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Against Summary Judgment

John Bronsteen*

Abstract

Summary judgment today is what settlement was twenty-five years ago: an increasingly popular and important form of dispute resolution, widely lauded for its efficiency, that has just begun to capture the full attention of civil procedure scholarship. Despite strong evidence that summary judgment violates the right to jury trial in civil cases guaranteed by the Seventh Amendment, most people assume this mechanism is necessary for our system to function at reasonable cost. This Article calls that assumption into question, suggesting that summary judgment actually costs us more than it saves and that our civil justice system would be both fairer and more efficient without it. Most cases that now go to summary judgment would settle early rather than go to trial if those were the only two options. By discouraging early settlement, summary judgment imposes large costs because the lion's share of litigation takes place before trial. Moreover, summary judgment creates a systemic pro-defendant bias due to the pressure on judges to move their dockets along by terminating cases rather than letting them proceed to trial.

Introduction

For centuries, the paradigm for resolving a legal dispute was a trial.¹ But about twenty-five years ago, legal scholarship began to take note of a shift away from that paradigm.² Empirical studies demonstrated that most cases were resolved by settlement rather than trial, and although this trend was lamented by a few (including most famously Owen Fiss in his article *Against Settlement*),³ it was supported by two emerging pillars of the legal academy. One was the field of law and economics, which welcomed settlement as a cheap and efficient

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¹ See, e.g., Stephan Landsman, *The Civil Jury Trial in America*, 62 *LAW & CONTEMP. PROBS.* 285, 285 (1999) ("Americans have relied on juries of ordinary citizens to resolve their civil disputes since the beginning of the colonial period.").

² E.g., Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 *UCLA L. REV.* 485, 502 (1985) ("Over 90% of all cases (both civil and criminal) are currently settled and taken out of the system and, thus, are unavailable for common law rule making."); Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374, 404 (1982).

³ Owen Fiss, Comment, *Against Settlement*, 93 *YALE L.J.* 1073 (1984).

alternative to adjudication.⁴ The other was the field of alternative dispute resolution, which grouped settlement with mediation and arbitration as less adversarial means of working through disagreements.⁵ Settlement was a boon to both litigants and the court system because it avoided the costs of trial. With broad approval from judges, parties, and academics, settlement was the new paradigm as the twentieth century ended.

But settlement and trial are not the only ways to resolve a legal dispute, and a third option has recently become so prominent as to mirror the focus attracted by settlement in the early 1980s.⁶ This new option is pretrial adjudication, typically in the form of summary judgment. When one party sues another, the defendant refuses to settle and instead litigates—but with the hope of never seeing a jury. After each side shows the other all of its relevant documents, propounds interrogatories to the opposing party, and makes available its witnesses for questioning via depositions, the parties ask the court to grant judgment in their favor on the ground “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”⁷

Judges now grant these motions so often⁸ that summary judgment stands alongside trial and settlement as a pillar of our system.⁹ A defendant¹⁰ can use this mechanism to rid itself of litigation without ei-

⁴ E.g., George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 135 (1993) (“Litigation is a negative-sum proposition for the litigants—the longer the process continues, the lower their aggregate wealth.”).

⁵ See, e.g., Menkel-Meadow, *supra* note 2, at 504 (“Settlement can be particularized to the needs of the parties, it can avoid win/lose, binary results, provide richer remedies than the commodification or monetarization of all claims, and achieve legitimacy through consent.”).

⁶ See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 600 (2004).

⁷ FED. R. CIV. P. 56(c). Although a party may move for summary judgment from the beginning of a suit, FED. R. CIV. P. 56(a)–(b), the rule gives judges discretion to continue a motion until further discovery has taken place, FED. R. CIV. P. 56(f).

⁸ See Burbank, *supra* note 6, at 592 (“[T]he rate of case termination by summary judgment in federal civil cases nationwide increased substantially in the period between 1960 and 2000 . . .”).

⁹ See Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 705 (2004) (using electronic docketing data to reach the “surprising conclusions that a smaller percentage of cases were disposed of through settlement in 2000 than was the case in 1970, [and] that vanishing trials have been replaced not by settlements but by nontrial adjudication”).

¹⁰ Although summary judgment can be granted in favor of either a plaintiff or a defendant, it is granted far more often in favor of the defendant. Burbank, *supra* note 6, at 616 (“In [fiscal year] 2000, judges in the Eastern District [of Pennsylvania] granted 293 motions for sum-

ther risking trial or paying a settlement, and the refusal to settle might discourage future lawsuits. Because summary judgment avoids the time and expense of trial, it also appeals to commentators who prize efficiency.¹¹ It is thus a staple of how today's U.S. civil justice system conducts business, and most view this state of affairs as a welcome development.¹²

Amid this movement toward an increasingly central role for summary judgment, there have been a few cautionary voices. When the Supreme Court started us down this road twenty years ago by making it easier for judges to grant summary judgment,¹³ some scholars wondered whether the intended improvements in efficiency would materialize¹⁴ or whether the right to a jury trial was being unduly restricted.¹⁵ And recently, a few scholars have begun to voice concerns that the

mary judgment (87 for plaintiffs and 206 for defendants)"); D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 900 n.142 (2006). Because the Administrative Office of the U.S. Courts does not keep statistics on summary judgment, Rave, *supra*, at 900, statistics must be calculated based on individual studies, e.g., Burbank, *supra* note 6, at 616–18 (collecting data from the Eastern District of Pennsylvania), or audits of sampled electronic docket information, e.g., Hadfield, *supra* note 9, at 712–23 (auditing electronic data for input error and compiling “corrected” data).

11 EDWARD J. BRUNET ET AL., *SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE* 1 (2d ed. 2000) (“Rule 56 performs a ‘workhorse’ task in the federal procedural system and occupies center stage in attaining the central goal of conserving the expenditure of judicial resources.”).

12 See *infra* note 17.

13 See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). This “trilogy” drastically reduced barriers for granting summary judgment motions. Before the trilogy, the judicial attitude toward summary judgment was perhaps best summed up by an Alabama courthouse sign that read “No Spittin’, No Cussin’ and No Summary Judgment.” Susan T. Wall, “No Spittin’, No Cussin’ and No Summary Judgment”: *Rethinking Motion Practice*, S.C. LAW., June 1997, at 29, 29.

14 Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 100 (1990) (“[C]hanges that facilitate judicial disposition of cases but impede settlement may fail to relieve, if not exacerbate, court congestion.”); see also Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crises,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1047 (2003) (“[C]ritics have questioned whether the [trilogy] decisions really will produce gains in efficiency, pointing out that summary judgment motions take time to prepare, support, and decide (realities that are likely to have been increased by the motion’s post-1986 vitality), often slow a case’s forward progress, and typically save time only when granted.” (citation omitted)).

15 E.g., Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 775 (1988) (“[W]hen the moving party would have the burden of persuasion at trial, the courts have . . . strained to permit the granting of the motion by interpreting the amendment not to include a strict submission of matters of credibility to the jury, a questionable determination.”); see also Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 141–42 (2000) (“[T]he increase in summary dispositions of civil cases stirs fear that, in the haste to resolve weak cases, courts risk overriding

summary judgment revolution might have gone too far.¹⁶ But these detractors have been all but drowned out in a sea of support for the new regime of dispute resolution, and even the detractors object merely to how often summary judgment is used, rather than to the fact that it is used at all.¹⁷ Indeed, the idea of questioning the legitimacy of summary judgment altogether is widely regarded as “a legal lunacy.”¹⁸

Against this backdrop, it makes sense that a forthcoming article titled “Why Summary Judgment Is Unconstitutional”¹⁹ has received such intense interest and provoked such profound surprise.²⁰ This article by Suja Thomas contends that summary judgment violates the Seventh Amendment to the U.S. Constitution, which guarantees the right to a jury trial in civil cases. The argument is straightforward: when we allow a judge to keep a plaintiff’s lawsuit away from a jury

the constitutional imperatives of due process and the right to a civil jury trial under the Fifth and Seventh Amendments.”)

¹⁶ E.g., Miller, *supra* note 14, at 1047; Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1941 (1998) (“Its flame lit by *Matsushita*, *Anderson*, and *Celotex* in 1986, and fueled by the overloaded dockets of the last two decades, summary judgment has spread swiftly through the underbrush of undesirable cases, taking down some healthy trees as it goes.”); Rebecca Silver, Note, *Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. CHI. L. REV. 731, 751–52 (2006) (lamenting that summary judgment has become the status quo for Freedom of Information Act decisions, even when genuine issues of material fact exist); Milton I. Shadur, *An Old Judge’s Thoughts*, CBA REC., January 2004, at 27, 27 (“From my perspective that trend has gone much too far, to the benefit of no one involved in the justice system . . .”).

