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# National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation

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# NATIONAL JURIES FOR NATIONAL CASES: PRESERVING CITIZEN PARTICIPATION IN LARGE-SCALE LITIGATION

LAURA G. DOOLEY\*

*Procedural evolution in complex litigation seems to have left the civil jury behind. Reliance on aggregating devices, such as multidistrict litigation and class actions, as well as settlement pressure created by “bellwether” cases, has resulted in cases of national scope being tried by local juries. Local juries thus have the potential to impose their values on the rest of the country. This trend motivates parties to forum-shop, and some commentators suggest eliminating jury trials in complex cases altogether. Yet the jury is at the heart of our uniquely American understanding of civil justice, and the Seventh Amendment mandates its use in federal cases. This Article makes a bold proposal to align the jury assembly mechanism with the scope of the litigation: In cases of national scope, juries would be assembled from a national pool. This proposal would eliminate incentives for parties to forum-shop, and it would make the decisionmaking body representative of the population that will feel the effects of its decision. The Article argues that we would see greater legitimacy for decisions rendered by a national jury in national cases. Moreover, it argues that geographic diversification of the jury would enhance the quality of decisionmaking. Finally, national juries would preserve the functional and constitutional values of citizen participation in the civil justice system.*

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INTRODUCTION  
LITIGATIVE UNITS, JURIES, AND PROCEDURAL STRATEGY  
IN LARGE-SCALE LITIGATION

In cases of national scope, the civil jury is in crisis. Indeed, some might describe it as moribund. The declining number of cases that come to jury trial—a trend driven both by increasing use of pretrial dispositive motions and by settlement—accounts in part for this obsolescence. In addition, media portrayals of jury verdicts in tort cases as disproportionate and inconsistent have revealed a crisis of legitimacy.<sup>1</sup> Repeat players in large-scale, high-stakes litigation at best tolerate the civil jury and at worst maneuver cases toward favorable jury pools. This tactic subjects the jury to criticism that local decisionmakers impose their will on the rest of the country. The problem stems from a disconnect between the scope of each controversy and the scope of the pool from which jurors are drawn to decide it. If the community affected by the litigation is national, then a local decisionmaker may not fairly represent the relevant constituency. This disconnect compromises the constitutional assurance that the decisionmaker be drawn from a fair cross-section of the community.

National cases are modern phenomena. Historically, most cases were local in scope and properly were decided by juries drawn from local pools. But the trend in modern civil litigation is to aggregate cases whenever possible in order to achieve efficiencies in processing and consistency in results.<sup>2</sup> Thus, individual claims are routinely consolidated via procedural devices such as multidistrict litigation and

<sup>1</sup> See generally Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1995).

<sup>2</sup> Evidence of this trend is the Aggregate Litigation project currently underway in the American Law Institute. The American Law Institute, Principles of the Law of Aggregate Litigation, [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=7](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=7) (last visited Feb. 29, 2008). For the project's most recent publication draft, see PRINCIPLES OF THE

class actions. In the resulting units of litigation, something larger is at stake than simply one person's story. Even without aggregation, when a litigated tort case involves a product or event that affects people not joined in the lawsuit, everyone involved (with the important possible exception of the claimant) knows that the stakes are much bigger than any particular litigant's claim. Defendants, lawyers, and judges behave accordingly.

The procedural strategies of repeat players in the mass litigation game<sup>3</sup> involve crucial decisions about forum choice, both as to geographic location and as between federal and state court. The jockeying for a favorable forum during the initial stages of what promises to be mass litigation is a function of the repeat players' prediction of how the first cases will affect future claims. For example, because of preclusion principles, a favorable plaintiff's verdict on a key issue—such as whether a product is unreasonably dangerous—may relieve future plaintiffs of having to prove the point.<sup>4</sup> As a result, future plaintiffs are significantly more likely to recover damages from juries and to secure higher settlements from defendants. An early verdict for the defendant, by contrast, allows that defendant to defeat future plaintiffs' efforts to use preclusion,<sup>5</sup> thereby reducing settlement amounts. Thus, a case that may at first appear to be local and self-contained can turn out to have national impact. The recent Vioxx litigation provides an example. The first three trials—in Texas, New Jersey, and Louisiana—resulted in inconsistent verdicts.<sup>6</sup> These and

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LAW OF AGGREGATE LITIGATION (Discussion Draft No. 2, 2007) [hereinafter AGGREGATE LITIGATION].

<sup>3</sup> These players include repeat defendants as well as plaintiffs' lawyers who form consortiums of varying degrees of formality and who often represent multiple plaintiffs. The forum-shopping problem is particularly acute in mass tort cases and has prompted recent legislative reform. *E.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

<sup>4</sup> *See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.14, at 723–30 (4th ed. 2005) (describing doctrine of issue preclusion and its expansion beyond doctrine of mutuality).

<sup>5</sup> *See id.* at 727–28 (describing standard by which courts determine propriety of offensive issue preclusion). Many courts refuse to allow offensive issue preclusion against a defendant who has won the issue in at least one previous case, even if another plaintiff has later won the issue. *See id.* at 726 (providing rationale for denying issue preclusion in this scenario).

<sup>6</sup> In the first case, a Texas jury found for the plaintiff and awarded \$253.5 million in compensatory and punitive damages. *Ernst v. Merck & Co.*, No. 19961-BH02, 2005 WL 2620257 (Tex. Dist. Ct. Aug. 19, 2005); Walter T. Champion, *The Vioxx® Litigation Paradigm: The Search for Smoking Guns*, 31 T. MARSHALL L. REV. 157, 180 (2006). Because Texas law caps punitive damages, the award was subject to automatic reduction. *Id.*

In New Jersey, a second jury found in favor of Merck, the producer of the drug. *Humeston v. Merck & Co.*, No. ATL-L-2272-03-M, 2005 WL 3440614 (N.J. Super. Ct. Law Div. Nov. 3, 2005). The trial court later granted plaintiff's motion for a new trial on the

other early cases<sup>7</sup> indicated to the parties the relative strength of their positions; many of the remaining individual claims were aggregated into a single federal district.<sup>8</sup> The parties then crafted a proposed global settlement of the litigation.<sup>9</sup>

The forum-seeking choices made by both plaintiffs and defendants in mass tort cases are driven by expectations about the identity of the decisionmaker in the first case. Plaintiffs usually file in state court—and fight to stay there—in order to secure the decisionmaker of their choice: the local jury. Defendants typically want to avoid state court juries and accordingly remove cases to federal court. They seek the federal forum in the hope that a judge will dispose of the case on a pretrial motion;<sup>10</sup> failing dismissal, defendants hope to control the jury pool either by enlarging it to encompass a federal district or by transferring to a location where more favorable jurors are likely to be summoned.

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basis of “new evidence.” *Humeston v. Merck & Co.*, No. ATL-L-2272-03-MT (N.J. Super. Ct. Law Div. Aug. 17, 2006) (order granting plaintiff’s motion for new trial). The jury empanelled in the second New Jersey trial returned a verdict for \$20 million in compensatory damages and an additional \$27.5 million in punitive damages. Heather Won Tesoriero, *Jury Awards \$47.5 Million to Man in Vioxx Retrial*, WALL ST. J., Mar. 13, 2007, at A3; see also Benjamin Zipursky, *Much Pain, Much Gain: Skeptical Ruminations on the Vioxx Litigation*, JURIST, Jan. 23, 2006, <http://jurist.law.pitt.edu/forumy/2006/01/much-pain-much-gain-skeptical.php> (describing “rough justice” wrought by inconsistent verdicts in first two Vioxx cases).

The third jury to consider a Vioxx claim deadlocked eight to one in favor of Merck, resulting in a mistrial. *Champion*, *supra*, at 182. Merck won the subsequent retrial, but the court ordered a third trial, agreeing with the plaintiff that one of Merck’s key expert witnesses misrepresented his qualifications. *Plunkett v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 489 F. Supp. 2d 587, 588 (E.D. La. 2007) (order granting plaintiff’s motion for new trial).

<sup>7</sup> See Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 697–98 (2006) (describing use of early “bellwether” cases in Vioxx litigation and their function in driving settlement).

<sup>8</sup> Federal Vioxx cases were transferred under the Multidistrict Litigation Act, 28 U.S.C. § 1407 (2000), to the Eastern District of Louisiana, where many are still pending. See *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1354–55 (J.P.M.L. 2005) (order transferring cases pursuant to § 1407); MDL-1657 Vioxx Product Liability Litigation, Current Developments, <http://vioxx.laed.uscourts.gov/> (last visited Feb. 29, 2008) (listing developments in consolidated proceedings). For a description of the multidistrict litigation (MDL) process, see *infra* notes 38–46 and accompanying text.

<sup>9</sup> On November 9, 2007, Merck announced a proposed global settlement of the Vioxx litigation for \$4.85 billion, an amount analysts described as a good deal for Merck, which faces liability valued in the tens of billions of dollars. Alex Berenson, *Analysts See Merck Victory in Vioxx Deal*, N.Y. TIMES, Nov. 10, 2007, at A1.

<sup>10</sup> The two most commonly used pretrial dispositions under the Federal Rules of Civil Procedure are the motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted and the motion for summary judgment under Rule 56. FED. R. CIV. P. 12(b)(6), 56.

This aspect of the mass tort game prompted recent legislative reforms, including the Multiparty, Multiforum Trial Jurisdiction Act of 2002 (MMTJA)<sup>11</sup> and, more recently, the Class Action Fairness Act of 2005 (CAFA).<sup>12</sup> In debating and passing CAFA, members of Congress devoted much rhetorical attention to the evils of forum-shopping by opportunistic plaintiffs' lawyers in mass tort cases. Certain counties, notably Madison County in Illinois and counties in the Rio Grande region of Texas, earned reputations for large plaintiffs' awards and consequently disproportionately large plaintiffs' filing rates.<sup>13</sup> The legislative fix shifted the forum-shopping advantage to defendants by making it easier—indeed, in the case of class actions, almost automatic—to shift litigation from state courts to federal courts. Defendants have long thought federal courts preferable to state courts<sup>14</sup> for reasons that include tighter judicial control of discovery,<sup>15</sup> broader availability of summary judgment,<sup>16</sup> and the reining in of juries during and after trial.<sup>17</sup> Demographic factors may also entice the mass tort defendant to prefer the federal tribunal. Federal courts usually draw juries from larger geographic districts than state courts do,<sup>18</sup> and the resulting demographic differences can prove quite significant even within a single metropolitan area.<sup>19</sup> Federal courts

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<sup>11</sup> Pub. L. No. 107-273 § 11020, 116 Stat. 1758, 1826 (2002) (codified as amended in scattered sections of 28 U.S.C.).

<sup>12</sup> Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

<sup>13</sup> See Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1595 (2006) (describing these counties as “magnet venues” due to “pro-plaintiff” reputations).

<sup>14</sup> See JoEllen Lind, “Procedural Swift”: *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 717–18 (2004) (“[H]ostility of the federal courts to plaintiffs’ tort claims is old news to repeat defendants who have always found the national courts more congenial.”).

<sup>15</sup> See FED. R. CIV. P. 26(b)(2) (giving federal judge power to impose limits on extent and frequency of discovery).

<sup>16</sup> See FED. R. CIV. P. 56 (authorizing entry of summary judgment when there exists “no genuine issue as to any material fact”); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (allowing defendants to support motions for summary judgment by pointing out lack of evidence to support essential elements of plaintiffs’ claims rather than affirmatively negating plaintiffs’ claims).

<sup>17</sup> See Dooley, *supra* note 1, at 333–34, 334 n.40 (describing ability of judges in federal civil cases to control jury verdicts using FED. R. CIV. P. 50 to enter judgment as matter of law).

<sup>18</sup> See Laura G. Dooley, *The Dilution Effect: Federalization, Fair Cross-Sections, and the Concept of Community*, 54 DEPAUL L. REV. 79, 87–90 (2004) (describing assembly of jury pools in federal court and demographic consequences of drawing jurors from federal districts rather than counties).

<sup>19</sup> *Id.* at 88–90.

also have the power to transfer cases to other federal districts<sup>20</sup> and often do so to facilitate consolidation with cases pending elsewhere on the same topic. The ramifications of these litigation tactics are felt beyond the scope of any given case.

Effective dispute resolution depends on the disputants' confidence in the integrity and impartiality of the decisionmaker. The modern popularity of alternative dispute resolution (ADR) systems, including arbitration and mediation, reflects parties' superior satisfaction with the outcomes produced by arbitrators (who are often experts in the field) or by the parties themselves (who must agree to any mediated result).<sup>21</sup> The flip side of the ADR trend is declining confidence in the decisionmaker of the traditional American civil justice system: the jury.

