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## Bulwark of Equality: The Jury in America

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## BULWARK OF EQUALITY: THE JURY IN AMERICA

*Nino C. Monea\**

### ABSTRACT

*Many decry the state of societal inequality in modern America. Juries are not normally thought of as part of the solution, but history shows that they should be. It reveals that juries oftentimes advanced the interests of the poor and lowly when no one else would. It also reveals that powerful interests—government and corporate—have sought to disempower juries that rule in favor of marginalized groups.*

*This Article examines four contexts throughout our history where juries have enhanced societal equality. (1) In early America, they resisted the British government and in the nascent republic were friends to debtors and farmers. (2) When Congress passed fugitive slave laws to enable slaveholders to haul accused runaways back into bondage, Northern juries effectively invalidated the laws. (3) During the Industrial Revolution and railroad boom, juries acted as a check on land seizures and compensated victims of grievous industrial injuries. And (4) throughout the labor movements of the last two centuries, juries tended to support workers agitating for better wages and conditions.*

*Each time, those in power fought back by trying to eliminate or weaken juries in response. And each time, courts or legislatures brought juries to heel. Still, history teaches us the valuable role juries play in creating a more equal society.*

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## I. INTRODUCTION

Recent events have thrown societal inequality into sharp relief. Income inequality has risen in the United States over the past several decades.<sup>1</sup> An ever-growing share of national wealth is being concentrated in the top 1% and top 0.1%.<sup>2</sup> These are people who earn more in one week or half-day, respectively, than someone in the bottom 90% earns in a year.<sup>3</sup> The Great Recession hurt everyone, but the least among us suffered the greatest losses.<sup>4</sup> And when the economy began to creep back, the rich grabbed the largest slice of the pie on the way up.<sup>5</sup> Beyond income inequality, the poor are locked out of the

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<sup>1</sup> See Claudia Goldin & Lawrence Katz, *The Future of Inequality: The Other Reason Education Matters So Much*, MILKEN INST. REV. 1, 1 (3d Quarter 2009); see also Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 525–26 (2009).

<sup>2</sup> Lawrence H. Summers, *The Inequality Puzzle*, DEMOCRACYJOURNAL.ORG (2014) (reviewing THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014)), <https://democracyjournal.org/magazine/33/the-inequality-puzzle/> (last visited Sept. 29, 2019).

<sup>3</sup> JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* 4 (2012).

<sup>4</sup> See generally Fabian T. Pfeffer et al., *Wealth Disparities Before and After the Great Recession*, 650 ANNALS AM. ACAD. POL. & SOC. SCI. 98 (2013).

<sup>5</sup> Ben Casselman, *Feel That Post-Recession Bounce? The Rich Feel It the Most*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/business/economy/wealth-inequality-study.html>.

justice system,<sup>6</sup> experience worse health outcomes,<sup>7</sup> and struggle in school as the educational achievement gap between rich and poor widens.<sup>8</sup>

There is no single, unified theory to explain the rise of inequality, but many have been suggested. Some point to technological growth outpacing educational attainment.<sup>9</sup> Others have argued that it is the confluence of information technology, international trade, and the decline in unionization.<sup>10</sup> To combat it, political leaders have put forth ideas such as bolstering unions, debt relief for students, and raising wages, to name but a few. Laws could easily address each of these topics, but so too could a less obvious method: strengthening juries.

This Article examines how, throughout American history, juries have contributed to societal equality and how those in power have worked to subvert them. I speak not only in abstract terms of liberty and justice, but in concrete ones: They helped invigorate the American Revolution, protect debtors, undermine the slave trade, compensate victims of industrial accidents, and empower unions.

The argument is not that juries always rule the right way. Prejudiced Southern juries, for example, perpetuated grave injustice to black litigants. The argument is narrower: On balance and throughout history, juries have helped marginalized groups, and each time those in power—be they governmental or corporate actors—have tried to stop them. Repeatedly, juries were curtailed only after they displeased the political, judicial, or economic elite. It is telling that those in power believed they can advance their interests more effectively without interference by democratic institutions such as juries.

Even the shameful verdicts that were based on racial animus should not disqualify juries as a system overall. First, these juries were operating in rampantly unjust and prejudiced communities.<sup>11</sup> It was not as if the judges, law

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<sup>6</sup> See generally LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>.

<sup>7</sup> Dan Simon, *Poverty Fact Sheet: Poor and in Poor Health*, INST. FOR RES. ON POVERTY (2013), <https://www.irp.wisc.edu/publications/factsheets/pdfs/PoorInPoorHealth.pdf>.

<sup>8</sup> Sabrina Tavernise, *Education Gap Grows Between Rich and Poor, Studies Say*, N.Y. TIMES (Feb. 9, 2012), <https://www.nytimes.com/2012/02/10/education/education-gap-grows-between-rich-and-poor-studies-show.html>.

<sup>9</sup> Goldin & Katz, *supra* note 1, at 3.

<sup>10</sup> Walter Frick, *Understanding the Debate Over Inequality, Skills, and the Rise of the 1%*, HARV. BUS. REV. (Dec. 21, 2015), <https://hbr.org/2015/12/understanding-the-debate-over-inequality-skills-and-the-rise-of-the-1>.

<sup>11</sup> The very notion of black citizens serving on juries was decried by voices throughout the South. See, e.g., *The Prejudice of Color*, WKLY. SENTINEL, Aug. 6, 1867, at 1, <https://www.newspapers.com/image/58183938/>; *Miscellaneous Items*, MORNING OREGONIAN, Aug. 7, 1867, at 4, <https://www.newspapers.com/image/9638120/>; *Negro Jurors*, GALVESTON DAILY NEWS, May 3, 1867, at 2, <https://www.newspapers.com/image/23964761/>.

enforcement, local politicians, or prosecutors were any more enlightened. Law enforcement usually did not even bother to prosecute whites who victimized blacks, and if they did, prosecutors only made half-hearted efforts to try the case.<sup>12</sup>

And there is no reason to think judges would have ruled any differently. Plenty of judges who expressed personal support for abolition ended up rendering proslavery decisions.<sup>13</sup> During the civil rights movement, when the National Association for the Advancement of Colored People (“NAACP”) sought an injunction to block Mississippi’s Jim Crow laws, for instance, judge after judge turned them down.<sup>14</sup> A Georgia judge ordered county officials to resist voting rights laws even if armed federal forces demanded it.<sup>15</sup> And so forth.

Second, the Sixth Amendment demands an *impartial* jury, not just any jury at all.<sup>16</sup> All-white juries were not representative cross samples of the community, plain and simple. Patrick Henry called the impartiality of the jury as valuable as the trial by jury itself, and he was right.<sup>17</sup> Biased jurors make a mockery of the right to trial by jury. But when black jurors were fairly seated during the Reconstructions, integrated juries convicted hundreds of Klansmen.<sup>18</sup>

Third, structurally, juries are more likely than any other common decision maker to reach a fair verdict. Research suggests that professional judges have the same biases and prejudices as the lay juror.<sup>19</sup> Not only that, but because juries bring with them diverse perspectives, they are better suited to combat stereotypes.<sup>20</sup> This stands to reason because a jury collectively has 500 years of human experience and a combined I.Q. equal to that of eight Rhodes scholars.<sup>21</sup> Southern civil juries in some cases awarded large verdicts against the same

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<sup>12</sup> RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 256 (2003).

<sup>13</sup> Derrick A. Bell, Jr., *Justice Accused: Antislavery and the Judicial Process*, 76 COLUM. L. REV. 350, 350 (1976) (book review).

<sup>14</sup> Louis Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1180–81 (1963).

<sup>15</sup> ROBERT CARO, *MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON* 1002 (2002).

<sup>16</sup> U.S. CONST. amend. VI.

<sup>17</sup> VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 37 (1986). Thomas Jefferson made a similar point. See Thomas Jefferson, *First Inaugural Address* (Mar. 4, 1801) (speaking of the importance of “trial by juries *impartially selected*” (emphasis added)).

<sup>18</sup> James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 925–26 (2004).

<sup>19</sup> Sandra D. Jordan, *The Criminal Trial Jury: Erosion of Jury Power*, 5 HOW. SCROLL SOC. JUST. L. REV. 1, 57 (2002).

<sup>20</sup> JONAKAIT, *supra* note 12, at 47; Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1292, 1295 (2000).

<sup>21</sup> J. KENDALL FEW, *AM. JURY TRIAL FOUND., IN DEFENSE OF TRIAL BY JURY* 85 (1993).

Klansmen who were acquitted by earlier criminal juries.<sup>22</sup> And unlike virtually every other governmental institution, challenges can be brought to ensure that juries are racially balanced.<sup>23</sup> Juries are not perfect, but from a design standpoint, they are more likely to reach a fair result than any other method of adjudication yet tried.<sup>24</sup>

And fourth, as this Article later illustrates, black litigants argued for jury rights to enhance, not degrade, the odds of a just result under the Fugitive Slave Act.

This Article proceeds in six Parts. Part I gives an overview of the history of the jury and explains its foundational role in structuring our government. It traces juries from the dusty banks of the Nile River four thousand years ago to their exalted role at the founding to their modern fall from grace. It also shows how juries operationalize and guard most other rights.

Part II explores juries in early America and how they inspired the founders, nourished the Revolution, ensconced freedom of speech, and protected citizens from unreasonable searches. From the very beginning, juries were also seen as necessary to counterbalance wealthy interests in society and they gave Federalists and Democratic-Republicans cause to break bread. It also shows the prominent role juries played in the ratification debates over the Constitution, mainly over how they were necessary to protect local debtors against faraway creditors. Although most politicians swore allegiance to jury rights, legislatures quickly started passing laws to erode jury rights, typically to make it easier for businesses or governments to collect debts and taxes.

Part III looks at how Northern juries blocked slaveholders from winning suits regarding the capture of persons accused of being runaway slaves. Later, Congress passed the Fugitive Slave Act, which allowed slaveholders to bypass juries. The law allowed judges, and later commissioners, instead of juries to decide cases. Parties were sometimes successful at getting courts to invalidate laws that took away jury rights, and abolitionists saw juries as a key piece of the fight against slavery. The Supreme Court upheld the law, however, and Southern

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<sup>22</sup> JOANNE DOROSHOW, *CTR. FOR STUDY OF RESPONSIVE LAW, THE CASE FOR THE CIVIL JURY: SAFEGUARDING A PILLAR OF DEMOCRACY* 20–21 (1992).

<sup>23</sup> *See, e.g.,* *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>24</sup> For a sample of research showing the effectiveness of juries, see BRIAN H. BORNSTEIN & EDIE GREENE, *THE JURY UNDER FIRE: MYTH, CONTROVERSY, AND REFORM* 15 (2017); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 *S. CAL. INTERDISC. L.J.* 1, 10 (1997); Stan V. Smith, *Why Juries Can Be Trusted*, 5 *VOIR DIRE* 19 (1998); Neil Vidmar, *Juries, Judges, and Civil Justice*, in *THE JURY AS FACT FINDER AND COMMUNITY PRESENCE IN CIVIL JUSTICE: REPORT OF THE 2001 FORUM FOR STATE APPELLATE COURT JUDGES* 8, 10 (2001).

outrage over how juries had thwarted the recapture of accused slaves helped push the South to secede.

Part IV uses railroads as a prime example of how the Industrial Revolution expanded the power of judges at the expense of juries. Legislatures and courts were worried that juries were biased against big business, and would stifle commerce by ruling against it. To prevent this perceived problem, some states took juries out of the eminent domain process, allowing railroads to expand at an alarming clip. And at the prompting of a coalition of businesses, courts aggressively employed new doctrines like the directed verdict, contributory negligence, and fellow servant rule to deny relief to victims and families who were terribly injured by new industrial technology.

Part V focuses on labor injunctions. Starting in the 19th century and continuing into the 20th, workers around the country began to unionize and agitate for better pay and conditions. Governments and businesses first tried criminal prosecutions against workers, but juries typically sided with the workers. In response, courts started issuing injunctions—which do not require a jury trial—to block protest, boycotts, and even criticism of industries. Despite some legislative attempts to narrow labor injunctions, they were never done away with.

Part VI pushes back against widespread criticism from corporate and academic circles to argue that America should embrace juries once again. For whatever flaws they might have, they are the most democratic means we have to adjudicate issues, and they have demonstrated history of standing up for the powerless.

## II. THE JURY SYSTEM

This Part charts the long and illustrious history of juries in western civilization. They are many thousands of years old and were used by virtually every society that had a justice system. In America, juries were once held dear by all parties and regions. What is more, they served as the mortar for the Constitution. They gave life to many other rights guaranteed under the great charter.

### A. *History of Juries Throughout the World and United States*

There is no consensus in the literature on the origin of the jury. Most agree the modern jury flows from the laws of Henry II (1154–1189 A.D.), but go any further back and it gets dicey. Some scholars will tell you it all began in ancient Greece with the laws of Solon.<sup>25</sup> Others will swear it was Louis the Pious,

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<sup>25</sup> Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 391 (1996).

son of Charlemagne.<sup>26</sup> The earliest venture is the Egyptian Kenbet in 2000 B.C., an adjudicative body with eight members—four from either side of the Nile.<sup>27</sup> Five hundred years later, the Bible tells us that God commanded Moses to deploy spies to Canaan to survey the land, assess the number of people, and gauge their strength.<sup>28</sup> Obedient as always, Moses picked 12 men, and after 40 days, they reported back tidings of milk and honey.<sup>29</sup> We would hardly consider this a jury today, but it was a group of 12 selected to gather facts, deliberate, and give recommendations on whether to attack or retreat. In that way, Moses’s spies bear more than a passing resemblance to the juries of antiquity, where jurors pounded the pavement to investigate the case themselves rather than passively absorbing evidence in court.<sup>30</sup>

Sir William Holdsworth was probably closest to the mark when he said: “[T]here may be more than one possible origin for the jury.”<sup>31</sup> William Forsyth argued they arose “silently and gradually” of their own accord rather than from any one lawmaker.<sup>32</sup> This makes sense. Virtually every culture seems to have adopted something like a jury at some point or another, from the Jewish Sanhedrin to the Greek dicast to the Frankish Inquest.<sup>33</sup> Zimbabwe uses farmers’ juries to allow ordinary citizens to hash out policy disputes.<sup>34</sup> Even the gods of ancient Greece used a jury to try Ares when he was accused of killing Poseidon’s son.<sup>35</sup> To amend an observation from Alexis de Tocqueville, the jury is the only judicial institution which is so perfectly natural that wherever a number of men are collected it seems to constitute itself.<sup>36</sup>

Although the exact origin of juries remains murky, we do know that, however long they have been around, concentrated powers have opposed them. Ancient Rome used juries for a time but ended them “apparently because it was too democratic for the tastes of the increasingly despotic emperors” around 500 A.D.<sup>37</sup> Swedish jury trials were once praised as the “bulwark of northern liberty,” but once they fell into disuse, “the liberties of the [Swedish] commons [were]

<sup>26</sup> Megan Healy McClung, *A Brief History of the Jury*, CBA REC., Feb./Mar. 2005, at 36.

<sup>27</sup> *Trial by Jury: “Inherent and Invaluable,”* W. VA. ASS’N FOR JUST., <https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury> (last visited Sept. 27, 2019).

<sup>28</sup> *Numbers* 13.

<sup>29</sup> *Id.*

<sup>30</sup> McClung, *supra* note 26, at 37.