¹⁷ E.g., BRUNET ET AL., *supra* note 11, at 327 (“Summary judgment should be seen as a potential expense-saving device to avoid an unnecessary trial.”); Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1853 (2004) (“[M]andating summary judgment as a condition precedent to entering into an enforceable settlement agreement eliminates the potential payoff from nuisance-value strategies, removing any incentive to employ them.”); Georgene M. Vairo, *Through the Prism: Summary Judgment After the Trilogy* (2003), in CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS, at 1543, 1564 (ALI-ABA, Coursebook, 2006) (“Justice Rehnquist’s opinion [in *Celotex*] is a veritable ode to the superiority of summary judgment as a means of fairly, efficiently and economically disposing of claims.”); see also Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1335 (2005) (“Because the very purpose of summary judgment is to avoid unnecessary trials, one need not be a trained logician to conclude that an increase in the availability of summary judgment will naturally have a corresponding negative impact on the number of trials.”).

¹⁸ Mollica, *supra* note 15, at 205.

¹⁹ Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).

²⁰ The article has attracted, as of this writing, 5149 abstract views and 1019 downloads on the Social Science Research Network. See Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886363 (last visited Mar. 23, 2007). It was also featured on two leading Weblogs. Legal Theory Blog, http://lsolum.typepad.com/legaltheory/2006/02/suja_on_the_con.html (Feb. 22, 2006, 18:33 CST); How Appealing, <http://howappealing.law.com/022206.html#011509> (Feb. 22, 2006, 21:50 EST).

on the ground that no “reasonable jury could find for”²¹ the plaintiff, we have violated the constitutional decree that “[i]n suits at common law, . . . the right of trial by jury shall be preserved.”²² Thomas notes that the Supreme Court has always interpreted the Seventh Amendment to mean that the jury trial right must never be limited further than it was at common law in 1791 (otherwise it would not be fully “preserved”), and she explains that neither summary judgment nor its equivalent existed at common law.²³

Thomas’s paper deserves the attention it has received, and its arguments are convincing with respect to history and textual interpretation. I doubt that anyone will mount a successful rebuttal to those points. Nonetheless, I doubt even more strongly that Thomas’s historical and interpretive arguments alone will persuade courts to abolish summary judgment. As the last half century of legal scholarship has demonstrated, courts temper their adherence to doctrine with a healthy dose of concern for the practical implications of their decisions. Because summary judgment is such an integral part of the everyday workings of the U.S. civil justice system, and because everyone assumes that the system would be crushed under the weight of innumerable trials if summary judgment disappeared, courts will turn a blind eye to the interpretive problems raised by Thomas and by the litigants who will cite her work.²⁴

I view this near-certain outcome as unfortunate—not because I believe that courts should ignore practical considerations, but rather because I think their assumptions about such considerations are inaccurate in this context. Specifically, I think that the civil justice system would actually enjoy a net benefit from abolishing summary judgment, in terms of both efficiency²⁵ and fairness.²⁶ To put it another way, *it would behoove us to abolish summary judgment even if we were not constitutionally obligated to do so*. My hope is that the twin problems of its unconstitutionality and its concrete harm might together be enough to persuade courts (or amenders of the Federal

21 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); BRUNET ET AL., *supra* note 11, at 267. This is the standard set out by the Supreme Court for whether summary judgment should be granted, and it governs current practice.

22 U.S. CONST. amend. VII.

23 See Thomas, *supra* note 19, at 148–58 (outlining the procedural mechanisms available at common law and concluding that summary judgment does not resemble those procedures).

24 To her credit, Thomas anticipates this point and addresses it in a couple of paragraphs near the end of her paper. See Thomas, *supra* note 19, at 177–79.

25 *Infra* Part I.C.

26 *Infra* Part II.A.

Rules of Civil Procedure) to move away from this practice rather than embrace it. We would be better off if we returned to the old paradigms of settlement and trial than if we maintained our current reliance on pretrial adjudication as the new dominant mode of resolving disputes.

I. *The Monetary Cost of Summary Judgment*

A. *Litigation in a System with Summary Judgment*

The single most important reason that courts and scholars will resist abolishing summary judgment is their assumption that without it, too many cases will go to trial.²⁷ But as we will see, this assumption ignores the main way in which summary judgment is currently used.

Plaintiffs, defendants, and lawsuits come in many different shapes and sizes, but in today's American civil justice system, perhaps the most typical defendant is a large corporation that is sued often by consumers, employees, shareholders, other corporations, or all of the above. Knowing that it must defend many lawsuits, the corporation seeks to minimize the two types of costs those suits create: attorneys' fees²⁸ and payouts to plaintiffs.

The most effective way to reduce attorneys' fees is to settle immediately, once the lawsuit is filed.²⁹ All else being equal, this would be the most appealing choice because it ends the litigation before lawyers start charging hefty hourly fees for discovery and other pretrial work that can take a very long time to complete. Saving these attorneys' fees is a crucial motivator for a corporate defendant.

But it can conflict with the other main motivator: avoiding large payouts to plaintiffs. Although early settlements help defendants avoid the worst-case scenario—an adverse jury verdict and accompanying huge assessment of damages—they also create two problems. First, they foreclose the best-case scenario of paying no money at all to the plaintiff; such a result could be reached only by a favorable judgment.³⁰ Second, settlement encourages other plaintiffs to bring lawsuits (and can even encourage the same plaintiff to bring new law-

²⁷ BRUNET ET AL., *supra* note 11, at 327.

²⁸ Stephen M. Bundy, Comment, *Commentary on "Understanding Pennzoil v. Texaco": Rational Bargaining and Agency Problems*, 75 VA. L. REV. 335, 346 (1989) ("In ordinary civil cases, the principal litigation cost is attorneys' fees . . .").

²⁹ Loewenstein et al., *supra* note 4, at 135.

³⁰ Issacharoff & Loewenstein, *supra* note 14, at 107 ("[T]he major benefit of summary judgment to the defendant is the possibility that she will prevail on the motion.").

suits with different claims), thereby multiplying the defendant's total costs of paying those who sue the corporation.³¹

What looms largest in this calculus is the ever-present awareness of the worst-case scenario: a jury verdict and "nuclear" award of damages to the plaintiff.³² Although early settlements can encourage some copycat lawsuits, nothing attracts the attention of plaintiffs' attorneys and would-be litigants like a large judgment.³³ In addition, such a judgment (which, unlike the terms of a settlement, is always public) can diminish the confidence of consumers and investors, thereby costing the company in ways that go beyond the assessed damages.³⁴ Most of all, those damages themselves can be staggering, sometimes reaching well into the hundreds of millions or even billions of dollars.³⁵

So the challenge for a defendant is to avoid at all costs the worst-case scenario while trying to walk the line between minimizing attorneys' fees and minimizing settlement payouts. In some cases, these goals are best achieved by early settlement. But in an increasingly large number of cases, defendants are choosing a different option. They litigate the case to summary judgment, hoping to win at that

³¹ Lee W. Rawles, Note, *The California Vexatious Litigant Statute: A Viable Judicial Tool to Deny the Clever Obstructionists Access?*, 72 S. CAL. L. REV. 275, 282-83 (1998) ("Often defendants in arguably frivolous suits choose to settle rather than expend large sums of money defending the suit. This, in turn, creates incentives for frivolous litigation, particularly for those who have previously received similar nuisance payments." (footnotes omitted)); cf. Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 8 (2000) ("If the defendant calculates accurately, and wins the first case, it will suffer fewer future claims and have a better chance of winning those claims that plaintiffs do bring.").

³² See JOINT ECON. COMM., 105TH CONG., AUTO CHOICE: RELIEF FOR BUSINESSES AND CONSUMERS 5 (Comm. Print 1998), available at <http://www.house.gov/jec/tort/relief/relief.pdf> ("Business defendants . . . suffer from a 'deep pockets' syndrome that makes it more likely they will get hit with a large damage award."). Of course, many cases involve small claims and thus create no threat of a large payout. I am referring in the text to the cases that are of most significance in terms of the amount at stake and how protracted and expensive the litigation is likely to be.

³³ See Erik K. Moller et al., *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. LEGAL STUD. 283, 286 (1999) ("[J]uries determine whether the plaintiff wins and, if so, how much the plaintiff will be awarded, thus establishing guidelines that will be used to value future disputes.").

³⁴ Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 571 (1991) ("[Businesses] also pay indirectly, through increased insurance premiums; indirect business costs of pending litigation such as the time of managers and employees who must participate in the litigation; reputational harm among customers, suppliers and distributors; the effects of reporting a large contingent liability in the company's financial statements on the company's stock price and its ability to obtain additional financing; and practical restrictions on the company's business options . . .").

