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The State of the Judiciary: A Corporate Perspective

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ABSTRACT

The rule of law depends on highly talented, independent judges who conscientiously strive to ensure that the law is consistently applied in a principled and predictable manner. This Essay addresses two potential threats to judicial independence and the rule of law that we believe warrant special attention at this time. First, inadequate judicial salaries pose a threat to the quality and independence of the judiciary. Judges' real pay has declined substantially over the past generation, even as the compensation of other callings within the legal profession has risen dramatically. This growing disparity in pay has prompted an increasing number of experienced judges to leave the bench and has discouraged many of our most talented and experienced lawyers from accepting judicial nomination. Furthermore, as judicial compensation has declined, judicial appointees have increasingly come to the bench from the public rather than the private sector. This trend likely does not bode well for a balanced judiciary. We believe that judicial compensation should be increased substantially at both the federal and state levels.

Second, the central role the jury has come to play in American tort law undermines the consistency and predictability that are the hallmarks of the rule of law. When juries, rather than judges, determine basic issues of liability as opposed to resolving issues of fact, similarly situated litigants may receive widely varying results from different juries. In addition, empirical studies indicate that juries treat corporate defendants differently from similarly situated individual defendants, holding corporations to a higher standard of care and assessing significantly higher damages against corporations when they find liability. The direct and indirect costs of such inconsistent and discriminatory treatment harm not only corporations, but also employees, shareholders, and consumers. Judges can and should play a greater role in resolving liability questions in tort disputes in order to restore clarity, consistency, predictability, and accountability to this area of the law.

TABLE OF CONTENTS

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INTRODUCTION

An independent judiciary composed of highly qualified judges who conscientiously uphold the rule of law is of first importance to our constitutional republic. And, as General Counsel to a Fortune 500 company and the founding partner of a litigation firm serving major corporate clients, we can attest that judicial independence and the rule of law are vital to corporate America as well. In order to conduct their affairs in accordance with law, corporations spend a great deal of time and money on legal planning. Still, despite their best efforts, corporations find themselves in court far too often. Whether planning or litigating, corporations depend on an independent judiciary that will apply the law in a principled and consistent manner.

Although a judicial system premised on judicial independence and the rule of law depends on many things, we would like to focus on two requirements of such a system that warrant special attention at this time. First, our judicial system requires independent judges "of the first talents"[1] who are capable of resolving difficult issues of law in a responsible and intellectually rigorous manner. Second, those judges must conscientiously uphold the rule of law by ensuring that legal disputes are consistently resolved in a principled and predictable manner—like cases should be decided alike. With respect to the first requirement, we believe that inadequate judicial salaries currently pose a threat to the quality and independence of the judiciary. With respect to the second requirement, we believe that the central role the jury has come to play in American tort law undermines the consistency and predictability that are the hallmarks of the rule of law. Indeed, we are concerned that the inconsistency and unpredictability that have come to characterize our tort law may be migrat-

1. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 429 (Max Farrand ed., rev. ed. 1966).

ing to other areas of the law as well. We submit that judicial salaries should be increased to ensure a highly talented, widely experienced, and independent judiciary, and the judiciary, in turn, should conscientiously strive to ensure that tort disputes are resolved in a principled and consistent manner.

I. INCREASING JUDICIAL COMPENSATION TO ENSURE JUDICIAL QUALITY AND INDEPENDENCE

Last spring Judge J. Michael Luttig resigned from the United States Court of Appeals for the Fourth Circuit to take a job as General Counsel for Boeing. Although he had served as a federal judge for nearly fifteen years, he was only fifty-one years old.[2] In our opinion, Judge Luttig was one of the finest judges of his generation, and his departure from the federal bench is an immeasurable loss to the judicial system and the country.

Judge Luttig's resignation illustrates a disturbing trend. As Chief Justice Roberts indicated in his 2005 year-end report:

> Figures gathered by the Administrative Office show that judges are leaving the bench in greater numbers now than ever before. In the 1960s, only a handful of district and appellate court judges retired or resigned; since 1990, 92 judges have left the bench. Of those, 21 left before reaching retirement age. Fifty-nine of them stepped down to enter the private practice of law. In the past five years alone, 37 judges have left the federal bench—nine of them in the last year.[3]

And a 2003 report prepared by the American Bar Association and the Federal Bar Association (the "ABA Report") observed that the recent spate of departures from the bench "is alarming because the number is increasing significantly (even after factoring in the overall growth of the judiciary) in a profession where there is an expectation, grounded in the Constitution, of life tenure."[4] At the same time, substantial anecdotal evidence suggests that many of our most talented and experienced lawyers are unwilling to accept nomination to the federal courts.[5]

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2. *See* Editorial, *Luttig's Legacy*, WALL ST. J., May 16, 2006, at A16.

3. JOHN G. ROBERTS, JR., 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2006), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf; *see also* Harlington Wood, Jr., *"Real Judges,"* 58 N.Y.U. ANN. SURV. AM. L. 259, 264 (2001) (noting that "sixty Article III judges retired or resigned from the bench between 1991 and 2002, marking it as the largest number of departures in federal judiciary history for any ten-year period").

4. AM. BAR ASS'N & FED. BAR ASS'N, FEDERAL JUDICIAL PAY: AN UPDATE ON THE URGENT NEED FOR ACTION 20 (2003), *available at* http://www.abanet.org/poladv/documents/2003judpay.pdf [hereinafter ABA REPORT].

5. *See, e.g.*, ABA REPORT, *supra* note 4, at 22–23; William H. Rehnquist, Chief Justice of the United States, Judicial Compensation, Statement Before the National Commission on the Public Service (July 15, 2002), http://www.supremecourtus.gov/publicinfo/speeches/sp_07-15-02.html.

In a time of ever increasing caseloads[6] and bitter partisan politicization of the judicial selection process, there are no doubt many reasons why judges might choose to leave the bench and why well-qualified lawyers might hesitate to accept judicial nomination. But it is clear that one significant reason is increasingly inadequate judicial compensation.

