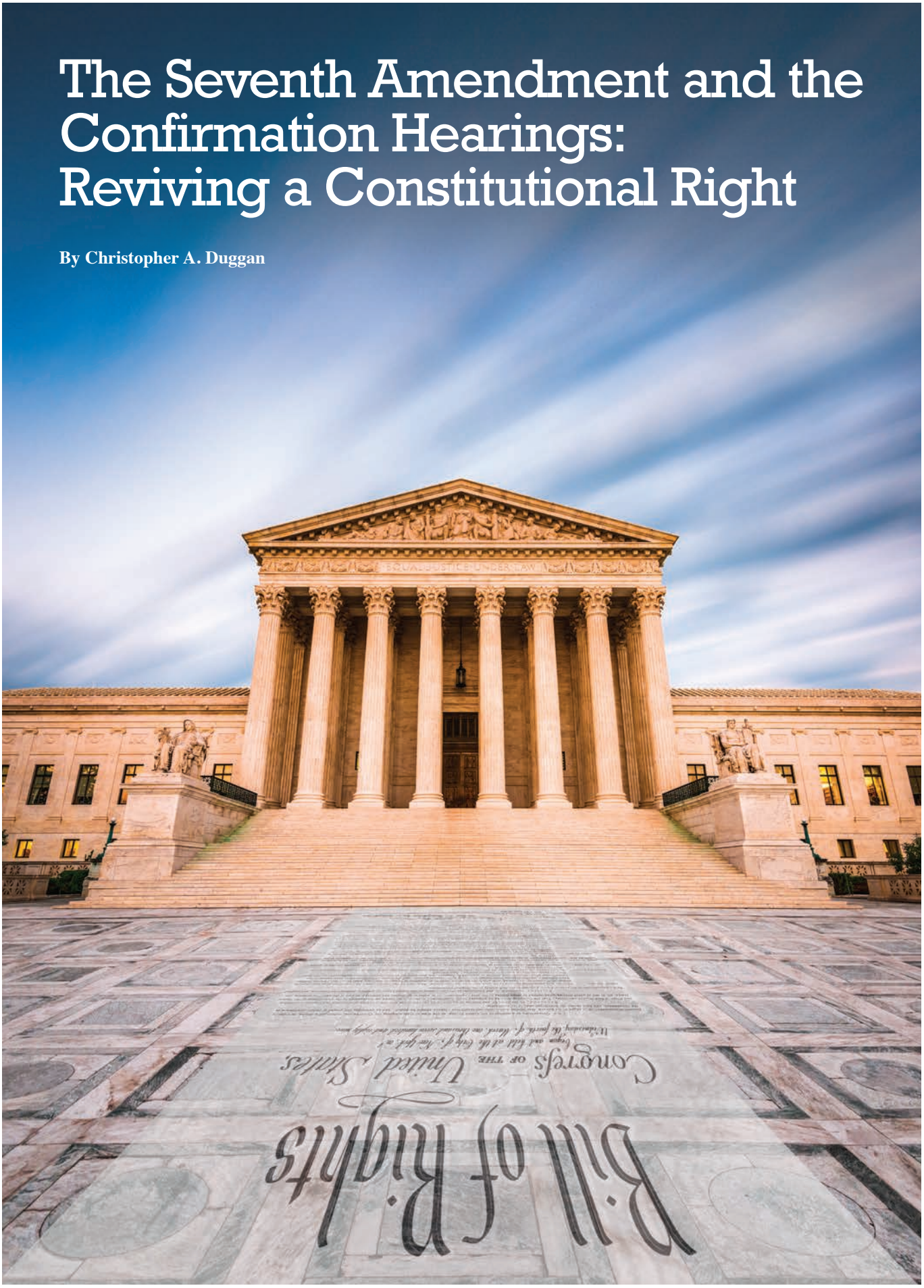
The Seventh Amendment and the Confirmation Hearings: Reviving a Constitutional Right

By Christopher A. Duggan



Now that President Trump has nominated Judge Neil Gorsuch to fill the seat on the United States Supreme Court left vacant by the death of Justice Antonin Scalia, the Senate will soon turn its attention to performing its Constitutional "advice and consent" function under Article II, §2, cl.2. Many groups and individuals have already expressed opinions on Judge Gorsuch's nomination, exercising a cherished Constitutional right — free speech — that must never be impugned in a functioning democracy. Such citizen participation in this important decision is heartening. The People care.