The actual number of cases tried to juries is now quite low.<sup>22</sup> Yet juries still play an essential role both in the strategies of parties and in the popular consciousness. When negotiating difficult questions of how to allocate responsibility for injuries caused by modern life, the public wants a direct share in the decisionmaking.<sup>23</sup> The question is whether we can preserve the substantive and legitimating functions of the jury without undermining it through forum-shopping by litigants. I submit that we can.

When parties litigate a case of national scope, this Article argues that the proper jury pool is neither local (as in state court, where jury pools are typically defined along county lines) nor regional (as might

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<sup>20</sup> Multidistrict Litigation Act, 28 U.S.C. § 1407 (2000); *see also* 28 U.S.C. § 1404(a) (2000) (allowing transfer of federal case to another federal district where case could have been brought “[f]or the convenience of parties and witnesses [and] in the interests of justice”).

<sup>21</sup> *See generally* CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (3d ed., rev. 2003) (providing broad overview of alternative dispute resolution processes).

<sup>22</sup> *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 *STAN. L. REV.* 1255, 1260 (2005) (“The recent decline has been precipitous in the federal courts, where the number of civil trials fell by two-thirds from a high of 12,570 in 1985 to 4206 in 2003.”); Kirk W. Schuler, Note, *ADR's Biggest Compromise*, 54 *DRAKE L. REV.* 751, 761–63 (2006) (describing decline in federal civil jury trials and noting that in 2005, juries decided less than one percent of civil cases terminated in federal court). Much has been made in the scholarly literature, including by the author of this Article, of the anti-populist features of modern procedural devices that effectively steer cases away from jury trial. *See, e.g.*, Dooley, *supra* note 1, at 357–60 (describing twentieth-century expansion of directed verdict procedure).

<sup>23</sup> This has been true since the beginning of the republic and was the driving political force behind the Antifederalist effort to include the right to a civil jury trial in the Bill of Rights. *See* Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 *HASTINGS L.J.* 579, 598–600 (1993) (describing Antifederalist efforts to defeat constitutional ratification by citing lack of civil jury guarantee and describing populist movement to include guarantee in Bill of Rights).

be true in a federal district): A national case demands a national jury drawn from a national pool. The remainder of this Article assesses whether this is a realistic option. Because cases of national scope are now more likely than ever before to be concentrated in federal court, the problem of summoning jurors outside the court's sovereignty is obviated. But many problems, political as well as logistical, remain. In the end, we must assess whether the gains to populism and legitimacy are worth any efficiency loss.

This Article first analyzes what sort of litigation would benefit from decisionmaking that is representative of a community defined nationally. Defining what constitutes a case of national scope implicates concerns ranging from content to complexity to economic impact. Formidable though it may be, however, the task is far from impossible. To begin, one can look to the well-established process under the Multidistrict Litigation Act (MDL statute),<sup>24</sup> which has for decades identified litigation for consolidated pretrial treatment. Other obvious candidates will be class actions either filed in federal court or removed from state courts under CAFA.<sup>25</sup> Individual cases may also warrant national treatment if they involve issues that impact parties or policies nationwide.<sup>26</sup> The decision to empanel a national jury could be vested in one court with jurisdiction over a large-scale litigation or in a multijudge panel similar to the multidistrict litigation (MDL) panel.

Part II argues that for these national cases, national juries would improve the legitimacy of jury verdicts and effectuate the constitutional fair cross-section guarantee. The waning legitimacy of the civil jury in large-scale litigation reflects the disparity between the scope of the local jury pool and the scope of the cases. I argue that the use of national juries for cases of national scope will improve both the actual and perceived quality of lay decisionmaking and will restore legitimacy to jury verdicts. Moreover, the democratic values animating the Seventh Amendment can best be realized in large-scale litigation by empanelling a national jury. Despite the desuetude into which the civil jury may have fallen, the Seventh Amendment mandates its use in federal civil cases.<sup>27</sup> This constitutional right to a civil jury is tied to guarantees of a jury drawn from a cross-section of the community.

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<sup>24</sup> 28 U.S.C. § 1407 (2000).

<sup>25</sup> 28 U.S.C. §§ 1332(d), 1453 (Supp. V 2007).

<sup>26</sup> *Cf. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (reasoning that fate of entire industry should not be vested in one local jury). One can imagine a situation in which a national jury is summoned to serve in a case that remains in the district in which it was originally filed.

<sup>27</sup> U.S. CONST. amend. VII.



When a local body controls a case of national consequence, the decisionmaker does not represent adequately the community that will bear the impact of the jury's decision. This problem disappears if the jury is drawn from the national community in accordance with the scope of the litigation. Additionally, since the Seventh Amendment does not bar other innovative approaches to streamlining large-scale litigation, I conclude that this new conception of the relevant jury pool would honor the Constitution's commitment to citizen participation without violating its technical terms.

Part III argues that a "national jury" is viable both politically and logistically. I discuss issues of size and cost, as well as possible modifications to existing jury assembly mechanisms. Although adoption of a national jury system might impose financial costs, such costs would be a small price for preserving an important civic good.

## I

### DEFINING CASES OF NATIONAL SCOPE: OF LITIGATIVE UNITS AND COMMUNITIES

The first step in evaluating the concept of a national jury is to identify the types of cases that would qualify for national jury treatment. One issue that need not detain us long is the problem of state versus federal jurisdiction. Although empanelling a national jury in a state court case might raise sovereignty problems, recent statutory innovations have already moved the vast majority of national cases into federal court. CAFA and MMTJA replace the traditional requirement of complete diversity with one of minimal diversity, making it far easier for plaintiffs to file in federal court or, more commonly, for defendants to remove cases from state courts.<sup>28</sup> Implicit in both pieces of legislation is the notion that local juries should not be allowed to control the fate of a national business based on the fortuity that a local claimant has brought suit—or, worse, that a plaintiff has forum-shopped to get access to a particular local jury pool.<sup>29</sup> Indeed, these legislative initiatives are widely recognized as responsive to the

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<sup>28</sup> See 28 U.S.C. §§ 1332(d), 1453 (Supp. V 2007) (providing federal jurisdiction in class actions involving minimal diversity if amount in controversy exceeds \$5 million and allowing removal from state court in such cases); 28 U.S.C. §§ 1369, 1441 (2000 & Supp. IV 2004) (providing federal jurisdiction in civil actions involving minimal diversity if seventy-five natural persons died in single accident and allowing removal from state court in such cases).

<sup>29</sup> See Edward F. Sherman, *Decline & Fall*, A.B.A. J., June 2007, at 50, 53 ("The business community was especially irked that an undue proportion of multistate class actions were filed in 'magnet venue' state courts . . . where the judges—usually elected—were more likely to certify a class action and the juries tended to be pro-plaintiff.").

defense bar's refrain that corporate defendants could not get a fair shake in state court.<sup>30</sup>

Because most litigation of national scope will meet the minimal diversity requirements of CAFA and MMTJA, getting into federal courts will be straightforward. This Part will focus on which of these cases best lend themselves to national jury treatment. The federal courts' experience with complex litigation over the last several decades suggests at least two types of cases that should qualify: nationally aggregated claims and individual cases that serve a "bellwether"<sup>31</sup> function for related litigation.

### A. Aggregated Claims

The success of aggregating devices suggests several obvious candidates for national jury treatment. Congress has authorized some such devices, including multidistrict litigation<sup>32</sup> and class actions.<sup>33</sup> Use of these aggregative techniques results in units of litigation that are often national in scope. This has resulted in heightened attention by policy analysts like the American Law Institute to the challenges and potential opportunities raised by these aggregating devices.<sup>34</sup>

#### 1. Multidistrict Litigation

The MDL story began in the 1960s when the federal courts faced what would turn out to be the first of many pieces of large-scale litigation with national scope. Thousands of private civil suits accused the electrical equipment industry of price-fixing.<sup>35</sup> Because discovery required production of the same evidence in each case, the federal courts developed a coordinating committee to supervise discovery in all the cases scattered throughout the country.<sup>36</sup> The MDL statute grew out of that initial success.<sup>37</sup>

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<sup>30</sup> Cf. Bruce Moyer, *Class Actions Move to Federal Court*, FED. LAW., Mar.–Apr. 2005, at 10, 10 (quoting lawmaker's statement that CAFA is "the Vioxx protection bill, it is the Wal-Mart protection bill, it is the Tyco protection bill, and it is the Enron protection bill").

<sup>31</sup> See Sherman, *supra* note 7, at 696–98, 696 n.18 (noting that "the term [bellwether] comes from a lead sheep in a flock that wears a bell," and describing use of such representative suits in Vioxx MDL proceeding).

<sup>32</sup> Multidistrict Litigation Act, 28 U.S.C. § 1407 (2000).

<sup>33</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

<sup>34</sup> See, e.g., AGGREGATE LITIGATION, *supra* note 2 (discussing principles and major challenges of aggregate litigation).

<sup>35</sup> RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 142 (4th ed. 2004).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 3.

Under the MDL statute, a panel of seven federal judges reviews federal<sup>38</sup> cases to determine their amenability to MDL treatment.<sup>39</sup> The panel then transfers appropriate cases to one federal district for coordinated or consolidated pretrial proceedings. The transferee judge enjoys plenary power during the pretrial phase of the consolidated cases, including the power to decide dispositive motions and promote settlement discussions.<sup>40</sup> The statute, however, requires that cases return to their home districts for trial.<sup>41</sup> Yet prior to 1998, MDL courts routinely conducted trials, despite the statutory mandate to retransfer the cases, by using other transfer statutes to maintain control of the cases.<sup>42</sup> The Supreme Court ended that practice in 1998, holding that courts could not circumvent the MDL statutory scheme requiring remand to home districts for trial.<sup>43</sup> If MDL courts are to hold consolidated trials, Congress will have to authorize that course of

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<sup>38</sup> Because states are separate sovereigns, the MDL panel has no power to transfer cases from state to federal court. But defendants' ability to remove cases, now expanded under CAFA and MMTJA, means that a large proportion of litigation that one might consider "national" will end up in federal court and thus become subject to MDL treatment. See Sherman, *supra* note 13, at 1608 ("After CAFA, the federal courts are essentially 'the only game in town' for multistate and national class actions."). Indeed, the presence of overlapping class actions is a factor that favors MDL transfer of related cases. See Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1010 (1974) ("[Granting class action transfers] is intended to prevent the confusion and delay that would result if two courts were to enter determinations that similar actions should proceed as class actions with regard to all plaintiffs similarly situated."). However, when "mass actions" are removed under CAFA, transfer under the MDL statute cannot occur "unless a majority of the plaintiffs in the [mass] action request transfer pursuant to section 1407." 28 U.S.C. § 1332(d)(11)(C)(i) (Supp. V 2007). Thus, an incentive remains for plaintiffs' attorneys to file cases en masse in a district that they perceive to be a favorable jury pool.

<sup>39</sup> 28 U.S.C. § 1407(d) (2000). The threshold question is whether the cases share "one or more common questions of fact." § 1407(a). If so, the panel may order MDL treatment, but it is not required to do so. See Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, ME. B.J., Winter 2004, at 16, 16 (listing factors in deciding whether to transfer cases).

<sup>40</sup> See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004) ("[A] judge may terminate actions by ruling on motions to dismiss, for summary judgment, or pursuant to settlement, and may enter consent decrees."); see also Hansel, *supra* note 39, at 21 (reporting that once MDL cases are centralized, they tend to settle or be resolved by summary judgment by transferee judge).

<sup>41</sup> § 1407(a).

<sup>42</sup> See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 102 F.3d 1524, 1541 (9th Cir. 1996) (Kozinski, J., dissenting) (discussing practice of "self transfer," noting that "after the MDL process got underway . . . [j]udges began to develop proprietary feelings toward the cases entrusted to them" and began routinely holding on to these cases for trial through venue transfer statute, 28 U.S.C. § 1404(a) (2000)), *rev'd*, 523 U.S. 26 (1998); see also *id.* at 1532 & n.3 (majority opinion) (listing cases that had recognized courts' authority to transfer cases to themselves).

<sup>43</sup> 523 U.S. at 28.

action explicitly,<sup>44</sup> and indeed Congress has considered such legislation.<sup>45</sup> In practice, cases undergoing MDL treatment rarely go to trial: Either the cases settle (as do most civil cases generally), or they are decided on pretrial motions.<sup>46</sup>

MDL cases have included much of the prominent products liability litigation of the last several years. The asbestos litigation may be the poster child of national cases. The MDL panel initially was reluctant to order transfer to an MDL forum given the diffuse nature of asbestos litigation, with its multitude of causation and damage issues.<sup>47</sup> But once the magnitude of the asbestos problem became clear, the MDL panel reconsidered and ordered transfer of pending cases to the Eastern District of Pennsylvania.<sup>48</sup> The morass that asbestos litigation produced prompted the Supreme Court to call repeatedly for a federal legislative response,<sup>49</sup> but legislation stalled in Congress.<sup>50</sup>

If asbestos litigation and cases like it, including the Firestone Tires<sup>51</sup> and Vioxx litigation,<sup>52</sup> are to remain a judicial rather than an

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<sup>44</sup> *Id.* at 40.

