

# Restoring the Civil Jury's Role in the Structure of Our Government

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RESTORING THE CIVIL JURY'S ROLE IN THE STRUCTURE  
OF OUR GOVERNMENT

SHELDON WHITEHOUSE\*

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## INTRODUCTION

Every day, thousands of Americans receive summonses to serve on civil juries in state and federal courts.<sup>1</sup> These summonses present a remarkable invitation to participate in the exercise of government power. If selected for service, these Americans will adjudicate factual disputes among fellow citizens. In so doing, they will perform a function of long historical pedigree as part of a political institution that protects our liberty, and in Alexis de Tocqueville's words, they will exercise "one mode of popular sovereignty."<sup>2</sup>

The civil jury is a structural element of our government and is best understood in the context of our larger constitutional system. As a general matter, the seven articles of the Constitution establish the structure of government,<sup>3</sup> and the Bill of Rights protects individual rights.<sup>4</sup> There are exceptions to this general rule. Elements of the original Constitution protect individual rights<sup>5</sup> and provisions in the Bill of Rights perform structural functions.<sup>6</sup> Other provisions both serve a structural function and protect individual rights.<sup>7</sup> The Fourth Amendment, for example, interweaves the substance of the right against unreasonable searches and seizures with a structural provision that requires the executive branch to secure search warrants from the federal courts.<sup>8</sup>

The Seventh Amendment likewise serves a structural purpose and protects individual rights. It preserves the individual right to trial by jury in suits "at common law," accompanied by a structural allocation of the authority to decide facts without reexamination.<sup>9</sup>

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1. *E.g.*, 2012 *Jury Administration Statistics*, ST. CONN. JUD. BRANCH, [www.jud.ct.gov/statistics/jury/Jury\\_12.pdf](http://www.jud.ct.gov/statistics/jury/Jury_12.pdf) (last visited Jan. 29, 2014).

2. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 311 (Arthur Goldhammer trans., Penguin Putnam Inc. 2004) (1838).

3. *See, e.g.*, U.S. CONST. art. I, § 1 (establishing the legislative branch of government).

4. *See, e.g.*, U.S. CONST. amend. I (protecting free speech and other rights).

5. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 2 (preserving access to the writ of habeas corpus).

6. *See, e.g.*, U.S. CONST. amend. X (reserving to the states and to the people powers "not delegated to the United States by the Constitution").

7. *See, e.g.*, J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1687 (2004) ("[T]he supposed dichotomy between rights and structure is never so stark as some would have it.").

8. U.S. CONST. amend. IV.

9. U.S. CONST. amend. VII.

This allocation of authority to the civil jury confers its political importance. Colonial Americans understood that “[e]very new tribunal erected for the decision of facts, without the intervention of a jury ... is a step towards establishing aristocracy, the most oppressive of absolute governments.”<sup>10</sup> The Founders intended the civil jury to serve as an institutional check on that power by giving ordinary American people direct control over one element of government.<sup>11</sup>

This Article will proceed in four parts. First, it will demonstrate the historical understanding of the civil jury as a political institution, from the pre-revolutionary period, through the drafting and ratification of the Constitution and Bill of Rights, and beyond. Second, it will describe the recent corporate attacks on the civil jury and how a series of Supreme Court decisions have prioritized corporate interests over the protection of the civil jury. Third, it will explain the importance of continuing to protect the civil jury as a political institution within our system of government. Finally, it will propose some practical steps for achieving this goal.

## I. THE HISTORY OF THE CIVIL JURY AS AN ELEMENT OF THE STRUCTURE OF AMERICAN GOVERNMENT

### A. *Early English History*

Elements of the jury system appeared in England in the twelfth century when “Henry II introduced the principle that instead of the judicial combat [the tenant] might put himself upon the grand assize, a forerunner of jury trial.”<sup>12</sup> By the fifteenth century, civil juries of independent persons heard witness testimony brought by opposing counsels.<sup>13</sup> This now-familiar system “avoid[ed] the

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10. 3 WILLIAM BLACKSTONE, COMMENTARIES \*380.

11. 1 ANNALS OF CONG. 437 (1789) (Joseph Gales ed., 1834) (statement of James Madison).

12. JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 100 (2009) (alteration in original) (quoting F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 22 (A.H. Chaytor & W. Whittaker eds., 1909)) (internal quotation marks omitted).

13. *See id.* at 245 (describing “a civil jury trial in which jurors ignorant of the events learn about the facts from witness testimony”).

doubtful outcome of battle,”<sup>14</sup> in part because unbiased jurors were able to judge the reliability of witnesses brought before them.<sup>15</sup>

To English legal scholars, such as Sir William Blackstone, the “trial by jury” was the “glory of the English Law.”<sup>16</sup> Blackstone urged his readers to “guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time imperceptibly undermine this best preservative of English liberty.”<sup>17</sup> He explained, in words that should ring true still today:

[T]he most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.<sup>18</sup>

A few elements of this analysis bear emphasis. First, Blackstone focuses on the relative power of the injured party and the injuring party and stresses the jury's political function as a venue in which all citizens stand equal before the law.<sup>19</sup> Second, Blackstone reminds his reader that the power exercised by the jury properly belongs to the people as a whole, not to a wealthy few, and that the jury is thus a fundamentally democratic institution.<sup>20</sup> Third, Blackstone's comments are directed at the jury's resolution of disputes between

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14. *Id.* at 100 (quoting THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 28 (G.D.G. Hall ed. & trans., 1965)).

15. Sir Fortescue explained that jurors were “sound in repute and fair-minded, not brought into court by either party, but chosen by a respectable and impartial officer .... The[y] know all that the witnesses admit in their depositions, and they know the reliability, unreliability, and repute of the witnesses brought forward.... Truly, nothing is omitted that can discover the truth of the question in dispute.” *Id.* at 244 (quoting JOHN FORTESCUE, ON THE LAWS AND GOVERNANCE OF ENGLAND 38-40 (Shelley Lockwood ed., Cambridge Univ. Press 1997) (1470)).

16. BLACKSTONE, *supra* note 10, at \*379-81.

17. *Id.* at \*381.

18. *Id.* at \*380.

19. *See id.*

20. *See id.*

individuals: in other words, civil suits.<sup>21</sup> Fourth, Blackstone implies that the power of the jury depends on the inability of powerful individuals to tamper with it, stressing that the jurors are “indifferent men” who are insulated from interference in that they are “not appointed till the hour of trial.”<sup>22</sup> Finally, unlike many constitutional provisions designed to protect the individual against abuse of the power of government, the civil jury defends the individual against “the more powerful and wealthy citizens.”<sup>23</sup>

### *B. Pre-Revolutionary American History*

America’s earliest settlers established trial by jury in the new colonies. As Stephan Landsman has documented:

The 1606 charter given by James I to the Virginia Company has been read as incorporating the right to jury trial. By 1624 juries were available for all civil and criminal cases in Virginia. The Massachusetts Bay Colony followed a similar pattern by introducing jury trials in 1628 and codifying jury procedure in the Massachusetts Body of Liberties in 1641. The Colony of West New Jersey followed suit in 1677, as did Pennsylvania under William Penn’s proprietorship in 1682. Eventually, all the colonies embraced trial by jury.<sup>24</sup>

These juries served a political function by ensuring local community control over criminal sanctions and the redress of grievances.<sup>25</sup> As Akhil Amar has noted, few colonists ever had the opportunity to vote for the imperial officers who held governing authority, whether “King George, his ministry, the English Privy Council and its Board

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21. *See id.*

22. *See id.*

23. *See id.*

24. Stephan Landsman, *The Civil Jury in America: Scenes from an Underappreciated History*, 44 HASTINGS L.J. 579, 592 (1993) (footnotes omitted) (citing Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History*, in THE JURY SYSTEM IN AMERICA 24-25 (Rita J. Simon ed., 1975); MASSACHUSETTS BODY OF LIBERTIES para. 29 (1641), reprinted in SOURCES OF OUR LIBERTIES 151 (Richard L. Perry & John C. Cooper eds., 1952)).

25. *See generally* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (examining the constitutional significance of the law of redress).

of Trade, Parliament, colonial governors, [or] colonial judiciaries.”<sup>26</sup> In contrast, “ordinary colonists could and did vote for colonial assemblies and vote in colonial juries.”<sup>27</sup> This “best preservative of English liberty”<sup>28</sup> sank deep roots into American soil.

By the late eighteenth century, Americans used their civil jury powers “to assail imperial policies and shield patriot practices,” including by finding against the British in customs cases.<sup>29</sup> This drove British authorities to “divert as much judicial business as possible away from American juries.”<sup>30</sup> Such denials of jury access “featur[ed] prominently in formal colonial complaints in the 1760s and 1770s.”<sup>31</sup> When Parliament passed the Stamp Act, which sought to collect numerous duties from the colonies, it also restricted jury access by authorizing enforcement “in any Court of Record, or in any Court of Admiralty ... or in any Court of Vice Admiralty ... at the Election of the Informer or Prosecutor.”<sup>32</sup> Colonists in the Stamp Act Congress of 1765 responded by declaring that “trial by jury is the inherent and invaluable right of every British subject in these colonies.”<sup>33</sup> Similar protests were made throughout the mid-1770s even after the Stamp Act was repealed. “[T]he oppressive behavior of British authorities in enforcing the so-called Intolerable Acts and similar measures” was answered by colonial congresses that “trumpeted the right to trial by jury in both civil and criminal cases and excoriated royal administrators for tampering with that right.”<sup>34</sup>

Colonial complaints about deprivation of access to the jury moved the colonies toward revolution. The Second Continental Congress, for example, complained that colonists were deprived “of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property.”<sup>35</sup> Fundamentally, the colonists

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26. AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 233 (2005).

27. *Id.*

28. BLACKSTONE, *supra* note 10, at \*381.

29. AMAR, *supra* note 26, at 233.

30. *Id.*

31. Landsman, *supra* note 24, at 595.

32. Stamp Act, 1765, 5 Geo. 3, c. 12, § 57 (Eng.).

33. Landsman, *supra* note 24, at 595 (quoting RESOLUTIONS OF THE STAMP ACT CONGRESS 1765, para. 7, reproduced in SOURCES OF OUR LIBERTIES, *supra* note 24, at 270).

34. *Id.* at 595-96.

35. DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (1775), reprinted in SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606-1775, at 374, 376 (William MacDonald ed., 1906).



complained about their lack of self-government: “But why should we enumerate our injuries in detail?” they asked, because “[b]y one statute it is declared, that parliament can of right make laws to bind us in all cases whatsoever.”<sup>36</sup> But the focus on the jury was intense. The Virginia Declaration of Rights, for example, demanded: “That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.”<sup>37</sup> The Declaration of Independence itself listed “depriving [the colonists] in many Cases, of the Benefits of Trial by Jury” as one way in which the “present King” had “combined with others to subject [the colonists] to a jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation.”<sup>38</sup> As Blackstone explained, the civil jury “preserves in the hands of the people that share which they ought to have in the administration of public justice.”<sup>39</sup> The colonists would not yield this share of power.

### *C. The Constitution and Bill of Rights*

When the new states drafted their constitutions after independence, they enshrined the civil jury. The Pennsylvania Constitution of 1776 provided: “Trials shall be by jury as heretofore: And it is recommended to the legislature of this state, to provide by law against every corruption or partiality in the choice, return, or appointment of juries.”<sup>40</sup> The New Jersey Constitution of 1776 provided that “the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.”<sup>41</sup> The Georgia Constitution of 1777 preserved the role of civil juries, even granting them the authority to be “judges of law, as well as of fact,” and allowing appeal of a jury verdict only to

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36. *Id.* (internal quotation marks omitted).

37. VA. DECLARATION OF RIGHTS § 11 (1776), available at [http://avalon.law.yale.edu/18th\\_century/virginia.asp](http://avalon.law.yale.edu/18th_century/virginia.asp).

38. THE DECLARATION OF INDEPENDENCE paras. 15, 20 (U.S. 1776).

39. BLACKSTONE, *supra* note 10, at \*380.

40. PA. CONST. of 1776, § 25, as reprinted in 5 THE FOUNDERS' CONSTITUTION 353 (Philip B. Kurland & Ralph Lerner eds., 2000).

41. N.J. CONST. of 1776, art. XXII, as reprinted in THE FOUNDERS' CONSTITUTION, *supra* note 40, at 353.

another “special jury.”<sup>42</sup> New York, Vermont, Maryland, Massachusetts, Delaware, North Carolina, and South Carolina’s constitutions all protected the civil jury.<sup>43</sup>

The Articles of Confederation did not mention the civil jury, but the civil jury figured prominently during consideration of the proposed Constitution. Although the Constitution guarantees that “Trial of all Crimes, except in Cases of Impeachment[,] shall be by Jury,”<sup>44</sup> the proposed Constitution did not make reference to the civil jury. This omission “triggered a firestorm of protest” from anti-federalists who feared the consolidation of political power by the federal government.<sup>45</sup> The “Federal Farmer,” for example, emphasized the advantages of the civil jury as a political institution and its democratizing effect:

The trial by jury is very important in another point of view. It is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department.... The few, the well born, etc. as Mr. Adams calls them, in judicial decisions as well as in legislation, are generally disposed, and very naturally too, to favour those of their own description.<sup>46</sup>

The Federal Farmer inquired in a later letter “why not use the language that has always been used in this country, and say, the people of the United States shall always be entitled to the trial by

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42. GA. CONST. of 1777, art. XLI, XLIII, as reprinted in THE FOUNDERS’ CONSTITUTION, *supra* note 40, at 353. My home state of Rhode Island was governed by its original Royal Charter from 1663 until 1843. The 1843 Constitution includes a right to civil jury trial that has been preserved since adoption. PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION: A REFERENCE GUIDE 90 (2007).

43. See DEL. DECLARATION OF RIGHTS § 13 (1776); MASS. CONST. of 1780, art. XV; MD. DECLARATION OF RIGHTS art. III (1776); N.Y. CONST. of 1777, art. XLI; N.C. CONST. of 1776, art. XIV; S.C. CONST. of 1776, art. XVIII; VT. CONST. of 1777, ch. 1, art. XIII.

44. U.S. CONST. art. III, § 2.

45. Landsman, *supra* note 24, at 598 (“The omission of the civil jury triggered a firestorm of protest. In response, the Federalists sought to assuage worries about the right to civil jury trial.”); see also *id.* at 600 (“It was critical to the Antifederalists that the jury serve the interests of democracy by injecting the values of the many into judicial proceedings.”) (internal quotation marks omitted).

46. Letter from the Federal Farmer, No. 4 (Oct. 12, 1787), as reprinted in THE FOUNDERS’ CONSTITUTION, *supra* note 40, at 354.

jury.”<sup>47</sup> The Federal Farmer believed “the people still hold the right sacred” and that “the jury trial is a solid uniform feature in a free government.”<sup>48</sup> “A Democratic Federalist” added that the proposed constitution “effectually abolished” the right to civil trial by jury.<sup>49</sup> He cited the example of a citizen injured by a federal officer and asked what “satisfaction [could be] expect[ed] from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizen?”<sup>50</sup> He saw no shelter in such a forum from the “iron hand of arbitrary power” and urged his fellow citizens to “never consent to part with the glorious privilege of trial by jury, but with your lives.”<sup>51</sup>

Federalists who responded to these criticisms were quick to concede the importance of the civil jury. James Wilson, speaking at the Pennsylvania Ratifying Convention, recognized the “excellences” of the civil jury<sup>52</sup> and reported that the members of the Constitutional Convention had not intended to abridge the right to a jury in civil cases.<sup>53</sup> Wilson argued that the number of differing forms of trial by jury in the states made inclusion of a civil jury provision in the Constitution impractical and that leaving the precise form of the federal civil jury to Congress’s determination was the wisest approach.<sup>54</sup>

James Iredell, or “Marcus,” explained similarly that, in light of the existence of Courts of Chancery and Admiralty and other courts

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47. Letter from the Federal Farmer, No. 16 (Jan. 20, 1788), as reprinted in *THE FOUNDERS’ CONSTITUTION*, *supra* note 40, at 358 (internal quotation marks omitted).

48. *Id.*; see also *id.* (“The trial by jury in criminal as well as in civil causes, has long been considered as one of our fundamental rights, and has been repeatedly recognized and confirmed by most of the state conventions.”).

49. Letter from A Democratic Federalist (Oct. 17, 1787), as reprinted in *THE FOUNDERS’ CONSTITUTION*, *supra* note 40, at 355.

50. *Id.*

51. *Id.*

52. 2 *ELLIOT’S DEBATES* 488-89 (1787), as reprinted in *THE FOUNDERS’ CONSTITUTION*, *supra* note 40, at 355-56 (statement of James Wilson) (“I think I am not now to learn the advantages of a trial by jury. It has excellences that entitle it to a superiority over any other mode, in cases to which it is applicable.”).

53. *Id.* at 489 (“It is a charge, sir, not only unwarrantable, but cruel: the idea of such a thing, I believe, never entered into the mind of a single member of that Convention.”).

54. *Id.* (“The legislature shall establish it by proper regulations! So, after all, the gentleman has landed us at the very point from which we set out. He wishes them to do the very thing they have done—to leave it to the discretion of Congress. The fact, sir, is, nothing more could be done.”).

that do not use juries, “[a] general declaration therefore to preserve the trial by jury in all civil cases would only have produced confusion.”<sup>55</sup> He believed that the Constitution could not have spoken to the subject without “entering into a detail highly unsuitable to a fundamental constitution of government.”<sup>56</sup> Iredell saw no risk to the civil jury because it was “so justly a favorite of the whole people” and elected representatives would “have no interest in making themselves odious, for the mere pleasure of being hated.”<sup>57</sup> He believed that restricting access to the civil jury “would undoubtedly produce an insurrection ... that would hurl every tyrant to the ground who attempted to destroy that great and just favorite of the English nation.”<sup>58</sup>

Alexander Hamilton likewise reassured in Federalist No. 83 that Americans had nothing to worry from the Constitution’s silence regarding the civil jury.<sup>59</sup> Though he admitted his own doubts that access to a civil jury was essential to liberty and wondered about better systems for adjudicating property suits,<sup>60</sup> Hamilton explained that it was practical challenges that prevented its inclusion in the Constitution: “For my own part, at every new view I take of the subject, I become more convinced of the reality of the obstacles which, we are authoritatively informed, prevented the insertion of a provision on this head.”<sup>61</sup>

Hamilton’s view did not prevail. By August 1788, “five of the thirteen ratifying conventions had already made clear, in a series of formal declarations, that Americans wanted more jury safeguards

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55. James Iredell, Marcus, Answers to Mr. Mason’s Objections to the New Constitution (1788), reprinted in THE FOUNDERS’ CONSTITUTION, *supra* note 40, at 357.

56. *Id.*

57. *Id.*

58. *Id.* He continued: “We certainly shall be always sure of this guard at least upon any such act of folly or insanity in our representatives. They soon would be taught the consequence of sporting with the feelings of a free people.” *Id.* at 357-58.

59. THE FEDERALIST No. 83, at 419 (Alexander Hamilton) (Ian Shapiro ed., Yale Univ. Press 2009).

60. Thomas Jefferson did not share these doubts. He wrote to Thomas Paine, for example, in the summer of 1789 stressing: “I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.” Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), reprinted in 7 THE WRITINGS OF THOMAS JEFFERSON 408 (Andrew A. Lipscomb & Albert E. Beigh eds., 1903); see also Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), reprinted in THE FOUNDERS’ CONSTITUTION, *supra* note 40, at 363.

61. THE FEDERALIST No. 83, *supra* note 59, at 423.

than Article III offered.”<sup>62</sup> Soon Congress sent the provisions now known as the Bill of Rights to the states for ratification.<sup>63</sup> Among these was the Seventh Amendment, which provides: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.”<sup>64</sup>

Even James Madison, who once did not see the need for a Bill of Rights, supported the Amendment, stating that “[t]rial by jury ... is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.”<sup>65</sup> The Amendment was ratified effective December 15, 1791, with the rest of the Bill of Rights.<sup>66</sup> The anchor was set by which the government would be held to the principles of the new Constitution.

A few elements of the Amendment bear particular note. First, it “preserved” the right to the civil jury.<sup>67</sup> The civil jury was a preexisting institution of government with which all citizens were familiar and whose significance was well appreciated in the pre-revolutionary period.<sup>68</sup> Second, the Seventh Amendment identifies fact-finding as the core function and province of the jury.<sup>69</sup> Blackstone had said, “[W]hen once the fact is ascertained, the law must of course redress it.”<sup>70</sup> The jury, not the judge, holds this core power of ascertainment under the Seventh Amendment.<sup>71</sup> Third, the Amendment does not focus on specifics such as how many jurors are required.<sup>72</sup> Instead,

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62. AMAR, *supra* note 26, at 236; *see also* Landsman, *supra* note 24, at 600.

