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TRIAL

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The Seventh Amendment

The Founders' Views

R. Ben Hogan, III

The colonists knew and valued the right to trial by jury in civil cases. When the colonial authorities tried to limit this right, one cause of revolution was born. With the Revolutionary War won and a new Constitution being created, the right to a jury trial was debated. These debates throw light on the right to a jury in civil cases today.

The seventh amendment to the United States Constitution preserves the civil jury trial.¹ That amendment is interpreted based largely on common-law jury-trial practice at the time of its passage.

The civil jury trial was part of the judicial system in courts of general jurisdiction in each of the colonies.² A few years before the outbreak of the Revolutionary War, colonial administrators had begun circumventing the civil jury trial by broadening the powers of what were called "vice admiralty courts."³

As early as June 6, 1766, George Mason wrote to the Committee of Merchants in London asserting that one point of dispute between the American colonies and England had become the threat to the accepted practice of trial by jury due to assertions of jurisdiction by the vice admiralty courts.⁴ In 1772, a Boston town meeting passed a resolution charging that the right to trial by jury was jeopardized by the power of the vice admiralty courts.⁵

On October 14, 1774, the first Continental Congress adopted the declaration of rights. It stated that "the respective Colonies are entitled to the common law of England, and more especially to the great and ines-

timable privilege of being tried by their peers of the vicinage, according to the course of that law."⁶ Finally, the Declaration of Independence in 1776 listed among the offensive English acts that were denounced: "For depriving us in many cases of the benefits of Trial by Jury."

Immediately after war broke out, all 13 new states restored civil jury trials. Ten guaranteed the right in their state constitutions, and three others recognized it by statute or practice.⁷ One legal historian has observed that "the right to trial by jury was probably the only universally secured right by the first American state constitutions."⁸

The Constitutional Debates

When Congress framed the Northwest Ordinance in 1787, for governing territories west of the Appalachians, it included a specific guarantee of jury trial in civil cases.⁹ Yet the Constitutional Convention of that same year in Philadelphia did not raise the subject until September 12, five days before the convention was to adjourn. On that date the Committee on Style and Arrangement filed its report, having merely edited the draft presented by the Committee on Detail on August 6. The proposed Constitution contained a version of what eventually became article III, section 2, clause 3, protecting the right of jury trial in criminal cases. At that point Hugh Williamson, a North Carolina delegate, raised an objection to the lack of guarantee of civil jury trial:

Mr. Williamson observed to the House that no provision was yet made for juries in civil cases and suggested the necessity of it.

Mr. Gorham. It is not possible to discriminate equity cases from those in which juries are proper.

The Representatives of the people may be safely trusted in this matter.

Mr. Gerry urged the necessity of Juries to guard agst. [sic] corrupt Judges. He proposed that the Committee last appointed should be directed to provide a clause for securing the trial by Juries.

Col. Mason perceived the difficulty mentioned by Mr. Gorham. The jury cases cannot be specified. A general principle laid down on this and some other points would be sufficient. He wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose—It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.

Mr. Gerry concurred in the idea & moved for a Committee to prepare a Bill of Rights. Col. Mason 2ded [sic] the motion.

Mr. Sherman was for securing the rights of the people where requisite. The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient—There are many cases where juries are proper which cannot be discriminated. The Legislature may be safely trusted.

Col. Mason. The Laws of the U.S. are to be paramount to State Bills of Rights.¹⁰

Elbridge Gerry's motion to have a Bill of Rights prepared at this late date must have made the homesick delegates swoon. It was defeated, with Gerry even failing to carry his fellow delegates from Massachusetts.¹¹ On September 15, a Saturday, Gerry and South Carolina delegate Charles Pinckney jointly moved to add a civil jury trial provision to article III:

Art. III, sect. 2, parag. 3. Mr. Pinckney & Mr. Gerry moved to annex to the end. "And a trial by jury shall be preserved as usual in civil cases."

Mr. Gorham [of Massachusetts]. The constitution of Juries is different in different States and the trial itself is usual in different cases in different States.

Mr. King [of Massachusetts] urged the same objections

Genl. Pinckney [of South Carolina] also. He thought such a clause in the Constitution would be pregnant with embarrassments.