<sup>45</sup> See Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. (as passed by House, Apr. 19, 2005) (providing statutory mechanism to transfer certain MDL cases for trial purposes); S. 3734, 109th Cong. (2006) (as introduced in Senate, July 26, 2006) (same). The bill passed the House but not the Senate. Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 GEO. L.J. 1155, 1164 (2007).

<sup>46</sup> See Hansel, *supra* note 39, at 21 (noting that MDL litigation, “like all cases . . . tends to settle or is resolved by summary judgment”).

<sup>47</sup> Indeed, the Panel denied transfer on five separate occasions, though the earlier cases presented smaller units of litigation. *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 417–18, 417 n.4 (J.P.M.L. 1991).

<sup>48</sup> *Id.* at 424–25 (ordering transfer of over 26,000 asbestos personal injury cases to Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings). That consolidated litigation produced *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the most important decision to emerge so far from the Supreme Court on the subject of settlement class actions. Interestingly, the settlement class ultimately decertified by the Court was comprised of asbestos victims who had yet to file claims and therefore were not directly involved in the coordinated MDL proceedings. *Id.* at 601. The “futures” class was the brainchild of both attorneys for the defendant and attorneys for the current MDL plaintiffs. See *id.* at 599–601 (summarizing negotiation process).

<sup>49</sup> *Amchem*, 521 U.S. at 598–99, 622–23.

<sup>50</sup> Bills were introduced in the Senate and referred to the Senate Judiciary Committee in both the 108th and 109th Congresses. See Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. (as introduced in Senate, Apr. 19, 2005) (providing for national asbestos injury claims resolution system); Fairness in Asbestos Injury Resolution Act of 2003, S. 1125, 108th Cong. (as introduced in Senate, May 22, 2003) (same). Both the bills were reported to the Senate but made no further progress. Cf. James L. Stengel, *The Asbestos End-Game*, N.Y.U. ANN. SURV. AM. L. 223, 223–24 (2006) (discussing failed 2005 bill and predicting that “a comprehensive federal legislative solution will not eventuate”).

<sup>51</sup> See *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1021 (7th Cir. 2002) (reversing district court’s certification of nationwide classes in MDL proceeding).

administrative problem, then these cases will be strong candidates for national jury treatment. The cases often involve national and multinational defendant-corporations, geographically dispersed plaintiffs, and economic consequences felt by a variety of third parties, including the insurance industry and state and federal governments. Although most litigation ends by settlement, the parties' expectations regarding particular jury pools affect their positions in global settlement negotiations.

## 2. *Class Actions and Mass Actions After the Class Action Fairness Act*

Another aggregating device that often creates litigation units that are national in scope is the class action. Years into the "tort reform" movement, Congress enacted CAFA, which significantly expanded federal jurisdiction over most class actions of any size or importance.<sup>53</sup> CAFA made sweeping changes in the jurisdictional rules that make it easier to litigate class actions in federal court: it relaxed the complete diversity requirement,<sup>54</sup> removed the requirement that each class member meet the amount-in-controversy requirement,<sup>55</sup> and allowed defendants to remove to federal court even when sued in their home

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<sup>52</sup> See *supra* notes 6–8 and accompanying text (describing initial stages of Vioxx litigation).

<sup>53</sup> See generally Sherman, *supra* note 13 (surveying CAFA's resulting expansion of federal jurisdiction).

<sup>54</sup> 28 U.S.C. § 1332(d)(2). Under the general diversity statute, all plaintiffs must be diverse (i.e., from different states) from all defendants. 28 U.S.C. § 1332(a) (2000); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In class actions prior to CAFA, the Supreme Court had long interpreted the diversity statute to require complete diversity only of named representatives. *E.g.*, *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921). As a result, by choosing nondiverse class representatives, plaintiffs' attorneys could preserve a state forum for the class action.

<sup>55</sup> Currently set at \$75,000, the amount-in-controversy requirement, § 1332(a), prohibited many large-number, small-claim suits from being litigated in federal court. See *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973) (finding no federal jurisdiction over class action where named plaintiffs met amount-in-controversy requirement but unnamed plaintiffs did not). In 2005, the Supreme Court held that the supplemental jurisdiction statute, 28 U.S.C. § 1367 (2000), overrules *Zahn* and allows jurisdiction over additional claims, including those by other class members, as long as one plaintiff meets the amount-in-controversy requirement. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005). CAFA superimposes on the new *Allapattah* rule an additional basis for federal jurisdiction when no class member has a claim greater than \$75,000, allowing claims that aggregate to an amount exceeding \$5 million. 28 U.S.C. § 1332(d)(2) (Supp. V 2007).

districts.<sup>56</sup> These changes arguably federalize any class action that could fairly be characterized as one “of national importance.”<sup>57</sup>

One condition that paved the way for CAFA’s passage was contempt for local juries. Congress designed the bill to thwart plaintiff forum-shopping, particularly into so-called “magnet jurisdictions,” epitomized by Madison County, Illinois.<sup>58</sup> President George W. Bush, for example, cited Madison County as the epicenter of class action abuse, noting that “Madison County juries are responsible for awarding large verdicts” and that “the vast majority [of affected parties] are not from Madison County.”<sup>59</sup> In fact, CAFA has reduced class action filings in magnet jurisdictions. In Madison County, class action filings dropped precipitously after CAFA was signed into law.<sup>60</sup>

CAFA has thus effected a sea change in class action practice. Its effect on the fraught relationship between class actions and the jury trial bears examination. Litigants tend to believe that federal juries

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<sup>56</sup> Under the general removal statute, 28 U.S.C. § 1441(b) (2000), defendants who are sued in a state court in their own home districts may not remove to federal court on diversity grounds, on the theory that they already enjoy any home court advantage and therefore do not need access to a federal forum to protect against a local disadvantage. See FRIEDENTHAL ET AL., *supra* note 4, § 2.11, at 63 (noting that in-state defendant “hardly can expect to encounter prejudice against out-of-staters in the courts of his home state so there is no reason for extending federal jurisdiction”). CAFA eliminates this impediment as to class actions within its jurisdictional purview. 28 U.S.C. § 1453(b) (Supp. V 2007).

<sup>57</sup> Indeed, Congress explicitly stated that one of the concerns prompting CAFA was that cases “of national importance” were being kept out of federal courts and that state and local courts were “making judgments that impose their view of the law on other States and bind the rights of the residents of those States.” 28 U.S.C. § 1711 note (Supp. V 2007) (Class Action Fairness Act §§ 2(a)(4)(A), (C)). Other provisions within CAFA, known as the “Consumer Class Action Bill of Rights,” 28 U.S.C. §§ 1711–15 (Supp. V 2007), deal with problems such as unclear class notice and coupon settlements. But because recent amendments to FED. R. CIV. P. 23 and increased judicial oversight already addressed these problems, Congress was more focused on CAFA’s jurisdictional innovations by the time it came to a vote. The motivating force was to curtail perceived rampant forum-shopping by plaintiffs’ attorneys. Sherman, *supra* note 13, at 1594–95.

<sup>58</sup> See Ann Knef, *Federal Courts Taking on Class Action Burden Post CAFA*, MADISON-ST. CLAIR REC., Feb. 19, 2007, at 5 (quoting Brian Wingfield, *Class-Action Law Gums Up Courts*, FORBES.COM, Feb. 15, 2007, [http://www.forbes.com/2007/02/14/class-action-law-suits-biz-cx\\_bw\\_0215class.html](http://www.forbes.com/2007/02/14/class-action-law-suits-biz-cx_bw_0215class.html)), available at <http://www.madisonrecord.com/printer/article.asp?c=190648> (noting that Congress intended CAFA to reduce forum-shopping by plaintiffs).

<sup>59</sup> *Id.* (quoting President Bush). The American Tort Reform Association was an effective lobbyist for the legislation. See AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2005, at 6 (2005), available at <http://www.atra.org/reports/hellholes/2005/hellholes2005.pdf> (criticizing Madison County and other jurisdictions seen as unfair to civil defendants).

<sup>60</sup> Ann Knef, *Class Action Fairness Act: Is it Working?*, MADISON-ST. CLAIR REC., Mar. 27, 2006, at 1, available at <http://www.madisonrecord.com/printer/article.asp?c=176457>.

are more “sophisticated” than their state counterparts.<sup>61</sup> Yet even in federal court, most defendants would prefer to avoid jury trial<sup>62</sup> and use procedural escapes such as summary judgment and directed verdicts to do so.<sup>63</sup> Moreover, CAFA has given defendants a neat new hat trick: When facing a complaint filed in state court that seeks the certification of a nationwide class, defendants can first remove to federal court and then argue that the national class cannot be certified because choice-of-law problems defeat class commonality.<sup>64</sup> Although remaining individual claims may proceed as aggregate litigation (usually via MDL), they cannot receive the collective advantages of class status.<sup>65</sup>

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<sup>61</sup> *Id.* at 7 (paraphrasing statement by attorney Richard W. Cohen that “plaintiffs in complex cases such as anti-trust matters prefer federal court where juries are perceived as more sophisticated and judges more competent”). Interestingly, the prospect that federal jurors would be more sophisticated than their state counterparts may well have been the impetus behind the Framers’ creation of diversity jurisdiction. See Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1070–76, 1095 (2007) (describing Federalist defeat of vicinage requirement for civil juries, thus allowing federal juries to be drawn mostly from commercial centers, and arguing that “it was the very prospect of [the control and manipulation of the jury pool] that most motivated the Framers to establish diversity jurisdiction”).

<sup>62</sup> Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 480 (1998); see also Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1149 (1992) (describing “lawyers’ longstanding perceptions” of juries as biased “in favor of the plaintiff or the little person on liability and toward generosity on damages”). Professors Clermont and Eisenberg demonstrate that these perceptions lack an empirical basis. *Id.* at 1152 (“[R]esearch does not support a view of the jury as overly generous on awards, frequently ignoring the law, or institutionally unable to handle complex cases.”).

<sup>63</sup> Since plaintiffs generally bear the burden of proof at trial, defendants can attack their cases and avoid jury decisions by convincing the court before trial that no “genuine issue” exists as to an essential element of plaintiffs’ claims, entitling defendants to summary judgment. FED. R. CIV. P. 56; FRIEDENTHAL ET AL., *supra* note 4, § 9.3, at 477. After the plaintiff has had the opportunity to present her case at trial, the defendant is entitled to a judgment as a matter of law if the court finds that “a reasonable jury would not have a legally sufficient evidentiary basis” to find for the plaintiff. FED. R. CIV. P. 50(a); see FRIEDENTHAL ET AL., *supra* note 4, § 12.3, at 579 (noting that directed verdict “acts somewhat like a delayed summary-judgment motion in that it determines that there are no genuine issues of fact that need to be sent to the jury”).

<sup>64</sup> See Jeremy T. Grabill, Comment, *Multistate Class Actions Properly Frustrated by Choice-of-Law Complexities: The Role of Parallel Litigation in the Courts*, 80 TUL. L. REV. 299, 307–09 (2005) (explaining how choice-of-law problems, particularly in tort cases, frustrate class certification under FED. R. CIV. P. 23).

<sup>65</sup> Interestingly, Congress rejected a proposed amendment to CAFA that would have instructed federal courts not to refuse class certification based on choice-of-law concerns. The amendment, proposed by Senator Feinstein of California, read as follows:

Notwithstanding any other choice of law rule, in any class action, over which the district courts have jurisdiction, asserting claims arising under State law . . . the district court shall not deny class certification, in whole or in part, on the ground that the law of more than 1 State will be applied.

Rather than eliminating forum-shopping, CAFA changes forum-seeking strategies on both the plaintiff and defense sides. Plaintiffs can still forum-shop among the ninety-four federal districts<sup>66</sup> and may file in federal circuits with favorable precedents on issues of class certification,<sup>67</sup> although they may be forced to contend with an MDL transfer for pretrial proceedings. Plaintiffs may also try to avoid removal to federal court by structuring class actions to fit within an exception to CAFA. For example, plaintiffs may allege less than \$5 million in damages in the complaint,<sup>68</sup> but defendants can still seek removal by showing with “legal certainty” that the plaintiff class’s ultimate recovery will exceed that jurisdictional minimum.<sup>69</sup> Thus, forum-shopping into, or out of, particular jury pools continues under CAFA. Designating appropriate CAFA cases for national jury treatment would reduce these forum-shopping incentives if plaintiffs and defendants both recognize that aggregate treatment can achieve efficiency gains that exceed the benefits to either side of capturing a particular jury pool.

