 (1997) (noting that a judge has the ability to cut evidence short with a directed verdict following the presentation of the plaintiff's evidence). See generally John E. Rumel, The Hourglass and Due Process: The Propriety of Time Limits on Civil Trials, 26 U.S.F. L. Rev. 237 (1992) (discussing the authority of courts to limit the time of trial).

[116] See 28 U.S.C. § 1291 (2001) (stating that courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States"); see also Herbert F. Goodrich, A Case on Appeal—A Judge's View, *in* Comm. on Continuing Legal Educ., ALI, A Case on Appeal 1, 2–3 (Hon. Charles E. Clark ed., 3d ed. 1957) (explaining the federal court requirement that, barring certain limited exceptions, all appeals must be made from final decisions).

[117] Canter v. Am. Ins. Co., 28 U.S. (3 Pet.) 307, 318 (1830); see also Carleton M. Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539, 551 (1932) (placing

Justice Story continued: "It would occasion very great delays, and oppressive expenses."[118] More recently, Professors Jack H. Friedenthal, Mary Kay Kane, and Arthur R. Miller wrote: "Although the application of the final judgment rule can produce some harsh results, the rationale supporting its use rests on a desire to achieve judicial economy and efficiency."[119] They explained that "[b]y avoiding interlocutory appeals, the trial process . . . may proceed more rapidly, because it will not need to be stalled while waiting for an appellate ruling on some point."[120]

Finally, doctrines of res judicata—generally known today as claim and issue preclusion—bolster the efficient aspect of the traditional common law trial. "At some point litigation must end."[121] Res judicata limits parties to one trial opportunity for adjudicating related claims or defenses and one actual adjudication of issues.[122] According to Professor Allan Vestal, "[p]eople who have engaged in a formal adjudication in the socially established manner expect, and have the right to expect, that the end of the process will be reached."[123] Vestal concluded that "[l]ife simply must move forward; we cannot spend our energies refighting old battles."[124]

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Justice Story's remarks within the context of the historical development of the final judgment rule).

[118] *Canter*, 28 U.S. (3 Pet.) at 318.

[119] Jack H. Friedenthal et al., Civil Procedure 602 (3d ed. 1999).

[120] Id.

[121] Colin Hugh Buckley, Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction and Legal History, 24 Hous. L. Rev. 875, 875 (1987).

[122] "The rules of res judicata in modern procedure . . . may fairly be characterized as illiberal toward the opportunity for relitigation." Restatement (Second) of Judgments § 1, at 10 (1982). "In general terms, these limitations include the rules of claim preclusion and issue preclusion . . . ." Id. at 1.

> The rule of claim preclusion . . . is that a party ordinarily may not assert a civil claim arising from a transaction with respect to which he has already prosecuted such a claim, whether or not the two claims wholly correspond to each other. The rule of issue preclusion, sometimes referred to as collateral estoppel, . . . is that a party ordinarily may not relitigate an issue that he fully and fairly litigated on a previous occasion.

Id.

[123] Allan D. Vestal, Res Judicata/Preclusion V-8 (1969).

[124] Id.

### *B. Balance*

The traditional model is also balanced between plaintiffs and defendants. Plaintiffs are favored by their power to begin traditional civil law suits. One advantage flows from plaintiffs' right to choose the time to begin litigation, subject only to limits imposed by statutes of limitations. Another advantage flows from plaintiffs' right to determine the place a civil suit will be litigated, subject, of course, to the requirements of personal jurisdiction, subject matter jurisdiction, and venue. These constraints, in earlier times quite demanding, are now comparatively relaxed,[125] a development which has only added to plaintiffs' initial advantage. Also, plaintiffs are generally recognized as "masters of their complaint,"[126] which means plaintiffs enjoy the benefit of defining the subject of a law suit. Although defendants may add concerns by responding with defenses and counterclaims, plaintiffs' theories lay the foundation for all that follows. These three initial advantages for plaintiffs add up to a strong pro-plaintiff bias in the earliest stage of the traditional model.

Plaintiffs' initial advantage is balanced by the usual assignment to plaintiffs of the burdens of pleading, production, and persuasion on the claim for relief.[127] Plaintiffs must adequately describe the case to the court, present evidence posing questions of fact for the jury, and convince the jury that plaintiffs' version of the facts is correct. If a plaintiff fails in carrying out any of these three tasks, the de-

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[125] See generally Fleming James et al., Civil Procedure §§ 2.4–2.5 (5th ed. 2000) (noting that "the concept of actual physical presence was enlarged to include . . . having some connection with the state").