A. THE ABSOLUTE AND RELATIVE DECLINE IN JUDICIAL COMPENSATION

Although judges have never been highly compensated in this country, federal district and circuit judges' real pay has declined nearly 24% since 1969.[7] Supreme Court Justices have suffered an even greater loss of purchasing power—more than 37%.[8] By contrast, during this same time, the real pay of the average American worker has grown more than 15%,[9] the real cost of a house has increased 42%, and the real cost of a college education has risen some 126%.[10] Much of the loss in real pay for judges occurred between 1993 and 2002, a period when Congress repeatedly denied the judiciary (and itself) annual statutory cost-of-living adjustments; judicial real pay accordingly declined some 9.8%.[11] Not surprisingly, the National Commission on the Public Service (the "Volcker Commission") concluded in 2003 that "[j]udicial salaries are the most egregious example of the failure of federal compensation policies."[12] And however inadequate federal judicial salaries may be, it bears remembering that state judicial salaries are lower still. State general jurisdiction trial judges are paid, on average, approximately seventy percent of a federal district judge's salary, and the average salary for an associate justice of a state court of last resort is less than two-thirds that of an Associate Justice of the United States Supreme Court and just over three-fourths that of a federal circuit judge.[13]

At the same time that judge's real pay has declined, the salaries of attorneys in other fields have increased dramatically. Although it is no surprise that the compensation of partners at major law firms and the in-house counsels of major

6. *See* ABA REPORT, *supra* note 4, at 18–19 (reporting that from 1969 to 2002, average caseloads grew 58.4% for district court judges (from 339 to 537 cases per judge) and 211.4% for circuit judges (from 123 to 383 cases per judge)).

7. *See* ABA REPORT, *supra* note 4, at 12; ROBERTS, *supra* note 3, at 4.

8. *See* ABA REPORT, *supra* note 4, at 12.

9. *See* ROBERTS, *supra* note 3, at 4; *see also* ABA REPORT, *supra* note 4, at 13 (noting a 17.5% increase in the real pay of the average American worker between 1969 and 2002).

10. *See* ABA REPORT, *supra* note 4, at 13.

11. *See id.* at 12; *see also id.* app. II at 26 (charting cost-of-living adjustment effects on judicial and congressional salaries since 1993).

12. NAT'L COMM'N ON PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 22 (2003), *available at* http://www.brookings.edu/gs/cps/volcker/reportfinal.pdf [hereinafter VOLCKER REPORT].

13. *See* Nat'l Ctr. for State Courts, Survey of Judicial Salaries 7–14 (Jan. 1, 2006), *available at* http://www.ncsconline.org/WC/Publications/KIS_JudComJudSal010106Pub.pdf.

corporations dwarf judicial salaries,[14] many junior or even first-year law firm associates now earn more than district and appellate court judges, most of whom were highly experienced lawyers before they joined the bench.[15] Indeed, "[t]o exacerbate an already demoralizing situation, some of our Federal judges report that these high-earning, first-year associates clerked for them the preceding year."[16] Moreover the ABA Report determined in 2003 that the average salary of a law school dean exceeded that of the Chief Justice of the United States, while the Volcker Commission found that one year earlier the average salary of the deans at the top-ranked law schools was more than twice that of a district judge and that the average earnings of full professors at these schools significantly exceeded that of any member of the state or federal judiciary.[17]

B. THE CONSEQUENCES OF DECLINING JUDICIAL PAY

There are good reasons to think that increasingly inadequate judicial compensation plays a significant role in prompting judges to leave the bench. As Chief Justice Rehnquist observed in testimony before the Volcker Commission:

> Although we cannot say that the judges who are leaving the bench are leaving *only* because of inadequate pay, many of them have noted that financial considerations are a big factor. The fact that judges are leaving because of inadequate pay is underscored by the fact that most of the judges who have left the bench in the last ten years have entered private practice.[18]

Accounts abound of judges who have left the bench at least in part because of financial considerations.[19] Indeed, Judge Luttig "alluded to his financial situation in his resignation letter to President Bush, noting his daughter is near college age and his son 'is following not long behind.'"[20] Likewise, administra-

14. *See* ABA REPORT, *supra* note 4, at 17 ("On average, partners at the major law firms received compensation in excess of $700,000 and profits ranging from $270,000 to $3,285,000 in 2001. General counsels of major companies earned cash salaries averaging $445,000 and substantial bonuses in 2000.").

15. *See id.* at 16–17.

16. *Id.* at 17; *see also* Wood, *supra* note 3, at 264 ("[J]udges often see their law clerks recruited to leading private firms at starting salaries comparable to those of judges.").

17. *See* ABA REPORT, *supra* note 4, at 18 ("Nationwide, the average salary of law school deans for 2002–03 was approximately $200,000 . . . ."); VOLCKER REPORT, *supra* note 12, at 23 (summarizing a study of the salaries of professors and deans at the *U.S. News and World Report*'s top twenty-five law schools, which found that the deans of these schools made an average of $301,639, and that full professors at these schools made an average base salary of $209,751, with summer research and teaching supplements usually ranging between $33,000 and $80,000). By way of contrast, in 2003 the Chief Justice's salary was raised from $192,600 to $198,600, and the salary of a district judge increased from $150,000 to $154,700. *See* Administrative Office of the U.S. Courts, Judicial Salaries Since 1968, http://www.uscourts.gov/salarychart.pdf (listing salaries through 2006).

18. Rehnquist, *supra* note 5.

19. *See, e.g.*, ABA REPORT, *supra* note 4, at 14–15, 27–28.