CAFA also created a new litigative unit: the “mass action.” The mass action permits joinder in federal court of individual claims where one hundred or more cases “involve common questions of law or fact” and where each plaintiff meets the jurisdictional amount.<sup>70</sup> Unlike the MDL statute, this provision focuses on mass trial joinder. The statute explicitly exempts cases that are already consolidated in state court for pretrial proceedings only.<sup>71</sup> Thus, mass action jurisdiction attaches

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151 CONG. REC. S1166 (daily ed. Feb. 9, 2005). The amendment was defeated by a vote of sixty-one to thirty-eight. *Id.* at S1184; Grabill, *supra* note 64, at 317 & n.102.

This issue arose in the Vioxx litigation, where defense attorneys argued that the court should not certify a national class for medical monitoring because of differences in state law, even though the cases had been concentrated in one federal court pursuant to CAFA and MDL. Sherman, *supra* note 13, at 1608–09.

<sup>66</sup> See Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 598 (2006) (“In a nation with fifty state court systems as well as ninety-four federal districts . . . attorneys will have choices.”).

<sup>67</sup> See Sherman, *supra* note 29, at 53 (“[P]laintiffs lawyers may engage in forum-shopping at the federal level, searching for courts with favorable precedents in their circuits primarily on the issue of ‘predominance.’”).

<sup>68</sup> See 28 U.S.C. § 1332(d)(2) (Supp. V 2007) (requiring that “the matter in controversy exceed[ ] the sum or value of \$5 million, exclusive of interest and costs”).

<sup>69</sup> See *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 999 (9th Cir. 2007) (adopting “legal certainty” standard). Plaintiffs can still capture a local jury pool by filing a case beneath the jurisdictional minimum amount in controversy. But the availability of a national jury might offset other perceived procedural disadvantages, making plaintiffs less likely to adopt this strategy in cases at the margins.

<sup>70</sup> § 1332(d)(11)(B)(i). Currently, the jurisdictional amount requirement is \$75,000. § 1332(a) (2000).

<sup>71</sup> § 1332(d)(11)(B)(ii)(IV).



only when trial is imminent or at least likely. This focus on trial suggests that Congress created the mass action to address concerns about local juries. In an apparent concession to the plaintiffs' bar, the statute withdraws mass actions from MDL treatment so that they cannot be transferred to a distant federal district.<sup>72</sup> Even so, CAFA's mass action provision removes these cases from state to federal court, thereby enlarging the jury pool (in most places) from a state county to a federal district—a move that can work profound changes in the demographics of jurors.<sup>73</sup> Empanelling a national jury in mass actions might better address concerns of both sides and might improve the legitimacy of verdicts in such cases. Plaintiffs and defendants alike would enjoy the benefits of citizen participation in the decisionmaking without concern that the other side has corralled a particular jury demographic through forum manipulation.

### 3. *Multiparty, Multiforum Trial Jurisdiction Act*

A third aggregating device arises from MMTJA, which permits the centralization into one federal court of all cases arising out of a single mass accident. The statute enlarges federal jurisdiction in these tort cases, which traditionally have been within the purview of state courts, by requiring only minimal diversity when at least seventy-five natural persons have died in the accident.<sup>74</sup>

Though many cases concentrated in federal court pursuant to § 1369 (where key provisions of MMTJA are codified) may qualify for national jury treatment, some may be large pieces of essentially local litigation that merit a local jury. The paradigmatic example of the former is a mass transit accident where many people are injured in one discrete location.<sup>75</sup> In the case of an airplane crash, the statute

<sup>72</sup> § 1332(d)(11)(C)(i).

<sup>73</sup> See Dooley, *supra* note 18, at 88–90 (describing demographic differences between state counties and federal districts in five metropolitan areas).

<sup>74</sup> 28 U.S.C. § 1369(a) (Supp. II 2003). The statute distinguishes between corporate citizenship—the traditional notion that corporate citizenship exists in the state(s) of incorporation and principal place of business—and corporate residence, which is any state in which the corporation “is incorporated or licensed to do business or is doing business.” § 1369(c)(2). The statute also imposes minimal requirements of multistate contacts, § 1369(a)(1)–(3), and conversely advises district courts to “abstain” from exercising jurisdiction when the contacts are concentrated in a single state, § 1369(b).

<sup>75</sup> § 1369(a) (“[D]istrict courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least seventy-five natural persons have died in the accident *at a discrete location*.” (emphasis added)); see H.R. REP. NO. 107-685, at 199–201 (2002) (Conf. Rep.), as reprinted in 2002 U.S.C.C.A.N. 1120, 1151–53 (detailing legislative response to airplane accidents and other mass accidents); 147 CONG. REC. 3583–84 (2001) (statement of Rep. Sensenbrenner) (introducing various features of MMTJA, including improved treatment of mass accident cases).

would consolidate all cases arising from the accident into a single federal district.<sup>76</sup> If, as is likely, plaintiffs (the passengers and their families) and defendants (the airline and its suppliers and insurers) hail from different parts of the country, a national jury might be appropriate. Thus, even though MMTJA (like CAFA) will wrest litigants away from their local courts and local jury pools, a national jury system would provide them with a representative decisionmaker.

Not all cases eligible for federal jurisdiction under § 1369 are truly national in scope. Some accidents large enough to trigger its jurisdictional provisions are still essentially local. For example, actions arising out of the horrific 2003 nightclub fire in West Warwick, Rhode Island were removed and consolidated in federal court under § 1369.<sup>77</sup> Though the large number of deaths (one hundred) coupled with minimal diversity triggered federal jurisdiction, most of the litigants were local to the Rhode Island region.<sup>78</sup> Arguably, any jury empanelled in that case should have been drawn from Rhode Island. The West Warwick case illuminates the problem of minimal diversity as a basis for federal jurisdiction: There is not always a real reason (other than perhaps the size of the case) for the federal government to have an interest in such cases. Congress anticipated this objection and directed the federal courts to abstain when the substantial majority of all plaintiffs are citizens of the same state as the “primary” defen-

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<sup>76</sup> By contrast, products liability cases, which involve injuries to consumers in many discrete locations over a period of time, would not qualify for multiparty, multiform treatment under § 1369. Representative Kastenmeier addressed opponents who feared that MMTJA would apply to ordinary products liability cases:

Their primary concern was that while the bill as originally drafted may have been directed toward airline crashes and similar events, it could conceivably have been misapplied to ordinary products liability and toxic exposure cases. It was never our intention to reach routine products liability or toxic exposure cases, and the bill was amended at subcommittee markup to make that absolutely clear.

136 CONG. REC. 12,612 (1990) (statement of Rep. Kastenmeier); see also Laura Offenbacher, Note, *The Multiparty, Multiform Trial Jurisdiction Act: Opening the Door to Class Action Reform*, 23 REV. LITIG. 177, 184–88 (2004) (surveying sponsors’ and critics’ arguments about scope and fairness of § 1369).

<sup>77</sup> *Passa v. Derderian*, 308 F. Supp. 2d 43, 48–49 (D.R.I. 2004). Plaintiffs argued that the case was essentially local in character, citing state court litigation already in progress. *Id.* at 64–65. The federal district court rejected plaintiffs’ argument and retained the case. *Id.* at 65.

<sup>78</sup> Based on “the data available to the Court,” over 60% of those killed or injured in the fire were residents of Rhode Island, Massachusetts, or Connecticut. *Id.* at 60. The residency of 34.3% of those killed or injured could not be established. *Id.* While the litigants disputed the definition and scope of “primary defendants,” many high-profile defendants (such as the nightclub owners) were Rhode Island residents. *Id.* at 61.

dants.<sup>79</sup> But as the judge in the Rhode Island case pointed out,<sup>80</sup> even after extracting defendants who may bear only derivative liability (like insurers), there remain many defendants in large-scale disasters who may bear direct liability. Primary defendants under the statute are those facing direct liability, regardless of their ultimate share of the liability.<sup>81</sup> When plaintiffs sue multiple defendants, particularly national corporations, the likelihood of all “primary” defendants hailing from the same state as a “substantial majority” of plaintiffs is reduced, as the Rhode Island case itself demonstrates, and federal jurisdiction obtains.<sup>82</sup>

Thus, the fact of jurisdiction under MMTJA does not necessarily connote a case of national concern warranting a national jury pool. Instead, as with CAFA, a court considering national jury treatment must take care to analyze whether a trial court decision in the case will have an impact on a national scale. In choosing cases for national jury treatment, the functional justifications for a national jury pool identified in Part II could supply a workable test.<sup>83</sup>

#### 4. *ALI Proposals*

During the 1980s and early 1990s, after the development of multidistrict litigation but before CAFA and MMTJA, the federal courts struggled with an ever-increasing docket of complex cases. The American Law Institute (ALI) ventured into the fray with the Complex Litigation Project, a comprehensive attempt to address problems repeatedly posed by those cases. The project made a number of recommendations related to centralizing litigation of national scope.<sup>84</sup>

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<sup>79</sup> § 1369(b). Corporate “residence” triggers jurisdiction; corporate “citizenship” of the primary defendant, if the same as a substantial majority of plaintiffs, defeats it. *Id.* See generally Lind, *supra* note 14, at 737–45 (describing how MMTJA expands federal jurisdiction by focusing on corporate residence rather than citizenship and evaluating effect of federal procedural innovations on state power and democratic values).

<sup>80</sup> *Passa*, 308 F. Supp. 2d at 62–63.

<sup>81</sup> *Id.*

<sup>82</sup> Litigation arising out of Hurricane Katrina, consisting primarily of claims against insurers, has sparked controversy as to whether § 1369 jurisdiction could properly be invoked. See generally Stephen Aslett, Recent Development, *Wallace v. Louisiana Citizens Property Insurance Corp.: The Fifth Circuit Expands Federal Jurisdiction over State Court Class Actions Arising out of Hurricane Katrina*, 81 TUL. L. REV. 1331 (2007) (describing applicability of MMTJA jurisdiction to claims arising out of Hurricane Katrina). Because Hurricane Katrina—and more particularly the governmental and private response to it deemed inadequate by so many—captured the attention of the nation, the resolution of Katrina-related disputes is arguably a national interest.

<sup>83</sup> See *infra* Part II.A (describing primary reasons for preferring national jury pool).

<sup>84</sup> AM. LAW INST., *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* (1993) [hereinafter *COMPLEX LITIGATION*]. As listed in the foreword, the project’s recommendations include

The ALI drafted proposed federal legislation to facilitate transfer and consolidation within the federal court system<sup>85</sup> and, for the first time, to allow consolidation of cases between the state and federal systems.<sup>86</sup> The proposed facilitating body would be called the “complex litigation panel” and would operate much like the current MDL panel.<sup>87</sup> Transferee judges would be imbued with power to commandeer all litigation on a single topic—in state or federal court—into their courts.<sup>88</sup>

The purpose of the recommendations made by the Complex Litigation Project is to ease unwarranted burdens on the court system, to reduce transaction costs, and to prevent inconsistent outcomes by capturing litigation in a single court.<sup>89</sup> Although the project contemplates that either federal or state judges might handle such litigation, it does not address the significant demographic differences between jury pools in those jurisdictions.<sup>90</sup> The overall bent of the project toward

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enhancement of authority in federal courts for consolidation within the federal system of related cases in complex litigation . . . ; procedural mechanisms for consolidation among state courts and by transfer of cases from the federal courts to state courts . . . ; broader removal jurisdiction whereby to bring related cases in complex litigation into the federal courts from state courts and the enhancement of authority in the federal courts to encourage intersystem consolidation . . . ; and choice of law rules having greater specificity than those generally obtaining in contemporary law.

*Id.* at xvii.

<sup>85</sup> For example, the proposed statute would allow multidistrict consolidation for trial as well as pretrial, effectively expanding the MDL concept. *Id.* app. A § 1407(b), at 438. After the Supreme Court’s 1998 decision in *Lexecon*, Congress would have to amend the MDL statute to allow this. *See supra* notes 43–45 and accompanying text.

<sup>86</sup> *See* COMPLEX LITIGATION, *supra* note 84, app. A § 1407(e)(1)–(4), at 439–40 (describing factors to determine whether to consolidate federal and state actions in one court).

<sup>87</sup> Indeed, the ALI intended the proposed legislation to modify the current MDL statute. *See id.* app. A at 437 (suggesting that proposed “complex litigation statute” might be adopted to amend 28 U.S.C. § 1407). Such a “complex litigation panel” might be ideally suited to address the amenability of particular pieces of large-scale litigation to national jury treatment.

<sup>88</sup> For example, transferee judges would have the power to enjoin transactionally related proceedings in any state or federal court and to command intervention of nonparties on pain of being bound by factual determinations made in the transferee court. *Id.* app. A § 1407A(f), (g), at 443–44.

<sup>89</sup> *Id.* at xviii.