<sup>31</sup> WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 313 (1922).

<sup>32</sup> WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 1 (1875).

<sup>33</sup> Jack Pope, *The Jury*, 39 TEX. L. REV. 426, 427–29 (1961).

<sup>34</sup> STUART A. COUPE ET AL., *A FARMERS’ JURY: THE FUTURE OF SMALLHOLDER AGRICULTURE IN ZIMBABWE* 7 (2005).

<sup>35</sup> LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* 1 n.\* (2d ed. 1988).

<sup>36</sup> *Cf.* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 101 (1835).

<sup>37</sup> *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1414 (1997).



extinguished, and the government . . . degenerated into a mere aristocracy.”<sup>38</sup> Henry VII created the Star Chamber as an alternative to juries. It was held in secret, with no indictment, no witnesses, and no appeals.<sup>39</sup> For centuries afterward, kings prosecuting treason preferred to use faux trials before judges who doubled as prosecutors or to have the legislature pass a bill of attainder rather than roll the dice with a jury.<sup>40</sup> Oppressive governments have sought to abolish juries.<sup>41</sup> Executives, legislators, and judges today are, at best, ambivalent about juries and often hostile toward them.<sup>42</sup> And commercial interests have tried to weaken them.<sup>43</sup>

In America, no other right has fallen from such a vaunted height to such lowly obscurity as the jury. It is no exaggeration to call juries *the* premier right in early America. The Pilgrims had barely found their land legs at Plymouth Rock when they declared in 1623 that all criminal cases should be tried by juries—the very first ordinance they adopted in the New World.<sup>44</sup> At the time of the Constitutional Convention, criminal jury trials were the only right guaranteed by every state constitution.<sup>45</sup> Few protected certain rights that we now consider fundamental, such as freedom of speech.<sup>46</sup> One struggles to find a single luminary in the early Republic that did *not* heap fulsome praise upon the institution.<sup>47</sup> Congress impeached a Supreme Court justice because he stripped powers from juries.<sup>48</sup> The South Carolina General Assembly declared in 1751 that “any person who shall endeavor to deprive us of so glorious a privilege as trials by juries is an enemy to this province.”<sup>49</sup>

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<sup>38</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*381; *see also* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 111 (2010) (explaining that delegate William Findley at the Pennsylvania ratifying convention said when Sweden abandoned jury trials “the commons of that nation lost their freedom” and “tyrannical aristocracy” took over).

<sup>39</sup> *Trial by Jury: “Inherent and Invaluable,” supra* note 27.

<sup>40</sup> GARRETT EPPS, AMERICAN EPIC: READING THE U.S. CONSTITUTION 62 (2013).

<sup>41</sup> MOORE, *supra* note 35, at 116–19.

<sup>42</sup> William G. Young, In Celebration of the American Jury Trial, Address at Massachusetts Continuing Legal Education, Inc. 7 (Oct. 2, 2014) (transcript available online at <https://www.massbar.org/docs/default-source/publications-document-library/ejournal/2015-16/in-celebration-of-the-american-jury-trial.pdf?sfvrsn=2>).

<sup>43</sup> Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 605 (1993).

<sup>44</sup> *Maxwell v. Dow*, 176 U.S. 581, 609 (1900) (Harlan, J., dissenting).

<sup>45</sup> Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994).

<sup>46</sup> MICHAEL KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 580 (2016).

<sup>47</sup> FEW, *supra* note 21, at 6.

<sup>48</sup> Alschuler & Deiss, *supra* note 45, at 908.

<sup>49</sup> DOROSHOW, *supra* note 22, at second unnumbered page.

This soaring rhetoric matched reality, for juries undergird our entire system of government. Most clearly, Article III guarantees that the trial of all crimes, except impeachment, shall be by jury.<sup>50</sup> In the Bill of Rights, juries are expressly mentioned in the Fifth, Sixth, and Seventh Amendments—respectively guaranteeing the rights to an indictment by grand jury, a public trial by an impartial, local jury, and a civil jury.<sup>51</sup> Indeed, juries are mentioned more often than any other right.

Today, the institution of the jury is more likely to be lamented than lauded. In recent times, both a Chief Justice of the United States<sup>52</sup> and a Vice President of the United States have critiqued it.<sup>53</sup> South Carolina's legislature reneged on its solemn vow, recently enacting a law to erode the powers of juries.<sup>54</sup> Through the incorporation doctrine, the U.S. Supreme Court has applied federal rights to the states—except for jury rights. With the recent incorporation of the Second Amendment,<sup>55</sup> the jury and grand jury rights remain as the most prominent rights yet unincorporated.<sup>56</sup>

Today, some of the greatest critics of juries are politicians, legislators, the media, and special interest groups.<sup>57</sup> For example, the American Medical Association and the Council of Engineering Companies have funded an anti-jury front group, and a review of 246 media stories on litigation found they overrepresented controversial forms of litigation and overinflated plaintiff win rates and damage amounts, giving a distorted view of juries.<sup>58</sup> Attacks on juries tend to be based on anecdotes, misuse of statistics, and appeals to authority or “common sense.”<sup>59</sup> Plenty of others lack citations, assuming, without supporting, the premise that judges are bred of a superior mental stock.<sup>60</sup> However, because

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<sup>50</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>51</sup> U.S. CONST. amends. V–VII.

<sup>52</sup> Warren E. Burger, *Thinking the Unthinkable*, 31 LOY. L. REV. 205, 210 (1985).

<sup>53</sup> Aviva Freudmann, *Quayle Urges Reforms in Civil Court System*, JOC.COM (Aug. 13, 1991, 8:00 PM), [https://www.joc.com/quayle-urges-reforms-civil-court-system\\_19910813.html](https://www.joc.com/quayle-urges-reforms-civil-court-system_19910813.html).

<sup>54</sup> Brian A. Comer, *South Carolina's Tort Reform Statute Became Effective January 1, 2012*, S.C. PRODS. LIABILITY L. BLOG (Feb. 9, 2012, 8:59 AM), <http://scproductliabilitylaw.blogspot.com/2012/02/south-carolinas-tort-reform-statute.html>.

<sup>55</sup> *McDonald v. Chicago*, 561 U.S. 742 (2010).

<sup>56</sup> EDWIN MEESE III ET AL., *THE HERITAGE GUIDE TO THE CONSTITUTION* 360 (2005).

<sup>57</sup> Brian H. Bornstein & Timothy R. Robicheaux, *Crisis, What Crisis? Perception and Reality in Civil Justice*, in *CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL & LEGAL PERSPECTIVES* 1–2 (Brian H. Bornstein et al. eds., 2008).

<sup>58</sup> *Id.* at 13.

<sup>59</sup> Vidmar, *supra* note 24, at 7.

<sup>60</sup> For instance, a 1926 article in the *Yale Law Journal* casually declared, without a source, “[t]here can be little doubt that the fact that the plaintiff happens to be indigent or that the defendant is personally unpopular or is a corporation, often has far greater effect upon the jury than the abstract charge of the trial judge.” William H. Wicker, *Special Interrogatories to Juries in Civil*

juries, unlike nearly every other group in modern society, lack any sort of organized advocacy group, these attacks go unanswered.

The best juries can hope for nowadays is indifference. The Public Papers of the Presidency of Barack Obama—a compendium of addresses, remarks, statements, interviews, and other such communications—reveal only a single glowing reference to the right to trial by jury in his first term.<sup>61</sup> For comparison, he exalted the freedom of speech roughly a dozen times in 2011 alone.<sup>62</sup>

Oh, how the mighty have fallen.

### B. *The Jury's Foundational Role in American Government*

Roman tradition holds that Cincinnatus was a small-time farmer appointed dictator of Rome in 458 B.C. to fend off an invading army.<sup>63</sup> He left his plow behind and defeated the enemy on the field of battle.<sup>64</sup> But instead of consolidating power, he freely surrendered his authority as soon as his task was completed and returned to his farm.<sup>65</sup> Cincinnatus is remembered in history as a paragon of virtue, humility, and duty.<sup>66</sup>

This legend was a captivating role model for George Washington, who left Mount Vernon to lead the Continental Army, but resigned his commission as Commander in Chief once independence was won and returned to farming.<sup>67</sup> Lest the obvious parallels be missed, his fraternal order of wartime officers was named the Society of Cincinnati.<sup>68</sup>

The same spirit of simplicity and nobility channeled by Cincinnatus and Washington lives on today in the jury. Every day, Americans of all stripes

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*Cases*, 35 YALE L.J. 296, 296 (1926). A 1969 article in the *Columbia Law Review* said, without a source, “a trial judge is less likely to be influenced by the demeanor of the witnesses than would be the jury; he is more likely to focus on the probative value of their testimony. He may be less likely to be the victim of inflamed passions in a sensitive case.” Note, *Trial by Jury in Criminal Cases*, 69 COLUM. L. REV. 419, 447 (1969). And a judge asserted, without a source, that “[t]he judge on average will likely have more disciplined mental skills than the typical juror.” Patrick E. Higginbotham, *Juries and the Complex Case: Observations About the Current Debate*, in THE AMERICAN CIVIL JURY: FINAL REPORT OF THE 1986 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES 74 (1987).

<sup>61</sup> Barack H. Obama, Remarks to the Parliament in London (May 25, 2011), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: BARACK H. OBAMA 598 (2011).

<sup>62</sup> See PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: BARACK H. OBAMA (2011).

<sup>63</sup> *Lucius Quinctius Cincinnatus*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Lucius-Quinctius-Cincinnatus> (last visited Sept. 27, 2019).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Rob Hardy, *Cincinnatus*, MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/cincinnatus/> (last visited Sept. 27, 2019).

<sup>68</sup> *Id.*

and stations are summoned from their normal routine to serve on juries where they resolve matters of public concern. They hold no elective office, but when assembled in the jury box they hold near-absolute power over the outcome. Once the case is over, they yield their awesome power and return to their lives as if nothing had ever happened.

Given how well juries fit into the American mythos, it is fitting that they have served as a cornerstone of our system of government. Judge William Young has observed that, under the federal Constitution, each branch of government has two types constitutional officers: president and vice president for the executive, senator and representative for the legislature, and judge and jury for the judiciary.<sup>69</sup> As constitutional officers for the justice system, jurors wield great power. In all cases, it is an onerous task to get a jury verdict overturned.<sup>70</sup> Should they deliver an acquittal to a criminal defendant, it *cannot* be overturned.<sup>71</sup> And when there is a unanimous verdict requirement, any one juror may nullify any law, deny any recovery, or veto any prosecution.

No other government on earth trusts its people to the same extent. In the 1980s, virtually every other country had abandoned juries, meaning four-fifths of all jury trials occurred in the United States.<sup>72</sup> Today, it is nine-tenths.<sup>73</sup> Even in foreign nations where juries have clung on, they are unrepresentative and subservient.<sup>74</sup> European judges are disdainful of how much power American juries hold.<sup>75</sup>

But there's more. Juries operationalize many other rights we hold dear. The Fourth Amendment was intimately connected to jury rights because it would be civil juries who determined whether a given search or seizure was "reasonable."<sup>76</sup> One Antifederalist wrote that if a federal official was searching "for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift . . . a trial by jury would be our safest resource."<sup>77</sup> A second wrote, "Without [a jury] in civil actions, no relief can be had against the High Officers of State, for abuse of private citizens."<sup>78</sup>

Freedom of speech, protected under the First Amendment, is close to worthless if the government is the sole arbiter. But thanks to juries, it is not. That

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<sup>69</sup> YOUNG, *supra* note 42, at 2.

<sup>70</sup> In the federal system, for example, a jury verdict may only be set aside if "there is no legally sufficient evidentiary basis for a reasonable jury to have found for [the prevailing] party." FED. R. CIV. P. 50(a)(1).

<sup>71</sup> *Fong Foo v. United States*, 369 U.S. 141, 143 (1962).

<sup>72</sup> HANS & VIDMAR, *supra* note 17, at 30–31.

<sup>73</sup> YOUNG, *supra* note 42, at 1.

<sup>74</sup> HANS & VIDMAR, *supra* note 17, at 32.

<sup>75</sup> *Id.*

<sup>76</sup> AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 73 (1998).

<sup>77</sup> *Id.* at 74.

<sup>78</sup> *Id.*

is why, when publishers were prosecuted under the Alien and Sedition Acts, they pled their case directly to the people through juries.<sup>79</sup> And because juries were empowered to issue a verdict in libel or slander cases, they were the ones determining the boundaries of free speech.<sup>80</sup> Indeed, by acquitting publishers charged with treason, colonial juries helped establish the inestimable principle that the press should be free to criticize the government.<sup>81</sup> The Thirteenth Amendment bars involuntary servitude unless a person is duly convicted of a crime.<sup>82</sup> Because all criminal defendants have a right to jury trials, no person may be subjected to involuntary labor without a chance to put it to a vote of 12 peers.<sup>83</sup> And by forbidding bills of attainder, the Constitution made sure that juries, not legislatures, would be the arbiters of guilt.<sup>84</sup>

Were that not enough, juries were once the primary government regulators in the country. They enforced taxes, oversaw public works projects, and set welfare rolls,<sup>85</sup> and in frontier states, they were “effective sounding boards in making known the desires of the people and served as a curb upon the activities of public officials.”<sup>86</sup> Grand juries had broad powers to investigate suspected wrongdoing by government corruption and bring it to light. Illinois tasked them with investigating prisons and jails to report on conditions.<sup>87</sup> It was like a blue-ribbon commission on corruption in every courthouse.<sup>88</sup> Petit juries, or trial juries, had the power to judge both law and fact.<sup>89</sup> One jury foreman was so bold as to ask a judge whether the legal instructions given were “*raly* the law, or whether it was *only jist* your notion.”<sup>90</sup>

As the following pages show, juries often used their powers to not only inject community values into the courtroom, invigorate civic participation among the population, and ensure robust deliberation on weighty matters, but also help make society a little more equal.

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<sup>79</sup> *Id.* at 24.

<sup>80</sup> *Id.* at 23–24.

<sup>81</sup> Landsman, *supra* note 43, at 593.

<sup>82</sup> U.S. CONST. amend. XIII.

<sup>83</sup> U.S. CONST. amend. VI.

<sup>84</sup> U.S. CONST. art. 1, § 9, cl. 3.

<sup>85</sup> Stephan Landsman, *Juries as Regulators of Last Resort*, 55 WM. & MARY L. REV. 1061, 1062 (2014).

<sup>86</sup> STACY PRATT McDERMOTT, *THE JURY IN LINCOLN’S AMERICA* 52 (2012).

<sup>87</sup> *Id.* at 32.

<sup>88</sup> NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 85 (1937).

<sup>89</sup> WALTER STAHR, *JOHN JAY: FOUNDING FATHER* 308–09 (2005).

<sup>90</sup> Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 582 (1939).