20. Jess Bravin & J. Lynn Lunsford, *Breakdown of Trust Led Judge Luttig to Clash with Bush*, WALL ST. J., May 11, 2006, at A1 (quoting Judge Luttig).

tion officials and others involved in recruiting judicial candidates report that insufficient compensation is "the single most important factor" deterring potential candidates from seeking appointment.[21]

Inadequate judicial pay has troubling consequences for the quality and independence of the judiciary. As Chief Justice Roberts has observed, "[e]very time an experienced judge leaves the bench early, the judiciary suffers a real loss."[22] New judges rarely bring to the bench the types of judging and judicial management skills that years of judicial experience provide. Because it takes time for new judges to gain such experience and skills, when an experienced judge leaves the bench, the nation suffers a temporary, but significant, loss in judicial productivity.[23]

Furthermore, when judicial compensation is so low that many of our most talented and experienced lawyers are unwilling to accept nomination, there is a real risk that "the judiciary will over time cease to be made up of a diverse group of the Nation's very best lawyers."[24] In the memorable words of former Chief Justice Rehnquist, "Our judges will not continue to represent the diverse face of America if only the well-to-do or mediocre are willing to become judges."[25]

There is evidence that inadequate judicial salaries may already be changing the makeup of the judiciary in at least one significant respect. Although the federal judiciary has traditionally attracted talented and seasoned lawyers with extensive and successful experience in the private sector,[26] the ABA Report indicates that "[a] review of judicial appointments from 1977 through 2002 indicates a pronounced trend for district court appointees increasingly to come from the public sector."[27] This trend likely does not bode well for a balanced judiciary in general or for corporate America in particular. As former Chief Justice Rehnquist recognized, lawyers with extensive experience in the private sector bring to the bench "a perspective and an independence that is vital to the judiciary."[28] Moreover, it is judges with this experience who are most likely to have the perspective and expertise to appreciate and understand fully the practical dimension of legal issues of greatest importance to the shareholders, employees, and communities that constitute corporate America.[29]

Inadequate judicial compensation has the potential to compromise not only

21. ABA REPORT, *supra* note 4, at 22; *see also id.* at 23.

22. ROBERTS, *supra* note 3, at 5.

23. *See* Rehnquist, *supra* note 5.

24. ROBERTS, *supra* note 3, at 4.

25. Rehnquist, *supra* note 5.

26. *See id.*

27. ABA REPORT, *supra* note 4, at 23.

28. Rehnquist, *supra* note 5; *see also* ABA REPORT, *supra* note 4, at 23 ("The Federal judiciary benefits from the collective wealth and expertise of its jurists who have served in different capacities in the public and private sectors.").

29. *Cf.* ROBERTS, *supra* note 3, at 4 (predicting that if the judiciary "come[s] to be staffed by a combination of the independently wealthy and those following a career path before becoming a judge

judicial quality and diversity, but also judicial independence. As former Chief Justice Rehnquist has explained:

> Inadequate compensation seriously compromises the judicial independence fostered by life tenure. The prospect that low salaries might force judges to return to the private sector rather than stay on the bench risks affecting judicial performance—instead of serving for life, those judges would serve the terms their finances would allow, and they would worry about what awaits them when they return to the private sector. John Adams warned in his 1776 pamphlet, "Thoughts on Government," that judges' "minds should not be distracted with jarring interests; they should not be dependant upon any man, or body of men."[30]

Furthermore, as one prominent judge has observed, persistently inadequate compensation

> leads to the unseemly practice of judges having to implore Congress to restore fair compensation at the same time those same judges are sitting in review of congressional enactments and of judges seeking the support in this regard of the Executive Branch, which also happens to be the principal litigant in the federal courts.[31]

Regardless of whether Article III's prohibition of judicial pay cuts explicitly applies to the erosion of judges' real pay resulting from inflation, the principle of judicial independence that this prohibition was intended to preserve is plainly compromised when Congress fails to maintain adequate judicial compensation.[32]

C. JUDICIAL COMPENSATION SHOULD BE INCREASED NOW

From the time of our country's founding, judges have willingly served for much less than they could make in private undertakings—feeling, perhaps, as did our third Chief Justice, Oliver Ellsworth, that "[t]ho' our country pays badly,

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different from the practicing bar at large[, s]uch a development would dramatically alter the nature of the federal judiciary").

30. Rehnquist, *supra* note 5 (quoting John Adams, *Thoughts on Government*, *in* 4 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 193, 198 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1851)); *see also* ABA REPORT, *supra* note 4, at 20–21 ("For judges to emulate the pattern of executive branch Federal service as a mere steppingstone to reentry into private sector law firm practice is inconsistent with the traditional lifetime calling of Federal judicial service."); ROBERTS, *supra* note 3, at 3–4 (expressing concern about life-tenured judges leaving the bench because of financial considerations).

31. Honorable John M. Walker, Jr., Remarks Before the American Bar Association Commission on Separation of Powers and Judicial Independence (Dec. 13, 1996), *reprinted as Current Threats to Judicial Independence and Appropriate Responses: A Presentation to the American Bar Association*, 12 ST. JOHN'S J. LEGAL COMMENT. 45, 55 (1996).

32. *See id.* at 54.

it is the only one in the world worth working for."[33] As Teddy Roosevelt recognized, however, "[i]t is not befitting the dignity of the nation that its most honored public servants should be paid sums so small compared to what they would earn in private life that the performance of public service by them implies an exceedingly heavy pecuniary sacrifice."[34] We agree with the Volcker Commission's recommendation that Congress should grant "an immediate and substantial increase in judicial salaries."[35] The impact of even a substantial raise on the federal budget would be "vanishingly small."[36] States should likewise significantly raise judicial pay. To continue to ignore inadequate judicial salaries could prove costly indeed. In the words of the Volcker Commission:

> The lag in judicial salaries has gone on too long, and the potential for diminished quality in American jurisprudence is now too large. Too many of America's best lawyers have declined judicial appointments. Too many senior judges have sought private sector employment—and compensation—rather than making the important contributions we have long received from judges in senior status.
>
> Unless this is revised soon, the American people will pay a high price for the low salaries we impose on the men and women in whom we invest responsibility for the dispensation of justice.[37]

II. RESTORING CONSISTENCY AND PREDICTABILITY TO TORT LAW

Although independent, highly qualified judges are the key ingredient of a well-functioning legal system, it is also necessary that these judges conscientiously uphold the rule of law. This requires that clear legal principles be faithfully and consistently applied to resolve disputes, and that like cases be treated alike. As Professor Eugene Rostow once observed, "[t]he basic moral principle, acknowledged by every legal system we know anything about, is that

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33. Letter from Oliver Wolcott (Oct. 16, 1800), *in* 2 MEMOIRS OF THE ADMINISTRATIONS OF WASHINGTON AND JOHN ADAMS 434 (George Gibbs ed., New York, William Van Norden 1846), *quoted in* Rehnquist, *supra* note 5.