<sup>90</sup> The ALI Reporters do consider Seventh Amendment implications for bifurcation of liability and damages. When multiple juries consider overlapping issues, like causation and comparative negligence, bifurcation may run afoul of the Seventh Amendment’s prohibition on the “reexamination” of facts found by a federal civil jury. *See infra* text accompanying notes 94–97, 151. However, the Reporters conclude that the advantages of bifurcation outweigh potential problems. COMPLEX LITIGATION, *supra* note 84, § 3.06 cmt. f, at 123. The Reporters cite studies that show bifurcation to be a distinct advantage for defendants. *Id.* cmt. f, Reporter’s Note 15.

centralization and concentration of national litigation<sup>91</sup> is, however, consistent with this Article's argument that the fact finder in such litigation should represent a national pool.

The ALI's most recent procedural project, the Aggregate Litigation Project, postdates CAFA and MMTJA and addresses cases that are formally aggregated for litigation as well as cases that are "tried to test the value of related claims."<sup>92</sup> Both types of cases—aggregated claims and bellwether cases—are promising candidates for national jury treatment. The Aggregate Litigation Project's consideration of the jury's role in such cases has centered on the reexamination problem identified earlier in the Complex Litigation Project.<sup>93</sup> The Constitution's Reexamination Clause<sup>94</sup> bars a new verdict when one jury finds facts interrelated with facts that a previous jury found—a pattern that routinely occurs when issues are designated for aggregate treatment.<sup>95</sup> The ALI Reporters have sought to "reorient" the reexamination debate in aggregate litigation to focus on the original purpose of the Reexamination Clause: preventing a federal appeals court from overriding a local jury by empanelling a second jury far from the first.<sup>96</sup> This "reorientation" invites us to rethink the relevant jury pool for initial decisionmaking in aggregated litigation. If the Founders' true concern was for the civil jury to represent the proper constituents, then juries that decide aggregated cases of national scope should represent the entire nation.<sup>97</sup>

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<sup>91</sup> Indeed, the Reporters devoted a whole section of the project to developing national choice-of-law rules for complex cases:

[T]he difficulties associated with complex litigation identify it as a national problem. Certainly, the most direct way to attempt to solve the issues posed would be to adopt national standards to govern the conduct of individuals or entities who are engaging in activity having interstate effects and who now are controlled by multiple, sometimes conflicting, state laws.

COMPLEX LITIGATION, *supra* note 84, ch. 6 Introductory Note, at 305. Noting the political difficulties of proposing new choice-of-law rules, the Reporters recommend that Congress enact "a coherent and uniform federal choice of law code." *Id.*

<sup>92</sup> The American Law Institute, Principles of the Law of Aggregate Litigation, *supra* note 2.

<sup>93</sup> See *supra* note 90.

<sup>94</sup> U.S. CONST. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

<sup>95</sup> See generally Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 531–33 (1998) (explaining reexamination problem in aggregate litigation of particular issues and concluding that it should not impede formation of issue classes).

<sup>96</sup> AGGREGATE LITIGATION, *supra* note 2, § 2.11 cmt. c, at 183. The Reporters noted that some states allowed appellate override at the time of the founding. *Id.*

<sup>97</sup> For more of the Seventh Amendment justification for the national jury proposal, see generally Part II *infra*.

### B. Bellwether Cases of National Scope

The traditional civil lawsuit involves a single plaintiff suing a single defendant to assign financial responsibility for alleged harm. These cases are normally local in scope, and a local jury is the appropriate decisionmaker. Some seemingly simple cases, however, have national import because they serve as bellwethers<sup>98</sup> for future litigation.<sup>99</sup> In mass tort litigation, trying bellwether cases has become a common technique.<sup>100</sup> A plaintiff's verdict on a key issue, such as whether a particular product is "unreasonably dangerous," will allow plaintiffs' lawyers in future cases to argue that a defendant can be collaterally estopped on that issue.<sup>101</sup> But if the case involves a large damage award, there may be negative effects—both on potential future plaintiffs and on those unrelated to the litigation.<sup>102</sup>

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<sup>98</sup> See *supra* note 31 (describing origin and meaning of term "bellwether").

<sup>99</sup> Very occasionally, other parties will agree in advance to adhere to the verdict rendered in a bellwether case. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004) (stating that MDL transferee court may conduct bellwether trial which, upon consent of parties to constituent actions not filed in transferee district, may be binding on them); see also Sherman, *supra* note 7, at 696–97 (describing as "rare" situations when parties agree in advance to be bound by bellwether decisions); cf. *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1505, 1510 (D. Colo. 1989) (noting that parties in multidistrict litigation agreed to be bound on specific issues as resolved by exemplar trial). More often, the principles of issue preclusion, or collateral estoppel, allow a future court to use a finding made by an earlier bellwether case, and early results drive settlement negotiations. See Sherman, *supra* note 7, at 697 (describing use of bellwether cases "to provide information as to the dollar value of various kinds of injuries and damages in product liability, pharmaceutical, and environmental litigation").

<sup>100</sup> See generally MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.315 (2004) (describing procedure for trying bellwether cases in mass tort litigation).

<sup>101</sup> See FRIEDENTHAL ET AL., *supra* note 4, § 14.14 (describing when nonparties may assert collateral estoppel). Most courts, including the federal courts, have abolished the mutuality doctrine that restricted issue preclusion to parties actually joined in the earlier case. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (holding that federal courts may apply offensive nonmutual collateral estoppel). Thus, unrelated plaintiffs may use a previous plaintiff's win on a key issue against a common defendant. See generally Laura Gaston Dooley, *The Cult of Finality: Rethinking Collateral Estoppel in the Postmodern Age*, 31 VAL. U. L. REV. 43, 60–61 (1996) (explaining use of offensive nonmutual collateral estoppel by new party pursuing claim against repeat player who has lost previous case to someone else).

<sup>102</sup> For example, if the defendant does business on a national scale, a large punitive damage award may affect its employees and shareholders scattered around the country. A punitive damage award may also indirectly affect other potential plaintiffs who have similar claims if later courts subscribe to a "limited generosity" or "punitive overkill" theory and deny punitive damage awards against a defendant who has already been "punished" in a previous civil case. See Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 112–13 & n.31, 125–26 (1995) (explaining courts' reaction to punitive overkill theory and proposing analysis to synthesize constitutional limits on excessive punishments).

Moreover, in the last Term, the Supreme Court held that a state court's imposition of punitive damages for harm to people outside the purview of the litigation violates due

Courts are sometimes uneasy about allowing plaintiffs to benefit from previous local jury verdicts, and they have cabined the doctrine of collateral estoppel to limit the effects of local cases. Collateral estoppel, the common law doctrine that bars a litigant from retrying an issue that has been actually litigated and decided against her, evolved from an ideal of efficiency: using court resources to relitigate issues already decided seems wasteful and unnecessary.<sup>103</sup> Courts applied the doctrine quite rigidly both where the litigants involved in the later case were identical to those in the earlier case and where a defendant sought to bind a plaintiff who had switched adversaries in order to relitigate an issue.<sup>104</sup> But as plaintiffs sought to use the doctrine to bind defendants, some courts began to balk.<sup>105</sup> These courts describe collateral estoppel as a discretionary doctrine and apply defendant-friendly fairness factors to avoid its application.<sup>106</sup> More generally, courts began to scrutinize both the precise articulation of the issue previously decided and the circumstances under which the verdict was rendered. For example, in the asbestos litigation, one appellate court rebuffed a seasoned trial judge's effort to apply collateral estoppel to the issue of whether asbestos is an unreasonably dangerous product, ruling that factual differences meant that the issue was not precisely the same as the issue decided before.<sup>107</sup> Another federal appellate court refused to apply collateral estoppel in antitrust litigation where a sister circuit had found nonreversible error in the jury trial that resulted in the first verdict—even though that circuit affirmed the verdict.<sup>108</sup>

This unease mirrors concerns expressed by, for example, the Supreme Court,<sup>109</sup> Judge Posner,<sup>110</sup> and Congress<sup>111</sup> about local cases

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process, noting that allowing such damages in effect imposes local policy on the rest of the country. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007).

<sup>103</sup> See *Parklane*, 439 U.S. at 326 (“Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.”).

<sup>104</sup> FRIEDENTHAL ET AL., *supra* note 4, § 14.14, at 725.

<sup>105</sup> Dooley, *supra* note 101, at 61.

<sup>106</sup> See *Parklane*, 439 U.S. at 330 (noting that factors include assessing if current plaintiff exercised “wait and see” strategy or if defendant won issue in previous litigation).

<sup>107</sup> See *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 345 (5th Cir. 1982) (holding that collateral estoppel was inappropriate when issue, stated at high level of specificity, could not possibly repeat from case to case).

<sup>108</sup> *Jack Faucett Assocs., Inc. v. AT&T Co.*, 744 F.2d 118 (D.C. Cir. 1984) (finding no collateral estoppel based on jury verdict rendered after evidence had been improperly excluded at trial, even though Second Circuit had held error nonreversible).

<sup>109</sup> See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007) (warning of “risk that punitive damages awards can, in practice, impose one State’s (or one jury’s) policies . . . upon other states”).

having national effects. These critics question whether the initial decisionmaker, the local jury, should wield such power. The subtext is that we can tolerate the imprecise calculations made by a jury in an individual case, but we hesitate to export such an imperfect product to other cases, especially outside that locality. Moreover, a local jury does not expect its verdict to have an impact beyond the case at hand. But the courts' reluctance to use collateral estoppel against defendants is in tension with our view that the jury is an essential part of our civil justice system.<sup>112</sup>

A national jury system could alleviate this tension. Under a national jury system, bellwether cases would be decided by jurors representing the larger communities that feel the effects of the decisions. Arguably a verdict rendered by a national jury would garner more respect beyond the boundaries of the individual bellwether case. And the national jury itself would have a better sense of the ultimate impact its verdict might have on people who are not participating in the current lawsuit.<sup>113</sup>

Empanelling a national jury might also provide more consistency on damages issues. Much as administrative tribunals provide consistency in, say, worker's compensation cases, a national jury could try a number of individual claims to produce a range of damage awards that can be used in future litigation as a basis for settlement or other ADR

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<sup>110</sup> *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) ("One jury, consisting of six persons . . . , will hold the fate of an industry in the palm of its hand."). In a later economic analysis of evidence rules, Judge Posner defends the jury and the adversary system against charges that it is inherently inferior to inquisitorial systems, noting that though jurors may be "more subject to cognitive illusions and emotionalism than a professional judge who has 'seen it all before,'" the adversarial system creates greater incentives to search for relevant evidence, and juries offer a collective wisdom. Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1487-97 (1999). Judge Posner suggests several reforms that he believes would produce more accurate factfinding; interestingly, one suggestion is to restore the size of the jury to its traditional twelve members. *Id.* at 1497-99. For a discussion of the optimal size for a national jury, see *infra* Part III.B.

<sup>111</sup> See *supra* note 57 (describing how, in passing CAFA, Congress's motivating concern was that state and local courts were "making judgments that impose their view of the law on other states").

<sup>112</sup> Dooley, *supra* note 1, at 329-30 (describing Americans' "love-hate" relationship with civil jury).

<sup>113</sup> These absent parties could not, as a matter of due process, be bound. See *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."). But they could use the verdict both for settlement negotiation and collateral estoppel, if necessary. Moreover, under proposals advocated by the American Law Institute, absent parties might be bound if certain criteria are met. See *generally* COMPLEX LITIGATION, *supra* note 84, § 5.05, at 275-303.



techniques. Some critics of the petit jury argue that a judge sees more cases across a career and has a better sense of how individual cases fit within that overall framework.<sup>114</sup> A national jury that sat for a number of cases (on something like a grand jury model) could do the same. On the other hand, a national jury might do no better than a traditional jury in setting damages in a particular case. No *one* jury—regardless of geographic origin—can set a value on a particular claim with any degree of precision.<sup>115</sup> Damages are inherently individual and approximate, subject to specific determinations in unique cases. So while we might expect juries to return consistent verdicts on liability as long as the underlying factual circumstances are constant, valuation of damages inevitably will vary from claim to claim. One strategy might be to bifurcate liability from damages in bellwether cases.<sup>116</sup>

Courts' selection of bellwether cases for national jury treatment could be informed by judges' experience with "sampling" in mass tort litigation.<sup>117</sup> The benefit of sampling is that by trying some number of

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<sup>114</sup> See, e.g., Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 210–12 (1998) (arguing that judges are superior decisionmakers on punitive damages, in part because judges "are in a better position to impose a punishment that is in line with the punishments imposed for similar misconduct").

<sup>115</sup> This sort of concern was a motivating factor in the Seventh Circuit's decisions in both the *Firestone* and *Rhone-Poulenc* cases to decertify classes that had been approved by federal district judges. See *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (Easterbrook, J.) ("[O]nly 'a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions' will yield the information needed for accurate evaluation of mass tort claims." (citation omitted) (quoting *Rhone-Poulenc*, 51 F.3d at 1299)). Thus, Judge Easterbrook condemns the "central planning model" of the ALI Complex Litigation Project and extols a "market model." *Id.* But if the clear goal of the recent legislative and policy reform efforts in complex litigation is aggregate resolution of disputes whenever possible, then the use of a larger, national jury would produce better and more legitimate outcomes on issues of both liability and valuation of damages.