## III. JURIES IN EARLY AMERICA

Leveling the playing field was a key feature of the American jury from its outset. Pro-jury rhetoric was suffused with anti-elitist sentiments. The jury was a “repository of the people’s sense of justice, reason, and fair play,” whereas judges were seen as elite government officials on the government payroll.<sup>91</sup> The government, in turn, was seen as partial toward the wealthy and the executive branch.<sup>92</sup>

Many founders also saw juries as inherently resistant to corruption. On this point, even bitter rivals like Thomas Jefferson and Alexander Hamilton could agree. Jefferson explained that permanent classes of judges would develop a sense of camaraderie that would leave them vulnerable to bribery and partisan loyalties, but “the opinion of 12 honest jurymen gives still a better hope of right” than judges.<sup>93</sup> Hamilton concurred, saying it is much harder to corrupt a temporary, ephemeral body like a jury than a fixed judge.<sup>94</sup>

Juries were also seen as necessary to check the class bias of judges.<sup>95</sup> This was hardly a new idea. A few decades before, Sir William Blackstone wrote that the presence of juries “prevents the encroachments of the more powerful and wealthy citizens” and the absence of them would be “a step towards establishing aristocracy, the most oppressive of absolute governments.”<sup>96</sup> One key reason for this was that judges, being drawn from a princely social stratum, would “frequently [have] an involuntary bias towards those of their own rank and dignity.”<sup>97</sup>

A. *Prerevolutionary America: Juries v. the Crown*

England had given the colonists good reason to cherish juries. For as this Section demonstrates, juries had stood up to the Crown many times. In so doing, they helped ensure that even those in power were not above the law.

Today, the reasonableness of search warrants is determined beforehand by a judge.<sup>98</sup> But this was not always so. Once, virtually any search and seizure would instead be litigated after the fact.<sup>99</sup> Defendants who were wronged by the

<sup>91</sup> Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 41 (1994).

<sup>92</sup> Alan H. Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 150 (1991).

<sup>93</sup> Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in *THE PAPERS OF THOMAS JEFFERSON* 282–83 (Julian P. Boyd ed., 1958).

<sup>94</sup> THE FEDERALIST NO. 83 (Alexander Hamilton).

<sup>95</sup> Haddon, *supra* note 91.

<sup>96</sup> BLACKSTONE, *supra* note 38, at 380.

<sup>97</sup> *Id.* at 379.

<sup>98</sup> AMAR, *supra* note 76, at 69.

<sup>99</sup> *Id.*

government could go before a jury to determine if the search was lawful, and if it was not, seek damages.<sup>100</sup> After a jury trial, the defendant could not only get the search declared unlawful, but the government official could be made liable for compensatory—and perhaps punitive—damages.<sup>101</sup>

English juries routinely soaked government officials for unlawful searches. In *Wilkes v. Wood*<sup>102</sup> and *Entick v. Carrington*,<sup>103</sup> the government defendants—with warrants—broke into and ransacked the homes of plaintiffs in search of seditious libel. The jury found against the defendants and awarded the plaintiffs damages. In the *Wilkes* case, damages were even awarded against Lord Halifax, the head of government.<sup>104</sup> In *Huckle v. Money*,<sup>105</sup> another wrongful search and seizure case, the actual damages to the plaintiff were relatively small, only 20 pounds, but the jury was so aghast they also imposed exemplary damages of ten times that amount against 15 different government officers. No wonder government officials prefer adjudicating warrants before the fact.<sup>106</sup>

Things went even worse for the Crown when it tried to crack down on colonists. Take libel. In England, it was commonly used as a tool to suppress anti-government speech. John Wilkes, for instance, was a British politician who openly decried government abuses.<sup>107</sup> In response, the government convicted him, in absentia, of libel after Lord Chief Justice Mansfield told the jury they were to find him guilty.<sup>108</sup> Bookseller John Almon published a pamphlet criticizing Lord Mansfield's arbitrary and capricious handling of the *Wilkes* case.<sup>109</sup> Almon found himself prosecuted for libel against Lord Mansfield, and the court held that criticisms of judges could be summarily punished without a jury.<sup>110</sup> *Wilkes* and Almon were hardly alone. Hundreds were convicted of libel in England in the 17th and 18th centuries.<sup>111</sup>

But in the American colonies, opposition by local juries flipped the script. Publisher John Peter Zenger criticized the colonial governor in 1734, and the jury acquitted him when the government brought charges in spite of the

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 70.

<sup>102</sup> *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763).

<sup>103</sup> *Entick v. Carrington*, 19 Howell's St. Trials 1029 (C.P. 1765).

<sup>104</sup> Landsman, *supra* note 43, at 591.

<sup>105</sup> *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763).

<sup>106</sup> AMAR, *supra* note 76, at 69.

<sup>107</sup> Nancy LoPatin-Lummis, *Man of Contradictions*, 58 J. LIBERAL HIST. 43, 43–44 (2008) (reviewing ARTHUR H. CASH, JOHN WILKES, THE SCANDALOUS FATHER OF CIVIL LIBERTY (2006)).

<sup>108</sup> *Id.* at 44.

<sup>109</sup> Thomas M. Keck et al., *The Judicial Protection of Anti-Judicial Speech*, 33 AM. U. INT'L L. REV. 693, 698 (2018).

<sup>110</sup> *Id.*

<sup>111</sup> Alschuler & Deiss, *supra* note 45, at 874.

strong evidence of guilt.<sup>112</sup> Another time, preacher William Penn was prosecuted for delivering a fiery sermon in defiance of the Church of England.<sup>113</sup> The jury included a mariner, a brewer, a vintner, an artisan, a baker, a merchant, a blacksmith, a carpenter, a currier, a tradesman, and a clerk.<sup>114</sup> The judge, expecting a pliant jury, instructed them to convict.<sup>115</sup> When the jury refused, the judge said,

Gentleman, you shall not be dismissed till you bring in a verdict which the court will accept. You shall be locked up without meat, drink, fire, or tobacco. You shall not think thus to abuse the court. We will have a verdict by the help of God or you shall starve for it.<sup>116</sup>

The judge made good on his word, but the jury was implacable.<sup>117</sup> Treatises praising juries quickly flooded the market and left a strong impression on Americans.<sup>118</sup>

Juries also refused to convict libelers. Throughout the colonies, only a half-dozen libel prosecutions were attempted, and only two of those secured convictions.<sup>119</sup> So steadfast was the opposition to libel laws that colonial juries “all but nullified the law of seditious libel” in pre-revolutionary America.<sup>120</sup> Juries also refused to indict Stamp Act protestors and other patriots.<sup>121</sup> In New York, grand juries refused to indict rioters to register their displeasure with British rule.<sup>122</sup> Virginia grand juries took a different approach, indicting aristocrats for petty offenses.<sup>123</sup>

And juries refused to convict smugglers. As a typical example, John Hancock—of penmanship fame—made much of his fortune through illegal

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<sup>112</sup> Kevin E. Sralla, *The Search for Harmful Prejudice: An Analysis of People v. Budzyn and the Underlying Purpose of the Jury System*, 46 WAYNE L. REV. 259, 263–64 (2000).

<sup>113</sup> McClung, *supra* note 26, at 37.

<sup>114</sup> Nancy Jean King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41, 41 (1999).

<sup>115</sup> McClung, *supra* note 26, at 37.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Landsman, *supra* note 43, at 591.

<sup>119</sup> Alschuler & Deiss, *supra* note 45, at 874.

<sup>120</sup> *Id.*

<sup>121</sup> AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 424 (2012).

<sup>122</sup> CHRISTOPHER WALDREP, JURY DISCRIMINATION: THE SUPREME COURT, PUBLIC OPINION, AND A GRASSROOTS FIGHT FOR RACIAL EQUALITY IN MISSISSIPPI 20 (2010).

<sup>123</sup> *Id.*



smuggling.<sup>124</sup> When stopped by customs officials, Hancock refused to allow them to inspect his cargo.<sup>125</sup> As was common at the time, officials did not even bother to seek an indictment against someone accused of smuggling, for they knew the grand jury would never go for it.<sup>126</sup> Later, they went ahead and seized the goods through the juryless admiralty court.<sup>127</sup> But Hancock sued for trespass, and the jury was all too happy to not only return his goods but fine the government official too.<sup>128</sup> Such was the state of affairs that one colonial governor complained, “‘A Custom house officer has no chance with a jury,’ and another protested, ‘A trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers.’”<sup>129</sup>

Thanks to juries, oppressive laws were dead letters. So, when Parliament wanted to actually enforce something, they made sure to subtract juries from the equation. The Dockyards Act achieved this by removing some prosecutions to England—robbing defendants of a chance to have a local jury.<sup>130</sup> After the Boston Tea Party and the accompanying destruction of property, England passed the Boston Port Act, which was effectively a judgment of liability against the people of Boston stating that they had not made “full satisfaction” for the cost of the destroyed tea.<sup>131</sup> Americans saw the destroyed tea as a tort matter that should have been resolved by a jury.<sup>132</sup>

And when Parliament wanted to increase customs revenues, it did not need to raise rates or hire more enforcers; it simply had to eliminate juries. That’s why the Sugar Act of 1764 had customs collection cases tried in admiralty court—where judges appointed by the King, instead of juries drawn from the citizenry, would reign supreme.<sup>133</sup> Even though the law cut the tax rate in half, the removal of juries meant it was intended to increase revenues.<sup>134</sup>

Violations of jury rights fanned the flames of revolution. Patriots argued that anti-jury laws deprived them of a right that they as Englishmen were entitled to through colonial charters.<sup>135</sup> The First Continental Congress called for jury

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<sup>124</sup> See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 24 (2000).

<sup>125</sup> *Id.*

<sup>126</sup> See *id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Alschuler & Deiss, *supra* note 45, at 874 (citation omitted).

<sup>130</sup> Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672, 1699 (2012).

<sup>131</sup> *Id.* at 1700.

<sup>132</sup> *Id.*

<sup>133</sup> STAHR, *supra* note 89, at 20.

<sup>134</sup> *Id.*

<sup>135</sup> Chapman & McConnell, *supra* note 130, at 1699.

trials in its Declaration and Resolves, which set out American rights.<sup>136</sup> When Jefferson penned the Declaration of Independence, he admonished the King for “depriving us in many cases, of the benefit of Trial by Jury” and for “transporting us beyond Seas to be tried for pretended offences,” which subverted local juries.

*B. Adopting and Ratifying the Constitution with Juries as a Major Sticking Point*

After the Constitution was hammered out in Philadelphia, it went to the states for ratification.<sup>137</sup> Jury rights were a frequent topic, and the lack of civil jury rights was one of the harshest criticisms of the document.<sup>138</sup> Joseph M’Dowall declared bluntly, “Trial by jury is not secured. The objections against this want of security have not been cleared up in a satisfactory manner. It is neither secured in civil nor criminal cases.”<sup>139</sup>

Beyond jeremiads about the lack of juries, many delegates were openly fearful of unchecked judges abusing the poor and lowly.<sup>140</sup> Thomas Tredwell of New York bemoaned how foreign courts that took life and property without jury trials were the cause of “much misery and a more rapid depopulation” of those nations.<sup>141</sup> Critics repeatedly warned that wealthy citizens would control the administration without juries—the only government institution free from the control of “oligarchs.”<sup>142</sup> William Grayson of Virginia was so pessimistic he wondered if even juries would be enough to secure the poor a fair shot.<sup>143</sup>

After the conventions were over, Antifederalists started beating the same drum around the country. One said the federal courts served no purpose but to “accumulate costs against the poor debtors who are already unable to pay their just debts . . . . [T]he poorer and middling class of citizens will be under the necessity of submitting to the demands of the rich and the lordly.”<sup>144</sup> Antifederalists argued that juries had been taken away in the federal

<sup>136</sup> WALDREP, *supra* note 122, at 21.

<sup>137</sup> U.S. Const. art. VII.

<sup>138</sup> Of the six state ratifying conventions that proposed amendments, five proposed adding civil jury rights. MEESE ET AL., *supra* note 56, at 359.

<sup>139</sup> See, e.g., *Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution*, ELLIOT’S DEBATES, Vol. IV, 211 (1836), <https://memory.loc.gov/ammem/amlaw/lwed.html> [hereinafter *Debates of North Carolina*]; see also JACK N. RAKOVE, THE ANNOTATED U.S. CONSTITUTION AND DECLARATION OF INDEPENDENCE 198 n.71 (2009); MAIER, *supra* note 38, at 44.

<sup>140</sup> E.g., *Debates of North Carolina*, *supra* note 139, at Vol. III 431, 569.

<sup>141</sup> *Id.* at Vol. II, 397.

<sup>142</sup> JONAKAIT, *supra* note 12, at 38–39.

<sup>143</sup> *Debates of North Carolina*, *supra* note 139, at Vol. III, 431, 569.

<sup>144</sup> ANTIFEDERALIST NO. 82.

government,<sup>145</sup> and that cases submitted to a judge would be “almost a certain prospect of ruin, at least in those cases where the middle and common class of citizens are interested.”<sup>146</sup> Another complained, “[B]ut what satisfaction can we expect from a lordly [judge] always ready to protect the officers of government against the weak and helpless citizens”?<sup>147</sup>

Of particular concern were debtors. During the Revolution, contracts required payments at high prices because paper money was so heavily devalued.<sup>148</sup> After the war, paying off contract prices could destroy debtors.<sup>149</sup> Patrick Henry worried that without civil juries guaranteed by the Constitution, American debtors could be dragged into federal court and fleeced by judges, meaning that “the liberty and happiness of our citizens [will be] gone, never again to be recovered.”<sup>150</sup> M’Dowell fretted that the federal courts would allow “the wealthy to recover unjustly of the poor man.”<sup>151</sup>

Pro-debtors were worried not only about the lack of juries, but the lack of *local* juries. When tried in a familiar setting, a debtor “could hope that his creditor would be forced to bring suit in the debtor’s local court where, under the protection of favorable local laws, the debtor might receive a sympathetic hearing before a jury composed of his friends and relatives.”<sup>152</sup> The original Constitution required only that criminal trials take place in the *state* where they were located, and said nothing about requirements for civil juries.<sup>153</sup> The Sixth Amendment narrowed criminal trials to the *state and district*, but the Seventh Amendment was silent about where juries were drawn.<sup>154</sup> James Madison proposed explicitly stating that jurors should be drawn from the vicinage of the crime, meaning the local neighborhood, but the Senate voted him down.<sup>155</sup>

This matter was hugely consequential for litigants, and poor ones doubly so. In an age when travel was nasty, poor, brutish, and long, it could be expensive to get to court. And criminal defendants could be charged for the cost to summon distant jurors, and the cost of incarceration while they awaited the start of trial.<sup>156</sup> M’Dowell argued that the rich would have an unfair advantage without local

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<sup>145</sup> *Id.* (“[T]he trial by jury, which has so justly been the boast of our forefathers as well as ourselves[,] is taken away under them.”).

<sup>146</sup> ANTIFEDERALIST NO. 83.

<sup>147</sup> THE COMPLETE ANTI-FEDERALIST 60 (Herbert J. Storing ed., 1981).

<sup>148</sup> JONAKAIT, *supra* note 12, at 37.

<sup>149</sup> *Id.* at 37.

<sup>150</sup> *Debates of North Carolina*, *supra* note 139, at Vol. III, 579–80.

<sup>151</sup> *Id.* at Vol. IV, 211, 143.

<sup>152</sup> JONAKAIT, *supra* note 12, at 37.

<sup>153</sup> U.S. CONST. art. III, § 2, cl. 3.

<sup>154</sup> *Id.* amends. VI, VII.

<sup>155</sup> *Williams v. Florida*, 399 U.S. 78, 94 (1970).

