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TOWARD A CIVIL JURY-TRIAL DEFAULT RULE

*Richard Lorren Jolly**

INTRODUCTION

The Federal Rules of Civil Procedure require litigants to affirmatively assert their Seventh Amendment right to trial by jury. Failure to do so defaults the proceedings to trial by judge. This jury-waiver default emerged at the federal level in 1938 and has remained unaltered since. But recently, Justice Neil Gorsuch and Judge Susan Graber recommended the Advisory Committee adopt a jury-trial default, such that a litigant would receive a jury trial unless it was affirmatively waived.¹ This Article expounds upon their brief proposal, reviewing the history of the jury-waiver default, the purported benefits of a jury-trial default, and the potential detriments of adopting the proposed rule.

The jury-waiver default emerged at the federal level concomitantly with the Federal Rules of Civil Procedure and the merging of the courts of law and equity. Nothing about merged courts, however, necessitated automatic waiver. Instead, the initial drafters of the Federal Rules adopted this approach for two reasons. First, it offered easy and efficient administration. It settled the mode of dispute resolution early, simplifying the process for judges and preventing a party from asserting her jury right in such a way as to secure a strategic advantage.² Second, automatic waiver was adopted in order to limit the number of jury trials. The initial advisory committee members were pro-judge, if not explicitly anti-jury, in their thinking.³ That a jury-waiver default would lead parties to forfeit their right and drive down the number of jury trials was understood and intentional.⁴

* Research Fellow to the Civil Jury Project, New York University School of Law. Thank you to Judges Lee Rosenthal and William Young, as well as Professors Kellen Funk, Alexandra Lahav, Renée Lerner, Suja Thomas, and Stephen Yeazell. All errors are, of course, my own.

1. See Hon. Neil M. Gorsuch & Hon. Susan P. Graber, Suggestion 16-CV-F in COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (Jan. 3, 2017), http://www.uscourts.gov/sites/default/files/2017-01-standing-agenda_book_0.pdf [hereinafter Suggestion 16-CV-F].

2. See *infra* notes 33–38.

3. See *infra* notes 39–46.

4. See *infra* Section I.

Justice Gorsuch and Judge Graber's recommendation suggests that neither of these rationales persists today. The reasons animating their proposal are concise enough to be reproduced in their entirety:

First, we should be encouraging jury trials, and we think that this change would result in more jury trials. Second, simplicity is a virtue. The present system, especially with regard to removed cases, can be a trap for the unwary. Third, such a rule would produce greater certainty. Fourth, a jury-trial default honors the Seventh Amendment more fully. Finally, many states do not require a specific demand. Although we have not looked for empirical studies, we do not know of negative experiences in those jurisdictions.⁵

In this brief paragraph the judges make three main contentions: The rule will increase the number of jury trials, ease administration, and be truer to the Constitution.

Some of the judges' contentions are more persuasive than others. Accepting their position that more jury trials is constitutionally desirable, it is unclear whether the proposed change would yield that result. Data on the number of jury trials inadvertently waived due to the current rule is unavailable. However, consideration of the many other factors contributing to the historically low rate of jury trials suggests that changing the default is unlikely to revive the enfeebled institution. Nevertheless, the judges are correct in asserting that a jury-trial default will increase certainty and simplify the administrative process in removed proceedings. They are also correct to highlight the symbolic significance of adopting a default rule reflecting the civil jury's importance as a constitutional actor.

Notwithstanding these benefits, the proposed rule might carry undesirable consequences. It could result in an increase in the number of pro se litigants entitled to a jury trial. But while pro se litigants impose costs on the judicial system, many of their claims are disposed of through pretrial motions. Regardless, procedural rules should not be traps for the unrepresented. Furthermore, the initial advisory committee's purported fears of strategic assertion of jury rights had more to do with when a mode of trial must be settled than with the given default rule. A near-century of experience has made determining which claims are entitled to a jury trial far more certain. Where debate persists, the issue can be resolved just as easily in the presumptive shadow of a jury trial.

5. Suggestion 16-CV-F, *supra* note 1.

I. HISTORY OF THE JURY-WAIVER DEFAULT RULE

Nothing about merged courts of law and equity necessitates a jury-waiver default. Prior to the adoption of the Federal Rules, many states had already merged their courts and maintained a jury-trial default.⁶ It must be stressed that the initial drafters of the Federal Rules made an affirmative decision to adopt automatic waiver. They did so based on claims of administrative efficiency, but also with the intent to decrease the number of jury trials.⁷

To understand how dramatic the shift to a jury-waiver default regime was, one must remember that nonjury trials did not exist at common law. Trial by jury was—with a few obscure exceptions—the only form of trial used in courts of law in the United States.⁸ One of the most significant distinctions between courts of law and equity was the consistent presence of a jury in the former.⁹ The procedural rules for the separate courts were chiefly animated by this distinction. In courts of law, the rigid writ system required complex claims to be simplified into easily cognizable trials such that juries could readily comprehend and resolve disputes.¹⁰ Courts of equity, in which no jury right existed, employed highly flexible procedures that granted judges tremendous discretion in crafting resolutions.¹¹

This began to change during the mid-nineteenth century. In 1846, New York became the first state to alter its constitution to allow litigants to waive their right to a civil jury “in the manner to be prescribed by law.”¹² The Field Code, named after its principal drafter David Dudley Field, was enacted shortly thereafter. That Code merged New York’s courts of law and equity, but also permitted jury waiver in three ways: (1) by failing to appear at the trial; (2) by written consent, in person or by attorney, filed with the clerk; or (3) by oral consent in open court, entered in the minutes.¹³ Critically, it did *not* require a litigant to make an affirmative jury demand.