The motion was disagreed to nem. con.¹²

When his motion failed, Gerry refused to sign the Constitution. He stated that the "rights of the citizens were . . . rendered insecure by the general power of the Legislature . . . to establish a tribunal without juries, which will be a Star-chamber as to civil cases."¹³ Edmund Randolph and George Mason of Virginia also refused to sign.¹⁴

In fact, Mason left the Philadelphia Convention before it adjourned. According to his biographer, even as he left he jotted down on his own draft of the Constitution his objection that there was no Bill of Rights, including the right to civil jury trial.¹⁵ Mason was among those who opposed ratification of the Constitution, or else wanted ratification conditioned on a Bill of Rights. He was joined in this by Patrick Henry. Responding to a speech favoring the Constitution by James Madison, Henry appealed to the Virginia ratification convention:

To hear gentlemen of such penetration make use of such arguments, to persuade us to part with that trial by jury, is very astonishing. We are told that we are to part with that trial by jury which our ancestors secured their lives and property with, and we are to build castles in the air, and substitute visionary modes of decision for that noble palladium. I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common-law suits. The unanimous verdict of twelve impartial men cannot be reversed.¹⁶

Governor Randolph, on the other hand, ended up supporting the Constitution during the Virginia ratification convention even though he had refused to sign it in Philadelphia. His speech on the civil jury trial was typical of his lukewarm position:

The trial by jury in criminal cases is secured; in civil cases it is not so expressly secured as I should wish it; but it does not follow that congress has the power of taking away this privilege which is secured by the constitution of each state, and not given away by this Constitution. I have no fear on this subject. Congress must regulate it so as to suit every state. I will risk my property on the certainty that they will institute the trial by jury in such manner as shall accommodate the conveniences of the inhabitants in every state. The difficulty of ascertaining this accommodation was the principal cause of its not being provided for. It will be the interest of the individuals composing Congress to put it on this convenient footing.¹⁷

A motion by Patrick Henry to refer amendments to other states for acceptance before ratification lost by only eight votes. Instead the convention merely recommended a series of amendments, which included "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 [ought] to remain sacred and inviolable."¹⁸

A similar amendment was voted in New York as a condition for ratification, but this was made a mere recommendation a few days later.¹⁹ Rhode Island similarly recommended a Virginia-style amendment.

In North Carolina the civil jury trial forces prevailed; that convention originally voted not to ratify the Constitution without a Bill of Rights.²⁰ Among those pro-jury forces was James M'Dowall, whose attack contained the presumption that jurisdiction given to the Supreme Court to decide issues of both law and fact would require citizens of North Carolina to go to the seat of government (at that time Philadelphia) for some trials:

Mr. Chairman, the objections to this part of the Constitution have

not been answered to my satisfaction yet. We know that the trial by a jury of the vicinage is one of the greatest securities for property. If causes are to be decided at such a great distance, the poor will be oppressed; in land affairs, particularly, the wealthy suitor will prevail. A poor man, who has a just claim on a piece of land, has not substance to stand it. Can it be supposed that any man, of common circumstances, can stand the expense and trouble of going from Georgia to Philadelphia, there to have a suit tried? And can it be justly determined without the benefit of a trial by jury? These are things which have justly alarmed the people. What made the people revolt from Great Britain? The trial by jury, that great safeguard of liberty, was taken away, and a stamp duty was laid upon them. This alarmed them, and led them to fear that greater oppressions would take place. We then resisted. It involved us in a war, and caused us to relinquish a government which made us happy in everything else. The war was very bloody, but we got our independence. We are now giving away our dear-bought rights. We ought to consider what we are about to do before we determine.²¹

Although the Constitution was ratified over the objections of forces who wanted to condition ratification on a Bill of Rights that included the civil jury trial, it was understood and assumed that amendments including that right would be quickly approved. Support came from all quarters. Thomas Jefferson, an ambassador during much of the ratification process, wrote home that he favored "a trial by jury in all cases determinable by the laws of the land."²² In his speech to the first Congress, James Madison noted:

I believe the great mass of the people who opposed it [ratification of the Constitution] dislike it because it did not contain effectual provisions against the encroachment on particular rights and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power.²³

Madison and others proposed the Bill of Rights, which promptly cleared Congress on September 29, 1789.²⁴ The preamble of the act of Congress

passing the 10 amendments notes:

