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

PETIT JURIES IN COMMON LAW CASES

Whereas the amendments immediately preceding deal with federal criminal trials, the Seventh Amendment deals with federal civil trials, such as diversity of citizenship cases and the like. With a view to perceived British abuses that the Second Continental Congress had noted in its *Declaration of the Causes of Taking up Arms*, the Seventh Amendment provides the right to a jury trial in all common law civil cases exceeding twenty dollars.

In the nineteenth century, the Supreme Court decided that the common law that the amendment applied was that of England at the time the amendment was adopted—the "historical test"—rather than that of individual states. Consistent with the Eleventh Amendment, courts have also limited the use of juries: in civil cases in which individuals attempt to sue the government—the so-called public rights exception. In accord with the reference within the Seventh Amendment to "common law," courts have limited jury trials in federal cases involving maritime law or patent infringement; and in equity cases where individuals are seeking injunctions rather than monetary damages.

The provision for jury trials in civil cases remains one of the few provisions in the Bill of Rights that courts have not equally applied to the states, although some state constitutions protect this right. As it has done in criminal cases, in *Colgrove v. Battin* (1973), the Supreme Court upheld the constitutionality of six-person juries in civil cases. It decided that such juries performed the same functions as their larger counterparts.

The second part of the Seventh Amendment, known as the Reexamination Clause, responded to Anti-Federalist fears that Article III had eroded jury protections by vesting the Supreme Court appellate power "both as to Law and Fact." The amendment sought to restore common law practices that insulated jury judgments of fact from such review. Some critics fear that modern provisions for summary judgments and directed verdicts that are outlined in modern Federal Rules of Procedures go beyond such common-law principles (see Meese 2005, p. 362) and renew the threat that the authors of the amendment sought to preclude.

THE EIGHTH AMENDMENT

Although some constitutional provisions are highly specific, others leave matters of degree to future generations to decide. The provisions in the Eighth Amendment arguably fit squarely within the latter category. The amendment respectively prohibits "excessive bail," "excessive fines," and "cruel and unusual

Right to Jury in Civil Cases

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....

(AMENDMENT VII)

Toward the end of the Constitutional Convention, Hugh Williamson of North Carolina noted that "no provision was yet made for juries in civil cases and suggested the necessity of it." Elbridge Gerry agreed, while George Mason further argued that the omission demonstrated that the Constitution needed a Bill of Rights. Nathaniel Gorham of Massachusetts responded that the question should be left to Congress because of complexities in determining what kind of civil cases should be given to a jury. A few days later, when Gerry and Charles Pinckney moved to insert "And a trial by jury shall be preserved as usual in civil cases," Gorham argued that there was no usual form, because the structure of civil juries varied among the states. Apparently sensing the difficulty in phrasing the guarantee, the convention unanimously defeated the motion.

It was a costly oversight, for the omission of a guarantee of civil juries occasioned the greatest opposition to the Constitution in the ratifying conventions, as Alexander Hamilton candidly admitted in *The Federalist* No. 83. Hamilton tried to minimize the differences by arguing that the only difference between the supporters and detractors of the Constitution on this issue was that "the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." Mason and Gerry had themselves refused to sign the Constitution, citing the absence of the guarantee among their other concerns. In the ratification debates, the Anti-Federalists argued that the provision in the Constitution for juries in criminal cases necessarily implied their abolition in civil cases. The Anti-Federalists tied this argument to their objections to the power of the Supreme Court in Article III to hear appeals "both as to law and fact," suggesting that the Constitution would effectively abolish juries in the states as well.

In response, the Federalists continued to argue that defining in the Constitution the appropriate cases for civil juries was too difficult a task and that the Congress could be trusted to make provision for civil juries. This was a weak argument, as twelve of the states themselves protected civil juries in their constitutions. Of the six ratifying conventions that proposed amendments to the Constitution, five included a right to a jury in civil cases.

The history of the revolutionary struggle also counted against the Federalists. The colonists had had no objection to trials without juries in traditional admiralty and maritime cases. But when Parliament extended the jurisdiction of the admiralty courts to other cases, the colonists' opposition to England crystallized around the deprivation of their right to trial by jury. In the *Declaration of the Causes and Necessity of Taking up Arms* (1775), the Second Continental Congress declared: "[S]tatutes have been passed for extending the jurisdiction of courts of Admiralty and Vice-Admiralty beyond their ancient limits; for depriving us of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property." The complaint was also among the bill of particulars in the Declaration of Independence.

The Seventh Amendment, passed by the First Congress without debate, cured the omission by declaring that the right to a jury trial shall be preserved in common law cases, thus leaving the traditional distinction between cases at law and those in equity or admiralty, where there normally was no jury. The implied distinction parallels the explicit division of federal judicial authority in Article III to cases (1) in law, (2) in equity, and (3) in admiralty and maritime jurisdiction. The contemporaneously passed Judiciary Act of 1789 similarly provided that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." As Justice Joseph Story later explained in *Parsons v. Bedford* (1830) "In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."

The Supreme Court has, however, arrived at a more limited interpretation. It applies the

amendment's guarantee to the kinds of cases that "existed under the English common law when the amendment was adopted," *Baltimore & Carolina Line v. Redman* (1935), or to newly developed rights that can be analogized to what existed at that time, *Luria v. United States* (1913), *Curtis v. Loether* (1974). Accordingly, in a series of decisions in the second half of the twentieth century, the Supreme Court ruled that the Seventh Amendment guarantees the right to trial by jury in procedurally novel settings, like declaratory judgment actions, *Beacon Theatres v. Westover* (1959), and shareholder derivative suits, *Ross v. Bernhard* (1970). The Court also applied the amendment to cases adjudicating newly created statutory rights, *Curtis v. Loether*, *Pernell v. Southall Realty* (1974). In addition, the Supreme Court has ruled unanimously that when factually overlapping "legal" and "equitable" claims are joined together in the same action, the Seventh Amendment requires that the former be adjudicated first (by a jury), and that when legal claims triable to a jury are erroneously dismissed, relitigation of the entire action is "essential to vindicating [the plaintiff's] Seventh Amendment rights." *Lytle v. Household Manufacturing, Inc.* (1990).

The right to trial by jury is not constitutionally guaranteed in certain classes of civil cases that are concededly "suits at common law," particularly when "public" or governmental rights are at issue and if one cannot find eighteenth-century precedent for jury participation in those cases. *Atlas Roofing Co. v. Occupational Safety & Health Review Commission* (1977). Thus, Congress can direct Article III courts to resolve personal and property claims against the United States without the aid of a jury, or simply divert such claims to non–Article III courts with no jury component. *Osborn v. Haley* (2007). In addition, where practice as it existed in 1791 "provides no clear answer," the rule is that "[o]nly those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature." *Markman v. Westview Instruments, Inc.* (1996). In those situations, too, the Seventh Amendment does not restrain congressional choice.

In contrast to the near-universal support for the civil jury trial in the eighteenth and early nineteenth centuries, modern jurists consider civil jury trial neither "implicit in the concept of ordered liberty," *Palko v. Connecticut* (1937), nor "fundamental to the American scheme of justice," *Duncan v. Louisiana* (1968). Accordingly, in solitary company with the Grand Jury Requirement Clause of the Fifth Amendment, the Seventh Amendment is not "incorporated" against the states; it applies only in the federal courts. In the federal courts, the parties can waive the right, but there is no longer a requirement, as there was in 1791, that civil juries be composed of twelve persons and must reach a unanimous verdict. *Colgrove v. Battin* (1973).

Eric Grant

See Also

Article III, Section 2, Clause 1 (Federal Party)
Article III, Section 2, Clause 2 (Original Jurisdiction)
Amendment V (Grand Jury Requirement)
Amendment VI (Jury Trial)

Suggestions for Further Research

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1 John Phillip Reid, Constitutional History of the American Revolution: The Authority of Rights (1986)

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Significant Cases

Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830)
Kohl v. United States, 91 U.S. 367 (1876)
Luria v. United States, 231 U.S. 9 (1913)

Seventh Amendment (1791)

The Seventh Amendment guarantees a jury trial in civil cases and ensures that the facts decided by a jury may not be re-examined by a federal court.

VII

IN suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

COMMENTARY

Few delegates to the Constitutional Convention anticipated the controversy over the provision in Article III giving the Supreme Court jurisdiction "both as to law and fact." Anti-Federalists argued that the provision would deny the right of trial by jury in civil cases.

The purpose of the Seventh Amendment was not to expand the right to a jury trial but to preserve it as it then existed. Existing common law made two distinctions when it came to the right to a jury trial. Cases in *equity* were tried exclusively by judges without a jury, while cases in *law* were tried before both a judge and a jury—the judge having the sole power to decide the law and the jury having the sole power to decide the facts. Generally, cases in *law* result in verdicts for money damages, while cases in *equity* result in court-ordered decrees such as injunctions preventing (or mandating) certain actions, or declaratory judgments, in which a judge decides the respective rights and duties of the parties under a contract or a statute.