³⁵ *E.g.*, *Pennzoil, Co. v. Texaco, Inc.*, 729 S.W.2d 768, 784 (Tex. App. 1987) (\$10.53 billion).

stage and avoid any payout to the plaintiff. A grant of summary judgment would also have the advantage of deterring future lawsuits because plaintiffs (or their lawyers, who sometimes receive a contingent fee and are thus the real entrepreneurs who drive the litigation)³⁶ would have to pay the costs of discovery to oppose the motion for summary judgment but would receive no award of damages.³⁷ The case would be a severe money-loser for the plaintiff, and future litigants and their lawyers would take note.

In many cases, the court grants the motion for summary judgment.³⁸ But perhaps the most important feature of this litigation strategy is what happens when that motion is denied. Typically, the defendant settles the case immediately.³⁹ This stands to reason because litigating after a denial of summary judgment costs money (attorneys' fees) and risks the nightmare outcome of an adverse judgment.⁴⁰

³⁶ See John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1450 (2003) (“[P]laintiffs’ lawyers, engaged on a contingent basis, would invest their time and cover the ongoing costs of discovery and trial only if they had a reasonable chance to win.”).

³⁷ See Cross, *supra* note 31, at 1 (“[R]epeat player litigants, particularly tort and product liability defendants, have a strong economic interest to engage in strategic precedent setting and reduce their potential liability in future cases.”).

³⁸ Rave, *supra* note 10, at 901 (“From the empirical data, it appears that the success rate for summary judgment motions (resulting in terminations) in the years since the Trilogy varies from a low of roughly 20% to a high around 40%.”); see also *infra* Part II.A (discussing the judicial bias in favor of defendants at the summary judgment stage).

³⁹ See BRUNET ET AL., *supra* note 11, at 325–26 (“[T]he denial of a defendant’s motion for summary judgment may give the defendant an incentive to make a reasonable settlement offer, rather than face the risk and expense of going to trial. By contrast, as long as the motion is still pending, the party who has filed the motion may be unwilling to engage in realistic settlement discussions.”); Carrie E. Johnson, Comment, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CAL. L. REV. 225, 241 (1997) (“When trial is a legitimate and immediate threat, it influences the substance and tenor of settlement discussions: a quickly approaching trial date encourages parties to participate realistically and cooperatively in settlement efforts.”).

⁴⁰ Although the possibility remains for judgment as a matter of law at the end of the plaintiff’s case-in-chief, see FED. R. CIV. P. 50(a)(1), summary judgment and judgment as a matter of law now share the same standard in the post-trilogy world, making this possibility unlikely. Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 FLA. ST. U. L. REV. 689, 704–05 (1996). See generally Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 149 (1988) (“When there is an issue whether the testimony of an affiant or deponent would be credible if presented at trial, the court must deny summary judgment However, a directed verdict motion typically would be made after the witness had testified and the court could take account of the possibility that he either could not be disbelieved or believed by the jury.” (quoting 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2713.1 (2d ed. 1983))).

A typical litigation strategy is thus for a defendant to go through discovery in the hope of winning at the summary judgment phase, then to settle immediately if summary judgment is not granted. Appreciating this strategy is essential to debunking the pervasive assumption about what would happen in the absence of summary judgment, namely, that most of these cases would go to trial.

B. *Litigation in a System Without Summary Judgment*

In the current system, there are three main stages at which a lawsuit can be resolved. First, it can be settled immediately after it is filed. Second, it can be resolved just after the filing of a summary judgment motion, either by the court's decision to grant the motion (thereby ending the case) or by the parties' choice to settle after the court has denied the motion. Third, it can be resolved by the verdict of a jury or judge upon completion of a full trial.

Of course, this is an oversimplification. A case can end at any time between its original filing and the ruling in the last available appeal or collateral attack. The plaintiff can drop the case, or the parties can settle, whenever they choose. But the three stages described in the previous paragraph are nonetheless useful because they identify common times in which cases are resolved and therefore allow us to analyze, however broadly, the likely effects of changing the system.

Specifically, the current system looks like this:

<u>Time One</u>	<u>Time Two</u>	<u>Time Three</u>
Early Settlement	Summary Judgment or Settlement	Adjudication at Trial

If we eliminated summary judgment, this picture would change dramatically: Time Two would disappear.⁴¹ The clear (but widely underappreciated)⁴² result of that disappearance is as follows. *The many cases that currently are resolved at Time Two would not all become*

⁴¹ See Issacharoff & Loewenstein, *supra* note 14, at 97 ("In the absence of a summary judgment procedure, a legal dispute can be conceptualized as a two-stage process consisting of negotiations during the pretrial phase of the case, followed by trial if negotiations fail to result in a settlement.").

⁴² The article by Issacharoff and Loewenstein, *supra* note 14, is a noteworthy exception. Published seventeen years ago, just after the Supreme Court's trilogy of cases expanding summary judgment, it used economic analysis to anticipate the possibility that summary judgment could divert cases away from settlement. *Id.* at 100-03 ("[I]t is not at all clear that the expansion of summary judgment yields the intended consequence of decreasing the likelihood of trial. Furthermore, the expansion of summary judgment will likely increase aggregate legal expenditures, thus producing a corresponding deadweight loss to society."); see also Stempel, *supra* note 40, at

Time Three cases; instead, a large majority would almost certainly become Time One cases.

Summary judgment gives a defendant a “free” opportunity to receive a favorable adjudication.⁴³ The opportunity is certainly not costless—attorneys’ fees for litigating through discovery to summary judgment are high—but it is free of the realistic possibility of losing the case. For whatever reason (one possibility is the fact that a plaintiff must prove her case by a preponderance of the evidence), judges routinely grant summary judgment motions for defendants but not for plaintiffs.⁴⁴ Defendants accordingly view summary judgment as an opportunity to win without the risk of losing.

Whereas it is tempting to avail oneself of such an opportunity, a trial does not hold the same allure. Unlike summary judgment, adjudication at trial can and does routinely result in judgments for the plaintiff, accompanied by crippling awards of damages.⁴⁵ The fact that a defendant chose to litigate a case through summary judgment rather than settle immediately does not indicate that the defendant would have litigated through trial rather than settle immediately if summary judgment were not available.

In fact, we should expect just the opposite. The dominant theme of civil procedure scholarship over the past twenty-five years has been how rare trials have become.⁴⁶ This theme has only intensified recently with the new focus on summary judgment and other pretrial adjudication, highlighted by the recent initiative of the American Bar Association to study “The Vanishing Trial.”⁴⁷ A central reason that trials are so rare is that defendants avoid them like the plague, steering away from the risks associated with a jury verdict. There is no reason to believe that this decisive aversion to trials—the aversion that drives our current system of dispute resolution and has done so for at least two decades—would abate in a world without summary

170–73. Now that summary judgment has moved to center stage in our judicial system, heeding these authors’ early warnings carries even more urgency.

⁴³ See BRUNET ET AL., *supra* note 11, at 325 (“[D]efendants with greater resources frequently feel that they have little to lose by the filing of such a motion.”).

⁴⁴ Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC’Y REV. 869, 882 (1999) (“It is much more difficult for a plaintiff than a defendant to obtain summary judgment . . . because the plaintiff generally bears the burden of proof.”); see also *supra* note 10 (citing statistics).

⁴⁵ See *supra* notes 32–35 and accompanying text.

⁴⁶ See generally, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

⁴⁷ See Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, LITIG., Winter 2004, at 1, 2.

judgment. On the contrary, it would steer cases toward early settlement.⁴⁸

More needs to be said in defense of this proposition, but first a brief detour is necessary to consider the extent to which the proposition matters if it is true. The next section accordingly explores what the costs would be of switching from a three-part system (1. early settlement; 2. summary judgment; and 3. trial) to a two-part system (1. early settlement and 2. trial)—i.e., whether the costs of even a few more trials might outweigh the benefits of steering most cases toward early settlement. After that, I will return in Part I.D to the question of whether I have fairly expressed the likely outcome of eliminating summary judgment. Do we have good enough reason to believe that the cases currently resolved by summary judgment (or by a settlement immediately after a denial of summary judgment) would settle early rather than go to trial if summary judgment were unavailable?

C. Comparing Costs

When people assume that the sky would fall without summary judgment, they base that assumption on two questionable premises. The first, discussed above, is that the lawsuits currently resolved by summary judgment would instead be resolved by trial.⁴⁹ I have suggested that most of those lawsuits would actually be resolved by early settlement, and I will further explore that claim in the next section in light of some likely objections. Before doing so, it is useful to mention and evaluate the second premise that makes people so attached to summary judgment. It is that trials are prohibitively expensive, whereas summary judgment is comparatively cheap.

Once again, it helps to look at the three main stages at which lawsuits are currently resolved:

<u>Time One</u>	<u>Time Two</u>	<u>Time Three</u>
Early Settlement	Summary Judgment or Settlement	Adjudication at Trial

⁴⁸ See Issacharoff & Loewenstein, *supra* note 14, at 100–03 (discussing the optimal conditions for settlement and finding that summary judgment likely hinders settlement efforts by altering the parties' incentives to settle at different stages of litigation); Morton Denlow, *Summary Judgment: Boon or Burden?*, 37 JUDGES' J., Summer 1998, at 26, 26 (“Summary judgment motions are excessively used and delay resolution of cases that would otherwise be tried or settled.”).

