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# CASE NOTES

## COLGROVE *v.* BATTIN— CONSTITUTIONALITY OF SIX-MEMBER JURIES IN FEDERAL CIVIL ACTIONS

In *Colgrove v. Battin*,<sup>1</sup> the United States Supreme Court held that a twelve-member jury is not a necessary component of the substantive right of trial by jury, and that a six-member panel in federal civil actions is constitutional in the context of the seventh amendment. The petitioner brought an action for libel in the United States District Court for the District of Montana. Pursuant to Local Rule 13(d)(1) of the Revised Rules of Procedure for the United States District Court,<sup>2</sup> respondent district court judge set this diversity case for trial before a jury consisting of six persons. On or about October 4, 1971, petitioner sought a writ of mandamus from the Circuit Court of Appeals for the Ninth Circuit to direct respondent to impanel a twelve-member jury. To support his writ, petitioner contended that the local rule violated the seventh amendment,<sup>3</sup> violated the statutory provision of 28 U.S.C. § 2072 which preserves “. . . the right to trial by jury as at common law and as declared by the Seventh Amendment . . .”<sup>4</sup> and was rendered invalid by Rule 83 of

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1. 413 U.S. 149 (1973).

2. Rule 13(d)(1) provides: “A jury for the trial of civil cases shall consist of six persons plus such alternate jurors as may be impaneled.” This rule became effective on September 1, 1971.

3. The seventh amendment provides:

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.

4. 28 U.S.C. § 2072 provides:

The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

the Federal Rules of Civil Procedure because it was inconsistent with Rule 48 of the Federal Rules of Civil Procedure which provides for juries of less than twelve when stipulated by the parties.<sup>5</sup> The Ninth Circuit did not agree with these contentions,<sup>6</sup> denied the request, and upheld the constitutional validity of the district court rule. The Supreme Court of the United States granted the petitioner's request for a writ of certiorari, and subsequently, the Court, finding no merit in the petitioner's contentions, affirmed the constitutional validity of the district court rule. *Colgrove v. Battin*, 413 U.S. 149 (1973).

In reaching the decision that the six-member panel was constitutional in terms of the seventh amendment,<sup>7</sup> the analysis of the majority in *Colgrove* was based on a three step approach: first, a consideration of the adoption of the seventh amendment to determine whether the framers of the Constitution had intended to include the twelve-man panel in the jury requirement; second, whether the common law right of trial by jury mandated a jury composed of twelve members; and third, an analysis of whether a six-member-jury satisfies the seventh amendment guarantee of trial by jury.

#### GETTING AROUND THE SEVENTH AMENDMENT

Considering the adoption of the seventh amendment, the Court commented that, on its face, the language of the amendment concerned the

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Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

5. Rule 48, Federal Rules of Civil Procedure, provides: "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Rule 83, Federal Rules of Civil Procedure, provides:

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

6. 456 F.2d 1379 (9th Cir. 1972).

7. The rationale behind the exclusion from the casenote of the petitioner's other two contentions is twofold. Regarding petitioner's claim that the local rule violated the statutory provision, 28 U.S.C. § 2072, that rules ". . . shall preserve the right to trial by jury as at common law and as declared by the Seventh Amendment . . .," the Court utilizes much of its rationale concerning the seventh amendment in resolving these contentions. Therefore, for sake of avoiding repetitions, this contention was not analyzed. As far as the petitioner's contention that the local rule was rendered invalid by Rule 83 of the Federal Rules of Civil Procedure because it was inconsistent with Rule 48 of the Federal Rules of Civil Procedure, the Court

type of cases for which trial by jury was afforded, and not jury characteristics such as size.<sup>8</sup> Conceding that there was "almost no direct evidence concerning the intention of the Framers . . ."<sup>9</sup> Justice Brennan, who delivered the majority opinion, expounded that the controversy over the seventh amendment was not generated by a concern "for preservation of jury characteristics at common law, but by fear that the civil jury itself would be abolished unless protected in express words."<sup>10</sup> Due to the variance in state practices as to when a civil jury trial was allowed, a provision guaranteeing this right was omitted from the Constitution and encountered the same difficulty when presented as one of the Bill of Rights.<sup>11</sup> As a result, the right to a jury trial in civil actions, although

treated this contention as a procedural problem whereby it held a court rule prevails over "stipulation by the parties." The focus of this casenote centers on the substantive aspect of the case and not the procedural problem confronted by the court.

8. The Court related that the pertinent words of the seventh amendment were: "In suits at common law . . . the right of trial by jury shall be preserved. . . ." 413 U.S. at 151.

9. *Id.* at 152; Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 291 (1966).

10. 413 U.S. at 152.

11. *Id.* at 153. 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 587 (1911). The question of a provision for the protection of the right to trial by jury in civil cases apparently was not presented at the Constitutional Convention until a proposed final draft of the Constitution was reported out of the Committee on Style and Arrangement. At that point, Mr. Williamson of North Carolina "observed to the House that no provision was yet made for juries in civil cases and suggested the necessity of it." This provoked the following discussion:

Mr. Gorham. It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter.

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

Col. Mason perceived the difficulty mentioned by Mr. Gorham. The jury cases cannot be specified. A general principle laid down on this and some other points would be sufficient. He wished the plan had prefaced with a Bill of Rights, and would second a Motion if made for the purpose.

Three days later, a proposal was made by Mr. Gerry and Mr. Pinckney to add the following language to the Art. III guarantee of trial by jury in criminal cases: "And a trial by jury shall be preserved as usual in civil cases." This proposal prompted the following reaction:

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

Mr. King urged the same objections.

Genl. Pinckney. He thought such a clause in the Constitution would be pregnant with embarrassments.

The proposal was neither accepted nor rejected, but was returned to the Committee

incorporated into the seventh amendment, was limited to "suits at common law."<sup>12</sup> Therefore, the Court concluded by simply reiterating what was stated in *Williams v. Florida*<sup>13</sup> with respect to criminal jury trials, namely, that the framers did not intend to "equate the constitutional and common law characteristics of the jury."<sup>14</sup>

Having dispensed with the intent on the part of the framers of the Constitution, the majority cited prior decisions which defined the seventh amendment jury right as coextensive with the common law right of trial by jury.<sup>15</sup> Moreover, the Court refuted several earlier United States Supreme Court decisions which held that trial by jury meant "a trial by a jury of twelve,"<sup>16</sup> by remarking that the above statement was at best an assumption and merely unsupported dicta of these earlier decisions.<sup>17</sup> Justice Brennan resolved the issue by just relying on the Court's rejection in *Williams* of the notion that "the reliability of the jury as a fact finder . . . [is] a function of its size."<sup>18</sup> Hence, the Court concluded that twelve members is not a substantive aspect of the common-law right of trial by jury.

Failing to find codification in the framer's intent as well as the common law right to trial by jury, the Court concluded that the seventh amendment did not mandate a jury of twelve and turned to its final consideration, namely, whether a jury of six satisfies the seventh amendment guarantee of "trial by jury." The Court upheld the constitutionality of this

on Style to provide such a clause for consideration. Respondent's Brief for Certiorari at 4, *Colgrove v. Battin*, 413 U.S. 149 (1973).

12. 413 U.S. at 155. The seventh amendment was added to the Bill of Rights largely due to the strong pressure brought by the Anti-Federalists who feared the ultimate abolition of civil juries unless protected by straightforward language. Henderson, *supra* note 9, at 292. See *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 446 (1830) where Mr. Justice Story stated: "One of the strongest objections originally taken against the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases."