34. President Theodore Roosevelt, Eighth Annual Message to Congress (Dec. 8, 1908), *in* 15 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 7198, 7209 (James D. Richardson ed., n.s. 1913).

35. VOLCKER REPORT, *supra* note 12, at 32.

36. ROBERTS, *supra* note 3, at 6. One commentator argued that

> judicial salaries make up only a tiny part of the national budget. Had judges received COLA adjustments in 1995, 1996, 1997, and 1999 . . . there would have been a 9.40% increase in judicial salaries. The effect of this salary increase would have accounted for less than 0.00012% of the 2001 [fiscal year] total federal budget, and only about 0.009% of the federal budget dedicated to the administration of justice.

Kristen A. Holt, Comment, *Justice for Judges: The Roadblocks on the Path to Judicial Compensation Reform*, 55 CATH. U. L. REV. 513, 542 (2006) (footnotes and internal quotation marks omitted).

37. VOLCKER REPORT, *supra* note 12, at 23.

similar cases should be decided alike."[38] When the legal system functions in this way, it is possible for corporations and individuals to structure their affairs to comply with the law and to avoid liability. Indeed, such predictability is vitally important to corporate America, where economic planning and stability are essential to prosperity and success.

Unfortunately, whatever may be the case in other areas of law, clarity, consistency, and predictability are largely lacking in the law of torts as it is applied in America today. Although these shortcomings have many causes, a substantial measure of the blame, we believe, is attributable to excessive reliance on juries, rather than judges, to determine issues of liability in this area of the law.

A. THE RISE AND CONSEQUENCES OF THE JURY'S PREDOMINANT ROLE IN MODERN TORT LAW

During the last century, tort law changed dramatically as appellate courts and legislatures rejected or modified a variety of venerable doctrines that had shielded defendants from expansive tort liability in a broad range of common circumstances. As the importance of these doctrines declined or even disappeared, tort liability increasingly came to turn on standards, rather than clear rules, and the application of these standards was generally left to the jury, rather than the judge. Thus, whatever the merits and effect of these changes in legal doctrine are as an abstract matter, one significant and, it appears, largely unintended practical result was to expand the jury's traditional fact-finding role and, at the same time, to decrease the significance of the judge's role in determining tort liability.[39]

As Judge Jerome Frank explained, although "[t]he function of the jury is supposed to be fact-finding," when the jury determines liability, as it generally does in the law of torts today, it determines "not the 'facts' but the legal rights and obligations of the parties to the suit."[40] Judge Frank continued:

> Jury-made law, as compared with judge-made law, is peculiar in form. It does not issue general pronouncements. You will not find it set forth in law reports or in text-books. It does not become embodied in a series of precedents. It is nowhere codified. For each jury makes its own law in each case with little or no knowledge of or reference to what has been done before or regard to what will be done thereafter in similar cases.[41]

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38. Philip K. Howard, *Making Civil Justice Sane*, CITY J., Spring 1968, at 64, 68 (quoting Professor Rostow).

39. *See* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 421 (1999) (explaining that "the growth of the power of the jury lies in the shift from rules to standards, a change the legal realists championed" while noting "[t]hat one fruit borne from the realists' labors is a growth in the power of the jury is ironic, for that was not their goal").

40. JEROME FRANK, LAW AND THE MODERN MIND 170, 172 (6th prtg. 1949).

41. *Id.* at 173–74 n.‡.

Nor, in the usual case, need the jury ever publicly justify or explain its decision. For example, in a typical tort case, the jury offers no reasons or analysis but simply reaches a general verdict finding the defendant liable or not liable. The unexplained verdict thus comes into court "as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi."[42]

There are significant implications for the rule of law when the jury, rather than the judge, is asked to determine basic issues of liability. Because jury verdicts neither create precedents nor establish general principles, "[t]wo litigants with virtually identical fact situations subject to the same standards of law may receive quite different results from two different juries."[43] Not only is such inconsistent treatment of similarly situated persons unfair, it "makes unenviable the task of prediction for those counseling clients on the specific conduct required by the law or the prospects of going to trial on a particular matter."[44] Moreover, because juries deliberate in secret and generally need not explain their verdicts, meaningful review of the jury's decisionmaking process by appellate courts or the public is often all but impossible.[45] Indeed, "[t]he most unusual characteristic of the jury—and especially the civil jury—is that, in a regime devoted primarily to the principled rule of law, jurors are intentionally allowed to make their decisions without requiring that they be justified or subjected to review, except on grounds of gross error."[46]

Relatively recent empirical studies raise additional concerns regarding the dominant role the jury has come to play in the interpretation and application of tort law. As an initial matter, although the law has long entertained the premise that "a reasonable jury is presumed to know and understand the law,"[47] a growing body of empirical studies has uniformly concluded that, whatever their merits as fact-finding bodies, juries often misunderstand and misapply judges' instructions regarding the law.[48] Among other things, these studies have shown

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42. Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 258 (1920); *see also* Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 25 (1990) (stating that where a jury reaches a general verdict with "no explanation of how the decision was reached," trial by jury "resemble[s] its ancient forbears, trial by ordeal and by battle, where similarly there was no division between fact and law but only a decision on the general question").

43. Brodin, *supra* note 42, at 35–36.

44. *Id.* at 36; *see also* FRANK, *supra* note 40, at 173 n.* ("Surely, if any law is retroactive—unknowable at the time of action—it is jury law. As long as the jury system flourishes it will be peculiarly absurd to say that any man warrantably acted with reference to a known state of law.").

