ADMINISTRATIVE PENALTIES AND THE CIVIL JURY: THE SUPREME COURT'S ASSAULT ON THE SEVENTH AMENDMENT

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INTRODUCTION

The decision of the Supreme Court in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*[1] has seriously weakened the protection afforded by the seventh amendment to the United States Constitution.[2] In *Atlas* the Court considered the constitutionality of the enforcement procedure established by the Occupational Safety and Health Act (OSHA).[3] This was the first time the Court had considered a seventh amendment challenge to recent statutes in which Congress has expanded the role of administrative agencies in the enforcement of federal regulatory statutes.[4] The Court's conclusion that the OSHA procedure is not forbidden by the seventh amendment constitutes a first round of approval for this expansion.

The OSHA procedure gives an administrative agency more power than has been given to agencies enforcing most older federal regulatory programs. Violations of the Act are not criminal offenses, and the only sanction is a civil money penalty. Civil money penalties have been used in other regulatory statutes,[5] but OSHA pro-

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1 430 U.S. 442 (1977). There were no dissents; Justice Blackmun did not participate in the decision.

2 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.

U.S. CONST. amend. VII.

3 29 U.S.C. §§ 651-678 (1970).

4 Other examples besides OSHA include the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1976) and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-260 (1970 & Supp. V 1975).

5 For a discussion of various considerations concerning the use of civil money penalties, see Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, in 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896 (1973). *See generally* Abrahams & Snowden, *Separation of Powers and Administrative Crimes: A Study of Irreconcilables*, 1 S. ILL. U.L.J. 1 (1976); Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974); Gellhorn, *Administrative Prescription and*

vides a new collection procedure. In earlier statutes Congress had generally provided for one of two typical collection procedures: if the agency could enforce payment of a penalty by a denial or withholding of agency permission, the agency did not have to rely on the federal courts; [6] if Congress wanted the government to be able to collect the civil penalty with the enforcement powers available for collecting a court judgment, the agency had to enforce the penalty by a *de novo* civil action in federal court.[7] Under the enforcement procedure in OSHA, however, the agency lacks power to collect the penalty by administrative action alone, and therefore requires some assistance from the federal courts, but the action is not a *de novo* civil action and there is no need to relitigate the violation in district court.

The petitioners in *Atlas* challenged this procedure on the ground that it violated the seventh amendment by using the federal courts to enforce payment without also providing for a right to trial by jury. The Supreme Court found no constitutional objection; in an opinion by Justice White it held that the seventh amendment did not render the OSHA procedure invalid because there is an exception for "public rights" cases—"cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact." [8] That conclusion alone reduced the reach of the seventh amendment because the public rights exception had never before been explicitly recognized.

The significance of the *Atlas* decision extends beyond the OSHA procedure because the opinion appears to mark the start of a new approach to seventh amendment interpretation. *Atlas* is the seventh in a current series of decisions interpreting the seventh amendment,[9] but the analysis in *Atlas* does not follow the pattern of the other recent decisions. There is no attempt to follow the classic

Imposition of Penalties, 1970 WASH. U.L.Q. 265; Comment, *OSHA Penalties: Some Constitutional Considerations*, 10 IDAHO L. REV. 223 (1974); Comment, *The Imposition of Administrative Penalties and the Right to Trial by Jury—An Unheralded Expansion of Criminal Law?*, 65 J. CRIM. L. & C. 345 (1974); Note, 7 SETON HALL L. REV. 458 (1976).

[6] An example is the immigration statute considered in Oceanic Navigation Steam Co. v. Stranahan, 214 U.S. 320 (1909), *discussed in* text accompanying notes 85-91 *infra*.

[7] Goldschmid, *supra* note 5, at 907.

[8] 430 U.S. at 450.

[9] The other six were Pernell v. Southall Realty, 416 U.S. 363 (1974) (landlord-tenant disputes in the District of Columbia); Curtis v. Loether, 415 U.S. 189 (1974) (damage suits under the Civil Rights Act of 1968); Ross v. Bernhard, 396 U.S. 531 (1970) (stockholder derivative actions); Katchen v. Landy, 382 U.S. 323 (1966) (bankruptcy court); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (complex actions and masters); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) (equitable cleanup doctrine).

doctrine that the scope of the seventh amendment is determined by reference to the common law of 1791.[10] Instead the opinion relies on Supreme Court precedents no earlier than 1856 to determine the correct interpretation of the seventh amendment, which is unusual. Moreover, the Court does not confidently assert that the cases from 1856 to 1977 accurately reflect the correct reading of the seventh amendment.

Atlas indicates that the Court is seeking more flexibility in the interpretation of the seventh amendment and is concerned that a strict interpretation will "choke the already crowded federal courts with new types of litigation" that would be better handled by "administrative agencies with special competence in the relevant field." [11] At the same time, however, the opinion indicates the Court is uneasy about an interpretation of the seventh amendment that would severely limit the protection of a guarantee found in the Bill of Rights. The burden of proceeding to demonstrate either that the earlier precedents were wrong or that the current Court is misreading the precedents is placed on the advocates of jury trial. In *Atlas* the petitioners did not convince the Supreme Court of either proposition, but the Court left open the possibility that further research and evidence might require the Court to reconsider its conclusion that the seventh amendment can be read less strictly.[12]

This Article will examine the *Atlas* opinion and the relevant history of the seventh amendment. The history is particularly important because *Atlas* demonstrates how easily a modern court can misinterpret the amendment if the analysis begins in the middle of the historical development. Section I analyzes *Atlas* at greater length. Section II discusses whether the seventh amendment can correctly be read as including a public rights exception. Section III considers the possibility of interpreting the *Atlas* decision to obtain a civil jury trial in an OSHA case by a procedure not discussed in *Atlas*. Section IV discusses the direction that this part of the seventh amendment debate may take in the future.

I. THE *Atlas* OPINION

The petitioners in *Atlas* and in *Frank Irey, Jr., Inc. v. Occupational Safety & Health Review Commission,* its companion, had been

[10] The Court included a perfunctory mention of the classic doctrine, 430 U.S. at 449 (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830)), but Justice White did not rely on this case in his analysis. For a discussion of this doctrine generally, see Wolfram, *The Constitutional History of the Seventh Amendment,* 57 MINN. L. REV. 639, 639-42 (1973).

[11] 430 U.S. at 455.

[12] *Id.* 461 n.16.

assessed civil penalties by the Occupational Safety and Health Review Commission (OSHRC) for violations of OSHA mandatory occupational safety standards.[13] In each case an employee had died in a work related accident,[14] and the Secretary of Labor had inspected the employers' worksites and cited them for OSHA violations. After proceedings before an administrative law judge and a review by the OHSRC, Atlas was assessed a penalty of $600, and the Frank Irey Co., a co-petitioner, was assessed a penalty of $5000.[15] A succinct description of the statutory procedure under which these penalties were imposed was provided by Justice White in the *Atlas* opinion.[16] The seventh amendment is involved because "the penalty

[13] 430 U.S. at 447.

[14] In *Atlas* an employee died when he fell through an opening in the roof of an unfinished warehouse. The Atlas Roofing Company, his employer, was cited for violating OSHA regulations requiring roof openings to be adequately covered or railed off. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 518 F.2d 990, 992-93 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

In the companion case, Frank Irey, Jr., Inc. v. Occupational Safety & Health Review Comm'n, 519 F.2d 1200 (3d Cir.), *aff'd on rehearing en banc*, 519 F.2d 1215 (3d Cir. 1975), *aff'd sub nom.* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977), an employee was killed when the side of a seven and one half foot trench collapsed onto him. Irey, as his employer, was cited for a violation of OSHA for failing to slope or shore the sides of the trench. *Id.* 1201-02.

[15] 430 U.S. at 447-48.

[16] The Act created a new statutory duty to avoid maintaining unsafe or unhealthy working conditions, and empowers the Secretary of Labor to promulgate health and safety standards. Two new remedies were provided—permitting the Federal Government, proceeding before an administrative agency, (1) to obtain abatement orders requiring employers to correct unsafe working conditions and (2) to impose civil penalties on any employer maintaining any unsafe working condition. Each remedy exists whether or not an employee is actually injured or killed as a result of the condition, and existing state statutory and common-law remedies for actual injury and death remain unaffected.

Under the Act, inspectors, representing the Secretary of Labor, are authorized to conduct reasonable safety and health inspections. . . . If a violation is discovered, the inspector, on behalf of the Secretary, issues a citation to the employer fixing a reasonable time for its abatement and, in his discretion, proposing a civil penalty. . . . Such proposed penalties may range from nothing for *de minimis* and nonserious violations, to not more than $1,000 for serious violations, to a maximum of $10,000 for willful or repeated violations . . . .

If the employer wishes to contest the penalty or the abatement order, he may do so by notifying the Secretary of Labor within 15 days, in which event the abatement order is automatically stayed. . . . An evidentiary hearing is then held before an administrative law judge of the Occupational Safety and Health Review Commission. The Commission consists of three members, appointed for six-year terms, each of whom is qualified "by reason of training, education or experience" to adjudicate contested citations and assess penalties. . . . At this hearing the burden is on the Secretary to establish the elements of the alleged violation and the propriety of his proposed abatement order and proposed penalty; and the judge is empowered to affirm, modify, or vacate any or all of these items, giving due consideration in his penalty assessment to "the size of the busi-

may be collected without the employer's ever being entitled to a jury determination of the facts constituting the violation." [17]

Neither Atlas nor Irey had been able to convince a court of appeals that the OSHA procedure deprived the employer of a seventh amendment right to jury trial. Atlas petitioned for review from the Fifth Circuit Court of Appeals; the Fifth Circuit affirmed the order of the Commission in an opinion that rejected both the challenge to the factual finding of a violation and the challenge to the constitutionality of the procedure.[18] Irey obtained review of the order before the Third Circuit. A panel opinion upheld the OSHA procedure; on rehearing *en banc* the full court also held the OSHA procedure was constitutional.[19] A vigorous dissenting opinion by Judge Gibbons, joined by three colleagues, argued that the procedure did violate the seventh amendment.[20]

In both *Atlas* and *Irey* the petition for certiorari raised questions concerning article III and the fifth and sixth amendments, as well as the jury trial clause of the seventh amendment.[21] The

> ness of the employer . . . , the gravity of the violation, the good faith of the employer, and the history of previous violations." . . . The judge's decision becomes the Commission's final and appealable order unless within 30 days a Commissioner directs that it be reviewed by the full Commission. . . .
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> If review is granted, the Commission's subsequent order directing abatement and the payment of any assessed penalty becomes final unless the employer timely petitions for judicial review in the appropriate court of appeals. . . . The Secretary similarly may seek review of Commission orders . . . but, in either case, "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." . . . If the employer fails to pay the assessed penalty, the Secretary may commence a collection action in a federal district court in which neither the fact of the violation nor the propriety of the penalty assessed may be retried. . . . Thus, the penalty may be collected without the employer's ever being entitled to a jury determination of the facts constituting the violation.

Id. 445-47 (footnotes and citations omitted).

[17] *Id.* 447.

[18] Atlas argued that the opening had been covered—by two bundles of the insulation material the employee was putting on the roof; the administrative law judge had held that the bundles were not "so installed as to prevent accidental displacement." 518 F.2d at 993.

[19] The decision of the Commission was vacated and remanded for further consideration because the administrative law judge had used an incorrect definition of a "willful" violation; without so holding, the opinion indicated that the violation was at most "serious," for which the maximum civil penalty was $1000 instead of $10,000. The Irey superintendent had testified that he thought the trench had been dug in shale and did not have to be shored; the technical data on the nature of the soil was unclear. 519 F.2d at 1201, 1206-07 & n.16.

[20] 519 F.2d at 1219 (Gibbons, Aldisert, and Hunter, JJ., dissenting from *en banc* opinion); *id.* 1226 (Garth, J., concurring in part in Judge Gibbons' dissent). *See also id.* 1207 (Gibbons, J., dissenting from panel opinion).

[21] 1. Whether the procedures set up by the Occupational Safety and Health Act of 1970 for administrative enforcement of the Act's civil penal-

Supreme Court granted certiorari only on the seventh amendment question.[22] Therefore, the Court in *Atlas* assumed that the money penalties were civil and not criminal and did not discuss the separation of powers issue.

Before the Supreme Court, Atlas and Irey argued that suits by the federal government for a civil penalty were suits for a money judgment, always considered suits at common law within the meaning of the seventh amendment.[23] Therefore, such a suit in federal court would be subject to the seventh amendment's guarantee of the right to trial by jury. Petitioners argued that Congress could not divide the adjudication, review, and collection powers between the courts and an administrative agency as it had done in OSHA, because the OSHA procedure deprived a defendant of any chance for a jury determination whether the Act had been violated.[24] Petitioners' brief surveyed the historical evidence in an attempt to demonstrate that the seventh amendment was intended to require a jury trial in all civil penalty cases.[25]

The government presented three arguments in support of the OSHA procedure: [26] (1) the seventh amendment does not apply to any kind of action in any forum in which the government is a party; (2) Congress has discretion to create an administrative procedure to adjudicate certain cases without a jury trial; and (3) the seventh amendment is not applicable to OSHA proceedings because OSHRC is a specialized court of equity under the doctrine of *Katchen v. Landy*.[27] The Court expressly declined to consider the first proposi-

ties and administrative definition of the Act's proscriptions violate Article III and the Fifth, and Sixth Amendments to the Constitution because the "civil penalties" and administrative enforcement mechanism are "penal" in nature and effect but omit the constitutional protections required in penal proceedings, including trial by jury.

2. Assuming *arguendo* that such civil penalties and enforcement procedures are civil in nature and effect, whether such procedures deny the defendant employer his right to jury trial guaranteed by the Seventh Amendment to the Constitution.

Petitioner's Petition for a Writ of Certiorari at 3, Irey v. Occupational Safety & Health Review Comm'n, 519 F.2d 1200 (3d Cir.), *aff'd on rehearing en banc*, 519 F.2d 1215 (3d Cir. 1975), *aff'd sub nom.* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977); Petitioner's Petition for a Writ of Certiorari at 2-3, Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n. Both petitioners were represented by the same counsel.

22 424 U.S. 964 (1976).

23 Brief for Petitioners at 17, 32-42.

24 *Id.* 44, 45, 61.

25 *Id.* 20-31.

26 Brief for Respondents at 17-19.

27 382 U.S. 323 (1966).

tion,[28] and the opinion did not discuss the third. The second argument, however, developed the analysis the Court used to sustain the OSHA procedure.

The Court in *Atlas* rejected the claim that the OSHA procedure violated the seventh amendment and stated a new rule to explain why the right to a jury trial does not apply to administrative proceedings:

> At least in cases in which "public rights" are being litigated—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.[29]

The public rights rule had to be created to decide the *Atlas* case; it is not the holding of any earlier opinion. In the remainder of the *Atlas* opinion, Justice White explained the precedents that supported the new rule and rebutted petitioners' specific arguments. The explanation of the precedents makes clear that the new rule is a conclusion reached from interpretation of several cases, none directly on point but all presumably sufficiently relevant to provide helpful authority. Justice White supported the *Atlas* rule with two basic lines of precedent: (1) six tax, tax penalty, and customs and immigration penalty cases; [30] and (2) excerpts from what is mostly dicta from five unrelated opinions, including the Court's two most recent seventh amendment opinions, *Curtis v. Loether* [31] and *Pernell v. Southall Realty*.[32]

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[28] 430 U.S. at 449 n.6. The government's argument was based on semantics, not precedent, and would have astonished the drafters of the Constitution and the Bill of Rights. Hopefully it will never be made again.

[29] *Id.* 450 (footnote omitted).

[30] Helvering v. Mitchell, 303 U.S. 391 (1938) (tax penalties); Lloyd Sabaudo Societa v. Elting, 287 U.S. 329 (1932) (customs and immigration penalty); Phillips v. Commissioner, 283 U.S. 589 (1931) (taxes); *Ex Parte* Bakelite Corp., 279 U.S. 438 (1929) (dictum on taxes in opinion discussing court of customs appeals); Oceanic Navigation Steam Co. v. Stranahan, 214 U.S. 320 (1909) (customs and immigration penalty); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (18 How.) 272 (1856) (listed by the Court as a tax case; for a contrary interpretation, see text accompanying notes 111-13 *infra*).

[31] 415 U.S. 189 (1974).

[32] 416 U.S. 363 (1974). The Court also relied on NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), Crowell v. Benson, 285 U.S. 22 (1932), and Bloch v. Hirsh, 256 U.S. 135 (1921).

The first line of cases requires the more careful consideration because it provides the core support for the *Atlas* rule. Justice White concluded from the six cases that:

> Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred. These statutory schemes have been sustained by this Court, albeit often without express reference to the Seventh Amendment.[33]

That conclusion appeared to refute petitioners' argument that the government may collect a civil penalty only by a common law action in a federal court subject to the seventh amendment right to trial by jury. The Court assumed, without discussion, that such power in tax, tax penalty, and customs and immigration penalty cases implied power to use administrative factfinding in a broader category of public rights cases. The Court further assumed, and so stated, that the earlier decisions that the courts did not have to be involved in the factfinding process in the first instance supported the proposition that the seventh amendment did not require a jury trial at any stage of the proceedings.[34] Neither assumption is self-evident; similarly, the assumption that all six cases correctly interpreted the seventh amendment is questionable. An analysis of the application of the seventh amendment to those cases will be developed later in this Article.[35]

The second line of cases provides even weaker support for the *Atlas* rule, because it is primarily based on dicta and observations.[36] Although these five cases may not support the *Atlas* rule, they help explain the reasoning behind the *Atlas* opinion. The treatment of *NLRB v. Jones & Laughlin Steel Corp.*[37] is particularly important.[38] Although it had been ignored by the Court in seventh amendment cases for 37 years, the precedent of *Jones & Laughlin* was revived by Justice Marshall in both seventh amendment opinions he wrote in 1974—*Curtis v. Loether* and *Pernell v. Southall Realty*. In *Atlas*, Justice White relied on the interpretation of *Jones & Laughlin* announced by Justice Marshall in *Curtis* and *Pernell*. Justice White

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[33] 430 U.S. at 450.