13. 399 U.S. 78 (1970). In the decision in *Williams*, the Court sustained the constitutionality of a Florida statute providing for six-member juries in certain criminal cases. Moreover, the Court concluded that the states are not required by the due process clause of the fourteenth amendment to provide for a twelve member jury in all criminal cases.

14. *Id.* at 99.

15. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); See also Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 671-72 (1918).

16. *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899).

17. 413 U.S. at 157-58.

18. 399 U.S. at 100-01.

contention simply by relying upon the conclusion reached in *Williams*, that there is "no discernible difference between the results reached by the two different-sized juries."<sup>19</sup>

What is troubling about the Court's opinion is not so much its result as its approach. For many decades, the major stumbling block which lay before those pursuing six-member juries in civil cases was the seventh amendment.<sup>20</sup> Yet, it seemed that the Supreme Court, in *Colgrove*, had relatively little difficulty in overcoming this barrier merely by tacitly accepting its findings in *Williams* and applying them to the instant civil action. What the Court failed to take into account was that *Williams* was not dispositive of this case. In *Williams*, the Court upheld a conviction obtained by the State of Florida before a jury of six persons who were impaneled pursuant to a Florida statute providing for such juries in all but capital cases. The Court in *Williams* held that the "impartial jury" guaranteed by the sixth amendment "in all criminal prosecutions," and the right to a jury trial in criminal cases provided by article III of the Constitution, do not require a twelve person panel.<sup>21</sup>

Despite sweeping language in the majority opinion, this case does not lay a foundation as to whether civil federal practice, under the seventh amendment, would support six-member juries. In the first place, the Court in *Colgrove* provided a rationale as to why *Williams* is not dispositive of this case. Distinguishing between the purpose which a jury trial served in criminal and civil cases respectively, the Court related that prevention of government oppression was the purpose in criminal cases,<sup>22</sup> whereas the purpose of civil jury trials involved the assurance of a fair and equitable resolution of factual issues.<sup>23</sup> Secondly, *Williams* was a state criminal case under the sixth and fourteenth amendments, whereas *Colgrove* involved a federal civil case under the seventh amendment. This is pertinent since there is a critical distinction between the sixth amendment criminal jury and the seventh amendment civil jury. The seventh amendment provides: "In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury . . . shall be otherwise examined in any court . . . than according to the rules of the common law." The seventh amendment makes reference

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19. *Id.* at 101.

20. Croake, *Memorandum on the Advisability and Constitutionality of Six Man Juries and 5/6 Verdicts in Civil Cases*, 44 N.Y.S.B.J. 385 (October 1972).

21. 399 U.S. at 102-04.

22. 413 U.S. at 157; 399 U.S. at 100.

23. 413 U.S. at 157; *Gasoline Products Co. v. Champlin Co.*, 283 U.S. 494, 498 (1931).

to the common law twice and preserves the right to trial by jury. The sixth amendment, on the other hand, only provides for an "impartial jury" in all criminal prosecutions. There is no direct language referring to common law standards, nor a requirement that trial by jury be preserved. As noted by the Court in *Williams*, these textual differences are explained by the special history of the sixth amendment which had no effect on the seventh amendment.<sup>24</sup> Since the *Williams* decision relied in part on these textual differences between the amendments and specifically pointed out that the seventh amendment illustrates that the framers knew how to incorporate common law features when they wanted to do so, one can conclude that the seventh amendment, unlike the sixth, requires a common law jury.<sup>25</sup>

Finally, the Court misread the *Williams* case and miscalculated the effect that case had on the seventh amendment. In *Williams*, the majority opinion expressly reserved the question whether its decision would also apply under the seventh amendment. "[W]e do not decide whether . . . additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation."<sup>26</sup> Hence, combining all these rationales, the *Williams* case should not be taken as authorization for the use of six-man juries in civil cases.

Despite the inadequate rationale presented by the Court as to why the local rule did not violate the seventh amendment, it does not follow that the Court's holding should have been decided otherwise. Rather, if the

24. 399 U.S. at 94-96. Certain proposed drafts of the sixth amendment differed from the final form of the amendment in that they included proposed requirements of "unanimity for conviction" and "other accustomed requisites." The framers could not agree that the criminal jury should be a pure common law jury, and the Court in *Williams* concluded that these requirements were deleted in the final text of the sixth amendment as the result of a compromise. 399 U.S. at 96.

Their absence indicated to the Court that a pure common law jury was not intended by the Framers regarding the sixth amendment.

[W]here Congress wanted to leave no doubt that it was incorporating existing common law features of the jury system, it knew how to use express language to that effect. . . . And the Seventh Amendment, providing for jury trial in civil cases, explicitly added "no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according the rules of the common law."

399 U.S. at 97.

This history makes the seventh amendment's two references to "common law" and its requirement that the right to trial by jury be "preserved" seem especially significant when compared with the bar requirement of an "impartial jury" in the sixth amendment.

25. Brief for Nooter Corporation as Amicus Curiae at 12, *Colgrove v. Battin*, 413 U.S. 149 (1973).

26. 399 U.S. at 92, n.30.

Court would have given proper and adequate consideration to its three-step approach when analyzing the case, there would not have been any necessity to totally rely on the *Williams* case to uphold six-member juries in civil cases.

#### THE CONSTITUTIONAL BASIS FOR TWELVE-MEMBER JURIES

"While the 'intent of the Framers' is often an elusive quarry, the relevant constitutional history cast considerable doubt on the easy assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution."<sup>27</sup> In the proceeding at the Constitutional Convention in Philadelphia, the issue of trial by jury in civil cases was raised in debate, but intentionally left out of the final document. Yet, the reason presented in *Colgrove*, for this omission,<sup>28</sup> in and of itself, is not dispositive of the issue. A provision for trial by jury was omitted from the original seven articles of the Constitution because: the convention members desired to go home;<sup>29</sup> fear among convention leaders that prolonged and protracted dispute and debate over the issue might very well devastate the agreement that had already been arrived at; the delegates had fulfilled the burning necessity for preserving the right of jury trial in all criminal cases; and the delegates felt Congress would promulgate the right to jury trial by legislation.<sup>30</sup> Moreover, the Court did not adequately analyze the framers' intent in terms of the twice-mentioned term "common law" contained in the amendment itself.<sup>31</sup>

Historical evidence bears out the fact that the words "common law" as used in the seventh amendment refer to the right of jury trial as guaranteed by the common law of England, and action to be tried by a jury—suits at law—as opposed to those tried without a jury—suits in admiralty

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27. *Id.* at 92.

28. See text accompanying note 11 *supra*.

29. Henderson, *supra* note 9, at 294-96.

30. Respondent's Brief for Certiorari, *supra* note 11, at 4-5.

31. Although the Court relates that the pertinent words of the seventh amendment are: "In suits at common law . . . the right of trial by jury shall be preserved . . .," it does not go any further in analyzing what the Framers meant by the first reference to the "common law" other than to say it defines the kind of case for which jury trial is preserved. 413 U.S. at 152.

As far as the second reference to "common law," the Court felt it was irrelevant to the present inquiry because it dealt with the prohibition contained in that clause against the indirect impairment of the right of trial by jury through judicial reexamination of fact-findings of a jury other than as permitted in 1791. 413 U.S. at 152, n.6.



and equity.<sup>32</sup> With regard to the first reference to the term "common law," history supports the contention that it was used to distinguish the right of jury trial as it existed in common law actions as opposed to the procedures pertaining to equity and admiralty cases where no right to jury trial existed. This was clearly brought out in *Federalist No. 83*<sup>33</sup> as well as in the background of the Judiciary Act of 1789, which was debated at the same time as the amendment.<sup>34</sup>

Due to the extreme variance in jury utilization throughout the states, Alexander Hamilton was adamantly opposed to a constitutional provision for trial by jury in civil cases.<sup>35</sup> Yet, he did relate the necessity of distinguishing suits at law from those in admiralty and equity in determining which cases should be tried by a jury.<sup>36</sup> Using his home state of New York as a focal point in analyzing the omission of a specific civil jury process,<sup>37</sup> Hamilton discussed the separation of law and equity jurisdiction.<sup>38</sup> He concluded that uniform rules for civil juries would be impossible.<sup>39</sup>

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32. Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507, 511 (1972).