63. There is limited legislative history for the Seventh Amendment. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 292 (1966) (“Thus the only evidence we have shows—not really to anyone’s surprise—that the Bill of Rights was adopted to reassure the minority who felt that the Constitution in its unamended form did not sufficiently safeguard their liberties.”).

64. U.S. CONST. amend. VII.

65. 1 ANNALS OF CONG. 437 (1789) (Joseph Lales ed., 1834) (statement of James Madison); *see* Paul Finkelman, *James Madison and the Bill of Rights*, 1990 SUP. CT. REV. 301, 309-13 (noting that James Madison did not support a declaration of rights during the Constitutional Convention).

66. ROBERT AUEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 217 (1955).

67. U.S. CONST. amend. VII.

68. *See* Landsman, *supra* note 24, at 592.

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

70. BLACKSTONE, *supra* note 10, at \*380.

71. *See* U.S. CONST. amend. VII.

72. *See id.*

the Amendment positions the civil jury, however its details are worked out, as an important element of American government.<sup>73</sup>

#### *D. Post-Ratification and Reconstruction History*

Reverence for the civil jury continued after ratification of the Seventh Amendment. Joseph Story, who served on the Supreme Court of the United States from 1811 to 1845, wrote that the Seventh Amendment is “most important and valuable” and “places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty.”<sup>74</sup> This view also continued to be held at the state level, including in my home state of Rhode Island, which had used juries since 1743.<sup>75</sup> Previously governed by the Royal Charter that had been issued in 1663, Rhode Island adopted its first constitution in 1843.<sup>76</sup> That constitution protected the civil jury with a provision that has been preserved ever since.

Reconstruction renewed the emphasis on the civil jury. Political leaders understood jury service as a political right like voting, and the civil jury as a political institution.<sup>77</sup> Senator William P. Fessenden, chair of the Joint Committee on Reconstruction, for example, explained that “a voter is an officer, not in the same degree, perhaps, but as much so in substance as the man who enters the jury box, as any one who holds an office.”<sup>78</sup> Congress likewise

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73. This should have satisfied the Federal Farmer who wrote: “[T]he jury trial is a solid uniform feature in a free government; it is the substance we would save, not the little articles of form.” Letter from the Federal Farmer, No. 16 (Jan. 20, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 327 (Herbert J. Storing ed., 1981).

74. JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 574 (The Lawbook Exch., Ltd. 2001) (3d ed. 1858).

75. See *Olney v. Arnold*, 3 U.S. 308, 313 n.\* (1796) (“[B]oth the Grand and Petty Jury in the several counties, shall give their attendance at said court, on the second day of the court’s sitting, by nine of the clock in the forenoon: and in case of none appearance of a sufficient number, such juries shall be filled up *de talibus circumstantibus*, as at the inferior Courts of Common Pleas and General Sessions of the Peace, by the Sheriff or his deputy.”); Taylor v. Place, 4 R.I. 324, 352 n.1 (1856) (describing act of 1743, including jury right upon appeal).

76. CONLEY & FLANDERS, *supra* note 42, at 21.

77. See AMAR, *supra* note 26, at 612 n.106; Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

78. CONG. GLOBE, 39th Cong., 1st Sess. 704 (1866). This view of the comparability of voting in elections and in the jury box was subsequently echoed in Justice Harlan’s dissent

recognized that the jury would not serve its intended political function if discrimination were allowed in jury selection.<sup>79</sup> To that end, the Civil Rights Act of 1875 required that “no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude.”<sup>80</sup> Though later striking down other provisions, the Supreme Court upheld the provision of the Civil Rights Act of 1875 that authorized criminal prosecution for discrimination in jury service.<sup>81</sup>

## II. THE UNDERMINING OF THE CIVIL JURY’S STRUCTURAL ROLE IN AMERICAN GOVERNMENT AND THE BENEFITS TO CORPORATIONS

The civil jury’s role as a political institution that enables direct citizen engagement in government has made it a natural target of the most powerful elements of our society. Created as a check on the oppressions of “the most powerful individuals in the state,”<sup>82</sup> the civil jury will inevitably cause frustration to the powerful. Curbing “invasion of another’s right” by the powerful is its very function.<sup>83</sup> Perhaps unsurprisingly then, in the last forty years as corporations have more and more become “the most powerful individuals in the state,”<sup>84</sup> the civil justice system as a whole, and the civil jury particularly, have been the targets of a sustained attack by corporations. The immediate corporate wish is to reduce liability exposure. More broadly, big corporations do not want to be

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in *Plessy v. Ferguson* in which he noted the absurdity of subjecting citizens who were permitted to vote and to participate in a jury to segregation. See *Plessy v. Ferguson*, 163 U.S. 537, 561-62 (1896) (Harlan, J., dissenting).

79. See, e.g., *Ex parte Virginia*, 100 U.S. 339, 345 (1879).

80. See Civil Rights Act of 1875, 18 Stat. 335, 336, *invalidated by Civil Rights Cases*, 109 U.S. 3, 25 (1883).

81. See *Civil Rights Cases*, 109 U.S. at 25; *Ex parte Virginia*, 100 U.S. at 348-49. In fact, the dissent’s argument rested on the basis that jury service was considered an important political function, arguing that the Fourteenth Amendment protects only “civil rights.” The dissent believed that the Amendment did not protect “political rights” such as “holding office and discharging a public trust” and jury service, the subject of that case. *Id.* at 368 (Field, J., dissenting).

82. BLACKSTONE, *supra* note 10, at \*380.

83. *Id.*

84. *Id.*

answerable to institutions of government they can only influence through argument and on terms of equality.<sup>85</sup> This corporate campaign has been waged in state legislatures, Congress, judicial elections, and litigation. Too frequently, this campaign has succeeded, leaving Americans without redress and eroding the civil jury as a core component of our system of government.

### *A. Corporate Victories in the Courts*

Two months before his nomination to the Supreme Court, Lewis Powell, Jr. wrote a memorandum at the request of the Chamber of Commerce laying out “possible avenues of action” to aid American big business.<sup>86</sup> His recommendations ranged from enhancing corporate “public relations” departments to promoting pro-corporate faculty and textbooks in schools.<sup>87</sup> The strategy’s centerpiece was a new focus on government: “Business must learn the lesson,” Powell instructed, “that political power is necessary.”<sup>88</sup> This included exploiting a “[n]eglected [o]ppportunity in the [c]ourts.”<sup>89</sup> “Under our constitutional system,” he argued, “especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change.”<sup>90</sup>

Powell called on the Chamber of Commerce to assemble “a highly competent staff of lawyers” and hire “lawyers of national standing and reputation” to file amicus briefs in the Supreme Court.<sup>91</sup> Powell had in mind a sophisticated strategy of “impact” litigation to change the law.<sup>92</sup> In keeping with this direction, the Chamber launched its

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85. The extent of corporate influence on the executive and legislative branches through campaign contributions, relentless lobbying, and now unlimited election spending is verging on a national scandal. Seeking such influence with a jury—to “tamper” with it—is a crime. Thus corporate America prefers to have its important issues adjudicated in the legislative and executive branches.

86. Memorandum from Lewis F. Powell, Jr. to Eugene Sydnor, Chairman, Education Committee, U.S. Chamber of Commerce 1 (Aug. 23, 1971) (on file with the Washington & Lee’s Lewis F. Powell, Jr. Archives), *available at* <http://law.wlu.edu/powellarchives/page.asp?3pageid=1251>.

87. *Id.* at 10-11, 15-16, 19.

88. *Id.* at 25-26.

89. *Id.* at 26.

90. *Id.*

91. *Id.* at 27.

92. *Id.*



“Institute for Legal Reform” in 1988, which describes itself as a “national legal reform advocate ... working to change the laws, [and] also changing the legal climate.”<sup>93</sup>

One focus of the ensuing corporate legal campaign has been to make the civil justice system more favorable to corporations.<sup>94</sup> The campaign has achieved major victories since Chief Justice John Roberts’ investiture in 2005. From early 2006 through June 2010, the Chamber of Commerce prevailed in forty-one of the sixty cases in which it filed an amicus brief—a winning rate of 68 percent.<sup>95</sup> On average, the five conservative Justices voted for the Chamber’s position 74 percent of the time.<sup>96</sup> Many victories were significant. In the *Ledbetter* case, the Court overturned a verdict in an employment discrimination case, concluding that an employer could not be held liable if it successfully hid the discriminatory treatment from the victim long enough.<sup>97</sup> In the *Leegin* case, the Court reversed precedent that prohibited vertical price restraints.<sup>98</sup> In the *Janus* case, the Court limited the ability of mutual fund investors to recover for securities fraud, holding that fund advisors cannot be found liable for knowingly including misstatements of others in the documents they prepare.<sup>99</sup> And in the *Gross* case, the Court

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93. *About*, INST. FOR LEGAL REFORM, <http://www.instituteforlegalreform.com/about> (last visited Jan. 29, 2014).

94. This legal campaign has been supported in numerous ways, including media efforts, *see, e.g., About Us*, FACES OF LAWSUIT ABUSE, <http://www.facesoflawsuitabuse.org/about/> (last visited Jan. 29, 2014), professional development organizations such as the Federalist Society, *see, e.g., STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 135-37* (2008), and lobbying efforts in state legislatures by organizations such as the American Legislative Exchange Council, *see, e.g., Mike McIntire, Conservative Nonprofit Acts as a Stealth Business Lobbyist*, N.Y. TIMES, Apr. 21, 2012, at A1.

95. CONSTITUTIONAL ACCOUNTABILITY CTR., THE ROBERTS COURT AND CORPORATIONS: THE NUMBERS TELL THE STORY, 1 (June 2010), *available at* <http://theusconstitution.org/think-tank/issue-brief/robert-court-and-corporations-numbers-tell-story>.

96. *Id.*

97. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 632 (2007) (holding that an employee’s discrimination claim was untimely when not brought within 180 days after the alleged intentional discrimination, even when the employee could not have known the discriminatory act occurred until years later).

98. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) (replacing the per se rule against vertical price restraints under § 1 of the Sherman Act with a looser “rule of reason” standard), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

99. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (holding that only a “person or entity with ultimate authority over the statement, including

overturned a jury decision in favor of a victim of age discrimination.<sup>100</sup> Each of these cases was decided by a 5-4 margin, with the five Republican appointees voting as a bloc in support of the corporate position.<sup>101</sup>

*Citizens United*, another 5-4 decision, marked the crowning victory for corporations and opened the floodgates for unlimited, anonymous corporate cash in our elections, causing awful effects that we saw in the most recent election cycle.<sup>102</sup> As I explained in an amicus brief I submitted with Senator John McCain in a subsequent case, *Citizens United* grants corporations new power over our government not just through the corrupting ability to buy elections for favored candidates, but also through the corrupting but less visible ability to threaten officeholders with a barrage of negative attack ads if they fail to cast a pro-corporate vote.<sup>103</sup> Such a dominant role for corporations in our government would shock our Founding Fathers, who foresaw no important role in our republic for the corporations of the time, let alone today's massive agglomerations of corporate wealth.<sup>104</sup>

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its content and whether and how to communicate it" can be held liable for false statements under SEC Rule 10b-5).

100. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177-78 (2009) (holding that a plaintiff must prove "that age was the 'but-for' cause of the challenged employer decision" under the Age Discrimination in Employment Act of 1967, which prohibits discrimination against any employee "because of" that individual's age).

101. See *supra* notes 97-100 and accompanying text.

102. *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 372 (2010); see also, Spencer MacColl, *A Center for Responsive Politics Analysis of the Effects of: Citizens United v. Federal Election Commission*, OPEN SECRETS BLOG (May 5, 2011, 11:16 AM) <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html> (noting that "social welfare" groups organized under § 501(c)(4) of the tax code and who do not disclose their donors spent \$134 million in political advocacy).

103. Brief of United States Senators Sheldon Whitehouse & John McCain as Amici Curiae Supporting Respondents, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (No. 11-1179).

104. The Federalist Papers, for example, include no such arguments, and both Jefferson and Madison subsequently made clear their concerns about corporate wealth. See Letter from Thomas Jefferson to George Logan (Nov. 12, 1816), reprinted in 12 THE WORKS OF THOMAS JEFFERSON 44 (Paul Leicester Ford ed., 1905) ("I hope we shall take warning from the example and crush in its birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country."); Letter from James Madison to J.K. Paulding (March 10, 1827), reprinted in 9 THE WRITINGS OF JAMES MADISON 281 (Gaillard Hunt ed., 1910) ("Incorporated companies, with proper limitations and guards, may, in particular cases, be useful; but they are at best a necessary evil only.").

*B. Corporate Victories and the Undermining of the Civil Jury Right*

Corporate victories at the Supreme Court have undermined the civil jury and whittled down the political function that it plays in our society. Such victories have allowed corporations to steer plaintiffs out of civil courtrooms and into arbitration; to more readily fend off plaintiffs via pleading rules; to evade exposure to class actions; and to ask friendly judges to reduce the jury's assessment of punitive damages. All of these decisions, although pushed by many so-called "originalist" Justices, overlook the original understanding and purposes of the civil jury right.<sup>105</sup>

*C. Arbitration and Privatized Justice*

Congress enacted the Federal Arbitration Act (FAA) in 1925 to guide federal courts applying commercial arbitration agreements.<sup>106</sup> For many years, the Supreme Court applied the statute narrowly.<sup>107</sup> This began to change in the 1980s and 1990s,<sup>108</sup> and in 2001, the Court effectively broadened the FAA by adopting a constrictive interpretation of the exemption from the FAA of employees engaged in "interstate commerce."<sup>109</sup> More recently, the Court has gone further. In *Rent-A-Center, West, Inc. v. Jackson*, the Court held that Americans cannot go before a court to challenge an unconscionable

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105. Originalism is generally understood to inquire into the original intent or original meaning of the legal text at issue and often relies on dictionaries and other authoritative contemporaneous sources. See generally ORIGINALISM (Steven G. Calabresi ed., 2007). An originalist approach to the Seventh Amendment should thus give careful study to the fact that the Amendment "preserves" a preexisting right that Americans understood at the time of the founding to be a bulwark against tyranny and a form of popular government.

106. See *Southland Corp. v. Keating*, 465 U.S. 1, 23-30 (1983) (O'Connor, J., dissenting) (describing the history of the FAA).

107. Joshua R. Welsh, Comment, *Has Expansion of the Federal Arbitration Act Gone Too Far?*, 86 MARQ. L. REV. 581, 587-91 (2002) (discussing court cases limiting the applicability of the FAA).

108. See, e.g., *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 274-77 (1995) (holding that the FAA was intended to cover the full scope of activity covered by the Commerce Clause); *Southland Corp.*, 465 U.S. at 15-16 (holding that the FAA applies in state as well as federal court).

109. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

arbitration agreement.<sup>110</sup> Instead, questions about the unfairness of an arbitration agreement must be put to the arbitrator whose authority the injured party disputes.<sup>111</sup> Moreover, since the Court's decision in *AT&T Mobility LLC v. Concepcion*, mandatory arbitration clauses can deprive consumers of access to class action litigation.<sup>112</sup> That case considered a California law that had been interpreted by California courts to prohibit waiving access to a class action in an arbitration agreement.<sup>113</sup> The Court held that state law to be preempted by the FAA, leaving harmed plaintiffs with no alternative but to pursue individual arbitration claims.<sup>114</sup> In practice, this gave corporations license to pursue the low-dollar, high-volume frauds that are customary targets of class actions.

Taken together, this case law has established a presumption in favor of arbitration that tips the balance the wrong way.<sup>115</sup> Studies have found that top arbitrators ruled for businesses against consumers up to 93.8 percent of the time in some contexts.<sup>116</sup> Often, defendants benefit from hidden evidence, secret proceedings, limited or no review, and prohibitive costs for injured parties. With the jury removed from the picture (as the Federal Farmer warned), there is no longer a role in these cases for American citizens to apply and uphold our laws, protect the rights of individuals, and hold the powerful accountable.<sup>117</sup>

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110. 130 S. Ct. 2772, 2778-79 (2010).

111. *Id.*

112. 131 S. Ct. 1740, 1750-51 (2011).

113. *Id.*

114. *Id.*

115. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

116. JOHN O'DONNELL, PUBLIC CITIZEN, *THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS* 15 (2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>; Associated Press, *Firm Agrees to End Role in Arbitrating Credit Card Debt*, N.Y. TIMES, Apr. 19, 2009, at B8 (describing settlement of a suit filed by the Minnesota Attorney General that saw the National Arbitration Forum cease arbitrating consumer credit card disputes after being accused of "violating state consumer fraud, deceptive trade practices and false advertising laws by hiding financial ties to collection agencies and credit card companies").

117. See *supra* text accompanying note 46.

*D. Pleading Decisions and Lost Access to the Facts*

A second set of decisions has altered pleading standards, creating new barriers to block cases from getting to a civil jury. The Supreme Court had construed the governing Federal Rule of Civil Procedure, Rule 8(a), in *Conley v. Gibson*:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.<sup>118</sup>

“[B]eyond doubt”; “no set of facts”<sup>119</sup>—a tough standard and one consistent with respect for the civil jury right. If there were no material facts in dispute after discovery, the case could be resolved by summary judgment; but if there were facts to uncover or facts in dispute, the case would proceed to a jury, which would perform its historic role of ascertaining the facts.<sup>120</sup> As Justice Stevens explained, “Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in.”<sup>121</sup>

The Roberts Court’s decisions in *Twombly* and *Iqbal* overturned the notice pleading standard. The Court ruled that a complaint must “state a claim to relief that is plausible on its face.”<sup>122</sup> Such a claim, the Court ruled, must “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>123</sup> The Court’s pleading standard “asks for more than a sheer possibility that a defendant has acted unlawfully”; it is no longer enough if “a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability.”<sup>124</sup> The Court’s new “plausibility” standard, whereby a judge—not the jury—screens a complaint to make his own assessment of the facts and inferences,

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118. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

119. *Id.*

120. See BLACKSTONE, *supra* note 10, at \*380.

121. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 575 (2007) (Stevens, J., dissenting).

122. *Id.* at 570.

123. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

124. *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557).

makes it harder for plaintiffs to reach discovery and ultimately present their case to a jury. The result, according to one recent study, is that plaintiffs have seen their cases dismissed more frequently.<sup>125</sup> This trend benefits corporate defendants. But it marks a blow against the civil jury system itself.

### *E. Class Actions and Economic Barriers to Justice*

Roberts Court decisions have also restricted access to class action litigation. The class action vehicle allows individuals with common claims to seek adjudication of their complaints in a single case.<sup>126</sup> A class action can also benefit defendants by binding all of the parties in a single ruling. Despite these advantages, however, corporations have long lobbied against class actions. In 2011, the Court restricted employees' rights to participate in class action law suits for discrimination.<sup>127</sup> It did so through a novel interpretation of a preliminary requirement for class actions: that there be questions of law or fact common to the class.<sup>128</sup> The district court had identified a series of common facts related to the company's pay and promotion policies, which tied together the class.<sup>129</sup> But the conservative majority instead focused on differences between class members and made its own judgment of whether the common issues predominated.<sup>130</sup> The *Dukes* decision makes it more difficult for individual citizens who have been injured to join together, bring a case before a jury, and hold corporate wrongdoers accountable.<sup>131</sup>

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125. Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2273, 2277-78 (2012) (analyzing cases that faced motions to dismiss post-*Iqbal* and suggesting the shift in standards "negatively affected a sizeable share of those plaintiffs").

126. The class action can overcome "the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). "[The] class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.* (quoting *Mace*, 109 F.3d at 344).

127. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2250-52, 2257-58 (2011).

128. *Id.* at 2550-52.

129. *Id.* at 2549 & n.3.

130. *Id.* at 2555-56; see also *id.* at 2566 (Ginsburg, J., dissenting).

