"Inherent and Invaluable"
The Forgotten History of Trial by Jury

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"Trial by jury in the inherent and invaluable right of every British subject of these colonies."
1765 Declaration of Rights ◆ Stamp Act Congress

In the United States, there are two places where every American is supposed to be equal--at the ballot box and in the courtroom. That equality is a powerful right that should be championed by every one of us regardless of political affiliation. It is the very definition of a free people. Indeed, John Adams wrote, "Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds."[1]

Unfortunately, equality at the ballot box is now in question. While we still adhere to "one person, one vote," our political process is teeming with money. It is now cost prohibitive for many people to run for office, and candidates receive big money contributions. Following the U. S. Supreme Court's ruling in Citizens United, millions more are being spent in independent expenditures to influence elections. More often than not these are "dark money" campaigns whose donors are never disclosed to voters. After being elected to office, lawmakers come under the influence of special interest lobbyists.

That leaves our courtrooms and the right to trial by jury as the last citadel of equality, but that is threatened as well because corporations want the same level of influence in America's courtrooms as they have with other elected officials. Under the 7th Amendment in the Bill of Rights, Americans have the right to trial by jury in civil cases. Corporate special interests want to eliminate that right. Why? As U. S. Sen. Sheldon Whitehouse (D-RI) noted, "Corporations hate juries. It is the one part of government that you can't buy."[2] As a result, the same special interests spending millions on the elections are also leading this effort to restrict access to our courts. It is being done two ways. First, Americans are often required to sign restrictive contracts with binding arbitration agreements that prohibit them from filing claims in the court system. Second, these special interests are behind state and federal efforts to pass so-called "tort reform" that limit what claims may be filed as well as restrict what juries are allowed to do.

Trial by jury is one of the most fundamental rights we have as Americans. Thomas Jefferson wrote, "I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the

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[1] Letter from the Earl of Caledon to William Pym (Jan. 27, 1776), THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH THE LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS (Charles Francis Adams, ed. 1856).

[2] E. J. Dionne, *Whose Supreme Court Is It?* WASH. POST (June 28, 2010).

principles of its constitution."[3] It is a sentiment echoed by the late U. S. Supreme Court Chief Justice William Rehnquist. "The right to trial by jury in civil cases at common law is fundamental to our history and jurisprudence . . . the founders of our nation considered the right to trial by jury in civil cases an important bulwark against tyranny and corruption."[4]

It is imperative that the right to trial by jury be protected, but it is a right and history unknown to most--even though that history is the very bedrock of the United States of America. As Justice Hugo Black wrote in 1961, "[the denial of trial by jury] led first to the colonization of this country, later to the war that won its independence, and finally, to the Bill of Rights."[5]

The Trial That Sparked the American Revolution

Most Americans don't realize that it was a trial that first ignited the fire that became the American Revolution. John Peter Zenger was the publisher of the *New York Weekly Journal*. In 1734, the newspaper published a column that criticized Royal Governor William Crosby for removing Justice Lewis Morris from the bench. Outraged, Crosby had Zenger arrested and imprisoned for seditious libel. The charges against Zenger were heard in a criminal jury trial in 1735.

Zenger was represented by Andrew Hamilton of Philadelphia. Hamilton, one of the leading colonial lawyers at the time, appealed directly to the New York colonists who comprised Zenger's jury. "Jurymen are to see with their own eyes, hear with their own ears, and to make use of their own consciences and understandings, in judging the lives, liberties, or estates of their fellow subjects."[6] He argued that Zenger was not dissimilar to them and that they had the right to challenge their rulers. The jury found Zenger not guilty because he had printed the truth.

Zenger's case guaranteed freedom of the press--newspaper editors and publishers could no longer be found guilty for libel when they printed the truth. It was a landmark decision that is not only being studied in law schools, but also journalism schools still today. As a result of the decision, the colonial newspapers were free to openly criticize the British crown, and it was in the press that the revolutionary fervor grew in the decades following the *Zenger* decision. As Gouvernor Morris, who helped write the U. S. Constitution noted, "The trial of Zenger in 1735 was the germ of American Freedom, the morning star of liberty that subsequently revolutionized America."[7]

But why, in a society as oppressive as Crosby's New York, did Zenger have the opportunity to present his case in court and be tried by a jury of his peers? That answer goes back another 500 years to the signing of the Magna Carta by King John I and the reaffirmation of the rights enshrined there in the 1689 British Bill of Rights.