The Conventions of a number of the states having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the government will best insure the beneficent ends of its institution.²⁵

The Bill of Rights, including the seventh amendment, became effective when Virginia became the last necessary state to ratify on December 15, 1791.²⁶

Interpretation of the Seventh Amendment

Because of the term "preserved" in the seventh amendment, the Supreme Court ruled in 1935 that it must be interpreted according to the common law at the time of its adoption in 1791.²⁷ On the other hand, the Court ruled in 1970 that "the Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."²⁸ In that case, *Ross v. Bernhard*, the Supreme Court ruled that a jury trial was required for a shareholder's derivative action in federal courts. The *Ross* opinion contained the following footnote:

As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.²⁸

Considering the liberal values represented by the seventh amendment, it is notable that one of its professed champions on the current Supreme Court has been the Chief Justice, William Rehnquist.

In *Park Lane Hosiery Co., Inc. v. Shore*,³⁰ Justice Rehnquist dissented from a holding that use of offensive collateral estoppel to prevent a jury retrial of issues decided by a Securities and Exchange Commission order did not violate the seventh amendment. Quoting from Justice Rehnquist's dissent:

The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary. Those who passionately advocated the right to a civil jury trial did not do so because they considered the jury a familiar procedural device that should be continued; the concerns for the institution of a jury trial that led to passage of the Declaration of Independence and to the Seventh Amendment were not animated by a belief that use of juries would lead to more efficient judicial administration. Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the "passional elements in our nature," and thus keep the administration of law in accord with the wishes and feelings of the community.³¹

Justice Rehnquist, in making these observations, was repeating sentiments that were pressed earlier by Oliver Wendell Holmes.³² Elsewhere in his dissent, Rehnquist pointed out that preserving the right to a civil jury trial with reference to 1791 acts as a buffer against invasion of that right by the judiciary.

The persuasive reason is that the Seventh Amendment requires that a party's right to jury trial which existed at common law be "preserved" from incursions by the government or the judiciary. Whether this Court believes that use of a jury trial in a particular instance is necessary, or fair or repetitive is simply irrelevant. If that view is "rigid," it is the Constitution which commands that rigidity. To hold otherwise is to rewrite the Seventh Amendment so that a party is guaranteed a jury trial in civil cases unless this Court thinks that a jury trial would be inappropriate.³³

There was a wide divergence in the civil jury trial practice among the states in 1791.³⁴ Which state's common law was to apply to the seventh amendment? In one of the earliest cases on record involving the seventh amendment, Justice Story resolved the problem by referring solely to English practice:

Beyond all question, the common

law here alluded to is not the common law of any individual state (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.³⁵

What was so obvious to Justice Story has not been as obvious to later courts. In *Colgrove v. Battin*,³⁶ for example, the Supreme Court majority separated the "substance" of the seventh amendment from "procedure" in order to determine that it was constitutionally permissible to allow six-person civil juries. The *Colgrove* decision was reached after an analysis that concluded that there was "no discernible difference between the results reached by the two different-sized juries."³⁷ In *Galloway v. United States*, the Supreme Court held that the directed-verdict procedure does not violate the seventh amendment, explaining:

The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were "the rules of the common law" then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions.³⁸

The right of trial by jury in civil cases will undoubtedly continue to be interpreted in historical context. The history of the seventh amendment shows it to be a valued liberty. It was originally intended, as it still functions today, that the justice system depend upon the common sense of laypersons to safeguard the rights of all our citizens. ■