Some of the most vociferous participants in this debate see an opportunity for the next Justice to influence a specific political or social goal. Many have been quite vocal promoting political views or judicial philosophies they believe the next Supreme Court Justice should hold before he or she is confirmed to a seat on the bench. Advocates on abortion issues, gun rights, and the intersection of government power and religious liberty under the Constitution, the Bill of Rights and the Fourteenth Amendment have been particularly prominent. It is fitting that these views are aired in the marketplace of ideas as Thomas Jefferson envisioned.

Yet, there is one aspect of Judge Gorsuch's judicial philosophy that has received virtually no attention to date: his view of the role of the jury, and specifically the civil jury, in the American judicial system. Many people, perhaps even some in the federal service, might not realize that there is a Seventh Amendment right to trial by jury in most civil cases brought in United States courts, and that this right is fast withering from underuse. The confirmation hearings provide an excellent opportunity to remind all citizens of the special place juries have in the American system of self government — and why the people who created our government were especially concerned about maintaining the role of juries in deciding civil cases.

The Seventh Amendment: Text and Intent

The Seventh Amendment guarantees that:

"In suits at common law … the right of trial by Jury shall be preserved, and no fact, tried to a Jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

This is one of three amendments in the Bill of Rights, the Fifth (the Grand Jury), the Sixth (petit jury in criminal trials) and the Seventh (civil jury trials) that deal with citizen participation in the legal system as jurors. In addition, the very absence of the jury, except in one sentence in Article III of the original Constitution, was one of the driving forces behind the limitations on judicial power found in the First, Fourth and Eighth Amendments. Very simply, the Framers and the Founders were convinced that citizen juries were necessary in a government of the people to act as a check on both government tyranny and mob rule.

The Founding Fathers and Founding Mothers were convinced that The People's right to a civil trial must be promoted and remain inviolate. As they saw it, a jury chosen from good and impartial citizens of the vicinage, a process that pre-dated Magna Carta, was critically important to ensuring that all citizens received a just and fair hearing, and that their property could not be unfairly snatched from them without due process of law. This was as important in civil cases as in criminal actions, as the Founders made abundantly clear.

Just three days after the Federal Convention assembled in Philadelphia in May of 1787, Charles Pinckney of South Carolina submitted his "Observations on the Plan of Government" to the Convention in response to the "Virginia Plan," which had omitted the right to a jury trial in the new federal court system. Pinckney left no doubt that this omission was intolerable to a free people. Pinckney itemized four basic freedoms he felt were essential to the new government that were missing from the proposed plan:

> [T]he Writ of Habeas Corpus — the *Trial by Jury in all cases, Criminal as well as Civil* — the Freedom of the Press, and the prevention of Religious Tests, as qualifications to Offices of Trust or Emolument: The three first [are] essential in Free Governments; the last, a provision the world will expect from you, in the establishment of a System founded on Republican Principles, and in an age so liberal and enlightened as the present. *(Emphasis added.)*

Later that summer, when the Committee on Detail submitted a revised draft of the proposed Constitution that guaranteed jury trials only in criminal matters under Article III, Elbridge Gerry of Massachusetts objected. He refused to sign the final draft in part because, he believed, civil trials without juries would degenerate into nothing better than a Star Chamber. The brilliant George Mason of Virginia agreed. When the draft was adopted by the Convention, Mason also refused to sign; he too noted the lack of a guarantee of civil jury trials among his objections to the Constitution as drafted.

The Civil Jury Trial and Ratification

Ratification almost stalled due to vehement opposition in Massachusetts. John Hancock and Samuel Adams, among many others, were very concerned about what they believed was the erosion of the rights of The People under the proposed Constitution. They were specifically upset about the failure of the document to guarantee the right to a civil jury trial. Tyranny could be exercised as easily by taking a person's property through a judge acting without a jury as by imprisonment.