[34] *Id.* 456.

[35] *See* text accompanying notes 61-114 *infra*.

[36] *Id.* 456.

[37] 301 U.S. 1 (1937).

[38] *See* 430 U.S. at 453-54.

declared that these 1974 opinions had established the "proposition that when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible without violating the Seventh [Amendment]." [39] This use of *Curtis* and *Pernell* provides a clue to the reasoning of the Justices and indicates an important doctrinal shift in seventh amendment cases.

The reliance on *Curtis* and *Pernell* in *Atlas* indicates that *Atlas* is the next step in the Court's process of reevaluating the recent seventh amendment decisions. Although both earlier cases held that a jury trial was required in the particular circumstances, the opinions written by Justice Marshall pointedly discussed issues unnecessary to the particular case. In *Curtis,* Justice Marshall rejected the claim that *Jones & Laughlin* had established that all new statutory rights were outside the scope of the seventh amendment, and explained that *Jones & Laughlin* "merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings." [40] That statement was sufficient to explain the inapplicability of *Jones & Laughlin* to the *Curtis* facts, an action in federal district court for damages under the Civil Rights Act of 1968. Justice Marshall did not stop there, but went further, and described *Jones & Laughlin* and other cases as "uphold[ing] congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment." [41]

Two months after the Court's decision in *Curtis,* Justice Marshall repeated the dictum in *Pernell,* and expanded the interpretation of *Jones & Laughlin.* After several pages of historical analysis establishing that a landlord-tenant eviction action in the District of Columbia was a suit at common law within the meaning of the seventh amendment, Justice Marshall considered the reasoning of the court of appeals in the decision below. The lower court had interpreted one precedent, *Block v. Hirsh,*[42] as establishing that no landlord-tenant suit is within the scope of the seventh amendment because *Block* had upheld the constitutionality of a rent control commission. Justice Marshall found the circuit court's reasoning incorrect because the suit in *Pernell* was in the superior court, not before a commission, and "Block v. Hirsh merely stands for the principle that the Seventh Amendment is generally inapplicable in

[39] *Id.* 455.

[40] 415 U.S. at 194.

[41] *Id.* 195.

[42] 256 U.S. 135 (1921). *See* notes 116-32 *infra* & accompanying text.

administrative proceedings . . . ." [43] That discussion and the preceding historical analysis was more than sufficient to support the conclusion that a jury trial was required in the superior court, but the opinion included further dictum: "We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency." [44] Congress had not taken that possible step; nevertheless Justice Marshall included this advice on how to evade the seventh amendment.

For four years the dicta written by Justice Marshall in *Curtis* and *Pernell* has invited a response, but no commentator has challenged the assumption that Congress may so easily substitute factfinding by an administrative agency for trial by jury. The use of this dicta in *Atlas* to support the newly created public rights exception requires that it be ignored no longer; the opinions of Justices White and Marshall implicitly request further analysis.

The pattern of *Curtis, Pernell,* and *Atlas* suggests that at least Justices White and Marshall believe that serious review of the recent trend of seventh amendment cases is called for. Five of the six cases prior to *Atlas* held that a jury trial was required; [45] only in *Katchen v. Landy* [46] did the Court hold that an action was not a suit at common law within the terms of the seventh amendment. The effect of the other cases was necessarily an increase in the number of cases in which a jury could be demanded as a constitutional right by civil litigants. *Beacon Theaters, Inc. v. Westover* [47] and *Dairy Queen, Inc. v. Wood* [48] held that the merger of law and equity could have the effect of permitting a litigant to demand a jury trial on legal issues which previously would have been tried without a jury because of the equitable cleanup doctrine. *Ross v. Bernhard* [49] held that a jury trial could be demanded if the suit could be handled as a law action, even though the particular

[43] 416 U.S. at 383.

[44] *Id.*

[45] Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974); Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). In the most recent opinion on the right to jury trial, the Court, in an opinion by Justice Marshall, held that there is a right to jury trial for actions under the Age Discrimination in Employment Act; Justice Marshall discussed only the statutory issue even though the Fourth Circuit had also found a seventh amendment right. Lorillard, A Division of Loew's Theatres, Inc. v. Pons, 98 S. Ct. 866 (1978).

[46] 382 U.S. 323 (1966).

[47] 359 U.S. 500 (1959).

[48] 369 U.S. 469 (1962).

[49] 396 U.S. 531 (1970).

mechanism through which the suit was presented had been developed by the equity side and considered equitable. Then *Curtis* held that new actions created by Congress would be within the scope of the seventh amendment if the statute created legal rights and remedies enforceable by an action for damages in the federal district court.[50]

The cases from 1959 to 1974 interpreted the seventh amendment in a manner that produced a ratchet effect on the requirement of a civil jury. The number and type of cases requiring a jury were always increased, never decreased, as the merger of law and equity and improvements in civil procedure made an adequate remedy at law possible in a greater proportion of cases. During the same years the use of the jury in civil cases came under serious attack by commentators and judges.[51] The opinions in *Curtis* and *Pernell* may reflect the concern of the Court, or at least that of Justice Marshall, that it was expanding the scope of the seventh amendment at a time when many powerful voices were calling for the elimination of the civil jury or at least its curtailment. *Curtis* and *Pernell* reflect an awareness of the divergence between the Court's opinions and legal commentary. The dicta appears to be a tentative search for a way, short of amending the seventh amendment, to reverse the earlier trend and restrict the use of the civil jury, if contemporary needs made that the best public policy. The dicta thus suggest a rationale that would permit Congress to counter the trend of the Supreme Court's opinions. Congress could, for a class of cases not yet defined, create an adjudicatory body not subject to the seventh amendment, even though in most other respects it resembled a court. Presumably other constitutional guarantees would still apply to that body, so that it would have to afford due process and not conflict with the separation of powers limits of article III.

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[50] 415 U.S. at 194.

[51] *E.g.*, Devitt, *Federal Civil Jury Trials Should Be Abolished*, 60 A.B.A.J. 570 (1974); Landis, *Jury Trials and the Delay of Justice*, 56 A.B.A.J. 950 (1970); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 Nw. U.L. Rev. 486, 502-08 (1975); Steuer, *The Case Against the Jury (A Brief Without Citations)*, 47 N.Y.S. B.J. 101 (1975). *See also* Schaefer, *Is the Adversary System Working in Optimal Fashion?*, 70 F.R.D. 159, 159-65 (1976); Stanley, *The Resolution of Minor Disputes and the Seventh Amendment*, 60 Marq. L. Rev. 963 (1977).

The attacks were not new, but by 1974 Justice Black, one of the most consistent advocates of jury trial in past decades, was no longer on the Court. *See* Green, *Jury Trial and Mr. Justice Black*, 65 Yale L.J. 482, 488-94 (1956). *Cf.* Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 Fordham L. Rev. 227, 229 n.3 (1973) ("There is no significant pressure to adopt the English non-jury system [for civil cases] and I do not advocate it.").

Justice Marshall's stated assumption in *Pernell* seemed to fit the facts of *Atlas* very well; the absence of any response to the assumption allowed Justice White to take the next step of converting the dicta of *Curtis* and *Pernell* into the holding of *Atlas* that Congress could create an administrative agency to adjudicate OSHA civil violations without any provision for a jury trial. In *Atlas,* Justice White clearly attempted to make the case for eliminating the jury as strong as the precedents of the last 120 years would allow, but the opinion itself implies that Justice White recognized that the analysis supporting the holding was not exhaustive. The opinion, explained the Court, was following the earlier "holdings or dicta" and the recent observations of *Pernell* and *Curtis,* because "none of the grounds tendered for so reinterpreting the Seventh Amendment is convincing." [52]

The *Atlas* Court found three separate arguments raised by petitioners unconvincing. The first was petitioners' historical argument that some of the early cases had not expressly decided the seventh amendment issue.[53] The point was accurate but not persuasive; some of the cases did discuss the seventh amendment in upholding administrative factfinding.[54] The second ground rejected was the argument that all the precedents dealt "with the exercise of sovereign powers that are inherently in the exclusive domain of the Federal Government and critical to its very existence" [55]—cases involving immigration, customs, and taxation. Justice White rejected this argument because none of the earlier opinions had stated such a limitation, and some precedents, such as *Jones & Laughlin,* were not within the suggested limitation.[56] Finally, Justice White discussed the objection that congressional power to require litigation in an administrative agency would allow Congress to destroy the right to a jury trial by defining the appropriate forum for the resolution of disputes.[57] He found the argument "well put" but "unpersuasive," because Congress could allow administrative factfinding not covered by the seventh amendment only in "public rights" cases.[58] The flaw in this defense of the *Atlas* rule cannot be attributed to any particular point in the argument; rather the funda-

[52] 430 U.S. at 456.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* 456-57.

[57] *Id.* 457.

[58] *Id.* 457-58.

mental weakness is that the defense is nothing more than a collection of minor points supported by scattered quotations and assumptions.

The conclusion reached in the *Atlas* opinion reaffirmed that the Court was not determining all constitutional objections to the OSHA procedure, but only whether the OSHA statute conflicted with the seventh amendment right to a jury trial. The Court's conclusion did make clear that the seventh amendment issue had been decided in accordance with what recent opinions seemed to indicate was the "settled judicial construction" "from the beginning." [59] The Court intimated that it might reconsider the wisdom of the *Atlas* precedent in a final footnote that declared that "this Court has the final decision on the question whether a jury is required." [60] Thus, the debate is still alive if additional arguments are presented and supported by the defenders of the civil jury.

II. Is There a Public Rights Exception to the Seventh Amendment?

The argument of the petitioners in *Atlas* that the civil penalty action created in OSHA was a suit at common law under the seventh amendment [61] was not supported by any controlling precedent. Instead, the argument rested on the classic constitutional doctrine that the federal government has three distinct branches, each limited to the exercise of specifically granted powers. The adjudication of controversies is vested in the courts by article III, and in civil cases the federal courts are subject to the seventh amendment. The OSHA procedure was neither in equity nor in admiralty; therefore it had to be equivalent to "a suit for a money judgment which is classically a suit at common law." [62]

The Court rejected petitioners' analysis as incomplete because it did not account for all the methods the government had been permitted to use to collect the equivalent of a money judgment. The precedents were interpreted as establishing that the Constitution allowed administrative factfinding and adjudication in tax collection and related cases.[63] The cases allowed the government to collect money without a jury and without using any procedure that resembled a classic suit at common law. Therefore, the Court con-

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[59] *Id.* 460.

[60] *Id.* 461 n.16.

[61] Brief for Petitioners at 17, 34-38.

[62] 430 U.S. at 449.

[63] *Id.* 455.

cluded there was an exception to the seventh amendment for a class of public rights cases.

The administrative precedents developed in tax, tax penalty, and customs and immigration cases, however, provide only apparent support for a public rights exception to the seventh amendment. When the precedents are traced back to find the authority and reasoning supporting such administrative factfinding, a single basis emerges as the foundation of the rules stated in all later cases. That basis is that taxes were assessed and collected by an executive or administrative agency without judicial involvement in the colonies and in England before the adoption of the Constitution and the seventh amendment, and by the state and federal governments after 1791. The Court assumed that the practice of administrative tax collection and consistent judicial approval of that practice allows Congress to authorize administrative enforcement procedures in other kinds of cases without violating the seventh amendment.[64]

By relying on opinions from 1856 and later, instead of tracing the tax collection precedents back to 1791, the Court increased the chance that the interpretation of the seventh amendment would be inaccurate. Because the Court commenced its historical research in the middle rather than at the beginning, careful distinctions developed by the earlier judges were not recognized or understood and overstated dicta were accorded more authority than was proper. The careless use of precedent permitted the Court to declare that the cases upholding administrative factfinding in certain situations subsumed the general proposition that a jury trial is not required by the seventh amendment in public rights cases. This section will address three questions: whether the seventh amendment exception for tax collection can be expanded to include the collection of a penalty (subsection A); whether the Court correctly interpreted *Murray's Lessee v. Hoboken Land & Improvement Co.*[65] as establishing a public rights exception to the seventh amendment (subsection B); and whether the modern dicta have created an exception to the seventh amendment unknown in 1791 (subsection C).

A. *Can Tax Collection Procedures Be Used to Collect a Penalty?*

The constitutionality of collecting federal taxes by nonjudicial methods is supported by solid authority. The typical eighteenth century collection procedure allowed the collector to seize or distrain the property of the tax debtor and then to sell the property to obtain

64 *Id.* 458-60.

65 59 U.S. (18 How.) 272 (1856).

the money to satisfy the taxes; the method was nonjudicial and did not involve the courts at any stage from assessment to collection. Collection of a federal duty by distress and sale was authorized by Congress soon after the United States was formed.[66] The first exercise of the taxing power, the carriage duty of 1794, provided that unpaid duties and commissions could be collected either by suit in any federal or state court, or by distress and sale of the goods and chattels of the defaulting taxpayer.[67] Although the anti-Federalists brought a test case [68] in an attempt to block Hamilton's plans, there was no attack on the authority to collect by distress and sale.[69] Collection by distress and sale was not considered an improper procedure for collection of federal taxes because it had been used since the Elizabethan poor law of 1601. This procedure was part of the English land tax of 1689, and it had been used in the colonies as a common procedure.[70]

The often-stated reason for allowing nonjudicial collection of taxes was the absolute necessity that the government be able to collect quickly the revenue needed for operating; [71] therefore, the courts did not interfere with the collection by an administrative agency. Article III did not require collection by the slow processes of the courts,[72] and the seventh amendment did not apply because there was no common law action. Fines and penalties need not be collected so quickly because the purpose of the fine or penalty is to control conduct or punish offenses and only more incidentally to raise revenue. It may be difficult at times to determine whether a particular exaction is a penalty or a tax, but the distinction must be made if the seventh amendment is to be correctly applied. In *Atlas* the exaction had been labelled a civil penalty rather than a tax and the court consistently referred to it as a penalty and not as a tax.

The distinction between taxes and penalties was observed in the early federal statutes. The first customs acts allowed summary seizure of goods for non-payment of duties, but penalties could be

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66 *E.g.*, Act laying duties upon Distilled Spirits, ch. 15, § 23, 1 Stat. 199, 204 (1791).

67 Act laying duties upon Carriages for the Conveyance of Persons, ch. 45, § 5, 1 Stat. 375 (1794).

68 Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796).

69 The government sued to collect the tax by an action of debt, the alternative method of collection established by the statute.

70 *See* text accompanying notes 156-229 *infra.*

71 *See* R. BLACKWELL, POWER TO SELL LAND FOR THE NONPAYMENT OF TAXES 29-30 (2d ed. 1864).

72 *See* Waldron v. Lee, 22 Mass. (5 Pick.) 323, 327-28 (1827).

collected only by a civil action in a court.[73] There are no early federal precedents establishing that Congress cannot use the tax collection procedure to collect a penalty, because Congress never tried to do so; the statutory provision for a civil action included a statutory right to a jury trial,[74] and hence there was no seventh amendment issue.

The application of the seventh amendment was an issue in proceedings to forfeit property for violations of the federal revenue laws.[75] Forfeiture proceedings were a major source of discontent in the colonies before the Revolution. In England such matters were heard by the Exchequer, but there was no Exchequer in the colonies,[76] and the early cases were handled as ordinary civil actions in the colonial courts with a trial by jury. Often colonial juries found no violation justifying forfeiture even though the evidence was clear; eventually the problem became too great to be ignored. The English solution was to place such cases under the jurisdiction of the expanded system of vice admiralty courts in which jury trial was not used.[77] The absence of a jury in these courts was one of the major complaints voiced by the colonists.

Colonial history was of primary importance in early Supreme Court cases determining the proper application of the seventh amendment to forfeiture proceedings. In *United States v. La-Vengeance*,[78] the Court ruled on a forfeiture of a schooner seized for carrying contraband. The Court held that the forfeiture was *in rem* against the property only; the forfeiture did not impose a personal penalty on the owner,[79] so it was a civil action and not a criminal action. The Court held that an action to forfeit property seized on navigable water was an action in admiralty. The seventh amend-

[73] *E.g.*, Act of Aug. 4, 1790, ch. 35, § 67, 1 Stat. 176 (penalties sued for and recovered in any court proper to try the same; anything forfeited for nonpayment of duties to be seized and libeled); Act of July 31, 1789, ch. 5, § 36, 1 Stat. 47 (same). *See also* Act of June 5, 1794, ch. 45, §§ 5, 6, & 10, 1 Stat. 375 (carriage duty collected by suit in any court or by distress and sale; fines, penalties, and forfeitures to be sued for in any court).

[74] An Act to establish the Judicial Courts of the United States, ch. 20, §§ 9 & 12, 1 Stat. 73 (1789).

[75] Much of the historical background is recounted in C.J. Hendry Co. v. Moore, 318 U.S. 133 (1943) and People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 231 P.2d 832 (1951).

[76] The writs of the Court of Exchequer in London did not run in the colonies. D. CLARK, THE RISE OF THE BRITISH TREASURY 174-75 & n.38 (1960). A separate exchequer court was never created for the colonies.