45. *See* Brodin, *supra* note 42, at 19–20; *see also* Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1603 (2001) (observing that "a general verdict imposing or refusing to impose civil liability is largely inscrutable and, therefore, often unreviewable in practice").

46. George L. Priest, *Justifying the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 103, 105 (Robert E. Litan ed., 1993).

47. *E.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 243 (1993).

48. *See, e.g.*, Brodin, *supra* note 42, at 46–47 (summarizing and citing studies); Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 66 n.9 (1995) (same); Noah, *supra* note 45, at 1604 n.9, 1635 n.126 (same).

that jurors typically understand fewer than half of the legal instructions they are given,[49] and that jurors err on legal questions twice as frequently as on factual determinations.[50] It has thus been observed:

> When we depend on jurors untrained in the law to comprehend legal concepts provided to them through oral instructions by the judge and further to properly apply them to the facts as found, we make reliance on such rules in the conduct of one's daily affairs a matter of questionable wisdom.[51]

Moreover, and of special concern to corporate America, careful empirical research has also demonstrated that—consistent with the anecdotal evidence with which we are all familiar—juries treat corporate defendants differently from individual defendants. Thus, although the law provides no basis for such a distinction, juries hold corporate defendants to a higher standard of care than individual defendants charged with identical acts, finding corporate defendants negligent or reckless on the same facts on which individual defendants are found blameless.[52] Similarly, when corporate defendants are found liable in tort, juries assess significantly higher damages than they assess against individual defendants found liable for inflicting identical or substantially similar injuries.[53] For example, one seminal study based on actual jury verdicts predicted that in the ordinary run of tort cases "corporate defendants pay 34 percent larger awards, after controlling for plaintiffs' injuries and type of legal case" than do individual defendants and, in cases of severe physical injury, "a corporate defendant pays almost 4.5 times as much as an individual, on average."[54]

We believe the problems associated with the dominant role that the jury has come to play in American tort law should be a cause of concern not only to corporations but to the country as a whole. Indeed, the growth of class actions and mass litigation has accentuated the harm that can result from even a single ad hoc and unwarranted jury verdict.[55]

As an initial matter, jury verdicts that subject corporate defendants to unpredictable, inconsistent, discriminatory, and often practically unreviewable liabil-

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49. *See* Feigenson, *supra* note 48, at 66 n.9.

50. *See* Brodin, *supra* note 42, at 46–47.

51. *Id.* at 37.

52. *See* Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 338–39, 343, 344–45, 348–49 (1998) (summarizing results of analyses of jury verdicts and awards, judge-jury agreement for verdicts, and experimental studies); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 LAW & SOC'Y REV. 121, 126 (1996) ("Both archival analyses and mock jury experimentation indicate that in similar cases, juries do treat corporations differently from individuals."); Noah, *supra* note 45, at 1642 & n.155 (summarizing research that juries hold corporate defendants to a higher standard than individual defendants).

53. *See, e.g.*, Hans, *supra* note 52, at 338–39, 344–45 (summarizing results of jury award analyses and experimental studies in which corporate defendants were continually made to pay higher awards).

54. James K. Hammitt et al., *Tort Standards and Jury Decisions*, 14 J. LEGAL STUD. 751, 754 (1985).

55. *See* Gergen, *supra* note 39, at 422.

ity are fundamentally unfair. The mere possibility of such verdicts, moreover, creates uncertainty for those seeking to comply with the law and generates wasteful litigation. The costs of litigation and the possibility of such verdicts, in turn, can intimidate businesses into assuming a defensive posture, chilling productive and socially desirable activities that carry unavoidable risks, such as the development and marketing of new products and services. Indeed, "[t]here can be no doubt that the cumulative effect of jury verdicts in areas such as products liability and medical malpractice is tantamount to the making of social policy, influencing, if not directing, the future conduct of manufacturers, drug companies, and hospitals."[56]

The direct costs that such verdicts impose on business harm not only corporations, but also employees and the nearly 100 million American investors who own corporate stock, either directly or through mutual funds or retirement plans.[57] Such costs also harm consumers, who ultimately foot the bill for such verdicts through increased prices that effectively include what has been called a "lawsuit tax" of between $3000 and $4000 a year for a family of four.[58]

Large though these direct costs may be, the indirect costs may be more significant still. When fear of unjustified jury verdicts causes corporations to withdraw products or services from the market or to delay or terminate the development of new products or services, consumers lose the benefits that these products or services might have provided. For example, during the early 1980s, a rash of unjustified litigation alleged—despite the lack of sound scientific evidence—that Bendectin, a medication for morning sickness, caused limb reduction birth defects. Although judges uniformly found in favor of the defendant in cases that were tried without a jury, a substantial percentage (43%) of the jury trials resulted in verdicts for the plaintiffs.[59] Even though all of the verdicts for the plaintiffs were ultimately reversed or vacated, the damage had already been done. High litigation costs had led Merrell Dow to withdraw Bendectin from the market and this medication, which the Food and Drug Administration (FDA) continues to regard as safe and effective, is no longer available even though it served a valuable and beneficial therapeutic role for

56. Brodin, *supra* note 42, at 105–06; *see also id.* at 37 (discussing a study which concluded "that of the variety of external pressures felt by large manufacturers with regard to the safe design of their products, liability litigation had the greatest influence on design decisions, but that the signals sent by jury verdicts were extremely vague" (internal quotation marks omitted)); Noah, *supra* note 45, at 1650 (observing that "even if they set no precedent, civil verdicts have an undoubted regulatory effect"); *cf.* Kenneth W. Simons, *The Hand Formula in the Draft* Restatement (Third) of Torts*: Encompassing Fairness as Well as Efficiency Values*, 54 VAND. L. REV. 901, 935 (2001) (observing that "business and corporate entities . . . are more likely than individuals to consciously weigh the advantages of precautions against the disadvantages").