<sup>156</sup> DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 40 (2016).

juries because the poor would be forced to hoof great distances to go to court.<sup>157</sup> Moreover, the farther away a trial was held, the more likely evidence would be submitted through written depositions rather than live testimony.<sup>158</sup> Because only the richer members of society could read, distant trials might shut the poor out of legal proceedings altogether.<sup>159</sup>

The Sixth Amendment's requirement that jurors come from the same district as the crime would have been a small comfort. Even judicial districts could be hundreds of miles long—as they still are today<sup>160</sup>—assuming states were subdivided into districts at all. Colonial Virginia held all of its trials in Jamestown no matter where the crime occurred.<sup>161</sup> New York once held trial court only in New York City and Albany.<sup>162</sup> So what was to stop states from creating geographically vast districts? All in all, the concern for local debtors was one of the chief motivations for opposing the Constitution.<sup>163</sup>

These fears were prophetic. Before the Revolution, local juries were sympathetic toward debtors and refused to enforce rigid rules.<sup>164</sup> But the delegates in Philadelphia had been decidedly pro-creditor,<sup>165</sup> and prominent Federalists were fearful about the poor serving on juries *en masse*.<sup>166</sup> The Constitution empowered creditors to sue debtors and drag them into federal court, meaning an English merchant could sue an American debtor and deprive them of a local jury of their peers.<sup>167</sup> Sure enough, in the 1790s, hundreds of Americans lost federal suits to British creditors—even Thomas Jefferson.<sup>168</sup> Bowing in part to the critics, the Bill of Rights was quickly proposed after the government formed, and the Seventh Amendment—guaranteeing the right to civil juries—was adopted without debate.<sup>169</sup> Madison went so far as to propose

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<sup>157</sup> *Debates of North Carolina*, *supra* note 139, at Vol. VI, 211, 143.

<sup>158</sup> WALDREP, *supra* note 122, at 25.

<sup>159</sup> *Id.*

<sup>160</sup> See *Federal Judicial District Boundaries*, SYRACUSE U., <https://trac.syr.edu/tracreports/terrorism/011203/district.html> (last visited Sept. 23, 2019).

<sup>161</sup> JONAKAIT, *supra* note 12, at 108.

<sup>162</sup> HALE, *supra* note 156, at 40.

<sup>163</sup> Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 675–77 (1973).

<sup>164</sup> Landsman, *supra* note 43, at 594.

<sup>165</sup> *Id.* at 597.

<sup>166</sup> WALDREP, *supra* note 122, at 27.

<sup>167</sup> WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION 186–87 (2007).

<sup>168</sup> *Id.* at 187.

<sup>169</sup> MEESE ET AL., *supra* note 56, at 359.

prohibiting states from infringing on jury rights, calling it of “equal if not greater importance than” the other amendments, but was rejected by the Senate.<sup>170</sup>

Madison was on to something, for America’s honeymoon with juries was short lived. It soon forgot the lessons of its founding and states started depriving disfavored groups of jury rights, as the next two sections make plain. Perhaps it was because jury nullification was considerably less appealing to government officials when it was *American*, not *British*, laws being invalidated. Early juries, for instance, refused to convict defendants of crimes because even relatively minor offenses carried the death penalty.<sup>171</sup>

### C. *The Whiskey Tax and the Subversion of Local Juries*

The Whiskey Tax is another prime example. As a means of shoring up American credit, the federal government assumed state debts owed during the Revolutionary War. But to pay for these debts, the government would need revenue.<sup>172</sup> But who would pay for it? Not Wall Street and the stockjobbers of the east. And not Southern slaveholders with their lush plantations. No, to fund it, the government would look west.

Many farmers, often recent immigrants seeking economic opportunity and personal liberty on the frontier, settled along the banks of the Mississippi and Ohio rivers and their environs.<sup>173</sup> They found themselves living in “lice-infested hovels and scratching out a bare subsistence on land owned by absentee landlords.”<sup>174</sup>

Despite their poverty, Congress decided that they should bear the costs of financing the national debt and passed a whiskey tax and authorized excisemen to enforce it.<sup>175</sup> Taking a feather out of the British playbook, the law called for prosecutions under the law to be tried in federal courts in Philadelphia—many miles and a world away—depriving the farmers of a local jury and necessitating a financially ruinous journey east.<sup>176</sup> A few years earlier at the state ratifying convention, a young John Marshall mocked the idea that a Virginian defendant on the eastern shore could be forced to travel west to Kentucky for trial, because such an idea would be far too unpopular to become law.<sup>177</sup> But less than a decade later, the country proved him wrong.

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<sup>170</sup> William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 716 n.92 (1985).

<sup>171</sup> JONAKAIT, *supra* note 12, at 254.

<sup>172</sup> See generally Robert S. Kyff, *The Whiskey Rebellion*, AM. HIST., Aug. 1994.

<sup>173</sup> *Id.*

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

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> HALE, *supra* note 156, at 75.

These laws were despised by western farmers, for whiskey was essential to their commerce and culture. It served as a form of currency, medicine, and social lubricant to them.<sup>178</sup> And unlike eastern farmers near large markets, westerners had to distill their grains into whiskey so that it could be more efficiently transported over rugged terrain, thus bringing their harvests under the ambit of the tax.<sup>179</sup>

Buckling to intense resistance to the tax, Congress tried to appease the farmers by allowing for local trial for prosecutions under the law.<sup>180</sup> But when federal officials tried suing out west, local juries refused to convict defendants accused of violating them, rendering the laws inoperative.<sup>181</sup>

#### D. States Erode Jury Rights in a Variety of Ways

If Congress tried to diminish jury rights in its early days, state legislatures were serial offenders too. For example, at the dawn of the 19th century, Pennsylvania's legislature tried to create an arbitration system that would have replaced judges and juries alike, only to have it vetoed by the governor.<sup>182</sup> Most of these kinds of laws, however, were not vetoed.<sup>183</sup>

Early courts stood up for jury rights in some areas though. In 1785, North Carolina passed a law confiscating property from British subjects and denying them a jury trial.<sup>184</sup> All that was needed to accomplish the confiscation was an affidavit.<sup>185</sup> The high court found the law unconstitutional.<sup>186</sup> Incidentally, this was also purportedly the first time a court declared an act of the legislature unconstitutional,<sup>187</sup> and it occurred twenty years before *Marbury v. Madison*.<sup>188</sup>

Juries were also at the heart of the very first due process case. In 1795, Robert Randall tried to bribe several congressmen "to grant him land in the Northwest Territory."<sup>189</sup> Much to his surprise, rather than accepting the boodle, the Speaker of the House had him arrested, the House voted him guilty of

<sup>178</sup> Kyff, *supra* note 172.

<sup>179</sup> Michael Hoover, *The Whiskey Rebellion*, ALCOHOL & TOBACCO TAX & TRADE BUREAU (Aug. 21, 2014), [https://www.ttb.gov/public\\_info/whisky\\_rebellion.shtml](https://www.ttb.gov/public_info/whisky_rebellion.shtml).

<sup>180</sup> Kyff, *supra* note 172.

<sup>181</sup> JONAKAIT, *supra* note 12, at 28. For the first two decades of the nation, 95% of federal civil cases in Kentucky were brought by the government trying to enforce these tax laws. *Id.* at 38.

<sup>182</sup> 42 THE PAPERS OF THOMAS JEFFERSON 487 (James P. McClure et al. eds., 2016).

<sup>183</sup> WALDREP, *supra* note 122, at 34.

<sup>184</sup> See Chapman & McConnell, *supra* note 130, at 1711.

<sup>185</sup> *Id.*

<sup>186</sup> See generally Bayard v. Singleton, 1 N.C. (Mart.) 5 (Super. Ct. L. & Eq. 1787).

<sup>187</sup> Glenn v. Bd. of Educ., 187 S.E. 781, 784 (N.C. 1936).

<sup>188</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>189</sup> Chapman & McConnell, *supra* note 130, at 1741.

contempt, and had him detained.<sup>190</sup> Randall then became the first American to assert a due process violation: that the House had improperly punished him without a grand jury indictment or conviction by an impartial jury.<sup>191</sup> This time, however, the arguments were unsuccessful, and Congress to this day has the power to punish non-members for contempt.<sup>192</sup>

Beyond landmark cases, there were many routine examples of states abrogating jury rights, usually to help enforce a government policy more efficiently, and courts rebuffing them. Rhode Island passed a law in 1786 that penalized anyone who refused to accept paper money, and guilt was determined without a jury.<sup>193</sup> A butcher in Newport only accepted silver or gold coins as payment, and the state sought to fine him.<sup>194</sup> Although the butcher's objections are not stated, paper money was widely distrusted then thanks to severe inflation and irresponsible monetary policy by colonial legislatures.<sup>195</sup> He probably did not want it because accepting paper money could have spelled disaster for his business.<sup>196</sup> The state high court in *Trevett v. Weeden* invalidated the law.<sup>197</sup> It did not explain its decision, but since the defense was premised on the paramount importance of jury trials, that was probably the basis for the ruling.<sup>198</sup> At the time, judges were legislatively appointed for one-year terms, and the legislature responded to this decision by throwing out all the judges.<sup>199</sup>

In 1820, South Carolina passed a law imposing a \$10,000 fine (nearly \$200,000 in today's dollars) on anyone selling lottery tickets and authorizing tax officials to collect without a jury conviction.<sup>200</sup> The Constitutional Court of Appeals of South Carolina held that "the liability of the party must first be

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 1743 (citing *McGrain v. Daugherty*, 273 U.S. 135 (1927) and *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821) as reaffirmations of this principle).

<sup>193</sup> HOWARD GILLMAN ET AL., 2 AMERICAN CONSTITUTIONALISM: RIGHTS AND LIBERTIES 1 (2013), [http://global.oup.com/us/companion.websites/fdscontent/uscompanion/us/static/companion.websites/9780199751358/instructor/chapter\\_3/trevettv.pdf](http://global.oup.com/us/companion.websites/fdscontent/uscompanion/us/static/companion.websites/9780199751358/instructor/chapter_3/trevettv.pdf).

<sup>194</sup> *Id.*

<sup>195</sup> See Sharon Ann Murphy, *Early American Colonists Had a Cash Problem. Here's How They Solved It*, TIME (Feb. 27, 2017), <http://time.com/4675303/money-colonial-america-currency-history/>.

<sup>196</sup> Paper money could be heavily devalued in early America, so any savvy businessman would be circumspect. See JONAKAIT, *supra* note 12, at 37.

<sup>197</sup> James Varnum, *The Action of John Trevett Against John Wheeden for Refusing Paper Money, Rhode Island, 1786*, 4 AMERICAN STATE TRIALS 548 (John D. Lawson ed., 1915).

<sup>198</sup> See *id.*

<sup>199</sup> See Chapman & McConnell, *supra* note 130, at 1711.

<sup>200</sup> *State v. Allen*, 13 S.C.L. (2 McCord) 55, 56 (Const. Ct. App. 1822).

established by a jury of his country, and not by the arbitrary fiat of any individual,” and thus struck down the law.<sup>201</sup>

In 1829, Tennessee established a special court to adjudicate cases where the state bank accused a defendant of defaulting on his or her debts to the bank.<sup>202</sup> The court sat in equity, which meant it had the power to determine facts without a jury, and its decisions were not subject to appeal.<sup>203</sup> Three debtor-defendants sued, arguing the law violated the right to trial by jury.<sup>204</sup> Although the Tennessee Supreme Court agreed that juries were not required in equity cases, it rejected the notion that the legislature had the power to expand equity jurisdiction to include this sort of case.<sup>205</sup> To do so would give it the power to infinitely diminish the right to a jury trial, rendering it “a very useless one indeed.”<sup>206</sup> Each of the three judges of the Supreme Court wrote different opinions, but they all agreed that the law was an unconstitutional abridgment of jury rights.<sup>207</sup>

An 1825 New Jersey law tried to remove juries from small cases, but the high court smacked it down.<sup>208</sup> Even a seizure law that reduced the jury from 12 to six for its cases was held unconstitutional by the state supreme court.<sup>209</sup> An 1851 Maine law that doubled the punishment if a defendant elected to try the case before a jury was invalidated.<sup>210</sup> And a second Maine law that required defendants to post bond in order to get a jury befell the same fate,<sup>211</sup> as did a similar Rhode Island law.<sup>212</sup> On occasion, even local governments got in on the action; the city of Charleston passed a bylaw regulating soap and candle production and authorizing fines without a jury, and the Court of Common Pleas rebuked them.<sup>213</sup>

Although there are many examples of courts safeguarding jury rights against encroachments by other branches of government, the courts’ track record is far from perfect. On February 1, 1800—the tenth anniversary of its first session—the United States Supreme Court refused to strike down a bill of

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<sup>201</sup> *Id.* at 62.

<sup>202</sup> *State Bank v. Cooper*, 10 Tenn. (2 Yer.) 599, 608 (1831) (Peck, J.).

<sup>203</sup> *Id.* at 599–600 (Green, J.).

<sup>204</sup> *Id.* at 600.

<sup>205</sup> *Id.* at 604.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 623.

<sup>208</sup> *See generally* *Hinchly v. Mach.*, 15 N.J.L. 476 (1836). Sixty years later, New Jersey passed another law permitting small cases to be tried without a jury, and the high court once again struck it down. *State v. Lane*, 28 A. 421, 421 (N.J. 1893).

<sup>209</sup> *State v. Parkhurst*, 9 N.J.L. 427, 444 (1802).

<sup>210</sup> *State v. Gurney*, 37 Me. 156, 163–64 (1853).

<sup>211</sup> *See* *Inhabitants of Saco v. Wentworth*, 37 Me. 165, 176 (1853).

<sup>212</sup> *See* *Greene v. Briggs*, 10 F.Cas. 1135, 1144 (Cir. Ct. D.R.I. 1852).

<sup>213</sup> *Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382, 391 (1794).



attainder passed by the Georgia legislature to seize property from people it declared treasonous.<sup>214</sup>

Many early courts also used their contempt powers to punish critics directly, bypassing juries. Because contempt can be imposed on the judge's own accord, they can serve as "party, prosecutor, judge, and jury."<sup>215</sup> In 1788, after Eleazer Oswald questioned the impartiality of the judges in his libel case, the Pennsylvania Supreme Court fined and imprisoned him for contempt—without a jury.<sup>216</sup> Four years later, the same court meted out a similar juryless punishment to Thomas Passmore for contempt.<sup>217</sup> One survey of pre-1940 cases found that of 29 state high court cases involving speech acts criticizing a judge (and one criticizing a grand jury), 23 rejected free speech arguments and held the speaker in a contempt.<sup>218</sup>

#### IV. FUGITIVE SLAVE LAWS

Juries are not normally looked to as bastions of racial justice. And understandably so. A great many were infected by racial animus that prevented black litigants from having a fair chance. Emmett Till, the Scottsboro Boys, and Lemuel Penn are all examples of cases where juries decided the case not on the evidence, but on prejudice. Hundreds more cases met the same fate.<sup>219</sup> As noted in the introduction, however, this does not mean all jury verdicts are prejudiced. Northern juries eviscerated the Fugitive Slave Act, a prime example of an unjust law, as the following section shows.

##### A. *Fugitive Slave Act of 1793*

To understand the law, one must look back to the original Constitution. The Fugitive Slave Clause of the Constitution permitted the recapture of escaped slaves. It euphemistically reads:

No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.<sup>220</sup>

<sup>214</sup> Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800).

<sup>215</sup> Thomas M. Keck et al., *The Judicial Protection of Anti-Judicial Speech*, 33 AM. U. INT'L L. REV. 693, 699 (2018).

<sup>216</sup> *Id.* at 703.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 730–31.

<sup>219</sup> CARO, *supra* note 15, at 946.