131. See, e.g., Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 528 (2012) ("[T]he heightened Rule 23 'commonality' requirement in *Wal-Mart Stores* has the potential

This hurdle to jury access relates to the Court's decision in *Concepcion*, discussed above, which preferred individual arbitration to class action litigation.<sup>132</sup> Powerful corporations now have a clear playbook to evade the civil jury when they have caused a large group of people relatively small individual injuries.<sup>133</sup> If a contract forces mandatory arbitration and prohibits class actions, individual plaintiffs will lack the resources or incentives to bring claims. Large-scale, small-denomination frauds will lie beyond the reach of the civil jury.<sup>134</sup>

#### *F. Damage Caps and Juries' Lost Discretion*

American civil juries traditionally were afforded broad discretion to determine the appropriate damages in a case; it was one of their "peculiar function[s]."<sup>135</sup> In the 1990s, however, the Supreme Court began to constitutionalize this issue—not to protect the constitu-

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to largely limit employment class actions."); Nina Totenberg, *Top Court Rules in Favor of Wal-Mart*, NAT'L PUB. RADIO (June 20, 2011, 3:00 PM), <http://www.npr.org/2011/06/20/137304956/top-court-rules-in-favor-of-wal-mart> (citing civil rights attorney David Sanford as declaring, "This is a disaster not only for civil rights litigants but for anyone who wants to bring a class action"); see also Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1334 (2012) (indicating that the *Wal-Mart* decision was animated, in part, by a desire to restrain the role of civil juries).

132. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1758-60 (2011) (Breyer, J., dissenting).

133. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012).

134. *Id.* at 627 (warning that as a result of the Roberts Court's class action decisions, most companies "may simply opt out of potential liability by incorporating class action waiver language in their standard form contracts with consumers (or employees or others)"). One recent decision, *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, departs from the Roberts Court's trend of limiting class actions, holding 6-3 that a class need not prove the materiality of misrepresentation at the class certification stage. 133 S. Ct. 1184, 1197 (2013). The *Amgen* case appears to be an aberration, however, as it was followed by another 5-4 decision that treated a class action with hostility. See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1452 (2013) (holding that a class of cable subscribers was improperly certified because the circuit court had declined to look beyond the pleadings and consider whether the putative class could prove class-wide damages).

135. See, e.g., *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("For nothing is better settled than that, in such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict."); *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885) ("The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice.").

tional role of the civil jury, but rather to limit it in order to benefit corporate defendants in the name of the Due Process Clause.<sup>136</sup> Decisions imposing substantive due process review of damage awards prompted objections even from conservatives. Justice Scalia wrote in one case, “The jury in this case was instructed on the purposes of punitive damages under West Virginia law, and its award was reviewed for reasonableness by the trial court and the West Virginia Supreme Court of Appeals. Traditional American practice governing the imposition of punitive damages requires no more.”<sup>137</sup> Even if they concluded that some due process limits should apply, other Justices recognized the historic and constitutional role of the jury. Justice O’Connor dissented:

Our system of justice entrusts jurors—ordinary citizens who need not have any training in the law—with profoundly important determinations. Jurors decide not only civil matters, where the financial consequences may be great, but also criminal cases, where the liberty or perhaps life of the defendant hangs in the balance. Our abiding faith in the jury system is founded on longstanding tradition reflected in constitutional text, and is supported by sound considerations of justice and democratic theory. The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values.<sup>138</sup>

In 2008, however, the Court departed from the constitutional role of the jury in deciding damages awards.<sup>139</sup> In *Exxon Shipping*, a case arising from a catastrophic oil spill, the Supreme Court ultimately

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136. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-18, 425, 429 (2003); *BMW of N. Am. v. Gore*, 517 U.S. 559, 585-86 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 465-66 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15-19 (1991).

137. *TXO Prod. Corp.*, 509 U.S. at 470 (Scalia, J., concurring).

138. *Id.* at 473 (O’Connor, J., dissenting) (internal citations omitted). Justice O’Connor went on to explain her belief in constitutional damages limits:

Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking. Modern judicial systems therefore incorporate safeguards against such influences. Rules of evidence limit what the parties may present to the jury. Careful instructions direct the jury’s deliberations. Trial judges diligently supervise proceedings, watchful for potential sources of error. And courts of appeals stand ready to overturn judgments when efforts to ensure fairness have failed.

*Id.* at 474 (O’Connor, J., dissenting).

139. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).



reduced a jury's award of \$5 billion in punitive damages—equivalent to just one year of Exxon's profits at that time<sup>140</sup>—by 90 percent.<sup>141</sup> Although the case went through federal court and considered questions of federal law, in this case, maritime law,<sup>142</sup> the Justices paid no heed to the constitutional role of the civil jury. The Court reasoned that any punitive damages greater than the compensatory damage award would make the damages too unpredictable.<sup>143</sup> The judgment of the jury, and the wisdom of the Founding Fathers, was for the Court a lesser value than providing modern corporations "predictability."

In these various ways, the Court increasingly has become the handmaiden and body servant to the powerful, with particular ardor when that power is amassed in corporate form. In its ardency, the Court has repeatedly trampled over the original role, powers, and traditions of the civil jury.

### III. THE CONTINUING IMPORTANCE OF THE CIVIL JURY AS A POLITICAL INSTITUTION

The cases discussed above preferred corporate interests to the rights of everyday Americans and undermined the institution of the civil jury. As a result, we are changing from a society in which all parties must stand equal before a jury to one in which injured parties must seek relief directly from the corporations who injured them or through corporate-funded dispute resolution systems. Indeed, some scholars have questioned the value of the civil jury,

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140. See *Exxon, Chevron Profits Surge; Gulf Crisis Cited*, L.A. TIMES (Jan. 25, 1991), [http://articles.latimes.com/1991-01-25/business/fi-738\\_1\\_gulfcrisis](http://articles.latimes.com/1991-01-25/business/fi-738_1_gulfcrisis) (reporting Exxon's net income in 1990 as \$5.01 billion).

141. *Exxon Shipping*, 554 U.S. at 476, 481, 515. The Court of Appeals initially reduced the jury's punitive damages award from \$5 billion to \$2.5 billion. *Id.* at 481. The Supreme Court held that only a maximum of \$507.5 million in punitive damages could be awarded. *Id.* at 515.

142. *Id.* at 475-76 (discussing the federal maritime nature of the case).

143. *Id.* at 502 ("Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute. Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another.").

and others have suggested that preserving Americans' right to redress in court is most important, rather than any particular mechanism for gaining that redress.<sup>144</sup> The number of jury trials has plunged precipitously, with below 2 percent of federal civil cases and below 1 percent of state civil cases reaching a jury.<sup>145</sup> This is not simply because cases settle before they go to trial; of all the cases that reach trial in state court civil actions, 96 percent are resolved in bench trials.<sup>146</sup> Apparently parties, like some commentators, do not believe that juries are likely to adjudicate their cases better than a judge presiding over a bench trial.<sup>147</sup> These are not views that Alexis de Tocqueville could have foreseen when he argued that the jury is "first and foremost a political institution, and must always be judged as such."<sup>148</sup> These statistics instead beg the question whether the contemporary civil jury should still be understood as an important element of our system of government and as a "guarantor of fairness, a bulwark against tyranny, and a source of civic values."<sup>149</sup>

This Part will argue that the civil jury should continue to exercise a structural role in government beyond fact-finding in particular cases. The civil jury should remain a bulwark against the oppressions of power. In addition, the civil jury can prevent judicial autocracy and guide judges in the exercise of their authority in bench trials. Finally, the jury continues to be a forum in which Americans exercise a measure of popular sovereignty over their society, fostering civil engagement, education, and deliberation.

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144. See, e.g., Warren E. Burger, *Thinking the Unthinkable*, 31 LOY. L. REV. 205, 210-13 (1985) (arguing that citizens that make up juries are not well suited to handle the complex and lengthy trials that are now common); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 551-53 (2012) (arguing that an increase in pretrial discovery has eliminated the need for a fact-finding jury).

145. Langbein, *supra* note 144, at 524.

146. Solomon, *supra* note 131, at 1374 (citing Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1127 n.7. (1992)).

147. *Id.* at 1333-34.

148. DE TOCQUEVILLE, *supra* note 2, at 313; see also *id.* ("To regard the jury simply as a judicial institution would be to take a notably narrow view, for if the jury has a great influence on the outcome of a trial, it has an even greater influence on the fate of society itself.").

149. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 473-74 (1993).

A. *The Prevention of Judicial Autocracy*

The civil jury prevents judicial autocracy in two important ways. First, by removing fact determination from the province of the judge, the civil jury eliminates any bias that may be introduced through the judge's preferences. Blackstone observed, for example:

[Judges are] generally selected by the prince or such as enjoy the highest offices in the state, [and] their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that *the few* should be always attentive to the interests and good of *the many*.<sup>150</sup>

The modern practice of appointment by the chief executive, or of popular election using campaign contributions, does little to reduce this risk of "involuntary bias."<sup>151</sup>

Alexander Hamilton likewise viewed the civil jury as "a security against corruption."<sup>152</sup> He reasoned: "As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than the latter."<sup>153</sup>

Concerns over corrupt influence may not be relevant as often in our contemporary civil justice system,<sup>154</sup> but as judicial appointment becomes more politicized, and as special interest funding becomes more influential in judicial elections, corruption, particularly in the sense meant by the Founders, is a consideration not to be overlooked. At a minimum, the availability of civil jury trials ensures

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150. BLACKSTONE, *supra* note 10, at \*379.

151. *See infra* notes 152-55 and accompanying text.

152. THE FEDERALIST NO. 83, *supra* note 59, at 422.

153. *Id.*

154. *But see* Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 872-74 (2004) (holding that due process was violated when a West Virginia State Court of Appeals judge refused to recuse himself in a case with a defendant who had contributed \$3 million for the election of the judge just months before the company appealed); Stratos Pahis, *Corruption in Our Courts: What It Looks Like and Where It Is Hidden*, 118 YALE L.J. 1900, 1918 (2009) (identifying thirty-eight incidences between 1967 and 2000 of judges being convicted or removed from office for accepting bribes).

that parties are not forced to suffer the biases that might develop among judges.<sup>155</sup>

There is some evidence, albeit contested, that civil juries view certain matters differently than judges. One scholar identified a distinction between judges and juries in patent suits;<sup>156</sup> another found differing treatment of corporate defendants;<sup>157</sup> and others determined that juries in personal injury cases generally award higher compensatory and punitive damages than judges.<sup>158</sup> Even if these distinctions may be overstated, juries may inform how judges resolve cases in civil bench trials with respect to both the determination of liability and the scope of damages. There is a widespread perception, for example, that juries are particularly likely to hold corporations accountable (to be, in corporate lingo, “anti-business”).<sup>159</sup> That alone may, subtly, make judges more wary of letting particular defendants off the hook in bench trials. And with respect to a judge setting damages in civil cases, the level of compensatory and punitive damages in comparable cases tried before a jury will almost certainly be a relevant and informative factor.<sup>160</sup>

### *B. The Sovereignty of the People*

“The jury system as it is understood in America,” de Tocqueville wrote, “seems to me a consequence of the dogma of popular sovereignty just as direct and just as extreme as universal suffrage. Both

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155. See *supra* notes 150-54 and accompanying text.