6. See *infra* notes 19–26 and accompanying text.

7. See *infra* notes 32–48 and accompanying text.

8. See ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 260–61 (1952) (noting the exceptions).

9. *Id.*

10. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 963 (1987).

11. *Id.*

12. See N.Y. CONST. art. I, § 2 (1846).

13. N.Y. LAWS, c. 379 § 221 (71st Sess., Apr. 12, 1848).

The Field Code's justification for allowing waiver appears to be the result of New York's concomitant shift to an elected judiciary.¹⁴ Some have suggested that the rule reflected the drafters' perception that elected judges, like juries, were more likely to be representative of the community.¹⁵ Alternatively, others have noted that it was part of a general shift toward displacing civil juries.¹⁶ Justice Limpkin of the Supreme Court of Georgia took note of the air in 1848, stating: "[I]t is notorious, that modern law reform . . . seeks . . . to dispense as much as possible with juries."¹⁷ To support this proposition, Justice Limpkin erroneously cited New York as practicing the rule that "[a] jury is never to be invoked, unless specially demanded by one of the parties."¹⁸ His confusion would soon seem predictive.

As other states began to merge their courts of law and equity, the Field Code became their chief model, with many states adopting it outright or with small variation.¹⁹ Iowa partially adopted the Code in 1851, but altered it to become the first state to implement a jury-waiver default.²⁰ The reason for this alteration is unclear, but may have been the result of peculiarities in the state constitution that prevented the drafters from fully merging courts of law and equity.²¹ Still, Iowa's version proved influential, with Nebraska adopting an identical version six years later, complete with automatic waiver.²² Following the Civil War, Virginia and Connecticut adopted their own versions of automatic waiver in 1871²³ and 1879,²⁴ respectively. Alternatively, some states adopted the Field Code but maintained a jury-trial default. But some of these states imposed jury fees that parties needed to pay in advance, thereby achieving the same result as an

14. See Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 L. & HIST. REV. 311, 334 (1988).

15. *Id.* at 327.

16. For a review of this history, see Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 28 WM. & MARY BILL RTS. J. 811, 831 (2014).

17. *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 207 (1848).

18. *Id.*

19. See Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice* 123 AM. HIST. REV. 132 (Feb. 2018) (outlining state adoption of the Field Code).

20. See IOWA CODE § 1772 (1851).

21. See CHARLES MCGUFFEY HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* 97 (1897) (noting that Iowa's version was prompted by a perceived constitutional requirement).

22. See NEB. CODE § 1772 (1857).

23. Act of 1871, c. 57, § 38, 1871 Va. Acts 53.

24. Act of 1879, §29, 1879 Conn. Spec. Acts 156.

automatic waiver rule.²⁵ Finally, some states that maintained the jury-trial default began to recognize forms of jury waiver that went beyond those statutorily recognized in the Code.²⁶

The Field Code also proved a model to the initial advisory committee charged with developing the Federal Rules of Civil Procedure in the early twentieth century.²⁷ But like some of the state reformers in the preceding century, the advisory committee altered the Code to reflect a jury-waiver default. The committee viewed this as an imperative change. Charles E. Clark—often considered the chief architect of the Federal Rules—vehemently championed automatic waiver, writing frequently about its benefits and listing it alongside other reforms he considered vital.²⁸ Later, he would call Rule 38(b) “one of the best and most necessary features of the new system.”²⁹ Other members of the advisory committee, too, wrote about the need for a jury-waiver default.³⁰ They argued that this approach would increase administrative efficiency through limiting the instances in which a court would be required to determine the extent of the jury right, and preventing a party from strategically wielding the right.

Both of these concerns arose out of confusion at the time over the breadth of the jury right in merged courts of law and equity. Judges had struggled to determine when juries were required under their states’ code systems. For instance, Justice Cardozo struggled to determine the extent of the jury right under New York’s Field Code in three cases involving equitable counterclaims to suits for damages, with each case producing a different result.³¹ It was unclear to what extent claims of law and equity “merged,” and thus whether jury verdicts should be treated as binding or advisory. In response to these outcomes, some skeptics warned that in merged courts “[t]he wishes of the parties, or guesses of the trial judges, rather than the Constitution, will determine [the extent of the jury right].”³²

25. See Fleming James, Jr., *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L.J. 1022, 1025 n.21 (1936); Lerner, *supra* note 16, at 831 (acknowledging this effect).

26. See Lerner, *supra* note 16, at 831.

27. Subrin, *supra* note 14, at 312.

28. See, e.g., Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure II. Pleadings and Parties*, 44 YALE L.J. 1291, 1323 (1935); Charles E. Clark, *The New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 209, 213 (1933); CHARLES E. CLARK, CODE PLEADING 70 (1928); Charles E. Clark, *Fact Research in Law Administration*, 2 CONN. B.J. 211, 227 (1928); Charles E. Clark, *Trial of Actions Under Code*, 11 CORNELL L.Q. 482, 483–84 (1926).

29. Charles E. Clark, *The Nebraska Rules of Civil Procedure*, 21 NEB. L. REV. 307, 319 (1942).

30. See e.g., James, *supra* note 25, at 1025.

31. O.L. McCaskill, *Jury Demands in the New Federal Procedure*, 88 U. PA. L. REV. 315, 321 (1940) (outlining the results and the confusion).

32. *Id.* at 329.