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[3] Thomas Jefferson, *Letter to Thomas Paine, July 11, 1789* Jefferson Papers, NAT'L ARCHIVES, available at https://founders.archives.gov/documents/Jefferson/01-15-02-0259

[4] Parklane Hosiery Co. Inc. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

[5] Cohen v. Hurley 366 U.S. 117 (1961) (Black, J., dissenting).

[6] ROBERT R. BELL, THE PHILADELPHIA LAWYER: A HISTORY, 1735 – 1945 33(1992) .

[7] Gouvernor Morris to Dr. John W. Francis. Morris was the grandson of Judge Lewis Morris. Cited in *Crown v. John Peter Zenger* Historical Society of the New York Courts. http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-new-york-legal-eras-crown-zenger.html.

The Magna Carta is the "great charter" that protected the civil liberties of English subjects and guaranteed the two pillars of Democratic society--representative government and trial by jury. Chapter 29 reads, "No man shall be taken, outlawed, banished or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." While Chapter 29 does not provide for jury trials explicitly, immediate and subsequent interpretation of the clause by British sovereigns, Parliament, the courts, and legal scholars such as Thomas Coke guaranteed the right to British subjects in both civil and criminal matters. "Over time, people in England came to think of trial by jury as a protection against royal tyranny and, over time, they began to associate it with Magna Carta . . . as early as the 14th century, the jury of presentment was coming to be thought of as part of the procedural guarantees of Chapter 29." [8]

The Origins of Trial by Jury

There is much debate among legal and British history scholars regarding when the concept that became "juries" first appeared in the countries that comprise Great Britain. Some argue that it arrived in Britain with the Norman Conquest in 1066. Still others point to earlier forms of trial by jury centuries before in Anglo-Saxon Britain and that these forms were influenced by invasions by the Romans, Norse and, ultimately, the Normans. In his 1921 journal article Robert von Moschizer wrote, "The exact time of the introduction of the jury trial into England is a question much discussed by historians, some of them contending that it was developed from laws brought over by William the Conqueror, while others point to certain evidence of its existence, in an embryo state, among the Anglo-Saxons prior to the Norman Conquest; and still others suggest even an earlier date."[9] In his Commentaries on the Laws of England, written 1765-1769, William Blackstone wrote that "[trial by jury] hath been used time out of mind in this nation, and seems to have been coeval with the first government thereof . . . certain it is that juries were in use amongst the earliest Saxon colonies in England."[10]

It is believed that the present system is one which represents the gradual evolution of ancient customs brought to Britain by invaders over the centuries. As the complexity of society there grew, so did its jury system. As William Forsyth noted in his 1875 *History of Trial by Jury*, the jury does not owe its existence to any preconceived idea of jurisprudence, but evolved gradually out of modes of trial in use among the Anglo-Saxons and Normans, both before and after the conquest.[11] Von Moschizer advanced this theory as well. "The most tenable theory is that the present system represents a gradual development of ancient customs, brought to England by the earliest invaders, upon which, most likely, the Norman influence wrought material changes, and that subsequent developments kept pace with the increasing complexity of society."[12]

One reason for the debate is the many forms juries took and their changing roles in early and medieval British history. John Proffatt wrote in *Treatise on Trial by Jury*, "Perhaps the reason opinion has been so divided here is that many would look for the establishment of the jury in the same form and character, with the same functions as it possesses at the present time, not realizing or perceiving that it was a growth

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[8] THOMAS J. MCSWEENEY, *Magna Carta and the Right to Trial by Jury*, in MAGNA CARTA AND THE RULE OF LAW 153 (Randy J. Holland ed., 2014)

[9] Robert Von Moschizer, *The Historic Origin of Trial by Jury*, 70 U. PA. L. REV. 1-2 (1921).

[10] J.E.R Stephens, *The Growth of Trial by Jury in England* 10 HARV. L. REV. 151 (1896).

[11] WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 5 (J. W. Parker ed., 2d ed.1852).

[12] Von Moschizer, *supra* note 9, at 5.

of several centuries from its first introduction in a rudimentary form, until it attained its present form and development . . . It is in vain to look for such a settled procedure at that early day, in that rude age . . . ."[13]

It should also be noted that trial by jury was not the only method of trial available in early and medieval Britain—even after Magna Carta. Trial by oath, or compurgation, existed for centuries. The accused would swear, as would witnesses for the accused, that the individual was innocent or not liable. Compurgation means to "thoroughly cleanse or excuse." Trial by ordeal was used frequently, particularly in criminal cases. One of the most prevalent methods involved being bound and tossed into water blessed by a cleric. If the person sank, he or she was innocent since the "holy water" accepted the body. If they floated, they were guilty. Other methods included dipping an arm into boiling water or carrying hot irons. These and other methods involved clerics as well, under the assumption that God would intervene and protect the innocent. After the arrival of the Normans in 1066, there was also trial by battle. The parties involved would duel, and the winner would be proclaimed to be right. This method would continue in Britain until 1818, when it was finally abolished.

