WHAT IS A JURY?*

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The Supreme Court has held that the Seventh Amendment "preserves" the right to a civil jury as it existed when the Amendment was adopted in 1791. This "historical test" has become a hallmark of Seventh Amendment doctrine, but also, at times, a source of frustration. In one instance, the vexed Court has thrown up its hands and given up on the historical test entirely. Despite its best efforts, the Court has not been able to determine based on the historical record available whether the Framers intended to preserve the right to twelve jurors, or if a smaller number would suffice.

Although twelve was likely the usual number in 1791, its prevalence, in the Court's words, could very well have been an "accidental feature of the jury." The Court held that "forever codifying" the right to twelve jurors "would require considerably more evidence than we have been able to discover in the history and language of the Constitution." This Article scours ratifying convention records, contemporaneous treatises, Founding-era legal dictionaries, early precedents, and archival records from the private libraries of the Seventh Amendment's drafters in search of evidence that may shed light on their intentions and the Amendment's public meaning at ratification.

Perhaps most informative, however, is what the Framers did not consider a jury. As this Article chronicles, Carolina slave courts denied enslaved people constitutional and common law rights, but nevertheless offered accused slaves as many as five jurors in what were described as "non-jury" trials. By offering a careful and comprehensive look at what the drafters did not consider a jury, as well as at the events, early precedents, and writings that inspired the Seventh Amendment, this Article corrects the Court's misperception that the Founding-era practice of impaneling twelve jurors was mere happenstance.

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INTRODUCTION

The Federal Rules of Civil Procedure allow courts to impanel as few as six jurors in civil trials.[1] The American Bar Association ("ABA") has publicly

1. FED. R. CIV. P. 48 ("(a) NUMBER OF JURORS. A jury must begin with at least 6 and no more than 12 members . . . . (b) VERDICT. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members."); *cf.* Patrick E. Higginbotham, Lee H. Rosenthal & Steven S. Gensler, *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 JUDICATURE 46, 50 (2020) ("[J]uries of eight are the new normal . . . .").

expressed concerns about this rule and, as recently as 2023, called for the return to twelve jurors in all civil cases:

> [The ABA] seeks to encourage a return to the twelve-person jury . . . in all civil cases wherever feasible. Studies have established that there are significant differences between the effectiveness of six- and twelve-member juries. Larger juries deliberate longer and have better recall of trial testimony. Thus, they are more likely to produce accurate results. By contrast, smaller civil juries are more likely to produce a number of outlier awards that do not reflect community values.[2]

For the first 150 years following the Seventh Amendment's ratification, the Supreme Court presumed that the Amendment preserved the right to twelve jurors, and it made a number of pronouncements, albeit in dicta, noting as much. As the Court wrote in 1898, "[T]he jury referred to in the original Constitution . . . is a jury constituted, as it was at common law, of twelve persons, neither more nor less."[3] A year later, in 1899, the Court reiterated,

> "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions . . . is a trial by a jury of 12 men . . . . This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion.[4]

The following year, in 1900, the Court again confirmed that "the right of trial by jury . . . is preserved by the Seventh Amendment, [and] such a trial implies that there shall be a unanimous verdict of twelve jurors."[5] Thirty years later, in 1930, the Court reaffirmed, albeit again in dicta, that a jury requires twelve jurors: "A constitutional jury means twelve men as though that number had been specifically named; and it follows that when reduced to eleven it ceases to be such a jury."[6]

Constitutional scholars and Seventh Amendment commentators at the time similarly presumed that a jury, by definition, requires twelve jurors. As a leading scholar summarized in 1918, "The term 'jury,' it is said, connotes a body of twelve, no more and no less."[7]

2. PRINCIPLES FOR JURIES & JURY TRIALS princ. 3 cmt. (AM. BAR ASS'N 2023) (citations omitted).

3. Thompson v. Utah, 170 U.S. 343, 349 (1898), *abrogated by* Williams v. Florida, 399 U.S. 78 (1970).

4. Cap. Traction Co. v. Hof, 174 U.S. 1, 13–14 (1899), *abrogated by Williams*, 399 U.S. 78.

5. Maxwell v. Dow, 176 U.S. 581, 586 (1900), *abrogated by Williams*, 399 U.S. 78.

6. Patton v. United States, 281 U.S. 276, 292 (1930), *abrogated by Williams*, 399 U.S. 78.

7. Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 672 (1918) [hereinafter Scott, *Trial by Jury*].

Calls for shrinking the jury gained momentum in the 1950s and continued through the 1960s.[8] Advocates argued that impaneling fewer jurors could help "relieve congestion" on cluttered court dockets.[9] These efforts were successful in a number of states, particularly in courts of limited jurisdiction,[10] but they continued to face resistance from federal courts on constitutional grounds.[11]

The appointment of Chief Justice Warren E. Burger in 1969 represented a turning point and sparked renewed interest in efforts to reexamine long-standing Seventh Amendment protections. Chief Justice Burger had, prior to his appointment, expressed frustration that "jury trials slowed the wheels of justice," and he reportedly supported their abolition altogether.[12]

In 1970, the year after Chief Justice Burger's appointment, the Court reexamined the right to a criminal jury with fresh eyes.[13] The Court concluded that "the relevant constitutional history casts considerable doubt on the easy [twelve-juror] assumption in our past decisions."[14] The Court began by acknowledging that "'the intent of the Framers' is often an elusive quarry" and the "'very scanty history . . . in the records of the Constitutional Convention'

8. Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 137 & n.7 (1997) ("The first federal legislation that I have been able to locate that makes possible a smaller than twelve person jury was introduced on Feb. 19, 1953 . . . ." (citing H.R. Doc. No. 3308, 83d Cong. (1953))). For examples of midcentury advocacy for juries smaller than twelve, see *id.* at 137 n.7 (citing Roy L. Herndon, *The Jury Trial in the Twentieth Century*, L.A. BAR BULL., Dec. 1956, at 35; *Six-Member Juries Tried in Massachusetts District Court*, 42 J. AM. JUDICATURE SOC'Y 136 (1958); Edward A. Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120 (1962) [hereinafter Tamm, *The Five-Man Civil Jury*]; Edward A. Tamm, *A Proposal for Five-Member Civil Juries in the Federal Courts*, 50 A.B.A. J. 162 (1964)).

9. Resnik, *supra* note 8, at 137–38. *But see* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 346 (1979) (Rehnquist, J., dissenting) ("The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury was surely a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the right secured by the Amendment.").

10. *See* Resnik, *supra* note 8, at 139 n.12 (noting that Connecticut "succeeded in installing six person juries . . . in courts of limited jurisdiction").

11. *Cf.* United States v. Va. Erection Corp., 335 F.2d 868, 871 (4th Cir. 1964) ("Twelve is the magic number."), *overruled by* United States v. Olano, 507 U.S. 725 (1993).

12. Fred P. Graham, *Study Center Offers New U.S. Constitution*, N.Y. TIMES, Sept. 8, 1970, at A1, col. 3. *But see Parklane Hosiery*, 439 U.S. at 338 (Rehnquist, J., dissenting) ("It may be that if this Nation were to adopt a new Constitution today, the Seventh Amendment guaranteeing the right of jury trial in civil cases in federal courts would not be included among its provisions. But any present sentiment to that effect cannot obscure or dilute our obligation to enforce the Seventh Amendment, which *was* included in the Bill of Rights in 1791 and which has not since been repealed in the only manner provided by the Constitution for repeal of its provisions.").

13. Williams v. Florida, 399 U.S. 78, 92 n.30 (1970) ("While much of our discussion in this case may be thought to bear equally on the interpretation of the Seventh Amendment's jury trial provisions, we emphasize that the question is not before us . . . .").

14. *Id.* at 92.

sheds little light either way."[15] The Court therefore quite humbly acknowledged, "We do not pretend to be able to divine precisely what the word 'jury' imported to the Framers, the First Congress, or the States in 1789."[16] Because the Court could not find explicit evidence that the Framers intended to preserve the right to twelve jurors, it overturned precedent and upheld a Florida state court verdict rendered by only six jurors.[17]

At the time of the Court's decision, the Federal Rules of Civil Procedure required twelve jurors unless all parties stipulated to a lower number, but "within four months, federal district courts began to change their local rules."[18] By 1972, local rules in fifty-four federal district courts had been amended to allow for as few as six jurors in civil trials.[19]

In 1973, the Supreme Court granted certiorari, agreeing to hear a Seventh Amendment challenge to one of the recently amended local rules.[20] The Court once again announced that it would begin from a clean slate and dismissed its prior statements requiring twelve jurors under the Seventh Amendment as nonbinding dicta.[21] In a 5–4 decision, the Court held that, based on the scant historical record available at the time, it lacked sufficient evidence to conclude

15. *Williams*, 399 U.S. at 92–93; *cf.* Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 511 (1975) ("An historical inquiry into the [Seventh Amendment] framers' intent, therefore, may be a burdensome and fruitless task.").

16. *Williams*, 399 U.S. at 98.

17. *Id.* at 98–99, 103. *Williams* involved a state trial "and, therefore, the requirements of the Fourteenth Amendment rather than the Sixth." Colgrove v. Battin, 413 U.S. 149, 169 (1973) (Marshall, J., dissenting); *cf. id.* ("This case is, of course, distinguishable in that it deals with a federal trial and, therefore, with Bill of Rights guarantees which are directly applicable, rather than applicable only through the incorporation process.").

18. Resnik, *supra* note 8, at 139.

19. *Id.* In addition, by 1971, three states—Florida, Utah, and Virginia—had adopted civil trial provisions allowing for less than twelve jurors in their courts of general jurisdiction. *See* Edward J. Devitt, *Six-Member Civil Juries Gain Backing*, 57 A.B.A. J. 1111, 1113 (1971). The Supreme Court, however, had not—and, in fact, still has not—"clarified if the Fourteenth Amendment incorporates the Seventh Amendment civil jury right against the states." Wanling Su, *What Is Just Compensation?*, 105 VA. L. REV. 1483, 1522 n.209 (2019). *Compare* Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment. . . . [W]e express no view as to whether jury trials must be afforded in . . . actions in the state courts."), *with* McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010) ("Our governing decisions regarding the . . . Seventh Amendment's civil jury requirement long predate the era of selective incorporation."). *See generally* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 78 (2008) ("[T]he Supreme Court's failure to incorporate the Seventh Amendment, when it has incorporated almost all of the rest of the Bill of Rights, is . . . perhaps mistaken.").

20. Resnik, *supra* note 8, at 140.

21. *See Colgrove*, 413 U.S. at 158 ("We cannot, therefore, accord the unsupported dicta of these earlier decisions the authority of decided precedents.").

that the Seventh Amendment preserves the right to twelve jurors.[22] In fact, the Court went as far as to write that, based on its review of the historical record, "Constitutional history does not reveal a single instance where concern was expressed for preservation of the traditional number 12."[23]

The Court's struggle to find even a single example speaks to the challenge more than a half-century ago "of accessing the volume and breadth of English and early American primary sources necessary to apply the Seventh Amendment's historical test."[24] The challenge was particularly acute in this instance because the plaintiff who moved for a twelve-juror civil jury failed to cite a single primary or secondary historical source in his brief before the Supreme Court.[25] Instead, the plaintiff's brief rested entirely on citations to the Court's prior pronouncements describing the right to twelve jurors as a Seventh Amendment protection.[26] The Court was left on its own to scour through eighteenth-century historical archives[27]—an undertaking Justice William Brennan later referred to despondently as "rattling through dusty attics."[28]

This Article provides a closer examination of those "dusty attics" and unearths a number of writings and records that bear on the Court's application of the Seventh Amendment's historical test. In short, America's long tradition

22. *Id.*; *see also* Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 51 ("The decision upheld the validity of a rule of court promulgated by the District Court for the District of Montana that appeared to many to violate the Seventh Amendment, the Rules Enabling Act, and Rule 83 of the Federal Rules of Civil Procedure authorizing the promulgation of local rules not inconsistent with the national rules." (footnote omitted) (citing 28 U.S.C. § 2072 (1988))).

23. *Colgrove*, 413 U.S. at 156 n.10. Some legal scholars have described the Court's "halving of the jury by local court rule as . . . 'monumentally unconvincing.'" Carrington, *supra* note 22, at 51 (quoting FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 8.12, at 453 (3d ed. 1985)).

24. Su, *supra* note 19, at 1522.

25. *See* Brief for the Petitioner at i, ii, iii, *Colgrove*, 413 U.S. 149 (No. 71-1442) [hereinafter *Colgrove* Petitioner Brief]. The defendant in *Williams* who objected to the impaneling of only six jurors was similarly represented by a solo practitioner who failed to cite a single primary or secondary historical source in his brief before the Supreme Court. *See* Brief for Petitioner at i, Williams v. Florida, 399 U.S. 78 (1970) (No. 927) [hereinafter *Williams* Petitioner Brief].

26. *See Colgrove* Petitioner Brief, *supra* note 25, at 7 (citing Cap. Traction Co. v. Hof, 174 U.S. 1, 15 (1899)).

27. *See Colgrove*, 413 U.S. at 158; *cf.* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 n.6 (2022) ("Courts are . . . entitled to decide a case based on the historical record compiled by the parties."); United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) ("[A]s a general rule, our system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'" (alteration in original) (citations omitted) (quoting Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment))).

28. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 576 (1990) (Brennan, J., concurring in part and concurring in the judgment); *see also* Pereira v. Farace, 413 F.3d 330, 337–38 (2d Cir. 2005) (bemoaning the need "to scour through 'dusty attics'" to apply the Seventh Amendment's historical test (quoting *Terry*, 494 U.S. at 576)).

of twelve-person juries appears to be more than mere happenstance.[29] The common law's insistence on twelve disinterested peers reflects insights about group decision-making and the fair administration of justice accumulated across generations. The historical record indicates that the Seventh Amendment's drafters, and ratifiers more broadly, sought to preserve those insights by attributing the common law right constitutional proportions. Moreover, the empirical evidence that has emerged in the ensuing fifty years indicates that shrinking juries is a more serious matter than the Court has been led to believe.[30]

Part I of this Article begins by examining what the Framers did not consider a constitutional jury. It looks in particular into archival records collected from the Courts of Magistrates and Freeholders, historically known as "slave courts,"[31] in North and South Carolina. Although the Fundamental Constitutions of Carolina adopted in 1669 explicitly provided that "[e]very jury shall consist to twelve men," both North and South Carolina denied constitutional rights and common law protections to enslaved people.[32] The recovered records nonetheless indicate that accused slaves were granted at least three and as many as five jurors in what were described as "non-jury" trials.[33] These records suggest that the impaneling of fewer than twelve jurors carried with it a carelessness in procedural justice reserved for enslaved people who were denied constitutional rights.

Part II of this Article turns to ratifying convention records, Founding-era legal dictionaries, early state and federal precedents, as well as widely circulated contemporaneous treatises by Matthew Bacon, William Blackstone, Richard Burn, Lord Edward Coke, Thomas Cooley, Giles Duncombe, Matthew Hale, and other seventeenth- and eighteenth-century authors in search of evidence of the Seventh Amendment's public meaning[34] at ratification in 1791.

29. *Cf. Williams*, 399 U.S. at 102 (concluding that America's tradition of twelve-person juries "is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics'" (quoting Duncan v. Louisiana, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting))).

30. *See generally* Hans Zeisel, *The Waning of the American Jury*, 58 A.B.A. J. 367, 370 (1972) [hereinafter Zeisel, *Waning*] ("My purpose is not to advocate or oppose any particular solution. It is merely to make clear that the changes imposed on our jury system are more serious than we are led to believe.").

31. *See* Ernest James Clark, Jr., *Aspects of the North Carolina Slave Code, 1715–1860*, 39 N.C. HIST. REV. 148, 150 (1962).

32. THE LORDS PROPRIETORS OF CAROLINA, FUNDAMENTAL CONSTITUTIONS OF CAROLINA, 1669, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 108, 118 (Leon Friedman & Karyn Gullen Brown eds., 1971).

33. *See* Terry W. Lipscomb & Theresa Jacobs, *The Magistrates and Freeholders Court*, 77 S.C. HIST. MAG. 62, 62 (1976).

34. John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1376 (2019) ("[P]ublic meaning is normally thought to be the meaning that a knowledgeable and reasonable interpreter would have placed on the words at the time that the document was written.").

Part III explores events, writings, and preratification precedents thought to have influenced the Seventh Amendment's drafters.[35] It begins with a review of the writings and Philadelphia lectures prepared by James Wilson, a framer of the Constitution and later a Justice of the Supreme Court.

Next, it turns to records memorializing a 1780 oral opinion of the New Jersey Supreme Court which declared unconstitutional a wartime statute offering alleged traitors only six jurors in civil forfeiture trials.[36] The court held that the use of the word "jury" in New Jersey's Constitution imposes a right to twelve jurors in all civil trials.[37] Three of the individuals involved in the case later became leading figures in both the Constitutional Convention and First Congress: New Jersey Chief Justice David Brearley, who delivered the oral opinion, was a representative to the Philadelphia Convention that drafted the Constitution;[38] New Jersey Attorney General William Paterson served on the conference committee that reconciled the Seventh Amendment's language between the House and Senate;[39] and defense attorney Elias Boudinot later served in the First Congress, where he participated in House debates over the Bill of Rights.[40]

Part III also examines the influence that French mathematician Marquis Nicolas de Condorcet had on the Seventh Amendment's drafters, with a focus

35. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 13 (1991) ("An historical modality may be attributed to constitutional arguments that claim that the framers and ratifiers [of a constitutional provision] intended, or did not intend . . . .").

36. *See* Austin Scott, Holmes v. Walton*: The New Jersey Precedent, 1779*, 4 AM. HIST. REV. 456 (1899), *reprinted in* 1 THE BILL OF RIGHTS, *supra* note 32, at 405, 408 [hereinafter Scott, Holmes v. Walton] ("Persistent search has failed to discover the opinion of Chief Justice Brearly delivered in this case. It was probably an oral opinion and never written.").

37. *Id.* at 407; N.J. CONST. of 1776, art. XXII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2594, 2598 (Francis Newton Thorpe ed., 1909) ("That the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.").

38. *See* CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 44–45 (1925) (describing the roles that members of the New Jersey delegation had played in *Holmes*).

39. *See generally* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 239 (2006) (noting that the text incorporated into the Bill of Rights was chosen by a conference committee that included Senator William Paterson).

40. *See* 1 ANNALS OF CONG. 690–91 (1789) (Joseph Gales ed., 1834) (observing Elias Boudinot's appointment by the House on July 21, 1789, to the Committee of Eleven tasked to "take the subject of amendments in the constitution of the United States generally into their consideration, and to report thereupon to the House").

on his renowned Jury Theorem published in 1785—six years before the Seventh Amendment's ratification.[41]

Part IV investigates whether shrinking the number of jurors affects verdicts. More than a half century ago, the Supreme Court presumed not. In the Court's words,

> the number [of jurors] should probably be large enough to promote group deliberation . . . and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are . . . less likely to be achieved when the jury numbers six, than when it numbers 12.[42]

With the benefit of five decades of additional evidence, this Article revisits the Court's assumption. The data indicate that twelve jurors provide a more accurate and more representative verdict than six, suggesting that this numerical requirement was not arbitrary, but rather emerged from centuries of practical experience with the administration of justice.

This Article makes several contributions to our understanding of the Seventh Amendment's jury requirement. First, it unearths previously unexplored historical evidence from Carolina slave courts that illuminates what the Founding generation considered to fall below constitutional minimums. The stark contrast between the treatment of those afforded and denied constitutional protections provides insight into the constitutional significance of the twelve-juror requirement. Second, it synthesizes records from state archives, ratifying conventions, and private libraries to demonstrate that the traditional twelve-person jury was not merely accidental, but rather reflected generations of accumulated wisdom about group decision-making and procedural justice.

The implications of these historical findings are particularly significant given the Supreme Court's continued reliance on the Seventh Amendment's historical test. By demonstrating that the Court's 1973 decision[43] rested on an incomplete historical record and flawed empirical assumptions, this Article provides a compelling basis for reconsidering that precedent. Moreover, the convergence of historical evidence and modern social science research suggests that returning to twelve-person civil juries would not only restore the original constitutional understanding, but also advance the core purposes of the jury

41. *See generally* MARQUIS DE CONDORCET, ESSAI SUR L'APPLICATION DE L'ANALYSE À LA PROBABILITÉ DES DÉCISIONS RENDUES À LA PLURALITÉ DES VOIX [ESSAY ON THE APPLICATION OF MATHEMATICS TO THE THEORY OF DECISION-MAKING] (1785), *reprinted in* CONDORCET: SELECT WRITINGS 33 (Keith Michael Baker ed., 1976) (setting forth Condorcet's Jury Theorem).