The advisory committee was conscientious of this difficulty and proposed automatic waiver as a method of simply avoiding the issue. James Fleming, a Yale Professor and one of the advisory committee's research assistants, wrote that "[jury-waiver default] contains a clear direction which will forestall judicial worry as to possible complications anent the mode of trial."³³ Additionally, Clark contended that automatic waiver eliminated the need for a judge to "recall that once there was an historic struggle between Coke and Ellesmere . . . [, unless] a claim for jury trial is actually made."³⁴ "The remote danger that a possible litigant may at some time be deprived of his jury trial right by a failure of the court to perceive some of the historical connotations of his case," he added, "is too unsubstantial a basis to justify ancient formalism in pleading in all cases," especially if the parties are indifferent to the mode of dispute resolution.³⁵

By avoiding the issue in most cases, the authors maintained that automatic waiver prevented wily litigants from taking advantage of judicial confusion. Clark frequently made this point, arguing that "[a] necessary consequence of the original code provision allowing a litigant, even if indifferent, to rely on his jury right . . . is that he may use the right to jockey for procedural advantages."³⁶ That is, an opportunistic litigant might submit his dispute to a judge, "gambl[ing] on the result and, by keeping his position ambiguous, be able to assert his claim for a jury after he has lost out on trial to the judge."³⁷ There were a handful of cases exemplifying precisely such jockeying in those states maintaining the unaltered Field Code, and the advisory committee members frequently cited them as evidencing the necessity of a jury-waiver default.³⁸ Early waiver meant less opportunity for mischief.

The committee's willingness to resolve these administrative concerns through automatic waiver is telling of their views on the jury as an institution. As one scholar recognized, "Virtually everyone connected with urging uniform procedural rules denigrated juries."³⁹ Clark was particularly hostile, seeming "to have preferred equity to law simply because of the opportunity it offered to avoid jury trial."⁴⁰ He disparaged it as the "town hall method of trying cases," and

33. James, *supra* note 25, at 1040.

34. Clark, *The New Illinois Civil Practice Act*, *supra* note 28, at 213.

35. *Id.*

36. See, e.g., CLARK, CODE PLEADING, *supra* note 28, at 70.

37. Clark & Moore, *supra* note 28, at 1297.

38. See, e.g., Jackson v. Strong, 222 N.Y. 149, 152-53 (1917).

39. Subrin, *supra* note 10, at 968.

40. See LAURA KALMAN, LEGAL REALISM AT YALE 1927-1960, at 21 (1986).

claimed that juries “injected an element of rigidity—of arbitrary right—into a system wherein general rules of convenience should prevail.”⁴¹ Other committee members were no kinder. Edson Sunderland, for instance, published a hypercritical article aptly titled *The Inefficiency of the American Jury*.⁴² And when Fleming whittled the core objectives of united procedure down to just three, number two read:

The right of jury trial should not be expanded. This method of settling disputes is expensive, dilatory—perhaps anachronistic. Indeed, the number of jury trials should be cut down if this can be done so as to not jeopardize the attainment of other objectives.⁴³

Of course, the advisory committee could not do away with civil juries altogether. Not only did the Seventh Amendment stand in their way, but also Congress had explicitly warned that it would not accept a united procedure that limited the jury right.⁴⁴ The drafters insincerely heeded that instruction. A review of the minutes from their discussions reveals oft-repeated concerns about the need to maintain the *appearance* of protecting the right, even joking about Congress’ misguided wisdom.⁴⁵ To be sure, “[w]hen one member observed that they were drafting a code primarily for ‘actions tried by the court,’ rather than a jury, no one disagreed.”⁴⁶ The jury was a speed bump that the drafters sought to surreptitiously dispose.

The committee was well aware that a jury-waiver default would decrease the number of jury trials. Clark had conducted empirical research on the number of jury trials in New York and Connecticut, and attributed Connecticut’s dramatically lower rate to its automatic waiver rule.⁴⁷ In other writings, he acknowledged that under a jury-waiver default judges were more likely to sit without juries “since inertia leads to waiver and not to jury trial as under the old system.”⁴⁸ This was no great observation; Clark’s Contemporaries also acknowledged this effect.⁴⁹ One even proclaimed: “The most effective device

41. CLARK, *CODE PLEADING*, *supra* note 28, at 53.

42. Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 302 (1915).

43. James, *supra* note 25, at 1026.

44. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (2012)).

45. Subrin, *supra* note 10, at 972.

46. *Id.* at 973.

47. Clark, *Fact Research in Law Administration*, *supra* note 28, at 227.

48. See Clark, *The New Illinois Civil Practice Act*, *supra* note 28, at 212.

49. See, e.g., James A. Pike & Henry G. Fisher, *Pleadings and Jury Rights in the New Federal Procedure*, 88 U. PA. L. REV. 645, 647 (1940) (noting that “the formula has changed from inertia = jury trial, to inertia = no jury trial”).

yet evolved for effectuating a more limited use of the jury and yet which preserves the constitutional right is that of requiring a party to make a timely demand or be deemed to have waived his rights.”⁵⁰ Automatic waiver offered a way to limit the number of jury trials without alarming skeptics or Congress.

As this history demonstrates, the jury-waiver default was foreign to common law, unnecessary to merged courts of law and equity, and borne out of the advisory committee’s desire to limit confusion and curb civil jury trials. While the federal rule requiring an affirmative jury demand has undergone some changes since it was adopted in 1938, these changes have concerned only the time at which a party needs to make the demand.⁵¹ It appears the committee has never considered adopting a jury-trial default—that is, until Justice Gorsuch and Judge Graber submitted their proposal.