33. THE FEDERALIST NO. 83, at 424 (M. Beloff ed. 1948) (A. Hamilton).

34. Fisher, *supra* note 32, at 522.

35. *Id.*

36. *Supra* note 33, at 426. Hamilton stated:

Add to this, that admiralty causes, and almost all those which are of equity jurisdiction, are determinable under our own government without the intervention of a jury, and the inference from the whole will be that this institution as it exists with us at present, cannot possibly be affected to any great extent, by the proposed alteration in our system of government.

37. *Id.* at 429-30.

38. It is true that the separation of the equity from the legal jurisdiction is peculiar to the English system of jurisprudence, which is the model that has been followed in several of the States; but it is equally true that the trial by jury has been unknown in every case in which they have been united. And the separation is essential to the preservation of that institution in its pristine purity. The nature of a court of equity will readily permit the extension of its jurisdiction to matters of law; but it is not a little to be suspected that the attempt to extend the jurisdiction of the courts of law to matters of equity will not only be unproductive of the advantages which may be derived from courts of chancery, on the plan upon which they are established in this State, but will tend gradually to change the nature of the courts of law, and to undermine the trial by jury by introducing questions too complicated for a decision in that mode.

These appear to be conclusive reasons against incorporating the systems of all the States in the formation of the national judiciary.  
*Id.* at 432.

39. To devise a plan of that kind is a task arduous in itself, and which it would require much time and reflection to mature. It would be extremely difficult, if not impossible, to suggest any general regulation that would be acceptable to all the States in the Union, or that would perfectly quadrate

Justice Story, in his discussion of the Judiciary Act of 1789 and the seventh amendment, declared that the term "common law" was used to distinguish cases at law from cases in equity and admiralty.<sup>40</sup> Moreover, the same position has been adopted by the lower federal courts as well as the United States Supreme Court.<sup>41</sup>

The second use of the term "common law" is contained in the phrase "than according to the rules of common law."<sup>42</sup> This phrase is designed to qualify the words "and no fact tried by a jury shall be otherwise re-examined in any court of the United States."<sup>43</sup> The use of "common law" in this instance specifically refers to the reexamination of facts tried by

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with the several State institutions.

*Id.* at 433-34.

40. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 645-46 (L. Levy ed. 1970). Story states:

At this time there were no states in the Union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no states were contemplated, in which it would not exist. The phrase, "common law" found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution had declared, in the third article, "that the judicial power shall extend to all cases in *law and equity* arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority," &c., and "to all cases of *admiralty and maritime jurisdiction*." It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene; and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that the distinction was present to the minds of the Framers of the amendment. By *common law* they meant, what the Constitution denominated in the third article 'law;' not merely suits, which the *common law* recognized among its old and settled proceedings, but suits, in which *legal* rights were to be ascertained and determined, in contradistinction to those, in which equitable rights alone were recognized, and equitable remedies were administered; or in which, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit.

41. This position was adopted by the federal district court in *Ross-Meehan Bride Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 F. 957, 960 (C.C.E.D. Tenn. 1896).

In *Parson v. Bedford*, 28 U.S. (3 Pet.) 433, 446-47 (1830), the Court stated:

The phrase 'common law' found in this [first] clause is used in contradistinction to equity, and admiralty and maritime jurisprudence \* \* \* It is well known that in civil causes in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases \* \* \* When, therefore, we find, that the amendment requires that the right of trial by jury shall be preserved, in suits at common law, the natural conclusion is that this distinction was present to the minds of the framers of the amendment.

See *Ross v. Bernhard*, 397 U.S. 531 (1970).

42. U.S. CONST. amend. VII.

43. *Id.*

a jury and does not refer to a certain number of people that must comprise the jury.<sup>44</sup> The United States Supreme Court has interpreted this reference to "common law" as assuring no judge or judges shall substitute their decision on fact issues in the place and stead of the fact findings of a jury.<sup>45</sup> Thus, a close examination of the construction of the twice-mentioned term "common law" in the seventh amendment reveals the framers' intentions were to express two independent thoughts: "(1) the distinction between law and equity and (2) the limitation on reexamination of facts, rather than engraft a specific number of jurors on jury procedure."<sup>46</sup>

It is also interesting to note that the Court did not rely on *Williams* when it should have. The Court in *Williams* recognized that the framers did not intend to exalt form over substance when they considered three factors in arriving at the conclusion that the sixth amendment did not mandate a jury of twelve. First, the vicinage requirement, which was as much a feature of the common law jury as was the twelve-man requirement,<sup>47</sup> was specifically left out by the framers.<sup>48</sup> Secondly, all provisions explicitly tying the jury concept to the "accustomed requisites" of the time were eliminated.<sup>49</sup> Finally, "contemporary legislative and constitutional provisions indicated that where Congress wanted to leave no doubt that it was incorporating existing common law features of the jury system, it knew how to use express language to that effect."<sup>50</sup> From its observations, the Court concluded that while the framers may have had the twelve-man jury in mind when they adopted the Constitution, nothing in history suggests that the twelve-man requirement was an "indispensible component of the Sixth Amendment."<sup>51</sup>

Ever since the earliest proposals to form a union, the premise that Americans are entitled to the right of trial by jury according to the course of English common law has been emphatically stated.<sup>52</sup> Although the

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44. Fisher, *supra* note 32, at 511.

45. *Baltimore & Carolina Line Inc. v. Redman*, 295 U.S. 654, 657 (1935).

46. Fisher, *supra* note 32, at 511.

47. 1 G. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 23 (1863).

Technically, "vicinage" means neighborhood, and "vicinage of the jury" meant jury of the neighborhood or, in medieval England, jury of the county. See 4 W. BLACKSTONE, COMMENTARIES 350-51 (1849).

48. 399 U.S. 78, 96 (1970).

49. *Id.*

50. *Id.*

51. *Id.*

52. H.S. COMMANGER, DOCUMENTS OF AMERICAN HISTORY 44, 83, 93, 101 (5th ed. 1949).

seventh amendment appears clearly to preserve the common law jury in all cases where such a jury trial was permitted in 1791, in no part of the Constitution, the United States Code, or the civil rules does the number twelve appear as descriptive of the size of a civil jury.<sup>53</sup> Yet, as mentioned by the Court in *Colgrove*, prior constitutional interpretation of the seventh amendment has recognized that trial by jury in a civil action required twelve individuals.<sup>54</sup> Therefore, an analysis of the historical derivation of the jury and the twelve-member panel as well as significant cases which have construed the seventh amendment itself is necessary to provide a more concrete rationale as to why a jury of twelve is not a substantive component of the common law right of trial by jury.