42. Williams v. Florida, 399 U.S. 78, 100 (1970).

43. *See* Colgrove v. Battin, 413 U.S. 149, 160 (1973) ("[W]e conclude that a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases.").

right: promoting effective deliberation and ensuring representative cross sections of the community. This analysis thus offers both historical and functional justifications for revisiting one of the most consequential changes to civil jury practice in American history.

I. DENIAL OF TWELVE JURORS IN FOUNDING-ERA SLAVE COURTS

The Seventh Amendment dictates that "[i]n Suits at common law, . . . the right of trial by jury shall be preserved."[44] Use of the term "preserve"[45] implies a preexisting right that the drafters sought to codify.[46] Scholars and courts alike have concluded that the term "preserved" renders the Seventh Amendment right "largely, or even entirely, determined by historical considerations."[47] The Court has referred to the Amendment's insistence on preservation as a "textual mandate."[48] Even those critical of the Court's Seventh Amendment jurisprudence acknowledge that the Seventh Amendment's text requires "special attention to history" as the "gravity of [the] term [preserve] is difficult to escape."[49] The term, at a minimum, demands greater engagement with

44. U.S. CONST. amend. VII; *see also* FED. R. CIV. P. 38(a) ("The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.").

45. *See* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 857, 875 (2013) [hereinafter Miller, *Text, History, and Tradition*] ("'Preserve,' as defined in the eighteenth century, means much the same thing as it does today: 'to save; to defend from destruction or any evil; to keep.'" (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1768))); *see also* WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY 408 (Boston, Isaiah Thomas & Ebenezer T. Andrews 5th ed. 1788) (defining preserve as "to save, defend"); 2 THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (Philadelphia, W. Young, Mills & Son 6th ed. 1796) (defining preserve as "to defend from destruction or any evil").

46. *See* Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted."); Miller, *Text, History, and Tradition*, *supra* note 45, at 902 ("[T]he Seventh Amendment . . . simply acknowledges a preexisting right of Englishmen.").

47. Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467, 474 (2022); *see also* RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHERMAN & JAMES E. PFANDER, CIVIL PROCEDURE: A MODERN APPROACH 548 (7th ed. 2018) ("By its terms, the Amendment appears to dictate a form of historical inquiry . . . ."); John C. McCoid, II, *Procedural Reform and the Right to Jury Trial: A Study of* Beacon Theatres, Inc. v. Westover, 116 U. PA. L. REV. 1, 1 (1967) ("The wording of the seventh amendment suggests . . . an historical inquiry."); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 596 (2006) ("It is, indeed, difficult to discover many interpretations of the Seventh Amendment that are not based in history.").

48. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708 (1999) ("Consistent with the textual mandate that the jury right be preserved, our interpretation of the Amendment has been guided by historical analysis . . . .").

49. Miller, *Text, History, and Tradition*, *supra* note 45, at 875; *see, e.g.*, David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 706 n.361 (1982) (critiquing the "esoteric research" required by the Seventh Amendment's "historical test," but calling it "scarcely avoidable" given the Amendment's textual insistence on preservation);

historical context than courts apply to other Bill of Rights provisions that omit an explicit reference to preservation.[50]

As one scholar put it, the Seventh Amendment "embod[ies] the policy judgment, quite deliberately made, to leave the extent of jury trial about where history had come to place it."[51] Indeed, the vast majority of scholars across "a range of interpretive methodologies" have concluded "that courts are not to ask . . . what the jury trial right should be, but what the jury trial right was."[52] The Court's jury jurisprudence in recent years has invoked even stronger language: "When the American people chose to enshrine [jury] right[s] in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses."[53]

The Court has accordingly "interpreted the Seventh Amendment's text to command a 'historical test.'"[54] The Court defines the Seventh Amendment's historical test by reference to 1791—the year of ratification: "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791."[55]

Unless the eighteenth-century record is equivocal, the Court applies the historical test to resolve "questions concerning the cases that demand a jury, the composition of that jury, and what matters the jury must hear."[56] Disputes over whether the Seventh Amendment applies are, however, more frequent than disputes over jury composition. Indeed, more than 180 years elapsed after the

Redish, *supra* note 15, at 531 ("The amendment's use of the term 'preserved' at least arguably authorizes an exact replication of the historical right, regardless of how irrational those practices may appear under modern merged procedures.").

50. Miller, *Text, History, and Tradition*, *supra* note 45, at 857; Scott, *Trial by Jury*, *supra* note 7, at 671 (noting that the Seventh Amendment's meaning "must be ascertained by a resort to history"); Redish, *supra* note 15, at 486 ("The [Seventh] amendment's choice of words is intriguing because of its use of the term 'preserved.' Use of this word has caused the [S]eventh amendment to hold a unique position in the realm of constitutional interpretation.").

51. Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 668 (1963).

52. Bray, *supra* note 47, at 475; *see also* Carrington, *supra* note 22, at 74 (explaining that federal judges interpreting the Amendment are placed in the self-dealing position of defining their own constraints, potentially explaining their formalistic approach).

53. Ramos v. Louisiana, 140 S. Ct. 1390, 1402 (2020) ("[The American people] were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed.").

54. Miller, *Text, History, and Tradition*, *supra* note 45, at 875 (quoting Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996)); *see id.* at 857 ("As a consequence, the Court has converged on a historical test that attempts to remain true to the text, history, and tradition of the Seventh Amendment.").

55. Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

56. Miller, *Text, History, and Tradition*, *supra* note 45, at 875–76; *see also id.* at 877 ("The Court frequently states that any departure from historical practice is unconstitutional."); *Markman*, 517 U.S. at 376 (noting the Court's intention to "keep[] with [its] longstanding adherence to this 'historical test'" (quoting Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 640–43 (1973))).

passage of the Seventh Amendment before the Court had an occasion to resolve the threshold question of what constitutes a jury.[57] In contrast, the Court has successfully applied the Seventh Amendment's historical test to resolve all matter of disputes over whether a jury is required—from cases as traditional as evictions[58] and copyright infringement disputes,[59] to post-eighteenth-century claims ranging from § 1983 inverse condemnation actions,[60] to patent claim construction cases,[61] and to actions brought under the Clean Water Act.[62]

Codifying the jury trial right in the Seventh Amendment imposed an intentional Article V safeguard against future efforts to tinker with the long-standing tradition.[63] The ensuing centuries have proven, however, that the Article V hurdle for constitutional amendment is not insurmountable. The Judiciary Act of 1789[64]—adopted by the same First Congress that passed the Seventh Amendment—initially deferred to state law to determine who could

57. *See* Colgrove v. Battin, 413 U.S. 149, 157 (1973) ("It is true, of course, that several earlier decisions of this Court have made the statement that 'trial by jury' means 'a trial by a jury of twelve . . . .' But in each case, the reference to 'a jury of twelve' was clearly dictum and not a decision upon a question presented or litigated.").

58. *See* Pernell v. Southall Realty, 416 U.S. 363, 373–74 (1974) ("Had [Defendant] leased a home in London in 1791 instead of one in the District of Columbia in 1971, it no doubt would have used ejectment to seek to remove its allegedly defaulting tenant. And, as all parties here concede, questions of fact arising in an ejectment action were resolved by a jury.").

59. *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 350 (1998) ("The practice of trying copyright damages actions at law before juries was followed in this country, where statutory copyright protections were enacted even before adoption of the Constitution.").

60. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 715 (1999) ("Early opinions, nearly contemporaneous with the adoption of the Bill of Rights, suggested that when the government took property but failed to provide a means for obtaining just compensation, an action to recover damages for the government's actions would sound in tort.").

61. *See Markman*, 517 U.S. at 380–81 ("Although by 1791 more than a century had passed since the enactment of the Statute of Monopolies, which provided that the validity of any monopoly should be determined in accordance with the common law, patent litigation had remained within the jurisdiction of the Privy Council until 1752 and hence without the option of a jury trial.").

62. *See* Tull v. United States, 481 U.S. 412, 418 (1987) ("After the adoption of the Seventh Amendment, federal courts followed this English common law in treating the civil penalty suit as a particular type of an action in debt, requiring a jury trial.").

63. *Cf.* U.S. CONST. art. V ("The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress . . . ."); Redish, *supra* note 15, at 531 ("If the language of a constitutional provision is read to encompass a particular case, it is not the proper function of the courts to reject the provision's applicability because they deem it inadvisable. That is what the amendment process is designed to do.").

64. Federal Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

serve on juries.[65] The composition of federal juries, therefore, varied across states in the late eighteenth and much of the nineteenth centuries.[66] The American people ultimately adopted additional constitutional amendments—thereby surmounting the Article V hurdle—with the goal of rooting out what, in hindsight, the Court recognized to be "invidious discrimination."[67]

The Fourteenth Amendment revised, but did not moot, the Seventh Amendment's historical test. Its Equal Protection Clause imposed a new requirement that juries represent a fair cross section of the community.[68] Use of the term "men" must therefore be read to include "women" in light of the Fourteenth Amendment's Equal Protection Clause.[69] Likewise, the American people have resolved via Article V to prohibit the systematic exclusion of African Americans from jury service notwithstanding state practice.[70]

Absent further Article V amendments, the Court will likely continue to apply the Seventh Amendment's historical test as supplemented by the Equal Protection Clause's fair cross section requirement. The Court's failure to do so in 1973, when asked to determine if six jurors are sufficient, represents a rare discrepancy.[71]

Justice Thurgood Marshall, one of the four dissenters to the Court's 1973 decision, questioned whether the Seventh Amendment's drafters would

65. Ramos v. Louisiana, 140 S. Ct. 1390, 1402 n.47 (2020); *see also* Federal Judiciary Act of 1789, ch. 20, § 29, 1 Stat. at 88 ("[J]urors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens . . . ."); *cf.* Taylor v. Louisiana, 419 U.S. 522, 536 (1975) ("[T]he direction of the First Judiciary Act of 1789 was that federal jurors were to have the qualifications required by the States in which the federal court was sitting and at the time women were disqualified under state law in every State.").

66. *Ramos*, 140 S. Ct. at 1402 n.47.

67. *See id.*

68. *See id.* ("So today . . . a jury of one's peers means a jury selected from a representative cross section of the entire community.").

69. *Cf.* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1187–88 (1995) (contending that in 1791, a "jury meant 'twelve men, good and true'" but "[t]oday, in light of the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, . . . 'men' must include women, too, and 'good and true' jurors include the black, the poor, and the young. But twelve should still mean twelve.").

70. *See* Smith v. Texas, 311 U.S. 128, 130 (1940) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. . . . The Fourteenth Amendment requires that equal protection to all must be given—not merely promised." (footnote omitted)); *see also Taylor*, 419 U.S. at 527 ("A state jury system that resulted in systematic exclusion of Negroes as jurors . . . violate[s] the Equal Protection Clause of the Fourteenth Amendment." (citing Glasser v. United States, 315 U.S. 60, 85–86 (1942))).

71. Colgrove v. Battin, 413 U.S. 149, 161 (1973).

recognize six jurors as a "jury."[72] Although Justice Marshall conceded that "the extant history of the [Seventh] Amendment is exceedingly sketchy" and acknowledged "the absence of [historical] source material," he hypothesized that the "six-man mutation" would be "wholly unknown to the Framers of the Seventh Amendment."[73] He concluded that, "We deal here not with some minor tinkering with the role of the civil jury[;] . . . . if such a radical restructuring of the judicial process is deemed wise or necessary, it should be accomplished by constitutional amendment."[74]

Justice Marshall's dissent demonstrates that no amount of sharp words can compensate for a dearth of historical records. In the fullness of time, however, Justice Marshall's hypothesis—that the Founders would have found the impaneling of fewer than twelve jurors so careless that use of the word "jury" would no longer apply—appears prescient. The recovery and digitization of records from North and South Carolina state archives over the ensuing half century validates Justice Marshall's presumption and confirms the dim view that the drafters' generation took to fewer than twelve jurors. Justice Marshall's dissent "speaks to the challenge of accessing the volume and breadth of English and early American primary sources necessary to apply the Seventh Amendment's historical test, especially given the tools available" a half century ago.[75]

As legal historians would readily acknowledge, the availability of historical sources in the 1970s left much to be desired.[76] Times have thankfully changed.[77] The digitization of early American collections at university libraries as well as at the national and state archives "accelerates the kinds of information-gathering

72. *Id.* at 166 (Marshall, J., dissenting) ("No one need be fooled by reference to the six-man trier of fact utilized in the District Court for the District of Montana as a 'jury.'"); *see also id.* at 180 ("It is senseless, then, to say that a panel of six constitutes a 'jury' without first defining what one means by a jury, and that initial definition must, in the nature of things, be arbitrary.").

73. *Id.* at 166–67, 172.

74. *Id.* at 166–68; *see also id.* at 168 ("The proponents of the six-man jury have not secured the approval of two-thirds of both Houses of Congress and three-fourths of the state legislatures for their proposal. Indeed, they have not even secured the passage of simple legislation to accomplish their goal. Instead, they have relied upon the interstitial rulemaking power of the majority of the district court judges sitting in a particular district to rewrite the ancient definition of a civil jury.").

75. Su, *supra* note 19, at 1522.

76. Lawrence M. Friedman, *American Legal History: Past and Present*, 34 J. LEGAL EDUC. 563, 576 (1984) ("At one time, the output in American legal history was skimpy, materials largely unavailable, [and] the flow of secondary sources a mere trickle."); *see also id.* at 576 n.27 ("Except for editions (some of them very fine) of colonial records, there were few attempts to edit or present primary source materials in American legal history until quite recently.").

77. *See, e.g.*, Alexandra Chassanoff, *Historians and the Use of Primary Source Materials in the Digital Age*, 76 AM. ARCHIVIST 458, 459 (2013) ("There have been widespread changes in access to archival materials over the last decade.").

that historians" can do, making "new realms of connection visible, [and] new kinds of questions answerable."[78]

The historical test that the Seventh Amendment commands is only as reliable as the sources available to courts applying it. The digitization of historical records has expanded the evidentiary foundation from which courts can draw, shedding new light on how the Founding generation understood and implemented jury rights. Particularly illuminating are recovered archives from North and South Carolina, which reveal a stark divide between the treatment of those afforded constitutional protections and those denied them. These records provide an essential window into what the Founding generation considered to fall short of a constitutional jury, helping to resolve questions that have vexed courts for decades.

This part examines how the treatment of enslaved people in Carolina slave courts illuminates what the Founding generation considered to fall below constitutional minimums. Through analysis of archival records from both North and South Carolina, this part demonstrates that the impaneling of fewer than twelve jurors was viewed as a form of second-class justice reserved for those denied constitutional rights. Section I.A explores South Carolina's practice of impaneling five "freeholders" in what were explicitly described as "non-jury" trials of enslaved people, while Section I.B traces North Carolina's eventual extension of twelve-person juries to enslaved defendants in 1793—a reform that reflected growing discomfort with providing fewer than twelve jurors even to those denied constitutional protections. This historical evidence suggests that the Founders viewed twelve jurors as an essential feature of constitutional jury rights, not a mere procedural accident.

A. *South Carolina Offered Five Jurors in "Non-Jury" Trials of Enslaved People*

The Supreme Court, writing in 1970, presumed that the dearth of historical evidence available could be attributed to the Founders' indifference towards the number of jurors seated for trial. In the Court's words, "the most likely conclusion to be drawn is simply that little thought was actually given to the specific question we face today."[79]

A closer review of archival records from the Carolinas demonstrates that eighteenth-century Americans viewed the impaneling of fewer than twelve

78. Lara Putnam, *The Transnational and the Text-Searchable: Digitized Sources and the Shadows They Cast*, 121 AM. HIST. REV. 377, 379 (2016) ("Precisely because web-enabled digital search simply accelerates the kinds of information-gathering that historians were already doing, its integration into our practice has felt smooth rather than revolutionary. But increasing reach and speed by multiple orders of magnitude is transformative. It makes new realms of connection visible, new kinds of questions answerable."); Friedman, *supra* note 76, at 576 ("There is plenty of material in our constitutional past to be explored.").

79. Williams v. Florida, 399 U.S. 78, 98–99 (1970).

jurors as an insult so stingy that only enslaved people who were denied civil and constitutional rights could be subject to such carelessness in the administration of justice. These records indicate that the impaneling of fewer jurors was not a casual decision of little consequence, but rather a deliberate choice to institutionalize second-class justice for enslaved people.

Article Sixty-Nine of the Fundamental Constitutions of Carolina, adopted in 1669, provided that "[e]very jury shall consist to twelve men."[80] Although South Carolina's constitution evolved after independence, and the explicit reference to "twelve" fell out of use in favor of more general constitutional language mirroring that of the Seventh Amendment, the insistence on twelve jurors remained unwavering.[81] Indeed, in 1794—three years after the Seventh Amendment was ratified—a South Carolina court interpreted the "trial by jury . . . shall be for ever inviolably preserved" language of the state constitution to require "rights of the citizens . . . to be determined . . . by 12 men."[82]

Enslaved people, however, fell outside the Constitution's purview. Their treatment therefore offers legal historians insight into what the denial of constitutional rights entailed. Slave codes, as they were known, "had two basic purposes:" (1) to enforce "police control" over enslaved laborers and (2) to separate enslaved people under a system of second-class justice, thereby institutionalizing the presumption of "inferiority."[83] The slave codes "developed gradually" and "were expanded or revised as necessity demanded" throughout the eighteenth century.[84] One constant over this period, however, was an institution known as the Courts of Magistrates and Freeholders—what were colloquially referred to as "slave courts"—in North and South Carolina.[85]

These courts had their origin in the 1690 South Carolina Act for the Better Ordering of Slaves,[86] which was modeled after those instituted in the West Indies, specifically Barbados.[87] Over the preceding two decades, almost half of the free white men who emigrated to South Carolina arrived from Barbados.[88] They brought with them the institution of enslaved labor and advocated for language in the Fundamental Constitutions of Carolina granting every freeman

80. FUNDAMENTAL CONSTITUTIONS OF CAROLINA, 1669, *supra* note 32, at 118.

81. *See* Zylstra v. Corp. of Charleston, 1 S.C.L. (1 Bay) 382, 384 (Ct. Com. Pl. 1794).

82. *Id.* at 384, 389.

83. Clark, *supra* note 31, at 148 ("The colonists . . . regarded the Negro as an inferior being.").

84. *Id.* ("Slavery became as much a means of assuring white supremacy as a method of police control of labor.").

85. *Id.* at 150 ("During the colonial period slave offenders of the law were tried by special courts variously called 'slave courts' or 'negro courts.'").

86. *See* An Act for the Better Ordering of Slaves, 7 Stat. 346 (S.C. 1690), *reprinted in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 343 (David J. McCord ed., 1840).

87. *See* L.H. Roper, *The 1701 "Act for the Better Ordering of Slaves": Reconsidering the History of Slavery in Proprietary South Carolina*, 64 WM. & MARY Q. 395, 404 (2007).

88. Thomas J. Little, *The South Carolina Slave Laws Reconsidered, 1670–1700*, 94 S.C. HIST. MAG. 86, 88 (1993).

"absolute Power and Authority over his Negro slaves, of what opinion or Religion soever."[89] The conspicuous addition of the term "power" to the clause reflects an attempt to quell any concern among prospective South Carolina settlers—"especially those from the West Indies—that their dominion over black slaves would be anything less than 'absolute.'"[90] In contemporary seventeenth-century usage, the term "'authority' connoted rule by consent"—thereby relying on "willing obedience, deference, and respect."[91] The term "power," by contrast, "was synonymous with force, compulsion, and might"[92]—thereby classifying enslaved people as a form of chattel in the eyes of the law.[93]

Although the Carolina slave courts "functioned for over 150 years, few of their records seem to have survived."[94] The preserved "records of testimony, proceedings, and sentences"[95] in state archives provide legal historians with insight into the procedures that the Founding generation believed ran afoul of constitutional minimums.[96]

Records indicate that the most frequent types of cases heard by the Courts of Magistrates and Freeholders involved "either petty larceny or disorderly conduct" with an average sentence of "fifty lashes at the whipping post."[97] These lashings were, in some instances, administered in weekly installments.[98] The courts, however, retained authority "to try serious crimes and the power to impose the death penalty,"[99] in which case the enslaved person's owner would

89. *Id.* at 87–88 ("Most of the slaves who came into the colony during the initial phase of settlement also came from the West Indies, especially from Barbados. In fact, Barbados was South Carolina's chief source of black labor during the seventeenth century."); *see also* PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION 25 (1974).

