

Business and Jury Trials: The Framers' Vision Versus Modern Reality

GENE SCHAERR* & JED BRINTON**

TABLE OF CONTENTS

I. THE FRAMERS' LIKELY ASSESSMENT OF THE IMPACT OF THE RIGHT TO JURY TRIAL ON BUSINESS	1056
A. <i>Check Against Unjust or Unconstitutional Laws</i>	1058
B. <i>Ensuring That Fact-Finders Are Familiar with the Parties and Facts</i>	1059
C. <i>Limiting the Complexity of Litigation</i>	1060
II. THE MODERN REALITY AND HOW IT DIFFERS FROM EXPECTATIONS DURING THE FOUNDING PERIOD.....	1061
A. <i>The Failure of Anticipated Benefits</i>	1061
1. <i>Increased Complexity</i>	1061
2. <i>Informed Fact-Finders</i>	1063
3. <i>The Demise of Jury Nullification</i>	1063
B. <i>Increased Business Risks from Civil Jury Trials</i>	1064
1. <i>Changes in Jury Composition</i>	1064
2. <i>Changes in the Financing of Litigation</i>	1066
3. <i>Punitive Damages</i>	1068
III. CONCLUSION.....	1069

During the Founding Period, the right to jury trial enjoyed a level of esteem bordering on religious reverence. As one delegate to Virginia's convention considering ratification of the federal Constitution put it, that right was generally regarded as an "inestimable privilege, the most important which freemen can enjoy[.]"¹ That view was common, not just among

* Partner and chair of the nationwide appellate litigation practice, Winston & Strawn LLP, and chairman of the Constitutional Sources Project (ConSource).

** Director of Legal Research for ConSource and recent graduate of the Yale Law School. The authors would especially like to thank Sarah L. Olson for her invaluable assistance.

¹ Journal Notes of the Virginia Ratification Convention Proceedings (June 24, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1494 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter 10 DOCUMENTARY HISTORY], available at <http://consource.org/index.asp?bid=582&fid=600&documentid=5143>.

frontiersmen and farmers, but also among wealthy businessmen.²

Given the nearly universal veneration of the right to jury trial, one of the great ironies of American constitutional history is the evolution of that right from a valued bulwark against state power—for businessmen and everyone else—into an institution that businesses today generally regard as a major threat to their success and, sometimes, their existence. Indeed, if one were to ask the general counsel of today's Fortune 500 companies to vote for one constitutional change that would have the most salutary impact on their business, at least ninety percent would likely vote to abolish the right to jury trial. Such sentiment undoubtedly reflects the fact that, in recent years, juries have hit corporations with a number of enormous verdicts, such as the \$5 billion in punitive damages against Exxon over the Exxon Valdez oil spill.³

This Article will briefly explore the evolution of the right to jury trial since the Founding Period and, in so doing, attempt to explain why that right affects modern American business so differently from what the Framers likely contemplated.

I. THE FRAMERS' LIKELY ASSESSMENT OF THE IMPACT OF THE RIGHT TO JURY TRIAL ON BUSINESS

While the Framers of the 1787 Constitution included a right to jury trial in federal criminal cases,⁴ they did not include a right to jury trial in civil cases. Although they debated the inclusion of such a right, they ultimately left it out—not only because they believed the federal Congress and courts would maintain the practice,⁵ but also because it would be too difficult to ensconce in the federal constitution without trampling the States'

² John Hancock, for example, was personally targeted by some of the British measures that ultimately led to the enshrinement of the right to jury trial when he was tried without a jury before an admiralty court over his business dealings during the *Liberty* affair. See O.M. Dickerson, *John Hancock: Notorious Smuggler or Near Victim of British Revenue Racketeers?*, 32 MISS. VALLEY HIST. REV. 517, 535–36 (1946).

³ See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 578, 598–99 (2008) (discussing the original jury award of \$5 billion in punitive damages before the Ninth Circuit remitted the award to \$2.5 billion and the Supreme Court ultimately limited the award to slightly more than \$500 million as a matter of maritime common law).

⁴ U.S. CONST. art. III, § 2.