⁴⁹ E.g., Gary T. Foremaster, *The Movant's Burden in a Motion for Summary Judgment*, 1987 UTAH L. REV. 731, 734 (“Summary judgment, therefore, alleviates the waste of time, the expense, and the burden of needless trials.”).

Without summary judgment, we would be left only with Time One and Time Three;⁵⁰ the cases in Time Two would migrate into those other categories. If the prevailing assumption were correct, then summary judgment might save money in the aggregate even if most cases that currently are resolved at Time Two would instead be resolved at Time One. So long as some cases end up in Time Three, the cost of those new trials could theoretically outweigh the savings from the cases that move from Time Two to Time One.

That view has it backwards. In fact, there is good reason to believe that in most cases *the cost of litigating to summary judgment exceeds the cost of settling early by a greater amount than the cost of trial exceeds the cost of litigating to summary judgment*. In other words, summary judgment is more expensive than trial. This statement lends itself to a misunderstanding, so it needs a bit of explanation. In the current system, a case that goes all the way to the end of a trial has necessarily gone through the phases of discovery and pretrial motions that lead to summary judgment. So a lawsuit litigated fully through trial includes the summary judgment stage and cannot logically be less expensive than if it had ended at summary judgment. When I say that trials are less expensive than summary judgments, what I mean is the wordy statement italicized earlier in this paragraph. When a case goes all the way through trial, the part of the litigation conducted after summary judgment (i.e., the trial) often costs less than the part conducted before summary judgment (i.e., discovery and pretrial motions).⁵¹ Summary judgment is much more expensive than people think, and trial is much less expensive, because the main expense of litigating all the way to the end of a trial is incurred before the trial begins.

Like surgery, litigation costs a lot because it can be done only by professional specialists who charge high fees. Parties pay lawyers hundreds of dollars per hour,⁵² so litigation costs depend primarily on how

⁵⁰ As noted earlier, this is an oversimplification. Some cases surely would settle after partial discovery had been conducted, arguably creating a new sort of "Time Two." But in my view it is naïve to think that in the current system, the reason that cases routinely settle immediately after summary judgment is denied is simply that this happens to be the time that sufficient discovery has been conducted to inform the parties that they want to settle. Instead, they settle then for the same reason that they settle early in any phase of litigation: to minimize lawyers' fees.

⁵¹ David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 104 (1983).

⁵² Of course, some lawyers are paid by the project, or on a contingency basis (typically plaintiffs' lawyers in certain areas of specialization such as personal injury cases, malpractice cases, and class actions). But such fee arrangements are the exception rather than the rule.

many hours the parties' lawyers must devote to the case. How are these hours spent? As first-year associates at large law firms know all too well, much of the time is devoted to reviewing the documents that must be produced for discovery. This task is often extremely onerous, as a defendant corporation typically keeps mountains of records that were not organized with litigation in mind.⁵³ Sifting through these records to find and duplicate only, and all, the materials that must be turned over to the plaintiff, takes time. And the cliché that "time is money" has never been more true.

The cost does not end with document review. All parties must be questioned, through depositions or interrogatories or, most often, both. Lawyers first send interrogatories (lists of written questions) to each party. When the questions are received, the lawyers for the other side draft answers with the help of the client. Drafting every interrogatory and every answer for each party in the lawsuit consumes plenty of billable hours.⁵⁴

But it still does not consume as many hours as does the other, more important form of questioning: live depositions. Here, lawyers are able to confront parties and witnesses face-to-face and learn how well they are likely to perform at trial. Unlike interrogatories, depositions require witnesses to answer questions themselves, rather than have those answers drafted by a lawyer. But these features come at a steep price. The lawyers for both parties typically are present, along with the deponent and a court stenographer. Everyone but the witness is being paid, and the witness is losing time from her ordinary work. A single deposition can take days, and a complicated lawsuit could require that scores of witnesses be deposed.⁵⁵ If any of these

⁵³ See, e.g., Robert L. Haig & John P. Marshall, *Corporate Discovery Strategy in Complex Litigation*, N.Y. St. B.J., Oct. 1995, at 36, 36 ("Corporate litigants have particular discovery problems and needs because many have numerous locations, large numbers of employees, and a multitude of documents.").

⁵⁴ Frequently, the interrogatories and their responses will create unnecessary cost due to overlap. For instance, in multi-defendant litigation, each defendant will take time to draft and send the plaintiff its own set of interrogatories. Therefore, multiple firms will often bill their respective clients for interrogatories that have already been propounded. Similarly, when multiple plaintiffs are represented by separate counsel, twice the hours will go into answering interrogatories sent by each defendant.

⁵⁵ Although the Federal Rules of Civil Procedure cap both the number of depositions allowed, FED. R. CIV. P. 30(a)(2)(A), and the length of each deposition, FED. R. CIV. P. 30(d)(2), the Rules also allow litigants to stipulate to expansions, FED. R. CIV. P. 29, or move the court to allow further discovery, FED. R. CIV. P. 26(b)(2).

witnesses are experts, then those experts too must be paid for their time by the party employing them.⁵⁶

The time devoted to reviewing and producing documents, writing questions and answers for interrogatories, and taking depositions (not to mention the litigation costs to compel noncompliant parties or witnesses)⁵⁷ is far from the entirety of pretrial costs. A major additional cost is simply the preparation for discovery. In order to know which questions to ask, which answers to give, and which documents to request or divulge, the lawyers for each party must investigate the case and form a litigation strategy. Merely learning the relevant information can require considerable effort.

In addition, every court-related document imposes a cost. This begins with the service of process and the complaint, and it continues with the answer, the discovery requests, the motions to dismiss, and the motion for summary judgment. Drafting these motions and the responses to them is a crucial part of the lawyers' work. In particular, the court's ruling on the summary judgment motion ordinarily determines whether the defendant will win the case outright or will instead have to pay a hefty settlement amount to the plaintiff.⁵⁸ As a result, parties are willing to pay lawyers to spend massive numbers of hours drafting and revising these long, detailed motions on which the outcome of the litigation turns.⁵⁹

Because the motion for summary judgment is so important, it also imposes a substantial time cost on the court.⁶⁰ The court must review all the accumulated evidence and render the central decision of the case. This comes after the court has reviewed and ruled on all earlier motions, including the motions to dismiss. Judges are not paid by the hour, but the time they spend on these decisions pushes back their

⁵⁶ MODEL CODE OF PROF'L RESPONSIBILITY DR 7-109(C)(3) (1983).

⁵⁷ Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. REV. 229, 240-41 (2004) ("Many civil litigators spend most or all of their time drafting discovery requests, compiling and reviewing documents and data to respond to discovery requests, drafting discovery responses, filing motions for protective orders regarding discovery or motions to compel discovery, responding to these motions, and otherwise fighting over discovery issues.").

⁵⁸ See BRUNET ET AL., *supra* note 11, at 325-26.

⁵⁹ Denlow, *supra* note 48, at 29 ("Summary judgment motions and their supporting papers can cost over \$10,000 per side to prepare.").

⁶⁰ Stempel, *supra* note 40, at 171 ("The judge deciding a summary judgment question must along with her law clerks read, research, reflect, hold a hearing, read and research some more, and often must draft, revise, and issue a lengthy written opinion as well. Although presiding over a jury trial takes time, it may not take any more of the judge's time than does consideration of the summary judgment motion.").

dockets, delaying the administration of justice in other cases.⁶¹ Such delay imposes costs on the parties in those other cases and arguably erodes confidence in the civil justice system by contributing to the impression that it moves too slowly and inefficiently to serve its purposes well.⁶²

All of these pretrial activities combine to form the largest piece of the litigation pie, both in terms of overall cost and overall time.⁶³ The rare civil lawsuit that actually goes to trial has surprisingly little left to it after the summary judgment motion has been denied.⁶⁴ Virtually all that remains is to repeat the highlights of the deposition questioning in open court, with occasional evidentiary objections thrown in. To be sure, there are other matters unique to trial: opening and closing statements, jury selection, and jury deliberation. But these procedures pale in comparison to the time and money consumed by pretrial work.⁶⁵

The view that trials cost relatively little is supported by the admittedly very limited empirical work that has been done on the subject. In 1983, David Trubek and others published a study indicating that in typical cases that went to trial, more than ninety percent of the lawyers' time was spent on pretrial work.⁶⁶ And in the spring of 2006, a Note in the *New York University Law Review* concluded that "for summary judgment to be clearly efficient, the cost of the motion to the plaintiff would have to be less than one-quarter the cost of trial, and for the defendant, less than one-eighth the cost of trial."⁶⁷ At the very least, these studies run against the grain of the widely held perception that abolishing summary judgment is unthinkable due to the costs that the practice is thought to save.