To Hancock and Adams, these were two sides of the same bad coin. They had lived it once following the Stamp Act, when the Parliament had moved most cases from common law

courts, where juries sat, to Admiralty where all cases were decided by a judge appointed and paid for by the Crown, and they had no intention of doing that again. From their experience, Hancock, Adams and their followers were convinced that the jury was the only defense citizens had to autocratic government.

In a widely-circulated pamphlet, one of America's first great post-Revolutionary historians, Mercy Otis Warren, writing under the pseudonym *A Columbian Patriot*, gave voice to the concerns of many about the failure of the draft Constitution to include a right to a civil jury trial. Relying on Blackstone's declaration that juries were essential to the protection of property (in civil cases) as well as to liberty, Mercy Otis Warren demanded:

> [S]hall a privilege … that has been a part of the law of nations, even in the [feudal] systems of France, Germany and Italy, and [that] from the earliest records has been held so sacred, both in ancient and modern Britain, … - shall this inestimable privilege be relinquished in America …?

Delegates to the Massachusetts Ratifying Convention took Warren's concerns to heart. After a contentious three weeks of debate, the Convention narrowly voted (187-168) to approve the proposed Constitution, but only after a bargain was struck. At the last second, Hancock agreed to support the document in exchange for a promise that, if the Constitution was ratified, the first Congress would take up requests for amendments to secure personal liberties of The People, specifically including the right to a civil jury trial. (To sweeten the deal, Hancock was also promised that he would be nominated for President if Virginia did not ratify, but that is a different story). This was the origin of what became the Bill of Rights. Had the Massachusetts Convention rejected the Constitution, it may well not have received the necessary support from nine states for ratification.

Even though he did not share the belief in the necessity of juries in all civil cases, Alexander Hamilton recognized how deeply The People felt about preserving the right of a civil jury trial, at least in cases of common law, and strained to explain why the Anti-Federalist concern for a constitutional guarantee for civil jury trials was misplaced. In *Federalist No. 83*, Hamilton stated that the omission of a civil jury trial guarantee did not mean that the Constitution abolished civil juries, only that it would be left up to the first Congress and the several States to adopt or restrict the practice as they saw fit.

Even so, Hamilton wrote the deep feeling the people had to preserve the right to civil trials. He wrote, "[t]he objection [to the Constitution] which has met with the most success in this state (New York), and perhaps in several of the other states is that relative to *the want of a constitutional provision* for the trial by jury in civil cases." (Emphasis Hamilton's). Hamilton recognized that both proponents and adversaries of the proposed Constitution agreed on the centrality of the civil jury in the American government:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government."

In the face of such popular demand, the first Congress proposed what became the Seventh Amendment. James Madison's first draft of that amendment praised the civil jury trial as "one of the best securities to the rights of a free people." Borrowing from Article XV of the Massachusetts Declaration of Rights written in 1780 by John Adams, Madison further wrote that the right to a civil jury trial "ought to remain inviolate."

With some changes to the words, but none to the substance, the Seventh Amendment became part of the country's fundamental law when it was ratified after little debate on December 15, 1791.

Tocqueville on the Civil Jury System

Possibly the most cogent early analysis of the role of the jury system in the American Republic, and specifically of the civil jury, was written by a Frenchman. After touring America in 1831 and 1832, and observing the operation of the American Experiment first hand, Alexis de Tocqueville published *Democracy in America,* in which he wrote at length about the central role of the juries, both civil and criminal, in the American practice of self-government.

Tocqueville recognized the critical dual function the jury played both in fostering citizen participation in a Republican form of government and in checking potential tyranny of the majority. He observed, "[I] f [the jury] exerts a great influence on the fate of cases, it exerts a much greater one still on the very destinies of society" in listening to and deciding the outcome of cases which the society generally accepts. Contrasting the American jury experience, even in 1832, with the English practice of limiting jurors to the Aristocratic class, Tocqueville declared that the jury is "as direct and as extreme a consequence of the dogma of the sovereignty of the people as universal suffrage."

Tocqueville also realized that the jury acted as a great civics teacher, and in that manner acted as a vital check on unrestrained emotions of the majority. The jury, he explained, "serves to give the minds of all citizens a part of the habits of the mind of the judge; and these habits are precisely those that best prepare the people to be free. It spreads to all classes respect for the thing judged and the idea of right… It teaches men the practice of equity… and serves incredibly to form the judgment and to augment the natural enlightenment of the people."