It was vitally important to the Founders that the right to a jury trial be protected. After all, King George's denial of a trial by a jury of one's peers (or equals) was a major cause of the Revolutionary War. The founding generation saw the jury, made up of common folks, as a shield against overzealous prosecutors or corrupt judges. In a very real sense, the jury was seen as an integral part of "self government," keeping as much decision-making power in the hands of the people as possible.

Consequently, the fact that Article III of the Constitution gives the Supreme Court jurisdiction "both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make" posed twin threats for those who valued the right of the jury to be the final arbiter of questions of fact. First, Article III suggested that the Supreme Court could reverse factual findings made by a jury. Second, the fact that Article III gave Congress the power to make "Exceptions" and enact "Regulations" raised the possibility of partisan political squabbles, further jeopardizing the rights of individual litigants. Since the Seventh Amendment has not been made applicable to the states, state courts are free, under federal constitutional law, to dispense with juries altogether in civil cases.

The U.S. Supreme Court has jealously guarded the right to a jury trial. In *Beacon Theatres Inc. v. Westover* (1964), Justice Black stated that only "under the most imperative circumstances," could the right to a jury trial be lost due to the fact that the court had previously decided related equitable claims.

Amendment VII

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The Seventh Amendment: Trial by Jury in Civil Cases

The Constitution includes trial by jury for the third time in the Seventh Amendment. It protects the right to a jury trial in **civil cases,** those deciding disputes between private parties over noncriminal matters, such as personal injuries or contracts. **Criminal cases** are those in which the government punishes individuals for committing crimes. The Seventh Amendment also limits a judge's power to overturn factual decisions by a jury, which could otherwise render a jury's power meaningless. Some Americans believe that, in an age of increasingly complex litigation, a civil jury is an incompetent artifact that actually endangers due process of law. Others argue that trial by jury, in both civil and criminal cases, ensures that the American people participate directly in self-government.

civil cases
those lawsuits deciding disputes between private parties over noncriminal matters, such as personal injuries or contracts

criminal cases
those in which the government punishes individuals for committing crimes

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,...
This provision in the Seventh Amendment protects the right to trial by jury in civil cases. When the Seventh Amendment was drafted, the amount in controversy had to exceed twenty dollars before the right to a jury would apply. Today, that amount seems minuscule.

Juries were first used in civil cases, not for criminal trials. During the Middle Ages, the English used trial by jury to resolve disputes, instead of religious practices believed to reveal the will of God. Among these practices was trial by ordeal, in which a person had to pass a physical test proving that he or she was telling the truth, such as holding hot metal. Another method was trial by battle, in which whoever won an armed contest would prevail. In trial by oath giving, the party won who could get the most neighbors to swear oaths to God on his behalf, thus risking damnation for their immortal souls.

"The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because it *was* good a thousand years ago."

—Mark Twain

But after the Norman Conquest in 1066, the English used trial by jury as the dominant practice of deciding the truth. In the beginning, jurors were those citizens from the local community who had probably witnessed the disputed events. Conversely, today's juries are specifically selected from people who have no personal knowledge of the case or its history. Although the Magna Carta of 1215 did not explicitly protect the right to trial by jury, it did prevent English nobles from being punished "except by lawful judgment of his peers," meaning his aristocratic equals. This provision led to the assumption that a "jury of one's peers," or fellow citizens, would issue a judgment in a trial by jury. However, in the nineteenth century England eliminated trial by jury in civil cases to increase the efficiency of the courts.

In America, trial by jury became increasingly important to the colonists as protection against the power of royal officials. In fact, by 1776 all thirteen colonies protected trial by jury in civil cases. Nonetheless, the right was not included in the original text of the Constitution, and seven states included it in their proposed amendments for a Bill of Rights.

Some legal scholars have proposed that, like English courts, Americans abolish trial by jury in civil cases. Particularly in complex civil litigation, they believe, juries are not the most efficient and competent dispensers of justice. They maintain that juries in some complicated trials–which can involve hundreds of plaintiffs and last more than a year–produce such erratic verdicts that they violate due process of law. But other legal experts maintain that trial by jury, both in civil and criminal cases, is essential to democratic self-government. Only in juries, they point out, do the people directly participate in decision making. In both the executive and legislative branches, the people elect representatives who exercise power on their behalf. Furthermore, these scholars say, judges can be ignorant and incompetent, too.

The Solemn Task of Self-Government *Akhil Reed Amar*

Yale Law professor Akhil Reed Amar sees the jury as the crucible of democracy, in which citizens grapple with the difficult issues of self-government face-to-face.

The jury box provides a unique forum for interaction among citizens who might otherwise never engage each other, people who live in different neighborhoods, attend different schools, worship in different congregations. . . . In the jury box, we meet citizen to citizen, face to face, not just to exchange greetings or currency but to listen to, learn from, and work with one another in the solemn task of self-government. Nowhere else, not even in the voting booth, must Americans come together in person to deliberate collectively about fundamental matters in our shared public life. Democracy is well served by the dialogue that takes place in the jury room.

Thus far, the Supreme Court has not recognized a complexity exception to the Seventh Amendment. The Supreme Court has also never incorporated the right to trial by jury in civil cases to apply to the states. Moreover, the Court uses different standards for jury trials in civil and criminal cases. Although federal criminal trials must have a twelve-person jury, the Court ruled in *Colgrove v. Battin* (1973) that civil trials only need a minimum of six jurors. But in general civil cases require unanimous verdicts, just as do federal criminal cases, unless the litigants stipulate otherwise.

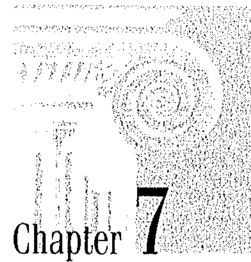
"Where do they dig up some of these jurors anyway? Last time I served, I sat with the flotsam of the universe."
—Whoopi Goldberg

...and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

What if a judge could ignore a jury's verdict, or instruct the jury to make a particular finding on the evidence? The framers of the Constitution were well aware of *Bushell's Case* (1670), an appeal of an English judge's punishment of jurors who refused to find William Penn, a Quaker and later founder of Pennsylvania, guilty of unlawful assembly. To avoid such injustice, the framers included a provision in the Seventh Amendment prohibiting a judge from disregarding a jury's determination of the facts, except under circumstances determined by law.

These jurors listen to the judge's instructions in a lawsuit about smoking.

In *Baltimore and Carolina Line v. Redman* (1935), the Supreme Court upheld the general principle that a jury decides the facts of a case, and the judge determines what law is relevant to those facts. The judge's job is to advise the jury of what verdict, under the law, is required if the jury finds certain facts to be true. The judge gives these legal instructions to the jury before it deliberates. However, the distinction between the law and the facts in a case is not always clear. In addition, the Supreme Court ruled in 1996 that in certain types of federal cases involving citizens from different states, the federal judge can apply a state law restricting jury awards for "excessive" damages without violating the Seventh Amendment.



Chapter 7

Seventh Amendment

by Richard J. Cretan

Text of the Amendment

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

Amendment Facts:

Submitted by Congress to the states: September 25, 1789.

Ratified by the required three-fourths of states (11 of 14): December 15, 1791. Declared to be part of the Constitution: December 15, 1791.

Overview

The Seventh Amendment, which guarantees the right to a jury in federal civil lawsuits, is a vital part of constitutional history. Indeed, once the final draft of the Constitution was written, the omission of this guarantee threatened the Constitution's chances of ratification by the states. Only last-minute political compromise secured its success. This compromise capped one of many struggles over the difficult question before the Framers: how strong should federal government be? It marked a defeat for the Federalists, who found the civil jury question troublesome, and a victory for their opponents, the Anti-Federalists, who made the dispute the centerpiece of their campaign against ratification.

In the months before ratification, both sides vied for public support. The Federalists believed it was impossible to forge a right that covered all extenuating circumstances. The Anti-Federalists argued that English law had traditionally provided for civil juries, and that the jury served as a check upon the power of corrupt judges. Their argument went over much better with the states, which already guaranteed the right in their own constitutions. As popular outcry grew, the Federalists, fearing the need to start drafting a new Constitution, agreed to make federal civil juries a part of the Bill of Rights. Thus was ratification ensured.

The result of this political struggle is a simple guarantee made in two clauses. The amendment's first clause provides for jury trials when lawsuits are

Thurgood Marshall *(1908–1993)*

Thurgood Marshall was born on July 2, 1908, in Baltimore, Maryland, where his mother was a teacher and his father a headwaiter and country club steward. Marshall attended Lincoln University, where he received his bachelor's degree *cum laude,* and then enrolled in the law school at Howard University in 1930, from which he graduated *magna cum laude* in 1933.