<sup>220</sup> U.S. CONST. art. IV, § 2, cl. 3.

However easy it might be to accuse a black person in the North of being a runaway, slaveholders would need to prove the identity of the person they accused. Some states left this determination to juries.<sup>221</sup>

Abolitionists were confident that juries would stridently refuse to enforce this law if given the chance.<sup>222</sup> Senator Charles Sumner wondered, “How can justice be administered throughout States thronging with colored fellow-citizens unless you have them on the juries?”<sup>223</sup> One American Anti-Slavery Society member averred, “Give the panting fugitive this inestimable right [to a jury trial] in every northern State, and he is safe.”<sup>224</sup>

Evidently concerned that juries could not be trusted to consistently rule in favor of slaveholders, Congress passed the Fugitive Slave Act in 1793, which allowed slave catchers to bypass juries.<sup>225</sup> The Act authorized slaveholders to “seize or arrest” an alleged fugitive, drag them before a judge, and cart them off to bondage if they provided “proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit,” that the claim person was a slave.<sup>226</sup> There was no opportunity to contest the allegations.

The Act led to clashes between the states as abolitionists worked to resist the federal law, often centered on juries. In 1826, Pennsylvania passed a law that made it illegal to kidnap any black person with the intent to sell them into slavery.<sup>227</sup> In 1832, Margaret Morgan escaped from bondage in Maryland and fled to Pennsylvania.<sup>228</sup> A few years later, Edward Prigg was sent to apprehend Morgan, but Prigg was arrested and prosecuted for violating the anti-slavery law.<sup>229</sup> The jury convicted him.<sup>230</sup> However, on appeal the Supreme Court interpreted the Constitution’s Fugitive Slave Clause to provide “a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain.”<sup>231</sup> The state law, and the jury’s verdict, were thus invalidated.<sup>232</sup>

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<sup>221</sup> See MICHAEL STOKES PAULSEN & LUKE PAULSEN, *THE CONSTITUTION: AN INTRODUCTION* 79 (2015).

<sup>222</sup> Forman, *supra* note 18, at 901.

<sup>223</sup> Cong. Globe, 42d Cong., 2d Sess. 822 (1872) (statement of Sen. Sumner).

<sup>224</sup> Forman, *supra* note 18, at 901 (quoting Sixth Annual Report of the Executive Committee of the American Anti-Slavery Society 15–16 (1839)).

<sup>225</sup> Act of Feb. 12, 1793, Pub. L. 2–7, 1 Stat. 302, ch. 7.

<sup>226</sup> See PAULSEN & PAULSEN, *supra* note 221, at 79.

<sup>227</sup> Prigg v. Pennsylvania, 41 U.S. 539, 608 (1842).

<sup>228</sup> *Id.* at 609.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 612.

<sup>232</sup> *Id.* at 637.

Margaret Morgan was not alone. In the early 1830s, slaveholder Mary Martin claimed to own a man simply named Jack, calling him a fugitive slave.<sup>233</sup> Jack moved for a writ of personal replevin or a writ that allowed a prisoner to get before a jury. In July 1834, the trial court ruled against Jack, saying that states could not interfere with slavery. The appeals court affirmed.<sup>234</sup>

In 1836, Matilda Lawrence escaped from slavery in Missouri to Ohio, where she was arrested, and Larkin Lawrence claimed her as his property.<sup>235</sup> Typically, alleged runaway slaves appeared before a magistrate for a determination of their fate without the benefit of a jury.<sup>236</sup> She argued that she was entitled to a jury trial before she could be condemned to involuntary servitude.<sup>237</sup> But the plea fell on deaf ears, as the judge ruled that Matilda Lawrence would be returned to slavery.<sup>238</sup>

During this time many newspapers viewed these sorts of cases through the lens of jury rights. Abolitionist papers criticized how the Fugitive Slave Act denied jury trials, and when northern states passed local laws to defeat the federal law, these papers cheered.<sup>239</sup> “The *National Era* and the *Circular* applauded the efforts of Vermont, New York, and New Jersey to guarantee the ‘right of a trial by jury to *all* people, including fugitive slaves.’”<sup>240</sup> An article in the *Chicago Daily Tribune* said any law that deprived people of juries was “dangerous and unjust.”<sup>241</sup> By the 1830s, abolitionists focused so much on jury rights that it became “the central feature in their argument.”<sup>242</sup>

### B. Fugitive Slave Act of 1850

Because of the fierce opposition to the law in the North, Southerners began agitating for a new, stronger version of the Fugitive Slave Act in 1848 and again in 1850.<sup>243</sup> A New Jersey Senator proposed giving juries the power to

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<sup>233</sup> WALDREP, *supra* note 122, at 41.

<sup>234</sup> *Id.*

<sup>235</sup> See Salmon P. Chase, Speech of Salmon P. Chase in the Case of The Colored Woman, Matilda 4 (Mar. 11, 1837).

<sup>236</sup> Matilda Lawrence, QUEENS QUEEN CITY (Sept. 8, 2017), <https://queensofqueencity.com/2017/09/08/matilda-lawrence/>.

<sup>237</sup> *See id.*

<sup>238</sup> *Id.*

<sup>239</sup> See MCDERMOTT, *supra* note 86, at 12.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> WALDREP, *supra* note 122, at 41.

<sup>243</sup> See Forman, *supra* note 18, at 902.

consider the claims made by slaveholders.<sup>244</sup> New York Senator William Seward had a proposal to guarantee all accused fugitive slaves the right to a jury.<sup>245</sup>

These kinds of ideas drew Southern ire. A Virginia senator remarked, “If you pass a law which shall require a trial by jury, not one man in twenty whose slave escapes will incur the risks or expense of going after the fugitive.”<sup>246</sup> Congress voted down the jury trial proposal but passed the law, which made it even easier for a slaveholder to recover an alleged fugitive. All the slaveholder had to do was produce an affidavit to a federal commissioner signed by a southern court officer saying the claimant owned the alleged fugitive.<sup>247</sup> At the private hearing, the accused could not testify on their own behalf, had no right to an attorney, had no right to an appeal, and the commissioner would be paid more if the accused was deemed a slave.<sup>248</sup> Thus, it was easier to claim ownership of a person than ownership of cattle.<sup>249</sup>

Cases litigating this new law soon followed. Arguments about jury rights helped avoid a conviction in *Butler v. Craig*.<sup>250</sup> The plaintiff was a woman named Mary Butler who claimed to be the descendant of a free white woman and sought a declaration of her freedom.<sup>251</sup> The defendant claimed her mother married a slave he owned, and thus he should be her master and she his slave.<sup>252</sup> The record is thin on the court’s exact reasoning, though Butler argued that if her mother married a slave, that would be a crime.<sup>253</sup> But since no jury had convicted the mother of any crime, the court could not infer that her mother married a slave, and thus, Butler herself had no connection to the defendant.<sup>254</sup> It appears the court bought into this line of reasoning, as it said there were no surviving records of Butler’s parents’ legal status, and the court would make no presumptions.<sup>255</sup>

The 1850 version of the Fugitive Slave Act also made it a crime for anyone to help a fugitive slave.<sup>256</sup> Although judges told juries to enforce this

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<sup>244</sup> *See id.*

<sup>245</sup> WALDREP, *supra* note 122, at 54.

<sup>246</sup> Forman, *supra* note 18, at 903 (citing Cong. Globe, 31st Cong., 1st Sess. app. at 1583 (1850)).

<sup>247</sup> *Id.* at 905.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 906.

<sup>250</sup> *Butler v. Craig*, 2 H. & McH. 214 (Md. 1787), *aff’d* (1791).

<sup>251</sup> *See id.* at 214.

<sup>252</sup> *Id.* at 236.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 233.

<sup>255</sup> *Id.* at 216.

<sup>256</sup> JUSTICE WILLIAM GOODLOE, JURY NULLIFICATION: EMPOWERING THE JURY AS THE FOURTH BRANCH OF GOVERNMENT 7 (1996).

provision of the law, scores of northern juries disobeyed and refused to convict on these grounds.<sup>257</sup>

One such example is *United States v. Morris*.<sup>258</sup> Three defendants were prosecuted for aiding and abetting runaway slaves.<sup>259</sup> During trial, the defense counsel told the jury that if the jury believed the Fugitive Slave Act was unconstitutional, they should acquit regardless of any contrary direction by the judge.<sup>260</sup> Justice Curtis, sitting as a trial court judge, interrupted and said that the lawyer could not make that argument.<sup>261</sup> In the opinion, he emphasized that the defense's position was untenable.<sup>262</sup> The acquittal was overturned on these grounds.<sup>263</sup>

Another example is *In re Booth*.<sup>264</sup> Joshua Glover escaped from slavery in Missouri in 1854—aided by Sherman Booth—and fled to Wisconsin. But a federal marshal arrested Booth under warrant authorization from a commissioner.<sup>265</sup> Booth argued that before he could be imprisoned, they would have to prove their claim to a jury, not a commissioner, citing both a violation of his right to a jury and improper delegation of judicial power to the commissioners.<sup>266</sup> For those reasons, the Wisconsin Supreme Court held that the 1850 law was repugnant to the Constitution and Glover must have his rights determined by a jury of his peers.<sup>267</sup> A jury was later empaneled and acquitted him on most of the charges.<sup>268</sup>

However, the United Supreme Court would have the last word. The aggrieved federal marshal appealed, and Chief Justice Roger Brook Taney, writing for the majority, reversed the state case on federal supremacy grounds. In *Ableman v. Booth*, the Court said it was a matter for the federal courts to cure any supposed defects with the 1850 law, not a state court.<sup>269</sup> To clear up any confusion, the Court clarified that the law was fully constitutional, the

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<sup>257</sup> *Id.*

<sup>258</sup> 26 F. Cas. 1323, 1331 (C.C.D. Mass. 1851).

<sup>259</sup> See Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1178 n.114 (1997).

<sup>260</sup> *Morris*, 26 F. Cas. at 1331.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 1333.

<sup>263</sup> Brown, *supra* note 259, at 1178 n.114.

<sup>264</sup> *In re Booth*, 3 Wis. 1 (1854), *rev'd*, *Ableman v. Booth*, 62 U.S. 506, 510 (1858).

<sup>265</sup> *Id.* at 7.

<sup>266</sup> *Id.* at 63–64.

<sup>267</sup> *Id.* at 64–70.

<sup>268</sup> *Ableman*, 62 U.S. at 510.

<sup>269</sup> *Id.* at 525–26.

commissioner could issue the warrant, and the process was “regular and conformable to law.”<sup>270</sup>

Even after the Court had ordained the Fugitive Slave Law, Southerners nursed a grudge, and their outrage over how the Fugitive Slave Act had been thwarted helped push them to secede. Tennessee Governor Isham Harris, speaking before the Tennessee Secession convention, groused about how the northern people impaired the value of slavery by “constant agitation and refusal to deliver up the fugitive.”<sup>271</sup> One delegate to Virginia’s secession convention mocked the idea of blacks serving on juries and bemoaned the impossibility of recapturing runaways in the North.<sup>272</sup> When justifying its decision to secede, Mississippi passed a declaration complaining that the North “has nullified the Fugitive Slave Law in almost every free State in the Union.”<sup>273</sup>

## V. RAILROADS AND THE INDUSTRIAL REVOLUTION

The Industrial Revolution transformed society and made organized business an ever-larger part of life.<sup>274</sup> Perhaps no other industry represents the sea change as well as railroads. For as long as humankind has traded, it needed a way to transport goods. By sea, people could use relatively swift and inexpensive ships. By land, their choices were poor. Beasts of burden were stubborn and sluggish. So, when the first railroad charters were granted in 1815,<sup>275</sup> trains must have seemed miraculous. Despite all the early imperfections of railroads, they could transport goods far faster than animals.<sup>276</sup>

Understandably, the young nation developed an insatiable appetite for railroads. By 1840, 3,000 miles of track had been laid.<sup>277</sup> By 1860, it was 30,000 miles.<sup>278</sup> By 1880, it was 93,000 miles.<sup>279</sup> And by 1916, it was 254,000—more

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<sup>270</sup> *Id.* at 526.

<sup>271</sup> Governor Isham Harris, Address to the Tennessee Legislature (Jan. 7, 1861), [https://www.americancivilwar.com/documents/isham\\_harris.html](https://www.americancivilwar.com/documents/isham_harris.html).

<sup>272</sup> Henry L. Benning, Address at the Virginia Secession Convention (Feb. 18, 1861), <http://www.civilwarcauses.org/benningva.htm>.

<sup>273</sup> Proceedings of the Mississippi State Convention 47–48 (1861), <https://docsouth.unc.edu/imls/missconv/missconv.html>.

<sup>274</sup> See generally VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 80–81 (2000) (explaining how businesses evolved from rare, public-oriented entities to commonplace, private-oriented entities).

<sup>275</sup> MICHAEL LEAVY, RAILROADS OF CIVIL WAR: AN ILLUSTRATED HISTORY 5 (2010).

<sup>276</sup> *Id.*

<sup>277</sup> Errol E. Meidinger, *The “Public Uses” of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 27 (1980).

<sup>278</sup> *Id.*

<sup>279</sup> CHRISTIAN WOLMAR, THE GREAT RAILROAD REVOLUTION: THE HISTORY OF TRAINS IN AMERICA, at xi (2012).

miles of track than any other nation on earth, a distinction it maintains to this day.<sup>280</sup> By the eve of the Civil War, trains had “altered cities, generated new industries, and created thousands of jobs.”<sup>281</sup> Additionally, the rise of the modern stock market is largely due to railroad companies’ need for capital.<sup>282</sup> One writer observed, “America was made by the railroads. They united the country and then stimulated the economic development that enabled the country to become the world’s richest nation.”<sup>283</sup>

Railroads brought enormous economic benefits, but they had costs too. Irish, German, and Chinese immigrants—and in the South, slaves—toiled to lay tracks.<sup>284</sup> The transcontinental railroad was death to the bison and other game that Native Americans depended on and brought settlers to Native lands.<sup>285</sup> Rail line monopolies charged farmers exorbitant freight costs to ship their goods to market, robbing them not only of their wealth but their sense of self-reliance from when farming was local.<sup>286</sup>

Drawbacks of the railroad notwithstanding, legislatures and courts did everything they could to speed up and protect this economic dynamo. There were ploys: states lavished railroad companies with tax breaks, permitted them to hold lotteries to raise funds, granted monopolies, and even authorized them to establish special banks.<sup>287</sup>

There was also a concerted effort to disempower juries. A common complaint was that juries were a luxury that could no longer be afforded. In Ohio, Michigan, and Indiana, constitutional conventions debated eliminating grand juries because they would be too expensive, even though grand juries only cost about a penny per person per year.<sup>288</sup> Similar cries of economic necessity was used to justify eliminating juries in England when the landed aristocracy joined forces with commercial interests to erode the jury system in the mid-nineteenth century.<sup>289</sup>

But there was another, graver fear: Juries might strangle commerce. A coalition of merchants, bankers, and industrialists joined together to demand a

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<sup>280</sup> *Id.* at xiii, xix.

<sup>281</sup> LEAVY, *supra* note 275, at 7.

<sup>282</sup> See ADAM WINKLER, WE THE CORPORATIONS, HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 106 (2018).

<sup>283</sup> WOLMAR, *supra* note 279, at xix.

<sup>284</sup> LEAVY, *supra* note 275, at 7.