<sup>116</sup> This type of bifurcation has been around for a long time and is less controversial than the more recent innovation of plucking out particular issues (like causation) for separate trial. See Sherman, *supra* note 7, at 702 ("The most common form of bifurcation that goes back many years is between liability and damages.").

<sup>117</sup> Sampling in mass tort cases is the use of statistical methods to decide a large number of similar cases by the trial of randomly selected test cases. See Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 563 (1993) (describing how, after adjudicating each sample case, court "statistically combines the sample outcomes to yield results for all cases in the larger population"). Sampling techniques have been tried in asbestos litigation, for example. See David Friedman, *More Justice for Less Money*, 39 J.L. & ECON. 211, 212–14 (1996) (describing Judge Parker's use of sampling techniques in asbestos cases). Professors Saks and Blanck note that "[e]very verdict is itself merely a sample from the large population of potential verdicts" so that multiple trials are necessary to reach an accurate mean verdict. Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 833–34 (1992). They

cases, the parties can get an idea of likely results for other claims as well as a sense of how to value those claims.<sup>118</sup> Representativeness of the cases is the key to successful sampling. The problem, of course, is how to choose “representative” cases: Plaintiffs’ lawyers try to choose the strongest claims and defendants’ lawyers try to choose the weakest. For example, the Fifth Circuit rejected a plan to give issue-preclusive effect to sample cases when the cases chosen by the parties were among the fifteen strongest and fifteen weakest and thus not representative of the other three thousand pending claims.<sup>119</sup> Such plans raise both procedural and substantive due process concerns unless the sample “is a randomly selected, statistically significant sample.”<sup>120</sup>

As in sampling, representativeness of bellwether cases for national jury treatment would depend on the strength of the case chosen relative to other claims that might be affected. Collateral estoppel would provide a doctrinal mechanism for courts to analyze the similarity of the facts found by the national jury to the facts at issue in later cases. And a national jury would remove one obstacle to collateral estoppel—the argument that estoppel exports local policy or biases. Additionally, the rendering jury would have known the scope of its decision, which we might expect to foster more careful deliberation. Much as the legitimacy of sampling turns on the representativeness of the sample cases, the legitimacy of jury decisionmaking in

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suggest that the use of multiple juries best avoids the risk of exporting error, and that cases should be randomly assigned to avoid potential bias in juries hearing multiple cases. *Id.* at 848–49. Saks and Blanck further contend that “[i]n principle, we could determine the optimal number of juries,” but that “[i]n the absence of such data, the safest way to avoid this risk is to use as many juries as practicable.” *Id.* at 848. But drawing juries used in sampled mass tort cases from geographically diverse pools might produce greater reliability with less inefficiency than the strategy of using “as many juries as practicable,” *id.*, particularly if the national jury pool follows a grand jury model with a larger size than the typical petit civil jury. Different subgroups could be summoned to hear a series of cases from which a mean verdict could be calculated. Besides the reliability gains, such a plan would produce verdicts enjoying greater legitimacy and would remove the incentive to forum-shop for a favorable jury pool for the all-important sample trial.

<sup>118</sup> See *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (“[T]he results of such trials can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by the jury verdicts.”).

<sup>119</sup> *Id.* at 1019–20. Interestingly, Judge Robert M. Parker, the circuit judge who authored the *Chevron* opinion, was well known as a federal trial judge for using innovative techniques, including sampling, to clear the huge asbestos docket in his district. See *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 664–65 (E.D. Tex. 1990) (Parker, C.J.) (approving use of sample damage verdicts to calculate damages to other class members), *rev’d*, 151 F.3d 297, 321 (5th Cir. 1998); see also Friedman, *supra* note 117, at 212–14 (discussing Judge Parker’s use of sampling techniques in asbestos cases).

<sup>120</sup> *Chevron*, 109 F.3d at 1021.

national cases turns on the degree to which the jurors represent the larger communities.

## II

### WHY NATIONAL JURIES: OF LEGITIMACY AND EFFICIENCY

Citizen participation in mass litigation is under threat of extinction. The last few decades have seen explicit calls for the elimination of the civil jury in complex litigation.<sup>121</sup> At the same time, the civil jury has suffered a procedural bleeding of its power.<sup>122</sup> As a result, the civil jury serves mainly as a mere strategic pawn in the mass litigation game.

An analysis of the place of juries in federal civil litigation has to begin, and perhaps end, with the Seventh Amendment.<sup>123</sup> Though its guarantee of a jury trial in civil cases is one of the few provisions of the Bill of Rights never applied to the states, its place in the federal justice system is fundamental. Akhil Amar has forcefully argued the “big idea” of the jury beyond the textual guarantees in the Fifth, Sixth, and Seventh Amendments.<sup>124</sup> Professor Amar seeks to shift the focus

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<sup>121</sup> See, e.g., *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1084 (3d Cir. 1980) (“[D]ue process precludes trial by jury when a jury is unable to [resolve complex disputed issues] with a reasonable understanding of the evidence and the legal rules.”). Chief Justice Burger was famously willing to consider abolishing the civil jury:

I do not, for example, think it subversive to ask why England, the source of all our legal institutions, found it prudent and helpful 40 years ago to abandon jury trials for most civil cases. A whole range of important kinds of civil cases have been tried without juries since the beginning of the republic. If, as some American lawyers ardently advocate, it is sound to consider adopting British concepts of pretrial disclosure of all prosecution evidence in criminal cases, I hardly think we endanger the republic if we also make thoughtful inquiries into England’s civil procedures, and their ideas of finality of judgments, short of three or four appeals and retrials.

Warren E. Burger, Chief Justice of the U.S., Agenda for 2000 A.D.—A Need for Systematic Anticipation, Keynote Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976), in 70 F.R.D. 83, 89–90 (1976).

<sup>122</sup> See Dooley, *supra* note 1, at 333–34 (describing waning power of civil jury during twentieth century).

<sup>123</sup> U.S. CONST. amend. VII (“[T]he right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

<sup>124</sup> Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1176 (1995) [hereinafter Amar, *Reinventing Juries*]; see also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991) (“If we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury.”).

from litigants' rights in procuring jury trials to citizens' rights to serve on juries as an important exercise in civic participation.<sup>125</sup>

The civil jury's legitimacy is inextricably tied to its relationship with the community from which it is drawn. The verdicts of local juries in local cases seem legitimate when the jury's decisionmaking reflects local values. The legitimacy crisis in complex cases reflects the disconnect between the national scope of large-scale litigation and the local community from which the jurors hail.

This Part first analyzes the relationship between the waning legitimacy of the civil jury and the failure of the jury in large-scale litigation to serve as a fair cross-section of the national community affected. I argue that recreating the jury as a body of national scope can best realize the constitutional value of citizen participation. Previous experimentation with the jury, notably the use of "blue-ribbon" or special juries for fact-finding in complex cases, demonstrates that the concept of the civil jury is not static. The Part then tackles the tension between efficient centralization of large-scale litigation (which raises constitutional problems of reexamination) and inefficient relitigation of common issues before many different juries. I conclude that a national jury can achieve the efficiency goals without sacrificing citizen participation or risking unconstitutional reexamination.

#### A. *The (Il)legitimacy of the Civil Jury in Complex Litigation*

As cases grew more complex in the mid-twentieth century, both procedurally and substantively, some courts and commentators began to question the competence of juries to provide quality decisionmaking. The Supreme Court itself hinted at such a concern, albeit indirectly and in a footnote.<sup>126</sup> The Third Circuit later held that a jury unable to comprehend technical evidence in an antitrust case would not render a rational decision, resulting in a violation of due process.<sup>127</sup> The decision sparked a lively debate in the academic litera-

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<sup>125</sup> Amar, *Reinventing Juries*, *supra* note 124, at 1177. Professor Amar notes that Alexis de Tocqueville, the famous French chronicler of American democracy in the early half of the nineteenth century, found participation on civil juries to be even more important than participation on criminal juries. *Id.* at 1191.

<sup>126</sup> *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970). The Court listed factors to consider in determining whether the Seventh Amendment requires a jury trial in a particular case: "first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Id.*

<sup>127</sup> *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1084 (3d Cir. 1980). The Third Circuit reached the following conclusion:

[W]e find the most reasonable accommodation between the requirements of the fifth and seventh amendments to be a denial of jury trial when a jury will not be able to perform its task of rational decisionmaking with a reasonable understanding of the evidence and the relevant legal standards. In lawsuits of

ture,<sup>128</sup> but the Supreme Court has not returned to the issue in large-scale litigation.<sup>129</sup>

Others have suggested creative solutions to ameliorate the effects of a perceived lack of juror sophistication without running afoul of the Seventh Amendment. One such solution is to empanel a special or “blue-ribbon” jury in complex cases.<sup>130</sup> The idea behind the special jury is to empanel a collective decisionmaker that has expertise in the subject of litigation. It is not a new idea.<sup>131</sup> More than half of

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this complexity, the interests protected by this procedural rule of due process carry greater weight than the interests served by the constitutional guarantee of jury trial. Consequently, we shall not read the seventh amendment to guarantee the right to jury trial in these suits.

*Id.* at 1086. The Ninth Circuit reached the opposite conclusion in *In re U.S. Financial Securities Litigation*, 609 F.2d 411, 432 (9th Cir. 1979).

<sup>128</sup> See, e.g., Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 848 (1980) (surveying available sources and finding no historical support for “complexity exception” to jury trial right); Morris S. Arnold, *A Modest Replication to a Lengthy Discourse*, 128 U. PA. L. REV. 986, 987 (1980) (arguing that colonial Americans trusted juries and would not have allowed exception); James S. Campbell & Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965, 966–67 (1980) (disputing Professor Arnold’s historical analysis); Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 203–04, 205–20 (1990) (criticizing result in *Japanese Electronic Products* and advocating “more active jury model”); Richard O. Lempert, *Civil Juries and Complex Cases: Let’s Not Rush to Judgment*, 80 MICH. L. REV. 68, 68–72 (1981) (arguing that Supreme Court should not resolve issue presented in *Japanese Electronic Products* without empirical data about jurors’ decisionmaking ability); Frank M. Loo, *A Rationale for an Exception to the Seventh Amendment Right to a Jury Trial: In re Japanese Electronics Products Antitrust Litigation*, 30 CLEV. ST. L. REV. 647, 664–65 (1981) (approving test adopted by *Japanese Electronics Products* court).

<sup>129</sup> In other later cases involving the right to jury trial, the Court has focused only on the *Ross* factors of custom and remedy. E.g., *Tull v. United States*, 481 U.S. 412, 417–18 & n.4 (1987) (listing with approval custom and remedy factors and noting that “practical limitations” factor has never provided “independent basis for extending the right to a jury trial”). And in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), a patent infringement case, the Court assigned to the judge the task of construing the scope of the patent even though a jury trial right exists, on the ground that judicial “training and discipline” made the judge better qualified for the task. *Id.* at 388–89. The Court noted that its decision was possible only because it could find no clear historical answer as to whether this issue was one for the jury, thus indicating that history is still the predominant test. *Id.* at 384.

<sup>130</sup> See, e.g., Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 59–61 (1997) (arguing for at least some college-educated jurors in complex civil cases); Rita Sutton, Comment, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. CHI. LEGAL F. 575, 595–99 (proposing four models for special juries).

<sup>131</sup> Professor Oldham explains that the “special jury” had three different iterations during the seventeenth century: a jury of higher-class individuals, a jury of persons with special expertise in the subject of litigation, and a jury “struck” from a very large venire. James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 139 (1983). After 1730, the third iteration became synonymous with the term “special jury.” *Id.* at 140. That was the year that the “special jury” became a right recognized by statute in England;

American states had statutes authorizing the use of special juries during the first half of the twentieth century;<sup>132</sup> Delaware still has such a statute permitting special juries in complex cases.<sup>133</sup> The United States Supreme Court twice upheld the constitutionality of special or blue-ribbon juries in state courts against Fourteenth Amendment challenges that such a specially constituted body was not drawn from a fair cross-section of the community.<sup>134</sup>

There is some question about whether the fair cross-section requirement, which emanates from the Sixth Amendment's guarantee of an impartial jury,<sup>135</sup> applies in civil cases as a constitutional matter.<sup>136</sup> In civil cases pending in federal court, however, the Supreme Court has in its supervisory capacity imposed a fair cross-section requirement.<sup>137</sup> Most of the Court's analysis has developed on the criminal side of the docket. Supreme Court doctrine dictates that criminal jury panels must not systematically exclude "identifiable segments of the community,"<sup>138</sup> but does not guarantee that any particular petit jury will "reflect the various distinctive groups in the population."<sup>139</sup> Thus, the fair cross-section requirement allows innovations such as special juries, so long as the venire does not exclude distinct demographic groups.