90. Little, *supra* note 88, at 87 (citing NORTH CAROLINA CHARTERS AND CONSTITUTIONS, 1578–1698, at 150, 164, 183 (Mattie Erma Edwards Parker ed., 1963)).

91. *Id.* at 87 n.3.

92. *Id.*; *see* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 55–56 (1967).

93. *See* JOHN SPENCER BASSET, SLAVERY AND SERVITUDE IN THE COLONY OF NORTH CAROLINA 27 (Herbert B. Adams ed., 2002) ("It recognized the slave as a chattel. He could, according to the popular theory, be bought, bred, worked, neglected, marked, or treated in any other respect as a horse or a cow.").

94. Lipscomb & Jacobs, *supra* note 33, at 62.

95. *Id.* at 62–63 ("In recent years, bundles of slave trial papers . . . have been inventoried and transferred to the Archives; the cases for each district have been arranged in chronological order.").

96. *See* HOWELL MEADORS HENRY, THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA 58 (1914) ("None of the safeguards cherished by Englishmen, such as trial by jury, were thrown around the negro. It was a court given large discretion and unhampered by technicalities.").

97. Lipscomb & Jacobs, *supra* note 33, at 63.

98. *Id.* (discussing "a total sentence of five hundred lashes (well laid on) to be administered in weekly installments during a five week imprisonment").

99. *Id.* at 62; *see also* John H. Blume, *Ghosts of Executions Past: A Case Study of Executions in South Carolina in the Pre-*Furman *Era*, 107 CORNELL L. REV. 1799, 1803 n.19 (2022) (noting the "variety of corporal punishments" available to the Court of Magistrates and Freeholders "including branding a

be compensated by the state for what amounted to destruction of personal property.[100] Indeed, "[i]n many cases, slaveowners preferred execution and compensation to the retention of recalcitrant slaves."[101]

Cases were most frequently instituted by an injured party who demanded compensation from the enslaved person's owner for torts committed by an enslaved person. In some instances, however, an owner might institute proceedings seeking execution of the enslaved person, and thereafter compensation from the state.[102] Records indicate that free Black people, in addition to those enslaved, could find themselves before the Courts of Magistrates and Freeholders, as "all persons of 'black complexion' were presumed to be slaves."[103]

The Courts of Magistrates and Freeholders operated outside of constitutional bounds, thereby providing historical insight into what eighteenth-century Americans believed lay on the other side of constitutional minimums. The emphasis on swift resolution of cases meant that rights considered fundamental to Carolinians—such as the right to trial by jury—had no place in the Courts of Magistrates and Freeholders. In the words of the South Carolina Court of Errors—the state's highest court at the time and precursor to the modern South Carolina Supreme Court—"[a]ll the Acts operating upon slaves directly, and to punish them, do not fall within the inhibition of the Constitution."[104] As the South Carolina Court of Appeals

convict's face 'with a red hot iron'" (quoting An Act for the Better Ordering and Governing of Negroes and Other Slaves, No. 476, §§ VII-XX, *reprinted in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 86, at 371, 374)).

100. *See* N.C. Sec'y of State, *Magistrates and Freeholders Courts, 1760–1769*, N.C. DIGIT. COLLECTIONS, https://digital.ncdcr.gov/Documents/Detail/magistrates-and-freeholders-courts-1760-1769/439165 [https://perma.cc/YK4H-F6WG] (description of document from 1769 reads: "The punishments ranged from physical beatings to execution. If the court sided with the accuser and executed them, the person who enslaved these men and women could petition . . . for compensation. Since men, women, and children forced into this position were treated as commodities, the enslavers were able to receive payment for the loss of the enslaved person's life based on their purported value.").

101. Alan D. Watson, *North Carolina Slave Courts, 1715–1785*, 60 N.C. HIST. REV. 24, 32 (1983) [hereinafter Watson, *N.C. Slave Courts*]; *see also* BASSET, *supra* note 93, at 28 ("If a slave should be executed by order of the court, or if he should be killed while resisting arrest, it was the duty of this court to ascertain his value and to give a certificate of that valuation to the owner.").

102. Philip N. Racine, *The Spartanburg District Magistrates and Freeholders Court, 1824–1865*, 86 S.C. HIST. MAG. 197, 198 (1986) (noting that "[t]he injured party might be the slave's owner who believed the crime too serious for him to punish").

103. Clark, *supra* note 31, at 149–50 (explaining that "any person of color who disclaimed the [slave] status was required to prove his freedom in court"); *see also* Lipscomb & Jacobs, *supra* note 33, at 64–65 ("Freed blacks were prohibited by law from returning to South Carolina after they had once removed from the state, and violations of this statute were tried by the magistrates and freeholders courts.").

104. State *ex rel.* Kohne v. Simons, 29 S.C.L. (2 Speers) 761, 768 (S.C. Ct. Err. 1844) (enslaved person at issue); *cf.* Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV ("[A]t the time of the Declaration of

explained, "[Enslaved people] have no rights, other than those which their masters or owners may give them. They are the property of their masters or owners, and are considered in this State, in law, as goods and chattels, and not as persons entitled to the benefits of freemen."[105]

The Courts of Magistrates and Freeholders nonetheless impaneled at least three, and as many as five, jurors to try accused slaves and free persons of color.[106] To be clear, use of the term "juror" is anachronistic in this regard. These members of the community impaneled to find facts at trial are referred to as "freeholders" in historical records. Contemporaneous references to the institution did not use the term "jury" and certainly did not refer to individual members as "jurors." Indeed, proceedings before the Courts of Magistrates and Freeholders were uniformly described as non-jury trials by higher courts, as the number of freeholders impaneled fell below the minimum required for a constitutional jury.[107]

The issue of juror number came to a head in *State ex rel. Kohne v. Simons*,[108] in which a statute granting the Courts of Magistrates and Freeholders jurisdiction over slave forfeiture was declared unconstitutional.[109] The statute permitted South Carolina to seize, and condemn as forfeited by the owner, any slave who returned after being taken north of the Potomac.[110] The owner of an enslaved woman named Emma contested a forfeiture verdict rendered by five jurors before a Court of Magistrates and Freeholders.[111] The owner argued that,

Independence, and when the Constitution of the United States was framed and adopted . . . , [public opinion] had for more than a century . . . regarded [Black people] as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.").

105. Kinloch v. Harvey, 16 S.C.L. (Harp.) 508, 514 (S.C. Ct. App. L. & Eq. 1830) (enslaved person at issue); *see also id.* at 517 ("[W]hen the dreadful nature and consequences of the insurrection of slaves in South Carolina are taken into consideration, it appears to me, that the judges of the Superior Courts ought to be extremely cautious in interfering with the magistrates and freeholders of the State, in the exercise of these summary jurisdictions; and they ought not to be eagle-eyed in viewing their proceedings, and in finding out and supporting every formal error or neglect . . . ."); *Ex parte* Boylston, 33 S.C.L. (2 Strob.) 41, 43 (S.C. Ct. App. L. 1847) (enslaved person at issue) ("'[E]very endeavor to extend [an enslaved person] positive rights, is an attempt to reconcile inherent contradictions.' In the very nature of things, he is subject to despotism. Law as to him is only a compact between his rulers . . . ." (quoting *Kinloch*, 16 S.C.L. (Harp.) at 514)).

106. *See* Lipscomb & Jacobs, *supra* note 33, at 62; State v. Sullivan, 48 S.C.L. (14 Rich.) 281, 284 (S.C. Ct. Err. 1867) (enslaved person at issue) (noting that the Act of 1740 (7 Stat. 397) granted the court of magistrates and freeholders "exclusive jurisdiction over slaves and free persons of color" and required that they be tried by "not less than three freeholders").

107. *Simons*, 29 S.C.L. (2 Speers) at 768; *see also* Lipscomb & Jacobs, *supra* note 33, at 62 (describing the impaneling of no less than three, and no more than five, jurors as "non-jury" trials).

108. 29 S.C.L. (2 Speers) 761 (S.C. Ct. Err. 1844).

109. *Id.* at 768.

110. *Id.* at 765.

111. *Id.* at 768.

although Emma herself had no right to a jury—and therefore could be tried criminally before five jurors—the owner's property rights could not be forfeited without a verdict rendered by twelve jurors—that is, a jury.[112]

The South Carolina Court of Errors sided with Emma's owner, making clear that "a jury," in the constitutional use of the term, necessitated twelve jurors.[113] In declaring the forfeiture statute unconstitutional, Judge O'Neall, writing for a unanimous court, held that a trial before five jurors is "not a trial by jury, in any sense in which the words have ever been legally used; neither could a judgment pronounced by them be regarded as the judgment of her peers."[114] As the court explained, the words "trial by jury" as invoked by the South Carolina Constitution meant "trial by twelve good and lawful men of the vicinage, in the presence of the accused, and by the oath of a witness."[115] The constitutional command to "preserve[]" required that this right "be continued to every freeman, and of course to every woman and child; they being embraced in the larger general terms used."[116] The "[r]eport of the presiding judge" accompanying the court's opinion noted that "it is impossible that the rights of property can be defeated by any proceeding so utterly inconsistent with a due course of law."[117]

B. *North Carolina Grants Enslaved People the Right to a Twelve-Person Jury in 1793*

North Carolina granted Courts of Magistrates and Freeholders jurisdiction over enslaved people in 1715 by statutory mandate.[118] The state impaneled a minimum of four jurors in criminal trials of enslaved people and followed the trajectory of its southern neighbor for much of the eighteenth

112. *Id.*

113. *Id.*

114. *Id.* (holding that the slave forfeiture statute "having undertaken to clothe a forum with the power of depriving [the owner] of her property, which is not sustained by the law existing at the adoption of the Constitution, and which does not proceed by the common law mode of trial by jury, is so far unconstitutional and void; and that, therefore, the whole of the proceedings . . . are illegal").

115. *Id.* ("It is . . . necessary to test the Act by what is meant 'by the judgment of his peers' and 'the trial by jury, as heretofore used in this State, shall be forever inviolably preserved.'").

116. *Id.*

117. *Id.* at 762, 764 ("It is true, that a Court of Justices and Freeholders, at that time, was an acknowledged tribunal for the trial of slaves, free negroes, Indians not in amity with this government, mulattoes, and mustizoes, for crimes, but such a thing as such a court having jurisdiction to impose fines, or declare forfeitures, against free white persons, was altogether unknown.").

118. Act Concerning Servants and Slaves, ch. 46, 1715 N.C. Sess. Laws 21, 21 (repealed 1741) (instituting North Carolina slave courts), *reprinted in Acts of the North Carolina General Assembly, 1715–1716*, 23 COLONIAL & ST. RECS. N.C. 62, https://docsouth.unc.edu/csr/index.php/document/csr23-0001 [https://perma.cc/9NAN-JX2H]; *cf.* Alan D. Watson, *A Consideration of European Indentured Servitude in Colonial North Carolina*, 91 N.C. HIST. REV. 381, 386 (2014).

century.[119] The perennial threat of insurrection influenced public perceptions of enslaved people, thereby shaping the legal rights granted to them. As the Supreme Court of North Carolina later reflected, "our ancestors . . . were probably impelled by a sense of common danger, and the duty of self-preservation to vest this extraordinary" authority in four jurors "who might be hastily collected at the courthouse and proceed to the condemnation and execution of a slave, without . . . [a] jury."[120]

The two states' paths, however, diverged in 1793—two years after the Seventh Amendment was adopted. Ultimately, the denial of twelve jurors proved too much for the moral conscience of North Carolinians to bear. As historians later recounted, "[a]ccompanying the egalitarian spirit of the Revolution, Quaker manumissions of slaves, and the fervor of evangelical Protestantism was a growing concern for the equitable judicial treatment . . . of slaves."[121] Although North Carolina courts maintained that enslaved people had no constitutional rights, the legislature in 1793 voluntarily granted enslaved people and free persons of color the opportunity to request trial by twelve jurors—what the statute and courts referred to as a "jury" for the first time.[122]

The legislative movement to extend the right to twelve jurors to enslaved persons accused of crimes stems from Americans' belief at the Founding that impaneling fewer than twelve jurors could compromise the impartiality of the verdict. As they witnessed in slave courts prior to the 1793 reform, "[j]ury selection was haphazard, with magistrates sometimes favoring speed and convenience over fairness by selecting jurors from a single family or neighborhood."[123] Mandating what the Founders knew as a "jury" in trials of enslaved people eased the conscience of North Carolinians as it granted, by statute, the same jury right that white people garnered by their constitutional birthright, and ensured that the verdict rendered would more accurately reflect

119. *See* Alan D. Watson, *Impulse Toward Independence: Resistance and Rebellion Among North Carolina Slaves, 1750–1775*, 63 J. NEGRO HIST. 317, 317–18, 320 (1978) [hereinafter Watson, *Impulse Toward Independence*] ("The slave code of the colony emanated from laws passed in 1715 and 1741, which were supplemented and modified by later statutes. The 1715 legislation . . . attempted to minimize the independence and mobility of slaves, discourage commercial and social relations between slaves and whites, and reduce the possibility of slave runaways and violence. The 1741 legislation reiterated many of the provisions of the earlier law but, passed in the wake of the Stono Rebellion in South Carolina, proved more punitive than the 1715 statute.").

120. State v. Ben, 8 N.C. (1 Hawks) 434, 435 (1821) (enslaved party).

121. Watson, *N.C. Slave Courts*, *supra* note 101, at 35. For a discussion of the Quaker objections to slavery at the time, see generally STEPHEN B. WEEKS, QUAKERS AND SLAVERY: A STUDY IN INSTITUTIONAL HISTORY 50–69 (Herbert B. Adams ed., Bergman Publishers 1968) (1896).

122. An Act to Extend the Right of Trial by Jury to Slaves, ch. 5, 1793 N.C. Sess. Laws 38, 38 (repealed) ("[S]lave[s] shall be entitled to trial by jury, on oath, consisting of twelve good and lawful men, owners of slaves . . . ."); *Ben*, 8 N.C. (1 Hawks) at 436 (noting that "the act of 1793 extended the trial by Jury to slaves").

123. JOHN WILLIAM WERTHEIMER, RACE AND THE LAW IN SOUTH CAROLINA: FROM SLAVERY TO JIM CROW 56 (2023).

community values, rather than those of outliers. As the Supreme Court of North Carolina observed, "every time the Legislature have touched this subject since the revolution, it has been for the purpose of improving the condition of slaves, more especially in admitting them to the benefit of an impartial trial."[124]

While North Carolina distinguished itself after the Revolution by granting accused slaves the right to a jury trial, many "slaveholding states . . . clung to their repressive colonial systems that emphasized efficiency and speedy justice" over impartiality.[125] Some attribute the divergent treatment to the "[s]maller agricultural units and smaller average slaveholdings" in North Carolina, contributing "to less demanding work and more personal concern for slaves."[126] Regardless of rationale, the initiative by North Carolina's legislature to increase the number of jurors from four to twelve—that is, from a "non-jury" to a "jury"—demonstrates that Americans at the Founding harbored concerns over the impartiality of fewer than twelve jurors and publicly questioned whether such carelessness in the administration of justice was morally conscionable for enslaved people. The thought that such stinginess in juror number would migrate from slave courts to courts of general jurisdiction that operate under the purview of the Constitution would have been unfathomable at the time. By 1793, North Carolinians would not tolerate this form of second-class justice, even for enslaved people.

II. FOUNDING-ERA SOURCES DEFINE JURY BY NUMBER TWELVE

Founding-era records indicate that the Carolinas were not alone in their use of the word "jury" as a term of art to refer to twelve jurors.[127] Contemporaneous documents from across the nascent nation demonstrate that the Founding generation routinely used the word "jury" in place of the more verbose "twelve jurors." Although "the conventional usages of individual words change over time," the Seventh Amendment's historical test places doctrinal importance on usage of the word "jury" in 1791, when the Bill of Rights was ratified.[128] The term's usage in the late eighteenth century is therefore not

124. *Ben*, 8 N.C. (1 Hawks) at 436.

125. Watson, *N.C. Slave Courts*, *supra* note 101, at 35.

126. Watson, *Impulse Toward Independence*, *supra* note 119, at 318 ("[S]ome observers believed that North Carolinians accorded . . . [enslaved people] better treatment than did South Carolinians and Virginians.").

127. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 577 (2008) (asserting that constitutional meaning "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation"); McGinnis & Rappaport, *supra* note 34, at 1376 ("[P]ublic meaning is normally thought to be the meaning that a knowledgeable and reasonable interpreter would have placed on the words at the time that the document was written.").

128. *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 519 (2003) ("For illustrations, one need only consult the *Oxford English Dictionary*, which arranges its definitions

merely of scholarly interest, but of considerable doctrinal value in resolving the question of jury size under the Court's established historical test.

Drawing on an array of historical sources, this part demonstrates that the Founding generation consistently understood and used the term "jury" to mean exactly twelve jurors. The analysis begins by examining ratifying convention records, which reveal how delegates explicitly connected the constitutional jury right to the twelve-person requirement. It then turns to influential legal treatises of the era, which uniformly defined juries as requiring exactly twelve members—neither more nor less. The discussion continues with an examination of period legal dictionaries, which treated "twelve men" and "jury" as synonymous terms, before concluding with early court precedents that interpreted constitutional jury provisions to incorporate the common law's twelve-juror requirement. Together, these sources paint a compelling picture of how the term "jury" was understood when the Seventh Amendment was ratified in 1791.

A. *Ratifying Conventions Document Public Meaning*

One indication of public meaning at ratification is remarks made during the state conventions on adoption of the federal Constitution. The Virginia ratifying convention, for instance, is illustrative. The role of Virginian Edmund Randolph is particularly notable, as Randolph served as both a participant in the federal constitutional convention as well as the Virginia Governor overseeing the state ratifying convention. Randolph is recorded as having defended the proposed constitution "against the onslaught of" concerns voiced by former Virginia Governor Patrick Henry.[129] At the convention, Randolph commented that the Article III reference to "jury" need not include additional language as "[t]here is no suspicion that less than *twelve* jurors will be thought sufficient."[130] Although Henry reportedly "found danger to liberty in almost every clause of the proposed constitution," even he did not doubt that a jury referred to twelve jurors.[131] At the convention, Henry proclaimed "trial by jury" to be "an excellent mode of trial," noting that "[t]he unanimous verdict of *twelve* impartial men cannot be reversed."[132]

of each word so that they proceed from the earliest usages to those that were introduced more recently."); *cf.* Pernell v. Southall Realty, 416 U.S. 363, 373 (1974) (discussing jury practice at "the time our Constitution was drafted").

129. JOHN A. MURLEY & SEAN D. SUTTON, THE SUPREME COURT AGAINST THE CRIMINAL JURY: SOCIAL SCIENCE AND THE PALLADIUM OF LIBERTY 32 (2014).

130. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 467 (Jonathan Elliot ed., 2d ed. 1891) (emphasis added).

131. MURLEY & SUTTON, *supra* note 129, at 32.

132. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 130, at 544 (emphasis added).

Records from the Pennsylvania ratifying convention similarly contain references to the word "jury" in the context of twelve jurors. The state's Chief Justice Thomas McKean defended the appellate jurisdiction of the United States Supreme Court under Article III by noting that, at common law, appellate courts routinely reviewed trial court decisions, even in certain cases tried to a jury.[133] In Chief Justice McKean's words: "Juries are not infallible because they are *twelve* in number."[134]

North Carolina offers yet another example. Its ratifying convention featured remarks made by state judge Samuel Spencer, who declared that "[j]uries are called the bulwarks of our rights and liberty," adding that "cases which affect . . . lives and property, are to be decided in a great measure, by the consent of *twelve* honest, disinterested men."[135] These casual references, albeit in passing, to the jury as numbering twelve reflect how those who ratified the Constitution understood and used the term.

B. *Contemporaneous Treatises Uniformly Define Jury by Twelve Jurors*

Treatises provide another avenue of historical inquiry into the term's contemporaneous usage, as they capture the prevailing attitude "with less idiosyncratic risk" than that of a single remark or opinion.[136] As the Supreme Court has explained, "in assessing [historical] practice, we look primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like)."[137]

The Court has recognized one such treatise, *Commentaries on the Laws of England* by Sir William Blackstone, as "the preeminent authority on English law for the founding generation."[138] Blackstone's treatise has its roots in lectures originally delivered at Oxford beginning in 1753.[139] Historians have called their appearance in 1765–69 "[t]he great legal publishing event of the [eighteenth] century."[140] Some argue that Blackstone's *Commentaries* "ha[ve] had as much (or more) influence on American legal thought as [they] ha[ve] had on British."[141] Indeed, they quickly became a bestseller in the colonies[142] and were described

133. 2 *id.* at 540.