156. See Kimberly A. Moore, *Populism and Patents*, 82 N.Y.U. L. REV. 69, 76, 81-82 (2007).

157. See Ann M. Scarlett, *Shareholders in the Jury Box: A Populist Check Against Corporate Mismanagement*, 78 U. CIN. L. REV. 127, 158, 172-73 (2009) (“[J]uries tend to award larger damages against corporate defendants than individual defendants.”).

158. See Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 2-3 (2004); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065 (1964) (finding that, on average, juries’ damage awards were 20 percent higher than judges reported they would have awarded).

159. See Valerie P. Hans, *The Illusions and Realities of Jurors’ Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 328 (1998) (“Contemporary assessments of the jury’s predispositions toward business corporations in the courtroom continue to reflect the view that juries are anti-business.”).

160. See, e.g., *Thomas v. iStar Fin., Inc.*, 508 F. Supp. 2d 252, 255, 263 (S.D.N.Y. 2007) (“Most significantly, the jury’s award is not in line with the punitive damages awarded in similar cases by this Court or other courts in this Circuit.”).

are equally powerful means of ensuring that the majority reigns.”<sup>161</sup> This remains true to this day. Juries infuse community values into the adjudication of civil suits and ensure that judgments are based on the principles of a representative selection of the parties’ peers.<sup>162</sup> They also allow Americans to participate in self-government.<sup>163</sup> Juries need not achieve a better result than judges for popular sovereignty to have value.<sup>164</sup> Nor does the sovereign function of civil juries lie only in their power to ignore or otherwise nullify unjust or unreasonable laws (although on occasion, civil juries have done just that).<sup>165</sup> Rather, the civil jury’s elevation of the sovereignty of the people is important for at least two major reasons.

First, service on civil juries fosters civic education and citizen engagement in our government. As de Tocqueville wrote:

The jury is incredibly useful in shaping the people’s judgement and augmenting their natural enlightenment. This, in my view, is its greatest advantage. It should be seen as a free school, and one that is always open, to which each juror comes to learn about his rights.... I think that the primary reason for the practical intelligence and political good sense of Americans is their long experience in civil matters.

I do not know if juries are useful to civil litigants, but I do know that they are very useful to people who judge them. I see the

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161. DE TOCQUEVILLE, *supra* note 2, at 314; *see also id.* at 315 (“The jury is above all a political institution. It should be regarded as a form of popular sovereignty. If popular sovereignty is repudiated, the jury should be discarded entirely; otherwise it should be seen in relation to other laws establishing popular sovereignty.”).

162. *See* Steven Hetcher, *The Jury’s Out: Social Norms’ Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 646-47 (2003) (arguing that juries “draw from their diverse array of everyday norms and customs ... to render a decision”). The infusion of community values into jury decision making is not simply a contemporary observation; it is also an ideal we aspire to in our political system. *See, e.g.*, Solomon, *supra* note 131, at 1376 (noting the political ideal that juries create communal norms).

163. *See infra* notes 166-67 and accompanying text.

164. For example, a jury acquitted four police officers who were charged with, and caught on video tape, assaulting Rodney King. *See* Richard A. Serrano, *All 4 Acquitted in King Beating*, L.A. TIMES (Apr. 30, 1992), [http://articles.latimes.com/1992-04-30/news/mn-1942\\_1\\_ventura-county-jury](http://articles.latimes.com/1992-04-30/news/mn-1942_1_ventura-county-jury).

165. *See, e.g.*, Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1628 (2001) (arguing that civil jury nullification was present and accepted as part of the American judicial system in the late eighteenth century).

jury as one of the most effective means available to society for educating people.<sup>166</sup>

This holds true today. No juror can sit through a trial, evaluating witnesses, listening to instructions from the bench, and grappling with pieces of evidence without learning about our laws and our legal institutions. I can personally attest to this phenomenon, both with grand and petit jurors.

Jurors form a political decision-making body. Along with voting and service in the military<sup>167</sup> or as a government employee, participation in a jury offers citizens a direct path to serve our republic. Jury service, in fact, may be the most democratic means through which ordinary citizens can participate in government at the federal level. Voters can choose their representatives, and members of the military and public servants can help defend our country or implement our laws. But in jury service, the people themselves are empowered to make decisions on the outcome of disputes and the application of laws in our communities. Judges frequently report on the seriousness with which jurors engage in these responsibilities and the sense of engagement with which it invests them.<sup>168</sup> And, “[b]y forcing men to be concerned with affairs other than their own, [trial by jury] combats individual egoism which is to societies what rust is to metal.”<sup>169</sup>

Jury service allows citizens to reflect on their broader civic role and obligations. This form of civic engagement proves to be satisfying for most jurors. Recent research indicates that those who serve on juries typically report a far more satisfying experience with the legal system than those who were summoned for duty but never

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166. DE TOCQUEVILLE, *supra* note 2, at 316.

167. David Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

168. See, e.g., Allen Pusey, *Judges Rule in Favor of Juries*, DALL. MORNING NEWS (May 7, 2000), 2008 WLNR 9445148 (reporting on a survey of judges that showed 98 percent of judges find that juries do at least “moderately well,” with more than 60 percent saying that “they would rather have their own civil case heard by a jury than a judge or an arbitrator”).

169. DE TOCQUEVILLE, *supra* note 2, at 316.

empanelled.<sup>170</sup> Some recent research further indicates that jury service makes citizens more likely to vote.<sup>171</sup>

Because the jury is a deliberative body, it requires citizens to interact with, debate, and listen to each other to arrive at a shared decision.<sup>172</sup> We do not simply conclude a case, instruct the jury, take a poll, and allow the majority to prevail. Instead, jurors discuss the evidence and the law with each other in order to agree on an outcome. Scholars and judges have noted that this deliberation produces better results.<sup>173</sup> In addition, jury service brings together people from different walks of life, locks them in a room with each other, and requires them to deliberate together. That can only strengthen, bit by bit, the fabric of our democracy.<sup>174</sup> In de Tocqueville's words, the jury was "the most effective means available to society for educating the people."<sup>175</sup>

Second, the civil jury has political value simply because it helps distribute government power. The American system of government is built on Montesquieu's and Locke's premise that divided government and separated powers are most protective of individual liberty.<sup>176</sup> In our system of interlocking checks and balances, the

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170. Julianna C. Chomos et al., *Increasing Juror Satisfaction: A Call to Action for Judges and Researchers*, 59 DRAKE L. REV. 707, 709-10 (2011).

171. JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 26-51 (Oxford University Press 2010); see also John Gastil & Phillip J. Weiser, *Jury Service as an Invitation to Citizenship: Assessing the Civic Value of Institutionalized Deliberation*, 34 POL'Y STUD. J. 605, 609, 614-15 (2006) (finding that satisfying jurors' expectations for jury service yields changes in selected civic and political behaviors).

172. Leah Sprain & John Gastil, *What Does It Mean to Deliberate? An Interpretative Account of Jurors' Expressed Deliberative Rules and Premises*, 61 COMM. Q. 151, 154-55 (2013) (evaluating how jurors conceptualize and experience deliberation).

173. See, e.g., JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION* 1-2, 29 (1991) (arguing that democracy is best served through a deliberative process that can inform participants); see also Pusey, *supra* note 168 (quoting a federal judge in praise of a jury that "[i]t's more than the wisdom of one person times twelve. One juror hears something differently from the other. They begin to rethink the way they've seen things.").

174. As Akhil Amar has explained, "Through the jury, citizens would learn self-government by doing self-government." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1187 (1991); see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 606, 608 (1969) (discussing the importance to the proper function of the American constitutional system that the Founders placed on a virtuous and engaged citizenry).

175. DE TOCQUEVILLE, *supra* note 2, at 285.

176. See BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151-52 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1777) ("When the legislative and executive powers are united in the

civil jury plays a minor but vital role. The civil jury further distributes the divided authority of the state and vests citizens with direct and substantial authority with respect to one of the state's functions: adjudicating disputes both among citizens and between citizens and government officials. By separating this power, the American system of government makes it more difficult for those with power to gain control over all the levers of power in society or, less dire but perhaps more significant, for those with undue influence in society to abuse that influence.<sup>177</sup> By diversifying the form and function of different elements of government, the Founding Fathers ensured that all of government could not be readily broken or captured, even if one branch or another were somehow compromised.<sup>178</sup>

It is in this context that the jury achieves its crowning role. The slow and persistent encroachments of power reach readily into most organs of government—a truth as old as government. The media can align with that power, echoing its narrative and approving its encroachments. The legislative and executive branches are most susceptible to the encroachments of the powerful, but even judges are not immune. Judges can have, as Blackstone noted, “an involuntary bias towards those of their own rank and dignity.”<sup>179</sup> Against this constant tide of power and influence stands the jury, an eight hundred year old institution designed to be separate from the prevailing structure of power.<sup>180</sup> When you are alone, and the forces of society are arrayed against you; when lobbyists have the legislature tied in knots and the governor in their pocket; when the owners of the local paper have marshaled public opinion against you; then, one last sanctuary remains: the hard square corners of the jury box stand firm against the tide of influence and money.

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same person, or in the same body of magistrates, there can be no liberty .... [T]here is no liberty, if the judiciary power be not separated from the legislative and executive.”). Locke similarly argued for a separation of powers noting that “the legislative and executive power are in distinct hands ... in all moderated monarchies and well-framed governments.” JOHN LOCKE, TWO TREATISES OF GOVERNMENT 203 (Thomas I. Cook ed., Hafner Publ'g Co. 1965) (1690).