[77] C. UBBELOHDE, THE VICE ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 75-77 (1960); *see* 4 C. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 168-71, 254-69 (1938).

[78] 3 U.S. (3 Dall.) 297 (1796).

[79] *Id.* 301.

ment did not require juries for forfeitures in admiralty [80] because the admiralty exception to the seventh amendment was grounded in the history before the Constitution and the practice that continued unchanged after the Constitution. In later cases the Court held that the admiralty exception would not be expanded to include all forfeitures; an action to forfeit property seized on land was an action at common law, subject to the right to trial by jury [81] because that had been the practice in such cases in Exchequer.

The tax collection procedures were not used to collect penalties,[82] and the admiralty exception did not extend to non-admiralty penalties because there was no history of such practices before 1791. Thus the early penalty and forfeiture cases affirm that the seventh amendment guaranteed a jury trial in every action at common law, unless pre-1791 precedent established an exception for a particular procedure. There was no procedure in the pre-1791 practice at all analogous to that in OSHA, so there can be no specific precedent to support an OSHA exception to the seventh amendment.

Even though there is no specific precedent for an OSHA exception, Justice White upheld the OSHA procedure under a general public rights exception. Even though there is no evidence that anyone in 1791 understood there was such an open-ended exception, several cases were presented in *Atlas* to support such an exception. The cases do not establish that the public rights exception ought to be considered part of the history of the seventh amendment; instead they show that the 1791 distinction between penalties and taxes has not always been observed. This has resulted in an expanding number of exceptions to the seventh amendment through misuse of the tax collection precedents. The customs and immigration penalty cases on which Justice White relied in *Atlas* illustrate the erosion of the seventh amendment by a gradual process in which a combination of false assumptions, misunderstood distinctions, and inaccurate dicta resulted in a misinterpretation of the seventh amendment.

The starting point for the trail of false turns was the opinion in *Bartlett v. Kane*,[83] a challenge by an importer to the administrative

[80] *Id.* *See also* United States v. Schooner Betsey and Charlotte, 8 U.S. (4 Cranch) 443 (1808); United States v. Schooner Sally, 6 U.S. (2 Cranch) 406 (1805).

[81] United States v. Winchester, 99 U.S. 372, 374 (1879); The Sarah, 21 U.S. (8 Wheat.) 391, 394 (1823) (dictum).

[82] *See* State v. Allen, 13 S.C.L. (2 McCord) 55 (1822) ("tax" of $10,000 on lottery office held to be a penalty; tax collector prohibited from enforcing his execution for the tax). *Cf.* Cowles v. Brittain, 9 N.C. 204 (1822) (sheriff may use distress and sale to collect penalty of $100 for peddling without a license; the peddler had refused to pay $10 required for a license).

[83] 57 U.S. (16 How.) 263 (1853).

collection of customs duties. The dispute in *Bartlett* was between the importer and collector over the value of the imported merchandise; the importer objected to the valuation made by appraisers and sought to have the valuation determined independently in federal court in an action for refund of duties paid. The appraisers had determined the value of the goods to be more than that declared by the importer, so that he had to pay duty on the higher value and an additional twenty percent as a penal duty for the undervaluation. The importer had not followed the procedure for review of the appraisal provided by the statute; [84] instead he brought the action for a refund. The Supreme Court held that the importer could not obtain a new determination of value in the federal court action and that the value found by the appraisers was binding. That result was unexceptional and caused no encroachment on the seventh amendment, because the appraisers were collecting a federal tax by an accepted nonjudicial procedure. The goods were concededly subject to some duty, so the appraisers were acting within their jurisdiction in finding the value of the goods. The additional duty, although labeled a penal duty, was not a separate penalty imposed after separate factfinding, but only an increased duty imposed because the appraisers' valuation was more than 110 percent of the importer's valuation.

Fifty-six years later the Supreme Court transferred the authority of *Bartlett* from the revenue laws to immigration penalties and upheld a procedure that began to undercut the protection of the seventh amendment. *Oceanic Navigation Steam Co. v. Stranahan* [85] was an action against the collector of customs to recover a penalty paid for transporting to the United States immigrants who were afflicted with certain diseases.[86] The fact of a violation had been administratively determined by the Secretary of Commerce and Labor; the penalty had been paid voluntarily, but under protest, because the collector could not grant a clearance to the steamship until the penalty was paid. Although other sections of the statute [87]

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[84] Tariff Act of Aug. 30, 1842, ch. 270, §§ 16 & 17, 9 Stat. 548.

[85] 214 U.S. 320 (1909).

[86] The action was brought under the Alien Immigration Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213.

[87] The Act included a variety of penalties and procedures. *E.g.*, *id.* at § 5, 32 Stat. at 1214 (civil suit, including private suit akin to breach of contract); *id.* at § 18, 32 Stat. at 1217-18 (misdemeanor); *id.* at § 19, 32 Stat. at 1218 (misdemeanor and clearance denied until fine paid); *id.* at § 38, 32 Stat. at 1221 (fine and imprisonment); *id.* at § 39, 32 Stat. at 1221 (fine and imprisonment).

created fines and criminal penalties that could be enforced only in the courts, the sanction for nonpayment of the particular penalty for transporting diseased immigrants was the administrative denial of clearance.[88]

The opinion of the Court, by the first Justice White, presents a clear example of misuse of precedent. On the basis of prior tariff, internal revenue, and taxation cases, Justice White presented the statement that his successor emphasized in *Atlas:* "[N]ot only as to tariff but as to internal revenue, taxation and *other subjects* [Congress could] impose appropriate obligations and sanction their enforcement by reasonable money penalties, *giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.*" [89] The first Justice White did not present any case that upheld the power with respect to "other subjects," and the second Justice White likewise presents no case to support the broad assertion made in *Oceanic.* Neither Justice could do so because there is no such case. The statement is incorrect or, at best, unsupported dictum, and hardly worthy of emphasis in *Atlas* to support that opinion. By using the added claim that the power had been upheld as to "other subjects," the Court in *Oceanic* began to transform the limited exception for administrative collection of revenue into an unlimited exception that could destroy the protection of the seventh amendment. The Court did not discuss why other cases might be analogous to revenue cases; the history of the seventh amendment shows that other subjects cannot so easily be added to the revenue collection precedents.

In addition to accepting uncritically the dictum of *Oceanic,* the *Atlas* opinion presented the *Oceanic* opinion as supportive of an issue the Court had not decided in *Oceanic.* In *Oceanic* the penalty was to be collected by the administrative procedure; however, although the agency could withhold a permit the steamship needed to operate, it could not affirmatively collect the penalty. Under OSHA the agency can affirmatively collect the penalty by invoking the judicial power in a very limited manner. The *Oceanic* opinion concluded with the admonition that the Court had considered only the particular procedure of collection by an administrative denial of permission to act—in this case for a ship to proceed into port—until the penalty was paid.[90] Therefore, even if it is accepted that

[88] *Id.* at § 9, 32 Stat. at 1215-16.

[89] 430 U.S. at 457 (quoting Oceanic Navigation Steam Co. v. Stranahan, 214 U.S. 320, 339 (1919)) (emphasis added in *Atlas*).

[90] "We have not considered the questions which would arise for decision if the case presented an attempt to endow administrative officers with the power to

the procedure upheld in *Oceanic* is not objectionable under the seventh amendment, *Oceanic* does not support *Atlas* because the OSHA procedure is substantially different.[91] Nevertheless, *Oceanic* is the foundation for the *Atlas* conclusion that the seventh amendment allows administrative adjudication of civil penalties.

B. *The Exchequer Extent and the Public Rights Exception*

The earliest precedent used by Justice White to support the existence of a public rights exception to the seventh amendment was an excerpt from the 1856 opinion in *Murray's Lessee v. Hoboken Land & Improvement Co.*:

> [T]here 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 of the United States, as it may deem proper.[92]

The decision in *Murray's Lessee* is unassailable on seventh amendment grounds, but it does not support the *Atlas* rule because it concerned a fact situation completely unlike that presented in *Atlas*. *Murray's Lessee* involved a very specific procedure for handling disputes between the Treasury and a federal tax collector; in *Atlas*, as often before,[93] the opinion is cited to support the constitutionality of markedly different procedures. Again the historical research is important because the history demonstrates that *Murray's Lessee* supports only a specific exception limited to its facts; therefore, it is inaccurate to assume that it is an example of any broader public rights exception.

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enforce a lawful exaction by methods which were not within the competency of administrative duties, because they required the exercise of judicial authority." 214 U.S. at 343.

[91] *Oceanic* can also be distinguished because it involves only admiralty jurisdiction for which the seventh amendment does not require a jury. Currie, *OSHA*, 1977 A.B.F. RES. J. 1107, 1156 & n.245; Note, *supra* note 5, at 477 & n.116.

The other penalty case cited in *Atlas*, Lloyd Sabaudo Societa v. Elting, 287 U.S. 329 (1932), adds no more authority to the argument. That opinion did not present a new analysis but simply repeated the prior holding of *Oceanic*. Again, as in the prior case, the seventh amendment was not mentioned; only the due process issue was considered.

Another two of the six core cases contain only dicta that add nothing new. *See* Helvering v. Mitchell, 303 U.S. 391, 402 (1938); *Ex Parte* Bakelite Corp., 279 U.S. 438, 451, 458 (1929).

[92] 59 U.S. (18 How.) 272, 284 (1856), *quoted in* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 451 n.8 (1977).

[93] *E.g.*, Phillips v. Commissioner, 288 U.S. 589, 596 (1931); Oceanic Navigation Steam Co. v. Stranahan, 214 U.S. 320, 339 (1909).

The procedure considered in *Murray's Lessee* was not an American invention; it was a development from the English practice prior to 1791.[94] The history of the land tax in England contains many instances of local collectors who did not promptly account for the taxes they collected.[95] The central treasury did not bring common law actions to recover from defaulting collectors. The procedure used was the extent, a prerogative process issued from the court of Exchequer which did not entitle the defendant to the normal trial by jury found in King's Bench or Common Pleas.[96] The extent was not widely used in England even against defaulting tax collectors [97] and was not used against taxpayers at all.[98]

Like the central authorities in England, the colonies had the problem of collecting the revenue from the local collectors.[99] The English Exchequer did not exist in the colonies, but early statutes authorized a process similar to the extent, by which the treasurer of a colony could issue a warrant to the local sheriff to collect taxes due from a defaulting collector.[100] The authorized means of enforcement was generally distraint and sale of the property of the collector by the sheriff acting without any judicial involvement.[101] Several early federal statutes also authorized such a process, which again was nonjudicial and did not involve the courts at all.[102] The question whether such procedures violated the seventh amendment was not raised in any of the early federal cases, but two early opinions do illustrate the limited reach of the procedure.

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94 Much of the history of treasury-collector procedure is recounted in the Supreme Court's opinion in Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

95 *See generally* W. WARD, THE ENGLISH LAND TAX IN THE EIGHTEENTH CENTURY 30-59, 86-99 (1953).

96 J. CHITTY, PREROGATIVES OF THE CROWN AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 265-71 (London 1820). *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277-78 (1856).

97 *See* W. WARD, *supra* note 95, at 37, 50, 100-22.

98 The entire collection process was decentralized, so the taxpayer was not a debtor to the Crown. A debtor of a debtor to the Crown could be proceeded against by the Crown by an extent in the second degree or by the Crown debtor by an extent in aid, but there is no evidence that taxes were collected from taxpayers by this procedure. The power of distress and sale was sufficient. *But see* Phillips v. Commissioner, 283 U.S. 589, 595-96 n.5 (1931) and note 156 *infra*.

99 *See* Boyd, *The Sheriff in Colonial North Carolina*, in ESSAYS IN AMERICAN COLONIAL HISTORY 400, 409-18 (P. Goodman ed. 1970).

100 *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 278-79 (1856).

101 *See id.*

102 *See* statutes cited at *id.* 279.

Ex parte Randolph [103] is valuable because one opinion is by Chief Justice Marshall sitting on circuit. Randolph had become acting purser of the frigate *Constitution* upon the death of the regular purser. After the ship returned to the United States, Randolph settled his accounts with the Treasury and received a discharge of all liability. Five years later the Treasury reopened the account and found a balance of over $25,000 due from Randolph. The Treasury then issued a warrant to the United States Marshal commanding him to collect the amount due by distress and sale of Randolph's property; if the Marshal could not find sufficient property he was to imprison Randolph until the debt was paid. The case came to the circuit court on Randolph's petition for a writ of habeas corpus. Chief Justice Marshall noted the objections that such a process violated article III and the seventh amendment,[104] but his opinion did not reach the constitutional question because the statute did not authorize the Treasury to use summary process against a person such as Randolph. The "extreme severity" of the summary process that "departs entirely from the ordinary course of judicial proceeding" [105] required that the statute be strictly construed. Regular receiving and disbursing officers might properly be subject to such process because the books of the Treasury would set out the amount of liability, but that would not authorize such a procedure in the case of a temporary purser who took over the accounts of another. Marshall implied that the Constitution would prevent Treasury adjudication if the statute had attempted to require it, because "such controverted question ought to be decided in a court of justice." [106]

The same statutory process was involved in another opinion of the Supreme Court, although it did not involve a seventh amendment issue. In *United States v. Nourse*,[107] decided by the Court in 1832, the Court discussed judicial involvement in the nonjudicial Treasury procedure. After Nourse had been removed from an office in the Treasury, his accounts were examined, and he was found to owe the United States over $11,000. The Treasury Department began proceedings to collect the amount due by the summary process of distress and sale by the Marshal. Nourse pursued the statutory relief available to him by seeking an injunction from the district court. The district court referred the accounts to auditors who

[103] 20 F. Cas. 242 (C.C.D. Va. 1833) (No. 11,558).

[104] *Id.* 253-54.

[105] *Id.* 255.

[106] *Id.* 257.

[107] 31 U.S. (6 Pet.) 470 (1832).

found for Nourse; as a result the district judge enjoined the Treasury from enforcing the warrant. The injunction was affirmed in the circuit court, but on appeal the Supreme Court held that the statute did not authorize the Supreme Court or the circuit court to hear an appeal by the government in such a case.[108] The decree of the circuit court was reversed, leaving the district court judgment in force in favor of Nourse.

The United States then sued Nourse in an action of assumpsit for the same amount. The Treasury Department argued that the first action had only decided that the government could not resort to the summary collection process and that it had not decided on the merits whether the $11,000 was due. The opinion by Chief Justice Marshall held that the earlier decision by the district court was *res judicata* and a bar to any further action by the United States.[109] Marshall repeated his statement in *Randolph* that the courts could not be excluded from the collection process entirely:

> It would excite some surprise, if, in a government of laws and principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process, and levy on the person, lands and chattels of the debtor, any sum he might believe to be due, leaving to that debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States. While it was perceived, that the public interest required a prompt remedy against public defaulters, the legislature was not unmindful of the rights of individuals . . . .[110]

In *Nourse* the appeal from the Treasury to the courts was in the request for an injunction, and the determination of facts required the settlement of accounts by auditors. Both the complicated nature of the dispute and the remedy sought required equity proceedings, and hence the common law jury requirement of the seventh amendment was not at issue. The two opinions of Chief Justice Marshall in *Randolph* and *Nourse* indicate the limited reach of the transplanted extent under the United States Constitution. Nonjudicial or administrative procedure was not available except

108 *Id.* 497.

109 United States v. Nourse, 34 U.S. (9 Pet.) 8, 32 (1835).

110 *Id.* 28-29.

against the very small class of regular officials handling government money, and even for those officials the Constitution might guarantee some access to the judicial system.

The most important Supreme Court precedent is the 1856 opinion in *Murray's Lessee v. Hoboken Land & Improvement Co.*[111] The case did not involve the typical collection from a taxpayer, but concerned only the procedure used by the Treasury to collect from the collector. In *Murray's Lessee,* both parties claimed the same land under different executions against the original owner, Samuel Swartwout.[112] The plaintiff claimed the land under a levy of execution on an ordinary judgment against Swartwout. The defendant claimed under a levy and sale by the Federal Marshal pursuant to a Treasury distress warrant issued because Swartwout's account was over one million dollars short. Swartwout was not a party in the Supreme Court and does not appear to have challenged the finding of a shortage in his account. The challenge of the Treasury process was made only by the plaintiff, who was therefore asserting the constitutional rights of the original owner. The Court upheld the constitutionality of the Treasury process in an opinion that reviewed the history of the extent, to demonstrate that Treasury officials could be distinguished from ordinary taxpayers and subjected to different procedures outside of the common law courts:

> This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England, is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the act of 1820, now in question.

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111 59 U.S. (18 How.) 272 (1856).

112 This is the third appearance of Samuel Swartwout in these cases. Swartwout was the defendant in Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836). *See* text accompanying notes 246 & 247 *infra.* After that opinion established the liability of the collector, Swartwout retained substantial sums of money in order to be able to repay successful plaintiffs; unfortunately Swartwout became insolvent and the Treasury was unable to collect all the duties Swartwout had retained. To prevent a repetition of the Swartwout affair, Congress passed the statute considered in Cary v. Curtis, 44 U.S. (3 How.) 235 (1845). *See* text accompanying notes 248-50 *infra.*

> It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the declaration of independence and before the formation of the constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it.[113]

The opinion in *Murray's Lessee* does not support the proposition that the federal government may substitute administrative tribunals for the article III courts in all cases, or all "public rights" cases as suggested by Justice White in *Atlas*. If the sentence from *Murray's Lessee* quoted by Justice White in *Atlas*[114] is interpreted as establishing a public rights exception, the sentence is dictum unsupported by history; the careful historical analysis presented in *Murray's Lessee* compels the conclusion that the Court was not therein establishing a public rights exception. The entire opinion shows that the particular procedure in *Murray's Lessee* was upheld against the constitutional challenge because there was a clear, definite, and limited history that a particular procedure had existed prior to the Constitution and had not been altered by the Constitution. The public official, in accepting the office and trust, accepted the historical procedure for protecting the government revenue, but an ordinary citizen cannot be said to have relinquished the constitutional protection afforded by article III courts and the seventh amendment.