D. Do Defendants Pursue Summary Judgment Primarily when They Otherwise Would Have Gone to Trial?

Because I emphasized so strongly above that many cases resolved by summary judgment would be settled early in a world without sum-

⁶¹ Denlow, *supra* note 48, at 27–28 (“Overuse of the summary judgment motion results in a backlog of such motions in already busy courtrooms.”).

⁶² *See id.* (discussing how the overuse of summary judgment motions leads to dissatisfaction with the legal system); *cf.* CHARLES DICKENS, *BLEAK HOUSE* (Norman Page ed., Penguin Books 1971) (1853).

⁶³ Trubek et al., *supra* note 51, at 104.

⁶⁴ *Id.* at 89, 104 (finding that the ordinary case required on average only 6.7 hours for trial out of an average 72.9 total hours).

⁶⁵ *Id.* at 104.

⁶⁶ *Id.* at 91.

⁶⁷ Rave, *supra* note 10, at 908–09.

mary judgment, it is important now to explore that contention more fully. The question a skeptic will pose is why these cases will settle early rather than go to trial.

My main answer has been that the fear of a jury verdict and the costs of litigation would discourage parties from proceeding toward adjudication if summary judgment were not an option. But the skeptic might try to tell the following sort of story. Perhaps defendants in the current civil justice system settle early when they expect to lose at summary judgment but pursue pretrial adjudication when they expect to win. If summary judgment were no more, these defendants would take the money they now pay for pretrial litigation and devote it to pursuing a favorable jury verdict. They would have little to fear because their cases are strong; the weak cases would settle early with or without summary judgment. Or so the argument would go.

If this argument were true, then summary judgment might save money because its sole use would be to cut short those lawsuits that would otherwise have gone to trial. But there are at least two reasons to mistrust this line of reasoning.

First, if the argument were true, we would expect summary judgment to be granted in an exceedingly high percentage of cases in which it is sought. After all, the premise is that defendants seek summary judgment only when they are so confident of success that they are willing to pay the high costs of litigation to secure it.⁶⁸ But in fact only twenty to forty percent of summary judgment motions are granted.⁶⁹ And this is so even after the Supreme Court issued its famous trilogy of opinions encouraging judges to grant such motions far more freely.⁷⁰ That percentage also includes the likely judicial bias, discussed later in this Article, in favor of granting such motions.⁷¹

Second, if the cases that now go to summary judgment would instead go to trial were summary judgment not available, then we would expect those cases to go to trial in the current system after summary judgment is denied. But instead, the typical practice is to settle immediately after the bid for pretrial adjudication fails.⁷² This practice strongly suggests that *defendants who are eager to litigate to summary*

⁶⁸ BRUNET ET AL., *supra* note 11, at 324 (“Although the goal of summary judgment procedure is to save the time, effort, expense, and the risk of a trial, at times the filing of such a motion can dramatically increase the costs of litigation while at the same time substantially delaying the case’s ultimate resolution.”).

⁶⁹ *See supra* note 38.

⁷⁰ *See supra* note 13.

⁷¹ *See infra* Part II.A.

⁷² *See supra* notes 39–40 and accompanying text.

judgment are unwilling to litigate those same lawsuits to trial. In a system without summary judgment, they would thus be inclined to settle early because trial would be the only alternative.

Defendants' usual behavior suggests that when they seek summary judgment, they do so either because they view it as an opportunity to win without the risk of losing (unlike a trial) or because they believe they have a better chance to win at summary judgment than at trial.⁷³ Either explanation is deeply troubling. There is no reason that defendants should be privileged with a device that gives them two chances to win every lawsuit, whereas plaintiffs realistically have only one chance.⁷⁴ Moreover, if it is true that a defendant has a better chance to win at summary judgment than at trial, then that bespeaks a severe flaw in our civil justice system because summary judgment by its nature should be granted only if a party is certain to win at trial.⁷⁵ The purpose of summary judgment is certainly not to reach a different outcome from the one that would be reached at trial, but rather to avoid the cost of trial when the outcome is not in doubt.⁷⁶

There are thus reasons to believe that defendants seek summary judgment because, at least in some cases, they believe courts will grant it even if a jury might well have ruled for the plaintiff at trial.⁷⁷ This practice conflicts not only with the rationale behind summary judgment, but also with the Seventh Amendment to the U.S. Constitution. Some observers might nonetheless wonder whether the practice, however legally illegitimate, could be beneficial in that judges might be better decision makers than juries. There is a rich literature on this question and no need to rehearse the well-known arguments here.⁷⁸ But in the context of summary judgment, I see a particularly strong reason to doubt the superiority of judges, and it is to that subject I will now turn.

⁷³ BRUNET ET AL., *supra* note 11, at 325.

⁷⁴ Denlow, *supra* note 48, at 27 ("Although a plaintiff has equal recourse to summary judgment under Rule 56, the motion has largely become a defendant's weapon."); *see also supra* note 10 (citing data indicating that summary judgment motions are granted for defendants at a higher rate than for plaintiffs).

⁷⁵ *See* Easton, *supra* note 57, at 247 ("If the system is working properly and the evidence is against you, you generally should lose, despite your best efforts.").

⁷⁶ BRUNET ET AL., *supra* note 11, at 1.

⁷⁷ Indeed, one practitioner's guide even instructs attorneys to "seriously consider filing a summary judgment motion where the equities of the case are clearly against the client's position but there is a chance to win the case on the law." *Id.* at 332.

⁷⁸ *See, e.g.,* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816-21 (2001); Landsman, *supra* note 1, at 288-89; Miller, *supra* note 14, at 1094-126.

II. *Nonmonetary Effects of Abolishing Summary Judgment*

This Article is motivated primarily by my belief that people generally overestimate the cost of abolishing summary judgment. But the harm caused by pretrial adjudication is not measurable in dollars alone.⁷⁹ Summary judgment reduces the fairness of the civil justice system, and its abolition would level the playing field in accordance with the principles the system aims to serve.

A. *Reducing Pro-Defendant Bias*

In theory, a judge will grant a motion for summary judgment only when no reasonable jury could reach the opposite result at trial. But as everyone understands, theory is different from practice. Any system run by human beings will have variations between different decision makers' interpretations of the same rule, not to mention simple errors made by those decision makers.⁸⁰ We strive to reduce these errors while understanding that perfection is unattainable.

It would therefore be a relatively minor complaint to say that judges sometimes grant summary judgment motions even if the outcome at trial might have been different. Judges, like the rest of us, are susceptible to making mistakes in all parts of their work. My concern is not with judicial fallibility. Instead, I think that summary judgment inherently causes judges to skew their judgments in a predictable pattern.

In my previous work, I have explored the phenomenon of settlement in class actions, a category of civil cases that has received special attention from the legal academy due to the importance of those cases and the challenges they pose for guaranteeing procedural rights to absent class members.⁸¹ Although there is much disagreement about how to craft an optimal system for handling class litigation, what is not in dispute is that the current system is failing.⁸² Chief among its problems is that the lawyer who represents the plaintiff class often

⁷⁹ Cf. Richard L. Barnes, *The Efficiency Justification for Secured Transactions: Foxes and Soxes and Other Fanciful Stuff*, 42 U. KAN. L. REV. 13, 15 (1993) ("In systemic efficiency all participants must experience a gain either through cost savings or increases in satisfaction.").

⁸⁰ See Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 3 (1994) ("[A]ll judges, as a part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decisionmaking process.").

⁸¹ John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903; Bronsteen & Fiss, *supra* note 36.

⁸² Douglas C. Nelson, *Consumer News*, 17 LOY. CONSUMER L. REV. 121, 125 (2004) ("[D]espite the class action lawsuit's noble purpose and undeniable success in many instances, arguably, no component of our legal system is more susceptible to abuse.").

colludes with the defendant to structure a settlement that pays the lawyer a lot but his clients (the class members) very little.⁸³ Because every class action settlement must be approved by a judge, much ink has been spilled trying to explain why judges routinely accept agreements that are, on their face, products of collusive dealing.⁸⁴ Why do judges abdicate their responsibility to police these deals?

A few factors are probably involved,⁸⁵ but many believe that the main one is as follows: if a judge rejects a class action settlement, then the case may go to trial, and judges desperately want to avoid trials. This is a poorly kept secret among judges and their law clerks, and sometimes it even spills out into public statements like this one, uttered by a judge as an explanation for why he opposed reforms that would have combated collusive class settlements: “From the court’s perspective, it would be terrible if a case went to trial because a settlement option is not available.”⁸⁶

Why do judges dislike trials? The reason is that trials impose two things on judges that most people find unpleasant—extra work and social disapprobation.⁸⁷ A case that settles is gone forever, but a case that goes to trial drags on and requires the judge’s constant attention. The judge is effectively chained to the bench, listening to testimony, ruling on objections, and shepherding the case along from jury selection through the verdict. As this takes place, more and more cases pile up on the judge’s docket—cases to which the judge cannot fully attend until the trial ends.⁸⁸ And while these cases are piling up, other cases must be diverted by the judicial system’s administrative staff to

⁸³ Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 821 (1997) (“In fact, there is no better formula for collusion than a situation in which the rights of non-participants can be extinguished without notice or an opportunity to get out from under a prospective court decree.”).