II. THE BENEFITS OF A JURY-TRIAL DEFAULT RULE

The three core reasons animating Justice Gorsuch and Judge Graber’s jury-trial default recommendation are: First, the rule will increase the number of jury trials; second, the rule will increase simplicity and certainty with respect to removed cases; and third, the rule is more true to the spirit of the Seventh Amendment.⁵² Only the second and third claims are persuasive.

A. *A Jury-Trial Default is Unlikely to Increase Jury Trials*

Although adopting a federal jury-waiver default initially decreased the number of jury trials, it is not clear that altering the rule now would reverse the trend. True, the proposed rule slightly increases costs on parties seeking to avoid juries. But there are far more salient factors contributing to the dearth of jury trials today than default inertia. These factors include the Federal Rules’ emphasis on discovery, the rise in managerial judging, and the relaxed summary judgment standard. Moreover, a review of states with different default rules reveals no meaningful change in jury trial rates.⁵³ Thus, despite the judges’ claims, the proposed rule is unlikely to rejuvenate the institution.

Often overlooked in the discussion on the jury’s decline is that the number of civil trials generally—bench and jury—has been decreasing

50. Harry W. Henry, *The Proposed Code of Civil Procedure for Missouri Parties and Pleadings*, 7 MO. L. REV. 1, 6 (1942).

51. See FED. R. CIV. P. 38 advisory committee’s notes.

52. Suggestion 16-CV-F, *supra* note 1.

53. See *infra* notes 72–73 and accompanying text.

steadily for almost eighty years. The proportion of federal civil cases concluding in trial has fallen as such: 15.2% in 1940; 12% in 1952; 9.1% in 1982; 3.5% in 1992; 1.2% in 2002. It has roughly remained at 1.2% for the past decade and a half.⁵⁴ Importantly, since 1987 there have been fewer bench trials than jury trials at the federal level.⁵⁵ The jury-waiver default in the Federal Rules has remained constant during this period, strongly suggesting that it is not a major contributing factor to the phenomenon.

A better answer for the decline is that the Federal Rules have made trials unnecessary. At common law, a trial was the only opportunity litigants had to discover facts about their dispute, as the pretrial process was largely dedicated to keeping order among the writs.⁵⁶ Courts of equity allowed litigants to conduct some level of what we might think of today as discovery, but it was very limited.⁵⁷ The Federal Rules changed this, dramatically expanding discovery into a sophisticated investigatory process for all trials. This made it no longer necessary for parties to wait until trial to understand the strengths and weakness of their case, freeing them to enter into informed settlements and making trials redundant.⁵⁸ In fact, in a recent speech Justice Gorsuch pithily acknowledged: “Not long ago, we used to have trials without discovery: Now we have discovery without trials.”⁵⁹

But the Federal Rules did more than just expand discovery. They also allowed for liberal joinder of parties and claims, precipitating the need for judges to assume a more managerial role.⁶⁰ In the 1960s, to facilitate case management, the judiciary abandoned master calendars and adopted an individual assignment system such that a single judge handled a case from filing to finish.⁶¹ At the same time, the courts issued a handbook encouraging judges to adopt a process of extensive pretrial conferencing, designed to help them oversee discovery and to identify and refine issues.⁶² This managerial role for judges allowed

54. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460–63 (2004).

55. *Id.*

56. John H. Langbien, *The Disappearance of Civil Trial*, 122 YALE L.J. 522, 525 (2012).

57. *Id.* at 525–26.

58. For a review of how discovery has affected trial rates, see Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 716 (1998).

59. Tony Mauro, *In Speech Notes, Neil Gorsuch Painted a Dark Picture of Litigation*, NAT'L L.J. (Mar. 13, 2017), <http://www.nationallawjournal.com/id=1202781242573/>.

60. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 377 (1982).

61. *Id.*

62. *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960).

them to shape litigation and pressure parties toward agreement.⁶³ The 1983 revisions to Rule 16 codified this responsibility, listing “facilitating settlement” as a core objective of pretrial conferencing.⁶⁴ Trials were no longer the process of resolving disputes, but rather the result of a breakdown in the process.

Three years later, in 1986, the Supreme Court’s reframing of Rule 56’s summary judgment standard further curtailed the number of trials. In a trilogy of decisions, the Court empowered judges to dismiss cases in which no genuine dispute of material fact existed so as to necessitate a trial.⁶⁵ Before the trilogy, summary judgment was used sparingly, and was even described as a “toothless tiger.”⁶⁶ Post-trilogy, however, judges were emboldened, resulting in a statistically significant increase in the number of summary judgment motions made, the frequency with which such motions were granted, and the rate at which they were affirmed on appeal.⁶⁷ While some scholars quibble with the extent to which the trilogy has influenced the overall decline in trials,⁶⁸ it is clear that fewer federal cases are proceeding to trial as a result of the new summary judgment standard.⁶⁹

Scholars have offered many explanations beyond these three to explain the decline.⁷⁰ But a review of the scholarship finds no recent writer suggesting that the jury-waiver default rule has had any effect.⁷¹ Moreover, although statistics of state jury trial rates are often inconsistent or unavailable, there does not appear to be any substantial difference in rates between those states employing the two defaults. For instance, in 2007, of the states with broadly applicable jury-trial de-

63. Resnik, *supra* note 60, at 376–77.

64. FED. R. CIV. P. 16(a).

65. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 578–80 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244–47 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 319–323 (1986).

66. See Arthur R. Miller, *The Pretrial Rush to Judgment*, 78 N.Y.U. L. REV. 982, 1023–24, 1055–56 (2003).

67. *Id.* at 1050.