[126] Mary P. Twitchell, Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts, 54 Geo. Wash. L. Rev. 812, 821 (1986) ("Many federal court opinions refer to the principle that plaintiff, as master of the complaint, should control the characterization of her claim.").

[127] See Thomas R. Lee, Pleading and Proof: The Economics of Legal Burdens, 1997 BYU L. Rev. 1, 21 (noting that "one of the purposes of the [plaintiff's burden] is to discourage indeterminate suits," which could be brought due to the ease of filing); Richard A. Posner, An Economic Approach to the Law of Evidence, 51 Stan. L. Rev. 1477, 1545 (1999) (stating that the plaintiff's burden may "reduce the frivolous or harassing use of the courts"). But see James et al., supra note 125, §§ 3.11, 4.5 (recognizing an exception to the general rule of burden allocation where defendants may be assigned the burden of proof by the courts in limited situations); Fed. R. Civ. P. 8(c) (assigning defendants the burden of pleading affirmative defenses for issues such as estoppel, fraud, and res judicata).

fendant will prevail. In the case of pleading and production burdens, defendants can prevail even though they took little or no action in response to the suit. The typical assignment of the persuasion burden to plaintiffs always gives defendants the "benefit of the doubt."[128] Standing alone, the assignment of all three trial burdens to plaintiffs surely would suggest a pro-defendant bias.

The onerous assignment to plaintiffs of all three trial burdens on the claim is itself balanced by the right traditionally given to plaintiffs to begin the presentation of evidence at trial and to rebut defendants' evidence.[129] Also, plaintiffs both open and close argument to the jury.[130] This typical order of proof and argument gives plaintiffs an opportunity to control the subject matter of the trial and the benefit of both primacy and recency effects on juries.[131] The ordering advantage given to plaintiffs is nearly complete.

Finally, balance is fostered because plaintiffs bear the laboring oar after trial; they must collect any judgment for money damages.[132] An important characteristic of the common law trial is that the entry of a judgment for damages usually ends judicial involvement. The plaintiff and his or her attorney must themselves invoke the assistance of the clerk of court and sheriff to realize the actual

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[128] In other words, if the evidence presented puts the parties in equipoise and if the plaintiff has the burden of persuasion, then the defendant wins. See 21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5122, at 558 (1977) ("[I]f the jury cannot make up its collective mind, it should find against the party with the burden of proof.").

[129] 75 Am. Jur. 2d Trial § 356 (1991) ("[T]he plaintiff . . . is entitled to open the evidence and introduce all his evidence in chief; then, after defense counsel has introduced all his evidence in chief, the plaintiff should be confined to rebuttal evidence.").

[130] See Martin v. Chesebrough-Pond's, Inc., 614 F.2d 498, 501 (5th Cir. 1980) ("Normally the party with the burden of proof has the right to open and close the argument to the jury."); Earl J. Silbert, Closing Argument, *in* The Jury 1984: Techniques for The Trial Lawyer 531, 534 (Practising Law Institute, Litigation Course Handbook No. 274, 1984) ("The side with burden of proof normally can open and rebut. Rebuttal limited to defendant's arguments, not for new matters.").

[131] See Richard D. Rieke & Randall K. Stutman, Communication in Legal Advocacy 206 (1990) (noting that both a recency and a primacy effect may exist).

[132] The Verdict: Collection, enforcement, and other options, The Compleat Lawyer, Winter 1993, at 30, 31 ("The judge's job is done when the order is entered. It is up to you and your lawyer to enforce the judgment.").

fruits of success at trial.[133] Absent extraordinary circumstances, the defendant has no personal obligation to make payment to the victorious plaintiff.[134] The plaintiff must work to find, seize, and sell property to satisfy the judgment, which is many times a challenging task.