<sup>285</sup> *Building the First Transcontinental Railroad: Native Americans*, Digital Pub. Libr. Am., <https://dp.la/exhibitions/transcontinental-railroad/human-impact/native-americans> (last visited Oct. 10, 2019).

<sup>286</sup> WOLMAR, *supra* note 279, at 251–52.

<sup>287</sup> *Id.* at 29–30.

<sup>288</sup> *Id.* at 50–51.

<sup>289</sup> FEW, *supra* note 21, at 85.

more sympathetic and predictable justice system, which meant stripping juries of their power to set the law.<sup>290</sup> Courts joined in on the call to limit jury power.<sup>291</sup>

Some judges bought into the notion that juries could not be trusted. In ruling that a plaintiff's case could be dismissed without a jury, an 1852 court said "in certain controversies between the weak and the strong—between a humble individual and a gigantic corporation, the sympathies of the human mind naturally, honestly and generously, run to the assistance and support of the feeble, and apparently oppressed."<sup>292</sup> Such moral calculus, the court concluded, "is wholly inconsistent with the principles of law and the ends of justice."<sup>293</sup> Judges often saw juries as biased against railroad companies and other corporations, believing they would kill the golden goose.<sup>294</sup> Two strategies to curtail juries in the context of railroads bear note: (1) loosening the rules of eminent domain, and (2) shielding railroad companies from legal liabilities for the injuries and deaths they caused.

#### A. *Juries Are Removed from the Eminent Domain Process*

In England, juries had been used since at least 1696 to assess compensation owed to property owners who had their land taken for public works projects.<sup>295</sup> Even back then, there was some opposition to juries, for when Parliament passed future public works statutes it empowered justices of the peace, arbitration, or a surveyor to determine compensation, although some acts still gave juries a role in the process.<sup>296</sup>

America, too, relied on juries early on for eminent domain proceedings. The Fifth Amendment ensures that the government may only take private property if it provides "just compensation." Who determines whether compensation is just? Typically juries.<sup>297</sup> For example, a New York law authorized commissioners to seize land to build private projects, but had a jury determine the compensation owed to the landowners who had their property

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<sup>290</sup> See Landsman, *supra* note 43, at 605.

<sup>291</sup> See David A. Pepper, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 CASE W. RES. L. REV. 599, 605 (2000).

<sup>292</sup> *Haring v. N.Y. & E.R. Co.*, 13 Barb. 9, 15–16 (N.Y. Gen. Term 1852).

<sup>293</sup> *Id.* at 16.

<sup>294</sup> Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 864 (2014); see also HANS, *supra* note 274, at 5 (noting the fear that juries might dampen economic progress).

<sup>295</sup> See Paxton Blair, *Federal Condemnation Proceedings and the Seventh Amendment*, 41 HARV. L. REV. 29, 34 (1927).

<sup>296</sup> *Id.* at 35–36.

<sup>297</sup> See LASSON, *supra* note 88, at 88; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 787 (1995) (noting that eminent domain statutes "typically provided for juries to award compensation for the land taken").



taken.<sup>298</sup> The federal government also provided for juries to determine the value of a taking.<sup>299</sup> Many states went so far as to guarantee the right to juries in private taking cases through their constitutions.<sup>300</sup>

Sometimes, courts stood up for these rights. In *Armstrong v. Jackson ex dem. Elliott*,<sup>301</sup> the plaintiff obtained a judgment evicting the defendant, and a statute provided for three commissioners to assess the value of the property.<sup>302</sup> The state supreme court recognized that the law conflicted with the constitution's guarantee to jury trials, and that if it was permitted to be used for damage assessments, commissioners could replace juries in any type of case.<sup>303</sup> It therefore affirmed the trial court's decision to set aside the report of the commissioners.<sup>304</sup>

This restraint went out the window during the frenzy of the railway boom. By the 1800s, governments commonly used eminent domain to take private property and give it to private entrepreneurs to build private turnpikes, bridges, and canals.<sup>305</sup> Legislatures passed laws granting railroad companies nearly carte blanche eminent domain powers, and courts upheld them.<sup>306</sup> Armed with eminent domain power, building tracks became as simple as selecting a route, confiscating the land, assessing the damages, and paying the owner.<sup>307</sup> Although farmers resented having their land seized by the railroad companies, they were powerless to stop it.<sup>308</sup>

Juries would ordinarily be involved in the damage assessment phase, but not always. Illinois used court-appointed commissioners in eminent domain cases.<sup>309</sup> Commissioners would assess the value of the land and set the dollar value, and hundreds of such commissions were used by the state in the 1850s.<sup>310</sup> The court could appoint seven commissioners, and only five were needed to

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<sup>298</sup> Taylor v. Porter & Ford, 4 Hill 140, 141–42 (N.Y. Sup. Ct. 1843). This law was struck down because it authorized property to be taken for private purposes, but it still highlights how baked into the process juries were. *See id.* at 148.

<sup>299</sup> Blair, *supra* note 295, at 37.

<sup>300</sup> See Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910*, 33 J. ECON. HIST. 232, 249–50 (1973).

<sup>301</sup> 1 Blackf. 374, 374 (1825).

<sup>302</sup> *Id.* at 374.

<sup>303</sup> *See id.* at 375–76.

<sup>304</sup> *Id.* at 376.

<sup>305</sup> DWIGHT H. MERRIAM & MARY MASSARON ROSS, *EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT* 129 (2006).

<sup>306</sup> *See, e.g.*, *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9 (N.Y. 1837).

<sup>307</sup> WOLMAR, *supra* note 279, at 28.

<sup>308</sup> *See id.* at 27.

<sup>309</sup> MCDERMOTT, *supra* note 86, at 39.

<sup>310</sup> *Id.* at 39, 191–92.

render a decision.<sup>311</sup> In Illinois, the commissioner law was challenged as violating the state constitution.<sup>312</sup> Addressing the argument that the law substituted jurors for commissioners, the court held that jury rights only extended “to suits at common law, where the value in controversy shall exceed twenty dollars.”<sup>313</sup> It traced the history of the constitutional provision to conclude that it was never intended to apply to damage assessment proceedings since the law was in effect when the constitution was adopted.<sup>314</sup> And it said there was a difference between a court case and an out-of-court damage assessment.<sup>315</sup> In sum, “it was competent for the legislature to provide that [damage assessments] should be ascertained without the intervention of a jury.”<sup>316</sup>

Mississippi adopted the same reasoning. In 1883, the New Orleans Railroad Company sought to construct a road through the property of Mr. E.S. Drake, who disagreed with the company about the value of the land.<sup>317</sup> The legislature had authorized the company to take private land for the construction of its roads, and provided that the Chancery Court could appoint commissioners who would assess the value of the property, and only after that point could a party demand a jury.<sup>318</sup> The commissioner system was challenged, and the Court quickly dismissed the claim that commissioners could not replace a jury.<sup>319</sup> The Court got around the jury requirement by reasoning that property assessments were not “matter[s],” “case[s],” or “cause[s],” as those terms were used in the Constitution—they were a class all their own.<sup>320</sup> So the legislature was free to fashion new rules for them.

Many other courts had similar systems. In 1808, Kentucky was perhaps the first state to use commissioners to assess damages in lieu of juries, and it used it often.<sup>321</sup> The Pennsylvania Supreme Court blessed a law that permitted six commissioners to assess damages for property destroyed by mobs.<sup>322</sup> Iowa and Wisconsin also followed the Illinois model.<sup>323</sup> Not only did these commissions

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<sup>311</sup> See *Ross v. Irving*, 14 Ill. 171, 172 (1852).

<sup>312</sup> *Id.* at 174.

<sup>313</sup> *Id.* at 179.

<sup>314</sup> See *id.* at 180–81.

<sup>315</sup> *Id.* at 181 (citing *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45, 73 (N.Y. Ch. 1831)).

<sup>316</sup> *Id.* at 182 (quoting *Campbell v. Head*, 13 Ill. 122, 127 (1851)).

<sup>317</sup> See *New Orleans, B. R., V. & M. R. Co. v. Drake*, 60 Miss. 621, 621 (1882).

<sup>318</sup> *Id.* at 622.

<sup>319</sup> *Id.* at 625.

<sup>320</sup> *Id.* at 626.

<sup>321</sup> See, e.g., *Fisher v. Cockerill*, 21 Ky. (5 T.B. Mon.) 129 (1827); *Fowler v. Halbert*, 7 Ky. (4 Bibb) 52 (1815); *Bodley v. Craig*, 4 Ky. (1 Bibb) 1 (1808).

<sup>322</sup> See *In re Pa. Hall*, 5 Pa. 204 (1847).

<sup>323</sup> MCDERMOTT, *supra* note 86, at 40.

make the system less democratic, they were also less likely to be accurate. As the above examples show, some commissions were only six or seven members large, about half the size of a traditional 12-person jury, and some allowed less-than-unanimous decisions.

Modern research has revealed that both these features hurt the decision-making process. Meta-analysis has found that larger juries tend to be more diverse, better able to recall testimony, more deliberative, and more consistent.<sup>324</sup> Smaller juries perform more poorly and fail to achieve significant cost savings, and virtually everyone who studies juries opposes reducing their size.<sup>325</sup> Allowing non-unanimity also cheapens deliberations by allowing minority viewpoints to be disregarded.<sup>326</sup>

### B. Courts Use New Doctrines to Shield Railroads from Juries

Today, it is a commonly accepted idiom that juries decide facts, and judges decide the law. But at the founding, many believed that juries should have unfettered power to make decisions without interference from judges. This meant that juries could judge the law and facts, and even jury instructions were resisted.<sup>327</sup> There was a sound basis for resistance. In many jurisdictions, statutes or constitutions, not mere tradition, gave juries the right to decide the law.<sup>328</sup> The military also gave jurors many powers that we now consider the province of the judge.<sup>329</sup> However, when juries did not take the same view of the law as the judge, no one said they “nullified” the law. Rather, the jury was said to have “interpreted,” “applied,” or “judged” the law differently, a reflection of the fact that the jury was seen as competent to decide the law.<sup>330</sup>

Judges, however, started to encroach upon the power of juries. And in the courtroom, the jury’s loss was the judge’s gain. The rise in judges’ power stemmed from judicial dissatisfaction with how juries handled corporate defendants.<sup>331</sup> Courts used their newfound powers to correct juries’ supposed errors, which usually meant helping railroads. They moved slowly at first. In

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<sup>324</sup> See Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 14 (1997); see also Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW & HUM. BEHAV. 451 (1997).

<sup>325</sup> JONAKAIT, *supra* note 12, at 90–92.

<sup>326</sup> See Saks, *supra* note 324, at 41–42.

<sup>327</sup> Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 44 (1990).

<sup>328</sup> See, e.g., 1850 MICH. CONST. art. VI, § 25; 1818 ILL. CONST. art. VIII, § 23; *Com. v. Anthes*, 71 Mass (5 Gray) 185, 185 (1855) (noting juries had the legal power to decide law and fact).

<sup>329</sup> DEP’T OF THE ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975*, at 89 (1975).

<sup>330</sup> HALE, *supra* note 156, at 61.

<sup>331</sup> See Landsman, *supra* note 43, at 607.

1836, the first court ruled that jury instructions were permitted but reassured the parties that juries “undoubtedly have the power to” decide the law.<sup>332</sup> In the antebellum Midwest, jury instructions became a “frequent bone of contention in appellate cases.”<sup>333</sup> Around the country, judges started invalidating laws and constitutional provisions that authorized juries to decide the law.<sup>334</sup>

Jury instructions, at least, still rested ultimate authority with the people. The directed verdict, however, gave courts the power to decide an entire case without ever impaneling a jury if the judge believed there was insufficient evidence. Courts relied on new, pro-defendant doctrines to strip even more cases away from the jury. Contributory negligence holds that if a plaintiff was even 1% responsible for their injury, they would be entirely barred from recovery.<sup>335</sup> This doctrine was fueled by the belief that juries were incapable of deciding cases fairly.<sup>336</sup> The fellow servant rule held that the “master is not, in general, responsible to his servant for injury sustained by the negligence of a fellow-servant in the course of their common employment.”<sup>337</sup> As a consequence, judges who found a mote of error from the plaintiff or a coworker could dispose of the case without ever bothering to submit it to a panel of citizens for review.

Courts used the directed verdict power to protect railroads with gusto. In one Massachusetts case, a woman crossed a track as a shortcut between stations—a common practice at the station that the defendant did nothing to warn against—and was struck by a train.<sup>338</sup> The Supreme Judicial Court held that, although the woman had a ticket, that did not entitle her to cut across the tracks so she was a trespasser at the time of injury.<sup>339</sup> It therefore affirmed the directed verdict for the railway.<sup>340</sup> There were plenty of other cases where courts reversed jury verdicts because they did not believe there was sufficient evidence.<sup>341</sup>

Even children could not catch a break. Many young boys, drawn to train engines like moths to a flame, were terribly injured while playing on the machines. Juries routinely awarded compensation, and courts routinely reversed them. In Illinois, a seven-year-old plaintiff brought a personal injury suit with conflicting evidence: five men testified in support of the railroad, and two

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<sup>332</sup> McGowan v. State, 17 Tenn. (9 Yer.) 184, 195 (1836).

<sup>333</sup> McDERMOTT, *supra* note 86, at 47.

<sup>334</sup> Alschuler & Deiss, *supra* note 45, at 910–11.

<sup>335</sup> *Id.* at 605–06. *See, e.g.*, Stuart v. Simpson, 1 Wend. 376 (N.Y. Sup. Ct. 1828)

<sup>336</sup> Landsman, *supra* note 43, at 607.

<sup>337</sup> Barstow v. Old Colony R. Co., 10 N.E. 255, 256 (Mass. 1887).

<sup>338</sup> Johnson v. Boston & M.R.R., 125 Mass. 75, 77–78 (1878).

<sup>339</sup> *Id.* at 79.

<sup>340</sup> *Id.* at 79.

<sup>341</sup> Jacobs v. Atchison, T. & S.F. Ry. Co., 154 P. 1023, 1026 (Kan. 1916) (citing cases).

children supported the plaintiff.<sup>342</sup> Two separate juries trusted the children and granted damages, but the courts thought they knew better.<sup>343</sup> They parsed the evidence to find for the railroad, with the state supreme court declaring “It was no part of the duty of the company . . . to maintain a guard over it to warn children from getting upon it or playing about it.”<sup>344</sup> The Supreme Court of Arkansas was more succinct. It started its opinion: “A railway company is not bound to keep a lookout to prevent boys from swinging on the ladders of its moving freight trains; and its failure to do so is not negligence,” and thus did not bother to send the question to a jury in the first place.<sup>345</sup> These were not outliers.<sup>346</sup>

Railroad companies were even willing to fight relatively minuscule verdicts. In *Santora v. New York, N.H. & H.R. Co.*, the victim was a 27-month-old infant who found herself on the tracks of the defendant’s railway and was struck.<sup>347</sup> The jury awarded a verdict of \$800, which even back in 1912 was not much—around \$20,000.<sup>348</sup> It was still high enough to appeal, however, and the court made it worth their while, reversing the paltry verdict because the toddler was a trespasser.<sup>349</sup>

Contributory negligence proved exceedingly effective at reducing corporate liability. At the beginning of the 20th century, industrial accidents caused two million injuries and 35,000 deaths per year.<sup>350</sup> Most of these were never compensated.<sup>351</sup> So effective were courts at rolling back juries that one Pennsylvania state legislator said that judges were usurping jury rights “with the stealthiness of a midnight assassin.”<sup>352</sup>

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<sup>342</sup> *Chicago, B. & Q.R. Co. v. Stumps*, 69 Ill. 409, 411 (1873).