⁸⁴ See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 375 (2000).

⁸⁵ Some of these factors are as follows: (1) the dearth of legitimate class settlements to which a judge can compare a presented settlement, Bronsteen, *supra* note 81, at 916; (2) the absence of an adversarial process at the settlement stage, *id.* at 916–17; (3) insufficient discovery when cases settle early, *id.* at 927; and (4) the sense of a lower threshold of judicial responsibility for policing settlements than for rendering judgments, *id.* at 923–27.

⁸⁶ *Class Action Lawyers Doubt Provisions in Legislation Aimed at Curbing Abuses*, 72 U.S.L.W. 2593 (Apr. 6, 2004) (quoting Judge Frederick Motz of the U.S. District Court for the District of Maryland), available at <http://pubs.bna.com/ip/BNA/law2.nsf/is/a0a8h2k7f7>.

⁸⁷ Bronsteen, *supra* note 81, at 915.

⁸⁸ See Resnik, *supra* note 2, at 421 (“If cases are disposed of quickly, the time saved can be used to consider more cases.”).

other judges whose dockets are less crowded, thereby imposing work on those other judges.⁸⁹

A judge who is constantly in trial will suffer a double hardship: she will work more than other judges while simultaneously drawing their ire for diverting other cases to them and thus forcing them to work more as well.⁹⁰ She will also risk ridicule from politicians and commentators who, often made aware of the issue by those who stand to gain by avoiding trials,⁹¹ emphasize the backlog of cases in the judicial system and accuse judges with large backlogs of corrupting the system.

In addition to these personal considerations, a judge who avoids trials might view herself as doing a service to the litigants whose cases are slated later in the docket.⁹² By moving the docket along, the judge gives those litigants their day in court sooner and in that respect improves the administration of justice with respect to them.⁹³ There is no doubt that a faster justice system is of great value, all else being equal.⁹⁴ But there is also no doubt that all else is not equal. To move their dockets along and achieve all of the benefits (personal and otherwise) that come with doing so, judges engage in several practices that directly undermine the fairness of our court system.⁹⁵ They approve manifestly unfair settlements in class action litigation.⁹⁶ They

⁸⁹ See *id.* at 404.

⁹⁰ *Id.* (“When judges who dispose of many cases lecture other judges on how to reduce backlogs, peer pressure tends to generate more vigorous management.”).

⁹¹ I have in mind large corporations who are constantly defendants in litigation, although less scrupulous members of the class action plaintiffs’ bar could also fit into this category.

⁹² See Resnik, *supra* note 2, at 404 (“[J]udges may believe that their intervention speeds settlement and improves the litigation process.”).

⁹³ Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1042 (1989) (“[S]ummary judgment motions have been granted much more readily, even in areas once regarded almost as taboo and often to an accompaniment of judicial rhetoric suddenly responsive to the need for more effective interception.”).

⁹⁴ See, e.g., Martin Luther King, Jr., Letter from Birmingham City Jail (Apr. 16, 1963), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 289, 292 (James Washington ed., 1986) (“[J]ustice too long delayed is justice denied.”).

⁹⁵ In the words of one judge,

I think in the 20 years since I was a district court judge, we’ve seen a tremendous increase in volume, tremendous pressure to decide cases without thinking very much about them, tremendous pressures to avoid deciding cases. I mean, some judges will do almost anything to avoid deciding a case on the merits and find some procedural reason to get rid of it, coerce the parties into settling or whatever it might be.

Richard Arnold, *Mr. Justice Brennan and the Little Case*, 32 LOY. L.A. L. REV. 663, 670 (1999).

⁹⁶ See Bronsteen, *supra* note 81, at 905–06.

browbeat parties into settling cases, sometimes using threats to discourage a litigant from availing herself of her right to go to trial.⁹⁷ And they grant defendants' motions for summary judgment in cases that juries might have resolved in favor of the plaintiffs.⁹⁸

In this way, summary judgment creates an incentive for judges to act unfairly.⁹⁹ When a judge grants a motion for summary judgment, the case goes away; whereas when a judge denies such a motion, a trial remains possible. The parties might instead settle, but there is no guarantee. So every time a judge adjudicates at the summary judgment stage, there is a thumb on the scale in favor of the defendant.

My claim is not, of course, that judges will always give in to the temptation to grant summary judgment. Some judges might not even be conscious of the influence that docket pressure exerts on their decision making.¹⁰⁰ But because this pressure is found in every case in which a motion for summary judgment is filed, it stands to reason that across the full landscape of cases, at least some will be affected.¹⁰¹

This phenomenon differs meaningfully from ordinary judicial error. It is a systemic bias in favor of defendants, caused by the mere existence of one of the central procedural devices in our system—summary judgment. That is, summary judgment prevents plaintiffs from being treated fairly by the judicial system because it biases judges against them. Arguably the most important element of due

⁹⁷ See Menkel-Meadow, *supra* note 2, at 505 (“Settlements can be coerced, either by the power of the parties, by a strong judge in a settlement conference, or by inexorable trial dates.”); Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 1003–04 (1998) (“Many trial judges have transformed their role from that of a passive arbiter resolving legal disputes based on legal principle into that of an active case manager who influences outcomes by controlling discovery and participating in settlement conferences.”); Resnik, *supra* note 2, at 379 (“[B]ecause of increasing case loads, . . . judges have begun to experiment with schemes for speeding the resolution of cases and for persuading litigants to settle rather than try cases whenever possible.”).

⁹⁸ See Mollica, *supra* note 15, at 180 (noting that a reversal rate of over one-third of the sampled summary judgment dispositions “should humble anyone who believes that district court judges can routinely pick out the cases worthy of trial or deserving of summary judgment”). Indeed, judges have been emboldened to combine these docket-clearing procedures. BRUNET ET AL., *supra* note 11, at 47 (“The 1993 amendment to Rule 16 makes explicit the relationship between Rule 56 and the pretrial conference.”).

⁹⁹ See generally Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 257–58 (2004).

¹⁰⁰ Nugent, *supra* note 80, at 49 (“[M]any judges are slow to accept the possibility of bias in their own decisionmaking, viewing the existence of partiality as improbable instead of as an inherent aspect of the human perceptual process.”).

¹⁰¹ Lisa C. Foster, Note, *Section 1447(e)’s Discretionary Joinder and Remand: Speedy Justice or Docket Clearing?*, 1990 DUKE L.J. 118, 148 n.171 (“[I]t must be recognized that docket overcrowding may be an inevitable aspect of court decisionmaking.”).

process is an impartial decision maker, so anything that makes it more difficult for judges to be disinterested should be subjected to thorough scrutiny. Many judges surely are able to adjudicate fairly despite the pressures they face, but it would be naïve to assume that those pressures never affect any judge's decisions.¹⁰²

Perhaps some pressures and their attendant biases are inevitable. But if a procedure skews the system in favor of one class of litigants and against another, that procedure would presumably need to be absolutely necessary (or at least enormously valuable) to justify its existence in light of the harm it causes. Summary judgment appears to saddle the system with overall monetary costs rather than benefits,¹⁰³ and it is probably unconstitutional.¹⁰⁴ When these negatives are added to the bias it creates, it is difficult to imagine why we would want to retain it.

B. The Counterargument: Potential Harms of Abolishing Summary Judgment

It is not difficult to imagine why defendants would want to retain summary judgment. It gives them a free bite at the apple (a chance to win without the possibility of losing), creates the possibility of winning without the costs or risks of trial, and pressures the decision maker to rule in their favor. Any call to abolish or even restrict summary judgment will meet with fierce resistance from the large corporations that benefit so much from it. Their most likely argument will be that summary judgment saves the court system from a backbreaking increase in trials. As explained above, I find this point unconvincing.¹⁰⁵ A few other potential harms, however, merit further discussion.

1. Would Motions to Dismiss Fill the Void?

Summary judgment is not the only form of pretrial adjudication. After a lawsuit is filed but long before the summary judgment phase, the defendant can move to dismiss the case. Rule 12(b) of the Federal Rules of Civil Procedure outlines seven grounds upon which a judge can terminate the lawsuit before any discovery has commenced: “(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction

¹⁰² Evan E. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023, 1024 (2002) (“Like all human beings, judges are influenced by personal routines and behaviors that have become second nature to them or have somehow dropped below the radar of their conscious control.”).

¹⁰³ See *supra* Part I.C.