The Court, in *Colgrove*, did not take into consideration the origin of the jury and the number "12" in determining whether a twelve-member jury is part and parcel of the common law right of trial by jury. Historians and students of the law have probed deeply into the shadowy past to establish the historical genesis and gradual development of the institution of trial by jury.<sup>55</sup> Still, no matter how exhaustive these studies are in delving into the subject, "the origins of the system and the steps by which it evolved are shrouded in doubt, with only the end result established."<sup>56</sup>

The earliest tribunals which resembled our modern trial by jury appeared among the ancient Greeks, Romans, and Scandinavians.<sup>57</sup> Yet,

53. Bogue and Fritz, *The Six-Man Jury*, 17 S. DAK. L. REV. 285, 286 (1972); Devitt, *Six-Member Civil Juries Gain Backing*, 57 A.B.A.J. 1111 (1971); Tamm, *A Proposal for Five-Member Civil Juries in the Federal Courts*, 50 A.B.A.J. 162 (1964); Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120, 128 (1962).

Constitutional history does not reveal an occasion where twelve was desired to be preserved as a traditional number. On the contrary James Wilson of Pennsylvania, a member of the Constitutional Congress, stated: "When I speak of juries, I feel no peculiar predilection for the number twelve . . ." II J. ANDREWS, *THE WORKS OF JAMES WILSON* 503 (McCloskey ed. 1967).

But see Rule 48 of the Federal Rules of Civil Procedure. Also 12-member juries are required, specifically, in criminal cases by Rule 23 of the Federal Rules of Criminal Procedure.

54. *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899). See also *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *American Publishing Co. v. Fisher*, 166 U.S. 464, 468 (1897).

55. Tamm, *supra* note 53, at 162.

56. *Id.* at 163. It is also important to note that various writers have reached conclusions concerning the origin of the jury diametrically opposed to the findings and conclusions made in other studies. Hogan, *Joseph Story on Juries*, 37 ORE. L. REV. 234 (1958); Stephens, *The Growth of Trial by Jury in England*, 10 HARV. L. REV. 150 (1896); Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 295, 357 (1892).

57. Augelli, *Six-Member Juries in Civil Actions in the Federal Judicial System*, 3 SETON HALL L. REV. 281, 282 (1972). In ancient Greece, there was the

it is now generally acknowledged that the origin of the jury is to be found in royal privilege.<sup>58</sup> When the Normans invaded England in 1066, the jury originated as a result of the Frankish "inquisition."<sup>59</sup> In the twelfth century, under Henry II, the royal procedure of the inquest was made available to the people, the purpose being the creation of a monopoly in the Crown for the administration of justice. Questions of fact were submitted to a jury who had knowledge of these facts in dispute, and it was the jury's responsibility to resolve these questions of fact. Moreover, the impetus for trial by jury was further strengthened by the prohibition of Pope Innocent III in 1215, which provided that the clergy could not participate in trials by ordeal.<sup>60</sup> As a result of these reforms ranging from the ordinances of Henry II to the resulting developments under them, by the thirteenth century, the modern institution of trial by jury evolved<sup>61</sup> and became the typical procedure utilized in civil and criminal cases.

History affords little insight into the considerations that gradually led to the size of the jury to be generally fixed at twelve.<sup>62</sup> It has been suggested that the number twelve was fixed simply because that was the number of the presentment jury from which the petit jury developed.<sup>63</sup> Other fanciful reasons for the number twelve have been given, "but they

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dikast, which was composed of 500 citizens chosen by lot; in ancient Rome, the comitia, a representative body which examined disputed facts; and in ancient Scandinavia, small district committees administered by the law. *Id.*

These tribunals were similar to our modern jury in that the citizens were selected from general lists of men in the city or district, judicial power was transferred from the state to laymen, and the citizens that participated were sworn in to give a valid verdict. *Id.* at 282-83. *But see* F. BUSCH, *LAW AND TACTICS IN JURY TRIALS* 5 (1959).

58. F. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 6 (1951); E. JENKS, *A SHORT HISTORY OF ENGLISH LAW* 47 (2d rev. ed. 1920).

59. 1 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 140 (2d ed. 1898). The "inquistio" was an institution compelling the oldest and wisest men in each district to answer, upon their oath, questions presented by royal officials in the name of the King.

However, in those early times, the inquisition had no fixed number. For instance, in the Frankish Empire, it was composed of "66, 41, 20, 17, 13, 11, 8, 7, 53, 15, and a great variety of other numbers." Thayer, *supra* note 56, at 295.

60. Augelli, *supra* note 57, at 283.

61. Busch, *supra* note 57, at 9.

62. 399 U.S. at 89.

63. 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 325 (1927); Wells, *The Origin of the Petty Jury*, 27 L.Q. REV. 347, 357 (1911). It is important to note that neither of these authors hazards a guess as to why the presentment jury itself numbered twelve.

were all brought forward after the number was fixed,"<sup>64</sup> and rest on little more than mystical or superstitious insight into the significance of "twelve."<sup>65</sup> For example, it has been posited that twelve was devised because court astrologers, who were in charge of choosing juries, selected one name for each of the signs of the Zodiac.<sup>66</sup> Romantic explanations have been offered for the number twelve, including Lord Coke's explanation "that the number of twelve is much respected in the Holy Writ, as twelve Apostles, twelve stones, twelve tribes, etc."<sup>67</sup>

Yet, no matter what reason behind this number, under Henry II, twelve was established as the usual number.<sup>68</sup> Still, it is important

64. Wells, *supra* note 63, at 357.

65. 399 U.S. at 89.

66. Wiehl, *The Six Man Jury*, 4 GONZAGA L. REV. 35 (1968). The rationale for the cited premise was that it would assure a fair verdict in that it would bring every type of mind and temperament to consider the question.

67. 1 COKE, INSTITUTES OF THE LAWS OF ENGLAND 155 (1797). The same thought was advanced at greater length in DUNCOMBE'S TRIALS PER PAIS where he stated:

And first of their Number Twelve: And this Number is no less esteemed of by our Law than by Holy Writ. If the twelve Apostles on their twelve thrones, must try us in our eternal State, good Reason hath the Law to appoint the Number of Twelve to try our Temporal. The Tribes of *Israel* were Twelve, the Patriarchs were Twelve, and *Solomon's* Officers were Twelve. . . . Therefore not only Matters of Fact were tried by Twelve, but of ancient Times, twelve Judges were to try Matters in Law, in the Exchequer-Chamber, and there were twelve Counsellors of State for Matters of State; and he that wageth his Law must have eleven others with him who believe he says true. And the Law is so precise in this Number of Twelve, that if the Trial be by more or less, it is a Mistrial. . . .

1 TRIALS PER PAIS 92-93 (8th ed. 1766).

Sir Patrick Devlin also propounded the same thought when he stated:

Many romantic explanations have been offered of the number twelve—the Twelve Tribes of Israel, the Twelve Patriarchs, and the Twelve officers of Solomon recorded in the Book of Kings, and the Twelve Apostles. Not all of these suggestions are equally happy; the first implies that there may be a thirteenth juror who got lost somewhere in the corridor, and the last that there is a Judas on every jury. It is clear that what was wanted was a number that was large enough to create a formidable body of opinion in favor of the side that won; and doubtless the reason for having twelve instead of ten, eleven or thirteen was much the same as gives twelve pennies to the shilling and which exhibits an early English abhorrence of the decimal system.

DEVLIN, TRIAL BY JURY 8 (1956).