⁵ Edmund Randolph told the Virginia Ratifying Convention that he was certain the new federal government would maintain the practice of jury trials: “I will risk my property on the certainty, that they will institute the trial by jury in such manner as shall accommodate the conveniencies [sic] of the inhabitants in every State” Journal Notes of the Virginia Ratification Convention Proceedings (June 6, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 974–75 (John P. Kaminski & Gaspare J. Saladino eds., 1990), available at <http://www.consource.org/index.asp?bid=582&documentid=5128>.

prerogatives to protect it in the manner they felt best.⁶ As George Washington put it at the time, “[I]t was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future adjustment.”⁷

The Anti-Federalists seized upon this omission as a reason to reject the proposed Constitution. They warned that, if the Constitution were ratified, Congress would allow federal courts to try civil lawsuits without juries, stripping citizens of the benefits of a jury trial.⁸ Ultimately, it was the promise of a Bill of Rights—including the right to a jury in civil cases—that convinced enough doubters to ratify the Constitution.⁹

When the issue was again discussed during the writing and ratification of the Bill of Rights, the Framers discussed at some length the benefits they believed to stem from civil jury trials. Some of their comments reflected an anti-business bias—especially the occasional veiled suggestion that rural farmers and other disadvantaged groups needed the right to jury trial so that local juries could excuse debtors from debts legitimately owed to urban businessmen.¹⁰ But as adopted, the Seventh Amendment took a decidedly

⁶ *Id.* at 974–75.

⁷ Letter from George Washington to Lafayette (Apr. 28, 1788), in 6 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 244 (W.W. Abbot ed., 1997), available at <http://www.consource.org/index.asp?bid=582&documentid=61929>.

⁸ See, e.g., Brutus II, Letter to the Citizens of the State of New York (Nov. 1, 1787), in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 527, 529 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter 13 DOCUMENTARY HISTORY], available at <http://www.consource.org/index.asp?bid=582&documentid=955> (“Does not the same necessity exist of reserving this right [to civil jury trial], under this national compact, as in that of this state?”).

⁹ For example, the dissenters at the Pennsylvania Ratifying Convention included protection of civil and criminal jury trial rights in their list of propositions and declared their “willingness to agree to the plan, provided it was so amended.” The Dissent of the Minority of the Pennsylvania Convention (Dec. 18, 1787), in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 20, 27–29 (John P. Kaminski & Gaspare J. Saladino eds., 1984) [hereinafter 15 DOCUMENTARY HISTORY], available at <http://www.consource.org/index.asp?bid=582&documentid=851>.

¹⁰ “A London merchant shall come to America, and sue for his supposed debt, and the citizen of this country shall be deprived of jury trial, and subjected to an appeal (tho’ nothing but the *fact* is disputed) to a court 500 or 1000 miles from home” Centinel II, Letter from Centinel II to Freeman’s Journal (Oct. 24, 1787), in 13 DOCUMENTARY HISTORY, *supra* note 8, at 462, available at <http://www.consource.org/index.asp?bid=582&documentid=265>. Much of the anti-business bias focused on British merchants. See Paul D. Carrington, *Civil Procedure in United States Law*, in 4 OXFORD ENCYCLOPEDIA OF LEGAL HISTORY 441 (Stanley N. Katz ed., 2009) (arguing that juries were trusted much more by the common man than judges in America and that the main reason for creating federal judges was to ensure that English creditors could collect their debts in accord with the peace treaty). However, the

pro-business turn: rather than allowing juries to be the judges of both the facts *and* the law—a practice that was common in many parts of the new nation¹¹—the Amendment expressly limited the jury’s authority to findings of fact. That limitation substantially reduced the likelihood that a jury would be allowed to engage in “nullification” of the law in the civil cases that were critical to businesses’ ability to enforce agreements.

In addition, as so conceived, the historical evidence suggests that the Framers thought the right to jury trial offered a number of other benefits to businesses, as well as the public at large.

A. *Check Against Unjust or Unconstitutional Laws*

One of the benefits was the ability to effectively “nullify” *criminal* laws viewed by the community as unjust, or even unconstitutional. Since the right of a criminal defendant to a jury trial under Article III and the Sixth Amendment did not limit the jury’s authority to “findings of fact,” the Framers could well have thought that juries in those cases *retained* the ability to exonerate a defendant even when the law dictated the opposite result on the facts.¹² Thomas Jefferson suggested this when, in a letter to Thomas

principles underlying such bias applied equally well to American businesses. See Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 174 (2001) (“Moreover, the same populist juries that were impeding the collection of British debt might use their power to disallow unpopular or controversial claims brought by American merchants or traders at some time in the future.”).