¹⁰⁴ Thomas, *supra* note 19; *infra* Part III.

¹⁰⁵ See *supra* Part I.C.

over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19.”¹⁰⁶

If summary judgment were no longer available, would judges (hell-bent on avoiding trial) begin to grant in droves these motions for judgment on the pleadings? The only real concern is motions for judgment under Rule 12(b)(6), failure to state a claim upon which relief can be granted, because the other grounds are self-evidently inapplicable most of the time. The issue is whether 12(b)(6) motions would become the new summary judgment.

To evaluate this question, it is valuable to consider precisely what a 12(b)(6) motion is. Unlike a motion for summary judgment, which asks the judge to look at all of the evidence amassed by both sides via discovery, a 12(b)(6) motion directs the judge to scrutinize only one document—the plaintiff’s complaint.¹⁰⁷ If the complaint alleges only that the defendant did *X*, and *X* is not prohibited by law, then a court will dismiss the case.¹⁰⁸ But if the complaint alleges illegal activity by the defendant, the judge cannot dismiss the case because the judge has no way of knowing whether the claims are true: only the complaint itself can be examined at this stage.

Some might suggest that if judges are as committed to avoiding trials and to moving along their dockets as I suggested in the previous section, then it follows that they will stop at nothing to achieve those aims. If they are willing to abdicate their responsibility by unfairly granting motions for summary judgment, then there is no reason to think they would not be willing to be equally unfair in granting motions to dismiss. But this claim makes a straw man of my argument. I do not view judges as automatons who see every procedural device only as a means to the end of terminating litigation and who therefore would move, in the absence of summary judgment, seamlessly to the next available vehicle. Nor do I see judges as callous or morally bankrupt shirkers who will ignore the law and dismiss case after case without seeing any evidence, just to move along the docket.

¹⁰⁶ FED. R. CIV. P. 12(b).

¹⁰⁷ *Id.* (“If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . .”).

¹⁰⁸ Rhynette N. Hurd, *The Propriety of Permitting Affirmative Defenses to Be Raised by Motions to Dismiss*, 20 MEMPHIS ST. U. L. REV. 411, 447 (1990) (“Rule 12(b)(6) alerts the court to the possibility that there is no legal basis on which to establish the plaintiff’s right to recover.”).

I see judges, rather, as ordinary human beings who want to be fair and to do their job well, but who are also subject to the influences and pressures that affect everyone. These pressures are often strong enough to make a judge cajole litigants into settling, or approve a fishy class action settlement, or grant a summary judgment motion despite some doubt as to the outcome at trial. But they are not strong enough to make judges adopt the widespread policy of dismissing cases that obviously state a claim, in the absence of any way for the judge to evaluate the merits of that claim.¹⁰⁹ Such an outcome seems to me far-fetched. And although I ordinarily do not view the appeals process as a particularly effective tool for remedying the wrongs perpetrated by trial judges,¹¹⁰ unlawful grants of 12(b)(6) motions would be such obvious legal error as to make appellate review a meaningful corrective and deterrent.

2. *Would More Lawsuits Be Filed?*

Another concern that could be raised is that abolishing summary judgment might lead to a proliferation of lawsuits because it would make it easier for plaintiffs to win. Without the threat of an adverse pretrial adjudication from a judge eager to end the case, plaintiffs could more easily get to a jury or leverage the specter of a jury trial into a favorable settlement.¹¹¹ Increasing the number of lawsuits is costly to litigants and to the court system, so it might constitute a hidden monetary cost of eliminating the summary judgment device.

Let us assume for the sake of argument that the claim is descriptively accurate—that abolishing summary judgment would lead to an increase in the number of lawsuits filed. We have no way of knowing whether this would be a positive or negative development,¹¹² as measured either by social cost or by any other yardstick. It depends upon whether the current number of cases filed is optimal, too small, or too

¹⁰⁹ See Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1104 (1986) (“The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.”).

¹¹⁰ Bronsteen, *supra* note 81, at 915–16.

¹¹¹ See Issacharoff & Loewenstein, *supra* note 14, at 105 (“By increasing the anticipated costs, summary judgment discourages a broad spectrum of plaintiffs from entering the litigation arena.”).

¹¹² See, e.g., Bronsteen, *supra* note 81, at 920; cf. Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965, 996 (1998) (“For the most part, the changing doctrines of the last two decades and greater use of procedure as an impediment to adjudication rather than as a catalyst for adjudication, have been a wrong turn in the law occasioned by an overwrought belief that the system demanded constraint in order to survive the onslaught of cases and controversies.”).

large. If the current system overly encourages lawsuits, then a further increase in cases would impose undue cost on defendants and courts. On the other hand, if the current system unduly discourages lawsuits, then removing barriers to litigation is necessary to create optimal deterrence of illegal acts. When defendants break the law, they impose social costs on their victims and, in turn, on the public that has deemed adherence to this particular law to be in its interest. In many contexts, private lawsuits are the primary means of enforcing our laws and deterring those who stand to gain by violating them. When too few plaintiffs sue, there is too little deterrence and therefore too much lawbreaking.

Without knowing whether an increase in lawsuits would be good or bad, it would be unreasonable to deem it a virtue that summary judgment might reduce the number of cases filed. Indeed, summary judgment appears to be a rather arbitrary advantage bestowed on the defendant,¹¹³ tipping the scales for no clear reason. If summary judgment were reconceptualized such that judges were just as willing to grant it in favor of plaintiffs as they are to grant it in favor of defendants, then the procedure would no longer discourage lawsuits. Such a change could be criticized on the same ground discussed here regarding abolition: it might lead to more litigation. But evening the playing field between plaintiffs and defendants is fair on its face; it would be problematic only if we were confident that most lawsuits lack merit. Some people hold that opinion, but I am unaware of any objective support for it.

3. *Harm to Faultless Defendants*

One last image might trouble those who are considering my plea to abandon the practice of summary judgment. It is the image of a defendant who did nothing wrong but who nonetheless faces repeated and protracted litigation. The source of the litigation is a set of unscrupulous plaintiffs and their lawyers who are eager to soak the deep-pocketed defendant for a settlement they do not deserve.¹¹⁴ The

¹¹³ See Issacharoff & Loewenstein, *supra* note 14, at 75 (“[S]ummary judgment fundamentally alters the balance of power between plaintiffs and defendants by raising both the costs and risks to plaintiffs in the pretrial phases of litigation while diminishing both for defendants.”); cf. Stempel, *supra* note 40, at 108 (“*Matsushita* unwarrantedly strengthened summary judgment by expanding the courts’ authority to foreclose from the factfinder certain interpretations of facts and to declare a plaintiff’s theory of the case impossible as a matter of law.”).

¹¹⁴ Jonathon T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 *IND. L.J.* 59, 95 (1997) (“[W]ith respect to small unmeritorious claims, a plaintiffs’ attorney may hope to profit from a case, even if the expected verdict will not cover his total litigation expenses, so long as he

money paid out by the defendant in settlements or attorneys' fees or both might ultimately create higher prices for consumers, losses for shareholders, and cutbacks for employees.¹¹⁵ Summary judgment gives the faultless¹¹⁶ defendant an attractive alternative to paying undeserved settlements or the large lawyers' bills associated with trial.

This point is entirely true. Summary judgment has the virtue of aiding the faultless defendant. And if all defendants were faultless, then it would be harmful to abolish the procedure. But, of course, the rub is that not all defendants are faultless. Because summary judgment entices judges to end cases before trial and makes it harder for any plaintiff to extract an early settlement, it helps *all* defendants—those who deserve the help and those who do not. As explained in the previous section, the plight of the virtuous defendant would become a persuasive point only if we had some reason to believe that most defendants fall into this category—a reason that no one so far has supplied.

My claim is not that abolishing summary judgment benefits everyone. It clearly does not. I am suggesting merely that on the whole, summary judgment costs more than it saves, both in terms of money and fairness. For every person who benefits from this procedural device, there is another who is harmed; and in the aggregate, Americans spend more money on litigation and receive a less fair product than they would if summary judgment were no longer a part of the civil justice system.

III. A Brief Sketch of the Constitutional Issue

It is unnecessary for this Article to restate the constitutional case against summary judgment laid out so well in Suja Thomas's forthcoming article.¹¹⁷ On the other hand, an article titled "Against Summary Judgment" would do its readers a disservice if it failed to

can induce the defendant to settle before trial for an amount that will cover three times the attorney's effort up to that point.").

¹¹⁵ JOINT ECON. COMM., 105TH CONG., AUTO CHOICE: RELIEF FOR BUSINESSES AND CONSUMERS 1 (Comm. Print 1998), available at <http://www.house.gov/jec/tort/relief/relief.pdf> ("Ultimately, the costs of the tort litigation system are passed on to consumers in the form of higher prices and reduced profits and dividends paid to stockholders. Workers are further impacted when excessive liability costs lower employment by diverting resources from payroll and production purposes.").

