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The Constitutional History of the Seventh Amendment

Charles W. Wolfram*

I. INTRODUCTION

Since its adoption almost two centuries ago in 1791, the seventh amendment to the federal Constitution has been interpreted as if it were virtually a self-explanatory provision. Its text, to be sure, has an alluring surface simplicity:

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

As with other sonorous phrases of the Constitution, however, the seventh amendment has presented its full share of interpretative and logical difficulties. The chief persisting obstacle to understanding the meaning of the amendment has been a failure to discern the objectives that the proponents of the seventh amendment sought to accomplish through its adoption as part of the Bill of Rights. Surprisingly, this difficulty in attempting to realize the core meaning of the amendment seems never to have been approached as a problem of history. This Article therefore examines the history of the seventh amendment in order to furnish a basis for further reflection on the federal right to civil jury trial.

A. THE "HISTORICAL TEST"

For at least the past century and a half, judicial and academic writings on the right to jury trial afforded by the seventh amendment have uniformly agreed on one central proposition:

* Professor of Law, University of Minnesota. The author wishes to express his gratitude to his colleagues, and particularly to Professor Edward H. Cooper now of the University of Michigan Law School, for their many insights and helpful reactions to ideas generated at various stages of research on this paper. I also wish to express my appreciation to the students in my courses in Civil Procedure who have cheerfully provided a testing ground for some of the ideas expressed here and who have furnished or provoked many thoughts that otherwise might not have seen the light of day. Work on this Article during the summer of 1972 was made possible by a grant from the University of Minnesota Law Alumni Association.

in determining whether the seventh amendment requires that a jury be called to decide the case the court must be guided by the practice of English courts in 1791. If a jury would have been impaneled in this kind of case in 1791 English practice, then generally a jury is required by the seventh amendment. If the case is one of those in which a jury would not have sat—in England in 1791—then none is required by the seventh amendment.¹ This, the so-called “historical test” of the right to jury trial, is thought to be required by the language of the seventh amendment which states that the right of trial by jury is “preserved” “[i]n Suits at common law.”² The same historical test is also employed to answer civil jury trial questions beyond the initial inquiry into whether a jury is required at all. Thus the historical test is used to determine such issues as the respective provinces of judge and jury in a case tried to a jury, whether the jury must return a unanimous verdict and whether a jury of less than twelve members is permissible. English practice in 1791 determines all.

This approach appeared initially in what was apparently the first recorded case on the point, *United States v. Wonson*,³ decided by Mr. Justice Story on circuit in 1812. The United States had appealed from a judgment entered on a jury verdict for the defendant in a proceeding for a penalty under the Embargo Acts of 1808. Circuit Justice Story first held that the attempted appeal by the plaintiff was unavailing because only writ of error was available.⁴ Story nonetheless went on to consider the argument of the United States that it was entitled to a retrial to a second jury in the federal circuit court as was the practice in Massachusetts state courts. The frontal answer to

1. There is probably no constitutional right under the seventh amendment to a trial in a civil case *without* a jury. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 459-60 (1851).

2. In the great majority of state jurisdictions that have a state constitutional right to jury trial in state court proceedings, the test is similar to that employed by the federal courts in interpreting the seventh amendment even under state constitutional language which is not the same as the federal provision. See generally C. CLARK, *CODE PLEADING* § 16, at 91 (2d ed. 1947); F. JAMES, JR., *CIVIL PROCEDURE* § 8.1, at 337 n.2 (1965). This study, however, has not included an examination of the use of the “historical test” in the state courts. Special considerations of the history of a state’s provision for civil jury trial might lead to conclusions different than those here suggested respecting the seventh amendment.

3. 28 F. Cas. 745 (No. 16,750) (C.C.D. Mass. 1812).