### *C. Democracy*

Finally, the traditional model incorporates democratic values. The traditional civil trial includes a jury drawn from the local community. But the significance of this aspect of traditional civil trials must be clarified by consideration of the relation of judge and jury in federal civil trials: The opportunity of the jury to determine the outcome in a case is constrained by the authority of the trial judge. The requirement that the judge instruct the jury provides at least an apparent constraint on the jury's decision,[135] and the judge's authority to choose either a general or special verdict may also have a limiting effect.[136] The judge's right to grant a new trial if the jury's verdict "is against the weight of the evidence" plainly limits the role of a particular jury.[137] Judicial authority to cancel the deci-

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[133] See Roger A. Needham & Lester Pollack, Collecting Claims and Enforcing Judgments § 11.10 (1969) (explaining the necessity for the practicing attorney to actively enforce a favorable monetary judgment).

[134] In general, a victorious plaintiff may use procedures such as garnishment and execution to attack the assets of the defendant. Id. § 11.13. However, absent some other form of bad conduct or extraordinary circumstance, a defendant does not face the prospect of incarceration for failure to make payment to the plaintiff. See id. § 11.18 (citing New York law as an example of defendant's liability for contempt of court in relation to civil damages); see also 13 Moore's Federal Practice § 69.02 (Matthew Bender 3d ed. 2001) (stating that exceptional circumstances are required for a federal court to issue a contempt order in connection with civil damages).

[135] See Fed. R. Civ. P. 51 (stating that "[t]he court, at its election, may instruct the jury before or after argument, or both").

[136] See Fed. R. Civ. P. 49(a) (stating that "the court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact"); see also James et al., supra note 125, § 7.23, at 457 (noting the special verdict "became transformed into a device for judicial control of juries [in the United States]").

[137] James et al., supra note 125, § 7.24, at 462 ("The most widely used device for correcting a verdict, and thereby controlling the jury after the fact, is by setting aside the verdict and granting a new trial. Granting new trials for . . . a verdict that is excessive or against the weight of the evidence . . . had become fairly well established at common law by the late eighteenth century.").

sion of a particular jury is nearly complete.[138] Thus, given this context, the power of a traditional jury is to obstruct an unjust result by failing to render a verdict or by rendering a verdict against the weight of the evidence.[139] Although limited, then, the civil jury provides the community a monitoring function and is one of the most democratic of legal institutions.

### *D. A Normatively Appealing Model Plan*

The traditional jury model embodies the three normative values of efficiency, balance, and democracy. As a whole, the Model Plan also embodies these values. First, it has the virtue of being efficient. Elements of the Plan tend to hold down transaction costs so that the costs of trial do not consume all or even a substantial part of the interests at stake in the dispute. An efficient process can protect the public from disputes that in their very solution diminish the public welfare. All four elements of the Plan contribute to efficiency. Polyfurcation and, if appropriate, the reversal of the usual trial order, has the potential to substantially reduce transaction costs. If, for example, liability is separated from damages, and the defendant prevails on the liability issue, litigation costs will be reduced. Likewise, the separation of an affirmative defense and the initial trial of that defense might eliminate most trial costs. Sampling is the preeminent element of efficiency, providing a technique for reducing information search costs in virtually every situation where those costs might be a problem. The trial of future claims would also reduce costs simply by eliminating one or more future

[138] A judicial order granting a new trial is generally not immediately appealable as it is not a final order. 12 Moore's Federal Practice § 59.50[1] (Matthew Bender 3d ed. 2001). In granting a new trial, the judge does not substitute his judgment for the jury's. Rather, after giving all reasonable inferences to the jury, the judge decides that the verdict is so against the weight of the evidence that the jury must be contaminated with some improper motive, bias, or feeling. See James et al., supra note 125, § 7.28, at 474. Furthermore, as this is not a final order, it contemplates that a future jury will be given a chance to render its verdict. Id. at 474–75.

[139] Contemporary jurors face no threat of penalty from giving a particular verdict, unlike the earlier sixteenth- and seventeenth-century practice of punishing jurors for acquitting against the law and the evidence. James et al., supra note 125, § 7.8, at 405. In federal court, all verdicts must be unanimous unless the parties stipulate otherwise under Rule 48 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 48. Combined, these rules give any juror an unchecked right to obstruct a particular outcome.

trials. Finally, a distribution trust can dramatically reduce the costs of identifying claimants, tailoring awards, and delivering compensation.