Passing the Maryland bar in 1933, Marshall practiced in Baltimore until 1938, serving also as counsel for the Baltimore branch of the National Association for the Advancement of Colored People (NAACP). In 1935 he successfully attacked segregation and discrimination in education when he participated in the desegregation of the University of Maryland Law School. Marshall became director of the NAACP's Legal Defense and Education Fund in 1939. A year earlier he had been admitted to practice before the U.S. Supreme Court, the U.S. Circuit Court of Appeals for the fourth, fifth, and eighth circuits, and the U.S. District Court for the Eastern District of Louisiana.

Winning 29 of the 32 civil rights cases which he and his aides argued before the Supreme Court (and sometimes threatened with death as he argued cases in the lower courts of some southern states), Marshall earned the reputation of "America's outstanding civil-rights lawyer." Some of the important cases he argued became landmarks in the destruction of segregation, as well as constitutional precedents. The most famous was *Brown v. Board of Education* (1954), which outlawed segregation in public schools and for all practical purposes "sounded the death knell for all forms of legally sanctioned segregation."

President John Kennedy nominated Marshall for judge of the Second Court of Appeals in 1961. After prolonged and contentious hearings, Marshall was confirmed. Three years later Marshall accepted President Lyndon Johnson's appointment as solicitor general, where Marshall successfully defended the United States in a number of important cases concerning industry.

In 1967 President Johnson nominated Marshall as associate justice to the U. S. Supreme Court. Marshall's nomination was strenuously opposed by several Southern senators on the Judiciary Committee but he was confirmed by a vote of 69 to 11. He took his seat on October 2, 1967, and was the first African-American justice to sit on the U.S. Supreme Court.

During his nearly quarter-century on the Supreme Court, Marshall remained a strong advocate of individual rights and never wavered in his devotion to ending discrimination. He formed a key part of the Court's progressive majority which voted to uphold a woman's right to abortion. His majority opinions covered such areas as ecology, the right of appeal of persons convicted of narcotic charges, failure to report for and submit to induction into the U. S. Armed Forces, obscenity, and the rights of Native Americans. Marshall died in 1993 at the age of 84.

brought in federal court for claims exceeding $20. The second clause addresses the respective roles of juries and judges. Juries examine facts, and judges many not reexamine facts that have been decided by juries.

Today, however, these straightforward provisions tell only a part of the whole picture. In the course of more than two hundred years of interpretation, the courts have regarded the Seventh Amendment as less than an absolute guarantee. Not all federal lawsuits, finally, will trigger the right to a jury. Enjoyment of the right, in the broadest sense, depends upon the identity of the parties to the lawsuit and what type of claim is at stake. Litigants who invoke the right face the hurdle of meeting court-developed tests before a jury trial will be ordered, and the courts may refuse to do so if the case fails to meet these conditions. In such outcomes, a judge tries the case.

The most important of these conditions is known as the historical test. Developed in the early nineteenth century and still in effect today, the historical test defines what the Seventh Amendment means by "common law." As a general definition, the phrase is understood as the whole sum of statutory and case law that existed in Eng-

land and the American colonies before the American Revolution. The historical test, however, uses a narrower definition that is fixed at a particular point in time and place. It interprets the Seventh Amendment to cover only the common law in England as it existed when the U.S. Constitution was ratified. Thus, to meet the test, a litigant has to assert a claim that would have triggered a jury in an English court in 1791.

Courts have carved out exceptions to the Seventh Amendment as well. Under the so-called "public rights" doctrine, these exceptions effectively cancel the right to a jury trial in two areas. The first is lawsuits against the federal government itself. Since the mid-eighteenth century, courts have recognized that the federal government is completely protected from lawsuits by its citizens: only when the government consents to be sued can a lawsuit go forward, and then, moreover, there is no right to a jury trial. The second area, which encompasses a very broad range of exceptions, allows Congress to create new rights as well as causes of action—the grounds for bringing lawsuits. Although lawmakers cannot take away jury trials that would have existed under English common law, they can assign new causes of action to administrative forums where judges try the cases. Both areas of exceptions have circumscribed the Seventh Amendment.

The type of claim in a civil lawsuit also plays a deciding factor in whether a jury hears the case. For a jury trial to be held, the claim at issue must be essentially legal as opposed to equitable in nature. Legal claims usually seek monetary damages for injuries. Equitable claims typically ask for nonmonetary remedies. These include injunctions, a form of relief in which a court prohibits a certain behavior, and specific performance, another kind of relief in which a court requires performance of the terms in a contract. But the categories of legal and equitable claims are not always clear cut. How the courts categorize a claim is therefore crucial to a litigant's Seventh Amendment rights. Courts will also fashion unique approaches when a case mixes both legal and equitable claims.

Origins

In the political struggle over ratification of the Constitution, proponents of civil jury rights pointed to English legal history. They saw the civil jury as a prominent feature of the common law, an idea that had its roots deep in the Middle Ages and which had matured over the course of six centuries. Their outlook, which held the right to belong to a cherished tradition, was founded not only on distant events but also on the recent experience of colonial rule.

Pre-Colonial Roots

Juries were unknown before the eleventh century. At this time, before the development of a common law, English custom already included the practice of trials, but what was conducted in medieval England differed greatly in idea and practice from the modern Western concept. As practiced in this primitive age, the various forms of trial mixed superstition, religion, and barbarism in an often unpleasant and even fatal result. England and other European countries believed in finding the truth through supernatural means. This belief held that innocence could be established by subjecting people to physical tests, and that God's judgment—the only one which counted—would be seen in the outcome.

In the aptly named "trial by ordeal," the physical test was torture. The fear of bodily harm sometimes led to confessions of guilt before the torture even began, a result that was considered a useful savings of time. If a stalwart person chose to undergo the ordeal, then the trial could take several forms, each of them an earnest test of endurance. The ordeal by fire required the accused to walk over hot coals or hold glowing iron; the ordeal by water involved submersion; and other creative tests of the flesh were devised, too. Whatever the exact ordeal, the absence of injury as well as the ability to endure extreme physical hardship were proof of innocence. God, it was thought, would protect the guiltless.

Civil disputes called for armed combat. This was called "trial by battle" or "wager of battle." It pitted adversaries against each other in a duel, the winner of which was believed to have been favored by God and the loser proven wrong. Like the trial by ordeal, this legal test was highly dangerous, but it at least provided greater protection to more affluent litigants: if they could afford to do so, they could hire champions to fight the duel for them.

Although these practices only died out slowly during the Middle Ages, a revolutionary idea

Six Member Juries Preserve Common Law Jury Right

The first part of the Seventh Amendment guarantees that in the federal courts "the right of trial by jury shall be preserved." On the first reading, this looks to be a simple and straightforward guarantee. In *Colegrove v. Battin* (1973), however, the nine justices of the Supreme Court found little agreement over its meaning. Although the amendment clearly assures a trial by jury, it gives virtually no clues as to what characteristics of that jury must be "preserved." By a vote of 5-4 the Court in *Colegrove* held that a jury of six members, rather than the customary 12, does not violate the Seventh Amendment.

Roland Colegrove brought a lawsuit in federal district court in Montana. District Judge James F. Battin ordered trial by a jury of six members, pursuant to a new local rule. Colegrove objected to a six-member jury and asked for a jury of 12. Judge Battin refused and Colegrove sued the judge for violating his rights under the Seventh Amendment, federal law, and the Federal Rules of Civil Procedure. The Court of Appeals for the Ninth Circuit denied Colegrove's claims and he appealed to the U.S. Supreme Court.

Justice William Brennan, writing for the majority, noted that at the time the Bill of Rights was composed, the states had varying practices regarding jury trials. For this reason, he opined, the language of the Seventh Amendment was deliberately nonspecific. To the majority the core purpose of the amendment was to assure a jury trial in the types of cases for which one had been available at common law, not to fix particular characteristics of the jury itself. The Court had remarked in prior cases that a "trial by jury" means a trial by 12 jurors, but Brennan dismissed these statements as dictum—remarks in an opinion that do not go to the issue before the court and are therefore not part of its holding. While it is true that a biased or otherwise inadequate jury would not satisfy the Seventh Amendment, Brennan found no persuasive evidence that a jury of six provided less reliable outcomes than a jury of 12.

Justice William O. Douglas wrote a dissent joined by Lewis Powell, and Thurgood Marshall dissented, joined by Potter Stewart. Douglas believed that only Congress had the power to shrink the civil jury from 12 to six jurors, not the courts, who had made the local rule. Federal Rule of Civil Procedure 48, which at that time had to be, and was, approved by Congress, allowed the parties to stipulate to an 11-member jury. To Douglas, this clearly indicated that a 12- member jury was otherwise the norm. The rule allowing juries of six therefore conflicted with Congress's intention and was invalid.