134. *Id.* (emphasis added).

135. 4 *id.* at 154 (emphasis added).

136. Su, *supra* note 19, at 1492.

137. Kahler v. Kansas, 140 S. Ct. 1021, 1027 (2020).

138. Alden v. Maine, 527 U.S. 706, 715 (1999); *see also* DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE 170, 180–81 (1938) (documenting that American cases between 1789 and 1915 cited Blackstone's *Commentaries* more than 10,000 times).

139. A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 652 (1981).

140. *Id.*; *see also* Schick v. United States, 195 U.S. 65, 69 (1904) ("[U]ndoubtedly the framers of the Constitution were familiar with it.").

141. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 209 (1979); *see also* Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 5 (1996).

142. *See* M.H. HOEFLICH, LEGAL PUBLISHING IN ANTEBELLUM AMERICA 131–34 (2010).

as "the most important if not the only textbooks for law students" by 1772.[143] Because the Bill of Rights was ratified by lawyers immersed in Blackstone's *Commentaries*, scholars maintain that its language "cannot well be understood without reference to . . . Blackstone's classic."[144]

As Blackstone explained it, a citizen could not be "affected either in his property, his liberty, or his person, but by the unanimous consent of *twelve* of his neighbours and equals."[145] Blackstone's treatise elaborated that a "trial by jury" must include "the unanimous suffrage of *twelve* of his equals and neighbours, indifferently chosen, and superior to all suspicion."[146] Blackstone clarified that the twelve-juror requirement applies equally to civil matters: "For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by *twelve* indifferent men."[147]

Blackstone's specificity in number of jurors was not unique. A review of Blackstone's contemporaries confirms that the twelve-juror framework was shared essentially uniformly by the leading treatises in circulation at the time. Lord Edward Coke's famous treatise, *Institutes of the Lawes of England*, is one such example.[148] As historians have noted, eighteenth-century colonial lawyers were "steeped" in the teachings of Coke.[149] In reference to the impaneling of jurors, Volume I of Coke's treatise explains that the law "delighteth her selfe in the number of 12[;] for there must . . . be 12 Jurors for the tryall of all matters of fact," adding that the "number of twelve is much respected in Holy Writ, as [in] twelve Apostles."[150] In Volume II, Coke includes a reference back to his earlier exposition, noting "[h]ow much, and for what cause the Law respecteth the number of 12."[151]

143. LOCKMILLER, *supra* note 138, at 170; *see also* Alschuler, *supra* note 141, at 2 (calling Blackstone's *Commentaries* "the most influential law book in Anglo-American history").

144. LOCKMILLER, *supra* note 138, at 174; *see also* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 7 (1985) (calling Blackstone's influence on the Constitution "pervasive").

145. 3 WILLIAM BLACKSTONE, COMMENTARIES *379 (emphasis added).

146. 4 *id.* at *350 (emphasis added); *cf.* Rouse v. State, 4 Ga. 136, 147 (1848) (quoting Blackstone's common law jury definition and finding it "obvious that the framers of [Georgia's 1798] Constitution, instead of incorporating the whole of this passage in that instrument, simply declare that the trial by jury, as therein delineated, shall remain inviolate").

147. 3 BLACKSTONE, *supra* note 145, at *380 (emphasis added).

148. *See* 1 EDWARD COKE, THE INSTITUTES OF THE LAWES OF ENGLAND 155 (London 3d ed. 1633). *See generally* A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968) (discussing the influence of Lord Coke's treatise on the colonies).

149. ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 57 (1957) (calling Lord Coke's *Institutes* one of the "most authoritative law books available to" eighteenth-century colonial lawyers).

150. 1 COKE, *supra* note 148, at 155.

151. 2 *id.*, *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 745, 847 (Steve Sheppard ed., 2003).

Although the Supreme Court, writing in 1970, worried that the historical practice of impaneling twelve jurors may be an unnecessary preoccupation "wholly without significance 'except to mystics,'"[152] scholars have noted that when early seventeenth- and eighteenth-century jurists "are moved to make exalted, mystical-religious explanations, it is because they deeply venerate the established practice."[153] One such example is the treatise *Tryals per Pais* by Giles Duncombe, which explains: "If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number of twelve to try our temporal [state] . . . . And the law is so precise in this number of *twelve*, that if the trial be by more or less, it is a mistrial."[154] Duncombe's invocation of divine judgment to justify the twelve-juror requirement exemplifies how such mystical explanations were not merely flowery rhetoric, but rather reflected jurists' respect for and dedication to preserving what they viewed as sacrosanct common law practices.

The twelve-juror requirement has likewise been articulated in a leading eighteenth-century treatise by Sir Matthew Hale: *History of the Pleas of the Crown*.[155] In reference to jurors, Hale declares, "*twelve* of them, neither more nor less, [must be] sworn," observing that a lay body of any less lacks authority to render a verdict.[156] Hale, in fact, explores the hypothetical, what if one juror "goes out of town, whereby only eleven remain"?[157] In short, "no verdict can be taken of the eleven, and if it be, it is error."[158] As Hale explains, "these eleven cannot give any verdict without the twelfth."[159] The remaining eleven jurors must "be discharged, and a new jury sworn, and new evidence given, and the verdict taken of the new jury."[160] Similarly, "[i]f only eleven be sworn by mistake, no verdict can be taken of the eleven."[161] As Hale summarizes:

> The law of *England* hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely by a jury of *twelve* men all concurring in the same judgment, by the testimony of witnesses

152. Williams v. Florida, 399 U.S. 78, 102 (1970) (quoting Duncan v. Louisiana, 391 U.S. 145, 182 (1968) (Harlan, J. dissenting)).

153. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 449 (2d ed. 1997).

154. GILES DUNCOMBE, TRYALS PER PAIS (1665), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 344, 344 (Philip B. Kurland & Ralph Lerner eds., 2000) (emphasis added).

155. 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 293–96 (London, E. Nutt, R. Nutt & R. Gosling 1736).

156. *Id.* at 293 (emphasis added).

157. *Id.* at 295.

158. *Id.* at 296.

159. *Id.* at 295.

160. *Id.* at 295–96.

161. *Id.* at 296.

> *viva voce* in the presence of the judge and jury, and by the inspection and direction of the judge.[162]

Matthew Bacon's treatise, *A New Abridgment of the Law*, first published in 1736, likewise observed that the petit jury must consist "of *twelve*, and can be neither more nor less."[163] This no smaller or larger than twelve language found its way into a number of eighteenth-century guidebooks for American judges, instructing them to impanel exactly twelve jurors.[164] One, for example, reminded judges to "count them *Twelve*" before proceeding any further.[165]

The twelve-juror requirement was reiterated in American treatises after the ratification of the Bill of Rights and well into the nineteenth century. Joseph Bingham's 1797 treatise is emblematic of such publications, noting that "on a trial by a petit jury no more nor less than *twelve* can be allowed."[166] William Barton's 1803 treatise similarly declared that trials require "a jury of *twelve* men, as now established by the constitution."[167] Justices Joseph Story,[168] Thomas Cooley,[169] and James Kent,[170] among other nineteenth-century authorities,[171]

162. 1 *id.* at 33 (second emphasis added); *see also* Thompson v. Utah, 170 U.S. 343, 350 (1898).

163. 3 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAWS OF ENGLAND 234 (London, His Majesty's Law Printers 3d ed. 1768) (emphasis added).

164. *See, e.g.*, JAMES PARKER, CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GAOLERS, JURY-MEN, AND OVERSEERS OF THE POOR 393 (New Jersey, Woodbridge 1764); 2 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 602 (London, W. Strahan & W. Woodall 1785) ("But upon a trial by a petit jury; it can be by no more nor less than 12 . . . .").

165. MICHAEL DALTON, THE COUNTRY JUSTICE: CONTAINING THE PRACTICE, DUTY, AND POWER OF THE JUSTICES OF THE PEACE 654 (London, E. Nutt, R. Nutt & R. Gosling 1727) (emphasis added).

166. JOSEPH BINGHAM, A NEW PRACTICAL DIGEST OF THE LAW OF EVIDENCE 63 (London, Holborn-Hill 1796) (emphasis added).

167. WILLIAM BARTON, OBSERVATIONS ON THE TRIAL BY JURY 10 (Strasburg, Pa., Brown & Bowmin 1803) (emphasis added).

168. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 541 n.2 (Boston, Little, Brown & Co. 4th ed. 1873) ("A trial by jury is generally understood to mean *ex vi termini* [by definition], a trial by a jury of *twelve* men, impartially selected . . . . Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional.").

169. *See* THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS 319 (Boston, Little, Brown & Co. 1868) ("Any less than this number of twelve would not be a common law jury, and not such a jury as the constitution preserves to accused parties . . . ."); *see also id.* at 563 n.4 ("A jury, without further explanation in the law, must be understood as one of twelve persons.").

170. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 13 n.b. (New York, E.B. Clayton & James Van Norden 3d ed. 1836) ("[T]he *judgment of his peers* means, trial by a jury of twelve men according to the course of the common law . . . .").

171. *See, e.g.*, ARTHUR JOSEPH STANSBURY, ELEMENTARY CATECHISM ON THE CONSTITUTION OF THE UNITED STATES 63 (Boston, Hilliard, Gray, Little & Wilkins 1831) ("[T]he jury consists of twelve persons . . . ."); PETER OXENBRIDGE THACHER, OBSERVATIONS ON SOME OF THE METHODS KNOWN IN THE LAW OF MASSACHUSETTS TO SECURE THE SELECTION AND

echo the twelve-juror requirement in their treatises, invoking strikingly similar language to their eighteenth-century predecessors.

C. *Founding-Era Legal Dictionaries Use "Twelve Men" Synonymously with "Jury"*

Legal dictionaries offer another opportunity to grapple with contemporaneous usage and public meaning at ratification.[172] Indeed, in interpreting constitutional text, Justices have on occasion looked to dictionaries to "confirm that the public shared [an] understanding."[173]

Among dictionaries available at the Founding, Giles Jacob's *A New Law Dictionary* enjoyed unparalleled popularity in law libraries.[174] In fact, his

APPOINTMENT OF AN IMPARTIAL JURY IN CASES CIVIL AND CRIMINAL 7 (Boston, Russell, Odiorne & Co. 1834) ("The trial by jury is by twelve free and lawful men . . . ."); FRANCIS HILLIARD, THE ELEMENTS OF LAW 338 (New York, John S. Voorhees 2d ed. 1848) ("A *jury* consists of twelve men . . . ."); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 345 (Philadelphia, Edward Eagle 1819) ("The petit jury, when sworn, must consist precisely of twelve . . . . If, therefore, the number returned be less than twelve, any verdict must be ineffectual, and the judgment will be reversed for error."); WARREN WOODSON, A TREATISE ON AMERICAN LAW 158 (Nashville, Cameron & Fall, Off. Tenn. Agriculturist 1843) ("The jury is to consist of twelve men."); 3 JOHN BOUVIER, INSTITUTES OF AMERICAN LAW 327 (Philadelphia, Childs & Peterson 1858) ("By *jury* is understood a body of twelve men . . . ."); HENRY FLANDERS, AN EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 209 (Philadelphia, T. & J.W. Johnson & Co. 4th ed. 1885) ("A *petit* jury consists of twelve men . . . ."); 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 897, at 546 (Boston, Little, Brown & Co. 2d ed. 1872) ("[A] jury of less than twelve . . . is not a jury; and a statute authorizing a jury of less, in a case in which the Constitution guarantees a jury trial, is void."); SEYMOUR D. THOMPSON & EDWIN G. MERRIAM, A TREATISE ON THE ORGANIZATION, CUSTODY AND CONDUCT OF JURIES § 6 (St. Louis, Mo., William H. Stevenson 1882) ("[W]here the record shows that the cause was tried by a jury of less than twelve men, the trial will be held to be a nullity . . . ."); JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 89 n.4 (Boston, Little, Brown & Co. 1898) (explaining that a "verdict, taken from eleven, was no verdict" at all).

172. *See* Nelson, *supra* note 128, at 519 (noting that some scholars look to "old dictionaries and other evidence of how the words in the Constitution were used at the time of the founding"); U.S. DEP'T OF JUST., OFF. OF LEGAL POL'Y, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 9 (1987) ("Contemporaneous dictionaries . . . are usually helpful in determining the general and popular use of constitutional language at the time it was ratified.").

173. McDonald v. City of Chicago, 561 U.S. 742, 814 (2010) (Thomas, J., concurring in part and concurring in the judgment); *see also* United States v. Jimenez-Shilon, 34 F.4th 1042, 1044–45 (11th Cir. 2022) (noting favorably that a definition "[found] support in Founding-era dictionaries").

174. *See* HERBERT A. JOHNSON, IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES, 1700–1799, at 59–64 (1978) (finding that Jacob's dictionary was in twice as many law libraries as the second most popular, John Cowell's *Interpreter*); EDWIN WOLF II, THE BOOK CULTURE OF A COLONIAL AMERICAN CITY: PHILADELPHIA BOOKS, BOOKMEN, AND BOOKSELLERS 151 (1988) (observing the prevalence of Jacob's dictionary among both lawyers and ordinary citizens).

treatises, along with his dictionary, have been catalogued in the private libraries of Founders, and later Presidents, John Adams and Thomas Jefferson.[175]

Jacob's *A New Law Dictionary* defines the term "Twelve Men" interchangeably with "jury."[176] Indeed, the definition for "Twelve Men" reads: "Is a number of *twelve* persons or upwards, by whom and whose oath as to matter of fact all trials pass, both in civil and criminal causes, through all courts of the Common law in this realm."[177] The stated definition concludes: "They are otherwise called the *jury* or *inquest*. See *Jury*."[178] The definition for "Jury," by comparison, reads: "Signifies a certain number of men sworn to inquire of and try the matter of fact, and declare the truth upon such evidence as shall be delivered them."[179] It further specifies that the "certain number" is twelve for "the petit jury," noting that "all the twelve must agree."[180]

The definition of "verdict" in Jacob's *A New Law Dictionary* is also telling. Jacob defines "verdict" as "the answer of a jury given to the court, concerning the matter of fact in any cause committed to their trial; wherein every one of the *twelve* jurors must agree or it cannot be a *verdict*."[181] The dictionary goes on to clarify: "If there be eleven jurors agreed and but one dissenting the verdict shall not be taken."[182] Another telling definition is that of "*tales*." Jacob's dictionary defines "*tales*" as jurors who "supply the places of such of the jurors as were wanting of the number of *twelve*."[183] In other words, when there are not sufficient jurors "appearing, or on their appearance [are] challenged as not indifferent," *tales* jurors fill in to reach the twelve required for trial.[184] Each of these definitions is indicative of the importance that Founding-era dictionaries placed on twelve jurors.

"Twelve men" is written in place of the word "jury" in a number of foundational colonial documents, underscoring their interchangeable usage in the seventeenth and eighteenth centuries. The New York Charter of Libertyes

175. *See* Gary L. McDowell, *The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation*, 44 AM. J. LEGAL HIST. 257, 261 (2000) (first citing 2 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON (E. Millicent Sowerby ed., 1953); and then citing CATALOGUE OF THE JOHN ADAMS LIBRARY IN THE PUBLIC LIBRARY OF THE CITY OF BOSTON (Lindsay Swift ed., 1917)).

176. GILES JACOB, A NEW LAW DICTIONARY 949 (J. Morgan ed., London, W. Strahan & W. Woodfall 10th ed. 1782).

177. *Id.* (emphasis added).

178. *Id.*

179. *Id.* at 539 (emphasis omitted).

180. *Id.* (emphasis omitted) ("Anciently the *jury* as well in Common Pleas, as Pleas of the Crown were *twelve* . . . .").

181. *Id.* at 954 (first emphasis added).

182. *Id.*

183. *Id.* at 911.

184. *Id.*

and Priviledges is one such example.[185] It provides that "[a]ll Tryalls shall be by the verdict of twelve men."[186] The Pennsylvania Frame of Government, a foundational document for the colony, likewise uses the term to indicate a jury trial guarantee: "[A]ll trials shall be by twelve men."[187] The Concessions and Agreements of West New Jersey similarly refers to "judgment passed by twelve good and lawful men" to indicate a jury trial right.[188]

The interchangeable use of "twelve men" and "jury" continued on the other side of the Atlantic throughout the eighteenth century as well. For example, a prominent House of Lords opinion in 1758—one that no doubt shaped the Founders' understanding of the writ of habeas corpus—states: "It must be taken to be true, until twelve men, upon their oaths, have said that it is false."[189] In other words, the court will assume the truth of a writ of habeas corpus unless and until a jury finds otherwise.

The interchangeable use of "twelve men" and "jury" can also be observed in statutory text at the time. In fact, before proposing the federal Bill of Rights, James Madison authored a number of bills passed by the Virginia legislature that invoke the term "twelve men" to indicate "jury."[190] For instance, "A Bill for Regulating Proceedings in Courts of Common Law" dated June 18, 1779, states: "No judgment, after a verdict of twelve men, shall be stayed or reversed, for any defect, or fault."[191] The phrase "twelve men" is used as a term of art in this context to mean "jury." The statute, in other words, states that judgment rendered after a jury verdict may not be "stayed or reversed."[192]

D. *Early Precedents Equate Constitutional Right with Eighteenth-Century English Common Law*

The Supreme Court, writing in 1970, presumed based on the limited record before it that "there is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury."[193] The Court reiterated the same three years later in

185. NEW YORK CHARTER OF LIBERTYES AND PRIVILEDGES (1683), *reprinted in* 1 THE BILL OF RIGHTS, *supra* note 32, at 163.

186. *Id.* at 165.

187. PENNSYLVANIA FRAME OF GOVERNMENT (1682), *reprinted in* 1 THE BILL OF RIGHTS, *supra* note 32, at 132, 140.

188. CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY ch. XVII (1677), *reprinted in* 1 THE BILL OF RIGHTS, *supra* note 32, at 126, 127.

189. Opinion on the Writ of Habeas Corpus (1758) 97 Eng. Rep. 29, 43 (HL).

190. *See, e.g.*, 12 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 354, 355 (William Waller Hening ed., Richmond, George Cochran 1823) (printing a bill authored by James Madison from 1786).

191. James Madison, *A Bill for Regulating Proceedings in Courts of Common Law*, *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON 599, 611 (Julian P. Boyd ed., 1950).

192. *See id.*

193. Williams v. Florida, 399 U.S. 78, 99 (1969).

1973 when asked the question in the Seventh Amendment context: "[W]hat was said [earlier] . . . is equally applicable here: constitutional history reveals no intention on the part of the Framers 'to equate the constitutional and common-law characteristics of the jury.'"[194]

Curiously, neither party, none of the amici, nor the four dissenting Justices raised the time-honored rules of construction discussed in Matthew Bacon's *A New Abridgment of the Law*. The Founders were no doubt familiar with Bacon's *Abridgment* as "the leading authority for interpretive canons in the eighteenth century."[195] Bacon's treatise explains: "If a Statute make use of a Word the Meaning of which is well known at the Common Law, such Word shall be taken in the same Sense it was understood at the Common Law."[196] The word "jury" had a well-known meaning at common law in 1791,[197] which by the rules of construction at the time, the Founders would expect to imbue to its use in the Seventh Amendment.

As Justice Story explained, writing for the Court in 1820, the common law "definitions are necessarily included, as much as if they stood in the text."[198] Or as Chief Justice John Marshall declared in 1824, writing for a unanimous Court, if Americans understood a word to have a meaning "when the Constitution was framed, . . . [t]he [constitutional] convention must have used the word in that

194. Colgrove v. Battin, 413 U.S. 149, 156 (1973) (quoting *Williams*, 399 U.S. at 99). *But see id.* at 171 (Marshall, J., dissenting) ("Certainly, that has been this Court's understanding in the past. In *Dimick v. Schiedt*, for example, the Court held that the Seventh Amendment 'in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791,' and the dissent agreed that the purpose of the Seventh Amendment was 'to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution.' In *Baltimore & Carolina Line, Inc. v. Redman*, the Court held that the 'right of trial by jury thus preserved (by the Seventh Amendment) is the right which existed under the English common law when the Amendment was adopted.' And in *American Publishing Co. v. Fisher*, the Court held that what was guaranteed by the Seventh Amendment was 'the peculiar and essential features of trial by jury at the common law.'" (citations omitted)).