4. *Id.* at 747.

this argument was that the practice was peculiar to the New England states and that the statutes of the United States did not require it.⁵ But Mr. Justice Story further held that a second jury trial would violate the seventh amendment. After briefly discussing the objections that had been raised to the original Constitution because of its failure to guarantee trial by jury in civil cases, Mr. Justice Story quoted the language of the seventh amendment and then continued:⁶

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

No federal case decided after *Wonson* seems to have challenged this sweeping proclamation; perhaps later judges have hesitated to appear to be the kind of intractable person that would require Mr. Justice Story to elaborate on the obvious.

The judicially developed doctrine that has stemmed from *Wonson* has two aspects. First, the right of jury trial is defined through reference by incorporation to the law of England, not to the law of the United States. Although one does occasionally encounter statements in opinions that suggest that the jury trial practice in the states of the United States might also be relevant,⁷ no decision has been encountered in which the alleged reference to the practice of United States courts has resulted in any conscious departure from the practices alleged to have obtained in England.

The second aspect of the historical test renders the reference to the common law of England temporally static, for the matured doctrine also required that the view of English law be taken as

5. *Id.* at 748.

6. *Id.* at 750. This language was employed in the course of a decision that assigned meaning to the phrase "according to the rules of the common law" that appears at the end of the seventh amendment and limits the power of appellate courts to re-examine fact findings once made by juries. The historical test of the *Wonson* case has also been used to define the reference to "Suits at common law" in the initial clause of the seventh amendment.

7. See, e.g., *Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry.*, 294 U.S. 648, 669 (1935) ("That guaranty has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England when the Constitution was adopted."); *Patton v. United States*, 281 U.S. 276, 288 (1930); *Thompson v. Utah*, 170 U.S. 343, 350 (1898).

of the date of the adoption of the seventh amendment in 1791.⁸ Mr. Justice Story did not mention the point in *Wonson*, very probably because the English practice did not permit retrial by a second jury either in 1791 or in 1812. The earliest Supreme Court opinion that mentions a specific time referent for the historical test was decided in 1898.⁹ This late development probably reflects the fact that many of the earlier cases involved issues as to which changes in the common law were irrelevant. It was only with later and more substantial innovations—such as the adoption of the Federal Rules of Civil Procedure in 1938 or the earlier changes in English practice in the latter half of the nineteenth century—that major differences between current and common-law practices raised significant issues.¹⁰

8. *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935): "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." See also *Ross v. Bernhard*, 396 U.S. 531, 534 (1970); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Patton v. United States*, 281 U.S. 276, 288 (1930); *Thompson v. Utah*, 170 U.S. 343, 350 (1898).

The Court suggested in *Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry.*, 294 U.S. 648, 669 (1935), that the appropriate time referent was "when the Constitution was adopted." This presumably could refer either to June 21, 1788, the date on which the ninth state (New Hampshire) ratified the proposed Constitution, or to the first Wednesday in March, 1789, when the Constitution became effective. The seventh amendment was adopted along with the other first ten amendments and became effective almost three years later on December 15, 1791. The statement in *Continental Illinois Nat'l Bank & Trust Co.* might have been a loose reference to the time of adoption of the seventh amendment instead of to the adoption of the main body of the Constitution. In any event, the Court did not suggest that the jury trial practice in 1788 or 1789 differed from that in 1791. In fact, courts have often been imprecise and unhistorical in dating jury trial practices that are held to fix the meaning of the seventh amendment. The accepted formulation of the historical test, however, has specified the year 1791, the year in which the seventh amendment was adopted, as the determinative date.

Professors Wright and Miller have advanced as settled the proposition that the historical test has come to require only an historical search into materials from any time prior to 1938 when law and equity were merged in the federal courts. 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2302, at 14-15 n.26 (1972). The authorities cited for this statement hardly seem supportive; but an uncited dictum in *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970), might do the trick. See text accompanying note 14 *infra*. Under the traditional historical test, such a reference to any pre-1938 materials would be legitimate only in a derivative sense. Authorities from years before or after 1791 presumably would be authoritative only to the extent that they themselves accurately reflect the English state of practice in 1791.