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

69. Certain types of cases are dismissed with greater frequency, such as antitrust, libel, RICO, securities fraud, civil rights, products liability, and age discrimination actions. See Miller, *supra* note 66, at 1052–53.

70. See SUJA THOMAS, *THIS MISSING AMERICAN JURY* 32–37 (2016) (advancing a theory of doctrinal insufficiency).

71. The most recent identified reference to the jury-diminishing effect of the waiver default came in 1952. See ROBERT WYNESS, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 262 (1952) (“The necessity of an explicit demand as a condition of jury trial has done much toward diminishing the incidence of that mode of trial.”).

faults,⁷² only Alabama held jury trials at a noteworthy rate.⁷³ While this is far from conclusive and additional research is encouraged, these figures further undermine the notion that the proposed rule will increase the number of jury trials, especially enough to justify adoption on that basis alone. Nevertheless, there are other benefits.

B. A Jury-Trial Default May Increase Simplicity and Certainty

As Justice Gorsuch and Judge Graber note in their recommendation, a jury-trial default would be simpler to administer with respect to cases removed to federal court. Federal Rule 81(c)(3)'s procedure for demanding a jury trial in removed cases is complicated, making inadvertent waiver more likely. This has sparked disparate judicial approaches for granting discretionary relief from jury waiver under Federal Rule 39(b). A jury-trial default would simplify this process and make litigants more certain they will receive their desired mode of dispute resolution.

Justice Gorsuch and Judge Graber are not the first to acknowledge the shortcomings of Rule 81(c)(3). The rule has been called “poorly crafted” with “needless complexity,” and a “trap for the unwary.”⁷⁴ A quick review of its terms demonstrates why. Rule 81(c)(3)(A) requires that in removed actions, “a party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal.”⁷⁵ However, “if the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so.”⁷⁶ Rule 81(c)(3)(B) goes on to state that if “all necessary pleadings have been served at the time of removal,” a party must demand a jury trial within fourteen days after it files notice of removal or is served notice of removal, with failure to do so resulting in waiver.⁷⁷

72. States with broad jury-trial default rules include: Georgia, GA. CODE ANN. §§ 9-11-38, 9-11-39 (2007); Minnesota, MINN. R. CIV. P. 38.02; Mississippi, MISS. R. CIV. P. 38(a); Missouri, MO. R. CIV. P. 38(a); and Oregon, OR. R. CIV. P. 51. Some states, such as Nebraska, have different default rules for different types of courts. See *Jacobson v. Shresta*, 849 N.W.2d 515 (Neb. 2014).

73. See National Center for State Courts, *Highlighting Aspects of the National Center for State Courts Civil Justice Reform Initiative*, 6 CIVIL ACTION, no. 1, 2007, at 1–4 (average number of trials per 100,000 population for jury-waiver default courts was 15.7, with Alabama holding 59.2).

74. See generally Susan M. Halpern, *Federal Rule 81(c) and Jury Demand in a Removed Action: A Procedural Trap for the Unwary*, 47 ALB. L. REV. 623, 628 (1983) (outlining and collecting criticisms).

75. FED. R. CIV. P. 81(c)(3)(A).

76. *Id.*

77. FED. R. CIV. P. 81(c)(3)(B).

Some issues should be immediately apparent. First, Rule 81(c)(3)(A)'s incorporation of state law overlooks the variety of jury demand provisions, particularly as to when a demand must be made. Some states, Nevada and New York for instance, require a demand but not until later in the proceedings.⁷⁸ Rule 81(c)(3)(A) is set in the present tense—"if the state law *did* not require an express demand for a jury trial"—seemingly setting the reference point at the time of removal, such that if a demand was not yet necessary the rule is not implicated. But courts have taken different approaches. The Ninth Circuit has held that the rule applies if a state requires a jury-demand *at any time*.⁷⁹ The Second Circuit, on the other hand, has held that the rule does not apply if a demand was not yet necessary under state law, holding Rule 38(b) is implicated instead.⁸⁰ Neither of these approaches is required by the text of Rule 81(c)(3)(A).

The more glaring issue is that Rule 81(c)(3)(B) does not address the situation in which a case is removed prior to "all necessary pleadings" being served. An example is if the case is removed prior to a defendant filing an answer. The response to this omission has been yet another judicial gloss, holding that under such circumstances Rule 38(b) kicks in and provides a party ten days after the last pleading is served—for instance, a defendant's answer—to make a jury demand.⁸¹ Failure to do so results in waiver under Rule 38(d). Again, this approach is not dictated by the Rules. The result is that a misinformed litigant—thinking she can demand a jury trial at a later date based on her state's more liberal rules—may inadvertently waive her right to trial by jury. Even an experienced attorney might make this mistake.

Rule 81's complexity has made discretionary relief under Rule 39(b) a necessary safety valve. That rule states that when no demand is made, "the court may, on motion, order a jury trial on any issue for which a jury might have been demanded."⁸² But courts employ disparate standards here, too. The Ninth Circuit, for instance, requires something beyond inadvertence or mere oversight in order to justify discretionary relief.⁸³ Alternatively, the Second Circuit provides more "play in the joints," reviewing whether the untimely jury demand will cause prejudice to the defendants or interference with the court's

78. NEV. R. CIV. P. 38(b); N.Y. CPLR § 4102(a).

79. *See, e.g., Lewis v. Time Inc.*, 710 F.2d 549, 556 (1983).

80. *See, e.g., Cascone v. Ortho Pharm. Corp.*, 702 F.2d 389, 392–93 (2d Cir. 1983).