¹¹ See William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. (forthcoming fall 2010); see also William E. Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904–17 (1978).

¹² See Diary: With Passages from an Autobiography (Feb. 12, 1771), in 2 THE WORKS OF JOHN ADAMS 254–55 (Charles C. Little & James Brown et al. eds., 1865), available at <http://www.masshist.org/digitaladams/aea/cfm/doc.cfm?id=D16> (“The general rules of law and common regulations of society, under which ordinary transactions arrange themselves, are well enough known to ordinary jurors. The great principles of the constitution, are intimately known; they are sensibly felt by every Briton; it is scarcely extravagant to say, they are drawn in and imbibed with the nurse’s milk and first air. Now, should the melancholy case arise that the judges should give their opinions to the jury against one of these fundamental principles, is a juror obliged to give his verdict generally, according to this direction, or even to find the fact specially, and submit the law to the court? Every man, of any feeling or conscience, will answer, no. It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.”).

Paine, he called trial by jury “the only anchor, ever yet imagined by man, by which a government can be held to the principles of it’s [sic] constitution.”¹³

As Professor Akhil Amar has noted, juries during that period actually used this power to nullify laws they viewed as unconstitutional.¹⁴ Indeed, Chief Justice of the United States, John Jay, instructed a jury (over which he presided as trial judge) that they had “a right . . . to determine the *law* as well as the fact in controversy.”¹⁵

Although jury nullification of unjust or unconstitutional laws would have been more important to individuals than to incorporated businesses, the Framers surely could have imagined that a business or its officers might be indicted and tried under a federal criminal statute—à la Arthur Andersen—for business activities. And the ability to argue that a jury should acquit because the law at issue was not worthy of application would have been a substantial benefit to businesses in certain criminal cases.

B. Ensuring That Fact-Finders Are Familiar with the Parties and Facts

The Framers also believed the right to trial by jury of *local* peers would benefit all defendants by ensuring that the trier was familiar with the circumstances of the case and the character of the defendant. At the Virginia ratification convention, Patrick Henry predicted that, without such a right, a “[p]erson[] accused may . . . be tried not by an impartial jury of the vicinage, acquainted with his character, and the circumstances of the fact; but by a jury unacquainted with both, and who may be biassed [sic] against him.”¹⁶ These problems, Henry argued, could arise even with the state-based vicinage requirement in Article III’s provision for juries in federal criminal cases.¹⁷ Accordingly, Henry compared that provision with the existing British practice, which required that at least some of the jury come from a local division of a county, while the remainder could be drawn from the rest of the county.¹⁸ And he observed that, “[w]ith less than this the people of England have never been satisfied.”¹⁹ Henry’s argument on this point was reflected in

¹³ Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 269 (Julian P. Boyd ed., 1958).

¹⁴ AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 98–104 (1998).

¹⁵ *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794) (emphasis added).

¹⁶ Journal Notes of the Virginia Ratification Convention Proceedings (June 16, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 1, at 1330.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

the language of the Sixth Amendment, which requires that the jury be drawn not only from the state in which the crime was committed, but also from the same “district.”²⁰

The vicinage requirement imposed by the Sixth Amendment would have benefited not only individuals, but local businesses as well, whenever they were charged with federal crimes.

C. *Limiting the Complexity of Litigation*

The Framers also believed the right to jury trial in civil cases would ensure that lawsuits were not so complex that the average man could not understand them. The dissenters at the Pennsylvania ratifying convention made this point by complaining about the failure of the 1787 Constitution to include a right to jury trial in civil cases.²¹ They argued that, without such a right, the federal court system would operate like a British court of chancery, and that in response to a claim, “[t]he rich and wealthy suitors would eagerly lay hold of the infinite mazes, perplexities and delays, which a court of chancery . . . would furnish him with, and thus the poor man being plunged in the bottomless pit of legal discussion, would drop his demand in despair.”²² Likewise, Hamilton warned that the expansion of non-jury equity courts into courts of law with general jurisdiction “will tend gradually to change the nature of the courts of law, and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.”²³ Once again, any mechanism that limited the complexity of litigation would, on average, benefit businesses as well as individuals by reducing the amount they would have to pay lawyers to handle their lawsuits.

