American Board of Trial Advocates

The Seventh Amendment and Democracy

By Christopher A. Duggan[1]

Text and Intent

The Seventh Amendment guarantees that:

> "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 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 government 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

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[1] Christopher Duggan is a civil trial lawyer and the founding partner of Smith Duggan Buell & Rufo LLP in Massachusetts. He is a member of the Massachusetts Chapter of American Board of Trial Advocates, and was National ABOTA Secretary in 2013 and 2014. Mr. Duggan holds an AB, *summa cum laude*, from Boston College (1981) and a JD from the University of Virginia (1984), and is a member of several honor societies including *Phi Beta Kappa*, *Phi Alpha Theta* and *Alpha Sigma Nu*. He founded the *James Otis Lecture Series*, nationwide program dedicated to teaching Constitutional principles and legal history to high school students and is the Director of the Massachusetts *Otis Lecture* program.

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, General 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:

> [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, 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. On September 15, Gerry and General Pinckney moved that a clause be inserted in Article III, §2 that guaranteed "a trial by jury shall be preserved as usual in civil cases."

Nathaniel Gorham, also from Massachusetts, objected. He argued that the States had different approaches to civil jury trials, so there was no "usual" practice among the States. Even though twelve states then recognized a civil jury trial right, Gorham prevailed and the motion failed. The outcome might have been the result of weariness as much as analysis. By that time, many of the delegates had been in Philadelphia for more than four months, and were anxious to go home.

Gerry refused to sign the final draft of the Constitution in part because, he believed, civil trials without juries would degenerate into nothing better than a Star Chamber. George Mason

of Virginia, the brilliant constitutional scholar and law professor 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 the 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. It is generally accepted by scholars that, had the Massachusetts Convention rejected the Constitution, it may not have received the necessary support from nine states for ratification.

The Anti-Federalists hammered the point home during the ratification conventions across the States. In a 40-page pamphlet published in October and November of 1787, the Federal Farmer, after decrying the absence of a civil jury trial, wrote:

> The jury trial, especially politically considered, is by far the most important feature in the judicial department in a free country, and the right in question is far the most valuable part, and the last that ought to be yielded, of this trial. Juries are constantly and frequently drawn from the body of the people, and freeman of the country; and by holding the jury's right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul in the judicial department.[2]

In 21st century parlance, the opponents were gaining traction on this point and the Federalists knew it.

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

[2] *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It,* A Federal Farmer, November 1787.

the first Congress and the several States to adopt or restrict the practice as they saw fit.

Even so, Hamilton acknowledged the deep desire 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. Specifically addressing the civil jury trial issue, Hamilton asserted that the difference between the Federalists and the Antis on this point was one of degree, not principle:

> 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 wrote in his first draft of the Amendment that the right to a civil jury trial "ought to remain inviolate."[3] With some interesting and unexplained changes, the Seventh Amendment became part of the country's fundamental law when it was ratified after little debate on December 15, 1791.

[3] Article XV of the Massachusetts Declaration of Rights, adopted in 1780, provides: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used, and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it."

The Structure of the Seventh Amendment

Four basic points about the structure of the Amendment should be highlighted. First, by its terms the Amendment guarantees citizens a civil jury trial "in suits at common law" as opposed to other types of civil law suits that in general included Admiralty claims and suits seeking equitable relief. Second, the text guarantees a civil jury trial in suits where "the value in controversy shall exceed twenty dollars." Third, the text states that the right of a civil jury trial will be preserved. Finally, the text makes it clear that facts found by a jury are not open to reexamination except to the extent jury verdicts could be appealed under well-established common law practice.

Suits at Common Law

The Amendment applies only to "suits at common law," which did not include maritime suits or equity claims, which essentially ask the court for relief other than an award of money damages. Long before the Revolution, cases involving issues arising on the seas were relegated to the Admiralty courts where judges appointed by the Crown decided both facts and law without juries. The practice grew out of England's maritime legacy but as tensions between the mother country and the colonies rose in the 18th Century, Parliament took cases from the common-law courts and juries and shifted them to the Admiralty courts where the government could be assured of a friendlier reception to its evidence. The colonists resented the deprivation of jury trials so much that it became one of the indictments against the King in the Declaration of Independence.

Equity cases also had a long history in England of being tried to a judge without jurors. These were mostly cases in which the parties were looking for orders from the court, rather money damages, and they often turned on principles of law rather than fact disputes.

Then as now these classes of cases were much less common than the cases in which a party sought money damages. Thus, the guarantee of civil juries in the Seventh Amendment for suits at common law illustrates the broad scope of the right the Framers sought to protect.