57. *See* Steven B. Hantler, Chairman, Am. Justice P'Ship, Tort Reform: Common Sense and Common Law, Address at the West Virginia Chamber of Commerce (Sept. 2, 2005), *in* 71 VITAL SPEECHES OF THE DAY 714, 716 (2005) (noting the large expenses that tort cases impose on businesses, small investors, and workers).

58. *Id.* at 717.

59. *See* Noah, *supra* note 45, at 1612 n.31.

many patients.[60] And no doubt "other pharmaceutical companies have gotten the clear message that marketing any drugs for the treatment of conditions during pregnancy will attract tort litigation because some juries will not overly concern themselves with questions of causation."[61] More generally, "a lawsuit culture . . . corrodes daily relations throughout society[,] . . . infecting daily dealings with distrust and defensiveness."[62] In the words of former Attorney General Benjamin Civiletti:

> Today innocent or near blameless defendants are too frequently put at the mercy of happenstance and the vagaries and passions of the jurors. The aberrations that plague current tort litigation not only disappoint the parties involved, but also impose a tremendous, unpredictable, and unnecessary cost on litigants and nonlitigants alike.[63]

B. RESTORING JUDICIAL CONTROL AND THE RULE OF LAW

This unfortunate state of affairs is not inevitable. Judges can and should take measures to restore clarity, consistency, predictability, and accountability to this area of the law.

As an initial matter, we believe that, when possible, judges should attempt to develop and enforce clear rules or at least more specific standards of tort liability. As Justice Holmes observed long ago:

> If, now, the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at last be the business of the court.[64]

For example, in the law of negligence, which remains of critical importance in tort law today, "the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances."[65] Justice Holmes's view of tort law fell decisively out of fashion during the twentieth century. But although his view may be more aspirational than practical in a broad run of cases today, there is nevertheless substantial room for the development of more specific rules and

60. *See id.* at 1656–57.

61. *Id.* at 1657; *see also* Brodin, *supra* note 42, at 106 n.409 (noting "the withdrawal of an effective anti-pertussis vaccine after several large jury verdicts against the pharmaceutical producers").

62. Howard, *supra* note 38, at 64.

63. Benjamin R. Civiletti, *Zeroing in on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 MD. L. REV. 40, 40 (1986).

64. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 111 (Little, Brown & Co. 1938) (1881).

65. *Id.*

standards in tort law.[66] For example, we believe that in many circumstances and contexts, compliance with safety regulations or industry customs should constitute a defense to tort liability as a matter of law, and that courts should reconsider or at least limit the prevailing contrary doctrine.[67]

When judges cannot resolve liability on the basis of clear rules, they should carefully review the sufficiency of plaintiffs' evidence to ensure that meritless cases are not submitted to the jury. The revitalization in recent years of summary judgment—which allows judges to keep claims that plainly lack evidentiary support from the jury—is a welcome development,[68] and courts should use this and other tools, such as dismissals and judgments as a matter of law, vigorously to help restore principled decisionmaking to the tort system.

Even when broad issues such as negligence must be submitted to the jury, judges can and should attempt to guide the jury's deliberation so as to promote fair and predictable application of the law. For example, the so-called Hand Formula, which makes clear "that negligence means creating an 'unreasonable risk,' defined as one whose expected costs exceed the costs of avoiding it, has been explicitly endorsed by the *Restatement of Torts*, by the leading treatises, and by courts in most states."[69] Yet courts do not ordinarily instruct juries to compare the costs and benefits of greater care, but rather simply ask "whether the actor behaved as 'a reasonably prudent person' would have under the circumstances."[70]

The failure to give a more accurate and complete account of the meaning of negligence likely results primarily from judicial abdication or inertia, and may

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66. *See* Simons, *supra* note 56, at 934–35 ("Negligence doctrine will and should continue to develop more specific standards in particular fields. The conventional wisdom that negligence rules normally cannot be articulated beyond the facts of a given case is wrong; negligence doctrine is full of special rules and standards. Although rigid, bright-line rules are often inadvisable, more flexible rules and standards are often both feasible and desirable." (footnote omitted)).

67. *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 612–13 (1998) ("The refusal to rely more heavily on either regulatory compliance or custom presents a lost opportunity to avoid a biased assessment of liability, especially in the case of custom."); Simons, *supra* note 56, at 935 ("Precedent, related statutory rules, and customary norms should also play a role in limiting the open-ended quality of negligence judgments.").

68. *See generally* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules . . . ."); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 254 (1986) (holding that to survive summary judgment, "there must be evidence on which the jury could reasonably find for the plaintiff" and that "the judge must view the evidence presented through the prism of the substantive evidentiary burden"); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (holding that if the factual context renders the plaintiff's claim implausible, the plaintiff must offer more persuasive evidence than would otherwise be necessary to survive summary judgment).

69. Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1015–16 (1994) (footnotes omitted).

70. *Id.* at 1017; *see also id.* at 1019 (explaining that in most cases "the reasonable person standard is given to the jury without elaboration"); *id.* at 1022–23 ("An accurate account of existing practices must therefore begin with the observation that modern negligence law endorses *both* the Hand Formula and the reasonable person standard, but (design defect cases aside) instructs the jury only in the latter." (footnotes omitted)).

as a practical matter facilitate juries' application of an improper standard of liability akin to strict liability in which a defendant is liable unless avoiding any risk is so costly as to be impractical.[71] Although a complicated or technical cost-benefit instruction might confuse the jury, it is difficult to see a downside to supplementing a "reasonably prudent person" instruction with an explanation (which captures the essence of the Hand Formula in a simple and intuitive manner) that such a person exercises such care as "an average reasonable person takes of his or her own person and property," perhaps coupled with an instruction that the Hand Formula should be applied "as a nontechnical rule of thumb."[72] Invoking the Hand Formula would make clear that the jury should consider only the risk of injury and the costs and benefits of additional care, not such legally irrelevant considerations as the defendant's corporate status or sympathy for the plaintiff's injuries.[73] Doing so would also indicate to the jury that when the costs of prevention are disproportionately high, actors engaged in beneficial activities may create reasonable, albeit foreseeable, risks without liability.[74]