In short, the Framers could well have believed that the right to jury trial would provide substantial benefits to business. To be sure, some businesses might be disadvantaged in particular cases. But it is unlikely the Framers would have seen the right to jury trial as systematically *disfavoring* business interests. Instead, they likely saw the right to jury trial as a net plus in their effort to create a legal regime conducive to the new nation’s economic growth and prosperity.

²⁰ U.S. CONST. amend. VI.

²¹ See 15 DOCUMENTARY HISTORY, *supra* note 9, at 25–28.

²² *Id.* at 25.

²³ THE FEDERALIST NO. 83 (Alexander Hamilton), in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 123 (John P. Kaminski & Gaspare J. Saladino eds., 1995), available at <http://www.consource.org/index.asp?bid=582&fid=600&documentid=764>.

II. THE MODERN REALITY AND HOW IT DIFFERS FROM EXPECTATIONS DURING THE FOUNDING PERIOD

Today, however, businessmen and their chief lawyers tend to view the right to jury as systematically disfavoring business. In 2007, U.S. businesses incurred more than \$161 billion in direct costs associated with civil lawsuits, *excluding* the costs of judgments, settlements, and the costs of defensive business practices.²⁴ And almost all of these cases involved either the reality or the immediate threat of a jury trial.²⁵ As a result, at least in recent decades, the right to jury trial has come to be seen less as an instrument for protecting liberty (including the liberty of business interests) and more as an instrument of wealth redistribution. What accounts for that enormous change?

A. *The Failure of Anticipated Benefits*

For one thing, the right to jury trial has, in substantial measure, failed to provide businesses with the benefits that were expected during the Founding Period.

1. *Increased Complexity*

The complexity of the issues that juries are asked to resolve is far greater than what the Framers could have imagined. The Framers recognized that a jury made up of non-professionals gathered ad hoc from the community would be less able to follow a highly complex case than an experienced and specialized judge. However, they did not foresee how the technological advances and interconnectedness of the modern world would complicate so many different areas of the law which were subject to jury trials.

Modern examples of complexity in jury trials include antitrust cases, in which the jury must determine whether a multi-faceted business practice constitutes a “restraint of trade” in the sense that it gives a company, or group of companies, genuine market power. Several years ago, for example, Netscape sued Microsoft over the inclusion of Internet Explorer in its Windows operating system and sought to present to the jury the complex economic question of whether that decision “restrained trade” under the modern economic theory of “network externalities.”²⁶ And in another

²⁴ 2008 Update on U.S. Tort Cost Trends, TOWERS PERRIN 6–7, 10 (2008), http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2008/200811/2008_tort_costs_trends.pdf.

²⁵ See *id.*

²⁶ See Joe Wilcox, *AOL's Netscape Sues Microsoft*, CNET NEWS (Jan. 22, 2002, 4:20 PM), <http://news.cnet.com/2100-1001-820227.html>.

complex case involving alleged price-fixing for TV sets in markets across the world by over 90 different companies, the Third Circuit found that the jury's inability to comprehend important aspects of the case meant that the case was exempt from the Seventh Amendment right to jury trial.²⁷

Similarly, in the patent field, juries are often asked to decide whether, for example, an innovation introduced into a complex molecule used as a medicine would have been "obvious" to someone else working in that field. It was on the basis of such an analysis that a jury recently refused to invalidate a patent covering a complex "anti-ulcerant" known as pantoprazole.²⁸

And in the product liability arena, juries are routinely asked to engage in complex engineering analyses to determine whether the benefits of a particular product design outweigh its costs and potential dangers.²⁹ These deliberations often require juries to make a series of decisions based on statistical principles, such as prior or relative probabilities, that go far beyond the abilities of the average high school or even college graduate.³⁰

All of these are questions that even a panel of highly-skilled experts would have difficulty answering. Accordingly, we ask an enormous amount from non-expert juries when we expect them to resolve such issues with any degree of accuracy and fairness. And, although the Framers realized this could be a problem, they could not have anticipated how complex civil litigation would eventually become.

Increased complexity almost always disfavors business because it gives plaintiffs' lawyers an undue advantage: when people do not understand

²⁷ *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1071, 1073–74, 1089 (3d Cir. 1980). "[T]he district court should not presume that a jury always will be capable of deciding issues in suits at law. Rather, the court should consider circumstances of a particular case when deciding whether the jury is capable of deciding it with sufficient understanding." *Id.* at 1089–90.