The idea of a group of persons brought together to render a decision on a question of importance goes back millennia. Beginning around 2000 B.C., ancient Egyptians adjudicated matters through Kenbet. It was comprised of eight men, four from each side of the Nile. In the 6th century B.C., Greece developed the Dikastes or Dikasteries--courts of justice. Each year 10 panels, with 500 citizens each, were selected from 6,000 citizens. A magistrate presented questions of law and his answers to each. This was followed by statements of those involved and their witnesses. The Dikastes would then consider the information presented and determine if the magistrate's decision was correct. The Dikastes were the ultimate judges of both facts and law. The Greek system evolved in Rome's Comitia (Assembly), also known as Judices, by the 4th century B.C. The Comitia would delegate criminal matters to a select group of members who would conduct a proceeding *in judicio*--court of justice. "They employed a formal system of pleading, to determine the issues for trial, and, in a proceeding *in jure*, a magistrate defined in writing the disputed points, referring them for trial . . . to a lay judge or judges (judices)" In this system, there was no officer, i.e. judge, who oversaw the proceedings and acted separately from the jury. In each, the citizen panel served as both judge and jury. Some believe that it was the Roman Comitia system that was most likely the first form of juries in Britain, with it arriving on England's shores with the Roman Conquest.[14]

Norse invaders brought similar trial by jury systems with them to Britain, particularly to Scotland. "Norway had a judicial body called 'laugrettomadr' meaning 'law-amendment-men,' the designation being derived from the circumstance that they were judges of both law and fact." Similar systems also existed in Sweden and Denmark. It has been argued that the Norse models also influenced trial by jury and its evolution in Normandy.[15] Others point to even earlier origins, arguing that the system developed naturally among the ancient people in Britain as it had in other European countries and elsewhere. William Blackstone, the great historian of British common law, wrote, "Some authors have endeavored to trace the origin of juries up as high as the Britons themselves, the first inhabitants of our island, but certain it is that there were in use among the earliest Saxon colonies, their institutions being ascribed by Bishop Nicholson to [Oden] himself, their great legislator and captain."[16]

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[13] *Id.* at 3.

[14] *Id.* at 5 - 6.

[15] *Id.* at 8 - 9.

[16] 2 WILLIAM BLACKSTONE, COMMENTARIES 152 *349 - 350
http://avalon.law.yale.edu/18th_century/blackstone_bk3ch23.asp

The Anglo-Saxon kings used various legal procedures that mirrored juries beginning in the 6th century. Called "inquests," the system used 12 knights in the local area to provide information in disputes over who owned property or what crimes had been committed. By the late 800s, under the leadership of Alfred the Great, inquests became the norm throughout most of England. As in the earlier forms, the citizen panel continued to serve as both judge and jury.
On the European continent, the Frankish Inquest was developed in 829 A.D. by Louis the Pious, son of Charlemagne. It was a "jury of administrative inquiry," and through it royal rights were determined by twelve of the "best and most credible men" in the locality. The Frankish Inquest, influenced by Norse methods of trial by jury in Normandy, arrived in Britain with William the Conqueror in 1066. The English word "juror" comes from the Old French word "jurer," which means to swear. Blackstone considered the Frankish Inquest as the start of the modern jury system in Britain, but there was still no distinction between judge and jury. After the Conqueror crowned himself William I, he became the first British king to appoint judges. As representatives of the Crown, they would ride circuits and oversee the trials even though questions of both fact and guilt or liability were determined by the juries.

Both civil and criminal jury systems evolved significantly under King Henry II, who ruled 1154 - 1189. There were four important changes. First, the systems moved from their earlier advisory role to one where jurors were finders of fact. This was possible due to the second change--significant changes in the evidence, testimony and other proof that could be presented. Third, an independent court administrator who was appointed by the king, oversaw the trials and was separate from the reviewing body. Each was responsible for traveling a circuit, and courts were convened when he was in the county. Finally, the new courts protected laymen from being charged in ecclesiastical courts by the church on untrustworthy evidence. Both historians and legal scholars point to the Henry II's reign as the beginning of the common law jury.