81. *See, e.g., Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1063 (9th Cir. 2005).

82. FED. R. CIV. P. 39(b).

83. *See, e.g., Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001).

schedule.⁸⁴ These disparate standards increase litigant uncertainty, making them reliant on judicial discretion to determine whether they will receive their legitimately desired jury trial.

Justice Gorsuch and Judge Graber's jury-trial default proposal offers a solution. Rule 81(c) might be adjusted such that a litigant would be entitled to a jury trial as of right in all cases removed to federal court, regardless of intentional or inadvertent waiver prior to removal. True, this approach would result in duplicative waiver filings and perhaps even inadvertent jury trials, but there is a simple solution. Should there be any question as to whether a bench trial is desired, the judge could simply inquire during pretrial conferencing. The 1963 advisory notes to Rule 81 already suggest "a district court may find it convenient to establish a routine practice of [directing the parties to state whether they demand a jury]."⁸⁵ The additional time required to make this determination would be insignificant, and would be outweighed by the benefit of ensuring litigants' Seventh Amendment rights.

C. *A Jury-Trial Default is Truer to the Constitution*

Perhaps the most significant benefit of adopting Justice Gorsuch and Judge Graber's proposal would be symbolic. Default rules project systemic values, signaling desired outcomes and gently nudging toward them.⁸⁶ The current automatic waiver rule paints the jury as merely an individual right, which is a perspective unmoored from the original intent of the Seventh Amendment. The Framers viewed the jury as a fundamental political institution, one in which civic participation was realized and community norms injected into the administration of justice.⁸⁷ Adopting a jury-trial default would better acknowledge this structural and public role. It would simultaneously ensure litigants' procedural autonomy, while also respecting the jury as a constitutional actor.

The current automatic rule could not be more out of step with the history of the Seventh Amendment. Under colonial rule, the jury served as a key channel through which colonists exercised local and democratic control against the distant and unrepresentative Crown.⁸⁸

84. See, e.g., *Cascone*, 702 F.2d at 392.

85. FED. R. CIV. P. 81 advisory committee's note to 1963 amendment.

86. For a general discussion on default rules, see Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1156, 1157 (2013).

87. 87 See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS* 74 (1998).

88. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653–56 (1972).

In the decades leading up to the Revolution, colonists used the civil jury both as a shield—for instance, by refusing to enforce civil penalties against smugglers—and as a sword—by awarding smugglers damages for harms resulting from officers’ searches.⁸⁹ The Crown responded by expanding the jurisdiction of juryless tribunals,⁹⁰ an act the colonists viewed as tyrannical.⁹¹ It even helped motivate the Revolution, with the Founders specifically accusing the Crown in the Declaration of Independence of “depriving [them] in many cases of the benefits of trial by jury.”⁹²

Following independence, the Framers constitutionalized the civil jury in part to serve as a similar bulwark against the new federal government. Local civil juries were entrusted to check abuses by each of the three branches of government.⁹³ Most apparent was the civil jury’s check on the judiciary. The Founders were wary of unelected judges, and particularly concerned with their potential for corruption and state bias.⁹⁴ By serving as the “lower judicial bench” in a bicameral judiciary,⁹⁵ the jury tied the hands of judges who might otherwise have sought to subvert the law. The civil jury also checked the legislature by guaranteeing that no national act would be enforced without first passing through a body of local laymen.⁹⁶ Finally, the jury checked the executive by ensuring that those harmed by enforcement abuses might nevertheless find relief.⁹⁷ The jury was the lynchpin constitutional actor for ensuring the enumerated rights.⁹⁸

Involving citizens in the administration of justice also had intended socio-political benefits. Serving on a jury was seen as an excludable political right, not entirely different from the right to vote for or serve

89. See, e.g., *Erving v. Cradock* (Mass. 1761) reprinted in JOSIAH QUINCY, JR., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772*, at 553 (Boston 1865).

90. See, e.g., *Stamp Act, 1765*, 5 Geo. 3, c. 12 (Eng.); *Townshend Revenue Act, 1767*, 7 Geo. 3 (Eng.).

91. 91 See *RESOLUTIONS OF THE STAMP ACT CONGRESS (1765)*, reprinted in *SOURCES OF OUR LIBERTIES 270–71* (Richard L. Perry & John C. Cooper eds., 1959) (“[The Stamp Act], and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists.”).

92. *THE DECLARATION OF INDEPENDENCE* para. 14 (U.S. 1776).

93. See generally SUJA A. THOMAS, *THE MISSING AMERICAN JURY* 43–48 (2016).

94. See THOMAS JEFFERSON, *ON DEMOCRACY* 61–66 (Saul K. Padover ed., 1939) (noting the benefits of “twelve honest men” over permanent judges).

95. JOHN TAYLOR, *AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES* 209 (W. Stark ed., Routledge & Kegan Paul Ltd. 1950) (1814).

96. See, e.g., Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 *TEX. L. REV.* 345, 351–52 (1995).

97. See AMAR, *supra* note 87, at 74, 88.

98. *Id.* at 108.

in elected office.⁹⁹ To be a juror meant that you were a citizen entitled to full democratic participation—a shamefully narrow class at the founding and throughout much of American history.¹⁰⁰ What is more, the jury box served as a place to teach and practice that participation. Alexis de Tocqueville famously described the jury as “a gratuitous public school” that “instill[s] some of the habits of the judicial mind into every citizen.”¹⁰¹ He added that it “teaches every man not to recoil before the responsibility of his own actions and impresses him with that manly confidence without which no political virtue can exist.”¹⁰² Jury service was a democratic and virtue enhancing activity that was meant to strengthen the young nation.