68. Thayer, *supra* note 56, at 295.

Similarly, Professor Scott writes:

At the beginning of the thirteenth century twelve was indeed the usual but not the invariable number. But by the middle of the fourteenth century the requirement of twelve had probably become definitely fixed. Indeed this number finally came to be regarded with something like superstitious reverence.

to note that prior to and subsequent to that time, the number was not uniform.<sup>69</sup> Moreover, juries consisting of less than twelve members were quite common to colonial America.<sup>70</sup> The Duke of York's Law, in force in several colonies late in the seventeenth century stated:

No jury shall exceed the number of Seven nor be under Six unless in special causes upon Life and Death, the Justices shall think fitt to appoint Twelve.<sup>71</sup>

Citizens of North Carolina petitioned for juries of six men in 1769.<sup>72</sup> The Colony of Maryland used a jury of ten in a case during the March term of the Provisional Court in 1681-1682,<sup>73</sup> and a jury of eleven in November of that year.<sup>74</sup> Thus, when analyzing the reasons offered as to why twelve members would comprise a jury as well as the various fluctuations that existed due to "convenience or local custom,"<sup>75</sup> it is apparent that the number twelve was a historical accident, unrelated to the great purposes which gave rise to the jury in the first place.<sup>76</sup>

A. SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW 75-76 (1922).

Forsyth has mentioned: "Although twelve was the most usual, it was not the the unvarying number of the jurors of the assise for some years." W. FORSYTH, HISTORY OF TRIAL BY JURY 131 (1852).

69. 1 J.H. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEM 299 (1928). The Ancient Greeks utilized juries of 500, 1000, and 1500 members. *Id.*

"[A]mong the Normans it varied much, and 'twelve has not even the place of the prevailing *grundzahl*; the documents show all sorts of numbers—4, 5, 6, 12, 13-18, 21, 27, 30, and so on." Thayer, *supra* note 56, at 295. Jocelin's Chronicle mentions juries of six and sixteen. See Forsyth, *supra* note 68, at 131-33.

70. *Contra*, Augelli, *supra* note 57, at 284.

71. Fisher, *supra* note 32, at 529, citing 1 COLONIAL LAWS OF NEW YORK, 40 (1894).

72. H.S. Commager, *supra* note 52, at 69. The petition of the Regulators of Anson County dated October 9, 1769 included a provision providing:

That all debts above 40s, and under £10 be tried and determined without lawyers, by a jury of six freeholders impanned by a justice, and that their verdict be enter'd by the said justice and be a final judgment.

73. Fisher, *supra* note 32, at 530, citing 70 PRINTED ARCHIVES OF MARYLAND 160 (1964).

74. *Id.*

75. Wiehl, *supra* note 66, at 39.

76. 399 U.S. at 89-90. It is interesting to note that even Justice Harlan, in his dissent, was unable to present any authority substantiating some other reason, apart from chance, for the selection of twelve as the appropriate number. *Id.* at 117 (Harlan, J., dissenting).

The following also advocate the holding made in *Williams*: P. DEVLIN, TRIAL JURY 8 (1956); F. HELLER, THE SIXTH AMENDMENT 64 (1951); Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120, 128-130 (1962); Wiehl, *The Six Man Jury*, 4 GONZAGA L. REV. 35, 38-39 (1968).

## NO MANDATE FOR TWELVE-MEMBER JURIES

Although prior decisions of the Supreme Court held that "trial by jury" meant "a trial by a jury of twelve,"<sup>77</sup> the Court, in *Colgrove*, refuted these holdings by remarking that, "in each case, the reference to a 'jury of twelve' was clearly dictum and not a decision upon a question presented or litigated."<sup>78</sup> Thus, in *Capital Traction Co. v. Hof*,<sup>79</sup> the case most often cited, the Court's finding was correct. As related in the majority opinion in *Colgrove*, the question presented in *Hof* concerned whether a civil action brought before a justice of the peace of the District of Columbia was triable by a jury. There, the result rested on whether the justice of the peace was a judge empowered to instruct them on the law and advise them on the facts.<sup>80</sup> Moreover, one commentator has suggested that the effect of adopting the *Hof* view would make "a fetish of a historical accident, would impose a nearly patternless pattern of practice on the courts, and would cut off arbitrarily a normal, rational development."<sup>81</sup>

Yet, considering another case cited by the court, namely *Maxwell v. Dow*,<sup>82</sup> which upheld the view expounded in *Hof*, the Court's rationale in *Colgrove* is immaterial. *Maxwell* was a criminal case, unlike the civil action in *Colgrove*, in which the plaintiff in error contended that a trial by jury of only eight persons abridged his privileges and immunities as a citizen of the United States, as secured by the sixth<sup>83</sup> and fourteenth<sup>84</sup> amendments.<sup>85</sup> Therefore, the Court should have placed

77. *Supra* note 16.

78. 413 U.S. at 157.

79. 174 U.S. at 1.

80. *Id.* at 13-14.

81. Henderson, *supra* note 9, at 336.

82. 176 U.S. at 581.

83. The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

84. Section 1 of the fourteenth amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

85. 176 U.S. at 582.



*Maxwell* in its proper perspective, and refuted the contention in *Maxwell* when confronting the problem in *Williams*, rather than inappropriately incorporating it in *Colgrove*.

Even if the above contention had support in common law doctrine, other significant cases which have construed the seventh amendment have shown that the common law is flexible and adapts itself by its own principles to varying conditions.<sup>86</sup> In *Ex parte Peterson*,<sup>87</sup> Justice Brandeis commented with respect to the seventh amendment:

The command of the Seventh Amendment that the right of trial by jury shall be preserved, does not require that forms of practice and procedure be retained. . . . New devices may be used to adapt the ancient institution [jury trial] to present needs and to make of it an efficient instrument in the administration of justice. Indeed such changes are essential to the preservation of the right. The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that ultimate determination of issues of fact by the jury be not interfered with.<sup>88</sup>

The Supreme Court, in *Galloway v. United States*,<sup>89</sup> commented on the Ninth Circuit Court's affirmation of a motion for a directed verdict in the context of the seventh amendment:

The [Seventh] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were "the rules of the common law" then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. In 1791 this process already had resulted in widely divergent common-law rules on procedural matters among the states, and between them and England.<sup>90</sup>

Hence, in the context of the framers' intentions as well as the common law right to trial by jury, the seventh amendment does not mandate a jury of twelve.

#### EFFICACY OF SIX-MEMBER JURIES

The major criticism of the jury system as presently constituted directly pertain to the incompetence of jurors and the inefficiency inherent in the

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86. *Funk v. United States*, 290 U.S. 371, 383 (1933); *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935).

87. 253 U.S. 300 (1920).

88. *Id.* at 309-10.

89. 319 U.S. 372 (1943).

90. *Id.* at 390-92.

process.<sup>91</sup> Critics contend that a jury lacks expertise in interpretation of the law and is therefore more likely to become confused than would a skilled jurist trying the same case.<sup>92</sup> Yet, despite these problems, the majority of the critics believe the jury system is too valuable to abolish entirely.<sup>93</sup> In an attempt to preserve the beneficial aspects of the jury system as well as to minimize the excessive investment of time and money which it requires many jurists have proposed,<sup>94</sup> many states have legislated,<sup>95</sup> and at least fifty-seven federal district courts have adopted local rules<sup>96</sup> providing for a reduction in the size of the jury. With this in mind, an analysis of the court's last step, namely, whether a jury of six satisfies the seventh amendment guarantee of "trial by jury," is necessary.

When confronted with this aspect of its rationale, the Court, in *Colgrove*, merely upheld the conclusion made in *Williams* that there was no discernible difference between the results reached between a twelve-member and a six-member jury.<sup>97</sup> Yet, in *Williams*, the Supreme Court supported its conclusion by relying on six articles in legal periodicals.<sup>98</sup> Some-

91. See, e.g., Lousberg, *On Keeping the Civil Jury Trial*, 43 NOTRE DAME LAW. 344 (1968); Comment, *The Case for Retention of the Unanimous Civil Jury*, 15 DE PAUL L. REV. 403, 407 (1966).