C. *The Misleading Authority of Modern Dictum*

In addition to the six tax, tax penalty and customs and immigration penalty cases represented by *Oceanic* and *Murray's Lessee,* Justice White summoned five other cases[115] to support the argument that the Court had recognized a public rights exception to the

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[113] 59 U.S. (18 How.) at 278-79.

[114] *See* note 92 *supra* & accompanying text.

[115] Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Crowell v. Benson, 285 U.S. 22 (1932); Block v. Hirsh, 256 U.S. 135 (1921).

seventh amendment prior to *Atlas*. The two most recent cases, *Curtis v. Loether* and *Pernell v. Southall Realty* clearly provide only dicta in support. The apparent support provided by the other three cases disappears upon a closer reading, because in none of the cases did the Court specifically uphold any procedure similar to OSHA against a seventh amendment challenge; if the cases established a public rights exception they did so only in dicta unsupported by precedent or analysis.

Justice White uses the opinion in *Block v. Hirsh* [116] in a manner that overstates the true holding by Justice Holmes. The authority derived from *Block* is summarized in a paragraph quoted by Justice White in *Atlas* to emphasize that the Court "squarely rejected" the seventh amendment challenge:

> The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. *If the power of the Commission established by the statute to regulate the relation is established,* as we think it is, by what we have said, *this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable.*[117]

The quotation alone does not explain the reasons for the conclusion that the seventh amendment does not apply. Justice White attempted to place the quotation in context by explaining that the challenged statute "temporarily suspend[ed] landlords' legal remedy of ejectment and relegat[ed] them to an administrative factfinding forum charged with determining fair rents at which tenants could hold over despite the expiration of their leases." [118] That description of the statute, while more accurate than the description written by Justice Marshall in *Pernell*,[119] still does not adequately explain the *Block* opinion. The actual holding of *Block* with respect to the seventh amendment issue was much more limited than the Court implied in *Atlas*.

The statute [120] challenged in *Block* created a rent control plan for the District of Columbia to deal with the disruption of the hous-

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116 256 U.S. 135 (1921).

117 430 U.S. at 452 (quoting Block v. Hirsh, 256 U.S. 135, 158 (1921)) (emphasis added in *Atlas*).

118 430 U.S. at 451-52.

119 "[The] statute transferr[ed] actions to recover possession of real property from the courts to a rent control commission." 416 U.S. at 382.

120 The Food Control and the District of Columbia Rents Act of Oct. 22, 1919, ch. 80, title II, 41 Stat. 297.

ing market in the District after World War I. As part of the rent control plan, the statute permitted tenants to hold over, after the expiration of a lease, at the rent set in the expired lease. The landlord could increase the rent only upon a determination by the administrative agency that a higher rent would be fair and reasonable.[121] In addition, a narrow exception to the hold over right was created in the statute if the owner wanted to occupy the premises or planned to tear down the building and rebuild; again the administrative agency determined whether the landlord could obtain possession under that exception.[122] The Court in *Block* divided five to four. Both the majority opinion by Justice Holmes upholding the regulation and the dissent by Justice McKenna focused on the scope of the police power and the asserted public interest in rents in the District. Justice Holmes upheld the rent control as a temporary measure made necessary by an emergency situation. The procedure was upheld because the Court found it reasonable, in light of the emergency, to suspend the ordinary remedies.[123]

In addition, the rent control statute did not completely suspend the remedy of ejectment, as stated in *Atlas*,[124] or transfer actions to recover possession from the courts to a rent control commission, as stated in *Pernell*.[125] The administrative procedure was required for only two issues: rent increases, and owner occupancy or reconstruction. All other issues remained unaffected by the statute, and could be determined in the usual manner.[126] A tenant who failed to pay rent had to be evicted in the usual manner, and rent overpayments and underpayments could only be recovered in ordinary legal actions in the courts.[127] The agency could determine the accuracy, sufficiency, and good faith of the landlord's notice to vacate to recover possession for the landlord's own use, but it could not evict a tenant who ignored a proper notice; the ejectment procedure was still judicial and between private parties. Even the administrative agency had to employ the courts to collect statutory

121 *Id.* at §§ 106-08, 41 Stat. at 300-02.

122 *Id.* at § 109, 41 Stat. at 301-02.

123 The Act was emergency legislation that expired at the end of two years. *Id.* at § 122, 41 Stat. at 304. "The regulation is put and justified only as a temporary measure. . . . A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." 256 U.S. at 157.

124 430 U.S. at 451-52.

125 416 U.S. at 382.

126 The tenant was protected from eviction only as long as the rent was paid and the conditions of the lease were fulfilled. The Food Control and the District of Columbia Rents Act of Oct. 22, 1919, ch. 80, title II, § 109, 41 Stat. at 301-02. The Act did not authorize the commission to hear eviction actions.

127 *Id.* at §§ 107 & 110, 41 Stat. at 300-01, 302.

penalties from landlords who violated the Act.[128] Justice Holmes, writing for the Court in *Block,* did not hold that there was no seventh amendment objection to entrusting landlord-tenant disputes to an administrative agency. The opinion establishes only that Congress may constitutionally empower an agency to determine certain facts when an emergency requires the government to regulate rates.[129] The facts found by the agency could not be relitigated in a subsequent court action,[130] but a judicial proceeding was required to force a recalcitrant party to act in accordance with any agency finding; [131] such a proceeding would be subject to the seventh amendment.

Any appearance that the quotation from *Block* supports the *Atlas* rule disappears when the circumstances of each case are compared. The temporary emergency that was the foundation of *Block* is absent in *Atlas.* The limited role of the rent commission in *Block* is not duplicated by the OSHRC in *Atlas.* Finally, *Block* hardly supports the announced rule of *Atlas* that administrative adjudication is possible when the government sues in its sovereign capacity to enforce public rights.[132] The government was not a party in *Block;* the lawsuit was only between a landlord and tenant.

In a similar fashion, any indication that support for *Atlas* can be found in the quotation from *Crowell v. Benson* [133] disappears upon a closer reading of the case. In a footnote to the *Atlas* opinion,[134] Justice White conceded that *Crowell* was not directly on point, because it involved private rather than public rights. *Crowell* was also an admiralty case, and the seventh amendment does not require a jury in admiralty cases.[135] Nevertheless, *Atlas* set out a

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128 *Id.* at § 112, 41 Stat. at 302.

129 Justice Holmes considered the statute as a form of regulation of rates of a business "clothed . . . with a public interest," 256 U.S. at 155, and therefore valid under the well established precedent of Munn v. Illinois, 94 U.S. 113 (1876). 256 U.S. at 157.

130 The Food Control and the District of Columbia Rents Act of Oct. 22, 1919, ch. 80, title II, § 106, 41 Stat. at 300.

131 An appeal to the court of appeals from the commission's determination was authorized, *id.* at § 108, 41 Stat. at 301, in which the commission's findings were to be reviewed on the administrative record only and not modified or set aside except for "error of law." If an owner collected any rent in excess of the amount fixed by the commission, the commission could recover an amount twice that excess. The tenant would be returned the excess paid and the balance was to be paid into the treasury. The doubled amount was similar to a civil penalty; it was recovered by an action in the municipal court. *Id.* at § 112, 41 Stat. at 302.

132 430 U.S. at 450.

133 285 U.S. 22 (1932).

134 430 U.S. at 450.

135 *Id.* n.7.

paragraph of dictum from *Crowell* that summarized the cases upholding factfinding by administrative agencies, again with emphasis added to the language that seemed to imply a public rights exception to the seventh amendment.[136] The Court in *Crowell,* however, was not interpreting the seventh amendment, because *Crowell* was an admiralty case. Of the fifteen cases listed in *Crowell,*[137] only three can be said to have involved the seventh amendment issue present in *Atlas,* and again the three cases were the tax collection precedents.[138] The dictum in *Crowell* that Justice White refused to disregard[139] in *Atlas* must be disregarded because it is completely unrelated to the facts of *Atlas.* In *Atlas* the government was attempting to extract money from the citizens as a civil penalty without a jury trial. The prior cases set out in *Crowell* do not support such a right; they merely establish two propositions unrelated to each other: (1) the government can collect taxes without a jury trial in the first instance, and (2) the government can employ administrative agencies to determine eligibility for some congressionally created "public rights," such as war risk insurance.[140] The latter, however, are not the rights involved in *Atlas.* The two propositions simply cannot be combined to support the *Atlas* rule. The tax cases cited in *Crowell* are strictly limited by the seventh amendment history to collection of taxes; claims against the government are not the same as claims by the government, and the remaining cases contain no discussion of any seventh amendment issue.

NLRB v. Jones & Laughlin Steel Corp.[141] is another case presented in support of *Atlas.*[142] Once again the actual holding is over-

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[136] 430 U.S. at 452.

[137] *See* 285 U.S. at 50-51.

[138] The three are Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856); Phillips v. Commissioner, 283 U.S. 589 (1931); and Passavant v. United States, 148 U.S. 214 (1893).

[139] "[Petitioners] would have us disregard the dictum in *Crowell v. Benson* . . . ." 430 U.S. at 456.

[140] The quotation from *Crowell* set out in *Atlas* includes several illustrations of administrative agencies with power to determine various matters such as "interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." 430 U.S. at 452 (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)). The non-tax examples are a mixed collection of rate making cases, claims against the government, and administrative cases in which there is no discussion of any seventh amendment issue. There is no discussion in *Crowell* or *Atlas* of how collection of a penalty by the government can be equated with, for example, a claim against the government under the War Risk Insurance Act, Silberschein v. United States, 266 U.S. 221 (1924), or a claim against the government by a military officer for lost personal property, United States v. Babcock, 250 U.S. 328 (1919).

[141] 301 U.S. 1 (1937).

[142] 430 U.S. at 453-54.

stated. The primary reasoning used by the Court in *Jones & Laughlin* to uphold the NLRB's order for reinstatement and back pay against the employer's seventh amendment challenge was that the remedy of reinstatement, even accompanied by an order for back pay, was the type of relief historically available only from an equity court. Therefore, the relief would not have been available at common law, and the seventh amendment, by its terms, does not require a common law jury in cases traditionally tried in equity. The damage award was deemed incidental to the equitable relief.[143] Justice White interpreted the *Jones & Laughlin* opinion to include a second ground for rejecting the seventh amendment argument: the action was also a suit at common law because it is "one unknown to the common law. It is a statutory proceeding." [144] Although the *Jones & Laughlin* opinion itself does not so state, Justice White concluded that the language was a clear holding that administrative proceedings, as well as equity and admiralty suits, are not subject to any seventh amendment challenge. That conclusion oversimplifies the actual holding of *Jones & Laughlin* as well as the precedents supporting the decision.

Even though the second ground identified by Justice White was not stated to be a separate and independent reason for rejecting the seventh amendment challenge, Justice White argued that it had to be so considered because the first ground alone would be "insufficient to decide the more general question of the NLRB's power to order backpay where . . . no such equitable order was sought." [145] The argument is weak because the Court did not decide that "more general question" in *Jones & Laughlin* and has never expressly addressed the question in the ensuing forty years.[146] It is hardly sound constitutional analysis to base an assault on the seventh amendment on an interpretation of an implication in an earlier opinion in which the issue was not discussed and in which not a single relevant precedent is cited. The only precedent cited as authority for the decision in *Jones & Laughlin* upheld factfinding by a court without a jury in a case that involved a claim against a city in the Oklahoma

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143 301 U.S. at 48-49.

144 430 U.S. at 453 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937)).

145 430 U.S. at 453 n.10.

146 The seventh amendment issue was not discussed in the only Supreme Court case listed in the *Atlas* footnote as "See Radio Officers v. NLRB, 347 U.S. 17, 54 (1954)." *Id. Jones & Laughlin* was ignored on seventh amendment issues until 1974. The lower federal courts did not follow any consistent interpretation of *Jones & Laughlin*. *See* Currie, *supra* note 91, at 1156 & n.248; Note, *supra* note 5, at 470-71 & n.77.

Territory.[147] Other cases not cited in *Jones & Laughlin* had allowed administrative or executive factfinding without a jury in cases such as pension claims against the government,[148] the right to government land under land grants,[149] and rate setting for public utilities.[150] No case had upheld such administrative factfinding in a case in which the government sought to exact money in a procedure analogous to that in OSHA.

If the language of *Jones & Laughlin* is interpreted as Justice White suggests in *Atlas* (following the lead of Justice Marshall in *Curtis v. Loether* and *Pernell v. Southall Realty* decided three years earlier) the statement is purely dictum unsupported by authority.[151] *Jones & Laughlin* supports the *Atlas* rule only if it is assumed that if the administrative procedure of one agency in a particular case does not violate the seventh amendment, then any agency and every administrative procedure will be equally constitutional. That assumption can be made only if history is ignored. The correct interpretation of the seventh amendment should not depend so strongly on the implications of a cryptic paragraph[152] when scores of past opinions are available to explain the scope of the seventh amendment. The assumption takes the existence of a public rights exception as a given fact, and eliminates any need to demonstrate that such a broad exception was known to the common law of 1791.

III. Restoring a Right to Jury Trial—The Tax Precedents

The preceding section of this Article has argued that there was no public rights exception to the seventh amendment known to the common law of 1791 and that no public rights exception had been established in the cases preceding *Atlas*. If *Atlas* created a public rights exception, it did so only by expanding the exception for administrative collection of taxes to include the collection of civil penalties. If it is recognized that *Atlas* rests on the tax collection

147 Guthrie Nat'l Bank v. Guthrie, 173 U.S. 528 (1899).

148 *E.g.*, Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840).

149 *E.g.*, Burfenning v. Chicago, St. P., M. & O. Ry., 163 U.S. 321, 323 (1896), McCormick v. Hayes, 159 U.S. 332, 341-47 (1895).

150 *E.g.*, Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930); Virginian Ry. v. United States, 272 U.S. 658 (1926).

151 Justice White in *Atlas* did not attempt to support his reading of *Jones & Laughlin* with any other precedent.

152 The seventh amendment issue was discussed in two paragraphs at the end of a 28 page opinion; clearly the jury trial issue was not the major concern of the Court. *See also* Frank Irey, Jr., Inc. v. Occupational Safety & Health Review Comm'n, 519 F.2d 1215, 1221-25 (3d Cir. 1975) (Gibbons, Aldisert, & Hunter, JJ., dissenting); *id.* at 1226 (Garth, J., dissenting), *aff'd sub nom.* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977).

precedents, then the opinion did not completely exclude the possibility of a civil jury trial in OSHA actions. A modern taxpayer has a statutory right to jury trial, not at the assessment or collection stage, but only in an action to recover the tax after it has been collected by the government.[153]

The opinion in *Atlas* does not discuss the possibility of a jury trial in a refund action. The parties did not discuss the possibility because the petitioners' challenge came after the proceedings before the OSHRC but before the penalty had been paid. One implication from the policy arguments presented in *Atlas* is that the Court intended to determine whether a right to jury trial exists at any stage of these proceedings, either before or after collection. In its discussion of the prior cases, the Court appears to use "initial" administrative adjudication interchangeably with adjudication "exclusively" by an administrative agency.[154] One implication from this is that the Court interpreted the tax collection precedents as establishing that there was never a constitutional right to a jury trial, either before or after collection. Although a first reading of the opinion suggests that the Court held there is never a right to a jury trial in OSHA penalty cases, the Court actually held only that there is no right to a jury trial before collection of the penalty.

Contrary to the implication of *Atlas,* the civil jury is not unknown in federal tax cases, and the seventh amendment guarantees a right to jury trial in these cases. Why there is a right to a jury trial has not always been clearly recognized; in recent years there has been almost no attention to the extent of any constitutional right. The analysis that establishes this right has not been examined for decades but must be explored today. Otherwise, *Atlas* will be the first step in misusing the narrow precedents from tax cases to destroy much of the protection of the seventh amendment.

This section will focus primarily on the history prior to 1856, the period not discussed in the *Atlas* opinion. That omission is unfortunate, because the early cases develop perspective and explain important distinctions in the later opinions. The analysis first examines the development of English tax procedures and the role of the common law jury; the common law can fully be understood only if its history is known. The available records of the colonial practices will then be examined to determine the influence of the English experience on colonial law. With this background from the English and colonial experience, the next section will discuss the

153 28 U.S.C. § 2402 (1970).

154 430 U.S. at 450.

early cases between 1791 and 1835. This period is most often completely ignored [155] because there are no United States Supreme Court opinions on point, but there is a wealth of lower federal and state court opinions that illuminates the seventh amendment history. Finally, the Supreme Court precedents will be examined to determine the extent to which the seventh amendment guarantees a jury trial in tax cases.

A. *The English History, 1601-1791*

To a modern reader, the history of tax collection in England appears complicated and incompletely recorded. Examination of the history is made especially difficult by a lack of historical analysis in the opinions of American courts that refer to bits of English history without an explanation of why the particular precedents chosen are relevant.[156] The most serious mistake is the assumption that all English tax collection procedures are equally relevant to the background of the seventh amendment. All English taxes were not the same, nor were they collected in the same manner. English tax cases can be understood and reconciled only by following the distinctions made in the common law. Therefore, the starting point must be an outline of early English tax history to determine which precedents are relevant to American decisions that interpret the seventh amendment.