Under the 1164 Constitutions of Clarendon, new legal actions were developed to resolve disputes over land and inheritances. Twelve "free and lawful" men of the local hundred (the country was divided into hundreds, which each comprised of approximately 100 estates) and four from the local village comprised the jury. They assembled and, under oath, swore to who was the true property owner or heir. While these juries were still self-informing--they used their existing knowledge of the facts--they considered additional evidence presented to them.

In 1164 the Assize Utrum introduced a standard form. Subjects could purchase a writ or command in the form, with the local sheriff or clerk filling in the necessary information. It also ordered the sheriff to summon "twelve free and lawful men of the vill" to hear individual claims. Both the standard form writ and the use of juries became the basic elements of the numerous reforms introduced during Henry II's reign. Thomas McSweeney wrote that "by introducing the jury—the twelve free and lawful men who were commanded to come hear the case—into the Assize Utrum, the jury too became a mainstay of English law."

In 1166, the Assize of Clarendon established what was then known as the presenting jury, the forerunner of today's grand jury. It required twelve summoned jury members to report under oath whether they knew of crimes being committed in the area. As with the civil system, the jurors presented what they knew instead of reviewing presented evidence. If the presenting jury determined a person had committed a crime, that individual would then stand trial. While there is evidence that petit juries were used in criminal cases as early as the 11th century, they were the exception. In the majority of cases, the accused faced trial by ordeal. This changed under the Assize of Clarendon. The subsequent Grand Assize in 1179 also allowed an individual facing trial by battle to elect to have trial by jury rather than fight the duel.[17]

[17] McSweeney, *supra* note 8, at 139-146.

The use of trial by jury in civil cases was well-established and the norm by 1215 when Magna Carta was signed. The success of subsequent laws governing trial by jury in civil disputes resulted in Chapter 18 of the document, which guaranteed that circuit courts would convene in each county several times per year to adjudicate disputes. This was not true for criminal cases. While Chapter 29 protects the right to trial by jury, it was still limited for criminal cases at the time the document was signed. That changed soon after.

In 1215, the church began to review its role in trial by ordeal. Canon 18 of the Fourth Latern Council issued that year prohibited the participation of clerics in the practice. Without the clergy's involvement, trial by ordeal was no longer valid. Countries, including Britain, had to develop alternatives. On the continent, this grew into what became the Inquisition, which limited the rights of the accused and restricted civil liberties. In sharp contrast, Britain chose to adapt its existing trial by jury system. Those accused of crimes faced two juries--first, the larger, presenting jury (later known as the grand jury) and then the smaller, petit or trial jury. By 1221, trial by jury became the standard for trying felons in the royal courts.[18]

Both the civil and criminal jury systems evolved further in the 14th century as juries moved away from being self-informing to one where juries heard and weighed evidence presented at trial. A statute passed in 1351 confirmed that Chapter 29 of the Magna Carta guaranteed the right to trial by jury--"from henceforth none shall be taken by petition or suggestion made to our lord the King, or to his counsel, unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deed be done, or by process made by writ original at the common law." The 1354 statute amended the guarantee of Chapter 29, adding that "no man, of whatever estate of condition he may be, shall be put out of his land or tenements, nor be taken or imprisoned, or disinherited, without being brought to answer by due process of the law." If further specified that "law of the land" meant trial by jury.[19]

The British Bill of Rights

Unfortunately for the British people, their right to trial by jury began to break down in the 16th century. King Henry VIII declared himself supreme ruler of Great Britain, and a central part of his plan to retain that ultimate power was the suppression and intimidation of the courts. He utilized the Star Chamber, which had evolved from the King's Council during his father's reign. Initially instituted as a special court for those too powerful to be held accountable in the country's common and civil courts, the Star Chamber became a political weapon to bring actions against those who challenged the crown. Its court sessions were held in secret, with no indictments, no juries, no witnesses and no appeals. Often individuals were charged, convicted and sentenced without ever being told of their crimes. In its 1975 opinion in *Farretta v. California*, the U. S. Supreme Court wrote, "The Star Chamber has, for centuries, symbolized disregard of basic individual rights."[20]

The Star Chamber continued under the Stuart kings and queens into the 17th century. Although the English Civil War overthrew the monarchy in 1649, the abuses of the Star Chamber and other limits on trial by jury continued under Oliver Cromwell. After Cromwell died in 1658, British Parliament restored the monarchy, and Charles II was crowned king in 1660. The truce between the crown and Parliament

[18] *Id.* at 149-151.

[19] *Id.* at 154-155.