Similarly, a national jury in a complex case would not run afoul of the cross-section requirement. The Supreme Court has consistently

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it was commonly used throughout the second half of the eighteenth century. Alan Feigenbaum, Note, *Special Juries: Deterring Spurious Medical Malpractice Litigation in State Courts*, 24 *CARDOZO L. REV.* 1361, 1398 (2003). England officially abolished the special jury in 1949. *Id.*

<sup>132</sup> Feigenbaum, *supra* note 131, at 1399.

<sup>133</sup> See DEL. CODE ANN. tit. 10, § 4506 (1999) ("The Court may [in its discretion] order a special jury upon the application of any party in a complex civil case.").

<sup>134</sup> Moore v. New York, 333 U.S. 565, 569 (1948); Fay v. New York, 332 U.S. 261, 296 (1947).

<sup>135</sup> U.S. CONST. amend. VI.

<sup>136</sup> See Mark A. Nordenberg & William V. Luneberg, *Decisionmaking in Complex Federal Civil Cases: Two Alternatives to the Traditional Jury*, 65 *JUDICATURE* 420, 424 (1982) ("[The Court's] relative silence with respect to civil actions may suggest that there is no constitutional cross section requirement in federal civil cases and that Congress is free to modify civil jury selection as it sees fit."); Feigenbaum, *supra* note 131, at 1406 ("[T]he Supreme Court has not had occasion to address the fair cross-section requirement in civil cases.").

<sup>137</sup> *E.g.*, Colgrove v. Battin, 413 U.S. 149, 160 n.16 (1973) ("[W]hat is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community."); Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946) ("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.").

<sup>138</sup> Apodaca v. Oregon, 406 U.S. 404, 413 (1972).

<sup>139</sup> Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

held that the fair cross-section requirement applies only to the jury venire, not to the panel chosen to sit in a particular case.<sup>140</sup> Indeed, given the concerns that the fair cross-section requirement addresses—namely, that the jury pool fairly reflect the relevant community—a national jury would *better* implement the constitutional ideal of community representation.

Assuming that a national jury would comport with the fair cross-section guarantee, would these verdicts carry more legitimacy? I think so for three interrelated reasons. First, national juries would not be subject to the criticism that local values should not set national policies. Judge Posner famously argued in the blood products litigation that “a single trial before a single jury” produced by class certification of a national “issues” class would allow that one jury to “hold the fate of an industry in the palm of its hand.”<sup>141</sup> He asserted that a better alternative would be to submit the issue to “multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers.”<sup>142</sup> A national jury might address Judge Posner’s concerns: The jury would be larger in number,<sup>143</sup> commensurate in scope to the dispute, and representative of the community that will feel the effect of the decision. This line of argument assumes that a national jury venire can be assembled in a representative way, a point that will require us in Part III to examine feasibility and logistical issues.

The second reason that national juries may produce more legitimate verdicts is that parties will lose the incentive to forum-shop. Filing a claim in a particular district will no longer carry the advantage of capturing a particular local jury pool.<sup>144</sup> After all, the perception of

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<sup>140</sup> *Id.* (holding that Sixth and Fourteenth Amendments do not require that petit juries, once chosen, actually “mirror the community”); *see also Thiel*, 328 U.S. at 220 (noting that Sixth Amendment does not require that individual jury “contain representatives of all the economic, social, religious, racial, political and geographical groups of the community”).

<sup>141</sup> *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

<sup>142</sup> *Id.* Admittedly, the national jury idea is more in sync with a “central planning” model of litigation than with a “market” model. *See supra* note 115 (contrasting ALI’s emphasis on aggregation with Judge Easterbrook’s preference for decentralization). But given the clear trend toward aggregate resolution of disputes—the dominance of the “central planning” model—the larger, more diverse national jury would avoid the provincialism of local juries and would facilitate citizen participation.

<sup>143</sup> Judge Posner noted that the typical federal civil jury consists of only six jurors and two alternates. *Rhone-Poulenc*, 51 F.3d at 1300. He later suggested increasing the size of federal juries to the traditional twelve to “obtain greater diversity of experience.” Posner, *supra* note 110, at 1498. As I explain in Part III, for a national jury to fulfill the promise of representing a cross-section of a nationally-defined community, it would likely have to be even larger in size. *See infra* text accompanying notes 166–71.

<sup>144</sup> Other forum-shopping incentives may remain, particularly with regard to choice of law, but a primary impetus for choosing a particular forum would be removed.

rampant forum manipulation motivated Congress to adopt legislation to shift most class actions and single-event tort cases to federal courts.<sup>145</sup> A national jury system would align the decisionmaker with Congress's nationalization impulse.

Third, national jury verdicts will have greater legitimacy because the quality of decisionmaking is likely to improve when jurors are drawn from a national pool. Venire members drawn from local pools are more likely to share local biases, and these biases are mutually reinforcing during deliberations.<sup>146</sup> Indeed, this bias factor is precisely why litigants forum-shop. The national venire will negate that problem, and could maximize diversity in terms of both demographics and interests.<sup>147</sup> Thus could we gain the superior collective decision-making of a group with "diffused impartiality."<sup>148</sup>

### B. *The (In)efficiency of the Civil Jury in Complex Litigation*

Thus far, the Seventh Amendment's Reexamination Clause has forced us to tolerate some efficiency loss and forum manipulation because the clause is an important check on procedural innovations to streamline complex litigation. Techniques that pluck out particular issues for aggregate resolution (like issue classes under Rule 23(c)(4))<sup>149</sup> or for separate treatment (like bi-, tri-, or polyfurcation)<sup>150</sup> risk forbidden "reevaluation" if future juries decide the remaining overlapping issues.<sup>151</sup> For example, if an initial jury deter-

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<sup>145</sup> See *supra* notes 58–60 and accompanying text (describing policies motivating CAFA's passage).

<sup>146</sup> This could be an advantage in criminal cases, which require us to recognize local community norms that might legitimately vary from place to place. The federalization of criminal prosecution, with its concomitant enlargement of the jury pool, diminishes the role of local norms, to the detriment of the criminal justice system. See Dooley, *supra* note 18, at 103–04 (discussing importance of local values in criminal law and jury service). But in civil cases of national scope, we should avoid the prospect of national policy held hostage to local norms.

<sup>147</sup> Cf. *infra* notes 164–65 and accompanying text (summarizing debate on how to increase minority representation in jury venires).

<sup>148</sup> Taylor v. Louisiana, 419 U.S. 522, 530–31 (1975).

<sup>149</sup> See Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 597–601 (2004) (describing issue classes and questioning their legitimacy).

<sup>150</sup> See generally Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705 (2000) (describing issue bifurcation and recommending its use to promote efficiency in complex litigation).

<sup>151</sup> See, e.g., Castano v. Am. Tobacco Co., 84 F.3d 734, 751 (5th Cir. 1996) (refusing to certify national class of smokers due to "risk that in apportioning fault, the second jury could reevaluate the defendant's fault . . . [and thereby] impermissibly reconsider[ ] the findings of a first jury"); see also Woolley, *supra* note 95, at 519–20 (describing Fifth Circuit's analysis in *Castano* on reexamination problem); *supra* notes 93–96 and accompanying text (describing efforts by ALI to prescribe streamlining procedures in complex litigation without running afoul of reexamination clause).



mines that a company was negligent in its product design, subsequent juries might have to assess the relative culpability of the defendant in order to determine damages to a particular victim under a comparative negligence rule.<sup>152</sup> This determination would require “reexamining” the earlier jury’s finding of negligence.

The reexamination problem creates tension between competing values in complex litigation: Consolidated cases may lead to unconstitutional reexamination of overlapping issues, yet trying individual cases presents problems of efficiency loss and forum manipulation. We must therefore choose between the evil of bifurcation and the evil of inefficient relitigation of the same issue, with the concomitant risk of inconsistent results. A third option—treating a single litigation as a national unit—vests too much power in one local jury to unleash national consequences.

Is there a fourth option? Empanelling a national jury would mitigate reexamination problems while preserving the efficiency gains of aggregation. A national jury would also address the concern that a local citizenry should not decide issues of national importance. Judge Posner’s critique—that one jury should not hold an entire industry in its hand<sup>153</sup>—may well reflect concerns about the relative provincialism of local juries rather than a distrust of juries generally.<sup>154</sup> Indeed, Judge Posner indicated that individual trials—with individualized jury verdicts—would be beneficial.<sup>155</sup> Multiple trials avoid the reexamination problem but create problems ranging from inconsistent verdicts to multiple rounds of out-of-control discovery, perhaps hundreds of times over. That path leads right back to forum-shopping.

A national jury system could assuage the concern about the disproportionate influence of local juries without reverting to the forum-shopping frenzy. Empanelling a national venire would remove the reexamination problem that arises when local juries rebuff findings made by other local juries in distant courts. Thus, we can enjoy the efficiency gains of aggregation devices without sacrificing our constitutional commitment to lay decisionmaking in civil cases.

Moreover, by drawing jurors from a national pool in appropriate cases, courts can entrust important issues to a decisionmaker that reflects the affected national community. This “more diverse sample

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<sup>152</sup> See, e.g., *Castano*, 84 F.3d at 751 (denying class treatment because of this risk).

<sup>153</sup> See *supra* note 141 and accompanying text.

<sup>154</sup> See Posner, *supra* note 110, at 1493–94 (noting advantages of collective decision-making and “freshness” of juror perspectives).

<sup>155</sup> *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995). Individual trials would have been feasible in the blood products case because each plaintiff could receive a judgment worth “millions,” thus overcoming the transaction costs of litigation. *Id.*

of decision-makers”<sup>156</sup> would understand the gravity and scope of their collective task and render a verdict carrying greater legitimacy.

I began this Part by asserting that an analysis of the jury must begin and end with the Seventh Amendment. Many of the procedural innovations proposed or executed in complex litigation over the last few decades have run afoul of Seventh Amendment scrutiny, making clear that the jury trial right trumps many efficiency concerns. In cases of national scope, the civil jury has special importance, and preserving the “big idea” of the jury in such cases requires us to think outside the (jury) box. Empanelling a national jury requires us to consider the feasibility of assembling a jury pool on a national scale, a subject to which I now turn.

### III

#### THE FEASIBILITY OF NATIONAL JURIES

Having concluded that national juries would enhance both the legitimacy and efficiency of large-scale litigation, many practical issues emerge. This Part will take a first stab at identifying those practical concerns and will make suggestions for addressing them. I first take up the problem of assembling a national jury pool by examining the current federal jury selection process and comparing other federal procedural mechanisms that allow courts to reach beyond district or state borders to facilitate litigation. The Part then considers structural and cost issues. One theme permeates the discussion: Our willingness to work out the logistical details of the national jury proposal and to absorb its inevitable costs is a function of our commitment to citizen participation in large-scale litigation.

##### *A. Assembling Jury Pools on a National Scale*

Legislative innovations, such as CAFA and MMTJA, have federalized most national cases, removing what might otherwise be a major impediment to the assembly of a national jury pool: the limits of state sovereignty.<sup>157</sup> Federal jurisdiction, however, does not confer the power to summon jurors across state lines. The Jury Selection and

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<sup>156</sup> *Id.*

<sup>157</sup> Notions of state sovereignty are tied to territorial boundaries. *See Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (“[N]o State can exercise direct jurisdiction and authority over persons or property without its territory. . . . [N]o tribunal established by [the state] can extend its process beyond that territory. . . .”). Though the strict territorialism of *Pennoyer* has been relaxed somewhat to allow states to exercise personal jurisdiction over out-of-state defendants who have “minimum contacts” with that state, *see Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945), there is no authority for the courts of one state to summon jurors from another.

Service Act of 1968 (JSSA), which governs the assembly of federal jury pools, defines the relevant community from which a jury shall be drawn as the federal district or division.<sup>158</sup> To assemble a federal jury drawn from a cross-section of a larger geographical area would therefore require an amendment to the JSSA.

Though federal courts do not issue jury summonses outside their immediate districts, no legal impediment exists beyond the statutory constraint of the JSSA. As the judicial arm of the federal sovereign, federal courts' power is defined by national, not state or district, borders. Indeed, federal courts already exercise power that reaches beyond the borders of the state in which they sit. For example, federal courts can exercise personal jurisdiction over parties joined as necessary parties<sup>159</sup> or by impleader<sup>160</sup> if they are within a hundred-mile radius of the court.<sup>161</sup> Some federal statutes allow for nationwide service of process, effectively giving federal courts personal jurisdiction over parties on a national scale.<sup>162</sup> Federal courts also have power to compel the attendance of witnesses across state lines, within specified geographical limits.<sup>163</sup>

One difficulty, of course, will be assembling a national jury pool representative of a country as large and diverse as the United States. Even in much smaller jury districts, underrepresentation of minorities on jury venires has sparked an enormous amount of scholarly literature and litigation.<sup>164</sup> Congress would have to consider how to

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<sup>158</sup> 28 U.S.C. § 1861 (2000).