For present purposes the focus on English taxation concerns the collection of three different kinds of revenue: the King's ordinary revenue, the King's extraordinary revenue, and the local taxes like the poor rate. The King's ordinary revenue came from eighteen different sources, including the rents of the demesne lands, shipwrecks, treasure-trove, forfeitures for offenses, escheats, and custody of idiots.[157] The King's extraordinary revenue included the land tax, malt tax, customs on merchandise imported and exported, internal excise duty, salt duty, post office duty, stamp duty, house and window duty, and servant duty.[158] Local taxes such as the poor rate

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155 *See, e.g.*, Plumb, *Tax Refund Suits Against Collectors of Internal Revenue*, 60 HARV. L. REV. 685, 688-89 (1947). *See also* Flora v. United States, 362 U.S. 145, 185-86 & n.5 (1960) (Whittaker, J., dissenting).

156 One example is the opinion of Justice Brandeis in Phillips v. Commissioner, 283 U.S. 589, 595-96 n.5 (1931), in which he incorrectly implies that administrative tax collection by the United States is derived from the English immediate extent in the second degree. The note documents the existence of each practice but fails to document the asserted relationship. There does not appear to be any evidence that the one was derived from the other.

157 1 W. BLACKSTONE, COMMENTARIES *281-306.

158 *Id.* *306-26.

were not part of the royal revenue; they were raised and spent locally under the authority of Parliamentary statutes.[159] Distinctions among the three types of taxation are important, because collection procedures were not the same and the place of the jury differed in litigation involving each type of tax.

It is also important to recognize the differences among the various English courts.[160] The four national courts of importance in England were Common Pleas, King's Bench, Exchequer, and Chancery. The Court of Common Pleas had jurisdiction chiefly over cases between subject and subject.[161] The core jurisdiction of King's Bench consisted of cases touching the King's interest, and encompassed criminal and civil cases and supervision over various state officials.[162] Exchequer had jurisdiction over revenue matters; Exchequer also exercised some equitable and common law jurisdiction.[163] Chancery was the principal court of equity.[164] The jurisdiction of King's Bench, Common Pleas, and Exchequer overlapped in many areas, however, because each court increased its jurisdiction by the use of pleading fictions. Exchequer did retain as a core of jurisdiction all cases touching the royal revenue, although not all tax litigation was in this court.

Exchequer employed several forms of procedure to collect the King's ordinary revenue; the most relevant to this discussion are the extent and the information. The information was the procedure used to collect forfeitures and to condemn seizures for violations of the trade laws; the procedure included the right to a jury trial.[165] The extent was used to collect debts, contract debts, and some of the ordinary revenue; the procedure seems to have involved a jury, although perhaps not the usual common law jury.[166] Neither procedure provided the foundation for the later development of ordinary tax collection methods in the United States.[167]

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159 *Id.* *359-65.

160 *See generally* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 73-170, 194-264 (1903).

161 *Id.* 76.

162 *Id.* 83.

163 *Id.* 104.

164 *Id.* 237-38.

165 *See* 3 W. BLACKSTONE, *supra* note 157, at *261-62. *See also* People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 231 P.2d 832 (1951).

166 *See* J. CHITTY, *supra* note 96, at 265-71.

167 The manner in which the practice of the information affects seventh amendment interpretation was discussed in the preceding section on the early penalty cases, *see* text accompanying notes 75-81 *supra*. The manner in which the practice of the extent affects seventh amendment analysis was discussed in the preceding section on *Murray's Lessee v. Hoboken Land & Improvement Co.*, *see* text accompanying notes 92-114 *supra*.

These Exchequer processes were developed over the centuries to collect the King's ordinary revenue. The extent and the information did not provide a model for tax collection in the colonies, however, because these taxes had declined in importance by 1600.[168] The forfeitures, collected through the information process, were common throughout England, but it is unlikely that many of the settlers were familiar with the extent procedure used to collect most of the other ordinary revenue. The extraordinary revenue and the poor rate were taxes to which most of the colonists were subject in England, so the tax collection procedures for the extraordinary revenue and the poor rate were more familiar to the colonists. These were the procedures transplanted to the New World, later to become part of the background of the seventh amendment.

The poor rate has the longer history of the two taxes. A Parliamentary statute in 1601 created the poor rate throughout England.[169] In each community the overseers of the poor were to raise money for the relief of the poor by collecting a poor rate similar in form to a real property tax. In addition to the overseers, the local justices of the peace were involved as supervisors of the overseers, as assessors, and as a board of review at quarter sessions.[170] If anyone did not voluntarily pay the rate assessed, the overseers could collect the amount under a warrant from any two justices of the peace authorizing distress and sale of the goods of the nonpayer.[171] The procedure was summary and not in the form of a lawsuit; the justices acted in an administrative rather than a judicial capacity. There were, of course, no trial at common law and no jury involved in the issuance of the warrant for nonpayment or in the distress and sale.[172] The procedure allowed assessment and collection of taxes with the relevant facts initially determined by an "administrative agency." The remedy for those aggrieved by this summary process was review by the justices of the peace at their quarter sessions.[173] The collection process was entirely local and did not involve the Exchequer or its processes at all.[174]

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168 *See* 1 W. BLACKSTONE, *supra* note 157, at *306.

169 An Act for the Relief of the Poor, 43 Eliz. c. 2 (1601). *See* 10 W. HOLDSWORTH, *supra* note 160, at 269-99 (1938). *See generally id.* 173-77, 211-14, 257-69.

170 10 W. HOLDSWORTH, *supra* note 160, at 288-89.

171 An Act for the Relief of the Poor, 43 Eliz., c. 2, § 4 (1601).

172 *See id.*

173 *See id.* § 6.

174 *See* authority cited note 169 *supra.*

The primary part of the extraordinary revenue, the land tax, has a more recent history.[175] This tax was adopted following the Glorious Revolution of 1688, when Parliament settled a revenue on the new rulers, William and Mary, and provided for a land tax to replace several other exactions of earlier royalty.[176] The method of collection for the land tax was similar to, although more involved than, that for the poor rate.[177] The country was divided into collection districts, each district was assigned a quota of the total tax, and collection of the portion of the annual tax required of the area was made by local assessors and collectors. The local subcollectors paid the money to head collectors who in turn paid the money to receivers general. The receivers general then sent the tax for their area to the Exchequer in London.[178]

Nonpaying citizens were not subject to Exchequer process; instead the local collectors had the power to levy and sell goods or chattels for nonpayment. Again the distress and sale was not authorized by any judicial order or law suit, but by a precept from the local commissioners.[179] A claim of an inaccurate assessment did not involve the judges because review of assessments was also done by the local commissioners[180] as an administrative function; it was not a common law suit and had no jury trial. Exchequer process was available against a receiver who did not account to the Exchequer for the money collected,[181] but even seriously defaulting receivers were rarely proceeded against by Exchequer extent.[182] There is no evidence that ordinary taxpayers were ever subject to the extent; they either paid the local collector voluntarily, or the local collector levied and sold their property.[183]

Both the poor rate and the land tax were collected without using common law actions in the courts, but the common law jury had a place in both collection processes. There was no right to a

175 *See generally* 1 W. BLACKSTONE, *supra* note 157, at *308-13; W. WARD, *supra* note 95, at 1-3.

176 An act for granting to their Majesties an Aid of four Shillings in the Pound for one year for carrying on a vigorous War against France, 4 W. & M., c. 1 (1692).

177 *Compare id.* with 43 Eliz., c. 2 (1601).

178 4 W. & M., c. 1, § 10 (1692).

179 *Id.* § 12.

180 *Id.* § 20. *See* 3 R. BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 47 (11th ed. 1769).

181 J. CHITTY, *supra* note 96, at 266.

182 *See* W. WARD, *supra* note 95, at 100-13.

183 *See* notes 97 & 98 *supra* & accompanying text. *See generally* G. GILBERT, AN HISTORICAL VIEW OF THE COURT OF EXCHEQUER AND OF THE KING'S REVENUES THERE ANSWERED (London 1738); G. GILBERT, TREATISE ON THE COURT OF EXCHEQUER (London 1758); W. WARD, *supra* note 95.

jury trial before the tax was collected because the collection did not involve the judicial function; the possibility of a jury arose after collection in common law actions challenging liability for the tax.[184] The role of the jury increased with the growth of the power of the common law courts. The contest between crown and Parliament in the 17th century over the power to tax was eventually won by Parliament. That contest was the most dramatic of the period, but during the same period that Parliament was increasing its power the common law courts were also expanding their jurisdiction. The procedure in the common law courts involved the jury trial; therefore, the increasing power of the common law courts meant an increase in the use of the jury.

An early and central figure in the development of the role of the jury was Sir Edward Coke. His efforts to elevate the common law courts were unsuccessful when he attacked Chancery; in the best-known showdown, James I clearly placed Chancery above the common law courts.[185] Other efforts are less well known, even though they were more successful, especially the effort to control the many specialized courts. The landmark opinion was that of Lord Coke sitting in King's Bench in the *Case of the Marshalsea.*[186] By 1600 the ancient Court of the Marshalsea existed only as a special court with its jurisdiction limited to disputes involving members of the royal household or anyone living within twelve miles of the King's residence.[187] In practice, however, the court did not restrict its jurisdiction to those limits, and in the *Case of the Marshalsea,* King's Bench successfully declared that it had the power to control such a limited court. The control was indirect; if such a court exceeded its powers, the party injured by the usurpation could sue the judges in a common law action in King's Bench.[188] The determination whether the limited jurisdiction had been exceeded was made by King's Bench, not by the specialized court. This enhancement of the power of King's Bench seems to have been unchallenged

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184 For example, an action against the collector in trespass, trover, or in assumpsit for money had and received. *See* notes 194-99 *infra* & accompanying text.

185 *See* Arguments Proving from Antiquity the Dignity, Power, and Jurisdiction of the Court of Chancery, 21 Eng. Rep. 576 (1616). *See generally* 10 W. HOLDSWORTH, *supra* note 160, at 648-50.

186 77 Eng. Rep. 1027 (K.B. 1612).

187 *See* 3 W. BLACKSTONE, *supra* note 157, at *75-76.

188 For example, in the *Case of the Marshalsea,* the suit was an action of trespass of assault, battery, wounding, and false imprisonment against the marshal of the Marshalsea, an officer of the staff, and a minor officer who had arrested and imprisoned the plaintiff under a precept from the Court of the Marshalsea.

and became an established precedent to be developed by later judges in King's Bench, Common Pleas, and Exchequer.[189]

A similar effort to control the local sewer commissions—restricted courts with power of levy and sale to collect assessments to support drainage facilities—resulted in a standoff between the common law courts and the Crown.[190] The privy council asserted authority to oust the common law courts from any jurisdiction to control the sewer commissions, and Lord Coke's refusal to accept that limitation was a reason for his discharge by James I as Lord Chief Justice,[191] but eventually the later judges also established the power of King's Bench to control the sewer commissions.[192]

These early assertions by the common law courts were part of a larger development, "for the common lawyers had formed the grandiose plan of making their system sole and supreme over all persons and causes." [193] Eventually solid doctrine emerged that subjected the administrative officials such as tax collectors to the power of the common law courts. The power was asserted in common law actions in which the local and Crown officials were required to defend their conduct by proving jurisdiction to take the action challenged by the injured citizen. The use of the common law actions in the common law courts necessarily involved civil jury trial as an essential part of the procedure. An official was not liable for an error in exercising jurisdiction actually granted, but the injured citizen could win if the official had exceeded his jurisdiction.

Two early cases illustrate the scope of the power of control exercised by the common law courts during this important period of development. The first, *Nichols v. Walker*,[194] involved the poor rate in a 1634 case. The action was in trespass against the church warden and the overseer of the poor of the parish of Hatfield. The defendants entered the plaintiff's house and seized his chattels, which were sold to collect the poor rate. Plaintiff claimed he was not subject to the poor rate because he was not an inhabitant of Hatfield

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189 The development in Exchequer was in the common law part of Exchequer and not the revenue part.

190 *See* Hetley v. Boyer, 79 Eng. Rep. 287 (K.B. 1614); The Case of Chester Mill Upon the River of Dee, 77 Eng. Rep. 1134 (K.B. 1609); Keighley's Case, 77 Eng. Rep. 1136 (K.B. 1609); The Case of the Isle of Ely, 77 Eng. Rep. 1139 (K.B. 1609).

191 10 W. HOLDSWORTH, *supra* note 160, at 648.

192 *See generally* 3 W. BLACKSTONE, *supra* note 157, at *73-74; 10 W. HOLDSWORTH, *supra* note 160, at 199-206.

193 T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 197 (5th ed. 1956). *See generally* 5 W. HOLDSWORTH, *supra* note 160, at 423-93.

194 79 Eng. Rep. 944 (K.B. 1634).

and owned no land in the parish. Apparently there were no factual issues for the jury to determine, because the defendants admitted the taking. They justified their action by claiming that the village of Tottridge, where plaintiff lived, was part of the parish of Hatfield. The jury found a special verdict, leaving the court to determine whether Tottridge was still part of Hatfield, even though there was no legal record of a separation. The court held for the plaintiff and determined that he was not subject to being rated in Hatfield. The defendants' claim that they should not be liable for the trespass because their acts were authorized by a warrant from the justices of the peace was rejected; the warrant provided authority only if the justices had jurisdiction, and the factual finding in King's Bench established there was no such jurisdiction.

A later case in Exchequer in 1668 [195] was an action of trover and conversion for goods levied and sold by the commissioners of excise in London to collect an excise on wine, a part of the King's extraordinary revenue. Again it appears that the jury returned a special verdict finding the facts; the case reported is the argument and decision of the full court on the legal question. The defense of the commissioners (that they were only mistaken in the exercise of their jurisdiction) was unsuccessful. By assessing a duty on wine that was later found not dutiable in the trover action, the commissioners exceeded their authority and were therefore liable to the plaintiff.

By 1791 the doctrine had matured, and established that officials collecting the poor rate, land tax, excise duty, or similar taxes were liable to a common law action in which King's Bench, Common Pleas, or Exchequer would determine whether the officials had properly determined that the tax was owed. The hardship on the officials of being subject to suit did not cause either the King or Parliament to oust the common law courts from the jurisdiction developed over two centuries. The only relief extended to the officials was a requirement of one month's advance notice of any suit brought against them with particulars (evidence at trial to be limited to that mentioned in any such notice), a chance to tender amends, a special pleading statute that allowed a defendant to plead the general issue and to defend under that plea with evidence of the particular authority, and the right to treble costs if plaintiff discontinued or lost his action.[196] The form of the action varied; liability

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[195] Terry v. Huntington, 145 Eng. Rep. 557 (K.B. 1668).

[196] *E.g.*, 24 Geo. 3, c. 70, §§ 30-34 (1783). *See also* An act for ease in pleading troublesome and contentious suits prosecuted against justices of the peace,

to a tax was challenged in actions of trespass,[197] trover,[198] and money had and received.[199] Significantly, the common law actions were not available to challenge the amount of an assessment or tax,[200] although a review of assessments was available from the justices of the peace at quarter sessions (or from the local commissioners in the case of the land tax).[201] Doctrine based on the *Case of the Marshalsea* did not make the officials liable for an erroneous assessment, because such a mistake would have been an error in exercising a granted jurisdiction and not an attempt to exercise jurisdiction beyond that granted.

These precedents developed in the English courts between 1601 and 1791 allowed a citizen to litigate most disputes over tax liability before a common law civil jury. The common law actions were not available if the liability had already been litigated in the Exchequer by condemnation of the goods.[202] The contest did not occur before the collection of the tax, because collection was accomplished without invoking the judicial power in the context of a lawsuit. Although in many cases the jury served only to return a special verdict and left the real contest to the decision of the judges, it cannot be denied that the traditional role of the jury in the tax cases was firmly established. The role and power of the jury that followed from this successful assertion of jurisdiction by the common law courts were transplanted to the colonies, where the jury eventually formed part of the background of the seventh amendment.[203]

B. *The American Experience Prior to 1791*

Published reports of American decisions prior to 1791 are rare; the few volumes available provide an extremely limited picture of

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mayors, constables, and certain other his Majesty's officers, for the lawful execution of their office, 7 Jac., c. 5 (1609).

197 *E.g.*, Williams v. Pritchard, 100 Eng. Rep. 862 (K.B. 1790); Harrison v. Bulcock, 126 Eng. Rep. 42 (C.P. 1788); Lord Amherst v. Lord Sommers, 100 Eng. Rep. 200 (K.B. 1788); Hutchins v. Chambers, 97 Eng. Rep. 458 (K.B. 1758). *See also* Patchett v. Bancroft, 101 Eng. Rep. 1024 (K.B. 1797).

198 *E.g.*, Eddington v. Borman, 100 Eng. Rep. 863 (K.B. 1790).

199 *E.g.*, Irving v. Wilson, 100 Eng. Rep. 1132 (K.B. 1791); Stevenson v. Mortimer, 98 Eng. Rep. 1372 (K.B. 1778); Campbell v. Hall, 98 Eng. Rep. 1045 (K.B. 1774); Camplin v. Bullman, 145 Eng. Rep. 755 (Ex. 1761).

200 Patchett v. Bancroft, 101 Eng. Rep. 1024 (K.B. 1797).

201 *See* 10 W. HOLDSWORTH, *supra* note 160, at 287-89; note 180 *supra* & accompanying text.