In addition, when courts must submit broad issues of liability to the jury, they should avoid asking the jury to deliver a general verdict that simply reports whether the jury found the defendant liable and, if it did, the amount of damages deemed appropriate by the jury. Rather, courts can and should make use of special verdicts or similar procedural devices that require the jury to specifically state how it resolved each of the disputed issues of fact, liability, and damages at issue in the case. By packaging the litigation into manageable components and focusing the jury's attention on key disputed issues, procedural devices such as special verdicts serve "to structure the jury's deliberations in a manner that highlights the judge's instructions."[75] More importantly, such devices promote accountability and meaningful review of the jury's decision by "enabl[ing] the public, the parties and the court to see what the jury has really done."[76] Although special verdicts and similar procedures have become more

71. *See id.* at 1025–26, 1052.

72. *Id.* at 1037, 1042.

73. *See id.* at 1044.

74. *Id.*

75. Brodin, *supra* note 42, at 64–65; *see also id.* at 63 (explaining that special verdicts and interrogatories "operate to improve the reliability of jury decision-making through the recognized psychological impact specific questions have in concentrating juror attention on certain matters to the exclusion of others").

76. Sunderland, *supra* note 42, at 259. Judge Hand elaborated on the value of procedural devices such as the special verdict:

> I also concur in thinking that it would be desirable to take special verdicts more often. True, it would often expose the general verdict to defeat by showing how irrational had been the operation of the juror's minds. However, like my brother Frank, I am not among those who appear to esteem the system just because it gives rein to the passional element of our nature, however inevitably that may enter all our conclusions. I should like to subject a verdict, as narrowly as was practical, to a review which should make it in fact, what we very elaborately pretend that it should be: a decision based upon law.

common in recent years,[77] increased use of these devices would foster clarity, consistency, and accountability in the tort system.

More fundamentally, the current state of the tort system may even warrant reexamination of the view that the application of liability standards, such as negligence, is a question of fact for the jury rather than one of law for the judge.[78] As some of our most eminent judges and scholars have recognized, even a highly fact-dependent standard of liability, such as the reasonably prudent care standard of negligence, remains at bottom a legal standard.[79] And special verdicts would seem tailor-made to assign the responsibility for determining historic facts to the jury, while reserving to the judge the application of legal standards of liability to those facts. Indeed, some of the most forceful advocates for the special verdict have contemplated just such a role for this procedural mechanism, even referring to such a verdict as a "fact verdict."[80] In the words of one such advocate:

> By confining the civil jurors' role to the facts and leaving law application to the judge, the fact verdict draws upon the strengths of each. In addition, jurors who are aware that their specific findings will be publicly recorded will be encouraged to focus impartially on those issues and to be accurate in their resolution of them. . . . Equally important, judges will no longer be able to pass the buck to the jury on so many of the most challenging and perplexing problems of modern law. Rather, those questions will have to be answered in publicly accessible written decisions by resort to evolving standards of conduct.[81]

Resolving issues of tort liability in this manner would promote principled decisionmaking and more consistency in application of the rule of law. Although it would be naïve to think that judges would be immune from making bad rulings, "at least the rulings [would] be in writing for all to see and [could] be appealed and, if [wrong], overturned by the legislature."[82] Moreover, as precedents accumulate, it seems likely, as Justice Holmes envisioned, that clear rules or at least more specific legal standards could be identified through the method of the common law. But even if the search for such rules and standards

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Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 70 (2d Cir. 1948) (Hand, J., concurring); *see also* Brodin, *supra* note 42, at 69 ("By breaking down and spelling out the results of the jury's deliberations, the special verdict makes review more meaningful and effective."); Noah, *supra* note 45, at 1653 (suggesting that "the increased use of special verdict forms or general verdicts with interrogatories could enhance the transparency of the jury's decisionmaking process").

77. *See* Brodin, *supra* note 42, at 62, 94.

78. *See, e.g.*, Richmond & Danville R.R. Co. v. Powers, 149 U.S. 43, 45 (1893); R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657, 663–65 (1874).

79. *See, e.g.*, *Skidmore*, 167 F.2d at 67; HOLMES, *supra* note 64, at 110–11, 123–24.

80. *E.g.*, *Skidmore*, 167 F.2d at 57–70. *See generally* Brodin, *supra* note 42, at 50 n.149 (collecting commentary).

81. Brodin, *supra* note 42, at 110–11.

82. Howard, *supra* note 38, at 73.

proved ultimately futile, a body of written precedents would at least provide by analogy a measure of coherence and predictability that is currently lacking from this area of the law. By contrast, "having no rulings"—as happens when issues of liability are decided by a jury in ad hoc, inconsistent, unpredictable, and largely unreviewable general verdicts—"is like having a perfect record of bad rulings. Most people will act as if they might be liable. Why take the risk?"[83]

C. THE SEVENTH AMENDMENT DOES NOT BAR REFORM

Some argue, however, that the Seventh Amendment bars federal judges from taking the application of tort liability standards, such as negligence, from the jury.[84] We do not believe that it does.[85]

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.[86]

Consistent with the textual requirement that the jury right "be preserved," the Supreme Court has consistently analyzed the Seventh Amendment's meaning in light of the historical jury right that existed at common law when the Amendment was adopted.[87]

Tort concepts like negligence were not yet developed at the time the Seventh Amendment was adopted, however.[88] Indeed, as Professor Lawrence Friedman has explained, the law of torts as a whole was "totally insignificant" at that time, "a twig on the great tree of law."[89] And the general negligence duty to take reasonable care in conduct that might foreseeably harm other people or their property appears not to have been clearly formulated until long after the Seventh Amendment was adopted.[90] Furthermore, the most closely analogous questions that did exist at the time of the Seventh Amendment's adoption, such as the reasonableness of notice in commercial cases and the existence of

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83. *Id.*

84. *See, e.g.*, Int'l Terminal Operating Co. v. N.V. Nederl. Amerk Stoomv. Maats., 393 U.S. 74, 75 (1968) (per curiam) (asserting cursorily that the Seventh Amendment requires that the determination of contributory negligence be left to the jury's determination).