177. WOOD, *supra* note 174, at 606, 608.

178. *Id.*

179. BLACKSTONE, *supra* note 10, at \*379.

180. See LANGBEIN ET AL., *supra* note 12, at 100.



The reduced number of civil jury trials does not entirely undercut the value of the civil jury as a mechanism for distributing and separating power. A check on power or tyranny need not be used frequently for it to have value. Other constitutional provisions such as those providing for the impeachment of federal judges<sup>181</sup> or the presidential veto<sup>182</sup> check abuse, even if they are infrequently used. A holstered weapon can have effect, but that weapon still has to be available. America should never let down its guard against the encroachment of the powerful, nor remove the safety valves that our Founding Fathers built into our system of government. The premise of the American system of government is that the most powerful in our society will seek to gain control over all exercises of government power. The principles of separation of powers and government by the people, including the civil jury, are our established guardians against such encroachment. We allow them to wither at our peril.

#### IV. RESTORING THE CIVIL JURY'S STRUCTURAL ROLE IN AMERICAN GOVERNMENT

Given the civil jury's political importance, it is disturbing that the erosion of the civil jury is happening with little attention or comment. The Seventh Amendment right to a civil jury is being so quietly relinquished. We are not, as a nation, simply waiving our individual right to a jury; we are slowly losing a key element of our system of government. The legal academy and the bar have particular standing to explain the importance of the civil jury as both an element of our system of government and as an individual right. We must also demand action from our courts and from Congress.

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181. U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives ... shall have the sole Power of Impeachment."); U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."). There have been sixteen full impeachment trials in the Senate, resulting in eight convictions. ELIZABETH B. BAZAN, CONG. RESEARCH SERV., 98-186 IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE, AND PRACTICE 16 (2010).

182. U.S. CONST. art. I, § 7. Presidents have exercised the veto power 1498 times. President Obama has exercised the veto only twice. See *Summary of Bills Vetoed, 1789-present*, UNITED STATES SENATE, <http://www.senate.gov/reference/Legislation/Veto/vetoCounts.htm> (last visited Jan. 29, 2014).

### A. *The Role of the Courts*

The Supreme Court has a ready option for restoring the civil jury and protecting its structural role in American government: overturning the decisions described above that have put corporate interests above the civil jury.<sup>183</sup> The following affirmative steps would also restore the civil jury's structural role in American government.

#### 1. *Incorporation of the Seventh Amendment*

The civil jury is a feature of most state court systems. It remains exposed to attack, however, because the Supreme Court has not incorporated the Seventh Amendment against the states.<sup>184</sup> The case for incorporation deserves detailed consideration that goes beyond the scope of this Article,<sup>185</sup> but it merits outlining here.

The Supreme Court has applied provisions of the Bill of Rights against the states through the Fourteenth Amendment's Due Process Clause.<sup>186</sup> Most recently, the Court applied this "incorporation" doctrine to conclude that the Second Amendment applies against the states.<sup>187</sup> It concluded that the standard for incorporation is whether the right is "fundamental to our scheme of ordered liberty or ... deeply rooted in this Nation's history and tradition."<sup>188</sup> The Second Amendment right to self-defense met this

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183. See *supra* Part II.B.

184. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.13 (2010) (listing the rights not fully incorporated against the states).

185. See, e.g., Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 729-730 (2000) (speculating as to why Justice Samuel Freeman Miller may have voted against incorporation of the Seventh Amendment by noting that "given the original understanding of the Seventh Amendment, the right to a civil jury simply does not lend itself to mechanical incorporation against state governments" because it was a structural amendment not directly addressing individual rights). *But see* Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1144-47 (2000) (arguing that both the original and Civil War era understandings of the Seventh Amendment do not suggest it was viewed as "uniquely unsusceptible to incorporation").

186. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (incorporating the Fourth Amendment against the states through application of the exclusionary rule to state courts).

187. *McDonald*, 130 S. Ct. at 3026.

188. *Id.* at 3036 (plurality opinion) (internal citations and quotation marks omitted) (citing

standard.<sup>189</sup> As the Court noted, this decision left the Seventh Amendment's guarantee of access to a civil jury as one of the few unincorporated provisions of the Bill of Rights.<sup>190</sup>

The Seventh Amendment should be incorporated against the states. The Supreme Court will be on firm doctrinal ground when it does so. As demonstrated above, the right is "deeply rooted in this Nation's history and tradition." It is also an established element of the structure of our Nation's government, and thus "fundamental to our scheme of ordered liberty."

### *2. Affirmative Protections for the Civil Jury*

Courts should also interpret the Seventh Amendment in a manner that protects the civil jury right from encroachment. The Supreme Court, for example, has recently shown great solicitude to the Second Amendment.<sup>191</sup> It should do the same with respect to the Seventh Amendment. To achieve this goal, courts should consider approaches taken in the context of other constitutional provisions.

### *3. Preventing "Chilling" of the Civil Jury Right*

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech."<sup>192</sup> The Supreme Court has interpreted this text to bar both pure prohibitions of speech and otherwise unobjectionable rules that would "chill" the exercise of free speech rights.<sup>193</sup> Last year, for example, the Court struck down

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Washington v. Glucksberg, 521 U.S. 702, 721 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

189. *Id.*

190. *Id.* at 3035 n.13 (citing *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211 (1916)) (identifying the Sixth Amendment right to a unanimous jury verdict, the Third Amendment's protection against quartering of soldiers, the Fifth Amendment's grand jury indictment requirement, the Seventh Amendment right to a jury trial in civil cases, and the Eighth Amendment's prohibition on excessive fines as the only provisions of the Bill of Rights not fully incorporated against the States, and explaining that the Supreme Court decision against incorporation substantially predates the current approach of selective incorporation).

191. *See id.* at 3026.

192. U.S. CONST. amend. I.

193. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (holding that a state provision defining subversive organizations was unconstitutionally vague and uncertain, creating a "chilling effect upon the exercise of [the] First Amendment" right of free expression

a law that made it a criminal offense to lie about being the recipient of combat medals.<sup>194</sup> The Court reasoned that by raising the specter of prosecutions for misstatements regarding medals, such a law would chill truthful speech properly protected by the First Amendment, and thus was invalid.<sup>195</sup>

Courts could take an analogous approach with respect to laws that burden the exercise of the civil jury right. First, courts could look closely at laws that establish “loser pays” systems, allow liberal pursuit of sanctions motions, or enable the opposing party to impose pretrial costs through motion practice or discovery litigation. In each instance, a court could conclude that the rule “chills” the exercise of a constitutional right by allowing the opposing party to create incentives to abdicate the civil jury right. Second, courts have established interpretive rules to avoid constitutional questions.<sup>196</sup> This logic should apply in the civil jury context. It bears considering, for example, whether the Supreme Court would have so decided *Twombly* and *Iqbal*, two cases in which it never so much as cited the Seventh Amendment, had it sought to avoid burdening the exercise of Seventh Amendment rights. The Court, for example, might have given concern about loss of access to a jury equal consideration to the expense of the discovery process.<sup>197</sup> And the Court might have seen its solution in improving the discovery process such that cases move more readily to trial, rather than in having more cases dismissed before a civil jury could hear them.

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because of the possibility of even unsuccessful prosecution).

194. See *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (plurality opinion).

195. *Id.* at 2548 (plurality opinion).

196. See, e.g., *Hooper v. California*, 155 U.S. 648, 657 (1895) (“The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”).

197. See *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (“Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.”); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007) (internal citations omitted) (“[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.”).

#### 4. Rules to Prevent Infringement of the Civil Jury Right

Courts could establish prophylactic rules to prevent infringement of the civil jury right. This approach would follow that adopted in the criminal law arena, where the *Miranda* doctrine serves to prevent infringement of the Fifth Amendment rights to counsel and against self-incrimination. In that context, the Supreme Court has insisted that persons in police custody must be aware of their constitutional rights—including the right to the assistance of counsel—and can only waive them knowingly and voluntarily.<sup>198</sup> The Supreme Court established the familiar *Miranda* rules to that end, concluding that “[p]rocedural safeguards must be employed to protect the privilege” against self-incrimination and that “fully effective means” should be “adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored.”<sup>199</sup> “Requiring *Miranda* warnings before custodial interrogation,” the Court later explained, “provides ‘practical reinforcement’ for the Fifth Amendment right.”<sup>200</sup>

The animating principle of the *Miranda* decision and its progeny—that it is at times necessary to prevent violations of constitutional rights rather than try to discern and remedy them after the fact—applies equally in the context of the civil jury right. In the criminal context, the Supreme Court realized that it would be hard to discern whether an arrestee knew his constitutional rights and knowingly waived them.<sup>201</sup> The same is true in the context of the civil jury right. It is far from certain that the average injured individual knows he or she has a right to access a civil jury. In this light, should the innumerable contract provisions that purport to be waivers of the constitutional right to a jury be enforced? It is uncertain, after all, how many Americans knowingly agreed to surrender their civil jury right in the fine print that bedevils wireless phone contracts, rental car agreements, and employee contracts. And even if these waivers are knowing, it is another question whether they are voluntary. Relinquishing access to the

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198. See *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

199. *Id.* at 478-79.

200. *New York v. Quarles*, 467 U.S. 649, 654 (1984) (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)) (internal quotation marks omitted).

201. See *Miranda*, 384 U.S. at 475.

civil jury is not voluntary in any meaningful sense if the alternative is not having a cell phone or not getting a job. To address this, courts could adopt rules declining to enforce mandatory predispute arbitration agreements. That and comparable rules would give “practical reinforcement”<sup>202</sup> to the Seventh Amendment civil jury right and allow the jury to continue to play its intended political function.

Each of these methods would help lift the Seventh Amendment from “stepchild” status, and reflect a judicial solicitude equivalent to that shown for other amendments.

### *B. The Role of Congress*

Though unable to change constitutional doctrine, Congress can act to protect the civil jury through the judicial confirmation process and in legislation.

#### *1. Judicial Nominations and the Civil Jury Right*

Nominees to the federal bench should have a proper understanding of the civil jury. This understanding should reach beyond a vague appreciation for jury service and a general willingness to accept the judgments a jury reaches. Nominees also must understand that the civil jury functions as a political institution in our system of government, including as a check on the authority of judges. Judicial nominees should not be confirmed to the bench thinking that the civil jury is simply an appendage of the court that needs to be managed and controlled.