202 Scott v. Shearman, 96 Eng. Rep. 575 (K.B. 1774).

203 The English common law courts became less vigorous in asserting their jurisdiction after 1791, but by that time the doctrine had become established in the United States. *See* Earl of Radnor v. Reeve, 126 Eng. Rep. 1345 (C.P. 1801); Allen v. Sharp, 154 Eng. Rep. 529 (Ex. 1848).

the precedents on tax collection procedure and the jury trial known to the framers when the Constitution and the seventh amendment were adopted. Although frequently neglected, an examination of colonial practice is also necessary to a complete understanding of which tax precedents were part of the common law known in the colonies before 1791. The framers' understanding of the English common law that the seventh amendment was intended to preserve may not have included the entire English practice. English juries were involved in common law suits against tax collectors, but not in the extent procedure of the Exchequer, so two different lines of precedent could have been preserved. Fortunately, there is evidence from the American experience prior to 1791 to establish that jury determination of liability in taxpayer cases was part of the common law known in colonial procedure.

The best illustration of the use of a common law action to challenge tax liability is the Massachusetts case of *Erving v. Cradock*.[204] This 1761 case was reported and more widely known than most decisions because it was not an ordinary action. The suit was a test case brought as an attempt to create a new method of resisting collection of English duties in the colonies. George Cradock served as collector for the port of Boston. He had seized a ship owned by John Erving, charged it with trade in contraband, and libeled the ship in the court of admiralty where a jury trial was not available. In the admiralty court Erving agreed to a settlement providing for the return of the ship to him upon payment of one half of its appraised value to the court. The money was paid, distributed by the court as required, and the case ended in the admiralty court.

Upon termination of the admiralty procedure, Erving brought a trespass action against Cradock in the colonial court of common pleas, and alleged that the seizure had been illegal. The jury found for Erving and awarded him damages in excess of £600. On appeal to the superior court, another jury again found for Erving and awarded damages of £740. The liability of the collector to such a common law action does not appear to have been in dispute. The earlier proceedings in the admiralty court should have prevented such a verdict for Erving, because the issues once had been decided by a court of competent jurisdiction,[205] but the Massachusetts juries deliberately ignored the admiralty decision. Erving's victory, however, was short-lived. Cradock appealed to the privy council, in

[204] Quincy 553 (Mass. Prov. 1761).

[205] *See* Scott v. Shearman, 96 Eng. Rep. 575 (K.B. 1775).

which Erving did not contest the appeal but acknowledged full satisfaction of the judgment.[206]

The final result in *Erving v. Cradock* appears to establish that a decision of the admiralty court acting within its jurisdiction would be controlling in a subsequent common law action. Thus, Erving's attempt to create a new mode of resistance may not have been fully successful in this case, but many other similar actions were brought in an effort to hamper the collectors.[207] These cases show that liability of a tax collector to a common law suit was known in the colonies.[208]

The Parliamentary response to *Erving v. Cradock* was not an attempt to oust the common law courts' jurisdiction; that jurisdiction seems to have been recognized and accepted. Instead, Parliament provided protection for revenue officers in the form of a new statute that barred any action or suit if the admiralty court certified that there was probable cause for the seizure. If the admiralty court did not act, the plaintiff could still bring suit, but the potential recovery was limited to the ship or goods seized, and damages of two pence. The plaintiff was not entitled to costs, and the defendant officer could be fined no more than one shilling.[209]

In addition to case law, the debates on the adoption of the Constitution are another source of evidence for the background of the seventh amendment. The Constitution empowers Congress to tax[210] and to create a judicial system,[211] but it does not provide a method of tax collection or a procedure for challenging the collection. There are some references in the available material on the debates to taxes, tax collections, courts, and juries, but those references do not explicitly discuss the role of the jury in tax cases. They do reflect assumptions about the relation of the jury to tax matters and can provide evidence of the background of the seventh amendment. Caution is required before determining that the scattered history supports the position that the drafters expected the jury to play the role postulated thus far. Another commentator has suggested that some expected the jury would play a nullifica-

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206 Quincy 553, 557 n.4.

207 C. UBBELOHDE, *supra* note 77, at 33-35, 165-77.

208 *See* W. NELSON, AMERICANIZATION OF THE COMMON LAW 17, 31-32 (1975).

209 An Act Granting Certain Duties in the British Colonies and Plantations in America, 1764, 4 & 5 Geo. 3, c. 15, §§ 46 & 47 (1764) (repealed 1867).

210 U.S. CONST., art. I, § 8.

211 U.S. CONST., art III.

tion role in federal tax matters similar to that expected in suits brought by British merchants to collect debts.[212] That role for the jury would be unusual and not grounded in the English law, but the use of the jury to defeat just debts due unpopular creditors was not grounded in English common law and consequently not openly discussed. As the following excerpts indicate, the jury does not appear to have been intended to nullify tax collection; it was assumed that the jury could be used to control tax officials by common law actions.

The need for a guarantee of jury trial to protect the citizens against the tax collectors of the new federal government was raised in the published letters of opponents of the Constitution, discussed in the Federalist defense of the Constitution, and debated at some length in the ratifying conventions of Virginia and North Carolina. One early attack on the Constitution was the speech of Luther Martin before the Maryland House of Delegates, an attack later expanded into his pamphlet *Genuine Information.*[213] Martin feared that the Constitution gave the federal government arbitrary power to impose whatever taxes or duties it pleased. Worse still, the officers appointed to collect the federal revenue would not be accountable to the states nor be subject to the jurisdiction of the state courts. Therefore, he considered the proposed federal courts, and saw a danger:

> [I]n all those cases where the general government has jurisdiction in civil questions, the proposed constitution not only makes *no provision for trial by jury* in the *first* instance, but, by its appellate jurisdiction, *absolutely takes away that inestimable privilege;* since it expressly declares the Supreme Court shall have appellate jurisdiction both as to law and *fact.* Should, therefore, a jury be adopted in the *inferior court,* it would only be a *needless expense,* since, on an appeal, the *determination* of that jury, *even on questions of fact,* however honest and upright, is to be of *no possible effect.*
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> . . . .
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> Thus, Sir, *jury trials,* which have ever been the *boast* of the English constitution, which have been by our several *State constitutions* so cautiously secured to us,—*jury trials,* which have so long been considered the *surest barrier*

212 Wolfram, *supra* note 10, at 705-08.

213 Martin, *Genuine Information (1787)* in SECRET PROCEEDINGS AND DEBATES OF THE CONVENTION 1 (1845), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 172, 204 (M. Farrand ed. 1937).

> against *arbitrary power,* and the *palladium of liberty,* with the *loss* of *which* the *loss* of our *freedom* may be dated, are *taken away,* by the proposed form of government, not *only* in a *great variety* of questions between *individual* and *individual,* but in *every case,* whether *civil* or *criminal,* arising *under the laws* of the United States, or the *execution* of those laws. It is *taken away* in *those very cases,* where, of *all others,* it is *most essential for our liberty* to have it *sacredly guarded* and *preserved;* in *every case,* whether *civil* or *criminal,* between *government* and its *officers* on the one part, and the *subject* or *citizen* on the other.[214]

From this omission Luther concluded that

> every *arbitrary act* of the general government, and every *oppression* of all that *variety of officers* appointed under its authority, for the *collection* of *taxes, duties, impost, excise,* and other *purposes,* must be *submitted* to by the *individual,* or must be *opposed* with *little prospect* of *success,* and *almost a certain prospect* of *ruin,* at least in those cases where the *middle* and *common class* of citizens are interested; since, to *avoid* that *oppression,* or to *obtain redress,* the application must be made to one of the courts of the United States.[215]

The best known response to this and similar arguments is in *The Federalist* Number 83,[216] in which Hamilton developed several counterarguments:

> It has been observed, that trial by jury is a safeguard against an oppressive exercise of the power of taxation. This observation deserves to be canvassed.
>
> It is evident that it can have no influence upon the legislature, in regard to the *amount* of the taxes to be laid, to the *objects* upon which they are to be imposed, or to the *rule* by which they are to be apportioned. If it can have any influence, therefore, it must be upon the mode of collection, and the conduct of the officers entrusted with the execution of the revenue laws.
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> As to the mode of collection in [New York], under our own Constitution, the trial by jury is in most cases out of use. The taxes are usually levied by the more summary proceeding of distress and sale, as in cases of rent. And it

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214 *Id.* 80-81 (emphasis added).

215 *Id.* 82 (emphasis added).

216 THE FEDERALIST No. 83 (B. Wright ed. 1961) (A. Hamilton).

> is acknowledged on all hands, that this is essential to the efficacy of the revenue laws. The dilatory course of a trial at law to recover the taxes imposed on individuals, would neither suit the exigencies of the public, nor promote the convenience of the citizens. It would often occasion an accumulation of costs, more burthensome than the original sum of the tax to be levied.
>
> And as to the conduct of the officers of the revenue, the provision in favor of trial by jury in criminal cases, will afford the security aimed at. Wilful abuses of a public authority, to the oppression of the subject, and every species of official extortion, are offences against the government, for which the persons who commit them, may be indicted and punished according to the circumstances of the case.[217]

Hamilton's discussion may be accurate, but it is incomplete and does not directly meet the objections. The precedents did not allow common law actions or jury trials on the amount of revenue to be raised, the amount of any particular assessment, or the object to be taxed. Distress and sale could be used to collect, so that a suit to compel payment of taxes was not required. The important issue was whether the citizen could bring a common law action against the tax officials if they collected a tax that was not due, which would constitute a civil action historically tried by a jury. Hamilton did not deny that the common law allowed an aggrieved citizen to bring a civil action; that issue was ignored in a weak assertion that the jury in a criminal case would provide enough control, at least if the tax officials willfully abused their authority. Contrary to the conclusion based on a first reading, *The Federalist* does not establish that the jury was not a safeguard against oppressive tax collections, because the real role of the jury was ignored by Hamilton.

The records from other state ratification conventions indicate that the common law jury did have a role in tax collections, although those records do not contain direct statements on the scope of judicial review of the decisions of tax collectors.[218] Most of the debate over the taxing power concerned the question whether the new Congress should have the power of direct taxation or should be required to rely on the states to raise and collect taxes to meet federal requisitions. There was no discussion on the narrow question whether a citizen could obtain redress in a jury trial if a federal tax

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[217] *Id.* 522-23.

[218] *See generally* J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, ANTECEDENTS AND BEGINNINGS TO 1801, at 324-412 (1971).

collector mistakenly collected a tax that was not owed. The records do provide notes from related discussion concerning the need for a jury to control federal officials, which supports the conclusion that the delegates understood the law of 1788 to allow judicial review of the acts of tax collectors in common law actions. Although there is no assurance that the discussion by the delegates accurately reflects the finer points of judicial procedure, the debates seem to indicate a consistent assumption by the speakers.

In the Virginia convention, the issues of tax collection and juries were discussed at greater length than in any other state, primarily because of the speeches of Patrick Henry. Henry's objections to the new Constitution included opposition to the unlimited power of taxation and a distrust of the assurance that "these powers, given to Congress, are accompanied by a judiciary which will correct all." [219] The judiciary was too weak because the judges were dependent on Congress, and the protection of a jury trial was not assured in the new federal courts. Henry feared that the protection of the jury in the state courts would not suffice, because any actions against federal officials would necessarily have to be in federal court.[220] These arguments by Henry, joined by George Mason,[221] were answered in the convention. Governor Randolph stated his belief that federal taxes would be collected in the same manner as state taxes—voluntarily or by distress. Federal collectors need not be feared because "such an officer would be amenable to the laws, like any other citizen. He is only protected by the law where he acts lawfully . . . ." [222] John Marshall also indicated his understanding that the federal official would be liable to a common law action, in either the federal courts or the state courts, because "[t]here is no clause in the Constitution which bars the individual member injured from applying to the state courts to give him redress." [223]

The most extensive discussion of the common law liability of officials was in the North Carolina convention, as supporters of the Constitution responded to the claim that an impeachment of the tax collector was the only remedy an injured citizen could seek.[224] Two

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219 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 57 (J. Elliot ed. 1888).

220 *See id.* 167-68, 326-27, 577-78.

221 *Id.* 524-26.

222 *Id.* 127. *See also id.* 121-22.

223 *Id.* 554.

224 We shall undoubtedly, for instance, have a great number of tax-gatherers. If any of these officers shall do wrong, when we come to

delegates responded that impeachment was unnecessary because the injured citizen could always "get redress by a suit at law." [225] James Iredell, then a Federalist delegate and later Associate Justice of the Supreme Court, explained more fully:

> Mr. Chairman, the objection would be right if there was no other mode of punishing. But it is evident that an officer may be tried by a court of common law. He may be tried in such a court for common-law offences, whether impeached or not. As it is to be presumed that inferior tribunals will be constituted, there will be no occasion for going always to the Supreme Court, even in cases where the federal courts have exclusive jurisdiction. Where this exclusive cognizance is not given them, redress may be had in the common-law courts in the state; and I have no doubt such regulations will be made as will put it out of the power of officers to distress the people with impunity.[226]

Governor Johnston later spoke in support of Mr. Iredell, observing:

> Mr. Chairman, impeachment is very different in its nature from what the learned gentleman from Granville supposes it to be. If an officer commits an offence against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment only extends to high crimes and misdemeanors in a *public office.* It is a mode of trial pointed out for great misdemeanors against the public. But I think neither that gentleman nor any other person need be afraid that officers who commit oppressions will

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fundamental principles, we find that we have no way to punish them but by going to Congress, at an immense distance, whither we must carry our witnesses. Every gentleman must see, in these cases, that oppressions will arise. I conceive that they cannot be tried elsewhere. . . .

In answer to Mr. Taylor, Mr. SPAIGHT observed that, though the power of impeachment was given, yet it did not say that there was no other manner of giving redress—that it was very certain and clear that, if any man was injured by an officer of the United States, he could get redress by a suit at law.

4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 36-37 (J. Elliot ed. 1888).

[225] Mr. MACLAINE. Mr. Chairman, I confess I never heard before that a tax-gatherer was worthy of impeachment. It is one of the meanest and least offices. Impeachments are only for high crimes and misdemeanors. If any one is injured in his person or property, he can get redress by a suit at law.

Id. 37.

[226] *Id.*

> pass with impunity. It is not to be apprehended that such officers will be tried by their cousins and friends. Such cannot be on the jury at the trial of the cause; it being a principle of law that no person interested in a cause, or who is a relation of the party, can be a juror in it. This is the light in which it strikes me. Therefore the objection of the gentleman from Granville must necessarily fall to the ground on that principle.[227]

These few excerpts may not provide a complete picture in themselves, but they are consistent in their indication of which English precedents were known in the colonies. Equally important is the absence of any evidence that other precedent was followed in the colonies. There is nothing to indicate any understanding that the actions of tax officials would be immune from judicial review because administrative determinations would be conclusive. Similarly, there is no evidence that the Exchequer procedure of the extent was used to collect taxes in the colonies or that it was intended to be used to collect federal taxes without a jury under the new constitution.

The liability of tax collectors to common law actions developed in the English courts from the doctrine espoused in the *Case of the Marshalsea* [228] was the only theory upon which the case of *Erving v. Cradock* [229] could have been brought; it is also the only English precedent that would support the statements in the ratification debates that a federal official would be subject to an action in the state or federal court. The strong evidence that the founders understood and expected that taxpayers could obtain redress by a common law action against a tax official must therefore be taken as establishing that such actions were part of the common law for which the right to a jury trial was preserved by the seventh amendment.

C. *Liability of the Tax Collector: 1791-1835*

The United States Supreme Court did not determine whether a federal tax official could be sued by a taxpayer in a common law action until the issue was presented in 1836 in *Elliott v. Swartwout.*[230]

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227 *Id.* 48. *See also id.* 45-48.

228 77 Eng. Rep. 1027 (K.B. 1612). *See* text accompanying notes 186-90 *supra.*

229 Quincy 553 (Mass. Prov. 1761). *See* text accompanying notes 204-09 *supra.*

230 35 U.S. (10 Pet.) 137 (1836). *See* text accompanying notes 246-47 *infra.*

The effect of the seventh amendment on such suits was not expressly considered by the Court until 1845.[231] The Court's silence on this issue from 1789 to 1836 does not prove that federal tax collectors were completely immune from common law actions. A large number of cases from the lower federal courts and the state courts illustrates that the English doctrine of liability to a common law action had been brought across the Atlantic and applied in American courts.[232]

For the initial period immediately following 1789, only limited evidence is available because of the incomplete reports of cases in the early years. State appellate opinions were not yet systematically reported, and even a complete record of appellate opinions would provide an insufficient picture of the work of the trial courts. Several early opinions indicate that tax collectors were sued in the common law actions of trespass or trover, but most of the opinions are too brief to provide a reliable guide to the finer points of then current doctrine.[233] Opinions by Judge James Kent in 1803 and by Justice Joseph Story in 1830 describe the legal doctrines more fully.

The opinions of the New York Supreme Court of Judicature in 1803 in *Henderson v. Brown*[234] present some of the best early analysis. The action was in trespass against a federal tax collector who had collected the federal land tax by a distress on $325 in cash found in plaintiff's building. In 1798 Congress had enacted the tax that taxed lands, dwelling houses, and slaves.[235] Dwelling houses were to be assessed in one manner, and all other land was to be assessed separately, but the same assessor acted on both forms of property. The assessor had assessed plaintiff's building as a dwelling house; plaintiff asserted the building was a theater that should have been assessed in the other list at a lesser value. The plaintiff had not followed the procedure for review of the assessor's action that was provided by the statute. Instead, plaintiff brought an action

231 In 1845 the Court decided Cary v. Curtis, 44 U.S. (3 How.) 235 (1845). *See* text accompanying notes 248-58 *infra.*

232 *See* cases cited in note 245 *infra.*

233 *See, e.g.*, Beacher v. Bray, 1 Root 459 (Conn. 1792); Belt v. Perry, 4 H. & McH. 348 (Md. 1799); Bergen v. Clarkson, 6 N.J.L. 352 (1796); Buchannan v. Biggs, 2 Yeates 232 (Pa. 1797); Wilcox v. Sherwin, 1 D. Chip. 72 (Vt. 1797). Statutes such as the Massachusetts law allowing commonwealth officers to plead the general issue and defend with evidence that the act was done in the execution of the office also indicate that common law actions against officials were known. Act of Feb. 25, 1793, Laws of Mass. 560.

