



**By Sheldon Whitehouse**

In recent years corporations have racked up significant victories before the U.S. Supreme Court at the expense of Americans who are unable to win redress for their injuries.

These decisions have also worked an often-overlooked harm: They have made it harder for the civil jury to play its constitutional function.

The jury is more than a means of dispute resolution, a fact-finding appendage to the court. It is a structural element of our system of separated powers. Alexis de Tocqueville described the civil jury as an “institution of government” and a “form of the sovereignty of the people.”

The civil jury, according to William Blackstone, “preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.”

Juries were established by 1624 in Virginia, 1628 in Massachusetts and 1677 in New Jersey. Civil juries provided a means of self-government, and efforts to deny that right helped foment the American Revolution. Americans sounded the alarm when the original Constitution was silent on the civil jury, and the Seventh Amendment — which protects the civil jury — was ultimately sent to the states with the Bill of Rights.

The civil jury remains an important institution. It provides a forum in which all citizens stand equal and have the authority to resolve disputes among themselves. It is a bulwark against judicial autocracy, thus providing what Alexander Hamilton called a “security against corruption.”

It fosters civic engagement and education, serving as what de Tocqueville called “a free school which is always open and in which each juror learns his rights.” It is immune from the traditional exercise of political influence. Finally, it strengthens our democracy by bringing Americans together to deliberate on important questions.

Unfortunately, the Roberts Court does not appear to value this tradition, perhaps because it is nettlesome to big corporations — as it was designed to be a guard against encroachments by the powerful and wealthy. Corporations exert massive influence over executive and legislative branch officials through lobbyists, campaign contributions and super PACs. Tampering with a jury is a crime.

For a big corporation to be on an equal footing with a regular person, in a forum it cannot grease with corporate largesse — that is not a corporation’s accustomed state.

One line of recent cases has seen the Supreme Court expand arbitration in ways that allow powerful commercial interests to divert litigants from civil juries, even allowing arbitrators to adjudicate whether an arbitration clause is unconscionable.

Supreme Court decisions also have departed from the simple notice pleading standard (preferring to test complaints for “plausibility”) and have made it far harder for injured individuals to proceed to a jury via class action. And the Supreme Court has limited the civil jury’s discretion to impose punitive damages, concluding that they were too unpredictable for corporations.

These decisions restrict the civil jury in its constitutionally intended political function of allowing citizens to decide disputes. Today, more and more disputes are diverted to corporate-funded arbitrators, screened out by judges before they get to a jury, or not permitted to proceed in an economically feasible manner. Even when cases make it to trial, the jury’s authority to choose a remedy is cramped by new judicial control. As a result, the jury exercises a

lesser share of the “sovereignty of the people” and more powerful and wealthy citizens.

There are ways to restore the civil jury to its rightful place and have the Seventh Amendment stand equally beside its fellows.

The Supreme Court could find the Seventh Amendment jury right to be deeply rooted in this nation’s history and fundamental to our scheme of ordered liberty, and thru “incorporate” it against the states under the 14th Amendment.

The court also could ask whether a rule chills the exercise of the civil jury right (as it asks in the First Amendment context); whether only a knowing waiver of the jury right will be accepted (as required in the context of the Fifth Amendment); or whether the solicitude recently shown by the court to the Second Amendment should also be directed to the Seventh Amendment.

Congress, too, can act. We could override most, if not all, of the Supreme Court’s recent decisions that have undermined the civil jury. Bills to ban mandatory predispute arbitration, restore notice pleading, protect class actions and enshrine the jury’s proper discretion regarding punitive damages have been introduced. I hope they will receive broad support.

A breakwater built into our system of government, the civil jury is designed to stand firm against the tide of influence and money. We allow it to crumble, or be disassembled, at our peril. ■

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