Justice Marshall's dissent was broader. He believed that the substance of the jury right could not be preserved if the size of the jury were cut in half. A jury must be representative of the community and the cross section achievable with six people was necessarily less representative than that provided by 12. In a footnote, Marshall provided statistics showing how jury awards could diverge when only six members of a community weighed the evidence, instead of 12.

To Marshall, the vague language of the amendment was reason to adhere more, rather than less, closely to jury practices at the time the amendment was drafted. The tradition of 12-member juries had been traced back over 800 years in English common law and for Marshall this tradition, in absence of anything embracing smaller juries, deserved deference.

Smaller juries are now commonplace in civil actions and with court resources growing ever more stressed, it is unlikely they will be abandoned. It also seems unlikely, however, that courts will permit civil juries of fewer than six members.

appeared following the Norman conquest in 1066. This was the notion of using the opinions of outsiders to decide a civil dispute—in essence, these outsiders were the first jurors. Now superstitious judgment began to give way to rational analysis. The origin of the early jury may have been the French inquest procedure, or it may have developed independently in England; the history is unclear. But the basic outline was simple: 12 men with knowledge of the dispute were summoned to help pass judgment. Originally, these jurors were called "oath helpers," so named because their statements would either challenge or support a civil defendant's statement, known as an "oath."

Their role was opposite from that of modern jurors who are not supposed to know the facts of a case until trial. Instead, more like modern-day witnesses, these local citizens told what they already knew about the dispute.

Over the next century, the jury trial gradually became popular. Shaping the jury into an institution were the powerful historical forces that transformed England and gave birth to the common law. First was the development of the royal courts, three distinct tribunals to which the king delegated authority to travel and hear cases throughout the kingdom. By the late 1100s, a civil defendant in royal court was entitled to request a jury trial and so "put himself upon his country," as the popular expression went. Then, in 1215, an uprising by England's barons forced King John to recognize liberties and legal procedures in the Magna Carta, the document which later formed the basis of English and U.S. constitutional law. Far from securing the right to a trial by jury, the Magna Carta mentioned in passing that questions of law should be decided by "judgment by one's peers," and that right was interpreted to protect only aristocrats. Yet this step toward systemization helped build the path to jury trials by strangling the old, cruder forms of justice: the trial by ordeal was abolished in England in 1219. By the end of the century, primitive criminal juries came into use, too.

It took four more centuries for the jury to evolve. The most significant turning point came in the fourteenth century as the role of juries changed fundamentally. Previously functioning like witnesses with knowledge of the case, they now heard evidence that was presented to them. Moreover, emphasis came to be placed on fairness, and accusations of juror bias appeared. As these developments gradually transformed juries into impartial triers of facts, confidence in the jury system grew, and, in 1689, the English Bill of Rights elevated the jury trial to a right. The great English jurist and commentator Sir William Blackstone would write by the 1760s that the civil jury trial was "the glory of the English law."

The Colonial Experience

The American colonists thus knew the jury tradition first hand. They even protected its use in the new land by explicitly guaranteeing it in many colonial charters. For several decades, from the founding of the colonies until shortly before the Revolutionary War, the tradition was commonly practiced. Colonial royal judges presided over civil lawsuits at which a 12-member jury was impaneled to try the facts in the case. The judges themselves were drawn from local communities, and though the British government appointed them, local legislatures paid their salaries, and thus a significant measure of autonomy existed. The civil jury system functioned much as it did in England.

But in the years leading up to the American Revolution, the British Crown tightened its grip on the colonies first economically and then legally. Following the oppressive taxation of the 1760s, sharp legal constraints were imposed a decade later. Juries were no longer assured in either criminal or civil cases; local judicial autonomy vanished. For some crimes, colonists could be taken off to England without any guarantee of either a fast or fair trial. In civil cases, British authorities undermined the jury trial through a reorganization of the court system. They gave new, expanded powers to the courts of admiralty and vice-admiralty, which previously had only administered maritime law. As these courts assumed jurisdiction over many areas of criminal as well as civil law, judges decided cases that had usually gone before juries.

The legal clampdown worked in the short term. For the British, the expanded courts of admiralty proved to be very effective in eliminating the participation of upstart colonists from the legal process. Juries made up of colonists presumably would have acquitted colonial defendants; loyal British judges did not. As the twentieth-century historian William Holdsworth observed, the colonists disliked this means of legal control more than any other. Their anger featured prominently in the Declaration of Rights adopted in 1774, which declared:

> the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to course of that law.

And two years later, when the colonists had had enough subjugation, the Declaration of Independence would denounce the British government for "depriving us in many cases, of the benefits of Trial by Jury."

With the outbreak of war in 1775, all of the 13 newly formed states swiftly restored the right

Only three states—Delaware, South Carolina, and Connecticut—did not include a provision in their constitutions, but they either passed laws or recognized the right in common practice. Ten other states wrote specific provisions into their constitutions, insisting that civil jury trials were a traditional right that must be upheld.

Given the recent experience of the colonists in losing the right, the state constitutions typically emphasized the central importance of the right to a jury trial. New York, for example, ensured 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." New Jersey's constitution guaranteed this "inestimable right" which would stand "without repeal, forever." Massachusetts and New Hampshire declared that the right "shall be held sacred." Only one state, Maryland, referred directly to the older legal tradition that had bequeathed the right, holding that its citizens were entitled to the trial by jury as a part of "the common law of England."

In a few instances, the language of the guarantees was pragmatic. These states recognized the traditional distinction between cases that triggered a civil jury trial and those which were to be decided without a jury. Pennsylvania, for instance, tailored its guarantee so that it extended to "controversies respecting property" and "suits between man and man." Similarly, Massachusetts left room for exceptions that had existed before and might arise in the future. It guaranteed the right

> 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.

New Hampshire used almost precisely the same language in its conditional guarantee. Neither state regarded the civil jury right as being any less important; in fact, by recognizing such conditions, they merely upheld tradition. Even when a state seemed to acknowledge imperfections in the practice of civil jury trials, it showed no less enthusiasm for protecting the right. Thus Virginia's constitution observed that "the ancient trial by jury is preferable to any other," while in the next phrase it asserted that the practice "ought to be held sacred."

But even as the new states attended to their constitutions, the larger question of nationhood loomed. In 1787 the states, a loosely connected union divided by vital questions about their future, took the steps necessary to create a federal government. This was the goal of the Constitutional Convention held that year in Philadelphia, Pennsylvania, attended by 55 delegates in three separate phases from May 23 to September 17. Among the many debates over issues large and small, the convention would consider the question of civil jury trials, but it would show none of the enthusiasm that earlier had led the states to proclaim the right inestimable, inviolable, and sacred. In fact, the delegates to the convention almost overlooked the civil jury trial, and their last-minute consideration and rejection of it would quickly have powerful implications for the constitution they had drafted.

On August 6, 1787, as the second phase of the convention was to begin, the Constitution existed in rough draft form. Based on proposals by Edmund Randolph of Virginia, this early draft contained no mention of juries—criminal or civil—at all. This was swiftly remedied with a provision for criminal trials. Over the next three weeks, the delegates approved the provision before giving it to the Committee on Style and Arrangement to refine the language that would ultimately appear in Article III, Section 2. The committee took almost two weeks to finish its work. Up to this point, notably, there is no historical record of any discussion regarding civil juries.

The issue first appeared on September 12. With five days left before adjournment, the convention was drawing to a close when the Anti-Federalists objected to the lack of a civil jury guarantee. Although the historical record is not entirely clear, the issue probably was first raised by Hugh Williamson, a delegate from North Carolina, who noticed that the provision was missing from the committee's revised draft and told the delegates that the right was necessary. Following his lead, another delegate went further. Elbridge Gerry of Massachusetts made an argument that summed up the Anti-Federalist position: juries were safeguards against judicial corruption. As the topic was briefly debated—perhaps for as short a time as an hour—a new and even more significant complaint was raised. The Constitution lacked a Bill of Rights. Putting forward this objection was one of the era's leading proponents of individual rights, the delegate George Mason, who had written the Virginia Declaration of Rights more than a decade earlier. Mason now told the delegates that

a Bill of Rights would comfort the public, could be prepared in a few hours, and needed only to address civil jury rights in a general fashion.

The Federalists rebuffed these arguments. Though acknowledging that the states had guaranteed the right to civil juries, they objected to creating a federal guarantee: the state approaches varied too widely for the convention to forge a universal right that would accommodate all of the different state approaches. One delegate, Nathaniel Gorham, led this Federalist counterattack. Gorham specifically pointed to the problem of equity cases, which traditionally had been tried only by judges. It was impossible, he contended, to adequately discriminate between all the types of legal and equity cases in broad, general language. Better, he and other Federalists maintained, to leave flexibility in the Constitution. Roger Sherman of Connecticut went so far as to assert that the people could trust legislatures to ensure the civil jury right where appropriate.