Tocqueville recognized that juries mitigate tyranny of the majority both by teaching jurors about their rights as citizens and by empowering them to make enforceable decisions within the bounds of the law. Even more than the criminal jury, these benefits were spread by civil juries, because few people found

Letter to the Chairman of the Senate Judiciary Committee

February 16, 2017

Hon. Charles Grassley
135 Hart Senate Office Building
Washington, D.C. 20510

Re: Confirmation Hearings for Judge Neil Gorsuch as Nominee to the United States Supreme Court

Dear Senator Grassley:

I am writing to you as the President of the American Board of Trial Advocates (ABOTA), an organization whose membership is evenly comprised of lawyers who primarily represent plaintiffs and those who normally represent defendants. We are an apolitical organization dedicated to preserving the Seventh Amendment right to jury trial and promoting civility and professionalism in the legal community, as well as a fair, impartial and independent judiciary.

I write not to support or oppose Judge Gorsuch's nomination, but rather to urge that you and your colleagues on the Senate Judiciary Committee discuss with the nominee a critically important, but often overlooked, topic that should be considered during the confirmation hearing process: the role of the jury, and specifically the civil jury, in the American judicial system. Before a vote on the nominee is taken, the Committee, the Senate, and ultimately, The People of the United States are entitled to have a clear understanding of how the nominee views the Seventh Amendment to the United States Constitution and its application to civil cases today. ABOTA also is engaged in improving civics education. The hearings can and should be used for this purpose. Our emphasis on the civil jury trial is based on both the text and the original intent of the Founders.

I have attached hereto an article by one of our ABOTA members, Christopher A. Duggan, that documents the central role of the jury in our constitutional framework and the importance the founders of our country placed on the role of the people as jurors in the civil justice system.

Unfortunately, resolution of civil disputes through jury trial has greatly diminished over the last two decades; according to the Bureau of Justice Statistics, fewer than 1% of Federal civil case filings result in a jury verdict. As Mr. Duggan points out in his article, the decline of the civil jury trial harms, not only the litigants, but also reduces citizen participation in the government in direct contravention to the intentions and vision of the founders of our country. Not only do civil jury trials serve to resolve the disputes between the parties, they also allow the public at large to directly participate in government and to learn of the underlying law applicable to the facts of a dispute that may be relevant in their lives, such as providing information regarding the appropriate conduct of institutions, corporations, and individuals.

Accordingly, on behalf of ABOTA, I ask that the Judiciary Committee pose the following questions to Judge Gorsuch at the confirmation hearing:

1. What do you see as the role of the civil jury trial under the Seventh Amendment in the 21st Century?

2. Do you believe the civil jury trial is invaluable as a means of resolving disputes among litigants today?

3. Why, in your view, are civil jury trials declining in the federal system? Do you have any suggestions for how they can be fostered and promoted? What are your thoughts about how the civil justice system at the federal level can be improved and made more efficient for all participants?

4. Do you believe that various forms of "Alternative Dispute Resolution" have made the Seventh Amendment obsolete?

5. Do you think that the right to a civil jury trial is an essential element of fundamental fairness to litigants who wish to have their common law cases decided by jury? Should the Seventh Amendment be applied to the States as are each of the other first eight Amendments? If not, why is the Seventh Amendment the only one of the first eight amendments not afforded that status since McDonald v. Chicago, 561 U.S. 742 (2010)?

6. Is it proper, under the Seventh Amendment, for citizens to be compelled to give up jury trial rights by mandatory arbitration clauses in adhesion contracts? Can you envision any limits on this practice under the Seventh or Fourteenth Amendment?

I am confident that, if the above questions are put to Judge Gorsuch, his answers will shed light upon important characteristics necessary for a Supreme Court Justice to faithfully apply the Constitution and to ensure the right to civil jury trial guaranteed by the Seventh Amendment.

ABOTA believes that the continuing vitality of the jury trial is central to our Republican form of government that relies so heavily on public engagement, and a full discussion of Judge Gorsuch's view of the jury's role in the judicial process will be an important insight into his qualifications to serve as a member of the United States Supreme Court.