195. Mark Moller & Lawrence B. Solum, *The Article III "Party" and the Originalist Case Against Corporate Diversity Jurisdiction*, 64 WM. & MARY L. REV. 1345, 1365 (2023); *see also* Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619, 621 (1997) ("Although Madison was not a lawyer in the sense that he had not practiced, he had studied law 'for years.'" (quoting LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 80 (1995))).

196. 4 BACON, *supra* note 163, at 647; *see also* 1 STORY, *supra* note 168, § 400 n.1, at 384 ("Bacon's Abridg[ment] title, Statute I. contains an excellent summary of the rules for construing statutes."); *cf.* Morissette v. United States, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").

197. *See supra* notes 3–4 and accompanying text.

198. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160 (1820); *cf.* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.").

sense."[199] An attempt to distinguish between the common law meaning and the constitutional meaning of the word "jury" would have been startling to eighteenth-century Americans steeped in Bacon's interpretive canons, especially since the text of the Seventh Amendment itself refers to the "common law"—not once, but twice—to define its scope.[200]

In addition, the predecessors to the Seventh Amendment, from which James Madison drew inspiration, contain references to the "common law." Indeed, the First Continental Congress in October 1774 defined the jury trial right in reference to the common law: "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."[201] Similarly, the Northwest Ordinance of 1787—which inspired the Seventh Amendment and predated it by only four years[202]—declared that the inhabitants of that Territory should "always be entitled to the benefits of . . . the trial by jury . . . and of judicial proceedings according to the course of the common law."[203] The Supreme Court acknowledged as much when writing in 1899:

> A comparison of the language of the seventh amendment, as finally made part of the constitution of the United States, with the declaration of rights of 1774, with the ordinance of 1787, with the essays of Mr. Hamilton in 1788, and with the amendments introduced by Mr. Madison in congress in 1789, strongly tends to the conclusion that the seventh amendment, in declaring that "no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law," had in view the rules of the common law of England . . . .[204]

199. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824).

200. U.S. CONST. amend. VII ("In suits at *common law*, . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined . . . , than according to the rules of the *common law*." (emphasis added)).

201. 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 69 (Worthington Chauncey Ford ed., 1904).

202. 1 THE BILL OF RIGHTS, *supra* note 32, at 385 ("The congressional attempt to provide for the government of those territories resulted in the Northwest Ordinance of 1787—perhaps the greatest achievement of the Confederation government. The Northwest Ordinance contained the first Bill of Rights enacted by the Federal Government.").

203. AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO, art. II (1787), *transcribed at Northwest Ordinance (1787)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/northwest-ordinance [https://perma.cc/8UWX-Y3ZC].

204. Cap. Traction Co. v. Hof, 174 U.S. 1, 7–8 (1899), *abrogated by* Williams v. Florida, 399 U.S. 78 (1970).

The Court in 1973, however, disavowed these prior statements as mere dicta and declined to afford them the deference owed to precedent.[205] Although the Court did not directly consider the question of jury size in the century following the adoption of the Bill of Rights, records indicate that a discussion of the issue took place before Chief Justice John Marshall, presiding over the 1807 treason trial of Aaron Burr.[206] Defense lawyer Luther Martin had not only participated in the Constitutional Convention but also played a leading role in the Anti-Federalist movement that led to the Bill of Rights.[207] His cocounsel Edmund Randolph had an equally impressive background: he was the nation's first Attorney General, secured Virginia's ratification of the Constitution during his tenure as Governor, and worked alongside James Madison and John Marshall on the Virginia committee that proposed a Bill of Rights for the U.S. Constitution.[208] Records demonstrate that both defense lawyer Luther Martin and United States District Attorney George Hay agreed, in open court, that the "common law attributes of jury trial were incorporated in Article III's jury trial mandate."[209]

A number of state courts in the years following ratification of the Seventh Amendment considered the question of jury size, albeit in the context of their own state constitutions. In each of these early precedents, the state courts equated the constitutional jury right with that of the common law.

For example, three years after the Seventh Amendment was ratified, in 1794, a South Carolina court interpreted the word "jury" in its state constitution to require the "rights of the citizens . . . to be determined . . . by 12 men . . . indiscriminately drawn from every class of their fellow citizens."[210] In 1800, a North Carolina court reversed the verdict of thirteen jurors explaining that the term "jury" requires exactly twelve—no more and no less.[211] In the court's words, "no such innovation should be permitted" to "the ancient mode" of twelve jurors.[212] Eight years later, in 1808, the Supreme Court of Pennsylvania

205. Colgrove v. Battin, 413 U.S. 149, 158 (1973).

206. DAVID ROBERTSON, 2 REPORTS OF THE TRIALS OF COLONEL AARON BURR 220–21, 343 (Philadelphia, Hopkins & Earle 1808).

207. Orin S. Kerr, *Decryption Originalism: The Lessons of* Burr, 134 HARV. L. REV. 905, 912 (2021).

208. *Id.* at 911–12.

209. Stanton D. Krauss, *Thinking Clearly About Guilt, Juries, and Jeopardy*, 70 IND. L.J. 921, 926 n.38 (1995); *cf. In re* Klein, 14 F. Cas. 719, 729 (D. Mo. 1843) (No. 7,866) ("Could congress direct a trial by jury, and provide that the jury should consist of three men; and that a majority should convict? No person will assert the affirmative."), *rev'd on other grounds*, 42 U.S. (1 How.) 277 (Catron, Circuit Justice, C.C.D. Mo. 1843).

210. Zylstra v. Corp. of Charleston, 1 S.C.L. 382, 384, 389 (Ct. Com. Pl. 1794) (interpreting constitutional provision stating "[t]he trial by jury, as heretofore used in this State, shall be for ever inviolably preserved").

211. Whitehurst v. Davis, 3 N.C. (2 Hayw.) 113, 113 (Super. Ct. L. & Eq. 1800) (per curiam).

212. *Id.* ("Our constitution declares, that in all controversies at law respecting property, the ancient mode of trial by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.").

had an opportunity to interpret a clause from the Pennsylvania Constitution of 1776 that stated, "the parties have a right to trial by jury, which ought to be held sacred."[213] The court held that term "trial by jury" requires "that all trials shall be by twelve men."[214]

In the ensuing decades, other state supreme courts were given an opportunity to opine on the word "jury" in their own state constitutions. Each held that the term necessitates twelve jurors. The Alabama Supreme Court declared, "There can be no question that every issue of fact must be tried by a jury of twelve men" as "[t]he term jury is well understood to be twelve men."[215]

The Mississippi Supreme Court likewise observed that, to interpret the right to a trial by jury, "we must necessarily recur to the provisions of the common law defining the qualifications, and ascertaining the number of which the jury shall consist; as the standard to which, doubtless, the framers of our constitution referred."[216] Because "[a]t common law the number of the jury, for the trial of all issues involving the personal rights and liberties of the subject, could never be less than twelve," the same is true under the constitutional provision.[217] In the court's words, "[i]t is a general rule that, where terms used in the common law are contained in a statute or the constitution, without an explanation of the sense in which they are there employed, should receive that construction which has been affixed to them by the former."[218]

The Arkansas Supreme Court held the same: "[W]hen the convention incorporated the provision into the constitution . . . , they most unquestionably had reference to the jury trial as known and recognized by the common law."[219] Because "the common law jury consisted of twelve men, . . . as a necessary consequence, since the constitution is silent on the subject, the conclusion is

213. Emerick v. Harris, 1 Binn. 416, 426 (Pa. 1808) (quoting PA. CONST. of 1776, art.11).

214. *Id.* ("These provisions are the same, in substance, with those of the charter of liberties granted by William Penn to the first settlers of the province, in which it is declared 'that all trials shall be by twelve men, and, as near as may be, peers, or equals, and of the neighbourhood, and without just exception' . . . .").

215. Foote v. Lawrence, 1 Stew. 483, 483 (Ala. 1828).

216. Carpenter v. State, 5 Miss. 163, 166 (High Ct. Err. & App. 1839).

217. *Id.* ("[I]n all cases where the term 'jury' is used in our statutes, it is regarded as one of fixed and determined meaning, ascertained by the paramount law.").

218. *Id.* at 166–67 ("Our courts have . . . proceeded on the assumption that, the constituents of the jury, at least so far as the number is involved, have been fixed by the constitution, as they existed at common law, at the time of its adoption."); *see also* Byrd v. State, 2 Miss. 163, 177 (High Ct. Err. & App. 1834) ("Our statute nowhere defines the number necessary to constitute a jury; but the number twelve, known as the number at common law, is no doubt what is meant by the constitution and all the statutes, when a jury is mentioned."); Wolfe v. Martin, 2 Miss. 30, 31 (High Ct. Err & App. 1834) ("There is no jury for the trial of issues known to the constitution and laws of this state, except that which consists of 'twelve good and lawful men . . . .'").

219. Larillian v. Lane & Co., 8 Ark. 372, 374 (1848).

irresistible that the framers of that instrument intended to require the same number."[220]

Adding to the growing consensus that constitutional jury rights required twelve jurors, the Ohio Supreme Court examined its state constitution's declaration that "the *right* of jury trial is recognized to exist."[221] The court began: "What, then, is this right? It is nowhere defined or described in the constitution."[222] In reviewing the history of juries on both sides of the Atlantic, the Court concluded that "beyond controversy the number of the jury at common law . . . . must be twelve," and accordingly reversed a verdict rendered by fewer than twelve jurors.[223] The Wisconsin Supreme Court likewise held that the constitutional right to trial by jury requires twelve jurors because "the meaning of the language used in our Constitution must be gleaned from the common law."[224]

The New York Court of Appeals similarly cautioned that "allow[ing] . . . any number short of a full panel of twelve jurors" "would be a highly dangerous innovation" that "ought not to be tolerated."[225] The Supreme Court of Missouri had its own opportunity to weigh in, holding that "[t]he term 'trial by jury' was well known and understood at the common law, and in that sense it was adopted into our bill of rights."[226] In reviewing the work of other state courts, it concluded they were "unite[d] in declaring that where there is a constitutional

220. *Id.* at 375; *see also* State v. Cox, 8 Ark. 436, 446–47 (1848) ("From the earliest period of the common law the term jury has had a technical and specific meaning, and has ever signified a body of twelve citizens . . . . The constitutional provisions securing the right of trial by a jury means a jury of twelve men, according to the known technical meaning of the term."), *overruled on other grounds by* Eason v. State, 11 Ark. 481 (1851); State v. Burket, 9 S.C.L. 155, 155 (S.C. Const. Ct. App. 1818) ("To constitute a jury, every lawyer knows that twelve lawful men are necessary, and that without this number no jury can exist . . . .").

221. Work v. State, 2 Ohio St. 296, 302 (1853), *overruled by* State *ex rel.* City of Columbus v. Boyland, 58 Ohio St. 2d 490 (1979).

222. *Id.* ("It is spoken of as something already sufficiently understood, and referred to as a matter already familiar to the public mind . . . . If ages of uninterrupted use can give significance to language, the right of jury trial and the habeas corpus stand as representatives of ideas as certain and definite as any other in the whole range of legal learning.").

223. *Id.* at 304; *see also id.* at 302 ("The institution of the jury referred to in our constitution, and its benefits secured to every person accused of crime, is precisely the same in every substantial respect as that recognized in the great charter and its benefits secured to the freemen of England, and again and again acknowledged in fundamental compacts as the great safeguard of life, liberty, and property."); Lamb v. Lane, 4 Ohio St. 167, 177 (1854) ("That the term 'jury,' without addition or prefix, imports a body of twelve men in a court of justice, is as well settled as any legal proposition can be." (first citing *Work*, 2 Ohio St. at 307; and then citing Willyard v. Hamilton, 7 Ohio 111, 117 (1836))).

224. Labowe v. Balthazor, 193 N.W. 244, 245 (Wis. 1923); *accord* City of Jackson v. Clark, 118 So. 350, 354 (Miss. 1928); *see also* Norval v. Rice, 2 Wis. 22, 29 (1853) ("'The right of trial by jury shall remain inviolate;' that is, it shall continue as it was at the time of the formation and adoption of the Constitution by the people of this State.").

225. Cancemi v. People, 18 N.Y. 128, 138 (1858), *superseded on other grounds by state constitutional amendment*, N.Y. CONST. art. 1, § 2, art. 6, § 18.

226. Vaughn v. Scade, 30 Mo. 600, 604 (1860).

guaranty of the right to trial by jury, twelve is the number of which the jury must be composed."[227] The Superior Court of Judicature of New Hampshire—the equivalent of its modern Supreme Court—concluded likewise, holding that the term "jury" was "used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of twelve men."[228]

III. ARCHIVAL RECORDS DISCLOSE DRAFTERS' INTENT FOR TWELVE JURORS

The United States Supreme Court, writing in 1973, began with the acknowledgment that "we have almost no direct evidence concerning the intention of the framers of the seventh amendment itself."[229] The Court's admission has become less and less true over time, thanks in part to the work of archivists who have worked diligently to preserve and digitize foundational documents. These records, when placed in the appropriate context, provide important insight into the events that led to the drafting and ultimate ratification of the civil jury right enumerated in the Seventh Amendment.

Part III examines three key sources of historical evidence that shed new light on the Framers' intent regarding the twelve-juror requirement. First, it analyzes the complete lectures and writings of James Wilson—a constitutional framer and later Supreme Court Justice—revealing that his views on jury size were misinterpreted by the Court's partial quotation in 1973. Second, it explores a landmark 1780 New Jersey Supreme Court decision that struck down a six-person jury provision as unconstitutional—a case that involved three individuals who would later play pivotal roles in drafting and ratifying the Seventh Amendment. Finally, it uncovers the intellectual influence of the Marquis de Condorcet's mathematical work on jury size on the Amendment's key architects, particularly James Madison and Thomas Jefferson, demonstrating that the twelve-juror requirement was grounded in rational calculation rather than mere tradition. Together, these archival sources provide compelling evidence that the Framers deliberately preserved the common law requirement of twelve jurors as an essential feature of the civil jury right.

227. *Id.*

228. Opinion of Justices, 41 N.H. 550, 551–52 (1860) ("[N]o such thing as a jury of less than twelve men, or a jury deciding by less than twelve voices, had ever been known, or ever been the subject of discussion in any country of the common law.").

229. Colgrove v. Battin, 413 U.S. 149, 152 (1973).

A. *Founder, and Later Justice, James Wilson Insisted on "No Less than Twelve" Jurors*

The Court believed it had found one instance—a single quote—in which a Founder did not express concern "for preservation of the traditional number 12."[230] The Founder in question, James Wilson of Pennsylvania, no doubt served as a bellwether of Founding-era sentiment. President George Washington appointed him to the Supreme Court several months after assuming the Presidency.[231] While the Bill of Rights was still being ratified, Justice Wilson delivered a lecture series "drawing on his experience as one of the most active members of the Constitutional Convention" of 1787.[232]

A quote from Justice Wilson's lectures created doubt in the majority's mind. The five Justices admitted: "It is true, of course, that several earlier decisions of this Court have made the statement that 'trial by jury' means 'a trial by a jury of twelve.'"[233] The Justices, however, disclaimed these prior statements as "at best an assumption" that should not be accorded "the authority of decided precedents" in light of the ambiguity created by Wilson's quote.[234]

The statement in question, as the Court quoted it, reads: "When I speak of juries, I feel no peculiar predilection for the number twelve . . . ."[235] However, it turns out that the Court only partially quoted Justice Wilson's lecture. The ellipsis leaves out perhaps the most important portion of the sentence. The full quote reads: "When I speak of juries, I feel no peculiar predilection for the number twelve: a grand jury consists of more, and its number is not precisely fixed."[236]

Wilson, in other words, was expressing ambivalence toward the number of jurors impaneled on grand juries in criminal proceedings—he was not discussing petit juries in civil proceedings that were the focus of the Court's 1973 decision. Indeed, a review of the entirety of his lecture resolves any doubt.

230. *Id.* at 156 n.10.

231. *See* Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

232. *Id.*; *see also* MAX FARRAND, THE FRAMING OF THE CONSTITUTION 198 (1913) (referring to James Wilson as "Madison's ablest supporter").

233. *Colgrove*, 413 U.S. at 157 (first quoting Cap. Traction Co. v. Hof, 174 U.S. 1, 13 (1899); then citing Am. Publ'g Co. v. Fisher, 166 U.S. 464 (1897); and then citing Maxwell v. Dow, 176 U.S. 581 (1900)).

234. *Id.* at 158.

235. *Id.* at 156 n.10 (alteration in original) (quoting 2 THE WORKS OF JAMES WILSON 503 (R. McCloskey ed., 1967)).

236. JAMES WILSON, THE SUBJECT CONTINUED. OF JURIES [hereinafter WILSON, OF JURIES], *reprinted in* 2 COLLECTED WORKS OF JAMES WILSON 954, 954 (Kermit L. Hall & Mark David Hall eds., 2007).

Justice Wilson, in the same lecture, clarified that, "[a] grand jury must consist of at least twelve members, because twelve are necessary."[237]

Elsewhere in the lecture, Justice Wilson touched on petit juries in civil proceedings—those now under the purview of the Seventh Amendment—stating that "no less than twelve persons should be called in all ordinary causes."[238] In another passage, Justice Wilson asked, "What is a verdict?," thereafter providing the answer: "It is the joint declaration of twelve jurymen upon their oaths."[239] Justice Wilson also quoted English legal scholar and judge Sir Thomas Littleton, who referred to jury verdicts as "the verdict of twelve men."[240]

At his Philadelphia lectures, Justice Wilson commented on petit juries in criminal proceedings as well—those now under the purview of the Sixth Amendment. He stated, "To the conviction of a crime, the undoubting and the unanimous sentiment of the twelve jurors is of indispensable necessity."[241] Elsewhere in the lectures, Justice Wilson explained that the word "jury" in Article III indicated a common law jury of at least twelve jurors: "By the national constitution, crimes committed in any state shall be tried in that state: and by a law of the United States, twelve, at least, of the jurors must be summoned from the very county, in which the crime was committed."[242]

In context, Justice Wilson's complete writings from his Philadelphia lectures demonstrate his consistent view that a petit "jury," whether civil or criminal, must consist of at least twelve jurors. While the Court quoted only a portion of Wilson's statement about having "no peculiar predilection for the number twelve," the full context of his lectures reveals his clear position that twelve jurors were required for petit juries in both civil and criminal cases. The Court's reliance on the shortened quote as evidence of Founding-era flexibility regarding jury size appears to overlook Wilson's numerous other statements affirming the necessity of twelve jurors in petit jury trials.

237. JAMES WILSON, OF THE DIFFERENT STEPS PRESCRIBED BY THE LAW, FOR APPREHENDING, DETAINING, TRYING AND PUNISHING OFFENDERS [hereinafter WILSON, OF THE DIFFERENT STEPS], *reprinted in* 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 236, at 1175, 1181.

238. WILSON, OF JURIES, *supra* note 236, at 967; *cf.* 2 RICHARD BURN, A NEW LAW DICTIONARY 45 (John Burn ed., London, A. Strahan & W. Woodfall 1792) ("[U]pon a trial by a petit jury, it can be by no more, nor less, than 12 . . . .").

239. WILSON, OF JURIES, *supra* note 236, at 980.

240. *Id.*

241. *Id.* at 985.

242. WILSON, OF THE DIFFERENT STEPS, *supra* note 237, at 1194.

B. *New Jersey Supreme Court Holds Alleged Traitors Have Constitutional Right to Twelve Jurors*

During the Revolutionary War—and eleven years before the Bill of Rights was ratified—the New Jersey Supreme Court, in one of the earliest American instances of judicial review, declared unconstitutional a wartime statute offering alleged traitors only six jurors in civil forfeiture trials.[243] The Enemy Seizure Act,[244] as passed by the New Jersey legislature, permitted six jurors to render a verdict in civil forfeiture cases where loyalists were accused of transporting "provisions, goods, wares and merchandize" to British troops.[245] Furthermore, the Act provided that "in every cause where a jury of six men give[s] a verdict . . . there shall be no appeal allowed."[246] As an incentive to American militias, the Act provided that those who seize goods en route to British troops—and win at trial—may collect the proceeds from the sale of those seized goods.[247]

Records show that the petition for certiorari listed "the unconstitutionality of the trial with six jurors" as a reason for reversal and cited a provision of the New Jersey Constitution of 1776 that provided, "[T]he inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal, forever."[248] The Chief Justice of the New Jersey Supreme Court issued its decision orally on September 7, 1780.[249] The court minutes on that date read, "[T]he Judgment of the Justice in the Court below be revers'd and [the alleged loyalists] be restored to all Things."[250]

243. *See* Scott, Holmes v. Walton, *supra* note 36, at 458–60.