<sup>159</sup> FED. R. CIV. P. 19.

<sup>160</sup> FED. R. CIV. P. 14.

<sup>161</sup> FED. R. CIV. P. 4(k)(1)(B).

<sup>162</sup> See, e.g., 28 U.S.C. § 2361 (2000) (allowing nationwide service of process in federal statutory interpleader cases).

<sup>163</sup> FED. R. CIV. P. 45(b)(2). Moreover, the ALI has proposed that courts handling complex litigation be given the power to issue subpoenas for attendance at a hearing or trial "at any place within the jurisdiction of the United States, or anywhere outside the United States if not otherwise prohibited by law." COMPLEX LITIGATION, *supra* note 84, app. A § 1785, at 445.

<sup>164</sup> See Dooley, *supra* note 18, at 79 & n.1 (describing academic literature on fair cross-sections); see also *id.* at 83–87 (describing fair cross-section jurisprudence). The traditional method of using voter registration rolls to assemble venires exacerbates the problem; indeed, the Act explicitly commands that federal courts devise an alternate plan for generating names of prospective jurors when the voter lists disproportionately exclude minorities. 28 U.S.C. § 1863(b)(2) (2000). Professor Kim Forde-Mazrui has coined the term "jural districts" to describe subdivisions within judicial districts that could be drawn to capture "communities of interest"—a concept borrowed from the law of electoral districting—to address the underrepresentation problem. Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 389–95 (1999). Juries would then be assembled by drawing from each of the jural districts, thus assuring that each "community of interest" is represented in the jury pool. *Id.* at 389. As Professor Forde-Mazrui explains, this method would yield juries that are

assemble a nationally representative venire. A starting point might be to draw candidates for the national jury pool from congressional districts, since those boundaries have already withstood constitutional and statutory scrutiny under election laws.<sup>165</sup> The census process could also be used to draw districts. Choosing a method of assembly requires consideration of other procedural issues, such as the size and structure of the venire and the petit jury. The next Section will survey some of these logistical problems and offer ideas as to how they might be resolved.

### B. *Matters of Structure, Size, and Cost*

The expansion of jury pools from local to national may require us to rethink the size of the venire and the petit jury, as well as verdict format and voting mechanisms. The trend in recent decades has been to shrink the jury from its traditional twelve-member structure to a new six-person jury composition.<sup>166</sup> The discussion surrounding this issue in *Colgrove* focused on what number is too low for a jury to perform its proper function of group deliberation by a representative cross section.<sup>167</sup> In order for a national jury to function, however, the discussion may well have to shift to how *large* a group can effectively deliberate without becoming unwieldy. The question should not be constrained by a rigid allegiance to the traditional size of juries. Given the justifications for empanelling a national jury, including jurors representing a cross section of the *national* community will require an expansion of size to accommodate the diverse demographics of that community.

Professor Amar notes that “there is nothing magic about twelve” and argues that bigger is better.<sup>168</sup> Increasing the size of the jury allows more people to gain access to jury service and improves cross-sectional representation.<sup>169</sup> Once we sever our commitment to the number twelve, we recognize that larger groups function well as grand

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more diverse than under the current system—a value of particular importance in criminal cases. *Id.* at 390–91.

<sup>165</sup> Congressional districts could comprise “jural districts” as described by Professor Forde-Mazrui. *Id.* at 389–95.

<sup>166</sup> See *Colgrove v. Battin*, 413 U.S. 149, 150–51 (1973) (upholding local rule in Montana that provided for six-person juries in civil trials). Subsequently, the federal rules changed to authorize six-person juries. See FED. R. CIV. P. 48 (“A jury must initially have at least 6 and no more than 12 members, and each juror must participate in the verdict . . . . Unless the parties stipulate otherwise, the verdict must be unanimous and be returned by a jury of at least 6 members.”).

<sup>167</sup> *Colgrove*, 413 U.S. at 160 n.16.

<sup>168</sup> Amar, *Reinventing Juries*, *supra* note 124, at 1188.

<sup>169</sup> *Id.*

juries<sup>170</sup> and legislatures.<sup>171</sup> Arriving at a precise number will depend on a complex matrix of factors—a task that is beyond the scope of this exploratory Article but is feasible.

The grand jury model may prove useful. One can imagine a national jury as a cross between the grand jury and the special jury:<sup>172</sup> Jurors could serve for specified lengths of time, perhaps in particular courts hosting MDL complex litigation. The learning curve for such jurors would be high. Having decided, say, causation issues in one products liability case, the national jury would have an informational advantage in understanding procedure and applicable substantive law for other cases. And this gain can be realized without sacrificing the democratic makeup of the jury—a quality lost in elitist special juries.

Next, we must consider what voting mechanisms would produce optimal efficiency and confidence in the outcome. The traditional requirement of jury unanimity ensures that every juror's voice counts<sup>173</sup>—a concern that may seem particularly acute given the diversity of views that we hope a national jury pool would produce. Professor Amar, however, points out that requiring unanimity (in the criminal law context) may in fact be undemocratic because it “create[s] an extreme minority veto unknown to the Founders.”<sup>174</sup> In fact, many courts have relaxed the unanimity requirement in civil cases,<sup>175</sup> paving the way for creative approaches to the issue. Particularly if national juries are to be larger than six or twelve members, a majority or supermajority system might work well (as it does in grand juries and legislative bodies).<sup>176</sup> Moreover, Professor Amar suggests a way to preserve the deliberative advantages of a unanimity requirement without it becoming a rigid constraint—by gradually decreasing

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<sup>170</sup> *Id.* at 1189 (noting that “grand juries typically have twenty-three members”). See generally 18 U.S.C. § 3321 (2000) (providing that grand juries shall have no fewer than sixteen members and no more than twenty-three); FED. R. CRIM. P. 6(a)(1) (same).

<sup>171</sup> Amar, *Reinventing Juries*, *supra* note 124, at 1189.

<sup>172</sup> See *supra* notes 130–33 and accompanying text (describing special jury and its past and present use in states).

<sup>173</sup> See, e.g., Amar, *Reinventing Juries*, *supra* note 124, at 1191 (“Friends of unanimity argue that it promotes serious deliberation—everyone’s vote is necessary, so everyone is seriously listened to.”).

<sup>174</sup> *Id.* at 1190.

<sup>175</sup> See Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 203 (2006) (noting that although federal courts still require unanimity of civil jury verdicts, only eighteen states do, while another three states allow nonunanimous verdicts after six hours of deliberation).

<sup>176</sup> *Cf.* Amar, *Reinventing Juries*, *supra* note 124, at 1189–90 (discussing use of majority rule by grand juries and legislatures and use of supermajority rule by Senate in impeachment context). *But see* Diamond et al., *supra* note 175, at 230 (concluding that cost of unanimity is “overblown”).

the required number of votes to reach a verdict as deliberation goes on.<sup>177</sup>

To avoid Reexamination Clause problems, a national jury could answer discrete questions regarding issues common to many cases. Thus, its work product would take the form of a special verdict, which could be *res judicata* in future or satellite litigation.<sup>178</sup> This would make clear the precise contours of the national jury's decision-making<sup>179</sup> and alleviate confusion as to what issues the national jury actually decided.<sup>180</sup>

Other logistical concerns would be primarily a matter of cost, such as transportation and lodging. The justice system has long provided a mechanism—sequestration—for accommodating jurors outside their homes when necessary to ensure that they are insulated from exposure to press about the case they are deciding.<sup>181</sup> Though this is a costly procedure, both in terms of financial costs to the government and personal sacrifices by the jurors, courts justify sequestration in the pursuit of fair trials,<sup>182</sup> demonstrating commitment to the democratic and legitimating functions of the jury. Adapting the sequestration procedure to facilitate a national jury would multiply those costs, and in choosing national jurors courts must be sensitive to the toll such service will take.<sup>183</sup> Moreover, technological advances that have facilitated other areas of procedure—discovery is a prominent example—could reduce some of the costs and inconvenience.<sup>184</sup>

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<sup>177</sup> Amar, *Reinventing Juries*, *supra* note 124, at 1191 (proposing system by which “on Day 1, a jury must be unanimous to convict; on Day 2, 11-1 will suffice; on Day 3, 10-2, and so on, until we hit our bedrock limit of, say two-thirds (for conviction), or majority rule (for acquittal)”).

<sup>178</sup> *Cf.* Woolley, *supra* note 95, at 542 (arguing that judicious use of special verdicts and jury instructions can alleviate reexamination clause problems).

<sup>179</sup> *Cf.* Sherman, *supra* note 7, at 705 (“Undoubtedly issues that are not sufficiently free-standing to warrant separate trial should not be the subject of bifurcation. But presumably a second jury would be instructed that it had to accept the first jury’s findings.”).

<sup>180</sup> See FRIEDENTHAL ET AL., *supra* note 4, § 14.11, at 710 n.15 (noting that general verdicts “reveal only whether liability was found and, if so, for how much,” while special verdicts “may include the information necessary to decide questions of issue preclusion”).

<sup>181</sup> See generally Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 77 (1996) (explaining that purpose of sequestration is to shield jurors from prejudicial publicity, pressure of others, and threats by those wishing to influence verdict).

<sup>182</sup> See *id.* at 77–116 (weighing costs and benefits of sequestration). Professor Strauss challenges the assumption that jurors are highly susceptible to outside influences and argues that we should trust jurors, as we do judges, to decide cases according to the evidence. *Id.* at 70.

<sup>183</sup> Perhaps national jurors could be chosen, at least initially, on a volunteer basis. Juror questionnaires could be adapted to ascertain prospective jurors’ amenability to serving at a distant location for particular lengths of time.

<sup>184</sup> See, for example, the increasing use of video conferencing to manage complex litigation. Some courts have even experimented with video testimony and “virtual” presence of

Ultimately, our willingness to grapple with logistical problems reflects our commitment to lay decisionmaking in civil cases. As the Fifth Circuit once noted, “[I]t seems that the defendants enjoy all of the advantages, and the plaintiffs incur the disadvantages, of the class action—with one exception: the cases are to be brought to trial.”<sup>185</sup> Adapting the civil jury to national litigation corrects the power imbalance between plaintiffs and defendants and reasserts our constitutional commitment to citizen participation in civil justice.

#### CONCLUSION

##### PRESERVING THE CIVIL JURY IN THE TWENTY-FIRST CENTURY

The civil jury, though steeped in history, is not frozen in time. In an era of increasingly complex litigation, the civil jury must adapt structurally to modern disputes while preserving its rich history and constitutional function. Though there will always be cases at the margins and some risk of party manipulation, we can identify most cases that are truly national in scope using largely objective procedural criteria. Indeed, Congress has already laid the groundwork in the MDL statute, CAFA, and MMTJA. Courts can evaluate particular cases by reference to the functional criteria outlined in Part II: Will a local jury impose local values on the rest of the nation? Is there an incentive for the parties to forum-shop? Would geographical diversity of jurors enhance the quality of decisionmaking?

The civil jury is under threat in mass complex litigation. The Supreme Court has repeatedly emphasized that the Seventh Amendment preserves the right to a jury trial generally, rather than the right to a jury trial in its precise form as of the time of ratification.<sup>186</sup> Adapting the ancient institution of the jury by nationalizing it in national cases honors the commitment to citizen participation that is at the heart of the Seventh Amendment. Conversely, using provin-

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parties via video conferencing at trial. *See, e.g.*, *Edwards v. Logan*, 38 F. Supp. 2d 463, 464 (W.D. Va. 1999) (permitting jury trial for prisoner’s civil rights claim to be held through video conferencing). *See generally* Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan’s Celestial City*, 98 COLUM. L. REV. 1516, 1524–29 (1998) (discussing prospect of “virtual trials”); James L. McCrystal & Ann B. Maschari, *Will Electronic Technology Take the Witness Stand?*, 11 U. TOL. L. REV. 239, 250–51 (1980) (advocating use of video in trials as “a means of administering justice far superior to our present system”).

<sup>185</sup> *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986). Indeed, it would be interesting to see how the implementation of a national jury regime in mass litigation would affect settlement strategies. That is, if the possibility of jury trial becomes more pressing, and if the parties are unable to forum-shop into particular jury pools, then “bargaining in the shadow” of the jury trial once again becomes an important factor. Marc Galanter, *The Regulatory Function of the Civil Jury*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 61, 62 (Robert E. Litan ed., 1993).

<sup>186</sup> *E.g.*, *Colgrove v. Battin*, 413 U.S. 149, 155–57 (1973).

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cialism of local juries as a reason for eliminating the jury trial affronts the Constitution. Professor Amar has urged that we preserve the “big idea” of the jury by “creative accommodation” to modern conditions.<sup>187</sup> Empanelling national juries in cases of national scope is just such a “creative accommodation”—and may well be the only way to preserve citizen participation in large-scale litigation.

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<sup>187</sup> Amar, *Reinventing Juries*, *supra* note 124, at 1193–94.