Respectfully,

F. Dulin Kelly
President
American Board of Trial Advocates

themselves in the criminal system, but any citizen might be in a civil lawsuit. Because the civil jury system touched virtually every aspect of everyday life, its use in spreading civic responsibility and teaching civil values was, to Tocqueville, all the greater.

Coming from France, which had so recently experienced wild swings from the autocracy of the Bourbon Dynasty to the terror of the Jacobins, the dictatorial rule of Napoleon and the Restoration of the monarchy, Tocqueville intuitively understood the vital role the juries played in ensuring stability, self-government and freedom in America. He was enamored of the power and the responsibility Americans placed in the jury and especially in the civil jury. Arguably, these important roles served by the civil jury are even more important now than they were in the 19th century, as numerous studies decry the lack of knowledge of basic civics among a growing percentage of our population.

MEMORANDUM

To: Judges Jeffrey Sutton, David Campbell, and John D. Bates

From: Judges Neil Gorsuch and Susan Graber

Date: June 13, 2016

RE: Jury Trials in Civil Cases

We write to suggest that the Advisory Committee on the Rules of Civil Procedure consider a significant revision to the rules concerning demands for jury trial. This proposal would affect, at a minimum, Rules 38, 39, and 81. We have not drafted proposed text; our suggestion is conceptual, though we would be happy to work on this issue further.

The idea is simple: As is true for criminal cases, a jury trial would be the default in civil cases. That is, if a party is entitled to a jury trial on a claim (whether under the Seventh Amendment, a statute, or otherwise), that claim will be tried by a jury unless the party waives a jury, in writing, as to that claim or any subsidiary issue.

Several reasons animate our proposal. First, we should be encouraging jury trials, and we think that this change would result in more jury trials. Second, simplicity is a virtue. The present system, especially with regard to removed cases, can be a trap for the unwary. Third, such a rule would produce greater certainty. Fourth, a jury-trial default honors the Seventh Amendment more fully.

Finally, many states do not require a specific demand. Although we have not looked for empirical studies, we do not know of negative experiences in those jurisdictions.

We recognize that this would be a huge change, and we also recognize that problems could result, especially in pro se cases. Nevertheless, we encourage the advisory committee to discuss our idea.

Thank you.

This memo is available online and to the public on the US Courts website at uscourts.gov

The Critical Importance of Civil Juries in our Democracy

The central role of the civil jury in our Constitutional framework has been largely ignored, or worse, denigrated, by people and organizations who fail to appreciate, as Tocqueville did, that the jury is one of the most powerful checks The People possess on unrestrained power, whether the danger stems from autocratic government or vigilante justice. Of late, the civil jury trial has been attacked, often by those who otherwise profess allegiance to the written text of the Constitution and the original intent of the Founders.

The percentage of civil cases that are tried to a jury in federal courts has dropped steadily over many years and is now at less than 1% of the civil cases filed. There are many reasons for this precipitous decline, including the reluctance of some judges to try civil cases and the attempt by some to coerce litigants into mediation or arbitration — perhaps the very type of private "Star Chamber" justice that Elbridge Gerry and Mercy Otis Warren feared in 1787.

This trend harms not only the litigants but also our democracy. The Seventh Amendment was, and is, central to citizen participation in the government. The Federalists and Anti-Federalists agreed on this point. The Federal Farmer, writing in opposition to ratification because of the absence of a civil jury trial right in the original Constitution, explained that a civil jury trial "brings with it an open and public discussion of all causes… [which is] the means by which the people are let into the knowledge of public affairs."

Mercy Otis Warren, the Federal Farmer and Tocqueville were all correct, as experience has shown. Issues as important and as far-ranging as product design, environmental pollution, medical care and even hot coffee have all caught the attention of the public and have been debated precisely because the cases were tried, in the open, to juries who decided the cases on the facts. Those verdicts have gone both ways, for plaintiffs and defendants. The decisions have legitimacy precisely because they were reached by honest people fairly drawn from a cross section of the

communities, whose deliberations were governed by prospective rules and whose decisions were based on the facts presented.