²⁸ *U.S. Jury Finds Nycomed's U.S. Pantoprazole Patent Not Invalid*, THE PHARMA LETTER (Apr. 26, 2010), <http://www.thepharmaletter.com/file/94463/us-jury-finds-nycomeds-us-pantoprazole-patent-not-invalid-shire-sues-teva-over-intuniv-patent-nycomedmerck-co-deal-on-daxas.html>.

²⁹ See, e.g., Gina Passarella, *Pa. Jury Awards Nearly \$89 Million in Plane Crash Case*, THE LEGAL INTELLIGENCER (Apr. 7, 2010) (describing a products liability case in which the jury found the engine manufacturer 100% liable in the face of a National Transportation Safety Board investigation of the accident that completely absolved the manufacturer).

³⁰ VALERIE P. HANS & ANDREA J. APPEL, A HANDBOOK OF JURY RESEARCH § 3.02(d)(1) (Walter F. Abbott & John Batt eds., 1999) (arguing that people tend to underestimate the significance of statistical evidence). See generally Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355, 359–67 (1998) (discussing the problems jurors have with expert evidence presented in scientifically complex civil cases).

something, they tend to be suspicious of it. And the products designed and made by businesses are generally more difficult to understand than other phenomena that jurors regularly encounter.³¹

Moreover, the cases with the most potential risk for business generally involve a lawsuit by an injured individual. In many of these, the explanation for the business's course of action, even if reasonable and ultimately justified, requires delving into the technical details of the relevant field of business activity. A suspicious jury will have a much easier time understanding the harm suffered by the individual plaintiff—who will often be sitting in front of them in a wheelchair—than the multi-faceted, detail-intensive, strategic challenges faced by the business. This, too, makes juries more inclined to rule against businesses.

2. *Informed Fact-Finders*

For similar reasons, any hope that juries would be well-informed and familiar with the facts underlying legal disputes has proven to be a pipe dream. Not only are the factual issues vastly more complicated than the Framers could have imagined, but modern communities are so large and ordinary people so poorly informed about local matters that a local jury is unlikely, in ordinary cases, to be substantially more adept than a jury in another state at resolving an issue involving a local company.

3. *The Demise of Jury Nullification*

Any hope that juries would be allowed to nullify unjust or unconstitutional federal laws was also dashed soon after the adoption of the Bill of Rights. For example, when James Callender was charged with printing seditious libel against President John Adams, the defense attorney tried to encourage the jury to ignore and, therefore, effectively nullify the Sedition Act as unconstitutional.³² But Justice Samuel Chase, sitting as a trial judge, reprimanded Callender's attorney and instructed the jury that its only responsibility was to find the facts, not determine the validity of the underlying law.³³ Although the uproar that arose over Justice Chase's behavior led to his impeachment, the vote to convict him was shy of the two-thirds necessary to remove him from office.³⁴ And his behavior reflected a push by a large group of judges to ensure that juries accepted the law as

³¹ See HANS & APPEL, *supra* note 30, at § 3.02(d)(2) (providing evidence that jurors tend to dismiss or give insufficient weight to evidence that they find to be unclear).

³² United States v. Callender, 25 F. Cas. 239, 253 (C.C. Va. 1800).

³³ See *id.*

³⁴ See WILLIAM H. REHNQUIST, GRAND INQUESTS 104–05 (1992).

written and as interpreted by the judge, rather than having the option of ignoring laws they viewed as unjust.

Later, during the nineteenth century, pro-slavery advocates again waged battle against jury nullification because it was used by abolitionists to prevent enforcement of the Fugitive Slave Law. As a contemporaneous commentator noted, “[C]ourts have repeatedly questioned jurors to ascertain whether they were prejudiced *against the government* The reason of this . . . was, that ‘the Fugitive Slave Law, so called’ was so obnoxious to a large portion of the people, as to render a conviction under it hopeless”³⁵ These efforts culminated at the end of the nineteenth century in the Supreme Court’s upholding a conviction in *Sparf v. United States*, despite the fact that the judge had refused to allow the defense attorney to argue for jury nullification.³⁶ Once such arguments were banned from the courtroom, few juries even recognized the possibility of refusing to apply a law they believed unjust.

For all these reasons, the right to jury trial proved to offer far fewer benefits to businesses than the Framers would have imagined.

B. *Increased Business Risks from Civil Jury Trials*

At the same time, three unanticipated developments made the civil jury trial a greater *threat* to business interests than the Framers likely thought.