244. New Jersey, *An Act to Prevent the Subjects of this State from Going into, or Coming Out Of, the Enemy's Lines, Without Permissions or Passports, and for Other Purposes Therein Mentioned* (Oct. 8, 1778), *reprinted in* ACTS OF THE COUNCIL AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY app. at 8 (Peter Wilson ed., Trenton, N.J. 1784) (act commonly referred to as the "Enemy Seizure Act").

245. *Id.* app. at 10–11 (incorporating by reference the jury trial provisions of an act of Feb. 11, 1775); New Jersey, *An Act to Erect and Establish Courts in the Several Counties in this Colony for the Trial of Small Causes, and to Repeal the Former Act for that Purpose* (Feb. 11, 1775), *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW JERSEY 468, 470–72 (Burlington, N.J., Samuel Allinson 1776) (providing for a trial by a six-member jury); *see also* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 409–10 (2008) [hereinafter HAMBURGER, LAW AND JUDICIAL DUTY] (explaining the relationship between these two acts); Scott, Holmes v. Walton, *supra* note 36, at 456.

246. New Jersey, *An Act to Erect and Establish Courts*, *supra* note 245, at 472; *see also* Scott, Holmes v. Walton, *supra* note 36, at 457.

247. *See* Scott, Holmes v. Walton, *supra* note 36, at 457 ("The law . . . further provided that if the plaintiff should win the suit the proceeds from the sale of the goods were to be divided among the persons seizing them.").

248. HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 245, at 414; N.J. CONST. of 1776, art. XXII, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 37, at 2598, 2598.

249. *See* Scott, Holmes v. Walton, *supra* note 36, at 456 n.1.

250. HAMBURGER, LAW AND JUDICIAL DUTY, *supra* note 245, at 416.

As historians have lamented, "Persistent search has failed to discover the opinion of Chief Justice Brearley delivered in this case."[251] An archival source, however, confirms that the New Jersey Supreme Court reversed "on the ground that the legislature's authorization of six person juries violated the state's constitutional guarantee of 'the inestimable right of trial by jury.'"[252] In addition, subsequent early nineteenth-century cases cite to the outcome, noting that although the state constitution did not explicitly specify the number of jurors, the New Jersey Supreme Court struck down the statute providing for six jurors as unconstitutional.[253]

The stakes could not have been higher. New Jersey served as a border state at the time, separating the American and British forces during the Revolutionary War. Smuggling undermined American morale and gave the British a tactical advantage.[254] The Enemy Seizure Act of 1778 had been passed by the New Jersey General Assembly without a single dissenting vote after New Jersey Governor William Livingston called on them to do so, stressing that smuggling across enemy lines represented "one of the most important objects that can engage the attention of the legislature."[255] In striking down the Enemy Seizure Act, the New Jersey Supreme Court affirmed that despite "profound military and economic emergencies," fealty to constitutional jury rights remained paramount.[256]

Constitutional historians have suggested that the delegates to the Constitutional Convention in Philadelphia during the summer of 1787 had the New Jersey Supreme Court's decision on their minds, as evidence indicates the case was discussed in Philadelphia newspapers and Convention-era pamphlets.[257] In fact, Pennsylvania's Gouverneur Morris had mentioned the case in an address to the Pennsylvania legislature assembled in Philadelphia two years earlier.[258]

251. *See* Scott, Holmes v. Walton, *supra* note 36, at 459; William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 474 (2005) ("There is no surviving copy of the opinion—it appears the decision was delivered orally . . . .").

252. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 152 (2014) [hereinafter HAMBURGER, ADMINISTRATIVE LAW].

253. State v. Parkhurst, 9 N.J.L. 427, 444 (1802) ("And upon this decision the act . . . was repealed, and a constitutional jury of twelve men substituted in its place.").

254. HAMBURGER, ADMINISTRATIVE LAW, *supra* note 252, at 152.

255. Scott, Holmes v. Walton, *supra* note 36, at 460.

256. HAMBURGER, ADMINISTRATIVE LAW, *supra* note 252, at 154.

257. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 936 n.184, 939 (2003).

258. *See* Scott, Holmes v. Walton, *supra* note 36, at 464 ("In 1785, Gouverneur Morris sent to the Pennsylvania legislature an address, whose object was to dissuade that body from passing a law to repeal the charter of the National Bank. In the course of that address he says: 'A law was once passed in New Jersey, which the judges pronounced unconstitutional, and therefore void. Surely no good citizen can

Perhaps more importantly, three of the leading figures involved in the case went on to play key roles at the Constitutional Convention and First Congress. First, Chief Justice David Brearley, who delivered the oral opinion on behalf of the New Jersey Supreme Court, served as a representative to the Philadelphia Convention that drafted the Constitution.[259] Second, New Jersey Attorney General William Paterson served on the conference committee that reconciled the Seventh Amendment's language between the House and Senate.[260] Third, and finally, defense attorney Elias Boudinot later served as a representative in the First Congress, where he participated in House debates over the Bill of Rights.[261] After their involvement in a case that garnered national attention, it is unlikely that these three men would have agreed—without debate—to drafting of the jury trial right in a manner contrary to the definition decided by the highest court of their home state, or in the case of Chief Justice Brearley, the definition that he himself announced as Chief Justice of the New Jersey Supreme Court.[262]

C. *Drafters Held Condorcet's Jury Theorem in High Regard*

Given the limited record before it, the Supreme Court presumed that the twelve-juror tradition at common law "rest[ed] on little more than mystical or superstitious insights."[263] Indeed, the failure of the petitioner to offer any citations to historical documents or social science research led the Court to conclude that the number twelve must have been "unnecessary to effect the purposes of the jury system and wholly without significance except to mystics."[264]

Although the twelve-juror requirement dates back nearly nine centuries to the reign of King Henry II, who "established twelve as the usual number" for a

wish to see this point decided in the tribunals of Pennsylvania. Such power in judges is dangerous; but unless it somewhere exists, the time employed in framing a bill of rights and form of government was merely thrown away.'").

259. *See* WARREN, *supra* note 38, at 44–45.

260. *See* LABUNSKI, *supra* note 39, at 239; *see also* Ware *ex rel.* Jones v. Hylton, 3 U.S. (3 Dall.) 199, 245–56 (1796) (Paterson, J.) (documenting that Paterson would go on to serve as a Justice in the first Supreme Court case to hold a state law unconstitutional).

261. *See* 1 ANNALS OF CONG., *supra* note 40, at 685–91.

262. *See also* Prakash & Yoo, *supra* note 257, at 939 n.206 ("Delegates William Livingston and William Paterson likely knew of *Holmes* as well because the former was the Governor and Paterson was Attorney General at the time of the decision.").

263. Williams v. Florida, 399 U.S. 78, 88 (1970).

264. *Id.* at 102.

jury,[265] the Court's five-member majority shared Justice Oliver Wendell Holmes's skepticism of tradition for tradition's sake:

> It is revolting to have no better reason for a rule of law than it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid have vanished long since, and the rule simply persists from blind imitation of the past.[266]

In the fullness of time, historical records have since been recovered indicating that the drafters of the Seventh Amendment were not blindly imitating the past and had engaged in far deeper discussions of jury-related probability calculus than the Justices writing in 1970 could have imagined.

Indeed, six years before the Bill of Rights were adopted, in 1785, French political economist and mathematician Marquis Nicolas de Condorcet, who served as Secretary of the Academy of Science in Paris at the time, published his *Essay on the Application of Mathematics to the Theory of Decision Making* ("*Essai*")—including what has come to be known as the "Condorcet Jury Theorem."[267] His Jury Theorem is still, to this date, foundational to the economic theory of information aggregation. Simply stated, it implies, using probability calculus, that a larger jury, on average, is more likely to reach an accurate verdict.[268] Each additional juror adds incremental accuracy to the verdict.[269] That said, it predicts that the benefit of each additional juror gets smaller and smaller, until it approaches essentially zero.[270]

The Condorcet Jury Theorem, in other words, puts mathematical precision to the intuition that increasing the number of jurors increases the accuracy of the verdict, until a point at which the verdict is so accurate that adding additional jurors no longer makes much difference. Under the theorem, changing the number of jurors, in essence, changes the expected error rate of

265. James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 295, 295 (1892); *see also* AUSTIN WAKEMAN SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW 76 (1922) (observing that "[b]y the middle of the fourteenth century[,] the requirement of twelve had probably become definitely fixed" and had "c[o]me to be regarded with something like superstitious reverence").

266. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

267. *See* CONDORCET, *supra* note 41, at 48–49; Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1498 (1999) (explaining that increasing the number of jurors "to the traditional twelve" will "make trial by jury more accurate" as it "exploit[s] the Condorcet jury theorem").

268. *See* SCOTT E. PAGE, THE MODEL THINKER: WHAT YOU NEED TO KNOW TO MAKE DATA WORK FOR YOU 27, 33, 40 (2018).

269. *See* CONDORCET, *supra* note 41, at 60–61 (explaining that each additional voter increases the probability of a correct collective decision).

270. *See* Bernard Grofman & Scott L. Feld, *Rousseau's General Will: A Condorcetian Perspective*, 82 AM. J. POL. SCI. 567, 571 (1988) (discussing the diminishing marginal returns of additional jury members under Condorcet's theorem).

the jury verdict—how often the jury gets it wrong.[271] The theorem predicts that when there are only a small number of jurors, the benefit of adding one additional juror is quite large, whereas when the number of jurors is already large, the benefit of adding an additional juror is only marginal.[272] Deciding the number of jurors, in other words, is akin to deciding the error rate that society is willing to tolerate in its jury verdicts.[273] The number of jurors, therefore, matters if one cares about the mathematical likelihood of justice.

Although originally written in French, Condorcet's *Essai* quickly "percolat[ed] through American political discourse at the time of the Framing."[274] Indeed, in the years before the Bill of Rights was adopted, Condorcet's work found its way into American private collections, public libraries, and even newspapers.[275] One indication of Condorcet's intellectual influence comes from the city of New Haven, Connecticut, which went as far as naming Condorcet "an honorary citizen."[276]

Condorcet's intellectual influence on Founders Thomas Jefferson and James Madison is particularly notable. As the United States' Minister to France from 1784 to 1789, Jefferson came to know Condorcet personally.[277] They met frequently during his time in France, and both shared a passion for bringing the rigor of the scientific method to politics.[278] Condorcet personally gave Jefferson a copy of the *Essai* outlining his Jury Theorem.[279] Archivists have confirmed that Jefferson's private library contained four of Condorcet's other published works.[280]

Jefferson reportedly sent James Madison a number of Condorcet's writings, calling them "the most judicious statement I have seen of the great

271. *See* Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. 617, 618–19 (1992) (analyzing how jury size affects the probability of correct decisions under Condorcet's framework).

272. *See* ROBERT E. GOODIN & KAI SPIEKERMANN, AN EPISTEMIC THEORY OF DEMOCRACY 21–22 (2018).

273. Grofman & Feld, *supra* note 270, at 571.

274. Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to* The Law of Other States, 59 STAN. L. REV. 1281, 1292 (2007).

275. *See* PAUL MERRILL SPURLIN, THE FRENCH ENLIGHTENMENT IN AMERICA: ESSAYS ON THE TIMES OF THE FOUNDING FATHERS 121–29 (1984).

276. *Id.* at 122; *see also* Max M. Mintz, *Condorcet's Reconsideration of America as a Model for Europe*, 11 J. EARLY REPUBLIC 493, 494 (1991).

277. *See* R.B. BERNSTEIN, THOMAS JEFFERSON 55–57 (2003).

278. *See* Iain McLean & Arnold B. Urken, *Did Jefferson or Madison Understand Condorcet's Theory of Social Choice?*, 73 PUB. CHOICE 445, 445 (1992).

279. *See* Arnold B. Urken, *The Condorcet-Jefferson Connection and the Origins of Social Choice Theory*, 72 PUB. CHOICE 213, 224 (1991).

280. *See id.* at 215, 218 (1991) (observing that Jefferson's library included copies of the *Essai*, *Lettres d'un citoyen des Etats Unis* (1788), *Sentiments d'un Républican sur les Assemblées Provinciales et les États-Généraux* (1788), *Reflexions sur les l'esclavage des Nègres* (1788), and *Esquisse d'un tableau historique des progrès de l'esprit Humain* (1795)).

questions which agitate [France] at present."[281] Madison reacted enthusiastically upon reviewing them, circulating them to Virginia Governor Edmund Randolph and telling him that they "contain[ed] more correct information than has been communicated to the public through any other channel."[282]

Shortly before Madison drafted the Bill of Rights, on January 12, 1789, Jefferson wrote him, stating: "We have lately had three books published which are of great merit in different lines. . . . The second is a work on government by the Marquis de Condorcet . . . . I shall secure you a copy."[283] Jefferson fulfilled his promise, and archivists have confirmed that Madison's private library contained "at least three works by Condorcet, including the *Essai* in which the full Jury Theorem appears."[284]

These historical records indicate that Madison's drafting of the Seventh Amendment was not simply codification of "mystical or superstitious insights," as the Court presumed, but rather reflected a degree of thoughtfulness in an attempt to balance the cost imposed by a jury system against the desire for accurate justice at trial.[285] The percolation of Condorcet's Jury Theorem in American political thought during the late eighteenth century suggests educated American readers at the time might have understood the Seventh Amendment jury right as grounded in mathematical concepts.[286] In fact, Condorcet was, by the time of ratification, so well-known that the *National Gazette* shortly thereafter published a column Condorcet authored for the American audience titled, *Thoughts on Constitutions*.[287]

Condorcet's direct engagement with the American public through such writings underscores the broader influence of his ideas on the Founding generation, demonstrating that the jury system's structure was influenced not just by tradition, but also by emerging mathematical and probabilistic insights into collective decision-making.

It is worth noting that Condorcet's insights continue to shape modern political science and institutional design.[288] Contemporary scholars regularly apply his Jury Theorem to analyze everything from legislative voting

281. Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* 13 THE PAPERS OF THOMAS JEFFERSON, *supra* note 191, at 440, 441 (1956); SPURLIN, *supra* note 275, at 122.

282. Letter from James Madison to Edmund Randolph (Oct. 28, 1788), *in* 11 THE PAPERS OF JAMES MADISON 320, 320 (Robert A. Rutland & Charles F. Hobson eds., 1977); SPURLIN, *supra* note 275, at 122–23.

283. Letter from Thomas Jefferson to James Madison (Jan. 12, 1789), *in* 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 191, at 436, 437 (1958).

284. Rosenkranz, *supra* note 274, at 1291 (citing McLean & Urken, *supra* note 278, at 447–48).

285. Williams v. Florida, 399 U.S. 78, 88 (1970).

286. Rosenkranz, *supra* note 274, at 1291–92.

287. *See* SPURLIN, *supra* note 275, at 124.

288. *See* HELENE LANDEMORE, DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY 156–58 (2013) (analyzing how Condorcet's insights apply to modern democratic institutions).

procedures to the optimal size of appellate panels.[289] The theorem has proven particularly influential in studies of deliberative democracy and information aggregation in political institutions. Recent empirical research has validated Condorcet's core insight that larger groups tend to make more accurate decisions under certain conditions, though scholars continue to debate the precise boundaries of these conditions.[290] This enduring relevance makes the Supreme Court's dismissal of the twelve-juror requirement as mere mysticism particularly unfortunate, as it overlooked both the historical mathematical foundations of jury size and their continued significance in political science and institutional design theory.

IV. TWELVE JURORS ARE NOT FUNCTIONALLY EQUIVALENT TO SIX JURORS

While the Supreme Court acknowledged in 1970 that the number of jurors seated at trial may have had historical significance that it was unable to ascertain, given the limited record available, it presumed that the issue was of little practical significance.[291] In the Court's words, "the reliability of the jury as a factfinder hardly seems likely to be a function of its size."[292]

The Court specified two practical goals of the jury.[293] First, in the Court's words, "the number should probably be large enough to promote group

289. *See generally, e.g.*, Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 AM. L. & ECON. REV. 1 (2003) (discussing how the Condorcet Jury Theorem provides insights into strategic voting and information transmission in legislatures); Maxwell L. Stearns, *The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore*, 3 THEORETICAL INQUIRIES L. 125 (2002) (applying the Jury Theorem to analyze optimal size of appellate panels).

290. *See* Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POL. PHIL. 277, 283–88 (2001) (demonstrating the Jury Theorem's modern applications to various democratic decision-making processes).

291. Williams v. Florida, 399 U.S. 78, 100 (1970).

292. *Id.* at 100–01. The speculative aspect to the Court's statements—and use of terms such as "likely" and "probably"—was not unusual given the nascent state of jury-focused social science research at the time. *See* Robert J. MacCoun, *Experimental Research on Jury Decision-Making*, 30 JURIMETRICS J. 223, 223 (1990) ("[B]ecause jury deliberation is cloaked in secrecy, legal policymakers have made important decisions about the scope and conduct of jury trials on the basis of untested intuitions about how juries reach their verdicts.").

293. The Court in *Williams* overlooked a third purpose for juries: their role as a tool to educate the public on their rights and civic matters more broadly. *See* Powers v. Ohio, 499 U.S. 400, 406 (1991) ("The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system."); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 305 (Henry Reeve trans., 1904) ("The jury . . . . may be regarded as a gratuitous public school ever open, in which every juror learns to exercise his rights . . . ."). Twelve-person juries allow this educative function to be accomplished more efficiently than with a smaller number of jurors. *See* Amar, *supra* note 69, at 1188 ("[I]f jury service is a positive good—a democratic plus—isn't twelve twice as good as six? More citizens will participate and be educated.").

deliberation."[294] Second, to satisfy the Equal Protection Clause, the number of jurors should be large enough "to provide a fair possibility for obtaining a representative[] cross-section of the community."[295]

In the end, the most that the Court could surmise was that, when measured against these goals, "neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous . . . than a jury composed of fewer members."[296] In the Court's words, "[W]e find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12."[297]

This part demonstrates that the Court's functional assumptions about six-person juries were incorrect, drawing on five decades of empirical research since those decisions. Section IV.A examines how reducing jury size affects verdict accuracy and reliability, showing that six-person juries produce more volatile and extreme verdicts compared to traditional twelve-person juries. The data reveal that smaller juries are more susceptible to individual personality influence, less likely to remember key evidence, and engage in lower-quality deliberations. Section IV.B then analyzes how jury size impacts demographic representation, particularly for racial and ethnic minorities. The empirical evidence establishes that six-person juries are significantly less likely to include minority jurors than twelve-person juries, undermining the constitutional requirement that juries represent a cross section of the community. Together, these findings suggest that the Court's decision to allow smaller juries has compromised both the accuracy and representativeness of jury verdicts.

The Court's premature assumptions about six-person juries are best interpreted as commentary on poor briefing, rather than a conclusion drawn after careful review of either historical sources or social science literature.[298] Indeed, less than two pages of the *Williams* plaintiff's brief is devoted to constitutional arguments, neither of which cites social science research or discusses the extensive historical evidence from Blackstone, Hale, and other canonical authors examined above in Part II.[299] Despite the clear historical understanding of "jury" as requiring twelve members—evidenced in ratifying conventions, legal treatises, and early precedents—none of these sources appear

294. *Williams*, 399 U.S. at 100.

295. *Id.*

296. *Id.* at 101–02.

297. *Id.* at 100; *cf.* José A. Berlanga & Diana P. Larson, *Six Is Not Enough: Why Six Person Juries in Concurrent Jurisdiction Cases in County Courts Are Not Constitutional*, 51 S. TEX. L. REV. 1, 6 (2009) ("This analysis has been described as 'functional equivalence.' The gist of the analysis is the suggestion that there is no constitutional violation by the use of smaller juries because a six-person jury is functionally equivalent to its larger counterpart." (quoting *Williams*, 399 U.S. at 99–101)).

298. The defendant in *Williams* who objected to the impaneling of only six jurors did not argue that the number of jurors might affect the verdict. *See Williams* Petitioner Brief, *supra* note 25, at 3.

299. *Id.* at 8–9.

in the Court's opinion or the parties' briefing. The absence of this historical evidence is particularly striking given the Court's own acknowledgment that the historical test is central to Seventh Amendment interpretation. Even more remarkable is that neither party brought to the Court's attention the widely circulated eighteenth-century treatises that explicitly defined "jury" as requiring exactly twelve members, nor the early state court decisions that had interpreted identical constitutional language to incorporate the common law twelve-juror requirement.