The Federalist position twice carried the day at the convention. When the Anti-Federalists Gerry and Mason moved on September 12, 1787, to have a bill of rights drafted, the motion was swiftly defeated by a vote of the states. Three days later, a second, last-ditch effort was made by Gerry and Charles Pinckney, a brash, 29 year-old South Carolina delegate (who later became controversial for claiming to have written much of the original draft of the Constitution by himself). They proposed to add the civil jury right alongside that of criminal jury trials in Article III by means of the phrase, "And a trial by jury shall be preserved as usual in civil cases." This attempt was also quickly brushed aside after Gorham, the Federalist, remarked that the practice was already preserved as usual by the states. Time pressures may have had an overriding influence on the convention's decision to press forward without further consideration of the issue. The weather in Philadelphia was hot, the delegates had overextended their stay and were tired, and nearly everyone wanted to go home.

Even so, the Anti-Federalists now had a rallying point as states debated ratification, which many of them hoped to prevent. In the months that followed, they mounted a public relations campaign over the issue of a bill of rights in general and civil jury trials in particular. One of the leaders in their campaign was again Mason, who had left the convention early out of opposition to signing the Constitution. Suspicious of the Federalists, Mason and others argued that their opponents had intentionally left out mention of civil juries because they intended to abolish the right. Similarly, they criticized the way in which the Constitution allowed appeals courts to review the findings of fact by juries, contending that this, too, effectively eliminated the civil jury right.

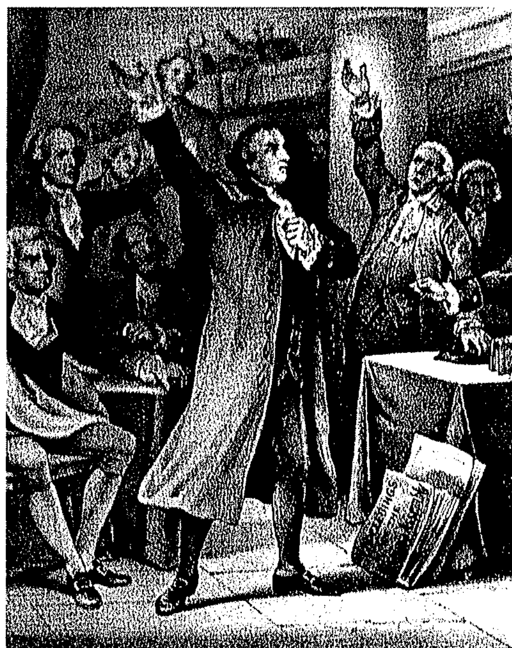
Taking this campaign before the state legislatures, the Anti-Federalists appealed to the libertarian wishes of a public that had recently been oppressed. Their theme was freedom from government tyranny: the civil jury would protect the people by empowering them as jurors, thus ensuring that trials could serve as a check upon the judiciary as well as the legislature. Some of the leading orators of the era bolstered this argument, among them the famed Virginia statesman Patrick Henry. At the Virginia Constitutional Convention, Henry praised civil juries as the "best appendage of freedom," which "our ancestors secured [with] their lives and property." "Why," Henry demanded, "is the trial by jury taken away?" In the North Carolina legislature, the Anti-Federalist James McDowall cited the "bloody" war against Great Britain and warned, "We are giving away our dear bought rights." Outside of statehouses, the arguments drew support from other champions of liberty such as the writer Thomas Paine, who viewed the civil jury as a natural right, and, later, Thomas Jefferson, who stated, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

Beyond these calls to philosophy and tradition, the Anti-Federalists also had a pragmatic argument with broad appeal. This was the protection of debtors. In the mid-1770s, personal debt ran high, especially to British creditors. Temporarily, at least, states had alleviated the problem by increasingly printing money, but this only played havoc with the value of the currency. As debts were called in, debtors were unable to satisfy them. The absence of a civil jury right would leave debtors before courts without the opportunity to have their case tried by a sympathetic jury. Making this argument was somewhat tricky for the Anti-Federalists, who did not wish to appear to be favoring a legal means to avoid debt. Their arguments were indirect, but the message was clear enough, and, particularly in the debt-ridden southern states, it proved popular.

The Federalists fought back. They passionately defended the proposed Constitution in a series of essays that came to be known as *The Federalist Papers,* published separately in New York newspapers between October 1787 and August 1788 by Alexander Hamilton, James Madison, and John Jay. Yet on the civil jury issue, their defense was far from spirited or effective. In *Federalist No. 83,* Hamilton, acknowledging the popularity of the Anti-Federalist arguments in the states, tried to rebut their claim that the Constitution eliminated the civil jury. Simply failing to mention the right, he asserted, did not mean that the Constitution took it away. The essay then repeated the Federalist case as made during the Constitutional Convention: state practices were too different to bring under one federal guarantee, and Congress could determine the future of civil jury trials through legislation. Yes, civil jury trials could protect against judicial corruption, Hamilton acknowledged, since both judges and juries would need to be bribed for a trial to be fixed. Even so, he professed doubt over the existence of any "inseparable connection between the existence of liberty and the trial by jury in civil cases."

This was not what the public or politicians wanted to hear. With the Anti-Federalists threatening to block ratification in nine states, a compromise became inevitable. The Federalists feared their labors would be lost and that a new constitutional convention would need to be held. Thus came their bargain: they promised that the first Congress would pass a declaration of individual rights. Accepting this, the Anti-Federalists hardly yielded easily. Seven states would only ratify if they were allowed to attach a list of proposed amendments to the Constitution, and six of these—Massachusetts, New Hampshire, Virginia, New York, North Carolina, and Rhode Island—attached proposals calling for the civil jury trial. Typical of these was Virginia's recommendation, which drew from the provision in its own state constitution: "That, in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and to remain sacred and inviolable."

The first Congress kept its word, though not immediately or without resistance. From the hundreds of proposals made by the states, James Madison narrowed down his first draft of the Bill



Patrick Henry speaks to a crowd of people. *(The Library of Congress)*

of Rights to 17 amendments that he presented on June 8, 1789. (From the original list of 17, Congress would cull ten amendments.) Other congressmen wanted to get on with the more important business of organizing the new government, but Madison, mindful of public expectations, asserted the need to demonstrate that the Congress was addressing its promise to the states. His first draft of the Seventh Amendment, which resembled the Virginia proposal, 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." Its language upset the Federalists. Leading the attack on the draft language was Samuel Livermore, the former Chief Justice of New Hampshire, who protested that some civil cases should be tried only by judges; Madison's language might convey the impression of an absolute jury guarantee. The Federalists, though having conceded the battle for civil juries to their opponents, still wished to prevent all civil cases from coming before juries.

Over the next three months, the final amendments took shape. In July, they were referred to a committee comprising one representative of each of the 11 states. Few details are known about the committee's internal work, but the results are clear enough. It revised the language of the Seventh Amendment, shortening Madison's phrasing and curtailing the power of judges to retry factual matters, and adding the curious language "shall be

preserved"—a phrase that did not exist in any of the state constitutions. It then presented a report to the House in late July. The House adopted the amendment in mid-August. The Senate, holding meetings in closed session of which there are no records, added the limitation of suits exceeding 20 dollars in September. The Bill of Rights was then sent to the states and, finally, became effective with its ratification two years later by the last state, Virginia, on December 15, 1791.

The Nineteenth Century

First Interpretation: Which "Common Law"?

About 20 years after ratification of the Bill of Rights, a federal circuit court issued the first interpretation of the Seventh Amendment. Although this was not a case before the U.S. Supreme Court, it was heard by an associate justice of the court during a time when the justices also tried circuit court cases. The decision in *United States v. Wonson,* a Massachusetts case from 1812, considered to be the wellspring of Seventh Amendment jurisprudence, had lasting significance. *Wonson* asked the question: what does the amendment mean by the "common law?" In short, the answer was that the phrase did not mean the law of the various states, but instead the common law of England. The decision created a standard that would still be applied over a century and a half later—a benchmark that has come to be known as the "historical test."

Wonson was an appeal by the federal government. Acting as a plaintiff in a common law case, it had failed to persuade a jury in district court that Samuel Wonson owed penalties under a federal embargo law. Now the government asserted that it had a right to retrial of the case, facts and all, in the New England circuit court. This claim went before a judge who would later be recognized as one of the towering legal figures of the era, Justice Joseph Story. At the time only 33 years old, the Harvard-educated politician and lawyer had been appointed to the U.S. Supreme Court only one year earlier. Yet already he was prepared to issue the bold, sweeping opinions—steeped in learned references—that became his trademark.