<sup>343</sup> *See id.* at 410, 414.

<sup>344</sup> *Id.* at 414.

<sup>345</sup> *Catlett v. St. Louis, I. M. & S. R. Co.*, 21 S.W. 1062, 1062 (Ark. 1893).

<sup>346</sup> *See, e.g.*, *Santora v. New York, N.H. & H.R. Co.*, 98 N.E. 90 (Mass. 1912); *Bjornquist v. Boston & A.R. Co.*, 70 N.E. 53, 54 (Mass. 1904) (sustaining exceptions to a verdict in favor of an eight-year-old plaintiff who injured himself playing on a train); *Morrissey v. E. R. Co.*, 126 Mass. 377, 377 (1879) (“A railroad corporation is not liable for running over a child who is using the track of the corporation as a playground, if the act is not done maliciously or with gross and reckless carelessness.”); *Chicago & N.W.R. Co. v. Smith*, 9 N.W. 830 (Mich. 1881) (reversing a jury verdict in favor of an eight-year-old plaintiff who injured himself playing on a train). *Cf.* *Rodgers v. Lees*, 140 Pa. 475, 483 (1891) (applying the same logic to a case where a boy was killed while playing in a mill).

<sup>347</sup> *Santora v. N.Y., N.H. & H.R. Co.*, 98 N.E. 90 (Mass. 1912).

<sup>348</sup> *See* Morgan Friedman, *The Inflation Calculator*, WESTEGG, <https://westegg.com/inflation/> (last visited Sept. 27, 2019).

<sup>349</sup> *Santora*, 98 N.E. at 91.

<sup>350</sup> HANS, *supra* note 274, at 7.

<sup>351</sup> *Id.*

<sup>352</sup> MCDERMOTT, *supra* note 86, at 11.

In order get around the Seventh Amendment's admonition that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States," courts had to create a legal fiction that when a judge permitted a putatively deficient case to go to the jury, it was an error *of law* on the part of the judge, which could be reversed without undoing the factual findings of the jury.<sup>353</sup> Today, these tools are enshrined in rules of civil procedure.<sup>354</sup>

Much of this anti-jury sentiment was animated by concerns that emotional jurors would deter business investment by making tort liability too painful.<sup>355</sup> Turns out that muzzling juries ended up deterring a different kind of business investment: safety innovations.<sup>356</sup> For example, efficient railway brakes were invented in 1868, but because contributory negligence allowed them to dodge liability for injuries, the industry did not have to adopt them until legislation forced them to 20 years later.<sup>357</sup>

*Century Branch Union Pacific Railroad Co. v. Henigh*<sup>358</sup> shows the mode of thinking that led to this underinvestment. A four-year-old child, named Charles W. Henigh, wandered away from his mother, clambered onto a train car, loosened the brake, fell off, and was crushed to death by it.<sup>359</sup> The court admitted that the death might have been avoided if the track was built level, or the lock was securely fastened, but asked "what specific right had Charles W. Henigh to say how said switch track should be constructed, or how said cars should be fastened? None at all."<sup>360</sup> The jury found that the train track's construction and poor locks were negligent, but they too, apparently, lacked the right to tell the company how to manage its own affairs, so the jury verdict for the plaintiff was reversed.<sup>361</sup>

## VI. LABOR INJUNCTIONS

The Seventh Amendment, which guarantees civil juries, only "preserves" the right as it existed in 1789, which means it does not extend to suits "in equity."<sup>362</sup> Suits of equity do not use juries and can seek injunctions that

<sup>353</sup> *Balt. & Carolina Line v. Redman*, 295 U.S. 654, 658–59 (1935).

<sup>354</sup> FED. R. CIV. P. 50(a) (judgment as a matter of law); FED. R. CIV. P. 50(b) (renewed motion for judgment as a matter of law); FED. R. CIV. P. 56 (summary judgment); FED. R. CIV. P. 59 (new trial).

<sup>355</sup> Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33 (1990).

<sup>356</sup> *Id.* at 70–71.

<sup>357</sup> Landsman, *supra* note 43, at 608.

<sup>358</sup> 23 Kan. 347 (1880).

<sup>359</sup> *Id.* at 355.

<sup>360</sup> *Id.* at 356, 358.

<sup>361</sup> *See id.* at 358, 360.

<sup>362</sup> EPPS, *supra* note 40, at 135.

proscribe certain conduct as a remedy. Thus, juries cannot weigh in on injunctions; it is a question for judges alone.<sup>363</sup> Suits of law, in contrast, do use juries and can impose money damages as a remedy. This distinction was used time and time again to deny striking workers the right to a jury through equitable injunctions.

A. *First Strikes and the Rise of Labor Injunctions*

Almost as soon as workers were brought together in factories, roughly at the dawn of the 19th century, the law has been used to block collective action.<sup>364</sup> In the early days, unions were seen as criminal conspiracies to thwart free trade. The shoemakers' strike of the 1790s, which called for higher wages, is an example.<sup>365</sup> The striking workers were prosecuted for criminal conspiracy, and the Philadelphia Mayor's Court held the workers' collective action violated the employer's right to pay whatever they wanted.<sup>366</sup> In its charge to the jury, the court was aghast at the notion of an equitable workplace. It said:

“Does this measure [to increase wages] tend to make good workmen? No; it puts the botch incapable of doing justice to his work on a level with the best tradesman. The master must give the same wages to each. . . . Consider the effect it would have upon the whole community. If the masters say they will not sell under certain prices, as the journeymen declare they will not work at certain wages, they, if persisted in, would put the whole body of the people in their power.”<sup>367</sup>

Criminal conspiracy prosecutions became a popular response to unions.<sup>368</sup> The Massachusetts Supreme Court permitted businesses to sue unions for persuading workers to quit and hindering company efforts to get replacements.<sup>369</sup> In addition to strikes, states passed laws to ban boycotts, and prosecutors brought criminal actions against workers for inciting riots, obstructing the streets, intimidation, and trespass.<sup>370</sup> Prosecutions did not always

<sup>363</sup> *Id.*

<sup>364</sup> *The Use of Injunctions in Labor Disputes*, CQ RESEARCHER (1929), <http://library.cqpress.com/cqresearcher/document.php?id=cqresre1928020400&type=hitlist&num=0>.

<sup>365</sup> Deborah A. Ballam, Comment, *The Law as a Constitutive Force for Change: The Impact of the Judiciary on Labor Law History*, 32 AM. BUS. L.J. 125, 128 (1994).

<sup>366</sup> Ballam, *supra* note 365, at 128 (discussing *Commonwealth v. Pullis* (the Cordwainer's Case), 3 DOC. HIST. OF AM. IND. SOC. 59 (2d ed. Commons 1910)).

<sup>367</sup> N. I. Gelman, *Public Intervention in Labor Disputes*, C.Q. RESEARCHER (1959), <http://library.cqpress.com/cqresearcher/cqresre1959012800>.

<sup>368</sup> *Id.*

<sup>369</sup> *Walker v. Cronin*, 107 Mass. 555 (1871).

<sup>370</sup> *The Use of Injunctions in Labor Disputes*, *supra* note 364.

go smoothly, however. When California tried to prosecute radical unionists, juries typically refused to convict. Unhappy with these acquittals, the government turned to injunctions.<sup>371</sup> Where prosecutions had failed, injunctions would succeed, for they did not require meddlesome jurors.

Injunctions provided a simpler way to accomplish the same end as criminal prosecutions through the civil justice system. For this reason, courts and employers came to prefer them as a more expedient alternative.<sup>372</sup> Judges alone got to decide whether a strike was lawful and thus could be enjoined.<sup>373</sup> Injunctions sidestepped not only juries but also police and elected officials—who often sided with labor at the time.<sup>374</sup> As an added bonus, federal troops could be called in to enforce injunctions.<sup>375</sup>

The first injunction to enjoin a strike was used in 1880 against ironmolders, with the court holding that the strike was a trespass upon the rights of the employer.<sup>376</sup> But injunctions really took off after 1885. They were extensively used to quell the Southwest railroad strike of 1886 and the practice first attracted great public attention during a railroad engineers' strike in 1888.<sup>377</sup> To the strikers, it was as if a single judge could bring a halt to strike without even hearing from anyone beyond the government or business. The absence of juries in most cases endured as one of labor's main objections to injunctions.<sup>378</sup> Before long, courts "came to look at much of organized labor's economic coercive activity as enjoined in itself, without bothering to find or to state in their opinions that it was also unlawful."<sup>379</sup>

Undeterred, striking picked up steam, oftentimes motivated by meager pay. In a miner strike during 1891, workers unionized to demand higher pay and better support for sick and injured workers and prevented nonunion members from mining until their demands were met.<sup>380</sup> The court recoiled at the idea that a mine could be "worked by such laborers, during such hours, at such wages, and under such regulations, as the laborers themselves might direct."<sup>381</sup> The district court ordered a continuing injunction. Indeed, the judge noted that when workers

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<sup>371</sup> JONAKAIT, *supra* note 12, at 77.

<sup>372</sup> Ballam, *supra* note 365, at 128.

<sup>373</sup> *The Use of Injunctions in Labor Disputes*, *supra* note 364.

<sup>374</sup> Ballam, *supra* note 365, at 142.

<sup>375</sup> *Id.*

<sup>376</sup> Murray T. Quigg, *The Use of Injunctions in Labor Disputes*, 3 LAB. L.J. 105, 106 (1952).

<sup>377</sup> *The Use of Injunctions in Labor Disputes*, *supra* note 364.

<sup>378</sup> *Id.*

<sup>379</sup> Gelman, *supra* note 367, at 3 (citations omitted).

<sup>380</sup> *Coeur d'Alene Consol. & Mining Co. v. Miners' Union of Wardner*, 51 F. 260, 261–62 (C.C.D. Idaho 1892).

<sup>381</sup> *Id.* at 263.



tried to shut down a business, “courts have with nearly equal unanimity interposed by injunction.”<sup>382</sup>

An 1893 strike by the Brotherhood of Locomotive Engineers prompted the company’s stockholders and creditors to file an injunction against the company employees to enjoin them from not only interfering with the business but also from quitting with or without notice.<sup>383</sup> The company claimed it was forced to cut wages—which prompted many workers to threaten the operation of the railroad—by economic necessity.<sup>384</sup> The court acknowledged the gravity of the company’s ask, saying that “[t]here is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case.”<sup>385</sup> Nevertheless, it determined “a court of equity should not hesitate to use this power when the circumstances of the particular case in hand require it to be done in order to protect rights of property against irreparable damage by wrongdoers,” and permitted the injunction.<sup>386</sup> That was the last injunction to go so far as to prevent workers from quitting.<sup>387</sup>

### B. *Injunction Powers Grow*

Soon, the Supreme Court would give its blessing to labor injunctions. The Pullman strike of 1894 began in Chicago, led by Eugene Debs, involving a refusal by workers to operate Pullman cars.<sup>388</sup> President Grover Cleveland sent in the Army, and the Attorney General sought an injunction against the strikers.<sup>389</sup> Not only was the injunction successful, but Debs was arrested for violating the injunction and tried for contempt.<sup>390</sup>

The case made it up to the Supreme Court with Clarence Darrow representing the workers.<sup>391</sup> The case had the added twist of whether the federal government could enforce an injunction without a jury. Answering in the affirmative, the Court said that if the federal government had no other way to

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<sup>382</sup> *Id.* at 267.

<sup>383</sup> *Arthur v. Oakes*, 63 F. 310, 312–13 (7th Cir. 1894).

<sup>384</sup> *Id.* at 314.

<sup>385</sup> *Id.* at 328.

<sup>386</sup> *Id.* at 328–29.

<sup>387</sup> *The Use of Injunctions in Labor Disputes*, *supra* note 364, at 2. In an 1897 case, however, during a discussion of whether an engineer may suddenly quit without notice, the Supreme Court did muse that “cases may be easily imagined where a sudden abandonment of a train load of passengers in an unfrequented spot might imperil their safety, and even their lives.” *Ex parte Lennon*, 166 U.S. 548, 557 (1897). The implication is that perhaps, in some circumstance, a worker could be prevented from quitting.

<sup>388</sup> *Quigg*, *supra* note 376, at 107.

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> *In re Debs*, 158 U.S. 564 (1895).

enforce interstate commerce regulations than by prosecution and punishment, “the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single state.”<sup>392</sup> Accordingly, “the strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce,” juries included.<sup>393</sup> But it denied there was any infringement of jury rights since courts could determine on their own whether a person was in contempt of an injunction.<sup>394</sup> There was no dissent.

The Court expanded the power of injunctions in *Ex parte Lennon*.<sup>395</sup> Locomotive workers for the Toledo, Ann Arbor & North Michigan Railway Company threatened to stop working because the company hired non-union members.<sup>396</sup> A court issued an injunction stopping locomotive workers from refusing to work.<sup>397</sup> One of the workers, James Lennon, disobeyed the injunction, and the court held him in contempt.<sup>398</sup> He appealed, arguing that he had not been a party to suit that issued the original injunction.<sup>399</sup> The Court held that injunctions could apply to people who were not parties to suits where the injunction was issued and who had not received personal notice of it, as long as they had actual notice.<sup>400</sup> All the company had to do, therefore, was post notices of the injunction around the workplace.<sup>401</sup> Again, the decision was unanimous.

Around this time, injunctions expanded beyond strikes and began to be used to stop boycotts as well. Based on the theory that employers had a right to engage in business, courts used injunctions to thwart a national boycott of the D.E. Loewe Company, started by the United Hatters Union.<sup>402</sup> The Supreme Court also prevented the American Federation of Labor from publishing an article calling a company “unfair” or telling its members not to patronize it.<sup>403</sup> And it even allowed injunctions to bar “peaceable persuasion” against patronizing a business, calling such conduct just as bad as the use of force or threats.<sup>404</sup> Facing stiff opposition from the courts, boycotts quickly died out.<sup>405</sup>

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<sup>392</sup> *Id.* at 582.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 594–95.

<sup>395</sup> *Ex parte Lennon*, 166 U.S. 548, 557 (1897).

<sup>396</sup> *Id.* at 549.

<sup>397</sup> *Id.* at 550.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.* at 551.

<sup>400</sup> *Id.* at 554.

<sup>401</sup> *Id.*

<sup>402</sup> Ballam, *supra* note 365, at 143; *see also* *Loewe v. Lawlor*, 208 U.S. 274 (1908).

<sup>403</sup> *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *see also* *Lawlor v. Loewe*, 235 U.S. 522 (1915).

<sup>404</sup> *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 467–68 (1921).

<sup>405</sup> Ballam, *supra* note 365, at 143.

Injunctions kept chugging right along into the 20th century and labor law became even less friendly to them as body blows from the courts kept right on coming. In *Hitchman Coal & Coke Co. v. Mitchell*,<sup>406</sup> the Court upheld an injunction by a coal mine against union organizers who were not even employed by the company.<sup>407</sup> The organizers could be blocked from “interfering” with the mine’s employees and trying to entice them to leave or join a union.<sup>408</sup> In *Bedford Cut Stone Co. v. Journeymen Stone Cutters’ Ass’n of North America*,<sup>409</sup> the Supreme Court prohibited a stonecutters union from directing its worker not to participate on projects that involved anti-union men.<sup>410</sup> The union’s actions were legal, they did not picket or boycott, nor did they threaten or deceive anyone.<sup>411</sup> The Court enjoined them anyway.