The Model Plan is also balanced. Although individual elements of the Plan may tend to systematically favor either plaintiffs or defendants, the traditional elements are collected in a way that balances the process so that, in general, neither plaintiffs nor defendants will be favored. While individual elements may exhibit bias, the whole exhibits neutrality. On the one hand, polyfurcation tends to favor defendants either by separating liability from damage determinations or by providing initial attention to a defense. On the other hand, sampling would most often be used by plaintiffs as a technique for determining gross damages. The typically high number of plaintiffs in federal class actions increases the cost of collecting evidence about the class. The trial of future claims once again tends to benefit present defendants who can, by using this element, eliminate contingent liabilities. The distribution trust, however, would favor plaintiffs because this element permits the efficient tailoring of damage awards to individuals, thus avoiding contentions that only individual trials can provide acceptable determination of individual damages. Thus, while individual elements might benefit plaintiffs or defendants, the Model Plan as a whole maintains the normative value of balance constituted in the traditional civil jury.

Finally, the Model Plan is democratic because it includes a civil jury. The Model Plan includes a jury composed of community representatives with the power to obstruct an unjust result by failing to render a verdict or by rendering a verdict against the weight of the evidence. The trial judge could, of course, grant a new trial in the event of either a mistrial or a verdict against the weight of the evidence in a trial using the Model Plan. Nevertheless, the use of the jury in the Model Plan incorporates the democratic value of decision makers from the community.

Thus far, this Essay has described the Model Plan, showing how each element would contribute to the capability of the Plan as a whole, as well as how the very elements themselves contribute to the normative acceptability of the Plan. Yet, both the positive capability and normative virtues of the Plan may be lost to constitutional objection. The argument against the Model Plan

would surely be that the trial procedure violates the rights to due process of law and equal protection of law and denies the right to jury trial. This Essay responds to the constitutional challenge in the following, final section.

## III. CONSTITUTIONAL REQUIREMENTS

Again, a comparison of the Model Plan and the traditional civil jury trial demonstrates that the two models have dramatically different capabilities: The Model Plan can adjudicate an unlimited number of claims in a single jury trial, but the traditional model can adjudicate only a limited number of claims in a single trial. This difference, however, is not one of constitutional significance. A comparison also shows that both models are efficient, balanced, and democratic. This similarity is a matter of constitutional significance because the Constitution is chiefly concerned with values. Since the traditional model is constitutional, the relevant similarity and normative appeal of the Model Plan suggest that it is likewise acceptable. But the ultimate question remains: Is the Model Plan constitutional? The final step remains of linking the normative virtues of the Plan to the language of the Constitution itself.

### *A. Due Process*

The normative aspect of efficiency is reflected in the contemporary doctrine of due process. The leading cases specify a situational analysis focused on the benefits and costs of additional process. In *Cafeteria & Restaurant Workers Union v. McElroy*,[140] the plaintiff was denied access to her job site after a Navy security officer determined that she failed to meet local security requirements. At the request of the plaintiff's union, her employer tried to arrange a meeting to discuss the denial of access, but the Navy refused. The plaintiff sued in federal court to regain admission to her job site, but her complaint was dismissed in the district court, and the court of appeals affirmed.[141]

[140] 367 U.S. 886 (1961).
[141] Id. at 889.

Justice Potter Stewart, writing for the Court, first determined that the denial of access was authorized by federal law.[142] He then turned to the question of whether that denial "violated the requirements of due process of law."[143] Justice Stewart wrote that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[144] "Due process," he argued, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[145] Justice Stewart then held that the due process issue "under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action."[146] Finding the private interest slight, Stewart concluded for the Court that no denial of due process had occurred.[147]

Fifteen years later in *Mathews v. Eldridge*,[148] the Court restated Justice Stewart's simple comparison of private and public interests as a balancing test taking frank account of benefits and costs. In *Mathews*, the plaintiff complained that his federal disability benefits had been terminated without a hearing, denying him due process of law. The district court held that the plaintiff had a right to a hearing, and the court of appeals affirmed, but the Supreme Court reversed in an opinion by Justice Lewis F. Powell, Jr.[149] According to Justice Powell, analysis of the specific requirements of due process required consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved

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[142] Id. at 893–94.
[143] Id. at 894.
[144] Id. at 895 (citations omitted).
[145] Id. (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)).
[146] Id.
[147] Id.
[148] 424 U.S. 319 (1976).
[149] Id. at 326.