The civil jury trial also performs a central role in preserving the federal structure of the Constitution. The Framers expressly envisioned that citizens, who were harmed by overreaching from the central government could have redress by bringing a civil action for damages against the government and the offending actors. This was designed by the Framers as an important check on the central government. Once again, there are numerous examples in recent years that demonstrate how prescient the Framers were to enable common citizens to resort to civil jury trials to vindicate their rights – and how necessary it is that these cases be decided by citizen jurors in open court, allowing The People to oversee both government action and a fair process for plaintiffs and defendants.

As Professor Akhil Reed Amar has written, "Spanning both civil and criminal proceedings, the jury played a leading role on protecting ordinary individuals against governmental overreaching." Amar, *The Bill of Rights*, p. 84, Yale University Press, (1998). That role is no less important now than it was in 1791.

The right and value of the civil jury trial is firmly grounded in the text of the Constitution, as well as in both the Original Intent of the Framers and the Original Understanding of the Founders who participated in the Ratification debate. It should, therefore, be protected and promoted no less than are other provisions of the Constitution and Bill of Rights that receive far more attention in the press and elsewhere.

In fact, the right to a civil jury trial is arguably one of the most important rights in the Bill of Rights. The civil jury trial is the one vehicle by which common citizens can vindicate their rights, if abridged, whether by private persons or public entities. It is also guarantees a process by which defendants can make their case in a fair and public hearing, often in the face of popular opposition. When rules are fairly applied, and juries base their verdicts on reason, not emotion, they stand the test of time.

The Judiciary Committee's Opportunity To Rejuvenate a Forgotten Constitutional Amendment

Given the importance of the civil jury trial, the Judiciary Committee would do The People a great service if the Confirmation Hearing would include a discussion of the proper role of the Seventh Amendment in the country today. Some topics for the nominee to address along these lines might include:

1. What do you see as the role of the civil jury trial under the Seventh Amendment in the 21st century?

2. Do you see any value in the civil jury trial as a means of resolving disputes among litigants today?

3. Why, in your view, are civil jury trials declining in the federal system? Do you have any suggestions for how they can be fostered and promoted? Do you have any thoughts about how the civil justice system at the federal level can be improved, and made more efficient for all participants?

4. Do you believe that various forms of "Alternative Dispute Resolution" have made the Seventh Amendment obsolete? Can or should a federal district court force parties to mediation if they want their disputes decided by a jury?

5. Do you think the right to a civil jury trial is an essential element of fundamental fairness to litigants who wish to have their common law cases decided by jury? Should the Seventh Amendment be applied to the States as are each of the other first eight Amendments? If not, why is the Seventh Amendment the only one of the first eight amendments not afforded that status since *McDonald v. Chicago*, 561 U.S. 742 (2010)?

6. Is it proper, under the Seventh Amendment, for citizens to be compelled to give up jury trial rights by mandatory arbitration clauses in adhesion contracts? Such clauses are routinely found in many if not all credit card "agreements" and online purchases, where most citizens do not even know they are waiving a constitutional right and have no choice in any event. Can you envision any limits on this practice under the Seventh or Fourteenth Amendment?

By engaging the nominee in a discussion on these topics, the Judiciary Committee and The People at large will have a better understanding of Judge Gorsuch's view of the place the civil jury trial has in our system of justice. Further, given the intense public interest in the confirmation process, the upcoming hearing offers a wonderful opportunity for the Committee to help educate the public on the central place the jury has had in the American Republic since its founding, and still should have today.

The civil jury ensures citizen participation in our democracy in a manner not found anywhere else. The jury is one of only six Constitutional offices, and the only one that allows for direct public participation. Its continuing vitality is central to our Republican form of government that relies so heavily on public engagement. Instead of the posturing that has dominated most of the Supreme Court nomination hearings, at least since Judge Robert Bork's failed nomination, perhaps the Committee will take advantage of this opportunity to explain and promote this fundamental aspect of our Constitution. ■

Christopher A. Duggan is a partner with the Boston law firm of Smith Duggan Buell & Rufo LLP. He serves as a National Board Representative for the Massachusetts Chapter of the American Board of Trial Advocates and is the Chair of the Amicus Committee. He is a frequent contributor to VOIR DIRE.