Considering these foundations, it might be surprising that jury waiver is permitted at all. Allowing private citizens to unilaterally bypass a public institution, thereby disenfranchising citizens and aggrandizing the judiciary, should strike us as somewhat problematic. When the law develops without democratic input, it becomes detached from community norms.¹⁰³ This is a particular threat when the bench is woefully unrepresentative of the nation’s populace, as is our own.¹⁰⁴ Also, citizens lose out on the educational and the emboldening experience of serving as a juror.¹⁰⁵ This should not be shrugged away. Data shows that citizens who serve on juries are more likely to vote and have higher rates of general civic engagement.¹⁰⁶ Excluding them can cause deep civic apathy. As Plato warned more than two millennia ago: “[I]n private suits . . . all should have a share, for he who has no share in the administration of justice is apt to imagine that he has no share in the State at all.”¹⁰⁷

Importantly, Justice Gorsuch and Judge Graber are not recommending eradicating jury waivers. That would be out of step with the

99. Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 220–21 (1995).

100. See Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1119 (2014) (reviewing the history of expanding jury participation rights).

101. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 274 (J.P. Mayer ed., 2000) (1835).

102. *Id.*

103. See, e.g., HARRY KELVIN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 494–95 (1966) (“The jury in the guise of resolving doubts about the issues of fact, gives reign to its sense of values.”).

104. See Carl Tobias, *Diversity and the Federal Bench*, 87 WASH. U. L. REV. 1197, 1197–98 (2010) (outlining the history of the unrepresentative federal bench).

105. See, e.g., Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2382 (1999) (reviewing the virtues of jury service).

106. See JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 128–29 (2010).

107. Plato, *Laws IV* 768, in 2 *THE DIALOGUES OF PLATO* 529 (B. Jowett trans., Random House rev. ed. 1937)

liberalization of civil procedure that has defined the last century and would represent a dramatic curtailment of litigant procedural autonomy.¹⁰⁸ Instead, they seek to reverse the current rule's nudge toward negative and constitutionally unintended consequences. The current rule reinforces the myopic view of the jury as little more than one among many potential adjudicative bodies. It ignores the need to constrain judges in unilaterally extending the common law and disrespects the value of democratic input. Changing the rule projects precisely the opposite. It acknowledges the jury as a socio-political institution that should not be discarded by mere accident. It places systemic inertia toward behavior in line with an original understanding of the Seventh Amendment.¹⁰⁹ And perhaps, in some small way, it reminds litigants that their dispute and its just resolution belong not solely to them.

III. POTENTIAL PROBLEMS OF A JURY-TRIAL DEFAULT RULE

Despite the increased simplicity and symbolic benefits, adopting Justice Gorsuch and Judge Graber's proposal may carry some undesirable consequences. First, there may be an increased number of pro se litigants standing before juries, which imposes unique costs on courts. Furthermore, in cases in which there is disagreement over the extent of the jury right, judges will be required to issue rulings that they may not have otherwise. Finally, there still may be a concern that parties will try to gain a strategic advantage by hiding their jury trial right. These concerns are easily addressed by pretrial conferencing and setting reasonable deadlines.

A jury-trial default rule will likely have the biggest impact on pro se litigants. For most sophisticated parties it is immaterial whether the Federal Rules assume a jury-trial or jury-waiver default, as the costs associated with a desired shift are minimal.¹¹⁰ But for parties unaware of the rule—as one might reasonably suspect pro se litigants to be—the effects of the assumed default are pronounced. Default rules are most often implicated by those unfamiliar with them.¹¹¹ Thus, in

108. See, e.g., STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 138 (7th ed. 2008).

109. It is worth noting that some of these ideals are already reflected in other contexts. For instance, courts require pre-dispute contractual jury waivers to be knowing, voluntary, and intelligent. The Supreme Court has been explicit that “[because] the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.” *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937). It is strange to think that the Constitution tolerates the disparate standards between contractual waiver and procedural default.

110. See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2–3 (1960).

111. See CASS R. SUSTEIN, *CHOOSING NOT TO CHOOSE: UNDERSTANDING THE VALUE OF CHOICE* 7 (2015).

choosing a rule, policy makers must decide whether to award or penalize low information actors.¹¹² The current rule punishes the uninformed with the waiver of a constitutional right. It takes this position not based on an assumption of the tacit preferences of uninformed parties, but because it saves judicial resources.¹¹³ Although statistics are unavailable on how much money is saved by the current rule, there is concern that a jury-trial default would lead to increased costs flowing from pro se litigants.

Pro se litigants do multiply the cost of jury trials. Their unfamiliarity with the intricacies of evidence and trial practice make conducting jury trials with them “a difficult and arduous task” for judges.¹¹⁴ In a 2011 survey, federal district court judges consistently noted that there was a “great need” for counsel at trial, as unrepresented litigants often required overt and repeated instruction.¹¹⁵ The time spent by judges explaining matters causes delays and may suggest to jurors that the judge is partial.¹¹⁶ As a result, some hardened judges simply refuse to “babysit[] the pro ses.”¹¹⁷ And as another judge noted: “I would not suggest any rule change that would encourage more pro se activity and the added burdens attached thereto.”¹¹⁸

This concern provokes two responses. First, capitalizing on the ignorance of unsophisticated actors is no basis for a rule. This is particularly true because the matter concerns a fundamental right that sits at the center of the Constitution’s structure. The second, more cynical response, is that most pro se claims are often dismissed well before trial anyway.¹¹⁹ The Federal Rules are a minefield for the unrepresented, often resulting in dismissals on technicalities long before the merits are considered. In fact, one might suspect that a pro se litigant who is sophisticated enough to navigate the Federal Rules to trial would be familiar with the need to demand a jury. Thus, the increase in pro se jury trials would likely be modest under a jury-trial default.