[20] Farretta v. California, 422 U.S. 806 (1975).

was short lived. Charles II suspended the laws passed by Parliament and dissolved the body repeatedly when it convened, and further infringed on the liberties guaranteed in the Magna Carta.

Charles II died in 1685 without producing an heir, and Catholic James II ascended to the throne. After James and his second wife, Mary of Modena, gave birth to a son, Protestant members of Parliament feared that Great Britain would again become a Catholic monarchy beholden to Rome. In the Glorious Revolution of 1688, the Protestants overthrew James II with the aid of William of Orange of the Netherlands, who was married to James' Protestant daughter Mary. Parliament offered the British throne to William and Mary to rule jointly as William III and Mary II, but, after nearly 200 years of abuses, wanted assurance that the rights guaranteed to them in the Magna Carta--including trial by jury--would not be taken from them again. Before William and Mary could be crowned, they had to sign the British Bill of Rights. It was signed in 1689, and they ascended to the throne.

The Colonial Era

In the 1600s British subjects, whose rights were threatened at home, sailed for America. As Roger Roots noted, "the British Crown's various efforts to deprive British subjects' right to jury trial between the fifteenth and seventeenth centuries may even have caused the colonization of North America by embittered Englishmen during that period."[21] The First Charter of Virginia guaranteed to the colonists and their posterity all of the "liberties, franchises and immunities" of the British subjects, including trial by jury. The Massachusetts Body of Liberties, enacted December 10, 1641, was the first colonial charter to expressly guarantee the right to trial by jury in both civil and criminal cases.[22]

Other colonies followed suit. Among the subsequent charters was William Penn's 1676 Fundamental Laws of West New Jersey. After his arrests and trials in Britain because of his Quaker faith and preaching, Penn knew firsthand about the importance of protecting the right to trial by jury. Indeed, it was a criminal case against Penn that led to the landmark *Bushell* decision. Jurors, including William Bushell, refused to convict Penn of all charges even after ordered to do so by the judge. The jurors were fined and imprisoned. Bushell petitioned the Court of Common Pleas for a writ of *habeas corpus*. In its opinion the Court wrote, "The jury must be independently and indisputably responsible for its verdict free from any threats of the court."[23] The *Bushell* decision ensured the independence of juries. In his charter for West New Jersey, Penn wrote, "No Proprietor, freeholder or inhabitant of the said Province of West New Jersey, shall be deprived or condemned of life, limb, liberty, estate, property or any ways hurt in his or their privileges, freedoms or franchises, upon any account whatsoever, without a due tryal, and Judgment passed by twelve good and lawful men of his neighborhood first had."[24]

With right to trial by jury enshrined in the colonial charters and reaffirmed for British subjects in the 1689 Bill of Rights, John Peter Zenger was tried before a jury of his peers in New York and found not guilty.

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[21] Roger Roots, "The Rise and Fall of the American Jury." 8 SETON HALL CIR. REV. 1-3 (2011)

[22] MASSACHUSETTS BODY OF LIBERTIES (1641) available at https://history.hanover.edu/texts/masslib.html

[23] Case of the Imprisonment of Edward Bushell, for alleged Misconduct at a Juryman: 22 Charles II A.D. 1670 [Vaughan's Reports, 135]. http://www.constitution.org/trials/bushell/bushell.htm

[24] CHARTER OR FUNDAMENTAL LAWS OF WEST NEW JERSEY, AGREED UPON - 1676, Chapter XVII (1676), available at http://avalon.law.yale.edu/17th_century/nj05.asp

The *Zenger* decision was not the only major challenge to British authority in the decades prior to the American Revolution. American juries also refused to convict colonists who were charged for violating the British Navigation Acts of 1651. The Navigation Acts were a series of laws to restrict both trade and which ships could be used to ship goods within the British Empire, including to and from the colonies. Colonials were required to export raw materials and products to Britain and other British territories using only British ships; colonial ships could not be used. Likewise, goods from Britain could be shipped to the colonies only on British ships. The Acts also prohibited colonies from trading directly with foreign countries. This ensured that Britain would continue to profit substantially from colonial trade.

While most colonists followed the law outlined in the Navigation Acts for nearly 80 years, by the 18th century American business owners and sea captains soon challenge the acts by using their own colonial ships. They also began trading with foreign countries and territories directly. The number of colonials who violated the law increased substantially after the passage of the Molasses Act for 1733. Extensive smuggling ensued. When caught by British authorities, the colonials were arrested and tried in American colonial courts for violating the acts. Colonial juries, which did not fear judicial retribution thanks to *Bushell*, refused to convict and nullified these laws.