This void in historical evidence left the Court to speculate about functional considerations without the benefit of understanding why the common law had insisted on twelve jurors for centuries. As the state attorney general highlighted to the Court, the plaintiff failed to "advance[] any statistical support for the proposition that it is essential to have twelve jurors in order to fulfill the jury's purpose."[300] This omission was again emphasized by the state assistant attorney general at oral argument: "[T]here is no statistical data available that has been presented by the Petitioner that would suggest that a man tried by 12 is going to receive a fairer trial than a man tried by six."[301] The failure to present either historical or empirical evidence left the Court without the tools to properly evaluate whether reducing jury size would compromise the right that the Founders sought to preserve.

That a mistaken conception of both historical sources and social science literature in 1970—based on less than two pages of briefing—found its way into a 5–4 Supreme Court opinion and ultimately the Federal Rules of Civil Procedure "is at once a comedy and a tragedy."[302] It showcases the adversarial system at its weakest, demonstrating how even fundamental constitutional rights can be reshaped when courts are deprived of crucial historical context and empirical evidence. The decision stands as a cautionary tale about the importance of thorough briefing in constitutional interpretation, particularly when centuries of accumulated wisdom about procedural protections hangs in the balance.

As support for its decision, the Court noted that, "[w]hat few experiments have occurred . . . indicate that there is no discernible difference between the results reached by the two different-sized juries."[303] The Court used the term "experiments" charitably. What the Court cited are more aptly characterized as

300. *See* Brief for the Respondent at 23, *Williams*, 399 U.S. 78 (No. 927) ("Respondent submits this dearth of reason or authority stems from the fact that experience demonstrates the impotency of petitioner's position.").

301. Transcript of Oral Argument at 39–40, *Williams*, 399 U.S. 78 (No. 927).

302. For a discussion of a similar phenomenon in the context of just compensation, see Su, *supra* note 19, at 1529 ("The story of how a mistaken conception of the historical record in 1893 found its way into Supreme Court dicta and the Federal Rules of Civil Procedure is at once a comedy and a tragedy—particularly so when it abrogates a deeply cherished civil right.").

303. *Williams*, 399 U.S. at 110.

a handful of anecdotes and speculation written by court personnel.[304] As a leading jury scholar at the time recounted, "the 'experiments' on which the Court relied are in no scientific sense experimental; rather they are speculative or impressionistic reports based on limited or, in one case, no experience with the six-member jury."[305]

Of the six so-called "experiments" cited by the five-member majority,[306] one speculated without evidence that there would be no discernible difference between twelve jurors and six jurors,[307] three were merely casual observations offered by courtroom personnel of six-person juries,[308] a fifth was speculation from a jurisdiction considering reducing the number of jurors,[309] and the sixth was an article on potential cost savings expected from reducing the number of

304. *See* Robert H. Miller, *Six of One Is Not a Dozen of the Other: A Reexamination of* Williams v. Florida *and the Size of State Criminal Juries*, 146 U. PA. L. REV. 621, 656–57 (1998) [hereinafter Miller, *Six of One*] (noting that the majority's six cited studies "said much less than the Court thought they were saying" due to their inherent and rampant methodological problems); David Kaye, *And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury*, 68 CALIF. L. REV. 1004, 1004 (1980) ("It was readily shown that [the six studies relied upon by the *Williams* majority] were inconclusive and had little bearing on the question of how size affects jury verdicts."); Hans Zeisel & Shari Seidman Diamond, *"Convincing Empirical Evidence" on the Six Member Jury*, 41 U. CHI. L. REV. 281, 282 (1974) (noting that the Court "was misled in believing that there was . . . evidence" demonstrating functional equivalence between twelve jurors and a smaller number).

305. Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643, 645 (1975) (quoting Hans Zeisel, *. . . And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 724 (1971) [hereinafter Zeisel, *. . . And Then*]) (calling this criticism "gentle," as "a careful reader of the [Court's citations] would have appreciated their nonexperimental nature and their limited bearing on the issue of whether jury size affects jury verdicts").

306. *See Williams*, 399 U.S. at 101 n.48.

307. *See* Lloyd L. Wiehl, *The Six Man Jury*, 4 GONZ. L. REV. 35, 39 (1968); *see also* Miller, *Six of One*, *supra* note 304, at 652 ("Judge Lloyd Wiehl cited only Charles Joiner's anecdotal reports in *Civil Justice and the Jury*, and Judge Wiehl's own unsupported assertions, to conclude that six- and twelve-person juries deliberate identically. Judge Wiehl's article offered no empirical justification for such a conclusion." (footnote omitted)).

308. *See* Tamm, *The Five-Man Civil Jury*, *supra* note 8, at 134–36; Philip M. Cronin, *Six-Member Juries in District Courts*, 2 BOS. BAR J. 27, 27 (1958); *Six-Member Juries*, *supra* note 8, at 136; *see also* Miller, *Six of One*, *supra* note 304, at 652–53 ("Judge Edward Tamm relied only on his 'satisfactory' experiences presiding over five-person juries hearing condemnation trials in the District of Columbia to draw his conclusions about the deliberative equivalence of six- and twelve-person juries. Consequently, Judge Tamm's article is devoid of the empirically verifiable evidence necessary to make his claim anything more than anecdotal. The Philip Cronin article, which reports the results of an experimental reduction in civil-jury size sanctioned by the Massachusetts legislature, suffers from the same lack of empirically verifiable evidence that plagues Judge Tamm's article. Although forty-three trials were observed, conclusions as to the equivalence of six- and twelve-person juries were based solely on the personal perceptions of the court clerk and three attending lawyers. The fourth 'authoritative' study cited as support by the *Williams* Court was a duplicative review of the Massachusetts experiment previously described." (footnotes omitted)).

309. *See New Jersey Experiments with Six-Man Jury*, 9 OYEZ! OYEZ! BULL. SECTION JUD. ADMIN. 6, 6 (1966); *see also* Miller, *Six of One*, *supra* note 304, at 653 ("Although it stated that 'the Monmouth County Court had experimented with the use of a six-man jury in a civil negligence case,' the study never drew any conclusions as to the jury's effectiveness." (footnote omitted)).

jurors.[310] As legal scholars put it, the Court's citations "were not empirical studies," but merely "conclusory statements . . . supported at best by limited experience and anecdote."[311]

Three years later, in 1973, the Court revisited the issue, albeit in the civil context.[312] Again, given the absence of historical records, the Court turned to "whether jury performance is a function of jury size."[313] The Court stated that "nothing has been suggested" in the parties' briefs, in amicus briefs, or at oral argument "to lead us to alter th[e] conclusion" reached three years prior that a twelve-juror jury is not necessarily more advantageous than a jury comprised of fewer jurors.[314] The Court essentially doubled down on its earlier holding: if a district court believes that it can save a little bit of time or money by impaneling fewer jurors, the Court will not intervene on constitutional grounds given that the verdict would "probably" have been the same anyway.[315]

Five years later, in 1978, the Court again revisited the question.[316] It acknowledged that new data indicated "smaller juries are less likely to foster effective group deliberation"[317] or to include members of "minority groups," thereby undermining a jury's likelihood of being "truly representative of the

310. *See* Richard H. Phillips, *A Jury of Six in All Cases*, 30 CONN. BAR J. 354, 356–57 (1956); *see also* Miller, *Six of One*, *supra* note 304, at 653 ("Judge Richard Phillips's article merely suggested the potential economic advantages to be derived from the reduction in jury size from twelve to six in all noncapital cases. Judge Phillips, however, never addressed the potential functional consequences of such a reduction." (footnote omitted)).

311. Higginbotham et al., *supra* note 1, at 52; *see also* Zeisel, *Waning*, *supra* note 30, at 368; *cf.* Ballew v. Georgia, 435 U.S. 223, 246 (1978) (Powell, J., concurring) ("[N]either the validity nor the methodology employed by the studies cited was subjected to the traditional testing mechanisms of the adversary process. The studies relied on merely represent unexamined findings of persons interested in the jury system.").

312. Colgrove v. Battin, 413 U.S. 149, 157 (1973).

313. *Id.*

314. *Id.*

315. *See* Williams v. Florida, 399 U.S. 78, 100–01; *see also* Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 JUDICATURE 263, 263 (1996) ("The questions the Court posed for itself were whether a reduction in size would adversely affect the quality of deliberation, the reliability of the jury's factfinding, the verdict ratio, the vulnerability of jurors in the minority to conformity pressure by jurors in the majority, and the ability to provide for a fair cross-section of the community. To all of these questions, the majority of justices concluded that the size of the jury made no difference, at least down to sizes as small as six.").

316. *Ballew*, 435 U.S. at 230–31 (Blackmun, J.) (plurality opinion) ("When the Court in *Williams* permitted the reduction in jury size—or, to put it another way, when it held that a jury of six was not unconstitutional—it expressly reserved ruling on the issue whether a number smaller than six passed constitutional scrutiny. The Court refused to speculate when this so-called 'slippery slope' would become too steep. We face now, however, the two-fold question whether a further reduction in the size of the state criminal trial jury does make the grade too dangerous, that is, whether it inhibits the functioning of the jury as an institution to a significant degree, and, if so, whether any state interest counterbalances and justifies the disruption so as to preserve its constitutionality." (citation omitted)).

317. *Id.* at 232.

community."[318] In light of this new evidence, the Court refused to permit five-person juries, but left its earlier decisions permitting six-person juries in criminal and civil proceedings unchanged.[319] In a concurring opinion, three Justices acknowledged that "the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere."[320]

While researchers and the ABA have questioned whether seating fewer jurors actually results in meaningful time or cost savings,[321] others have questioned why the Court was willing to engage in cost-benefit analysis to determine the bounds of jury rights enumerated in constitutional amendments.[322] As Justice Thurgood Marshall wrote in dissent,

> [S]urely there is nothing more significant about the number six . . . . The line must be drawn somewhere, and the difference between drawing it in the light of history and drawing it on an ad hoc basis is, ultimately, the

318. *Id.* at 236–37 (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)); *cf.* Opinion of Justices, 431 A.2d 135, 136 (N.H. 1981) ("Although . . . *Ballew* expressed these concerns [regarding decreases in jury size] in the context of a decision regarding a further reduction of criminal trial juries from six to five, we note these problems may also arise in the context of reducing the size of juries in civil cases from twelve to six.").

319. *Ballew*, 435 U.S. at 239, 245. Studies cited with approval in *Ballew* demonstrate that the erosion of jury accuracy is even greater from twelve to six jurors than from six to five jurors, raising questions over whether the Court should review and reverse its earlier decisions in *Williams* and *Colgrove*. *See id.* at 232–33 ("At some point this decline [in size] leads to inaccurate factfinding and incorrect application of the common sense of the community to the facts."); T. Ward Frampton, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 218 (2012) ("When the Court declined to extend *Williams* in 1978 . . . it persuasively articulated many of the reasons why juries with less than twelve jurors significantly disadvantage criminal defendants.").

320. *Ballew*, 435 U.S. at 245–46 (Powell, J., concurring) ("I concur in the judgment, as I agree that use of a jury as small as five members . . . involves grave questions of fairness.").

321. *See, e.g.*, PRINCIPLES FOR JURIES AND TRIALS, *supra* note 2, princ. 3, cmt., subdivs. A & B ("[S]ubsequent research has found that six person juries are only minimally more efficient or cheaper than twelve person juries. . . . . Data show that the additional time spent in the impaneling stage is insignificant. Similarly, studies indicate that differences in deliberation time are small. Overall, little court time is saved by reducing jury size." (citations omitted)); William R. Pabst, Jr., *Statistical Studies of the Costs of Six-Man Versus Twelve-Man Juries*, 14 WM. & MARY L. REV. 326, 327 (1972) (finding "virtually no reduction in time spent to empanel a jury or to try a case when the six-man jury is used" for civil trials in the District Court for the District of Columbia); *cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (overturning *Apodaca v. Oregon*, 406 U.S. 404 (1972), and holding that the *Apodaca* plurality erred by subjecting "the Constitution's jury trial right to an incomplete functionalist analysis of its own creation" rather than "grappling with the historical meaning of the Sixth Amendment's jury trial right").

322. *See, e.g.*, Parklane Hosiery, Inc. v. Shore, 439 U.S. 322, 346 (1979) (Rehnquist, J., dissenting) ("[N]o amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. The rule otherwise would effectively permit judicial repeal of the Seventh Amendment."); *cf. Ramos*, 140 S. Ct. at 1402 ("As judges, it is not our role to reassess whether the right to a unanimous jury is 'important enough' to retain.").

> difference between interpreting a constitution and making it up as one goes along.[323]

As Justice Neil Gorsuch echoed half a century later, dissenting from denial of a recent certiorari petition, "In 1970, this Court abandoned [an] ancient promise [of twelve jurors] and enshrined in its place bad social science parading as law. That mistake continues to undermine the integrity of the Nation's judicial proceedings and deny the American people a liberty their predecessors long and justly considered inviolable."[324]

A. *Data Demonstrate Verdicts of Six Jurors Are Less Accurate*

The Court's first stated purpose in weighing questions of jury size was to ensure that juries are "large enough to promote group deliberation."[325] The data accumulated over the past five decades demonstrate that reducing jury size from twelve to six undermines this goal. As detailed below, six-person juries exhibit multiple deficiencies in their deliberative process compared to twelve-person juries: they are more susceptible to domination by forceful personalities, demonstrate poorer collective recall of trial evidence, engage in shorter and lower-quality discussions, and ultimately produce more extreme and volatile verdicts. These empirical findings directly contradict the Court's assumption that six-person juries could adequately fulfill the essential function of promoting thorough group deliberation. Indeed, the research suggests that the traditional twelve-person jury size evolved precisely because it creates optimal conditions for the kind of robust collective decision-making that lies at the heart of the jury's constitutional role.

These deliberative deficiencies manifest in concrete ways that affect trial outcomes. Data over the ensuing decades since the Court last considered the issue have shown that reducing the number of jurors increases the volatility of

323. Colgrove v. Battin, 413 U.S. 149, 181–82 (1973) (Marshall, J., dissenting) ("I think history will bear out the proposition that when constitutional rights are grounded in nothing more solid than the intuitive, unexplained sense of five Justices that a certain line is 'right' or 'just,' those rights are certain to erode and, eventually, disappear altogether. Today, a majority of this Court may find six-man juries to represent a proper balance between competing demands of expedition and group representation. But as dockets become more crowded and pressures on jury trials grow, who is to say that some future Court will not find three, or two, or one a number large enough to satisfy its unexplicated sense of justice? It should be clear that constitutional rights which are so vulnerable to pressures of the moment are not really protected by the Constitution at all.").

324. Khorrami v. Arizona, 143 S. Ct. 22, 23 (2022) (Gorsuch, J., dissenting from the denial of certiorari) ("*Williams* was wrong the day it was decided, it remains wrong today, and it impairs both the integrity of the American criminal justice system and the liberties of those who come before our Nation's courts."); *cf.* Green v. United States, 356 U.S. 165, 216 (1958) (Black, J., dissenting) ("Trifling economies . . . have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. . . . On their scale of value justice occupied at least as high a position as economy.").

325. Williams v. Florida, 399 U.S. 78, 100 (1969).

jury verdicts and damage awards.[326] Studies have demonstrated that seating twelve jurors will result in a verdict that is a more reliable reflection of the statistical community average.[327] Six jurors, by contrast, are more likely to produce outlier verdicts inconsistent with community values. Indeed, six-person juries are four times as likely to arrive at an extreme damage award, either on the high or low end of the spectrum, compared to twelve-person juries.[328] Figure 1 offers a comparison of the respective statistical distributions of damage awards.[329] The data bear out the Founders' intuition that a smaller number of jurors is "less stable and trustworthy than" a jury of twelve.[330]

326. *See* Saks, *supra* note 315, at 263. ("The most harmful consequence of reduced size is that it increases the unpredictability of verdicts and awards. The smaller the group, the greater the variability in its decisions."); Zeisel, *. . . And Then*, *supra* note 305, at 724 ("We have shown that the change in verdicts that might be expected from the reduction of the twelve-member jury to six members is by no means negligible.").

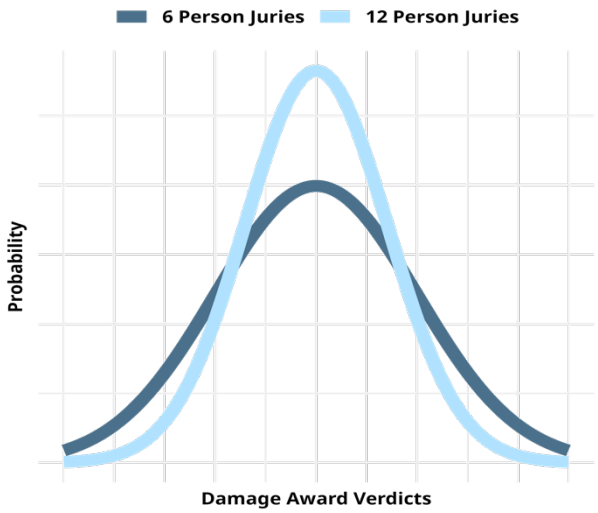
327. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 167 (1986) ("[O]ver two-thirds of the twelve-person juries will have . . . damage awards close to the community average, compared to just half of the six-person juries. . . . Hence, the twelve-person jury should provide a more accurate and more reliable reflection of the community's assessment.").

328. *See* Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW & HUM. BEHAV. 451, 457–61, 465–66 (1997) (examining seventeen studies involving 2,061 juries and more than 15,000 individual jurors and finding that twelve-person juries deliberate longer, deadlock more often, and recall testimony more accurately than a smaller number of jurors).

329. *See* Saks, *supra* note 315, at 263–64 ("Visually, the sampling distribution of sample means gets narrower and narrower (less and less error variation) as the sample size grows larger and larger.").

330. *See id.* at 263–65 ("Put simply, if six heads are better than one (and they are), 12 are in most respects better than six.").

Figure 1: Six-Person Juries Are More Likely to Produce Outlier Damage Award Verdicts than Twelve-Person Juries[331]



These statistical distinctions can be observed in the jury deliberation process as well. Studies have demonstrated that six-person juries are "more responsive to the influence of single idiosyncratic personalities,"[332] "less likely to have members who remember each of the important pieces of evidence or argument,"[333] and less likely to engage in "higher quality of discussion."[334] In other words, contrary to what the Court presumed in 1970, smaller juries do not function nearly as effectively as the traditional twelve. In numerical terms, reducing the jury from twelve to six, as the Court condoned, increases the variability of damage awards by forty-one percent.[335]

331. *Id.* at 264.

332. Carrington, *supra* note 22, at 53–54 ("There is also an empirical basis for the beliefs that larger groups such as full juries have greater resources of memory and cognitive understanding, provide more competition among views and thus more stimulation and better testing of ideas and reactions, and for these reasons make more accurate factual determinations.").

333. Ballew v. Georgia, 435 U.S. 223, 233 (1978) (Blackmun, J.) (plurality opinion) (citing Harold H. Kelley & John W. Thibaut, *Group Problem Solving*, *in* 4 HANDBOOK OF SOCIAL PSYCHOLOGY 68–69 (Gardner Lindzey & Elliot Aronson eds., 2d ed. 1969)); *see also* Saks, *supra* note 315, at 265 ("[M]embers of larger juries end up recalling more of the trial testimony and, even adjusting for the fact that they deliberate longer, members of larger juries engage in more communication.").

334. *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1486 (1997).

335. Saks, *supra* note 315, at 263 n.4; *see also* Zeisel, *Waning*, *supra* note 30, at 368–69 (1972) ("We know from experience and from many careful studies that the values different people place on the harm done in a personal injury case are likely to diverge considerably. The final award of a jury is very much related to these initial individual evaluations; in the end it is some kind of average. The size of the jury,

Reducing the number of jurors can paradoxically increase costs, rather than reduce them, due to the impact on settlement rates.[336] When a jury verdict is less predictable, it is harder for parties to come to terms on a negotiated settlement.[337] Put simply, "if lawyers have more trouble predicting outcomes," it is harder for them to reach settlements and, on the margin, more likely for them to go to trial.[338] If the goal is to save on trial costs, then shrinking the jury may, over the long run, have the opposite effect, because it increases the number of cases that go to trial and "the cost of the additional trials more than offsets the saving achieved by having fewer jurors."[339]

In evaluating options for medical malpractice reform, policymakers have recognized six-person juries as a culprit of "'haywire' verdicts . . . that are less predictable and more indefensible than those rendered by twelve-person juries."[340] Proposals as simple as restoring the tradition of twelve-person juries have been offered as a solution to reduce the likelihood of verdicts inconsistent with the evidence presented at trial.[341]

Law and economics scholar Judge Richard Posner has long argued—solely on economic efficiency terms—that mandating twelve jurors will "make trial by jury more accurate" as it "exploit[s] the Condorcet jury theorem."[342] As he posits, when the financial stakes are particularly high, accuracy—and therefore the number of jurors—is paramount.[343] In fact, some have extended this logic

therefore, matters a great deal in determination of these awards. It can be shown that reducing the jury from twelve to six increases what one might call the 'gamble' litigants take by about 40 per cent.").