> and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[150]

Justice Powell then applied this balancing test to termination of federal disability benefits and concluded that a pretermination hearing was not required.[151]

Both the *Cafeteria & Restaurant Workers* case and the *Mathews* case presented due process claims in the context of a federal administrative determination. In *Connecticut v. Doehr*,[152] the Supreme Court applied the balancing test for the first time to a dispute between two private parties. In *Doehr*, the plaintiff sued in federal court to prevent enforcement of a Connecticut statute permitting pre-judgment attachment of real estate incident to a civil action. The plaintiff argued that the statute violated the Due Process Clause because there was no provision for a hearing before attachment. The district court upheld the statute but the court of appeals reversed.[153] The Supreme Court affirmed in an opinion by Justice Byron Raymond White, who began his analysis by quoting the *Mathews* test.[154] He observed that analysis of the validity of the Connecticut attachment statute presented a somewhat different situation from *Mathews* because attachment is ordinarily involved in suits between private parties, rather than between a private party and the government, as in *Mathews*.[155] Justice White then announced a version of the balancing test tailored for disputes between private parties:

> For this type of case, therefore, the relevant inquiry requires, as in *Mathews*, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest

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[150] Id. at 335.
[151] Id. at 340–43.
[152] 501 U.S. 1 (1991).
[153] Id. at 7.
[154] Id. at 10.
[155] Id. at 10–11.

> the government may have in providing the procedure or forgoing the added burden of providing greater protections.[156]

Thus, beginning with the *Cafeteria & Restaurant Workers* case, the Supreme Court has developed a cost-benefit analysis to resolve due process claims to particular procedures. The claim will be supported provided the proposed procedure is efficient.[157]

### *B. Equal Protection*

The normative aspect of balance finds constitutional expression in the requirement that the government shall not "deny to any person within its jurisdiction the equal protection of the laws."[158] In essence, the guarantee is that similar individuals will be dealt with in the same way.[159] Since differential treatment is necessary for any legal regime to function,[160] the doctrine has emerged that, at a minimum, there must be a rational basis for differences in treatment.[161] The Supreme Court therefore has required equal procedural treatment among parties or a reason for any differences. In *Rinaldi v. Yeager*,[162] the plaintiff, a New Jersey state prisoner, sued in federal court to enjoin further application of a New Jersey statute claimed to be unconstitutional. Following his conviction, a New Jersey appellate court granted the prisoner leave to appeal *in forma pauperis* and granted his request for a trial transcript. The plain-

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[156] Id. at 11.

[157] See generally Robert Cooter & Thomas Ulen, Law and Economics 12–24 (3d ed. 2000) (describing several types of efficiency and relating one of them to the method of cost-benefit analysis).

[158] U.S. Const. amend. XIV, § 1. Although the Fourteenth Amendment only mandates equal protection by the states, the Supreme Court in *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954), extended this principle to the federal government by holding that the concept of equal protection was included in the Fifth Amendment's Due Process Clause. The standards for equal protection under either amendment are indistinguishable. See Laurence H. Tribe, American Constitutional Law § 16-1, at 1437 (2d ed. 1988).

[159] 3 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 18.2, at 208 (3d ed. 1999) ("The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government.").

[160] See Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 343 (1949) ("It is clear that the demand for equal protection cannot be a demand that laws apply universally to all persons. The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals.").

[161] See Rotunda & Nowak, supra note 159, § 18.3, at 216.

[162] 384 U.S. 305 (1966).

tiff's appeal failed, and he was billed for the cost of the transcript pursuant to a statute that applied *only* to unsuccessful appellants held in prison by the state. A three-judge district court denied relief, but the Supreme Court reversed.[163]

Justice Stewart wrote for the Court:

> The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. "The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same." Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made."[164]

After finding no reason to limit a cost recovery to a class of prison inmates having lost appeals, Justice Stewart concluded that "[w]e may assume that a State can validly provide for recoupment of the cost of appeals from those who later become financially able to pay. But any such provision must, under the Equal Protection Clause, be applied with an even hand."[165]

In *James v. Strange*,[166] the plaintiff was arrested and charged with robbery under Kansas law. The plaintiff, an indigent, accepted appointed counsel, pled guilty, and received a suspended sentence and probation. His attorney asked for and received payment from the state, and the plaintiff was asked to reimburse the state or have a judgment entered against him in the amount of the fees. The plaintiff began an action in federal court claiming that the Kansas statute was unconstitutional. The district court agreed, holding the statute a burden on the right to counsel.[167] The Supreme Court, in