234 1 Cai. R. 92 (N.Y. 1803).

235 Act to lay and collect a direct tax within the United States, ch. 75, § 11, 1 Stat. 600 (1798).

for trespass against the collector and relied on the recent English cases that recognized trespass against the collector as an available remedy to test tax liability. The court gave judgment for the defendant, but divided three to two. Four opinions are extensively reported, but the strongest and decisive opinion was that of Judge James Kent.

Judge Kent's opinion distinguished and reconciled the seemingly conflicting precedents advanced by the parties and other judges. The collector derived his authority from the assessors, so to Judge Kent the important issue was the scope of the federal assessors' jurisdiction. He reasoned that the collector could be held liable in a common law action if he or the assessors had exceeded their jurisdiction by taxing property not subject to the tax statute. The collector was not liable in this case because the assessors had not exceeded their jurisdiction; at most they had committed an error in exercising granted jurisdiction.[236] *Henderson v. Brown* confirmed that the federal tax collector could be sued in a state court in a common law action of trespass, even though the plaintiff lost on the merits.

In later cases the New York courts entertained other trespass actions against federal officers charged with exceeding their authority. At least one plaintiff successfully sued the federal collector of customs for the Port of New York; [237] other plaintiffs were unsuccessful because of pleading defenses or because the goods had been previously libeled and condemned in federal court.[238] None of the opinions indicated, however, that the federal officials were immune from suit. One action in assumpsit established that a shipowner could challenge the authority of the customs collector to demand a duty in the common law action of assumpsit brought to recover the amount paid.[239] The New York courts also allowed such actions against state and local officials. In 1816 the court affirmed a jury verdict for the plaintiff in an action of trover against a collector for a school district, who had levied upon and sold property of the plaintiffs.[240] Again the court distinguished between a want of jurisdiction and erroneous assessment, and found that the collector had acted without jurisdiction.[241] The statute involved

[236] Henderson v. Brown, 1 Cai. R. 92, 102 (N.Y. 1803).

[237] Woodham v. Gelston, 1 Johns. 134 (N.Y. 1806).

[238] Van Brunt v. Schenck, 11 Johns. 377 (N.Y. 1814); Sailly v. Smith, 11 Johns. 500 (N.Y. 1814).

[239] Ripley v. Gelston, 9 Johns. 201 (N.Y. 1812).

[240] Suydam v. Keys, 13 Johns. 444 (N.Y. 1816).

[241] *Id.* 446-47.

in the case authorized taxation of residents of the town of Munroe; the plaintiffs established at trial that they were residents of New York City.

The case law had solidly established the liability of a tax collector to the common law trespass action prior to 1830 when the issue arose before Justice Joseph Story in the circuit court in *Thurston v. Martin*.[242] The defendant Martin was the collector of taxes for Newport, Rhode Island; he had arrested and imprisoned Thurston for nonpayment of the town tax, a nonjudicial remedy authorized by the tax law. Thurston claimed he was not required to pay the tax because he was not a resident of Newport. The jury was instructed to find for the plaintiff if they determined he was not a resident of Newport, and the jury did find for the plaintiff for $505. Justice Story denied the motion for a new trial in an opinion that traced the English precedents starting with the *Case of the Marshalsea*[243] and the American cases including *Henderson v. Brown*. He concluded that an official was liable in trespass if the action was beyond the jurisdiction of the court, board, or tribunal, but he was not liable if he made a mistake or acted irregularly in the exercise of that jurisdiction.[244] The history summarized by Justice Story demonstrates that the common law courts were not completely excluded from tax collection matters. Administrative collection by nonjudicial means was employed and considered constitutional, but the administrative factfinding did not bar a challenge in the common law courts before a civil jury if the taxpayer claimed that no tax was owed.[245]

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[242] 23 F. Cas. 1189 (C.C.D.R.I. 1830).

[243] 77 Eng. Rep. 1027 (K.B. 1612).

[244] Thurston v. Martin, 23 F. Cas. 1189, 1191 (C.C.D.R.I. 1830).

[245] Other reported cases from many states show that the tax collector was generally subject to common law liability if the taxpayer alleged no tax had been owed. Connecticut (Allen v. Gleason, 4 Day 376 (1810) (trespass and false imprisonment); Thames Mfg. Co. v. Lathrop, 7 Conn. 550 (1829) (trespass); Prince v. Thomas, 11 Conn. 472 (1836) (false imprisonment and conversion)); District of Columbia (Farmers Bank v. Fox, 4 D.C. (4 Cranch) 330 (1833) (trespass)); Maine (Huse v. Merriam, 2 Me. 375 (1823) (trespass against assessor to challenge legality of tax); Mussey v. White, 3 Me. 290 (1825) (trespass against assessors to challenge legality of procedure)); Massachusetts (Rising v. Granger, 1 Mass. 47 (1804) (assault, battery, and false imprisonment); Martin v. Mansfield, 3 Mass. 419 (1807) (trespass); Thurston v. Little, 3 Mass. 429 (1807) (trespass); Capen v. Glover, 4 Mass. 305 (1808) (trespass); Pease v. Whitney, 5 Mass. 380 (1809) (trespass); Agry v. Young, 11 Mass. 220 (1814) (pleading decision holding trespass is proper action and not case)); New Hampshire (Johnson v. Dole, 4 N.H. 478 (1828) (trespass); Cloutman v. Pike, 7 N.H. 209 (1834) (trespass)); New Jersey (Van Dien v. Hopper, 5 N.J.L. 764 (1820) (trespass)); New York (Saunders v. Springsteen, 4 Wend. 429 (1830) (case); Wheeler v. Anthony, 10 Wend. 346 (1833) (trespass)); North Carolina (Sears v. West, 5 N.C. 291 (1809) (trespass); Stewart v. Davis, 7 N.C. 244 (1819) (trespass)); Vermont (Bates v. Hazeltine,

D. *The Tax Collector in the Supreme Court*

The Supreme Court did not decide whether a tax or customs official was liable in a common law action until 1836. When a case did reach the Court, the nature of the dispute was slightly different from that in most of the earlier cases; the common law action had developed as a procedure to contest whether any tax liability existed and not to contest the amount of the tax. *Elliott v. Swartwout* [246] was an action in assumpsit by an importer against the collector of the Port of New York to recover an overpayment of duties. The importer conceded that the goods were subject to duty but argued that the correct rate was ten percent and not the fifty percent levied by the collector. The opinion of the Court did not discuss the distinction in the earlier cases between collection of more than the authorized amount and collection when no tax was due.[247] The Court relied on the earlier English and state precedents to establish that the collector was personally subject to a common law action to recover an excess of duties, if the taxpayer gave notice of the claim of error at the time of payment. Thus the opinion recognized greater common law liability than seems required by the earlier cases and may have recognized a right to trial by jury in cases not included in the original scope of the seventh amendment.

The Supreme Court adhered to the rule in *Elliott v. Swartwout* for only nine years; in 1845 the Court reversed its position in *Cary v. Curtis* [248] and held that a cause of action for an overpayment could not be maintained against a collector. The stated reason for the change in doctrine was an 1839 statute [249] that required the collector to account immediately to the treasury for all duty collected. The Court reasoned that because the collector could no longer hold the money pending resolution of the action, it would be unfair to require the collector to refund money already paid into the treasury. The Court emphasized that *Elliott v. Swartwout* was not controlling because the 1839 statute had converted the tax collector from an

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1 Vt. 81 (1828) (trespass); Waters v. Daines, 4 Vt. 601 (1832) (trespass)); Virginia (*See* Kinney v. Beverley, 12 Va. 318 (1808) (argument of Attorney General Nicholas and Randolph: "Where a man fails to pay his taxes, his *personal* estate, it is admitted on all hands, is liable to be taken and sold *without process*. . . . If the proceedings are irregular, he may bring a suit to recover it, and have all the benefit of a trial by Jury." *Id.* 323-24)).

[246] 35 U.S. (10 Pet.) 137 (1836).

[247] In Whitbread v. Brooksbank, 98 Eng. Rep. 970, 972 (K.B. 1774), Lord Mansfield observed that an action for money had and received would not lie against an officer of revenue for an overpayment unless the defendant consented to the suit.

[248] 44 U.S. (3 How.) 235 (1845).

[249] Act of Mar. 3, 1839, c. 82, § 2, 5 Stat. 348 (1839).

agent of the federal government into a conduit for tax revenues.[250] Thus, the action in assumpsit for money had and received was no longer available because this common law action would lie only against an agent with the power to retain the funds he had collected for the principal. The Court attempted to allay fears expressed by the dissenting Justices by stating that "the answer to the assertion . . . [that] the party is debarred all access to the courts of justice, and left entirely at the mercy of an executive officer" [251] was that the taxpayer could bring suit under other common law causes of action such as replevin, detinue, and trover. This may be an inadequate response to the constitutional concern because these other common law writs all related to actions against one who had wrongfully taken goods and not money.[252] Thus a person who paid his taxes in cash might be excluded from a cause of action against the tax collector, while an individual whose goods were taken might still be able to bring an action. *Cary* can be read as establishing that there is no constitutional requirement that a taxpayer be able to bring an assumpsit action against a tax collector (whatever his relation to the government) for either an overpayment or a payment when no tax is due. Because the majority felt it could dispose of the case before it without explaining the constitutional issue, *Cary* should be read today as limited to its facts—an action for overpayment.[253]

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250 44 U.S. (3 How.) at 241-42.

251 *Id.* 250.

252 *Trover* lay for damages for the conversion of specific personal property, where the plaintiff was entitled to the immediate possession thereof. *Detinue* lay for the recovery of a specific chattel wrongly detained (or its value—the option lying with the defendant), together with damages for its detention. *Replevin* lay to recover specific personalty wrongfully taken and detained, together with damages for its detention.

C. CLARK, LAW OF CODE PLEADING 80 (2d ed. 1947).

253 The limited holding of *Cary v. Curtis* was recognized in DeLima v. Bidwell, 182 U.S. 1 (1901). Even though Congress had attempted to make the administrative decision final and had attempted to exclude the possibility of a common law action against the collector, note 267 *infra*, the Court held that in some cases a taxpayer could still bring a common law action to recover duty paid under protest. The dispute was not over the classification of the goods or the amount of duty; the plaintiff insisted that the goods were not imported at all so that the collector had no jurisdiction to assess any duty. The Court relied on *Elliott v. Swartwout* to hold that the action was properly brought. *Id.* 174-80. The seventh amendment was not discussed. *See also* In Re Fassett, 142 U.S. 479 (1892).

DeLima and *Fassett* have been distinguished in recent district and circuit court opinions as applicable only to the particular statute involved. *E.g.*, Argosy Limited v. Hennigan, 404 F.2d 14 (5th Cir. 1968); Akins v. Saxbe, 380 F. Supp. 1210 (D. Me. 1974). *See also* cases cited *id.* 1216. Neither *DeLima* nor *Fassett* has been overruled or limited by the Supreme Court, so both still affirm the vitality of the common law action preserved by the seventh amendment. The recent opinions do not discuss the seventh amendment issue, which cannot so easily be dismissed as a "somewhat aged judicial antecedent." 404 F.2d at 17.

The real problem in *Cary v. Curtis* is the mode of analysis adopted by the Court—analysis that emphasizes fine distinctions among the common law writs. It is the essence of the common law rights that is important. It is difficult to believe that the drafters of the seventh amendment sought to preserve the idiosyncracies of the common law system of writs. It is much more likely that the drafters were seeking to protect the fundamental rights that could be culled from the common law system, such as the right to bring suit against the collector of taxes, whatever the collector's relationship to the government. As Justice Story reminded the majority, the "government itself is not suable at all." [254] It was therefore important to assure that citizens would have some means of redress against the individual who acted for the government. The debates from the ratification period show [255] that the right to a jury trial was viewed as a means of protection against federal officials in federal courts. Justice Story pointed out in his dissent in *Cary:*

> [I]f Congress possess a constitutional authority to vest such summary and final power of interpretation in an executive functionary, I know no other subject within the reach of legislation which may not be exclusively confided in the same way to an executive functionary; nay, to the executive himself. Can it be true that the American people ever contemplated such a state of things as justifiable or practicable under our Constitution? I cannot bring my mind to believe it . . . .[256]

Justice McLean emphasized the absence of trial by jury: "The danger is in sanctioning the principle. . . . I object to it because it is dangerous and may be ruinous. It takes from the citizen his rights—rights secured to him by the Constitution; the trial by jury, in a court of law." [257] The dissents of the two Justices did not convince their brethren,[258] but they did find a receptive ear in Congress.

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254 44 U.S. (3 How.) at 256.

255 *See* text accompanying notes 213-27 *supra.*

256 44 U.S. (3 How.) at 253 (Story, J., dissenting).

257 *Id.* 265-66 (McLean, J., dissenting).

258 Justice Wayne dissented without an opinion, a fact not recorded by the Reporter. MINUTES OF THE SUPREME COURT OF THE UNITED STATES, *Cary v. Curtis,* Tuesday, January 21, 1845. The division was therefore 4-3; the opinion by Justice Daniel was supported only by Chief Justice Taney and Justices McKinley and Catron.

By the end of the next month Congress amended the statute interpreted by the Court [259] and expressly provided a right to a jury trial in actions against the collector for refunds.[260]

Customs duties do not directly affect the majority of citizens today; internal revenue taxes are more important. The potential common law liability of the collector was first recognized in an internal revenue case in *City of Philadelphia v. Collector*.[261] The issue in that case was whether the circuit court had jurisdiction over a removed action against the collector.[262] In its discussion finding jurisdiction, the Court stated that an action of assumpsit was the appropriate remedy to recover taxes assessed illegally or erroneously [263] and cited *Elliott v. Swartwout* and the related opinion in *Bend v. Hoyt*.[264] Since then, the right to challenge federal tax liability in a common law civil action has remained firmly established; in fact it is now so well established that the reason for it has been

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259 *Id. Cary v. Curtis* was decided on Jan. 21, 1845. Senator Huntington first mentioned corrective legislation on Jan. 23. CONG. GLOBE, 28th Cong., 2d Sess. 179 (1845). The bill was introduced on Jan. 27, with these remarks:

> Mr. Huntington, on leave, introduced a bill explanatory of the act making appropriation for the civil and diplomatic expenses of government for the year 1839.
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> Mr. Huntington remarked that the judiciary had decided that the provision of the law of 1839, which this bill was intended to explain, took away the right of the importer to recover back moneys, or to try the question of right to recover back moneys, in any court of law or equity in any State of the Union, paid as duties on goods to the collector, under protest; and that this bill was intended to give the right to the importer to maintain action at law against the collector, or other person acting as collector, to ascertain and try the legality and validity of the demand for the payment of duties on goods, wares, and merchandise which are not authorized to be paid, in part or in whole, by law.
>
> Mr. Woodbury remarked that the proviso of the law of 1839 alluded to was not intended to bar the right of the importer to maintain a suit at law for the recovery of duties illegally collected, but to prevent the money thus collected from laying in the hands of the collector.
>
> Mr. Huntington said that such he knew was the intention of the law, and to give the power money illegally collected when that fact was established.

Id. 195.

260 The Act was approved on Feb. 26, 1845, only five weeks after *Cary v. Curtis*. Ch. 22, 5 Stat. 727 (1845).

261 72 U.S. (5 Wall.) 720, 731-33 (1866). *See also* Erskine v. Van Arsdale, 82 U.S. (15 Wall.) 75, 77 (1872) ("Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them.").

262 72 U.S. (5 Wall.) at 727-28.

263 *Id.* 731.

264 38 (13 Pet.) 263 (1839). The defendant raised *Cary v. Curtis* as a defense, but the Court did not discuss the merits of the argument, 72 U.S. (5 Wall.) at 732.

forgotten.[265] This failure to recall the history of the action against the collector has led some judges to erroneous conclusions. For example, Justice Cardozo concluded that "[a] suit against a Collector who has collected a tax in the fulfillment of a ministerial duty is today an anomalous relic of bygone modes of thought." [266] A partial explanation is that by 1933 the history behind *Elliott v. Swartwout* and *Cary v. Curtis* had become less well known because Congress had attempted to take away the right to a jury trial in customs cases by providing an exclusive statutory procedure for challenging customs determinations.[267]

Today, federal taxes raise much more revenue and affect many more citizens more often than do customs duties. The effect of the seventh amendment on tax refund suits has been discussed very little recently. Constitutional analysis has been unnecessary for a quarter century because the right to a jury trial has been statutorily guaranteed since 1954, if the taxpayer pays the tax and sues for a refund in district court.[268] The relevant congressional hearings and reports trace the right to a jury trial to the common law precedents discussed in *Elliott v. Swartwout* [269] and make clear that the 1954 statute

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[265] For example, the earliest twentieth century opinion discussed the right to jury trial only in a brief paragraph of dictum that concluded without careful analysis that "the right . . . to a jury [in a suit against the collector] is not to be found in the Seventh Amendment and the Constitution but merely arises by implication from the provisions of § 3226, Revised Statutes, which has reference to a suit at law." Wickwire v. Reinecke, 275 U.S. 101, 105 (1927). Later opinions repeated the dictum and enhanced the apparent authority of the conclusion, but again there was little analysis of the history of the action against the tax collector. *See, e.g.*, Phillips v. Commissioner, 283 U.S. 589, 599 n.9 (1931).