85. Although we do not consider the questions posed by analogous state civil jury provisions, to the extent those provisions are interpreted consistent with the Seventh Amendment our analysis of the latter provision would likely be relevant or controlling in the state constitutional context as well.

86. U.S. CONST. amend. VII.

87. *See, e.g.*, Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996).

88. *See* Brodin, *supra* note 42, at 32 n.73.

89. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 467 (2d ed. 1985).

90. *See* Gergen, *supra* note 39, at 429–30 & n.107 (suggesting that *Heaven v. Pender*, (1883) 111 Q.B.D. 503 (C.A.) (Eng.), "is the original expression of this principle"); *see also* Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1891 (1966) (tracing this principle to *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490 (C.P.)).

probable cause in malicious prosecution actions, were treated as legal questions that could be decided by the judge.[91] It would thus appear that "from a strict historical test . . . there is no federal constitutional right to have a jury apply the reasonable man standard."[92]

More generally, special verdicts and other formal and informal mechanisms existed at the time the Seventh Amendment was adopted and allowed judges to control the application of legal standards to facts determined by the jury.[93] The Supreme Court has interpreted the Seventh Amendment to permit modern analogs of these procedures so long as "[t]hey do not trespass on the prerogative of the jury to determine all questions of fact."[94] And, as discussed above, a determination of liability, even under a context-dependent standard such as reasonableness, is, ultimately, a question of law.[95] Significantly, questions of reasonableness and similar concepts are often decided by judges as legal questions in many areas of the law, including, notably, commercial law and Fourth Amendment law.[96] Indeed, Justice Scalia has stated that he "frankly

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91. *See, e.g.*, Tindal v. Brown, (1786) 99 Eng. Rep. 1033 (K.B.) (holding that what notice is reasonable in commercial cases is a legal issue and granting judgment for the defendant on the facts found by the jury pursuant to a special verdict); Weiner, *supra* note 90, at 1916 (noting that in malicious prosecution cases, probable cause was a legal question that could be decided by the judge); *see also id.* at 1891–92 ("As to other questions of reasonableness in the pre-1791 common law to which this negligence issue 'could be analogized,' it should be noted that such questions were at the time generally deemed to be for the court rather than for the jury." (quoting Martin v. Detroit Marine Terminals, Inc., 189 F. Supp. 579, 583 (E.D. Mich. 1960)).

92. Weiner, *supra* note 90, at 1891.

93. At common law,

> it was not infrequent to ask from the jury a special, rather than a general verdict; that is, instead of a verdict for or against the plaintiff or defendant, embodying in a single declaration the whole conclusion of the trial, one which found specially upon the various facts in issue, leaving to the court the subsequent duty of determining upon such facts the relief which the law awarded to the respective parties.

Walker v. N.M. & S. Pac. R.R. Co., 165 U.S. 593, 596–97 (1897); *see, e.g.*, Brown v. Barry, 3 U.S. (3 Dall.) 365 (1797) (hearing an appeal from a case decided on a special verdict); WILLIAM BLACKSTONE, 3 COMMENTARIES *377 (describing a special verdict, wherein the members of the jury "state the naked facts, as they find them to be proved, and pray the advice of the court thereon"); THE FEDERALIST No. 65, at 361 (Alexander Hamilton) (E.H. Scott ed., 2002) (recognizing that juries "are sometimes induced to find special verdicts, which refer the main question to the decision of the court"); *see also* Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 57 (2d Cir. 1948) ("Those who resent any reform which invades the jury's province should be reassured by the historians who teach that the special verdict is no new-fangled idea, but one almost as old as the jury itself, older indeed than the modern jury.").

94. *Walker*, 165 U.S. at 595–98 (rejecting a Seventh Amendment challenge to a statutory procedure that allowed a judge to disregard the jury's general verdict and enter judgment on the jury's special findings of fact).

95. *See supra* notes 78–79 and accompanying text.

96. *See, e.g.*, Brodin, *supra* note 42, at 33 n.77 (explaining that "the issue of reasonable time in commercial law cases or of what constitutes probable cause in malicious prosecution actions . . . are often left for the judge"); Gergen, *supra* note 39, at 416 ("[J]udges decide whether there was a reasonable basis for bringing a lawsuit in the area of abuse of process . . . ."); Howard, *supra* note 38, at 69 (noting that "core concepts" in commercial law are often decided as a matter of law); *see also* Gergen, *supra* note 39, at 412 ("If juries were to play the same role in defining what conduct constitutes fair dealing, improper interference, or unjust enrichment that they historically they [sic] have played in

do[es] not know" how to answer to the question, "[w]hy should the question whether a person exercised reasonable care be a question of fact, but the question whether a search or seizure was reasonable be a question of law?"[97] In light of the historical record, we would submit that no such distinction is compelled by the Constitution, and that judges may determine the application of tort liability standards so long as they preserve to the jury the role of determining historical fact.

CONCLUSION

An independent judiciary composed of highly talented judges who ensure that the law is consistently applied in a principled and predictable manner is of vital importance to corporate America and to our constitutional republic. As a nation, we owe it to the judiciary and ourselves to ensure that judicial compensation is adequate to attract and retain judges who are independent and capable of resolving cases in a conscientious and intellectually rigorous manner. In turn, the judiciary must conscientiously uphold the rule of law by ensuring that like cases are treated alike and that legal disputes are resolved in a principled and predictable manner. Increased judicial salaries and an expanded role for judges in resolving tort disputes would go a long way towards improving the administration of justice, ensuring judicial independence, and promoting the rule of law.

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defining what is inappropriate conduct in negligence the consequences would be profound. The power to define the legal morality of the marketplace would thereby be shifted from the judge to the jury.").

97. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1181–82 (1989).