Justice Story tore through the government's claims. He first rejected the notion that there was any statutory authority for demanding a complete retrial. Only a writ of error—an appellate court order to review a trial court decision for legal mistakes—was available to the government. Indeed, the government admitted that the trial court had made no mistakes. Yet it asserted that because certain states in the circuit allowed for retrial by a second jury, the circuit court for that region should allow retrial as well. Story responded that this practice "seems to be a peculiarity of New England" and its neighboring states, but was not required by federal law.

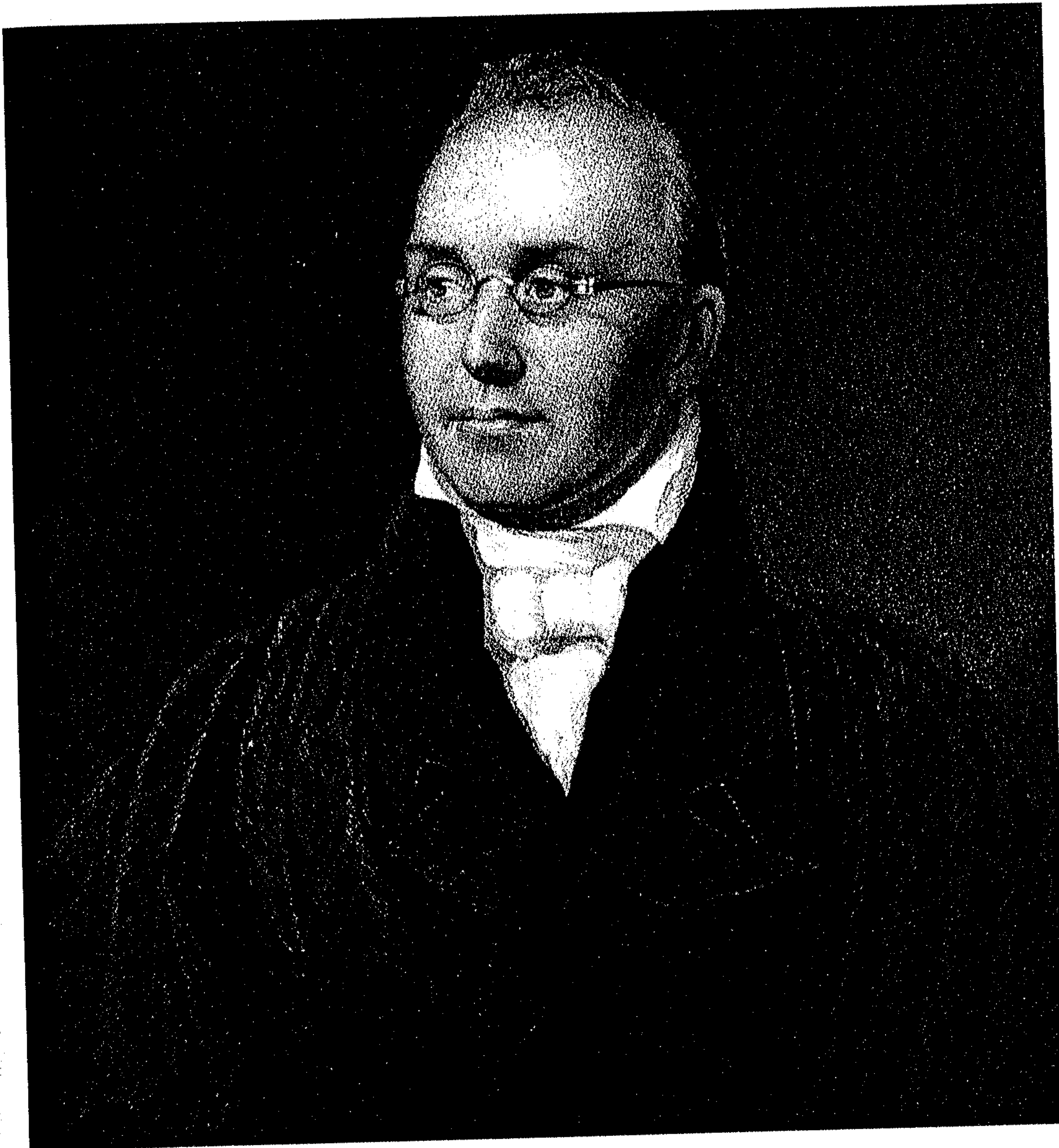
Although the decision could have ended there, Justice Story next examined the Seventh Amendment. He recounted its history, emphasizing that the controversy surrounding civil jury trials had been "one of the most powerful objections" brought against ratification of the Constitution, and, in particular, he noted the protests during that period over the possibility that a higher court could overturn the factual findings made at trial by a jury. He referred to *Federalist No. 81* and *No. 83* as evidence of the passionate debates between the Constitution's advocates and opponents. The historical debate pointed clearly to "the scope and object" of the Seventh Amendment, as well as its "obvious intention": to prevent the retrial of a jury's factual findings by a higher court. The government's claim thus violated the defendant's Seventh Amendment rights.

More significantly than just refusing to order a retrial, the opinion set forth a broad constitutional interpretation of the amendment itself. Justice Story analyzed the text of the amendment and read the phrase "common law" to have a highly specific meaning. It did not refer to the statutes and case law of the states, he concluded:

> 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.

For such a sweeping proclamation, the decision stopped short of explaining why English common law was what the amendment meant. "It cannot be necessary for me to expound the grounds of this opinion," Justice Story wrote, almost impatiently, "because they must be obvious to every person acquainted with the history of the law."

The decision gave birth to the basic standard for evaluating subsequent Seventh Amendment claims. After *Wonson,* courts would determine



Joseph Story (1779–1845). *(Archive Photos, Inc.)*

whether to order a civil jury trial first by referring to English common law. Eventually, scholars dubbed this the "historical test" since it looked backward in time: if a claimant would have been entitled to a jury trial under English practice, he or she now was entitled to one in a United States court, too.

However, during the nineteenth century, English common law began to limit civil jury trials for reasons of efficiency. Only claims in areas such as libel, false imprisonment, breach of promise of marriage, and fraud would trigger a civil jury trial in an English court. United States law did not adapt to the English changes. Instead, the Supreme Court froze the historical test at a specific date in history—the year 1791, in which the Bill of Rights went into effect—in the case *Thompson v. Utah* (1891). *Thompson* declared that

> the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument.

"That instrument" was the Bill of Rights. Although *Thompson* was a criminal case considering the rights found in Article III and the Sixth Amendment, the Supreme Court subsequently adopted this fixed historical test for judging claims for civil jury rights, too.

Developments Toward Seventh Amendment Exceptions

After the historical test, another important nineteenth-century development had lasting impli-

cations for Seventh Amendment jurisprudence. The development came in the form of an old, yet simple question: what if a party sues the government?

Historically, English law had found the answer in the principle of sovereign immunity. The king, or sovereign, could do no wrong, so there was no point in allowing pesky subjects to bring lawsuits; the sovereign was immune from civil actions. However, under certain exceptions, the king would deign to allow himself to be sued. His consent was usually required before a lawsuit could go forward.

When the new federal government of the United States faced lawsuits, the ancient concept of sovereign immunity was revived. The Eleventh Amendment, ratified in 1795, had prohibited using federal courts to sue states. Then the Supreme Court invoked the concept in the early cases of *Chisholm v. Georgia* (1793) and *Cohens v. Virginia* (1821). It held that the federal government was immune from lawsuits unless Congress gave authorization. Through the mid-nineteenth century, litigants had but one option if they were injured by the federal government. They had to ask Congress, on a case-by-case basis, for passage of a special bill that would award compensation for their injuries, a process that was slow and difficult.

Over time, the sovereign immunity concept began to weaken. In 1855 establishment of the U.S. Court of Claims allowed plaintiffs to sue the federal government over constitutional, contractual, and regulatory claims. Additional tribunals, boards, and appeals courts were established over the next hundred years, and, in 1946, Congress passed the Tort Claims Act, which authorized U.S. District Courts to consider liability claims against government agencies, officers, and employees. Further legislative and judicial action in the twentieth century eroded sovereign immunity, although it did not disappear completely.

But beginning in the mid-nineteenth century, the idea of sovereign immunity would have a special, and long-lasting, impact on Seventh Amendment rights. The case in which this trend began was *Murray's Lessee v. Hoboken Land & Improvement Co.* (1856). At issue was a challenge to the government's actions in stopping an embezzlement and land swindle by a federal tax collector, Samuel Swartwout. He had embezzled nearly $1.5 million from the government, used the funds to purchase land and, when an audit uncovered his crime, fled to England. The federal Treasury Department seized his land and issued an order to sell it to meet his debt. This sale brought a legal challenge from Swartwout and the new buyers of the land, who argued that the government was denying them their right to due process, including the right to trial by a judge. The Supreme Court ruled against the plaintiffs. It held that the government was not required to use a judicial process for enforcing the payment of taxes.