[266] Moore Ice Cream Co. v. Rose, 289 U.S. 373, 382 (1933).

[267] The Act of Feb. 26, 1845, c. 22, 5 Stat. 727 became § 3011 of the Revised Statutes of 1873. That section was repealed in 1890. Act to simplify the laws in relation to the collection of the revenues, ch. 407, § 29, 26 Stat. 141-42 (1890). At the same time Congress made the administrative decision final, *id.* at § 13, 26 Stat. at 136-37, unless review was sought in the circuit court, *id.* at § 15, 26 Stat. at 138, and declared that the collector was not liable to an ordinary civil action, *id.* at § 25, 26 Stat. at 141. The Supreme Court held that the statutory procedure was exclusive, and that the circuit courts had no jurisdiction to hear a common law action against the collector if the goods were actually imported and concededly subject to some duty. Schoenfeld v. Hendrichs, 152 U.S. 691 (1894); Arnson v. Murphy, 109 U.S. 238 (1883). It was still possible to bring some common law actions. *See* note 253 *supra.*

[268] 28 U.S.C. § 2402 (1970). The jury trial provision was added by Act of July 30, 1954, ch. 648, § 2(a), 68 Stat. 589.

[269] "[N]o one has seriously suggested that the right to a trial by jury be denied entirely. It has been retained in the form of a suit against the collector. That, incidentally, cannot be constitutionally denied the taxpayer, as I understand constitutional law." *Civil Actions in District Courts to Recover Taxes: Hearings on S. 252 Before a Subcomm. of the Senate Comm. on the Judiciary,* 83d Cong., 1st

was a reaffirmation of the common law liability of the tax collector recognized by the Supreme Court in 1836.[270] In 1966 Congress provided that suits for tax refunds in the district court must be brought against the United States;[271] if the taxpayer sues the collection officer, the United States must be substituted as the defendant.[272] This change in the caption of the suit may make the historical link with the common law precedents less obvious, but the seventh amendment would still guarantee a jury trial in such actions if the

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Sess. 3 (1953) (statement of Elbert P. Tuttle, General Counsel of Treasury Department).

> Suits Against the Director
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> The right to bring suit against one who illegally assesses a tax is not created by any statutory provision but derives from the common law, where it was a well-established principle that a person unlawfully exacting a sum from another could not avoid liability merely by showing that he had paid the moneys over to a third person. This rule of law, as applied to collectors of taxes, received early affirmation in the Federal courts of the United States.
>
> In *Elliott v. Swartwout* [10 Peters 137 (1836)], it was held that, where duties were paid under protest to the collector that they were too high, an action would thereafter lie to recoup the amount erroneously obtained. The Supreme Court cited as authority for this ruling, inter alia, the following: *Irving v. Wilson,* 4 T.R. 485 (1791); *Greenway v. Hurd,* 4 T.R. 554 (1792); *Sadler v. Evans,* 4 Burr. 1984 (1766); *Snowdon v. Davis,* 1 Taunt. 359 (1808); *Clinton v. Strong,* 9 Johns. 370 (1812); *Hearsey v. Pruyn,* 7 Johns. 179 (1810); and *Frye v. Lockwood,* 4 Cow. 454 (1825).
>
> In Erskine v. Van Arsdale, [15 Wall. 75 (1872)], the Supreme Court summarized the rule as it then existed as follows:
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> > Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them (p. 77).
>
> For all practical purposes, the proceeding against the collector is now a virtual fiction, for in those instances in which the collector or director as he is now called, has lawfully acted within his official capacity, the United States is the real party in interest and has assumed full liability. The artificial nature of the suit against the collector was recognized at an early date when the Federal Government, by statute, expressly provided that moneys recovered in an action against the collector for taxes exacted by him during the performance of his official duties would be paid out of the United States Treasury. [Rev. Stat. § 989 (Mar. 3, 1863); 28 U.S.C. 2006].
>
> There are two important considerations relating to personal suits against the director to recover taxes. The first, as noted before, is that this is the only remedy for obtaining redress against an overassessment in which a jury trial may be had.

H.R. REP. No. 662, 83d Cong., 1st Sess. 2-3 (1953).

See also H.R. REP. No. 659, 83d Cong., 1st Sess. 2 n.4 (1953) ("This right of action derives from the common law."), *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 2716, 2717 n.4.

270 S. REP. No. 115, 83d Cong., 1st Sess. 3 (1953) ("This bill gives no new substantive rights to the taxpayers . . . .").

271 I.R.C. § 7422(f)(1).

272 *Id.* § 7422(f)(2).

United States Code did not. The 1966 statute was not an attempt by Congress to restrict the seventh amendment right to a jury; the seventh amendment issue was not discussed in the congressional reports.[273]

The common law preserved by the seventh amendment begins with the *Case of the Marshalsea* and spans the two centuries during which the common law courts in England expanded their jurisdiction to control the officers of the government. The common law of this period, including that of 1791, clearly recognized the right of a taxpayer to a jury trial in an action against the collector. Therefore, the precedents do not support the conclusion of Justice White in *Atlas* that "taxes may constitutionally be assessed and collected . . . with the relevant facts in some instances being adjudicated only by an administrative agency." [274] The seventh amendment preserves the substance of these common law rights, not just the form of the writs. Thus the amendment guarantees that a taxpayer may obtain a civil jury trial to determine whether the alleged tax is owed in an action brought to recover a tax after it has been paid to the collector. The constitutional right to a jury trial to contest the amount of tax due may be open to question, but the right to contest the basic liability for tax is preserved by the seventh amendment.

IV. The Future Direction of the Seventh Amendment Debate

The attempt in *Atlas* to carve out a new exception to the seventh amendment to permit administrative factfinding in public rights cases poses a serious threat to a fundamental guarantee of the Bill of Rights. A forthright attack on the seventh amendment has replaced the "silent approaches and slight deviations" [275] of the past.

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[273] *See* H.R. Rep. No. 1915, 89th Cong., 1st Sess. 5-7 (1966); S. Rep. No. 1625, 89th Cong., 1st Sess. 6-7, *reprinted in* [1966] U.S. Code Cong. & Ad. News 3676, 3681-82. The United States was required as the named defendant instead of the actual collector because the 1966 legislation also required that all tax returns be filed with one of the seven regional service centers, and not with one of the 58 district director's offices. An action against the director of the service center could be brought only in the district where the director resided because of venue requirements, a rule which would concentrate tax actions in only seven federal courts and inconvenience to taxpayers forced to sue outside their home state. Instead of keeping the suit against the collector and amending the venue statute, Congress made the United States the named defendant so that the action could be brought where the taxpayer resided. The change was not described as an attempt to overrule the seventh amendment, but as "minor amendments designed to serve taxpayer convenience and preserve jurisdictional rules that are favorable to taxpayers in tax litigation." 112 Cong. Rec. 21,788 (1966) (remarks of Sen. Byrnes).

[274] 430 U.S. at 450.

[275] United States v. Boyd, 116 U.S. 616, 635 (1886).

> [I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.

Notwithstanding the asserted conclusion of *Atlas* that the Court will prevent Congress from making inroads into the seventh amendment,[276] there exists no standard to judge whether Congress has gone too far once the Court abandons the firm lessons of history. Precedent cannot provide any further content to the rule stated in *Atlas* because the rule is contrary to the common law precedents. Congress and the Court have tampered with the firm protection of the seventh amendment in the hope that an administrative agency will be better able than a court and jury to provide "speedy and expert resolutions of the issues involved." [277] The historical parallel is obvious but ignored by both Congress and the Court: the same demand for efficiency by the Crown resulted in the expansion of the admiralty courts in the colonies, a method for avoiding the common law jury so objectionable that it was a declared reason for revolution.[278]

The seventh amendment was added to the Constitution to preserve the common law right as fully as possible and to ensure that any future Congresses would be "rendered . . . powerless . . . to create new rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries." [279] The seventh amendment does not forbid the creation of administrative agencies; agencies that do not act in the nature of a common law court are outside the scope of the amendment.[280] The seventh amendment does not bar administrative factfinding even in matters similar to actions at common law; [281] the amendment only guarantees that the common law jury will be able to perform its historic function. Whether a modern procedure establishes a court, board, or agency that is a substitute for a common law court, and whether the common law jury had any historic function in such matters can-

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> This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Id.

276 430 U.S. at 461 n.16.

277 *Id.* 461.

278 "For depriving us, in many cases, of the benefits of trial by jury . . . ." Declaration of Independence.

279 430 U.S. at 460.

280 *See* notes 137-40 *supra* & accompanying text.

281 *See* note 286 *infra.*

not be correctly determined by looking only at modern dicta that gloss over established distinctions. Every historical exception to the seventh amendment listed in *Atlas*—equity, admiralty, tax collection, military justice, and condemnation [282]—is an exception grounded in the specific history of each action at common law. As a group, these actions constitute simply a collection of discrete categories and not a public rights exception. The absence of such an exception compels the conclusion that *Atlas* was incorrectly decided. The only procedure that would comply with the seventh amendment would be enforcement by *de novo* civil action in a state or federal court.

The Supreme Court has not ruled an end to the debate over the application of the seventh amendment to the OSHA procedure and others similar to it. The *Atlas* opinion sets forth the strongest argument that can be made for excluding the jury, but the Court did not foreclose the possibility that further evidence could require reconsideration of the application of the seventh amendment to OSHA or similar procedures.[283] Two possible avenues for reconsideration are open on issues not decided in *Atlas:* (1) whether the OSHA procedure violates article III of the Constitution by assigning judicial power to a body that is not a court; and (2) whether the defendant can obtain a civil jury trial by paying the penalty assessed by OSHA and bringing an action for a refund.

The objection that the OSHA procedure violates the separation of powers doctrine because the agency is not a court under article III was the first issue stated in the petitions for certiorari filed by Atlas and Irey. Although it may be difficult to separate the article III and seventh amendment issues, the Court did so by limiting its grant of certiorari to the seventh amendment question. It is therefore still open to the courts of appeals and the Supreme Court to decide whether an agency can be given the adjudicatory power that *Atlas* approved without giving judicial power to a body other than an article III court.[284] Full discussion of the article III issue is beyond the scope of this Article, but many of the same cases that provide the history of the seventh amendment also supply the history for article III. Those agencies or executive officers who were allowed to find facts without a jury were either not acting in the nature of

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[282] *Id.* 458. On condemnation actions, *see* 5 MOORE'S FEDERAL PRACTICE ¶ 38.31[1], at 233 (2d ed. 1977). On military justice, *see id.* ¶ 38.08[5], at 70 & n.50; H. MOYER, JUSTICE IN THE MILITARY 499 (1972).

[283] *See* 430 U.S. at 461 n.16.

[284] The courts of appeals have not yet read *Atlas* as an invitation to reopen the article III question. *See, e.g.*, Penn Dixie Steel Corp. v. Occupational Safety & Health Review Comm'n, 553 F.2d 1078 (7th Cir. 1977); Dorey Elec. Co. v. Occupational Safety & Health Review Comm'n, 553 F.2d 357 (4th Cir. 1977).

the common law courts (as in determining claims against the government) or, if acting in the nature of common law courts (as in determining how much was owed the government), were assessing taxes or duties. If the historic distinctions are observed, there is no precedent that would allow an administrative agency such as OSHRC to exercise the kind of adjudicatory power that *Atlas* implied had been given to the agency.

Although it may be unlikely that the Court will soon reexamine the same seventh amendment arguments presented in *Atlas,* the second avenue for reconsideration is open because the court in *Atlas* did not decide whether absence of the jury from factfinding in the first instance means that the jury is not required at any stage. Thus, it may be possible for an employer to obtain a civil jury trial by paying the OSHA penalty and bringing suit for a refund in federal district court. If the administrative procedure for enforcing OSHA determinations satisfies the seventh amendment only because OSHA civil penalties are analogous to taxes, then the OSHA penalties must also be subject to challenge in the same manner as taxes. This would allow the OSHRC to determine violations initially, just as the Internal Revenue Service has the unquestioned power in the first instance to find the facts administratively that establish the existence and amount of tax liability.

Under this procedure, employers charged with a violation of OSHA would have two alternative methods of obtaining review. Of course, the employer could use existing statutory review in the court of appeals; this would be the only method available if the employer does not want to pay the penalty in advance, but it would not allow a jury trial. Instead of seeking statutory review in the court of appeals, the employer could pay the assessed penalty and file an action against the Secretary of Labor for a refund.[285] Such an action would be a civil action for which the seventh amendment would guarantee a right to a jury trial. The only issue would be the factual question whether a violation had occurred and the amount of the penalty would not be open to relitigation.[286] A finding that no violation occurred would be a determination that the Secretary and Commission had exceeded their jurisdiction in de-

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[285] Civil penalties are to be paid to the Secretary for deposit into the Treasury of the United States. 29 U.S.C. § 666(k) (1970).

[286] Most other federal agencies can collect civil penalties or forfeitures only by a *de novo* action in the federal district court; in such cases the federal courts have held that there is no right to a jury trial on the amount of the forfeiture. *See, e.g.,* United States v. Duffy, 550 F.2d 533 (9th Cir. 1977) (under Federal Aviation Act) (no discussion of seventh amendment).

manding a penalty.[287] A finding that a violation had occurred would sustain the jurisdiction of the Secretary and Commission and deny the employer a refund.

The similarity between the two methods of review for tax cases and the two suggested methods of review for OSHA cases is not accidental, for it is only the tax collection precedent that supports the *Atlas* exception to the seventh amendment right to jury trial. Congress cannot eliminate the opportunity to bring a refund action, as it cannot expand the nonjury exceptions beyond their reasonable limits, to the exclusion and at the expense of the right to jury trial.

Atlas, Pernell, and *Curtis* all imply that Justices White and Marshall continue to explore tentatively the extent to which administrative agencies can be given power to adjudicate cases without violating the seventh amendment. The argument that the language of the seventh amendment permits creation of the procedure in OSHA is not supported by "history and our cases." [288] The only reason given for such an assault on the amendment is concern over crowded federal courts [289]—"the tyrant's plea of the *necessity* of unlimited powers in works of evident utility to the public." [290] The work of the drafters of the Constitution and Bill of Rights should not be so lightly cast aside. They could not foresee how the new federal government would grow or how powerful it would become, but they were fearful of creating a national government that would reinstitute the abuses against which they had rebelled. The Constitution and the Bill of Rights provided for the separation of powers, limited judicial power to the courts, and as far as possible provided the protection of a civil jury. Congress may use its constitutional powers to expand the reach of the federal government and to create federal agencies more powerful than ever

287 This Article has been limited to examining the history of the seventh amendment and the earlier opinions to determine if *Atlas* correctly determined that the seventh amendment did not apply. Once it is clear that there is a constitutional right to a civil jury trial, the question how the administrative determination and the civil jury trial should be related becomes important. What issues can be finally determined by the agency, what is open for relitigation in the trial court, and how the employer can obtain or waive rights are questions involving the murky area of res judicata and collateral estoppel of agency findings in later civil litigation. Under the classic doctrine the issue whether the Commission has jurisdiction to impose a penalty—which depends on whether a violation has occurred—would be open to full relitigation in court with no res judicata or collateral estoppel effect given to the agency finding of a violation. *See* RESTATEMENT OF JUDGMENTS § 10 (1942).

288 430 U.S. at 460.

289 *Id.* 455.

290 3 W. BLACKSTONE, COMMENTARIES 74 (4th ed. 1770). Blackstone thus characterized the claim of the privy council that the sewer commissions could not be controlled by King's Bench, a claim Lord Coke and the common law lawyers finally defeated. *See* text accompanying notes 190-92 *supra.*

imagined in 1789, but Congress cannot escape from the limitations of the Constitution or the Bill of Rights.[291] If Congress wants increased federal adjudication in additional areas, Congress must provide more federal trial courts in which federal judges and civil juries may hear these suits at common law. Any less respect for the seventh amendment, as *Atlas* so dangerously invites, is a breach of faith.

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[291] A jury could have competently determined whether a violation had occurred in *Atlas* or in *Irey*. No matter how complicated the safety rules may become, in the end they must be understood and followed by employees such as the roofer in *Atlas* and the pipe layer and construction superintendent in *Irey*. The expert testimony in such cases ought to be as understandable as in product liability or automobile accident cases.

The hostility toward the jury reflected in *Atlas* illustrates again a warning Professor Wolfram wrote which deserves repeating because too many judges are impatient with the civil jury:

> [T]he constitutional values represented by the seventh amendment are at a low state of importance in the minds of some, perhaps many, scholars. . . . The obvious implication . . . is that the seventh amendment jury in civil cases is such a drag on efficient judicial administration . . . and results in such inflated damage awards . . . that it should be avoided . . . except where the seventh amendment, rather narrowly conceived, compels otherwise.
>
> I cite this particular instance, not as pathological, but as typical of an attitude that must often color the perception and resolution of seventh amendment issues. Judges are not immune from the problem. See, e.g., Ross v. Bernhard, 396 U.S. 531, 544-45 (1970) (dissenting opinion). It is submitted that this is, at the least, rather unusual constitutionalism. The idea of rejecting the underlying values of a constitutional guarantee, or of viewing the guarantee as burdensome and thus to be restricted—if applied to other portions of the Bill of Rights—would certainly be rejected.

Wolfram, *supra* note 10, at 648-49 n.33.