1. *Changes in Jury Composition*

There have been dramatic changes to the composition of juries since 1791. At the time the Sixth Amendment was ratified, jury service was limited to men in every state; and in every state but Vermont, jury service was also limited to property owners or taxpayers.³⁷ Moreover, federal jury service requirements tracked state requirements until 1948.³⁸ As a result, as one commentator noted, “jury service was esteemed a privilege, to be reserved for the propertied.”³⁹

³⁵ LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 8 n.1 (1852).

³⁶ *Sparf v. United States*, 156 U.S. 51, 53, 59, 63–64 (1895).

³⁷ *Jury: Legal Aspects—Selecting Jurors*, LAW LIBRARY—AMERICAN LAW AND LEGAL INFORMATION, <http://law.jrank.org/pages/1434/Jury-Legal-Aspects-Selecting-jurors.html> (last visited Oct. 13, 2010).

³⁸ Note, *An Analysis of Alternative Constructions of the Requirement That Federal Jurors Be Competent Under State Law*, 64 YALE L.J. 1059, 1059 (1955).

³⁹ HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 140 (2005).

As the universal suffrage movement grew, however, states began to relax these restrictions and to open jury service to female, non-property-owning, and non-tax-paying citizens. Indeed, some states declared that jury service would be extended to all citizens eligible to vote. But other states continued to narrow the class of eligible jurors to a limited subset of eligible voters.

This disconnect in some states between the right to vote and the right to sit on a jury lasted until 1946, when the Supreme Court decided *Thiel v. Southern Pacific Co.*⁴⁰ The case involved the constitutionality of a law excluding from jury service “persons who work for a daily wage”—leaving only salaried employees and the landed gentry as eligible for jury service.⁴¹ The petitioner there had sought damages from a railroad company because it had not prevented him from jumping out of a moving train.⁴² At first, he demanded a jury trial; after the jury was empanelled, he moved to strike the entire panel, arguing:

[M]ostly business executives or those having the employer’s viewpoint are purposely selected on said panel, thus giving a majority representation to one class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes who constitute, by far, the great majority of citizens eligible for jury service⁴³

Speaking for the Court, Justice Murphy sustained the petitioner’s argument. Murphy began by observing that “[t]he American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community.”⁴⁴ He clarified that “[t]his does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community [because] frequently such complete representation would be impossible.”⁴⁵ But, he noted, it did mean that “prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups To disregard [this principle] is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.”⁴⁶ The Court thus swept away the limitations on jury service

⁴⁰ 328 U.S. 217 (1946).

⁴¹ *Id.* at 221.

⁴² *Id.* at 219.

⁴³ *Id.*

⁴⁴ *Id.* at 220.

⁴⁵ *Id.*

⁴⁶ *Thiel*, 328 U.S. at 220.

that the business community had long relied upon to ensure that juries would at least be sympathetic to its position.

In short, the Framers' original conception of a jury was that of a panel of at least moderately propertied, tax-paying, white men. But by 1946, such restrictions were deemed "abhorrent to the democratic ideals of trial by jury"⁴⁷ and were banned.

Though all would likely agree with the democratic ideals outlined by Justice Murphy in *Thiel*, one consequence of this shift in jury composition is an increased likelihood that a jury adjudicating a claim against a corporation will not be a jury of the corporation's "peers"—or at least peers of its directors and officers. And, with the practical reality that modern jurors are drawn disproportionately from less frequently employed populations, businesses are less likely to face juries composed of *employees* of corporations. And that makes it less likely that juries will even understand business interests, much less sympathize with them.

2. *Changes in the Financing of Litigation*

The method by which plaintiffs finance litigation has also changed dramatically since the Founding. Under what used to be known as the "English rule," the losing party paid the attorney's fees for its own attorneys as well as the prevailing party's attorneys.⁴⁸ For centuries this approach was the default for legal fees in England.⁴⁹ The same rule was followed in the colonies, with the difference that the amount that attorneys could recover was limited by statute instead of custom.⁵⁰

After the colonies broke free from England and formed the United States, however, the new legal system eventually adopted what came to be known as the "American rule," under which each party generally bears its own legal fees.⁵¹ Although the precise chronology and causes of the transition are unclear,⁵² by the late 1800s, the American rule was generally recognized as having replaced the English rule.⁵³

⁴⁷ *Id.*

⁴⁸ Murray Schwartz, *Symposium Foreword*, 47 LAW & CONTEMP. PROBS. 1, 1 (1984).