To that end, I have raised the political significance of the civil jury with recent judicial nominees, including now-Justices Sonia Sotomayor and Elena Kagan. These interactions are never conclusive. Judicial nominees are no more able or willing to make commitments regarding the civil jury than on any other issue. These discussions, nonetheless, can be productive. Justice Sotomayor, for example, observed that jury service often leaves jurors “more deeply

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202. See *Tucker*, 417 U.S. at 444.

committed to the fundamental importance of their role as citizens.”<sup>203</sup> Justice Kagan likewise commented:

[W]e learn about the separation of powers system and how the three branches of Government are designed to check each other. But the Framers also had a very strong view that there was another check in the system, and that check was the people and that the institution that the people often functioned as part of was the jury. And to the Framers, the jury was ... extremely important.<sup>204</sup>

More recently, Justices Scalia and Breyer returned to the Senate Judiciary Committee. I asked Justice Scalia whether he understood the jury to be a political institution and “an important piece of our governmental architecture.”<sup>205</sup> He responded:

Absolutely [it] is, which is why it is guaranteed in the Bill of Rights in criminal cases and, indeed, in all civil cases at common law involving more than \$20. The jury is a check on us. It is a check on the judges. I think the Framers were not willing to trust the judges to find the facts. Indeed, you know, at the beginning, or when the Constitution was ratified, juries used to find not only the facts but the law. And this was a way of reducing the power of the judges to condemn somebody to prison. So it absolutely is a structural guarantee of the Constitution.<sup>206</sup>

Justice Breyer likewise addressed the structural role of the jury, observing that the jury provides for an exercise of “community

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203. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 352 (2009) (statement of J. Sotomayor).

204. *Confirmation Hearing on the Nomination of Elena Kagan, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 200 (2010) (statement of J. Kagan). Now-Justice Kagan further explained: “I think, Senator Whitehouse, that the jury was an extremely important mechanism to the Framers, and it was a mechanism designed to check other institutions of Government.” *Id.* at 201.

205. *See Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 38 (2011) (statement of Sen. Whitehouse).

206. *Id.* at 39 (statement of J. Scalia).

power” which brings “an entire community into the legal process.”<sup>207</sup> Summarizing their sentiments, Justice Scalia added: “I am a big fan of the jury, and I think our Court is, too.”<sup>208</sup> But perhaps the Court is now an even bigger fan of corporations.

## 2. Legislation to Protect the Civil Jury Right

Congress also can protect the civil jury through legislation. Unfortunately recent legislative efforts in this vein have not been successful as corporate lobbies have vigorously fought against them.

Senator Franken and then-Senator Feingold, for example, championed the Arbitration Fairness Act.<sup>209</sup> The 2011 bill, which I co-sponsored, would have prohibited the enforcement of mandatory pre-dispute arbitration agreements in the employment, consumer, franchise, or civil rights contexts.<sup>210</sup> Senator Blumenthal’s Consumer Mobile Fairness Act, which I also co-sponsored, applied the same rule to mobile phone contracts.<sup>211</sup> Each bill was referred to the Senate Judiciary Committee and numerous hearings were held under the leadership of Chairman Leahy.<sup>212</sup> In the face of consistent corporate opposition, however, these bills never passed the Committee.<sup>213</sup>

Legislation to restore notice pleading and to protect the availability of class actions has met a similar lack of success. The Senate Judiciary Committee held a hearing to consider the effect of the *Iqbal* and *Twombly* decisions at which legal experts explained the

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207. *Id.* (statement of J. Breyer).

208. *Id.* at 40 (statement of J. Scalia).

209. See Arbitration Act of 2011, S. 987, 112th Cong. (2011); Arbitration Act of 2009, S. 931, 111th Cong. (2009); Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007).

210. S. 987 § 3.

211. See Consumer Mobile Fairness Act of 2011, S. 1652, 112th Cong. § 3 (2011).

212. See, e.g., *Arbitration: Is It Fair When Forced?: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 177 (2011) (discussing the Arbitration Fairness Act of 2011 and the Consumer Mobile Fairness Act of 2011); S. 1782, *The Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 396 (2007).

213. See, e.g., *Arbitration: Is It Fair When Forced?: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 12-13, 22 (2011) (statement of Victor E. Schwartz, Esq. on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform) (arguing that mandatory predispute arbitration is acceptable because the consumer can choose whether to sign the underlying contract).



importance of notice pleading to our justice system and the consequences of departing from it.<sup>214</sup> John Payton, head of the NAACP Legal Defense Fund, for example, testified that “[i]t is not an overstatement to say that the key successes of civil rights litigation in the last half century are due, in part, to the pleading standard set forth in the Federal Rules and reinforced by the Court in its seminal decision in *Conley*.”<sup>215</sup> Numerous other statements, including from a coalition of leading civil rights and civil justice organizations, emphasized the need to return to notice pleading to restore injured Americans’ day in court before the civil jury.<sup>216</sup> Unfortunately, however, corporate opposition was clear<sup>217</sup> and neither of the two versions of Senator Specter’s Notice Pleading Restoration Act secured sufficient support to move through Committee.<sup>218</sup>

I also have made repeated efforts to undo the harmful effects of the *Exxon v. Baker* decision.<sup>219</sup> As discussed above, the *Exxon* Court believed that predictability for corporations was more important than deterring misconduct, or honoring the tradition of the jury assessing damages.<sup>220</sup> My legislation would have undone the Supreme Court’s lawmaking—that a one-to-one ratio of punitive damages to compensatory damages was appropriate—and restored discretion to the jury to award punitive damages without reference to compensatory damages.<sup>221</sup> The Senate Judiciary Committee

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214. See *Has the Supreme Court Limited Americans’ Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009).

215. *Id.* at 258 (statement of John Payton, President and Director-Counsel, NAACP Legal Defense and Education Fund, Inc.).

216. See, e.g., *id.* at 78-79 (arguing on behalf of the American Civil Liberties Union, the Sierra Club, and thirty-four other civil justice organizations that *Twombly* and *Iqbal* “unilaterally expanded” the pleading rules and calling for restoration of the pleading standards “that have kept the courthouse doors open”).

217. See, e.g., Multi-Industry Letter to the Hon. Patrick Leahy, Chairman, Senate Judiciary Comm., Opposing S. 1504, the “Notice Pleading Restoration Act of 2009” (Dec. 1, 2009), available at <http://www.uschamber.com/issues/letters/2009/multi-industry-letter-opposing-s-1504-notice-pleading-restoration-act-2009>.

218. See, e.g., Notice Pleading Restoration Act of 2010, S. 4054, 110th Cong.

219. See *supra* notes 139-43 and accompanying text. Efforts have also been made to protect the ability of injured Americans to present their case to a jury as a class. Senator Barbara Mikulski, for example, has included civil justice protections in her longstanding efforts to win wage equality for women. The Acts sought to provide access to class actions to plaintiffs in paycheck equality lawsuits. See Paycheck Fairness Act, S. 3220, 112th Cong. § 3 (2012); Paycheck Fairness Act, S. 797, 112th Cong. § 3 (2011).

220. See *supra* Part II.F.

221. See The Maritime Liability Fairness Act, S. 592, 112th Cong. § 3 (2011); The Big Oil

considered the legislation in a hearing while oil was spilling into the Gulf of Mexico after the Deepwater Horizon tragedy.<sup>222</sup> Nonetheless, corporate opposition remained resolute.<sup>223</sup> Once again, legislation to bolster the civil jury right failed.

The fight to strengthen the civil justice system has not been entirely without success. The first bill that President Barack Obama signed into law was the Lilly Ledbetter Fair Pay Act, which extended the period during which an injured American can bring suit for employment discrimination.<sup>224</sup> Despite the challenges<sup>225</sup> and the rarity of such victories, they demonstrate that we need to keep pressing the fight in Congress, and build better public awareness of the history and importance of the civil jury. Winning more legislative battles will require mobilizing public opinion about the civil jury so that it is understood properly as a political institution and as a “preservative of ... liberty.”<sup>226</sup> Legislation will be hard but worthy work.

## CONCLUSION

The American system of separated powers has proved remarkably durable. One of the vital elements of this system is the civil jury.

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Polluter Pays Act, S. 3345, 111th Cong. § 3 (2010). Both bills found that “district and appellate courts have the authority under common law to reduce excessively large punitive awards,” so the effect of the legislation would have been to eliminate the arbitrary ratio established by the Supreme Court, not eliminate the ability of courts to provide any limit on the discretion of juries regarding punitive damages. S. 592 § 2; S. 3345 § 2.

222. See *The Risky Business of Big Oil: Have Recent Court Decisions and Liability Caps Encouraged Irresponsible Corporate Behavior?;* Hearing Before the S. Comm. on the Judiciary, 111th Cong. 1-3 (2010).

223. Industry opposition managed to block even the most reasonable measures supported by President Obama and a majority in the Senate, such as a bill that would raise the liability cap for damages from oil spills above the current \$75 million level. Richard Simon & Margot Roosevelt, *Senate Effort to Raise Spill Liability Cap Stalls*, L.A. TIMES, May 14, 2010, at AA5.

224. Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5, 6 (2009) (codified at 42 U.S.C. § 200e-5(e)(3)(A)) (providing that each instance of pay discrimination—for example, each paycheck that reflected the discriminatory action—violated the law for the purpose of calculating the limitations period).

225. Corporate Lobbies opposed the bill. See, e.g., Letter to Members of the United States Senate from R. Bruce Josten, Opposing S. 181, the “Lilly Ledbetter Fair Pay Act” (Jan. 14, 2009), available at <http://www.uschamber.com/letter/letter-opposing-s-181-lilly-ledbetter-fair-pay-act> (opposing the bill and indicating that votes on the bill would be scored as part of the Chamber’s legislative scorecard).

226. BLACKSTONE, *supra* note 10, at \*381.

Demanded by the founding generation as an essential preservative of liberty, and with a rich history that reaches centuries back in English legal history, the civil jury has a long legacy of protecting liberty and enhancing self-government. The attacks on the civil jury by corporations over the last forty years are a relatively recent phenomenon when viewed in light of this history. Indeed, the importance of the civil jury in our constitutional history, particularly compared to corporations' lack of similar constitutional pedigree, should have been a central discussion in evaluating these attacks on the civil jury. Any sincere belief in "originalism" as a principle would surely have led to this analysis. Unfortunately, however, these corporate attacks succeeded, diminishing the civil jury's significance as a political institution. This trend leads us away from our founding principles. The civil jury remains an institution to enable self-government, to facilitate the separation of powers, to protect against encroachments of power, and to foster civic engagement and education. It is indeed a mode of the sovereignty of the people. It must be protected and strengthened, not abandoned.