92. Lousberg, *supra* note 91, at 345; Comment, *Abolition of the Civil Jury: Proposed Alternatives*, 15 DE PAUL L. REV. 416, 419-21 (1966).

93. Summers, *Some Merits of Civil Jury Trials*, 39 TUL. L. REV. 3, 8-9 (1964).

94. Bogue & Fritz, *supra* note 53; Phillips, *A Jury of Six in All Cases*, 30 CONN. B.J. 354 (1956); Tamm, *supra* note 53; Wiehl, *supra* note 66.

95. See, e.g., MICH. COMP. LAWS ANN. § 600.1352 (Supp. 1973). "In a civil case . . . trial shall be by jury of 6 . . ." COLO. REV. STAT. ANN. § 78-7-4 (1963); CONN. GEN. STAT. ANN. § 51-243 (1960); WASH. REV. CODE ANN. § 4.44.120 (1956).

Two bills have been introduced in the House of Representatives in the 92nd Congress, both of which seek to change the federal jury to six jurors. H.R. 7800, introduced by William L. Scott of Virginia, would apply to juries in all civil cases impaneled after its enactment. H.R. 13,496, introduced by Emanuel Celler of N.Y., covers all civil cases and noncapital criminal cases. Gibbons, *The New Minijuries: Panacea or Pandora's Box?*, 58 A.B.A.J. 594, 599 (1972).

96. As of January 15, 1973, fifty-seven federal district courts had reduced the size of the jury from twelve to six in some or in all civil cases, and one other had reduced the jury to eight members in certain cases. Administrative Office of the United States Courts, List of U.S. District Courts That Have Adopted Rules Reducing the Size of Civil Juries. See also Fisher, *supra* note 32, at 335-42 (reproduces an Administrative Office list of 54 courts and quoting the applicable court rules, including date of adoption).

97. 399 U.S. at 101.

98. *Id.* at 101 n.48. The six articles relied upon were: Cronin, *Six-Member Juries in District Courts*, 2 BOSTON B.J. 27 (1958); *New Jersey Experiments with Six-Man Jury*, 9 BULL. OF THE SECTION OF JUDICIAL AD. OF THE ABA, May, 1966 at 6; Phillips, *A Jury of Six in All Cases*, 30 CONN. B.J. 354 (1956); Tamm, *The Five-*

of the reasons, advanced in these and other articles, why a jury composed of six members would be better than twelve include: the time necessary to try each civil jury case will be reduced;<sup>99</sup> it would lighten the burden on the community in providing jurors and give them a more favorable impression of the judicial procedure;<sup>100</sup> a reduction to six would result in a substantial financial saving;<sup>101</sup> and a jury of six would be large enough to provide a cross-section of the community.<sup>102</sup> Yet, this evidence should be interpreted with some skepticism since none was based on empirical investigation.<sup>103</sup> Rather, the sources cited by the Court consisted merely of the opinions of a judge,<sup>104</sup> lawyers,<sup>105</sup> and clerks of the courts.<sup>106</sup>

Although many articles have appeared since *Williams* in legal periodicals implying that a reduction in jury size will decrease the time and cost of jury trials,<sup>107</sup> several commentators have attacked that Court's conclusion and contend that specific differences in trial results would arise.<sup>108</sup>

*Man Civil Jury: A Proposed Constitutional Amendment*, 51 GEO. L.J. 120, 128 (1962); Wiehl, *supra* note 66 at 40-41; *Six-Member Juries Tried in Massachusetts District Court*, 42 J. AM. JUD. SOC'Y 136 (1958).

99. Tamm, *A Proposal for Five-Member Civil Juries in the Federal Courts*, 50 A.B.A.J. 162, 164 (1964). Although Judge Tamm advocates a jury of five instead of six, he relates, concerning the reduced time in the actual trial of a case, that the jury panel dispatched to a courtroom for the trial will be reduced by more than 50 percent. The voir dire examination will be reduced as well as the roll call of the jury panel. Jury selection will also require less time.

100. Phillips, *supra* note 98, at 356.

101. Bogue & Fritz, *supra* note 53, at 288. According to Bogue and Fritz, in federal district court, jurors receive statutory compensation of \$20.00 per day, plus an additional \$16.00 if they remain overnight. In civil cases, jurors also receive a mileage fee of ten cents.

102. Wiehl, *supra* note 66, at 40.

103. Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 713-15 (1971).

104. Tamm, *supra* note 53, at 134-36.

105. Cronin, *supra* note 98, at 28-29; *Six-Member Juries Tried in Massachusetts District Court*, *supra* note 98, at 136.

106. Cronin, *supra* note 98, at 27.

107. Croake, *supra* note 20; Bogue & Fritz, *supra* note 53; Augelli, *supra* note 57; Comment, *Reducing the Size of Juries*, 5 U. MICH. J.L. REFORM 87 (1971).

108. Pabst, *What do Six-Member Juries Really Save?*, 57 JUDICATURE 6 (June-July 1973); 22 CASE W. RES. L. REV. 529 (1971).

The latter article incorporated a standard binomial sampling theory to compare the expected performance of six-member and twelve-member juries in civil cases. The author concluded that the six-member jury's probability of conviction of defendants is higher in "weak" cases and lower in "strong" cases. *Id.* at 545-47. Zeisel relates that smaller juries may tend to have fewer minority group members and greater variation in verdicts. Zeisel, *supra* note 102 at 713-15.

For instance, Hans Zeisel, a leading authority on American juries,<sup>109</sup> simulated a random sampling from a stratified society in reaching his conclusion that the six-member jury's damage awards have a wider variation than the twelve-member jury's award.<sup>110</sup> Yet, these predictions of variation in trial results are of limited utility since they are based on highly problematic assumptions concerning the composition and deliberation of juries, and there have not been any empirical studies actually verifying the verdict-production process.<sup>111</sup> Therefore, in order to test the validity of the Court's conclusion in *Williams* and affirmation in *Colgrove*, empirical data is essential.

There have been few quantitative comparisons of the performances of six-member and twelve-member juries in comparable cases. Yet, statistical evidence that is available is confined to state courts who have adopted a rule similar to the Federal District Courts' rule providing for six-member juries. The first study concentrated on Workman's Compensation Act cases heard in the superior courts of the state of Washington during the calendar year of 1970.<sup>112</sup> Of the 128 jury trials in civil cases conducted in that state, ninety-five used twelve-member juries and thirty-three used six-member juries.<sup>113</sup> The number of cases in which the plaintiff prevailed was separated for each class of jury size from the number of cases in which the Department of Labor and Industries (DLI) prevailed.<sup>114</sup> The results showed that the distribution of decisions for the

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109. See H. KALVEN JR. & H. ZEISEL, *THE AMERICAN JURY* (1966). This book comprises one of the most extensive studies of the American jury.

110. Zeisel, *supra* note 103, at 716-19. Zeisel also predicts that fewer hung juries may be expected in six-member juries than in twelve-member juries where verdicts must be unanimous.

111. Comment, *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results*, 6 U. MICH. J.L. REFORM 671, 674 (1973).

112. Bermant and Coppock, *Outcomes of Six- and Twelve-Member Jury Trials: An Analysis of 128 Civil Cases in the State of Washington*, 48 WASH. L. REV. 593, 594 (1973). The authors relate that Workman's Compensation cases arrive in superior court only after a series of administrative lawyers are unable to reach an agreement between the injured worker and the state's Department of Labor and Industries (DLI).

The rules of the superior court provide for either a bench trial or a jury trial in which jury size may be less than twelve if both attorneys agree.