336. Carrington, *supra* note 22, at 54.

337. Saks, *supra* note 315, at 265.

338. *See id.*; Carrington, *supra* note 22, at 54 (explaining that "marginal declines in settlement rates" are the expected result of "greater disparities in the realistic evaluation of claims slated to be heard").

339. Carrington, *supra* note 22, at 54.

340. Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 30 (1993) (quoting Victor J. Baum, *The Six-Man Jury—The Cross Section Aborted*, 12 JUDGES' J. 1, 12 (1973)).

341. *See* Saks, *supra* note 315, at 265 ("In an explicit effort to stabilize damage awards, the Model Medical Malpractice Act promulgated by the Reagan Administration called for the use of 12-person juries in medical malpractice cases.").

342. Posner, *supra* note 267, at 1498 (noting that twelve-person juries "reduce variance in outcomes by drawing on a larger, though still small, sample of the community" and also "obtain greater diversity of experience, which is important because determining probabilities with regard to the sorts of uncertainty involved in a trial draws heavily on the adjudicator's common sense, which is shaped in turn by people's experiences.").

343. *Id.* at 1498 n.45; *see also* Saks, *supra* note 315, at 264 ("One of the major complaints about civil juries is that they have become 'unpredictable.' This is, of course, exactly what one would expect smaller juries to be. And it may be no coincidence that this feature of the 'liability crisis' has coincided with the period during which jury size has been reduced in many jurisdictions. Misdiagnosing its causes, the current reformers are looking for other ways to repair the problems of reduced stability and predictability actually created by the courts themselves.").

to advocate for juries larger than twelve or to propose that mass tort class actions be tried before a sample of separate twelve-person juries.[344]

B. *Six Jurors Are Less Likely to Represent a Cross Section of the Community*

The Court has long held that the jury must "be a body truly representative of the community"[345] and, to that end, the Fourteenth Amendment's Equal Protection Clause requires that the number of jurors is large enough to provide "a fair possibility for obtaining a representative cross-section of the community."[346] For example, if women make up fifty percent of the local community, then there must be some fair probability of seating a jury that is half female, when averaged across a large number of juries. As the Court explained, juries cannot play their "prophylactic" role "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."[347]

Statistical theory dictates that when drawing jurors from a diverse population—regardless of the type of diversity under consideration, whether gender, race, religion, sexual orientation, educational attainment, occupation, military service, political affiliation, etc.—the number of jurors will determine how well the minority group in question will be represented.[348] Sampling theory, for example, predicts that if six- and twelve-person juries are randomly impaneled from a population that is ten percent minority, over half of the six-person juries will contain no minority members, compared to fewer than a third of the twelve-person juries.[349] In other words, the twelve-person jury would be twenty-five percent more likely to include a minority member than its six-person counterpart.[350]

344. Posner, *supra* note 267, at 1498 n.45 ("Some cases are so huge that a single jury, even of 12, is too small to assure accuracy commensurate with the stakes."); *accord* Amar, *supra* note 69, at 1188–89 ("If anything, if twelve is not sacred, we should consider increasing the size of juries.").

345. Smith v. Texas, 311 U.S. 128, 130 (1940).

346. Williams v. Florida, 399 U.S. 78, 100 (1970); *cf.* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 127 (5th ed. 1956) ("[I]n its origins the jury is of a representative character; the basis of its composition in the early days . . . was clearly the intention to make it representative of the community.").

347. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

348. *See* Michael J. Saks, *Ignorance of Science Is No Excuse*, TRIAL, Nov./Dec. 1974, at 18, 19 (explaining that the Court "ignored what is obvious to every social scientist: that when sampling from heterogeneous populations, sample size . . . determines how well minority groups in the population will be represented").

349. *See* Zeisel, *. . . And Then*, *supra* note 305, at 716 ("[I]t can be shown that the smaller the size of the jury, the less frequently it even approaches community representation.").

350. *See id.* ("Suppose, now, we were to draw 100 twelve-member juries and 100 six-member juries from a population that had a 10% minority. Of the 100 twelve-member juries, approximately 72 would have at least one representative of that minority; while of the 100 six-member juries, only 47 would have one.").

Although the Court acknowledged the mathematical predictions of sampling theory, it demanded empirical evidence on this question.[351] Seeing none presented by the parties, the Court presumed that, in practice, minority representation on juries must not be a function of size.[352] The Court came to this conclusion "[w]ithout a single authority in its favor."[353]

The Court's musing on the question of jury representativeness has not aged well. Empirical data published over the ensuing five decades confirm that a minority perspective, however defined, "is less likely to be represented on a jury of six than on one of twelve."[354] Although "[o]ne's minority group membership can be defined by any number of attributes, . . . the one that has been the greatest concern to the courts has been race," particularly in light of the inclusionary history and purpose of the Fifteenth and Twenty-Fourth Amendments.[355] A number of federal and state courts across the country have appointed committees to investigate the issue. Courts of appeals have described the import of the resulting statistical evidence as "disquieting."[356] Whatever the cause, numerous studies show that juries across the country "rarely, if ever, are representative of the racial composition of" the local communities, when measured against census data.[357] African Americans, in particular, are

351. *See Williams*, 399 U.S. at 102 ("[W]hile in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible.").

352. *See id.* ("[T]he concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.").

353. Miller, *Six of One*, *supra* note 304, at 655.

354. Amar, *supra* note 69, at 1188 ("[I]f we want individual juries to be cross-sectional, to draw citizens from different backgrounds together in common deliberation, we should want each jury to be of substantial size.").

355. *See* Saks & Marti, *supra* note 328, at 455; *cf.* Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 440 (1995) ("For in terms of actual effect, there is little difference between eliminating minority viewpoints through reducing the size of the jury and overt discrimination against minority jurors."); Smith v. Texas, 311 U.S. 128, 130 (1940) ("For racial discrimination to result in the exclusion from jury service of otherwise qualified groups . . . is at war with our basic concepts of a democratic society and a representative government.").

356. *See, e.g.*, United States v. Royal, 174 F.3d 1, 12 (1st Cir. 1999) (calling the statistical evidence regarding African American representation on juries as "disquieting" and describing it as "a situation leaving much to be desired").

357. *E.g.*, MINN. SUP. CT. TASK FORCE ON RACIAL BIAS IN THE JUD. SYS., FINAL REPORT, S-13 (1993).

underrepresented on federal and state juries.[358] Many court-appointed committees "have found that this is 'the rule' rather than the exception."[359]

Reducing the number of jurors makes African American underrepresentation even more acute. A number of studies demonstrate that, in practice, "the actual difference in [racial] minority representation on twelve- and six-member juries [i]s even more pronounced than the sampling theory" would predict.[360] Twelve-person juries, in other words, are far more likely to include racial minorities than six-person juries.

A study of 277 civil juries in the Chicago area is illustrative.[361] Eighty-nine trials used six-person juries, while 188 used twelve-person juries.[362] Researchers observed the full spectrum of jury selection procedures including composition of the venire and the use of peremptory and for-cause challenges. They found the relationship between jury size—whether twelve jurors or six jurors are impaneled—and minority representation to be statistically significant.[363]

Figure 2 illustrates the disparities that resulted in African American representation on the jury. Even though African Americans comprised twenty-five percent of the venire from which jurors were selected, twenty-eight percent of the six-person juries lacked even a single Black juror, compared to only two percent of the twelve-person juries.[364] The likelihood of seating at least two African Americans was almost double for twelve-person juries relative to six-person juries.[365]

358. *See, e.g.*, PAULA L. HANNAFORD-AGOR & G. THOMAS MUNSTERMAN, NAT'L CTR. FOR STATE CTS., CT. SERVS. DIV., THIRD JUDICIAL CIRCUIT OF MICHIGAN JURY SYSTEM ASSESSMENT 7 (2006) ("Overall, the percentage of African-Americans reporting for jury service is more than one-third lower than expected . . . ."); *see also* Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719, 1722 (2016) ("[S]ubstantial evidence suggests that jury pools across the country often do *not* represent a fair cross-section of communities.").

359. *See, e.g.*, NEB. MINORITY & JUST. TASK FORCE, FINAL REPORT 17 (2003) (citing similar state court task forces' research).

360. Miller, *Six of One*, *supra* note 304, at 655.

361. *See* Shari S. Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 427, 449 (2009) ("[R]educing jury size *inevitably* has a drastic effect on the representation of minority group members on the jury. . . . As in the laboratory and as statistical theory would predict, the 12-member jury produces significantly greater heterogeneity than does the six-member jury.").

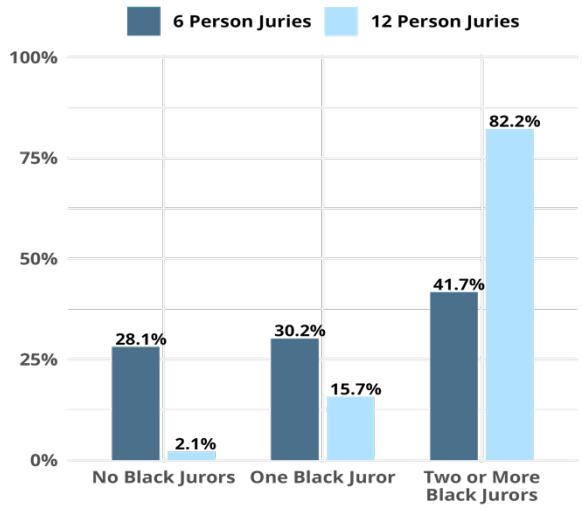
362. *Id.* at 435.

363. *Id.* at 443 (discussing the "large and significant" difference in "the percentage of juries with at least a two-person minority" and explaining that this is "of particular interest because of evidence that the ability of a juror to withstand majority pressure and to influence the deliberation process is substantially strengthened when the juror has an attitudinal ally, that is, when the minority position in the group is represented by at least two members"); *cf.* Stagi v. Nat'l R.R. Passenger Corp., 391 F. App'x 133, 137–38 (3d Cir. 2010) (explaining that statistical significance is the probability of the observed relationship occurring by chance and that many courts accept a five percent or smaller probability as sufficient to rule out the possibility that the relationship occurred at random).

364. Diamond et al., *supra* note 361, at 442.

365. *Id.* at 443.

Figure 2: Six-Person Juries Were Less Likely to Include Black Jurors than Twelve-Person Juries[366]



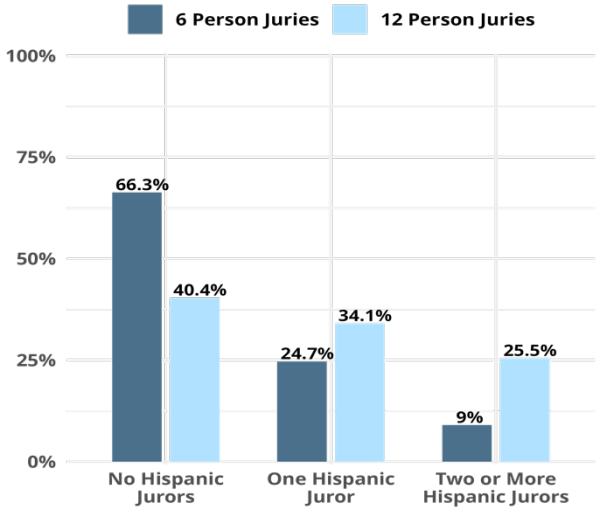
The resulting disparities in Hispanic juror representation are only marginally smaller, as Figure 3 shows. Two-thirds of the six-person juries lacked a single Hispanic juror, compared to less than half of twelve-person juries.[367] These results led the researchers to conclude that "[i]f increasing diversity in order to better represent the population is a goal worth pursuing . . . , the straightforward solution—the key—is a return to the 12-member jury."[368]

366. *Id.* at 442.

367. *Id.* at 444; *cf. id.* at 438 (noting that Hispanic Americans comprised eight percent of the venire from which jurors were selected).

368. *Id.* at 449 ("As in the laboratory and as statistical theory would predict, the 12-member jury produces significantly greater heterogeneity than does the six-member jury.").

Figure 3: Six-Person Juries Were Less Likely to Include Hispanic Jurors than Twelve-Person Juries[369]



These data are consistent with numerous studies conducted across jurisdictions. Indeed, a meta-analysis of all studies published over nearly two decades found overwhelming empirical evidence of this trend.[370] Not a single study from the seventeen analyzed, involving more than two thousand juries, contradicted this result.[371] In aggregating data across a number of studies, the researchers found that reducing jury size from twelve to six reduces the probability of minority representation "from about 63–64% to about 36–37%."[372] In other words, the smaller the jury, the less likely it is to include at least one member of the minority group under consideration. As the researchers explained, "The findings show . . . that the effect of jury size on minority representation is highly significant . . . . Indeed, this is the largest effect of any of the variables studied."[373]

This empirical result is unsettling in light of research demonstrating that the absence of African Americans on juries can have a striking effect on

369. *Id.* at 444.

370. *See* Saks & Marti, *supra* note 328, at 451 ("[L]arger juries are more likely than smaller juries to contain members of minority groups, deliberate longer, hang more often, and possibly recall trial testimony more accurately.").

371. *Id.* at 456–57 ("Examination of the first two data columns shows that for each of these studies, more large juries than small juries included at least one minority member.").

372. *Id.* at 457.

373. *Id.*

verdicts.[374] This differential, however, "is eliminated" when there is at least one African American seated on the jury—an outcome far more likely when twelve jurors are impaneled.[375] Tinkering with the centuries-old twelve-juror tradition, in other words, may have contributed to these issues in the first place.[376]

CONCLUSION

The Seventh Amendment's "historical test represents a rare instance in which the modern Court has come to almost complete agreement on methodology."[377] The Court, however, has been candid about the challenges that it entails: "We have long acknowledged that, of the factors relevant to the jury trial right, [the Seventh Amendment's historical test], 'requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.'"[378] A number of Justices have nonetheless expressed an eagerness to take on the burden and rigor that a historical test imposes.[379] Others have viewed their roles in Seventh Amendment doctrine begrudgingly. As Justice Brennan lamented, "Requiring judges, with neither the training nor time necessary for reputable historical scholarship, to root through the tangle of primary and

374. *See, e.g.*, Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1017 (2012) (finding that "juries formed from all-white jury pools convict black defendants significantly (16 percentage points) more often than white defendants").

375. *Id.* at 1020.

376. Justice Gorsuch has argued that it does not require "a barrage of statistical studies to tell us this much," history would suffice. Khorrami v. Arizona, 143 S. Ct. 22, 27 (2022) (Gorsuch, J., dissenting from the denial of certiorari). As he explained, "During the Jim Crow era, some States restricted the size of juries . . . as part of a deliberate and systematic effort to suppress minority voices in public affairs." *Id.* (citing LA. CONST. of 1898, art. 116); *see also* Ramos v. Louisiana, 140 S. Ct. 1390, 1393–95 (2020) (noting that the 1898 Louisiana Constitutional Convention allowed five-person juries alongside "a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements"); S.C. CONST. of 1865, art. III, § 1; 1866 S.C. Acts 493, § 3 (providing for five-person juries in courts with jurisdiction over "all criminal cases wherein the accused is a person of color"); 31 Cong. Rec. 1019 (1898) (observing that the U.S. Senate passed a resolution one week prior to the 1898 Louisiana Constitutional Convention calling for an investigation into the systematic exclusion of African Americans from Louisiana juries).

377. Miller, *Text, History, and Tradition*, *supra* note 45, at 887 (citing Meyler, *supra* note 47, at 596) (noting agreement on methodology across a wide range of the Court's ideological viewpoints).

378. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S 558, 576 (1990) (Brennan, J., concurring in part and concurring in the judgment) (quoting Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970)).

379. *See, e.g.*, *id.* at 592–93 (Kennedy, J., dissenting) ("The Court must adhere to the historical test in determining the right to a jury because the language of the Constitution requires it. The Seventh Amendment 'preserves' the right to jury trial in civil cases. We cannot preserve a right existing in 1791 unless we look to history to identify it. Our precedents are in full agreement with this reasoning and insist on adherence to the historical test. No alternatives short of rewriting the Constitution exist."); Dimick v. Schiedt, 293 U.S. 474, 486 (1935) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.").

secondary sources . . . has embroiled courts in recondite controversies better left to legal historians."[380]

This Article speaks to the risks associated with cursory reviews of the historical record. In hindsight, the Court's 5–4 decision[381] abandoning America's long tradition of twelve-person juries was ill-advised. What the Court characterized as a mere happenstance "wholly without significance" appears to have been intentional.[382] This Article corrects the Court's misperception through careful and comprehensive examination of what the term "jury" meant at the time of the Seventh Amendment's adoption.[383] Analysis of ratifying convention records, Founding-era state practices, and early Americans treatises converges on an unmistakable conclusion[384]: a constitutional jury in 1791 required twelve jurors.[385]

380. *Terry*, 494 U.S. at 576 (Brennan, J., concurring in part and concurring in the judgment).

381. Colgrove v. Battin, 413 U.S. 149, 158 (1973).

382. Williams v. Florida, 399 U.S. 78, 102 (1970) ("We conclude, in short, as we began: the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'" (quoting Duncan v. Louisiana., 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)); *see also Duncan*, 391 U.S. at 182 (Harlan, J., dissenting) ("I should think it equally obvious that the rule, imposed long ago in the federal courts, that 'jury' means 'jury of exactly twelve,' is not fundamental to anything: there is no significance except to mystics in the number 12." (citations omitted)).

383. The Court has noted the doctrine of stare decisis is "at its weakest" when interpreting rights of constitutional proportions. Agostini v. Felton, 521 U.S. 203, 235 (1997); *see also* Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018) (noting that stare decisis "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions."); United States v. Gaudin, 515 U.S. 506, 521 (1995) (explaining that the strength of stare decisis considerations is "reduced all the more when the rule is not only procedural but rests upon an interpretation of the Constitution"); *cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020) (Sotomayor, J., concurring in part) ("[O]verruling precedent here is not only warranted, but compelled."). Although the Court has "traditionally treated reliance interests" as a factor in "its stare decisis jurisprudence," reliance interests are unlikely to take central stage in a decision to overrule *Colgrove*, as new procedural rules apply only prospectively. Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845, 1853 (2023); *see also* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 541 (1991) (Souter, J.) (plurality opinion) ("Of course, retroactivity in civil cases must be limited by the need for finality; once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed." (citations omitted)); *cf. Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring in part) (invalidating "limited class" of convictions that violate Sixth Amendment is a "small price to pay for the uprooting of this weed").

384. *Ramos*, 140 S. Ct. at 1395 ("The text and structure of the Constitution clearly suggest that the term 'trial by an impartial jury' carried with it *some* meaning about the content and requirements of a jury trial. One of these requirements was unanimity. Wherever we might look to determine what the term 'trial by an impartial jury trial' meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.").

385. *Cf.* Wofford v. Woods, 969 F.3d 685, 707 n.27 (6th Cir. 2020) (noting that "*Williams* may no longer be completely sound after *Ramos*"); Phillips v. State, 316 So. 3d 779, 788 (Fla. Dist. Ct. App. 2021) (Makar, J., concurring) ("It seems a small step from the demise of the reasoning in *Apodaca* . . . as announced in *Ramos* to conclude that the reasoning in *Williams*, upon which [*Apodaca*] relied, is also in jeopardy.").

The implications of this historical finding are particularly salient given the empirical evidence that has emerged in the decades since the Court's decision. The data demonstrate that reducing jury size undermines both core functions identified by the Court: promoting effective group deliberation and ensuring representation of a cross section of the community. Six-person juries produce more volatile verdicts, engage in lower-quality deliberations, and are significantly less likely to include minority voices. The convergence of historical evidence and empirical data suggests that the traditional twelve-person jury requirement was not merely an accident of history, but rather reflected centuries of accumulated wisdom about how best to achieve fair and accurate jury verdicts.