⁴⁹ See ALAN J. TOMKINS & THOMAS E. WILLGING, TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS 7 (1986). See generally ANTON-HERMANN CHROUST, 1 THE RISE OF THE LEGAL PROFESSION IN AMERICA 85–327 (1965).

⁵⁰ John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 12 (1984).

⁵¹ Schwartz, *supra* note 48, at 1.

⁵² See Leubsdorf, *supra* note 50, at 15 (pointing to Justice Story's vacillations on the rule over the next 30 years and arguing that the law was unclear at the time). Compare

This development had enormous implications for the financial incentives governing litigation. Specifically, the demise of the English rule substantially reduced the financial risk entailed in the prosecution of a lawsuit by eliminating the possibility that the plaintiff would have to pay the defendant's fees if the plaintiff ultimately lost. No longer would the plaintiff be forced to internalize the costs that a meritless lawsuit imposed on the other side.

The change in fee-shifting rules was also closely associated with the rise of contingency fees.⁵⁴ The contingency fee contract—wherein an attorney agrees to represent a plaintiff for a percentage of the award instead of a fixed cost—arose in America in the mid-nineteenth century.⁵⁵ Prior to that, contingency fees were prevented by the common law doctrine of champerty, which prohibited assistance to a party by someone without a bona fide interest in the case.⁵⁶

There is some evidence of contingency fees as early as 1813. According to an 1813 treatise by Justice Brackenridge of Pennsylvania, indigent parties who could not pay up front would retain counsel anyway, with the attorney “taking what are called *contingent* fees.”⁵⁷ However, most reported cases from the early- to mid-1800s prohibited contingency fees as champertous.⁵⁸ As a result, most legal historians locate “the birth of the contingency arrangement in the waning decades of the nineteenth century.”⁵⁹

Regardless of when contingency fees arose in the nineteenth century, they were certainly not an accepted part of the legal system at the time of the Founding. And contingency fees have dramatically expanded the number of lawsuits—and with them, the number of jury trials—by making it possible for those without substantial means to retain counsel. Combined with the demise of the English Rule, this new development undoubtedly produced far

Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) (disallowing an award of \$1600 in legal fees since “[t]he general practice of the *United States* is in opposition [sic] to it”), with *The Appollon*, 22 U.S. (9 Wheat.) 362, 376, 379 (1824) (allowing an award of \$500 in counsel fees since “[i]t is the common course of the Admiralty, to allow expenses of this nature”).

⁵³ Leubsdorf, *supra* note 50, at 17.

⁵⁴ *Id.* at 16.

⁵⁵ PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 191–99 (1997).

⁵⁶ Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 234–35 (1998).

⁵⁷ H.H. BRACKENRIDGE, LAW MISCELLANIES, in AMERICAN LAW: THE FORMATIVE YEARS, at xx (Morton J. Horowitz & Stanley N. Katz eds., 1972).

⁵⁸ Karsten, *supra* note 56, at 235 n.22.

⁵⁹ Stephan Landsman, *The History of Contingency and the Contingency of History*, 47 DEPAUL L. REV. 261, 261 (1998).

more lawsuits, especially lawsuits against businesses, than the Founders could have foreseen.

3. *Punitive Damages*

Perhaps most importantly, today's juries have much greater power to impose punitive damages. John Steele Gordon argues that, although "punitive damages have an ancient history in the common law," up until fifty years ago civil juries rarely imposed them.⁶⁰ Instead, such awards were limited to cases involving torts between strangers, and usually for claims of assault, false imprisonment, or other actions where "harm had been the whole point of the misconduct."⁶¹

The first two recorded common law cases involving punitive damages are not actually all that "ancient," coming fewer than thirty years before the ratification of the Seventh Amendment in 1791. In *Huckle v. Money*, agents of the British Secretary of State had illegally imprisoned a man for over six hours in violation of the protections in the Magna Carta but without directly harming him.⁶² The appeals court affirmed the jury's decision to award "exemplary damages" beyond the damages that would recompense the plaintiff for direct harm.⁶³ The companion case to *Huckle*, *Wilkes v. Wood*, involved an illegal search also in violation of the protections normally afforded by contemporaneous warrant requirements.⁶⁴ Both cases involved the government's targeting the press and others who were speaking out against government policies.