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[163] Id. at 307–08.
[164] Id. at 308–09 (citations omitted).
[165] Id. at 311.
[166] 407 U.S. 128 (1972).
[167] Id. at 128.

an opinion by Justice Powell, affirmed, but on equal protection grounds.[168]

Justice Powell examined the Kansas statute and determined that it

> strips from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors, including restrictions on the amount of disposable earnings subject to garnishment, protection of the debtor from wage garnishment at times of severe personal or family sickness, and exemption from attachment and execution on a debtor's personal clothing, books, and tools of trade.[169]

Following *Rinaldi*, Justice Powell concluded that "[s]tate recoupment laws, notwithstanding the state interests they may serve, need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect. The statute before us embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law."[170]

These equal protection cases go beyond due process by requiring equal procedural treatment among classes of litigants. In *Rinaldi*, Justice Stewart describes this obligation as requiring that procedures "be applied with an even hand."[171] In other words, procedure must be balanced among classes to satisfy the Equal Protection Clause.

### *C. Jury Trial*

Finally, the normative aspect of a democratic trial is recognized in the Constitution. The Seventh Amendment provides that "[i]n suits at common law . . . the right of trial by jury shall be preserved."[172] The Jury Selection and Service Act of 1968[173] provides

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[168] Id. at 142.

[169] Id. at 135.

[170] Id. at 141–42.

[171] *Rinaldi*, 384 U.S. at 311; see also Paul G. Cassell, Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment, 1994 Utah L. Rev. 1373, 1457 ("It is no accident that the symbol of justice is a balanced set of scales.").

[172] U.S. Const. amend. VII, cl. 1. The Seventh Amendment applies only to federal courts. See 1 Laurence H. Tribe, American Constitutional Law § 3-32, at 616 (3d ed. 2000).

the specific selection process for federal civil juries. The Act requires a jury to be randomly selected by drawing names from voter registration lists but provides that district courts may supplement this method to ensure broad participation.[174] Most district courts combine lists of voters, licensed drivers, and other public lists that "are broadly inclusive of the adult population."[175]

These statutory requirements incorporate a policy established by the Supreme Court in the leading case of *Thiel v. Southern Pacific Co.*[176] In *Thiel*, the plaintiff sued the railroad for damages in a California state court, and the railroad removed to federal court on the basis of diversity. After demanding a jury, the plaintiff moved to strike out the entire jury panel alleging that

> mostly business executives or those having the employer's viewpoint are purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes who constitute, by far, the great majority of citizens eligible for jury service . . . .[177]

The motion was denied and the jury returned a verdict for the railroad. The court of appeals affirmed, but the Supreme Court reversed.[178] Justice Frank Murphy, writing for the Court, said: "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."[179] Widespread public participation in the activities of government shows, of course, a commitment to democratic values.[180]

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[173] 28 U.S.C. §§ 1861–1869 (1995).

[174] Id. § 1863(b)(2).

[175] Geoffrey C. Hazard, Jr. & Michele Taruffo, American Civil Procedure 130 (1993); see also 28 U.S.C. § 1863(b)(2) (requiring that jury selection lists be drawn from voter lists and any other sources necessary to ensure a fair cross-section of the community).

[176] 328 U.S. 217 (1946).

[177] Id. at 219.

[178] Id. at 219–20, 225.

[179] Id. at 220.

[180] Alexis de Tocqueville, Democracy in America 153 (Legal Classics Library 1988) (1838) (describing the participation of "the people" in American government with specific mention of jury service).

### *D. A Constitutional Model Plan*

The Model Plan, like the traditional civil jury trial, is efficient, balanced, and democratic. These virtues find expression in the doctrinal requirements of due process, equal protection, and right to jury trial. Thus, the normative pattern of both models can be linked to the constitutional requirements. This conclusion suggests that the elements of the Plan that render it efficient, balanced, and democratic might, upon further analysis, show that the Plan provides due process, equal protection, and right to jury trial.