Murray's Lessee contained the seed of an important idea. In his majority opinion, Justice Benjamin R. Curtis, in the course of reasoning that the sovereign immunity doctrine gave the government wide latitude in responding to lawsuits, introduced the idea of "public rights." He declared that

> there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts . . . as it may deem proper. Public rights meant something distinct from private rights. It referred to cases in which the federal government was a party. Congress could determine, in some but not all areas, how best to adjudicate these cases. Thus it could waive sovereign immunity by allowing the government to be sued. Or it could choose not to do so, and instead provide some other forum than the federal courts for resolving complaints.

Some 25 years later, the public rights doctrine showed its powerful impact upon civil jury trials. The Supreme Court first held that the government could deny jury trials to plaintiffs who sued it in *McElrath v. United States* (1880). The case arose when Thomas L. McElrath, a former Navy lieutenant who had been discharged, sued the government in order to recover back pay. The government not only denied that it owed McElrath anything, but also filed a counterclaim seeking the original sum back, which it won in the Court of Claims. On appeal, McElrath argued that his Seventh Amendment rights were violated by the statute that gave the Court of Claims authority to pass judgment without a jury. The Supreme Court rejected the appeal, upheld the statute, and offered a clear reading of the sovereign immunity rationale that lay behind the public rights doctrine.

The Court used strong, unambiguous language in its opinion in *McElrath.* Suits against the government, it reaffirmed, are only possible when the government consented to give a plaintiff this "privi-

lege." The government has the freedom to determine exactly how it will be sued, which includes choosing the forum, the rules, and the conditions that will apply. The Court of Claims was such a forum. Suits against the government in that body "are not controlled by the Seventh Amendment," the Court emphasized, because they "are not suits at common law within its true meaning." Over the next century, this public rights exception to the Seventh Amendment would become even more profound as the Court recognized greater and greater legislative and executive power.

The Twentieth Century

Seventh Amendment Not Applicable to States

The Bill of Rights guarantees many basic liberties to citizens that the federal government cannot take away. As the Framers intended, these liberties are a bulwark protecting the people from federal tyranny. During the 1920s, the Supreme Court began asking whether the Bill of Rights similarly protected citizens from the actions of state governments. Its answer to this question—heralding one of the most far-reaching developments in constitutional history—was affirmative: selective provisions of the Bill of Rights are applicable to the states. The first case deciding this was *Gitlow v. New York* (1925), which bound the states to uphold the protections of the First Amendment.

The Court arrived at its view through a principle known as the incorporation doctrine. At the heart of the incorporation doctrine was the Fourteenth Amendment's guarantee of due Process, which forbids states from depriving any person of life, liberty, or property, without due process of law. Through the due process guarantee, the Court decided, the Fourteenth Amendment incorporated select elements of the Bill of Rights, applying them to the states. After *Gitlow,* the Court gradually applied nearly all the provisions of the Bill of Rights to the states.

The Seventh Amendment, however, was not a part of this process. In 1916, the Court refused to apply it to the states in *Minneapolis & St. Louis Railroad v. Bombolis,* out of concern that doing so would erase the distinction between state and federal courts. To do so would lead to "fluctuating hybridization," the Court warned, in which "from day to day" the identity of the courts would depend less on the source of their authority than on "the mere subject matter of the controversy which they were considering." The decision predated the landmark changes announced in *Gitlow* by nearly a decade. But even as the Court gradually used the incorporation doctrine in ensuing decades, it did not revisit the holding in *Minneapolis & St. Louis Railroad.* In 1931, in *Hardware Dealers' Mut. Fire Ins. Co. of Wisconsin v. Glidden Co.,* it would simply declare that the Fourteenth Amendment "neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure."

As a consequence, the civil jury trial guarantee does not apply to state court even if a case includes a right under federal law. Yet jury trials are still widespread in the states. As was true even at the time of the ratification of the Bill of Rights, most states' constitutions offer guarantees similar to that of the Seventh Amendment.

Jury Trials and Sovereign Immunity

Sovereign immunity continued to be an important concept in Seventh Amendment jurisprudence, as seen in Supreme Court cases such as *Galloway v. United States* (1943) and *Lehman v. Nakshian* (1981).

Galloway illustrates how nineteenth-century developments affected Seventh Amendment cases in the twentieth century. The appeal grew out of a suit by a guardian, Freda Galloway, who attempted to claim disability benefits allegedly owed under a government wartime insurance policy to her husband, Joseph Galloway, a veteran of World War I. She lost in district court, which ruled she had failed to establish a case and therefore granted the government a *directed verdict.* Galloway appealed on the ground that the directed verdict—in which the judge, without jury involvement, decides against the party that fails to prove its case—violated the Seventh Amendment jury guarantee. In rejecting the appeal, the Court employed the historical test and invoked the public rights doctrine. "It hardly can be maintained," the Court wrote, "that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign." The opinion also paused to observe that, for nearly a century, the Court of Claims had not allowed jury trials in such cases "without offending the requirements" of the Seventh Amendment.

By 1981 the court showed the enduring power of this exception in *Lehman v. Nakshian.* Alice Nakshian, a 62-year-old civilian employee of the U.S. Navy, had sued the Navy under the Age Discrimination in Employment Act of 1967 (ADEA), which forbids private and government employers from discriminating against persons over the age of 40. At issue was whether Nakshian had the right to a jury trial. Ruling that she was entitled, an appeals court found support for this right in the legislative history of the law. But the Supreme Court, determining that the ADEA did not "affirmatively and unambiguously" grant such a right, used a much more exacting standard than mere review of the legislative history. It held that when Congress waives its sovereign immunity, the jury trial right exists only when Congress specifically grants it by statute.

Congress, in fact, was reluctant to grant such a right. As the Court noted in *Lehman,* nearly every time Congress waived the government's sovereign immunity in a statute it had "conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial." Beginning with the Court of Claims in the 1850s, as well as the extension of jurisdiction to district courts to hear contractual claims in 1887, the ways in which the federal government allowed itself to be sued in the twentieth century were also tightly restricted. Most notably, when allowing the government to be held liable for torts through the Tort Claims Act of 1946, Congress provided that trials would be held in district court without a jury. Similarly, courts designated to deal with customs, patent, and tax claims generally allowed no jury trial. One narrow exception was created in 1953 for jury trials in tax refund cases in federal district courts, but even then, the Congressional record expressed concern that juries "might tend to be overly generous because of the virtually unlimited ability of the Government to pay the verdict." To prevent this from happening, lawmakers limited recoveries to the amount of taxes illegally or erroneously collected. Thus throughout the century, lawmakers prevented the Seventh Amendment jury trial from being enjoyed in claims against the government.

Expansion of the Public Rights Doctrine

While the idea of sovereign immunity continued to inform some Supreme Court decisions on the Seventh Amendment, another line of cases went in a different direction. These, too, shaped the public rights doctrine, and they produced even more exceptions to the civil jury trial right. But now the Court offered a new rationale for its decisions. It held that the separation of powers—by which the government is divided into the executive, legislative and judicial branches—permitted the creation of new rights. And moreover, these rights could be adjudicated in new, quasi-judicial forums without juries. Congress could use its lawmaking power to define when, where, how, and by whom disputes over these rights would be settled. This development belongs to one of the most pervasive changes in federal legal practice in the twentieth century: the rise of so-called administrative law, in which federal agencies have sweeping power and the constitutionally distinct roles of the legislative and executive branch become mingled.

The separation of powers approach to public rights developed gradually over 60 years, starting with several early twentieth-century decisions. In just one of these cases, *Ex Parte Bakelite Corp.* (1929), the Supreme Court upheld the constitutionality of a special tribunal, the Court of Customs and Patent Appeals. Congress had created it under the Tariff Act of 1922. That law gave the president authority to impose taxes on imported goods, established a Tariff Commission to determine them, and allowed disputed rulings of the commission to be brought before the Court of Customs Appeals. The plaintiff opposed this arrangement on jurisdictional grounds: the legislative and executive branches seemed to be usurping the role of the judiciary. In rejecting this contention, the Supreme Court declared that the special tribunal was not a constitutional court at all. Instead, it was a "legislative" court, with both judicial and legislative power. Congress could create such legislative courts to handle matters that fell within the authority of the legislative or executive branches, the decision concluded, just as it had created the Court of Claims.

After *Bakelite,* the new, emerging view of public rights quickly affected the Seventh Amendment. In 1932, the Supreme Court rejected a claim to the right of a jury trial in a workman's compensation dispute. *Crowell v. Benson* upheld the authority of a deputy commissioner of the U.S. Employees Compensation Commission to decide a dispute between two private parties, an employer

and an employee, without a jury. The Court observed that the dispute between the parties involved a private right. Yet Congress had replaced the traditional common law approach to seeking damages from employers, which had proven ineffective, with a federal compensation scheme, the Longshoremen's and Harbor Workers' Compensation Act. The Court held that the law did not violate the Seventh Amendment. Even in an area that had traditionally involved private rights, the decision suggested, Congress could provide a new, juryless forum for resolving disputes.