Notes

- ¹ The amendment reads, "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." 11 S. CONST. amend VII.
- ² Alexander Hamilton described the differences between the civil jury trial practices of the 13 states in the *The Federalist No. 83*, at 565-66 (J. Cooke ed. 1961).
- ³ R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 71 (1957).
- ⁴ R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at 34 (1955).
- ⁵ *SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION, 1764-1788*, at 94 (S. Morrison 2d ed. 1929).
- ⁶ *JOURNALS OF THE CONTINENTAL CONGRESS* 69 (1904 ed.).
- ⁷ GA. CONST., art. LXI (1777), in 2 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS* 785 (F. Thorpe ed. 1909) (hereafter Thorpe); MD. CONST., art. III (1776), in 3 Thorpe 1686-1687; MASS. CONST., art. XV (1780), in 3 Thorpe 1891-1892; N.H. CONST., art. XX (1784), in 4 Thorpe 2456; N.J. CONST., art. XXII (1776), in 5 Thorpe 2598; N.Y. CONST., art. XLI (1777), in 5 Thorpe 2637; N.C. CONST., Declaration of Rights, art. XIV (1776), in 5 Thorpe 2788; PA. CONST., Declaration of Rights, art. XI (1776), in 5 Thorpe 3083; S.C. CONST., art. XLI (1888), in 6 Thorpe 3257; VA. CONST., Bill of Rights, § II (1776), in 7 Thorpe 3814.
- ⁸ L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 281 (1960).
- ⁹ The Northwest Territorial Government of 1787, art. II, in 2 Thorpe, *supra* note 7, at 960-61: "The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the people in the legislature, and of judicial proceedings according to the course of the common law."
- ¹⁰ Madison, *Debates in the Federal Convention*, 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 587-88 (M. Farrand ed. 1937).
- ¹¹ *Id.*
- ¹² *Id.* at 628.
- ¹³ *Id.* at 633.
- ¹⁴ *Id.* at 648-49.
- ¹⁵ R. RUTLAND, *GEORGE MASON* 91 (1961).
- ¹⁶ 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 544 (J. Elliot ed. 1891) [hereafter Elliot].
- ¹⁷ 3 Elliot, at 68.
- ¹⁸ *Id.* at 658.
- ¹⁹ 2 Elliot, at 399, 408-14; 1 Elliot, at 328-29.
- ²⁰ 4 Elliot, at 250. North Carolina ratified the

Constitution after it had become effective following the ratification by nine other states.

- ²¹ 4 Elliot, at 143.
- ²² Thomas Jefferson to Francis Hopkinson (from Paris) March 13, 1789, reprinted in 5 U.S. BUREAU OF ROLLS & LIBRARY, *DOCUMENTARY HISTORY OF THE CONSTITUTION, 1786-1870*, at 159-60 (1905).
- ²³ 1 ANNALS OF CONGRESS 433 (1789).
- ²⁴ 1 Stat. 97-98 (1789).
- ²⁵ *Id.*
- ²⁶ R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 215-17 (1955).
- ²⁷ *Dimick v. Schiedt*, 55 S. Ct. 796, 297 (1935) ("In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791"). See also *Ross v. Bernhard*, 90 S. Ct. 733, 735 (1970); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 57 S. Ct. 615, 629 (1937); *Baltimore & Carolina, Inc. v. Redman*, 55 S. Ct. 890, 891 (1935); *Patton v. United States*, 50 S. Ct. 253, 254 (1930); *Thompson v. Utah*, 18 S. Ct. 620, 622 (1898).
- ²⁸ *Ross*, 90 S. Ct. 733, 735.
- ²⁹ *Id.* at 738, n.10.
- ³⁰ 99 S. Ct. 645 (1979).
- ³¹ 99 S. Ct. at 645, 657-58 (Rehnquist, J., dissenting).
- ³² *Id.* (citing O. HOLMES, *COLLECTED LEGAL PAPERS* 237 (1920)).
- ³³ 99 S. Ct. 645, 660 (Rehnquist, J., dissenting).
- ³⁴ See generally Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973); Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966). This diversity of jury trial practice among the states was the reason for the defeat of Gerry's motion to include the protection in the original Constitution.
- ³⁵ *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (no. 16,750).
- ³⁶ 93 S. Ct. 2448 (1973) (interpreting 28 U.S.C. § 2072 and Montana District Court local Rule 13(d)(1) to allow six-person civil juries.) See also *Williams v. Florida*, 90 S. Ct. 1893 (1970) (allowing some six-member criminal juries). The *Colgrove* decision overturned a line of decisions that had held that "trial by jury" meant "a trial by a jury of 12." *Capital Traction Co. v. Hof*, 19 S. Ct. 580 (1899); *Maxwell v. Dow*, 20 S. Ct. 448 (1900).
- ³⁷ 93 S. Ct. 2448, 2453.
- ³⁸ 63 S. Ct. 1077, 1087-88 (1902).

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- ²⁸ *Ross*, 90 S. Ct. 733, 735.
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