Such an analysis is, in fact, possible. For example, elements of the Plan that play a role in creating a trial procedure that is efficient can also be evaluated in terms of cost-benefit analysis for due process evaluation. The Plan can provide a trial that will yield the benefits of a verdict at a cost that does not itself consume all benefits. The capability to preserve at least *some* benefit surely is a requirement of the current due process test, and thus due process remains present in a trial based on the Model Plan.

Similarly, the elements that contribute to a balanced trial process can be reconsidered as an effort to eliminate bias and provide equal protection. The potential general advantage to plaintiffs from sampling and distribution by trust can be viewed as a bias in favor of this group that is offset by including polyfurcation and deciding future claims which generally advantage defendants. Equal protection doctrine prohibits process bias unless a reasonable justification is provided. Since there can be no sufficient reason for generally preferring plaintiffs over defendants (or the reverse), this offset is a necessary and effective guarantee of equal protection.

Finally, the Plan includes a jury that provides the normative appeal of a democratic process. Viewed doctrinally, the inclusion of a jury with a role the same as any other common law jury (determining liability and damages, if any) "preserves" the right to a jury as literally required by the Seventh Amendment. Thus, the normative appeal of the Plan can, by further analysis, be transformed into constitutional appeal: The Plan provides due process, equal protection, and the right to jury trial. The Model Plan is constitutional, and the Plan's positive capabilities may be freely employed.

## IV. THE MODEL PLAN APPLIED

To this point, I have described the Plan without context and also without describing the Plan's potential for avoiding the objections to class action settlements discussed above. In this Part, I fold the elements of the Plan into the current federal court systems and point out the benefits that would emerge. The most important contextual factors are the federal requirements concerning class actions, personal jurisdiction, and choice of law.

The certification of a class is essential to the use of the Model Plan, because the plaintiffs must be aggregated to realize benefits. Obviously, the Plan would not be practical if applied to the trial of individual cases and hence would not offer a viable alternative to class action settlements. Rule 23 of the Federal Rules of Civil Procedure[181] provides for certification of three types of class actions. Rule 23(a) establishes prerequisites for all three types of class action. All classes must have members "so numerous that joinder of all members is impracticable," must exhibit "questions of law or fact common to the class," must include representative parties with claims or defenses "typical of the claims or defenses of the class," and those representatives must be able to "fairly and adequately protect the interests of the class."[182] The Model Plan would fit well with the requirements of a numerous class having common issues of fact. A typical representative would ordinarily be available in a numerous class with common questions of fact, and adequacy might well be demonstrated by showing an ability to employ the Model Plan.

Following the universal requirements of Rule 23(a), a class can be certified only if the additional requirements of one of the three types of classes is satisfied. The Model Plan's capabilities would encourage certification of Rule 23(b)(3) class actions. In particular, Rule 23(b)(3)'s requirement that the class format be "superior to other available methods for the fair and efficient adjudication of the controversy" would be served by information that an efficient and balanced trial plan is available.[183] Likewise, Rule 23(b)(3)(D)'s consideration of "the difficulties likely to be encountered in the

[181] Fed. R. Civ. P. 23.
[182] Id. at 23(a).
[183] Id. at 23(b)(3).

management of a class action" should also be influenced by the availability of a trial plan.[184] Thus, a favorable synergy would exist between use of the Model Plan and certification of Rule 23(b)(3) damages class actions.

The requirements of personal jurisdiction would not limit the use of Rule 23(b)(3) classes and the Model Plan. In *Phillips Petroleum Co. v. Shutts*,[185] the Supreme Court considered the due process rights of plaintiff class members and held that citizens of other states lacking local contacts could be included in Rule 23(b)(3) classes, because that type of class action includes the opportunity after notice of exiting the class.[186] Thus, linking the Model Plan with a Rule 23(b)(3) damages class would permit a nationwide class for trial according to the Plan. The exit of some class members from a damages class might diminish the benefits of using the Model Plan, but the exit choice may be more formal than real since a significant number of exits might, for those persons, bar any real chance for compensation.[187] Conducting any significant number of individual trials might well be impossible.

The third important contextual requirement is choice of law. In cases that are brought in federal court, but involve state law claims, the possibility of disparate state standards has recently served to limit the scope of class actions. Although Judge Weinstein famously sought to avoid this problem in *In re "Agent Orange" Product Liability Litigation*,[188] Chief Judge Richard A. Posner's treatment of this problem in *In re Rhone-Poulenc Rorer*[189] resulted in the de-certification of a national class of hemophiliacs who alleged that they had contracted AIDS from blood products.[190] Likewise, Chief Judge Posner's opinion led the Fifth Circuit in *Cas-*

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[184] Id. at 23(b)(3)(D).