### C. Labor Injunction Legislation Brings Mixed Results for Unions and Juries

Given the levels of judicial hostility, labor adjusted its strategy to curb the power of the judiciary to enjoin its activities.<sup>412</sup> The American Federation of Labor drafted a bill to limit the use of injunctions and advocated for jury trials in contempt cases.<sup>413</sup> But for many years, these efforts were unsuccessful. Unions managed to pass anti-injunction laws in a handful of states, but courts voided

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<sup>406</sup> 245 U.S. 229 (1917).

<sup>407</sup> *Id.* at 262.

<sup>408</sup> *Id.* at 261–62.

<sup>409</sup> 274 U.S. 37 (1927).

<sup>410</sup> *Id.* at 55.

<sup>411</sup> *Id.* at 56 (Brandeis, J., dissenting).

<sup>412</sup> Ballam, *supra* note 365, at 143. By this point, labor injunctions had become a fiercely debated political issue. The Democratic Party announced its opposition to labor injunctions six times in a row in its party platform between 1896 and 1916. *1896 Democratic Party Platform*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/1896-democratic-party-platform> (last visited Sept. 27, 2019) (decrying the “new and highly dangerous form of oppression by which Federal Judges, in contempt of the laws of the States and rights of citizens, become at once legislators, judges and executioners”); *1900 Democratic Party Platform*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/1900-democratic-party-platform> (last visited Sept. 27, 2019); *1904 Democratic Party Platform*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/1904-democratic-party-platform> (last visited Sept. 27, 2019); *1908 Democratic Party Platform*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/1908-democratic-party-platform> (last visited Sept. 27, 2019); *1912 Democratic Party Platform*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/1912-democratic-party-platform> (last visited Sept. 27, 2019); *1916 Democratic Party Platform*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/1916-democratic-party-platform> (last visited Sept. 27, 2019).

<sup>413</sup> *The Use of Injunctions in Labor Disputes*, *supra* note 364.

some of them and narrowly construed others.<sup>414</sup> Meanwhile, industrial groups were cooking up proposed legislation to prohibit strikes against government and causing one company to pressure another, and the Bar Association proposed eliminating strikes altogether.<sup>415</sup>

In 1914, the Clayton Act expanded the power of injunctions to forbid not only striking but mass picketing.<sup>416</sup> In what was called “the greatest industrial struggle that ever occurred in America,” 400,000 railroad workers across the nation mobilized a strike in 1922 to protest wage cuts and changes in work rules.<sup>417</sup> They rallied against pay cuts and changing work rules.<sup>418</sup> At the behest of President Warren Harding, Attorney General Harry Daugherty sought an injunction against the strike, a court granted it, and 2,200 new federal marshals were hired to enforce it.<sup>419</sup> The injunction crushed the strike as workers were not only barred from striking but also picketing and assembling near rail lines.<sup>420</sup>

The Norris–La Guardia Act of 1932<sup>421</sup> was a rare victory for labor, as it limited the use of labor injunctions, but did not eliminate them.<sup>422</sup> This was made painfully clear to unions in the next decade. After World War II ended, ten million soldiers returned from combat, and unions started to make demands that had been postponed during the war for the sake of national unity, leading five million workers to strike during the first few years of peacetime.<sup>423</sup> John L. Lewis led coal workers in 1946 to massive walkout to demand better wages; within a few weeks, industrial production was crippled.<sup>424</sup> Eventually, the government and workers reached an uneasy armistice, known as the Krug–Lewis agreement.<sup>425</sup> The agreement broke down, the workers prepared to resume striking, and the government sought an injunction, which was granted immediately and without notice to the workers.<sup>426</sup> The workers walked out

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<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> Quigg, *supra* note 376, at 110.

<sup>417</sup> ELIZABETH FAUE, *RETHINKING THE AMERICAN LABOR MOVEMENT* 81–82 (2017).

<sup>418</sup> *Id.*

<sup>419</sup> *Id.* at 82.

<sup>420</sup> *Id.*

<sup>421</sup> 29 U.S.C. §§ 101–115 (1988).

<sup>422</sup> Ballam, *supra* note 365, at 140.

<sup>423</sup> *The Postwar Strike Wave of 1945–46*, AM. HISTORY USA <https://www.americanhistoryusa.com/postwar-strike-wave-1945-46/> (last visited Sept. 27, 2019).

<sup>424</sup> Harold J. Logan, *The Coal Strike: A Rite of Passage for Presidents Since World War II*, WASH. POST (Feb. 21, 1978), <https://www.washingtonpost.com/archive/politics/1978/02/21/the-coal-strike-a-rite-of-passage-for-presidents-since-world-war-ii/aa750ae6-cdce-4ae7-9e0c-3aa3bbb7ea16/>.

<sup>425</sup> *United States v. United Mine Workers*, 330 U.S. 258, 263 (1947).

<sup>426</sup> *Id.* at 266.

anyway, and the government petitioned to have them held in contempt.<sup>427</sup> Lewis and the union were fined for contempt, and these punishments, though altered, were upheld by the Supreme Court.<sup>428</sup>

The Norris–La Guardia Act was also hobbled by other laws. The 1948 Taft–Hartley Act limited strikers’ right to jury trials in contempt cases arising out of labor disputes.<sup>429</sup> The government used the law to get eleven injunctions in as many years.<sup>430</sup> Unions repeatedly tried to have this right restored but failed.<sup>431</sup> And so labor injunctions continued. In 1959, steelworkers began striking en masse: 85% of the nation’s steel mills closed their doors as hundreds of thousands of workers left.<sup>432</sup> The Justice Department, at the President’s urging, sought an injunction to end the strike.<sup>433</sup> After the district court for the Western District of Pennsylvania ruled against the workers, and the Third Circuit affirmed, the Supreme Court ended the strike in a brief per curiam opinion.<sup>434</sup>

Maybe the only time that unions fought against legislative jury rights was during the debates over the 1957 Civil Rights Act. The law would have provided for legal enforcement for voting rights violations, but it faced stiff resistance from the southern segregationist wing of Congress.<sup>435</sup> To placate them, an amendment was proposed that would guarantee a jury trial for election officials who refused to let black people vote.<sup>436</sup> Because these juries would probably be all-white, and therefore reliably let off election officials, they were used to attract southern voters. To garner union support for the jury amendment, a proposal was also floated to ease up Taft–Hartley, but union leaders refused, saying “[l]abor will not barter away effective protection of the right of a Negro to register and vote.”<sup>437</sup> The law passed after Congress reached a compromise that had jury trials enforce election laws, but allowed blacks to serve on them—a meaningful new right.<sup>438</sup>

Over the years, companies found great success with injunctions. But when workers tried to turn the tables, they were not so lucky. In 1980, workers

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<sup>427</sup> *Id.* at 267.

<sup>428</sup> *Id.* at 307.

<sup>429</sup> CARO, *supra* note 15, at 952.

<sup>430</sup> Gelman, *supra* note 367.

<sup>431</sup> CARO, *supra* note 15, at 952.

<sup>432</sup> *United Steelworkers of Am. v. United States*, 361 U.S. 39, 63 (1959) (Douglas, J., dissenting).

<sup>433</sup> GREG NICHOLS, *STRIKING GRIDIRON: A TOWN’S PRIDE AND A TEAM’S SHOT AT GLORY DURING THE BIGGEST STRIKE IN AMERICAN HISTORY* 238 (2014).

<sup>434</sup> *United Steelworkers of Am.*, 361 U.S. at 44.

<sup>435</sup> CARO, *supra* note 15, at 944.

<sup>436</sup> *Id.* at 952.

<sup>437</sup> *Id.* at 961–62.

<sup>438</sup> *Id.* at 974.

sought an injunction against a steel company to prevent it from shuttering its plant—and throwing 3,500 people out of work—after it promised to keep it open as long it was profitable.<sup>439</sup> The workers offered to buy and operate the plant themselves, to no avail.<sup>440</sup> The courts denied their claims and refused, this time, to grant the injunction.<sup>441</sup>

When the layoffs were announced a few weeks before Christmas, the town's unemployment rate was 6.3%.<sup>442</sup> Within two years of the plant closure, it was 21%.<sup>443</sup>

## VII. CONCLUSION

As this Article has shown, in many times and many contexts, juries have stood up for the lowly and against the powerful. Whether it was thwarting the British crown, blocking recapture of runaway slaves, making railroads pay for the harm they caused, or supporting workers over industry, they injected a much-needed dose of humanity into the justice system.

This is as it should be. Echoing sentiments of past, Senator Shelton Whitehouse said that “[t]he jury is intended to be a thorn in the side of the powerful and wealthy. It is intended to make the powerful and wealthy stand annoyingly equal before the law with everyone else.”<sup>444</sup> If juries had been empowered to decide all the above cases on their own, would the outcomes have been different? It is possible that juries would have ruled the same way as the undemocratic arbitrators throughout history.

Even if they did, a judgment of peers would have had greater legitimacy. Judges, compared with jurors, are more likely to have attended private schools, live in exclusive neighborhoods, and belong to private clubs.<sup>445</sup> They “do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they see only their own workshop.”<sup>446</sup>

<sup>439</sup> *United Steel Workers, Local No. 1330 v. U.S. Steel Corp.*, 492 F. Supp. 1, 3 (N.D. Ohio 1980), *aff'd in part, vacated in part*, 631 F.2d 1264 (6th Cir. 1980).

<sup>440</sup> *Id.* at 10.

<sup>441</sup> *Id.* at 11.

<sup>442</sup> Jerry Knight, *Youngstown*, WASH. POST (Dec. 2, 1979), [https://www.washingtonpost.com/archive/business/1979/12/02/youngstown/19c24d1d-7d6a-452c-b21a-0d6ab3f53bf6/?utm\\_term=.3c8a61a50c02](https://www.washingtonpost.com/archive/business/1979/12/02/youngstown/19c24d1d-7d6a-452c-b21a-0d6ab3f53bf6/?utm_term=.3c8a61a50c02).

<sup>443</sup> *Youngstown Remains at Top in Unemployment Rate, 18.7%*, N.Y. TIMES (Nov. 17, 1982), <https://www.nytimes.com/1982/11/17/us/youngstown-remains-at-top-in-unemployment-rate-18.7.html>.

<sup>444</sup> *Senator Sheldon Whitehouse Champions the Civil Jury Trial*, N.Y.U. LAW (Sept. 16, 2015), <http://www.law.nyu.edu/news/senator-sheldon-whitehouse-civil-jury-project-inaugural-conference>.

<sup>445</sup> FEW, *supra* note 21, at 453.

<sup>446</sup> Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 231 (1989).

Jurors, compared with judges, are more likely to have struggled in classes, experienced unemployment, felt the sting of poverty, seen the inside of a prison, reflect the diversity of America, begrudged their jobs, staffed a hazardous workplace, been victims of fraud, or borne the brunt unconstitutional government activity.<sup>447</sup> They have, in other words, suffered the mundane indignities of life from which too many judges are insulated.

But to many, the humility of the jury is its fatal flaw. They see the huddled masses as incapable of treating powerful parties fairly. A survey of senior corporate executive found that a majority believed that “out of control” juries giving excessive awards helped explain the high costs of litigation and hurt America’ business competitive.<sup>448</sup> Insurance companies run ad campaigns claiming that high verdicts against them will result in higher rates.<sup>449</sup> Businesses fund advocacy groups that call for the diminution of juries.<sup>450</sup> Those in power see juries as hostile to them.

Scholars who research juries have reached the same conclusion. Valarie Hans predicted “a civil justice system without a jury would evolve in a way that more reliably served elite and business interests.”<sup>451</sup> Douglas Smith said, “Both judges and lawyers would fill the vacuum left by the erosion in the jury’s power.”<sup>452</sup> And Sandra Jordan wrote, “Elimination of the citizen jury would effectively result in a transfer of power to the political and judicial elite.”<sup>453</sup> History proves them right.

Today, many of the traditional jury functions have been taken away by judges. This was partly driven by the professionalization of the bench. Judges were once laymen themselves so they could not make any pretense of knowing more than the jury.<sup>454</sup> But it is also driven by the fact that many judges do not think jurors are quite smart enough to handle the messy business of self-government.<sup>455</sup> In one case, the judge said that a jury made up of

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<sup>447</sup> Scheiner, *supra* note 92, at 168–69 nn.140–142, 169; Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 124 n.300 (1980) (noting that as late as the 1970s, women were severely underrepresented on the bench and that judges inevitably are more educated than the average person); Jordan, *supra* note 19, at 51.

<sup>448</sup> HANS, *supra* note 274, at 13–15.

<sup>449</sup> Joanne Doroshov, *The Case for the Civil Jury: Safeguarding a Pillar of Democracy* 29, CTR. STUDY RESPONSIVE L., <https://csrl.org/wp-content/uploads/2014/12/The-Case-for-the-Civil-Jury.pdf> (last visited Sept. 27, 2019).

<sup>450</sup> HANS, *supra* note 274, at 52.

<sup>451</sup> *Id.* at 226.

<sup>452</sup> Douglas, *supra* note 25, 445.

<sup>453</sup> Jordan, *supra* note 19, at 3.

<sup>454</sup> Howe, *supra* note 90, at 591.

<sup>455</sup> See, e.g., *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 236 (7th Cir. 1988) (Posner, J., dissenting) (“In fact, the verdict was irrational, a distressingly frequent occurrence in complex commercial cases, where the issues are remote from the experience and understanding of

housewives, among others, could not be expected to understand complex economic concepts, so he struck the demand for a jury trial.<sup>456</sup> The ideas that a judge schooled in law might not be able to comprehend economic concepts either, or that a system of law too complex for ordinary people to ever understand was too complex to be fairly applied, were not entertained.

This is unfortunate. Whatever the shortcomings of the juries, what are they but a reflection of us all? If they are inadequate, we are inadequate. But their continued use, despite the critics, shows that the meaning of justice is not the exclusive domain of the lawyer or expert. It is something we all have a role in shaping. America is essentially the last place on earth where juries are widely used. We should be proud of this part of our heritage and slow to give it up.

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jurors.”); *Adams v. Wainwright*, 804 F.2d 1526, 1529 (11th Cir. 1986) (“While the judge is in fact the only entity that imposes sentence under the Florida scheme, his role is to serve as ‘a buffer where the jury allows emotion to override the duty of a deliberate determination’ of the appropriate sentence.”); *Fineman v. Armstrong World Indus., Inc.*, 774 F. Supp. 266, 269 (D.N.J. 1991) (“The verdict in this matter is the product of impermissible speculation, sympathy, and emotion. The jury decided this case with its viscera, not its reasoning, and therefore permitting the verdict to stand would constitute the gravest miscarriage of justice.”); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889, 936 (E.D. Penn. 1979) (“The foregoing observations demonstrate why we reject . . . the related argument that, in complex litigation, a right to trial by jury would carry with it the ‘right to an irrational verdict.’ Juries like judges may sometimes render irrational verdicts, but in such an event the court serves as a check on the power of the jury.”).

<sup>456</sup> *Peripherals Leasing Corp. v. Int’l Bus. Machines Corp.*, 458 F. Supp. 423, 448 (N.D. Cal. 1978), *aff’d sub nom. Memorex Corp. v. Int’l Bus. Machines*, 636 F.2d 1188 (9th Cir. 1980).