The Twenty Dollar Clause

The twenty-dollar clause has received the least attention of almost any phrase in the Bill of Rights. Even its origin is shrouded in obscurity. Madison's original language guaranteeing a civil jury trial, submitted to Congress on June 8, 1789, was one of two amendments dealing with Article III. The one that attracted most attention was a provision to limit the Supreme Court's appellate jurisdiction to cases in which at least $1,000 was at stake. In committee, the appellate jurisdictional limit was removed. On September 9, the Senate combined the two proposals into one, and added the twenty-dollar clause on civil causes to be tried in the federal courts.

There is no legislative history and none of the Framers, legislators who participated in revising Madison's draft left any record explaining how the twenty-dollar clause came about or why it was added. Madison's notes say nothing about it.

One explanation is that Congress did not want to deprive itself of the right to create a federal small claims court where juries would not be needed. Another is that the amendment's framers wanted to make sure that civil jury trials were tied to property cases, because the Founders and Framers closely equated liberty with property rights – some property should be at stake if juries were to be empaneled. But what appears clear is that the drafters set a low threshold: juries should be available to the parties in most cases where even small amounts were at issue.

The Preservation Clause: What, When and How?

That the Framers of the Amendment sought to preserve a civil jury trial right seems simple enough: the citizens were guaranteed a right to a jury in all common law cases by the plain words of the Amendment. Or so it seems.

In 1812, however, Supreme Court Justice Joseph Story, sitting as a Circuit Judge, decided *United States v. Wonson* in which he gave this clause a remarkable gloss. The government sued Wonson seeking a penalty for violation of the Embargo Act of 1808. Wonson won at trial and the United States sought to appeal. The Government also sought to try the same facts before a second jury as was allowed under the Commonwealth's procedure at the time.

Justice Story rejected the appeal on technical grounds: the Government had no right appeal under the terms of the statute. That could have, and perhaps should have, been the end of it. But Justice Story went on.

The attempt at a second jury trial would violate the Seventh Amendment, he held, could not be re-examined by another jury unless permitted at common law. That lead Justice Story to answer this: what was the common law that the Amendment addressed? Massachusetts procedure (arguably the common law of Massachusetts) did allow retrial of facts under some circumstances. To avoid this result, Justice Story held that the applicable "common law" was the common law of England - not the common law of the fourteen States. As the Government would not be entitled to a retrial under English common law, it could not get one here. In sweeping language, Justice Story declared:

> Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all) but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.[4]

That declaration formed the basis for the "Historical Test" which, for the most part, federal courts have followed ever since. If the parties to a civil case would have been entitled to a jury trial under English common law (before the adoption of the Amendment in 1791) then they are entitled to a civil jury trial. Otherwise they are not.

Many commentators in the 20th and 21st centuries have criticized this reasoning. It has resulted in freezing the Constitutional right to a jury trial in the 18th century, when all other rights, including those granted by the First, Fourth, Fifth Sixth and Eighth Amendment are not. It also throws into question the availability of a jury trial for new causes of action, not contemplated in 1791. The limitation seems fundamentally at odds with the Framers' intent to make civil jury trials available in the clear majority of cases, both to act as a check on unlimited power and as vehicle for making sure the verdicts are consistent with community

[4] *United States v. Wonson*, 28 F. Cas. 745, 750 (1812).

values; verdicts from a jury of citizens are imbued with the legitimacy of a democratic people.

The Reexamination Clause

Wonson also addressed the re-examination clause, and here Justice Story seems to have been on firmer ground. The text of the Amendment specifically prohibits re-examination of facts found by a civil jury by endless series of retrials until the most well-off litigant gets the desired result. Once a jury has spoken. The facts are final for the case.

The Amendment does contain an exception: a verdict can be reviewed under the rules of the common law. This preserved the right of parties to seek a new trial or other post-trial relief in the event of errors during the original trial. This procedure was standard both under English and American common law. Generally, however, once a jury has decided a fact, the matter is decided.

These four clauses are mutually supporting and reveal a desire to promote civil jury trials. As Hamilton wrote, both the Federalists and the Antis saw great value on civil juries as a fundamental pierce of the democratic experiment. In the 19th Century, a foreign traveler would expound on the benefits civil juries bring to a democratic nation.

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 wrote, "[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 observed 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 the 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 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.

The Importance of Civil Juries in our Democracy

Yet 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.

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 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 and not emotion, the decisions stand the test of time.

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.