As a result, the Crown began denying colonials their right to trial by jury. In an attempt to limit challenges to British authority and quell calls for American independence, Britain and its colonial governors set up special courts in several colonies that did not use juries. Colonials no longer had the right to be tried by a jury of their peers--and it became a focal point for revolutionaries.
In 1751, the South Carolina General Assembly declared that "We are so firmly of the opinion that any person who shall endeavor to deprive us of so glorious a privilege as trials by jury is an enemy to the people of this province."[25]

This reached a fevered point with the Stamp Act in 1765. The act was intended to increase Great Britain's wealth and replenish its coffers after the Seven Years War at the expense of the colonies and American businessmen. Parliament believed that it was justified since Britain had also borne the cost of the French and Indian War in North America. The Act was a direct tax on colonists that required all printed materials to be produced on paper embossed with a revenue stamp. It affected everything from legal documents to newspapers to playing cards. It also eliminated jury trials for those arrested for violating the act. British admiralty courts, where there was a judge and no jury, were given jurisdiction. Opposition was immediate. John Adams wrote, "[T]he most grievous innovation of all is the alarming extension of the power of courts of admiralty. In these courts, one judge presides alone! No juries have any concern there."[26] Colonists met in New York City in October 1765 as the Stamp Act Congress to oppose the act and draft a formal response to Parliament. While remembered more for "taxation without representation, that Congress also wrote that "trial by jury is the inherent and invaluable right of every British subject in these colonies."[27] The Stamp Act was repealed in March 1766.

The Period of Revolution
Revolutionary fervor grew, and Britain attempted to quash it by denying colonials the rights guaranteed in the British Bill of Rights. Efforts again included limiting trial by jury. In 1774, Parliament passed several laws that were later identified as the "Intolerable Acts." Among them were acts that eliminated existing colonial laws like the Massachusetts Jury Selection Law that provided jury selection procedures.

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[25] SOUTH CAROLINA JURY TRIAL FOUNDATION, A HISTORICAL NOTE ON TRIAL BY JURY (1991).

[26] JACK N. RACKROVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 303 (1996).

[27] RESOLUTIONS OF THE STAMP ACT CONGRESS, Oct. 19, 1765,http://avalon.law.yale.edu/18th_century/resolu65.asp

As a result, jury selection was taken from colonials and handed to the royal judges. The Court could manipulate colonial juries, including stacking them with Tories, American colonists who supported the Crown and would convict those who violated the King's laws.[28]

In 1774 the First Continental Congress assembled in Philadelphia. The Congress resolved that the American colonists were entitled to "the great and estimable privilege of being tried by a jury of their peers in the vicinage."[29] The Congress also authored the Bill of Rights Letters to the British and the Colonists, an open letter to the people both in America and Great Britain. Believed to be written for the Congress by John Jay, who would later become the first chief justice of the U. S. Supreme Court, it stated, "Know then that we claim all the benefits secured to the subject by the English Constitution, and particularly the inestimable right of trial by jury."[30]

In 1775, it became a focal point of the American Revolution. In the Declaration of Causes and Necessity of Taking Up Arms, the Continental Congress cited the denial of "the accustomed and inestimable privilege of trial by jury, in cases of both life and property." In 1776, in our Declaration of Independence, the charges against King George III included, "Depriving us in many cases, the benefits of trial by jury." With that document, America's founding fathers made trial by jury a right for which they pledged "[their] lives, [their] fortunes, and [their] sacred honor."

After the Declaration of Independence was signed, each colony had to write a new state constitution. These constitutions were based on the principles and rights outlined in the Magna Carta and the British Bill of Rights, as well as the interpretation of British common law by jurists such as Thomas Coke and William Blackstone. In his *Commentaries on the Laws of England*, Blackstone wrote, "The trial by jury ever has been, and I trust ever will be, looked upon as the glory of English law," and he called trial by jury the "bulwark of our liberties."[31] The leaders of the new United States of America viewed trial by jury, including trial by jury in civil cases, as a fundamental right that must be preserved in their state constitutions. Indeed, trial by jury was the only right guaranteed in all 13 new constitutions. This fact was cited by Justice Rehnquist in his *Parklane* dissent. "After war had broken out, all of the 13 newly formed States restored the institution of civil jury trial to its prior prominence; 10 expressly guaranteed the right in their state constitutions and the three others recognized it by statute or by common practice. Indeed, "'the right to trial by jury was probably the only one universally secured by the first American state constitutions.'"[32]