112. See J.H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 WM. & MARY L. REV. 899, 906–07 (2015).

113. See *supra* notes 47–50 and accompanying text.

114. See *e.g.*, *Oko v. Rogers*, 466 N.E.2d 658, 661 (Ill. App. 1984) (describing the difficulty of conducting jury trials with pro se litigants).

115. See DONNA STIENSTRA ET AL., FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF THE COURT AND CHIEF JUDGES 26–27 (2011), <https://www.fjc.gov/sites/default/files/2012/ProSeUSDC.pdf>.

116. *Id.* at 30, 37–38.

117. Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13, 19 (1998).

118. *Id.*

119. See Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 455 (2009).

The second potential detriment of a jury-trial default is that it may increase the frequency with which judges must determine whether a jury trial right exists, thus increasing work and the likelihood of mistakes. Remember, this was one of the rationales Charles E. Clark and other advisory committee members repeated in justifying automatic waiver.¹²⁰ But nearly a century of case law has largely settled any confusion that early jurists experienced. For instance, the Supreme Court settled in *Beacon Theatres v. Westover* that if a plaintiff brings an equitable claim and the defendant files a counterclaim at law, the legal claims must be tried by a jury before the equitable claims can be resolved.¹²¹ In *Dairy Queen v. Wood*, the Supreme Court clarified that where a plaintiff seeks both equitable and legal relief, the same ordering is required.¹²² Additionally, in *Ross v. Bernhard*, the Supreme Court settled that the jury right attaches to the issue to be tried rather than the procedural route in which it arises.¹²³ True, these decisions do not address all historical or future controversies, but few would earnestly suggest that jury trial demands today are a “shot in the dark.”¹²⁴

Admittedly, there may be disagreements as to the extent of the jury trial right and some litigants may overestimate the breadth of the guarantee. Inefficiencies would result if all actors were not on the same page as to the mode of trial at some early stage in the proceedings. The initial advisory committee’s solution to this was to force the parties to make a demand almost immediately upon filing. This might have made sense in an age when trials moved quickly and judges needed to manage active trial calendars, but this is no longer the case. The average federal judge tried less than two cases—jury and bench—between March 31, 2016 and March 31, 2017,¹²⁵ with a median time interval of filing to disposition by trial being over two years.¹²⁶ For most cases, there is zero administrative benefit to settling the mode of

120. See *supra* notes 36–38 and accompanying text.

121. 359 U.S. 500, 510 (1959).

122. 369 U.S. 469, 479 (1962).

123. 396 U.S. 531, 532–33 (1970).

124. Concerns over the extent of the jury right to legislatively created statutory rights persist, for instance. See Martin H. Redish and Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 408–09 (1995).

125. *Table C-4: U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending March 31, 2017*, ADMIN. OFF. U.S. CTS. (2017), http://www.uscourts.gov/sites/default/files/data_tables/fjcs_c4_0331.2017.pdf.

126. *Table C-5: U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending March 31, 2017*, ADMIN. OFF. U.S. CTS. (2017), http://www.uscourts.gov/sites/default/files/data_tables/fjcs_c5_0331.2017.pdf.

trial within Rule 38(b)'s fourteen-day time frame. The mode of trial could just as easily be settled during pretrial conference along with other administrative points. In fact, as mentioned before, the advisory notes to Rule 81(c) already suggest that judicial involvement is good practice.¹²⁷

Finally, concerns may remain that wily litigants may try to gain an advantage by sitting on their jury right. But rules already in place can be slightly modified to prevent this mischief. Rule 38(d) could be modified such that past a certain date the mode of dispute resolution can only be adjusted with the consent of all the parties and the judge, thereby preserving litigant and institutional resources.¹²⁸ And Rule 39(b) could be modified to prevent untimely and problematic *bench* trial demands, tamping down on the potential for gamesmanship.¹²⁹ Moreover, to prevent frivolous appeals, it should be assumed that any litigant who proceeds to trial without objection consents to that form of trial. Although this raise-or-waive rule places an affirmative requirement on litigants, it is no different from what is required with most other procedural deficiencies.¹³⁰ To be sure, conferencing requirements and time deadlines can quell concerns that a jury-trial default will somehow wreak havoc.

CONCLUSION

For nearly eighty years, one of the more pernicious Federal Rules has persisted: if a party does not claim her jury right, she waives it. This rule was unnecessary at the time and should be changed. As Justice Gorsuch and Judge Graber correctly claim in their recommendation, a jury-trial default is simpler to administer and truer to the Seventh Amendment. Any unintended consequences are likely to be minimal or can be easily addressed. Perhaps the only insurmountable obstacle facing this proposal is convincing lawyers and judges to change. As Charles E. Clark acknowledged in his 1928 treatise, “reform measures should not be obnoxious to the lawyers, for it is the bench and bar who must work with the rules of practice and pleading.”¹³¹ To our stubborn institutions, any change at all may very well be considered abhorrent.

127. See FED. R. CIV. P. 81 advisory committee's note to 1963 amendment.

128. FED. R. CIV. P. 38(d).

129. FED. R. CIV. P. 39(b).

130. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

131. CLARK, CODE PLEADING, *supra* note 28, at 35 n.109.