The limited nature of early punitive damages was such that, by the early twentieth century, many legal scholars thought punitive damages would disappear, and several American states abolished them altogether.⁶⁵ During the last fifty years, however, the tort system has fully embraced punitive damages, and the number of cases involving them has risen dramatically.⁶⁶ The Department of Justice estimated that punitive damage awards in the

⁶⁰ John Steele Gordon, *Punitive Damages*, AMERICAN HERITAGE BLOG (Oct. 31, 2006, 2:00 PM), http://www.americanheritage.com/blog/200610_31_644.shtml.

⁶¹ *Id.*

⁶² (1763) 95 Eng. Rep. 768, 768–69 (C.P.).

⁶³ *Id.* at 769.

⁶⁴ (1763) 98 Eng. Rep. 489, 498–99 (C.P.).

⁶⁵ See Gordon, *supra* note 60.

⁶⁶ George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 826–27 (1996) (noting the rising of punitive damage verdicts specifically in Alabama but also across the country since the late 1950s).

largest seventy-five counties alone totaled more than \$1.2 billion.⁶⁷ And that is only the tip of the iceberg, considering the fact that risk-averse corporations are much more likely to seek a settlement to avoid a potentially enormous punishment at the hands of a jury. Professor George Priest argues that “the availability of unlimited punitive damages affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process.”⁶⁸

This rise in lawsuits and punitive damage awards is attributed to three things: (1) smart plaintiff’s lawyers working on a contingency basis realizing that pursuing punitive damages can be highly lucrative; (2) judges expanding the kinds of cases in which punitive damages can be awarded; and (3) juries awarding larger and larger amounts in punitive damages.⁶⁹ These three factors have formed a perfect storm of potential punishment, making today’s corporations ever more leery of facing a jury.

This enormous power to inflict monetary damage on a defendant is more likely to hurt corporations than individuals because, as a general rule, corporations are more likely to have substantial assets and, therefore, make better “deep pockets.” Thus, it is no surprise that corporations would be more averse to the jury trials than individual citizens—and more likely to seek settlements to avoid them.

III. CONCLUSION

In sum, the relationship between businesses and juries has changed in ways unforeseen and unforeseeable at the Founding. As we have seen, the Framers expected the right to jury trial to create a number of concrete, beneficial effects on business: providing a check against unjust laws, limiting the complexity of lawsuits, and ensuring that legal decisions are made by fact-finders familiar with the parties and the facts. The Framers also understood that the right to jury trial would protect the disadvantaged from legal manipulation by the wealthy, but that effect would not have been thought to disadvantage *ethical* businesses. And so, as a means of creating a favorable business climate, as well as promoting other important values, the right to jury trial was seen as an unalloyed good.

⁶⁷ Thomas H. Cohen & Steven K. Smith, *Civil Trial Cases and Verdicts in Large Counties*, 2001 U.S. BUREAU OF JUST. STAT. BULL. 6 (Apr. 2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctcvlc01.pdf>. This figure is for all punitive damages, not just against businesses.

⁶⁸ Priest, *supra* note 66, at 830.

⁶⁹ See Gordon, *supra* note 60.

This is less true today. Although the right to jury trial still protects businesses in important ways, some of the anticipated benefits—including limitations on complexity and the possibility of jury nullification of laws viewed as unjust—have not materialized. And other developments, including the removal of certain qualifications for jury service, changes in the financing of litigation, and the simultaneous explosion of punitive damages, have created a civil jury trial environment that is surely more hostile to business than the Framers could have imagined. Indeed, these changes have been so significant that most American businessmen today likely regard the jury system, not as a bulwark against governmental power, but as a fearsome instrument of wealth redistribution.

Does that mean that the right to jury trial in Article III and in the Sixth and Seventh Amendments should be abolished or curtailed? We do not think so. For businesses concerned about the jury system, the better approach is to look closely at other aspects of the legal system—such as the rules governing juror qualifications, the financing of litigation, and punitive damages—and to seek changes that are consistent with our commitment to avoid sexual and racial discrimination that will move these rules back to the rules that prevailed during the Founding Period. If we do that, the right to jury trial may one day resume its place in the pantheon of institutions that are widely seen—by businesses as well as ordinary citizens—to protect the people's liberty.