WASH. SUPER. CT. (CIV.) R. 38 provides that unless a demand is made for a twelve-member jury, the case "shall be tried by a jury of six members with the concurrence of five being required to reach a verdict." It is important to note that the federal district court in Washington requires six-member juries in all civil cases. FED. DIST. CT. (W. WASH.) R. 39.

113. Bermant and Coppock, *supra* note 112, at 594.

114. *Id.* at 595. A four cell table, using the Chi-Square Test for independent samples, was utilized. The results were:

plaintiff and the DLI were virtually identical in juries of six and twelve members.<sup>115</sup>

A study by the Institute of Judicial Administration (IJA study) was made comparing six-member and twelve-member juries in over 650 civil cases in New Jersey.<sup>116</sup> As far as verdicts were concerned, the study disclosed less than a two percentage point difference between the respective percentages of verdicts rendered for the plaintiff by the two different sized juries.<sup>117</sup> However, the deliberation time as well as damage awards of the respective juries did differ.<sup>118</sup> Yet, the reliability of these findings is suspect since the attorneys in each case were permitted to select the size of the jury impaneled. This resulted in twelve-member juries being selected where the issues were complex or the potential damages large.<sup>119</sup>

JURY SIZE	PREVAILING PARTY		TOTAL
	DLI	PLAINTIFF	
six	15	18	33
twelve	44	51	95
total	59	69	128

115. *Id.* at 595-96. Of the total sample, 46 percent were decided for DLI and 54 percent for the plaintiff. The proportion was also reflected in both the six-member and twelve-member juries: 45 percent and 46 percent, respectively, found for DLI. The Chi-Square score was 0.014, a value far below that which would be required to reject the hypothesis of no difference between six-member and twelve-member juries.

Yet, even with these findings, the authors cautioned interpreters of these results that the similarity of performance by these juries does not imply that the identical social and psychological processes were operating in both cases.

116. INSTITUTE OF JUDICIAL ADMINISTRATION, A COMPARISON OF SIX-AND TWELVE-MEMBER CIVIL JURIES IN NEW JERSEY SUPERIOR AND COUNTY COURTS 1-58 (1972) [hereinafter cited as IJA study].

117. *Id.* at 22.

118. *Id.* at 28-29. The study related the average time for six-member deliberation was 1.2 hours; for twelve-member deliberation, it was 1.8 hours. *Id.* at 24.

Damage awards by the twelve-member juries averaged almost three times larger than those by six.

119. Some of the results of this study included:

1. "Six-member voir dices averaged approximately 45%, or 21 minutes, shorter than twelve-member." *Id.* at 7.
2. "Deliberation time by six-member juries averaged 36 minutes, or 33%, less than time for twelve-member deliberations." *Id.* at 7.
3. "Cases tried before twelve-member juries took approximately twice as much trial time as those tried before six (11 hours' trial time compared to 5.6)." *Id.* at 7.
4. "[S]ettlements of cases started before twelve-member juries also average three times larger than settlements of cases started before six." *Id.* at 7.

The author of the study related that these results cannot be taken as indicating any inherent difference between the different-sized juries:

Many of the differences between trials before six-and twelve-member juries

The most comprehensive study comparing six-member and twelve-member juries arose in Michigan in which the two types of jury were empirically tested at two levels: an analysis of the literal finding that there are no significant differences in results,<sup>120</sup> and an examination of whether the process by which those results are achieved differs between the different-sized panels.<sup>121</sup>

As far as trial results are concerned, data was collected from the court records of the Circuit Court of Wayne County, Michigan<sup>122</sup> comprising 193 twelve-member civil jury trials (except divorces) during the six-month period from March 1, 1969 to August 31, 1969 and 292 six-member civil trials (except divorces) during the six-month period from March 1, 1971 to August 31, 1971.<sup>123</sup> Both the six-member and twelve-member jury samples were comprised of 58 per cent automobile negligence cases and 42 per cent other general civil cases.<sup>124</sup> After presenting the data in areas which included the manner of trial termination after the jury was impaneled,<sup>125</sup> trial duration,<sup>126</sup> prevailing party,<sup>127</sup> the amount

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appear to be due to differences in the types of cases selected by lawyers to be tried to six- and twelve-member juries rather than to differences in the size of the jury.

*Id.* at 5. *But see* Pabst, *supra* note 108, at 10-11.

120. Comment, *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results*, *supra* note 111.

121. Comment, *An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes*, 6 U. MICH. J.L. REFORM 712 (1973).

122. Wayne County, Michigan is the county comprised largely of the city of Detroit.

123. Comment, *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results*, *supra* note 111, at 676.

The information extracted from the history of each case included:

1. [T]he dates of all important events during the progress of the case;
2. the type of case—either automobile negligence or “other general civil,” as categorized on filing;
3. the amount of damages sought by the plaintiff, as stated in the complaint;
4. the duration of the trial, in days;
5. the manner of trial termination—verdict, settlement, directed verdict, mistrial, or hung jury—after the jury was impaneled;
6. the prevailing party in which a verdict was rendered; and
7. the amount of damages awarded in cases in which the plaintiff was the prevailing party.

*Id.* at 677. Eminent domain and paternity suits were deleted from the “other general civil” category for both six-member and twelve-member juries because the amount sought and amount awarded data were generally unavailable from the court records. *Id.* at 676-77, nn. 25, 26.

124. *Id.* at 677-78.

125. *Id.* at 682-83. There were fewer settlements in the six-member jury cases than in twelve-member jury cases.

126. *Id.* at 683-85. Based on the data, there was a small difference between trial duration in the different-sized juries.

127. *Id.* at 684-88. Here, the author defined a plaintiff's verdict as a verdict

sought in the plaintiff's complaint,<sup>128</sup> and the amount awarded as a percentage of the amount sought in the plaintiff's complaint,<sup>129</sup> the author of the study gave a statistical analysis of the data to determine if the disparities revealed by some of the data resulted from the change in jury size or purely by chance.<sup>130</sup> Some of the findings made, after incorporating the null hypothesis<sup>131</sup> into the evidence from the data included: there is no statistical significant difference between the six-member jury and the twelve-member jury as far as damage awards are concerned;<sup>132</sup> six-member juries award the same proportion of damages sought in the complaint as the twelve-member juries;<sup>133</sup> and there was no statistically significant difference between the proportion of the plaintiff's verdicts rendered by the two different-sized juries.<sup>134</sup> The author interpreted the

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awarding the plaintiff some net amount and all cases not classified as plaintiff's verdict were considered defendant's verdicts.

128. *Id.* at 689-93. The amount sought in the complaint, theoretically is the estimate made by the plaintiff's attorney of the potential value of the plaintiff's cause of action if the case were to go to trial. From the data collected, the median amount sought in the six-member jury cases was higher in each category than the median sought in twelve-member jury cases.

129. *Id.* at 690-97.

130. *Id.* at 698-700. This study used significance tests, namely, five null hypotheses (hypotheses that state no change occurred), which were simply an elaboration of the United States Supreme Court's statement that there should not be any discernible difference between the results produced by the different-sized juries. The five hypotheses were:

1. The proportion of cases settled after trial has begun is the same in trials before a six-member jury and in trials before a twelve-member jury.
2. The six-member jury has the same proportion of cases ending in hung juries as the twelve-member jury.
3. The six-member jury renders verdicts in favor of plaintiffs and defendants in the same proportion as the twelve-member jury renders its verdicts.
4. In rendering a money judgment for the plaintiff, the six-member jury's damage awards are identical to the twelve-member jury's awards.
5. In rendering a money judgment in favor of the plaintiff, the six-member jury awards the same proportion of the damages sought in the complaint as the twelve-member jury awards.