¹¹⁶ I am using "faultless" as a shorthand for "not liable." My point applies not only to cases in which the defendant is accused wrongly of being negligent, but also to cases in which it is accused wrongly of a strict liability offense.

¹¹⁷ Thomas, *supra* note 19.

provide even a cursory explanation of the point that summary judgment is unconstitutional.

The Seventh Amendment to the U.S. Constitution states that “[i]n suits at common law, . . . the right of trial by jury shall be preserved.”¹¹⁸ The reference to “common law” and the word “preserved” have prompted the Supreme Court consistently to interpret the Amendment to mean that litigants today must be accorded no less restrictive access to a jury trial than were litigants in 1791 when the Amendment was ratified.¹¹⁹ There was no such thing as summary judgment in 1791,¹²⁰ so on its face the practice stands on infirm constitutional footing. It could, however, be permissible if any procedures that did exist in 1791 created a limitation on the right to jury trial equivalent to that which summary judgment creates in our current system.¹²¹

As Thomas explains, there were five relevant procedures in 1791 that limited the right to jury trial.¹²² Summary judgment is constitutional if and only if it equates to any of these procedures. The five procedures were: (1) demurrer to the pleadings, (2) demurrer to the evidence, (3) special case, (4) compulsory nonsuit, and (5) new trial.¹²³

The first three procedures shared a crucial similarity: in each, the judge made no assessment of the facts of the case whatsoever. The demurrer to the pleadings was a sort of precursor to the modern motion for judgment on the pleadings (i.e., the motion to dismiss under Rule 12(b)(6)).¹²⁴ One party admitted all facts alleged by the other and requested judgment in its favor. The judge would then issue a conclusive judgment *one way or the other*. Unlike a modern 12(b)(6) motion, in which the case proceeds if the motion is denied, a demurrer to the pleadings would end the case in favor of whichever litigant received the ruling it sought. A defendant who made such a motion would lose her right to advance her case because she would have admitted everything alleged.¹²⁵ Thus, this procedure at most limited the right to jury trial as much as does a 12(b)(6) motion—far less than a summary judgment motion, which allows the judge to keep the plain-

¹¹⁸ U.S. CONST. amend. VII.

¹¹⁹ BRUNET ET AL., *supra* note 11, at 14–15; Thomas, *supra* note 19, at 146–47.

¹²⁰ BRUNET ET AL., *supra* note 11, at 14–15.

¹²¹ *See id.*

¹²² *See* Thomas, *supra* note 19, at 148.

¹²³ *Id.* at 148–58.

¹²⁴ *Id.* at 149 (“Under demurrer to the pleadings, the court considered only the facts alleged by the opposing party.”).

¹²⁵ *Id.* at 149–50.

tiff from a jury on the ground that the plaintiff's evidence would be insufficient to convince a reasonable jury.

Unlike the demurrer to the pleadings, the demurrer to the evidence might look to some like a variation on our current practice of summary judgment. But there are determinative differences. After all the evidence was presented at trial, one side could admit that all of the other side's evidence was true and ask the judge to decide the case *either way* by applying the law to those admitted facts.¹²⁶ Like the demurrer to the pleadings, this procedure was rare because it carried a huge risk (one that today's summary judgment lacks): if the judge disagreed with your claim to win as a matter of law, then you would lose the case outright. Another difference from summary judgment was that the procedure took place during the jury trial rather than before. But by far the most important difference was that the judge was not asked to (indeed, was required not to) weigh each side's evidence and decide whether any reasonable jury could rule for one of the parties. Instead, to pursue a demurrer to the evidence, one side had to admit everything alleged by the other side. This resembles far more closely the standard applied to a modern 12(b)(6) motion than to a motion for summary judgment.

The third common-law procedure, the special case, also involved a judicial determination of the law when the facts were in no dispute. If the parties established the facts by agreement or by a jury verdict, then they could ask the court to decide the case by a pure application of the law to those facts.¹²⁷ This differs from summary judgment for the same reasons that the demurrer to the evidence does: the judge makes no factual assessment, and whichever party loses at this stage automatically loses the case.

The fourth common-law procedure, the compulsory nonsuit, comes closer to summary judgment but still falls short. In the compulsory nonsuit, the judge could overrule a jury verdict if there was *no* evidence to support it.¹²⁸ This procedure is far more like the modern judgment notwithstanding the verdict than it is like summary judgment, because it occurred after the trial rather than before. But it lacked even the teeth of its modern analogue because it was limited to cases where no evidence was offered to support a necessary claim:

¹²⁶ *Id.* at 150–51.

¹²⁷ *Id.* at 156–57.

¹²⁸ *Id.* at 155.

“Whether there be *any* evidence, is a question for the Judge. Whether [there be] *sufficient* evidence, is for the jury.”¹²⁹

That leaves only the fifth common-law procedure, the new trial. This is the only procedure that could plausibly be said to restrict the right to jury trial as much as does summary judgment. Only via this procedure could a litigant in 1791 receive a meaningful ruling from a judge based on the sufficiency, rather than the mere existence, of the other side’s evidence. After the trial and jury verdict, the judge could rule in effect that no reasonable jury could have reached this conclusion, and accordingly he would order a new jury trial.¹³⁰

Of course, the standard of review is the only similarity between this procedure and summary judgment. The timing is different—post-trial rather than pretrial—which arguably suggests that the old procedure infringes the right to jury trial less severely. Far more important, though, is the difference in remedy. Summary judgment causes a litigant to lose her case without ever seeing a jury, whereas the new trial procedure of the common law merely required the litigant to retry her case in front of another jury. Regardless whether this retrying procedure was wasteful or otherwise bad policy, one cannot reasonably contend that such a remedy impinged the right to jury trial as much as does the remedy in summary judgment. In 1791, a plaintiff who suffered an adverse ruling from the new trial procedure would receive two jury trials, whereas today a plaintiff who suffers an adverse ruling at summary judgment does not even receive one.

Thus, none of the procedural mechanisms available in 1791 restricted the right to jury trial to the extent that it is restricted today by summary judgment. None allowed the judge to evaluate the conflicting evidence offered by both sides and issue a judgment resolving the case on the basis of his evaluation. Summary judgment gives the judge this power, and it is therefore used frequently to keep cases away from juries. Because we currently employ a procedure that deprives plaintiffs of jury trials in cases in which they would have had such trials in 1791, we are violating the constitutional edict that “[i]n suits at common law, . . . the right of trial by jury shall be preserved.”¹³¹

¹²⁹ Co. of Carpenters v. Hayward, (1780) 99 Eng. Rep. 241, 242 (K.B.) (emphasis added).

¹³⁰ Thomas, *supra* note 19, at 157–58.

¹³¹ U.S. CONST. amend. VII.

Conclusion

Summary judgment might be a wonderful procedure were it not inefficient, unfair, and unconstitutional. It is inefficient because it gives a defendant the incentive to impose the costly and time-consuming burden of discovery and motions practice upon the plaintiff, the court, and itself, rather than to settle early and avoid those costs. It is unfair because it requires a judge to decide the case in a context in which ruling for the defendant speeds along the judge's docket, whereas ruling for the plaintiff potentially invites a trial that would backlog the docket and bring both criticism and an increased workload upon the judge. Summary judgment thus creates a systemic bias against one of the two categories of litigants (plaintiffs), arguably the most egregious problem that can plague a civil justice system.¹³² Finally, summary judgment is unconstitutional because it fails to "preserve[]" the "right of trial by jury" in civil cases as mandated by the Seventh Amendment. When the Amendment was ratified, no procedure existed that imposed the limits on the right to a jury trial that are now imposed by summary judgment.

Powerful interests are aligned in favor of summary judgment. Large corporations, the typical defendants in important civil litigation, benefit from the procedure and would no doubt exert inexorable political pressure to retain it.¹³³ Judges too might support it, though only because they would overlook the fact that without summary judgment, most cases they now adjudicate would settle early rather than go to trial. Perhaps these interests cannot be overcome. But if that is the case, then we should at least acknowledge that summary judgment owes its continued existence primarily to our system's capitulation to those who undeservedly benefit from it. In a better world, it would not exist.

¹³² Cf. Daniel W. Shuman & Jean A. Hamilton, *Jury Service—It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors*, 46 SMU L. REV. 449, 450 (1992) ("Perceptions about the fairness of the judicial system are important because they reflect belief about its legitimacy.").

¹³³ See Gerald Burk, *Corporate Power and Its Discontents*, 53 BUFF. L. REV. 1419, 1419 (2006) ("Perhaps most devastating for the rule of law is that artificial persons have learned to reshape legal doctrine to their advantage by litigating rules, rather than discrete rights. In a word, corporate persons have become hegemonic. They shape the rules of the game, professional norms, and legal outcomes.").