The scope of public rights exceptions to the Seventh Amendment expanded in the 1970s and 1980s. A major turning point came in 1977 with the decision in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission.* The case concerned federal safety regulations for employers. In 1970 Congress created the Occupational Safety and Health Review Commission (OSHRC) to rule on safety cases forwarded to it by the Department of Labor through passage of the Occupational Safety & Health Act. The law permitted employers to challenge OSHRC decisions in federal court. But as these challenges only consisted of judicial review of the commission's decisions, Atlas Roofing argued that the lack of a jury trial violated the Seventh Amendment.

The Supreme Court rejected the claim on the ground that Congress's broad authority over public rights extended to new areas. In certain circumstances, jury trials could be eliminated. Federal lawmakers could create new statutory public rights and assign their adjudication to an administrative agency "with which a jury trial would be incompatible," and neither of these legislative actions violated the Seventh Amendment. There were, however, limits to this legislative power. Traditional rights could not be written into statutes and then transferred to administrative agencies. And in order for agencies to have the authority to hear disputes based on these new rights, the government had to be a party to a dispute. Provided these conditions were satisfied, it was constitutionally permissible for the agencies to conduct both the fact-finding function of juries and, at least in an initial hearing, the judicial function of judges.

Twelve years later, the Court, weighing the consequences of the public rights doctrine to Seventh Amendment rights, determined that the advantages of greater exceptions outweighed the disadvantages. In the case of *Granfinanciera S.A. v. Nordberg* (1989), the Court heard an appeal from a bankruptcy court's decision to deny a jury trial. In *Granfinanciera* a trustee in bankruptcy had sued a private individual to recover funds the trustee alleged had been fraudulently transferred to the individual. The bankruptcy court ruled that such an action was a "core action" in bankruptcy, which, according to federal law, was to be heard by a bankruptcy judge without a jury. A federal district court, and appeal courts, had affirmed, characterizing the action as equitable, rather than legal, in nature. The Supreme Court, using the historical test, reversed. The Court found that in England in the eighteenth century, the trustee would have had to bring a suit at law to recover fraudulent payments. Congress has the power to assign resolution of public rights to a non-jury bankruptcy action; but the suit here, brought against a private individual for monetary relief, was historically a legal action, entitling the defendant to a jury trial.

But the amendment's guarantee was only available if Congress had not "withdrawn jurisdiction" through the creation of a public right and thus given adjudication to a nonjury tribunal. Recognizing the dangers inherent in this power, the Court sought to limit it: Congress could never strip away the right to a civil jury trial in cases involving torts, property, and contracts. Yet, acknowledging the burden of trials on busy federal courts, the Supreme Court held that Congress could create causes of action that were "closely analogous" to traditional common law claims. Thus the decision, at least to some observers, suggested the inevitable future expansion of the public rights doctrine and the whittling away of Seventh Amendment juries.

Civil Juries: Size and Function

The late twentieth century saw important interpretations of the role and identity of the civil jury itself. The courts considered several questions bearing on this issue. How small could the jury be? What degree of impartiality was required? And to what extent could judges overrule the jury?

Traditionally, civil juries had consisted of 12 persons. This traditional number had existed under English common law and was thus adopted in early legal practice in the United States. Yet by the late 1960s and early 1970s, reformers sought

greater efficiency in civil practice, and lawmakers, court administrators, and many judges themselves favored reducing the civil jury size. By 1973, more than 50 U.S. district courts adopted local rules that cut the size of the civil jury in half. That year, in *Colgrove v. Battin,* the U.S. Supreme Court heard a challenge to such a rule adopted by the U.S. District Court for the District of Montana on the ground that it violated the Seventh Amendment. Observing that the language of the amendment "is not directed to jury characteristics" but rather to the types of cases it preserves, the majority upheld the district court rule. The quality of jurors' deliberation was not impaired by having six rather than 12 members, the Court held, citing "convincing empirical evidence" in four studies of juries.

In upholding the constitutionality of smaller civil juries, the Supreme Court considered the question of impartiality. The legislative history of the Sixth Amendment's guarantee of juries in criminal trials had specifically declared the purpose of providing for impartial juries. But the historical record of the Seventh Amendment was "at best ambiguous," the Court found in *Colgrove.* Nonetheless, it did not intend at all to allow juror partiality with its decision or to back away from earlier decisions emphasizing the bedrock importance of fair juries in civil cases. Federal courts had long recognized that this fairness was guaranteed both by the Due Process Clause of the Fifth Amendment and the Seventh Amendment, as emphasized, for instance, in *McCoy v. Goldston* (1981).

Firm rules govern when impartiality is compromised. Since the Supreme Court strengthened jury impartiality rules in *Remmer v. United States* (1954), courts have had to presume that the Seventh Amendment is violated through a juror's unauthorized communication with anyone outside of the courtroom, including friends, relatives, or journalists. When courts make this presumption, litigants then face the difficult task of rebutting it by proving that the unauthorized communication did not lead to a tainted jury. Even one partial or biased juror is sufficient to violate a litigant's Seventh Amendment rights. Thus, in *Haley v. Blue Ridge Transfer Co.* (1986), the Fourth Circuit Court of Appeals overturned a verdict because a nonjuror was accidentally seated with the jury for one day before the trial began, and this individual's alleged remarks to other jurors created a presumption of partiality that tainted the trial.

As vital as the right to an impartial jury, is the sanctity of the jury's role. Jurors listen to the evidence, determine which facts are relevant, and reach a verdict. In a very different capacity, judges instruct juries on the law. The second clause of the Seventh Amendment prohibits federal judges from reexamining the facts after they have been tried by juries. The Federal Rules of Civil Procedure, which instruct judges in federal civil cases, spell out explicitly in rule 50 that a jury's verdict cannot be overturned as long as it is reasonably supported by the evidence. An important corollary to this idea is that the jury must be allowed to hear the lawsuit in its entirety, from start to finish, unless a judge determines that the legal claim at trial is completely lacking evidence to support it. This issue often has relevance in appeals. Thus in *Gregory v. Missouri Pacific Railroad* (1994), the Fifth Circuit Court of Appeals ordered a new trial in an employee injury case because the jury had not been allowed to hear a relevant piece of evidence.

Types of Civil Claims

Whether a litigant is entitled to a jury trial depends on the type of claim involved. Claims against the government, of course, are treated differently, according to the public rights doctrine. But even claims between private parties do not necessarily trigger the Seventh Amendment's jury guarantee. As early as 1830, the Supreme Court had observed the distinction between legal claims and those involving issues under maritime law, holding in *Parsons v. Bedford* that the latter do not guarantee a jury trial. Immigration law is another distinct area without jury guarantees. The Court ruled that the Seventh Amendment does not apply to claims relating to naturalization in *Luria v. United States* (1928), and it refused to review a decision in 1928 by the Fifth Circuit Court of Appeals which held that there is no civil jury trial right in deportation cases (*Gee Wah Lee v. United States*).

In 1996, the Supreme Court narrowed the jury right for patent infringement suits in the case of *Markman v. Westview Instruments, Inc.* Markman held the patent on a system used by dry cleaners to track customers' clothing. He alleged that Westview's system infringed that patent. After a jury found in Markman's favor, the judge overruled the jury, directing a verdict in favor of Westview. Markman appealed, arguing his jury right had been infringed. The Supreme Court, however,

ruled that a patent's construction—the scope of the rights it confers—is a question of law to be decided by a judge, not a question of fact for a jury. *Markman* drastically reduced patent holders' right to have their claim heard by a jury.

Twentieth-century courts have drawn lines between legal claims, which usually seek monetary awards, and equitable claims. Legal claims generally are entitled to the right to a jury. The second category, equitable claims, usually seeks a specific order from a court rather than the award of damages, and thus typically asks the court to enforce the terms of a contract or to order a party to stop a specific behavior. Such cases are tried by judges with no Seventh Amendment right to a jury.

The distinction between legal and equitable claims, however, is sometimes hard to discern, even for courts. Lawsuits asking for restitution, for example, have been treated as either legal or equitable, depending on the court. Occasionally, a court may decide that the monetary relief sought is only incidental to what is essentially an equitable claim, as the Eleventh Circuit Court of Appeals held in denying a jury trial in the 1996 case of *Stewart v. KHD Deutz of America.* The categories can even overlap, requiring a court to divide the claim into two proceedings. The legal claims are then tried by a jury, while the equitable claims are decided separately by a judge. As observed by the Seventh Circuit in *Lebow v. American Trans Air* (1996), the jury's factual findings on the legal claim are then binding when the judge decides the equitable claim.

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