In his June 1776 Virginia Declaration of Rights, George Mason wrote that "in all capital or criminal prosecutions a man has a right . . . to a speedy trial by an impartial jury of twelve men in his vicinage." He preserved the right in the Virginia constitution he wrote later that year. Section 11 of the Bill of Rights of the Virginia Constitution reads, "[I]n controversies respecting property, and in suits between

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[28] GREAT BRITAIN: PARLIAMENT. 1774 MASSACHUSETTS GOVERNMENT ACT (May 20, 1774), http://avalon.law.yale.edu/18th_century/mass_gov_act.asp

[29] DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS (Oct. 14, 1774), http://avalon.law.yale.edu/18th_century/resolves.asp

[30] FIRST CONTINENTAL CONGRESS. ADDRESS TO THE PEOPLE OF GREAT BRITAIN (Oct. 21, 1774), https://en.wikisource.org/wiki/Address_to_the_People_of_Great_Britain

[31] 2 BLACKSTONE, COMMENTARIES, at *379.

[32] LEONARD WILLIAMS LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1960) *cited in* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

man and man, the ancient trial by jury is preferable to any other and ought to be held sacred." The Constitution of North Carolina, approved December 14, 1776, states, "[I]n all controversies at law, respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and invaluable." The New York State Constitution, drafted by John Jay, Robert Livingston and Gouvernor Morris and approved April 20, 1777, reads, "And this convention doth further ordain, determine and declare, in name and by authority of the people of this state, that trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever." Similar language was used in all the other state constitutions as well as the charter for the Northwest Territories."[33]

The Constitution Controversy

After our victory in the American Revolution, the United States' first constitution, the Articles of Confederation, was deemed inadequate for the new nation. A convention was called in Philadelphia in 1787 to draft a new one.

After months of heated debate, a draft was presented to the convention on September 12. The draft allowed trial by jury in criminal cases, but not in civil cases. Elbridge Gerry of Massachusetts cited the omission. "The jury is adapted to the investigation of the truth beyond any other system the world can produce. A tribunal without juries would be a Star Chamber in civil cases." Gerry's position was affirmed and seconded by George Mason, who argued that the document needed a Bill of Rights to guarantee both freedom of the press and trial by jury. Delegates attempted to amend the constitution to include jury trials in civil cases. Opponents to the change argued that it was unnecessary since the right was preserved in the state constitutions. The amendment failed on September 15. The new constitution was signed on September 17, 1787, but it had to be ratified by the states.[34]

The document's failure to include trial by jury in civil cases nearly led to its defeat. Opposition to the proposed constitution organized quickly. "It [was] clear that even before the delegates had left Philadelphia, plans were underway to attack the proposed Constitution on the ground that it failed to contain a guarantee of civil jury trial in the new federal courts.[35]

As the states debated ratification, the political leaders split into two groups--the Federalists and the Anti-Federalists. The Federalists, led by men like Alexander Hamilton and James Madison, championed a strong, centralized government. The Anti-Federalists, whose members included George Mason, Patrick Henry and Samuel Adams, feared that a strong national government would overpower the rights of the states and citizens and advocated for a Bill of Rights. Despite their philosophical differences on many issues, there was one area on which they agreed--the right to trial by jury.

Hamilton did not include trial by jury in civil cases in the U. S. Constitution because he believed that existing state statutory and common law varied too greatly from one to the next to be included in the federal constitution. As outlined in Federalist Paper No. 83, the longest of the Federalist papers, Hamilton argued that the federal constitution did not abolish the right and that drafters believed that it would be better defined in statute by the individual states. Despite this difference of opinion with the

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[33] Copies of the original state constitutions are available at *The Original State Constitutions,* WORLDSERVICE.ORG, http://www.wordservice.org/State%20Constitutions/usa1000.htm (last visited May 11, 2017)

[34] THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587, 634, 640 (Max Farrand ed. 1787).

[35] ROBERT A. RUTLAND, GEORGE MASON: RELUCTANT STATESMAN 91 (LSU Press 1961). 91 *cited* in *Parklane* 439 U.S. 322 (Rehnquist, J., dissenting)

Anti-Federalists, he wrote, "The friends and adversaries of the plan of the Convention, if they agree on nothing else, concur at least in the value they set upon trial by jury; or if there is any difference between them in consists in this: the former regard it as a safeguard of liberty; the latter represent it as the very palladium of free government."[36] Hamilton's sentiments were echoed by other Federalists like Pennsylvania lawyer John Dickenson who wrote, "Trial by jury is the cornerstone of our liberty. It is our birthright; who is in opposition to the genius of America shall dare to attempt its subversion?" Madison stated that "trial by jury is essential to secure the liberty of the people as any one of the pre-existent rights of nature."