[185] 472 U.S. 797 (1985).

[186] Id. at 812 ("We think that the procedure followed by Kansas, where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process.").

[187] See generally Cimino v. Raymark Indus., 151 F.3d 297, 302, 322 (5th Cir. 1998) (reversing the district court's decision to try all cases at once despite that court's contention that individual trials could take four and a half years).

[188] Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disaster in the Courts 128–31, 143–67 (1987) (describing Judge Weinstein's efforts to settle the case up to and including commitment to a particular figure).

[189] 51 F.3d 1293 (7th Cir. 1995).

[190] Id. at 1296–97.

*tano v. American Tobacco Co.*[191] to de-certify a national class of individual tobacco users.[192] Thus, choice of law requirements suggest that Rule 23(b)(3) damages class actions would be limited in scope if based on state law. Nationwide damages class actions based on federal law, however, would remain an option.

With the context of the Model Plan established, it is possible to accurately address the potential of the Model Plan to respond to the critics of the current settlement-based regime. The procedural barrier to certification would be avoided by bypassing the settlement class option and routinely certifying classes for eventual trial. This strategy is possible under the Model Plan because the Plan's operational capabilities permit easy fulfillment of Rule 23(b)(3)'s trial-oriented requirements. With respect to concerns about collusion between class counsel and defendants, use of a Rule 23(b)(3) class and the Model Plan with either statewide or national scope would leave the determination of gross compensation to a jury and virtually eliminate the possibility of collusion harmful to the class. Plaintiffs' attorneys would necessarily direct their efforts toward persuading a jury rather than defendants. The remote possibility of collusion with respect to the conduct of the trial would surely be diminished by the public nature of the trial itself.[193]

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[191] 84 F.3d 734 (5th Cir. 1996).

[192] Id. at 748.

[193] In *In re Rhone-Poulenc Rorer*, 51 F.3d 1293 (7th Cir. 1995), Chief Judge Posner, writing for a panel of the Seventh Circuit, reversed the certification for trial of a nationwide class of plaintiffs claiming damages for the alleged negligent handling of blood products used in transfusions. Chief Judge Posner took into account the possibility that the defendants might be coerced into settling if the certification were allowed to stand. "They might . . . easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." Id. at 1298. *Rhone-Poulenc* was followed soon after by the Fifth Circuit in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), holding that a national class of plaintiffs claiming damages from the use of tobacco should not have been certified. Judge Jerry E. Smith wrote for the court: "[C]lass certification creates insurmountable pressure on defendants to settle . . . . The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." Id. at 746. Concerns about the coercion of defendants could be met by employing the Model Plan in conjunction with a single-state class format. Typically, a number of trials would be held, diminishing the coercion concern. As compared to individual adjudication, the Model Plan would yield great benefits even if limited to a statewide class. Fifty trials, at most, would be much better than hundreds or thousands of individual trials. See also Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class

## CONCLUSION

Recent judicial and academic concerns about the requirements for certifying settlement classes and the risk of collusion in class action settlements surely threaten the ability of federal courts to process cases involving thousands or even millions of related claims. This problem can be solved by preparing to routinely try federal class action cases to verdict and judgment. I have proposed a Model Plan with an operational capability that would permit the trial by a single jury of virtually any class action case in federal court. The Plan, like the traditional civil jury trial, has the virtues of being efficient, balanced, and democratic—virtues that can be linked to the constitutional requirements of due process, equal protection, and the right to jury trial. This demonstrates that the Model Plan is both normatively appealing and constitutionally acceptable. I have applied the Plan in context by pointing out both the need for and availability of Rule 23(b)(3) certification of a nationwide plaintiffs' class in federal question cases or statewide certification in diversity cases. As applied in context, the Plan would avoid both the procedural barriers and substantive objections to the settlement of class action lawsuits, making it a favorable and constitutional method for the resolution of federal class action cases.

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Actions: Reality and Remedy, 75 Notre Dame L. Rev. 1377 (2000) (suggesting multiple trials as an antidote for the pressure on defendants faced with a single potentially catastrophic trial).

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