*Id.* at 698-99.

In testing each null hypothesis, the sample statistic most relevant to the hypothesis was chosen. Then, if the hypothesis was assumed true, the probability that the observed value of the sample statistic would occur by chance was calculated. If the calculated probability was greater than the standard .05 critical probability, the likelihood of chance occurrence was great enough that the null hypothesis was not rejected. If less than .05, sufficient doubt is cast on the hypothesis such that it is rejected in favor of an alternative.

131. *Supra* note 130.

132. *Id.* at 704. Yet, in automobile negligence cases, there was difference between the awards of the two different-sized juries.

133. *Id.* at 705.

134. *Id.* at 703-04.

statistical evidence to mean that there are "no statistically significant differences between six-member and twelve-member jury verdicts in civil cases in Wayne County Circuit Court."<sup>135</sup>

In examining whether the deliberative processes by which the above results were achieved differ between the different-sized panels, social science techniques were employed in testing a legal proposition. After setting forth the hypotheses<sup>136</sup> and methodology utilized by the experiment,<sup>137</sup> the study presented the results obtained by examining the deliberations of different-sized juries concerning the same civil litigation. After the two different-sized groups were statistically compared, the study found there were no significant differences between the verdicts,<sup>138</sup> number of issues discussed in the two different-sized panels,<sup>139</sup> and the six-

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135. *Id.* at 710.

136. Comment, *An Empirical Study of Six and Twelve-Member Jury Decision-Making Processes*, *supra* note 121, at 714-19. There were five hypotheses advanced by the author. They were:

1. There will be no significant difference between the verdicts of six-member juries and the verdicts of twelve-member juries.
2. There will be no significant differences in the deliberation times of six- and twelve-member juries deliberating in the same case.
3. There will be a significantly greater number of individual contributions in the six-member jury than in the twelve-member jury.
4. There will be no significant difference between the number of issues discussed by six-member juries and that discussed by twelve-member juries.
5. There will be greater juror satisfaction among the members of the six-member jury than among members of the twelve-member jury.

*Id.* at 716-19.

137. *Id.* at 719-22. The study consisted of presenting a video taped trial, involving an actual automobile negligence case settled out of court, to eight six-member juries and eight twelve-member juries. The actual plaintiff and defendant involved in this accident portrayed themselves and an experienced trial attorney served as judge with two third-year law students acting as the attorneys.

The trial lasted for two and one-half hours on the video tape machine and, according to a questionnaire prepared by the researcher and administered to non-juror viewers of the mock trial, the trial was found to be perceived as realistic.

The individuals participating in the experiment were 144 student jurors, randomly selected from University of Michigan undergraduate speech classes. They viewed the video tape of the trial between April and October of 1972 in either six-member or twelve-member groups. After viewing the trial, these individuals answered a preliminary questionnaire ascertaining their immediate individual verdict. After the group decision, a second individual questionnaire was presented to arrive at a comparison between pre- and post-deliberation opinions. The latter questionnaire also evaluated the juror's individual satisfaction with the deliberations. The entire deliberation of each panel was coded so as to devise the number of issues discussed and the pertinence of those issues to the deliberation.

138. *Id.* at 722-24.

139. *Id.* at 725-28. The author used a content analysis in this area, whereby three coders listened to recordings of the entire respective deliberations. As a result of this, a list was compiled of all issues discussed in all of the deliberations. The



member jurors were not significantly more satisfied with the deliberative process than were the twelve-member jurors.<sup>140</sup> Therefore, although the results tend to establish that there is no discernible difference between six-member and twelve-member juries, the empirical studies that have been made in this area are somewhat confined and non-conclusive.

What the Court, in *Colgrove*, was doing by utilizing the conclusion in *Williams*, was relying on an empirical assumption without any empirical foundation. The majority of the Court found six-man juries to "represent a proper balance between competing demands of expedition and group representation."<sup>141</sup> Yet, as mentioned by Justice Marshall, in his dissent, the Court found that a panel of six constitutes a "jury" within the context of the seventh amendment without first defining what a "jury" meant in terms of some arbitrary standard.<sup>142</sup> The Court did not provide an avenue, by reference to an abstract principle, to determine whether "six is 'enough,' or five is 'too small,' and 20 'too large.'"<sup>143</sup> Rather, the Court merely incorporated the *Williams* conclusion that "[W]hat is required for a jury is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community."<sup>144</sup> Thus, the test adopted by the Court is really no test at all. As the dissent relates, it may be that the ideal jury would provide "enough" group deliberation and community representation. Still, the problem would arise as to how much is "enough." The Court also added insult to injury when it left open the question of whether any number less than six would satisfy the seventh amendment's guarantee of trial by jury in civil cases.<sup>145</sup> Yet as Justice Marshall related, when "the dockets become more crowded and pressures on jury trials grow, who is to say that some future Court will not find three, or two, or one a number large enough to satisfy"<sup>146</sup> the seventh amendment? Moreover, what effect will the *Colgrove* decision have regarding the constitutionality of six-member juries if a comprehensive study on federal civil courts is made five years from now showing there is a discernible difference between the two-different sized panels? Therefore, the Court should have

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content analysis of each deliberation resulted in no statistically significant difference between the number of relevant and irrelevant issues discussed by the different-sized juries.

140. *Id.* at 732-34.

141. 413 U.S. at 181 (Marshall, J., dissenting).

142. *Id.* at 180.

143. *Id.*

144. *Id.* at 160 n.16.

145. *Id.* at 159-60.

146. *Id.* at 181.

made their evaluations in terms of a hypothetical ideal jury of some arbitrarily chosen size.<sup>147</sup> Hence, due to the empirical inadequacies presented both in *Williams* and current studies, as well as the lack of arbitrary definition, as to what is a "jury," the Court in *Colgrove* was too premature in deciding that a jury of six satisfies the seventh amendment guarantee of "trial by jury."

#### CONCLUSION

It was not the purpose of this casenote to declare the Court's decision in *Colgrove* incorrect with regard to the constitutionality of the local rule insofar as the seventh amendment is concerned. Rather, this casenote was intended to show that not only was complete discussion of the real rationale not provided by the Court as to why the framers did not intend—and the common law right of trial by jury did not require—twelve-member panels, but also that the constitutionality of six-member juries was merely assumed with a definite standard as to what constitutes a "jury" as well as lack of any empirical verification. The jury system does serve an important function in our system of government. It provides a liaison between the judiciary and the citizenry in transmitting the legal philosophy of the former to the latter, imbuing "all classes with a respect for the thing judged and with the notion of right."<sup>148</sup> Yet, neither in the framers' intention nor the common law right of trial by jury is there support for the contention that a "jury" should always be composed of twelve individuals. Although the seventh amendment did incorporate existing common law features of the jury system, the twice mentioned usage of the term "common law" contained in the amendment had nothing whatsoever to do with the number of people that must constitute a jury. Juries consisting of less than twelve persons are not a current development in the United States. They were utilized in colonial America. Even though numerous federal district courts have passed rules providing for six-member civil juries,<sup>149</sup> conclusive "empirical" statistics showing there is no discernible difference between twelve and six-member panels are lacking. Therefore, *Colgrove* evinces a lack of consideration of these facts in upholding six-man juries based on the rationale stated in the Court's opinion.

Joel Handler

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147. It is important to note that Justice Marshall, in his dissent, contended that the inevitable process of arbitrary line drawing belongs to the legislative branch which is far better equipped to make ad hoc compromises. *Id.* at 182-83.

148. 1 DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 295 (Vintage Books ed. 1957).

149. *Supra* note 96.