Likewise, the Anti-Federalists supported trial by jury as fervently as Hamilton and the Federalists. Patrick Henry wrote, "Trial by jury is the best appendage of freedom. I hope that we shall never be induced to part with that excellent mode of trial.[37] Fellow Virginian Richard Henry Lee stated, "The right to trial by jury is a fundamental right of a free and enlightened people and an essential part of free government." Lee also stressed the importance of jury trials for both civil and criminal cases, writing, "Trial by jury in civil cases and trial by jury in criminal cases stand on the same footing: they are the common rights of Americans."

The Bill of Rights

While five states ratified the United States Constitution quickly, others--led by Massachusetts and Virginia--refused to ratify it unless the document was amended to include a Bill of Rights. John Adams and John Hancock brokered the Massachusetts Compromise in February 1788. Under the compromise the state delegates approved the constitution, but the state would lobby Congress to amend the document if it became law. Other states followed Massachusetts' lead and passed the document with provisions that it be amended to include a Bill of Rights.

Amendments guaranteeing the right to trial by jury in both criminal and civil cases was central to the proposed Bill of Rights the states wanted. As Roger Roots noted, "'Juries were at the heart of the Bill of Rights' in 1791. Indeed, as Yale Law Professor Akhil Amar recounts, the entire debate at the Philadelphia convention of the necessity of a bill of rights 'was triggered when George Mason [mentioned] . . . that no provision was yet made for juries in civil cases.' Jury trial was so important to the ratification of the Constitution that five of six states that advanced amendments during their ratifying conventions included two or more jury-related proposals."[38]

The Constitution was ratified and became law on March 4, 1789.

After the first United States Congress was seated at Federal Hall in New York City, its members began work on the Bill of Rights. James Madison, who headed the Virginia delegation, drafted the initial legislation. Based largely on George Mason's 1776 Virginia Bill of Rights, it outlined the first ten amendments to the Constitution. The proposed language for the amendment guaranteeing trial by jury in civil cases read, "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."[39]

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[36] THE FEDERALIST NO. 48 (Alexander Hamilton) http://avalon.law.yale.edu/18th_century/fed83.asp.

[37] JONATHAN ELLIOT, ELLIOT'S DEBATES 324, 544 (1941)

[38] Roots, *supra* note 21, at 2.

[39] 1ST ANNALS OF CONGRESS 435 (1789)

The draft Bill of Rights was passed by Congress on September 25, 1789. On December 15, 1791, Virginia became the eleventh state to ratify the constitutional amendments, and the Bill of Rights became law.

In the Bill of Rights, the 1st Amendment guarantees, among other liberties, freedom of the press --the spark that ignited the American Revolution with the trial of John Peter Zenger. The 6th Amendment outlines the right to a speedy, impartial jury trial in criminal cases--the right which ensured that Zenger had a fair trial in front of a jury of his peers. The 7th Amendment preserves the right to jury trial in civil cases and reads: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, according to the rules of common law."

Conclusion

Trial by jury in civil cases is central to American democracy and the rights of the American people. In his 1833 *Commentaries on the Constitution*, U. S. Supreme Court Justice Joseph Story wrote, "The inestimable privilege of trial by jury in civil cases is conceded by all to be essential to political and civil liberty."[40] That opinion was echoed by noted by French political scientist and historian Alexis de Tocqueville in *Democracy in Action*: "The civil jury is the most effective form of sovereignty of the people. It defies the aggressions of time and man. During the 16th century, the civil jury did in reality save the liberties of England."

The 7th Amendment is of paramount importance to the rights and liberties we enjoy as Americans, and are a critical part of Democratic government. The 7th Amendment guarantees the rights of average citizens to challenge the most wealthy, the most powerful and the government itself in our courtrooms and have equal standing. It can even be argued that the Bill of Rights and the additional rights enshrined there exist largely due to the fact that the right to trial by jury in civil cases was excluded from the original draft U. S. Constitution. It is a tremendous role for both the amendment and its history that have been largely forgotten in 21st century America.

It is the responsibility of every American to protect his or her 7th Amendment right to trial by jury. As U. S. Supreme Court Justice Hugo Black wrote in 1939, "It is essential that the right of trial by jury be scrupulously safeguarded as the bulwark of civil liberty. Our duty to preserve the 7th Amendment is a matter of high constitutional importance."

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[40] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1762 (1833).