9. *Thompson v. Utah*, 170 U.S. 343 (1898).

10. See discussion *infra* at note 282.

The central importance of the historical test to the resolution of seventh amendment issues has been reaffirmed in decisions of the Supreme Court to the present day, although with perhaps a suggestion of infidelity to the test in the Court's most recent seventh amendment case, *Ross v. Bernhard*.¹¹ The Court in *Ross* rested its decision in part on an allusion to the nature of the action at common law at the time the seventh amendment was adopted.¹² At another point in its opinion, however, the Court gave reason to speculate that the historical test might be subject to substantial modification in future cases. The issue before the Court was whether the seventh amendment required a jury trial in a shareholder's derivative action in the federal courts. The majority held that it did. In the course of its opinion the Court stated that "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."¹³ In its footnote to this otherwise unexceptionable statement, the Court expressed the following approach to the determination of whether the seventh amendment requires jury trial of a particular kind of issue:¹⁴

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

This short passage contains at least two startling departures.¹⁵ First, "the pre-merger custom with reference to such questions," unless it refers to the practices in England in 1791 as the traditional formulation of the historical test would have it, seems to invite casting about at large amongst the widely varying state and federal practices in the almost two centuries that have intervened. Perhaps, however, this was simply a shorthand (and otherwise unnoted) reference to the developing adequacy-of-remedies concept in *Beacon Theatres, Inc. v. Westover*¹⁶ and *Dairy Queen, Inc. v. Wood*.¹⁷ These cases have basically

11. 396 U.S. 531 (1970).

12. *Id.* at 533-34.

13. *Id.* at 538.

14. *Id.* at 538 n.10.

15. See Note, *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 172-76 (1970). See also J. MOORE, FEDERAL PRACTICE RULES PAMPHLET 810-11 (1971); Note, *From Beacon Theatres to Dairy Queen to Ross: The Seventh Amendment, the Federal Rules, and a Receding Law-Equity Dichotomy*, 48 J. URB. L. 459 (1971); Note, *Ross v. Bernhard: The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112 (1971).

16. 359 U.S. 500 (1959).

17. 369 U.S. 469 (1962).

remolded the ancient equity rule¹⁸ that an equity suitor was required to demonstrate that he had no adequate remedy in the law courts. The revised "adequacy" test of *Beacon Theatres* and *Dairy Queen* requires that before the court determines that it must deprive a party of the right to jury trial by prior adjudication of any "equitable" matter, it should determine whether there is any device available, including any of the procedural innovations of the Federal Rules, that will permit prior trial by a jury. If this concept is the "pre-merger custom" to which the Court was referring in *Ross v. Bernhard*, then no new ground was being broken.

Second, the Court's invocation of "the practical abilities and limitations of juries" as a criterion for deciding when the seventh amendment requires trial by jury would suggest, for the first time, that the Court is tantalized by an explicitly functional approach to this seventh amendment question. Briefly stated, this approach would have the Court determine the kinds of cases in which the jury can better perform its fact-finding and perhaps other constitutionally validated functions and then extend the right of jury trial to these cases, but not to others. Presumably this would operate both to expand and to contract the categories of cases in which the Court, operating under the traditional historical test, has previously held that a jury either must or need not sit. Several difficulties with such a functional approach are apparent. First, no one has successfully isolated those functions which the jury is supposed to perform under the seventh amendment, at least not to the satisfaction of any substantial audience. Second, to the extent that such an approach would be used both to expand and to contract the jury trial right, the functional approach might be thought to raise the spectre of federal judges using a disturbingly broad discretion in their determination of whether a jury ought to be interposed in particular cases.¹⁹ Finally, it seems clear that one of the purposes of the right of jury trial in civil cases is to place limitations upon judges. It thus might be thought to be particularly inappropriate in this instance for the federal courts to claim a broad and loosely structured power to determine whether this civilian check on their own functioning should be interposed.

Perhaps footnote 10 in *Ross v. Bernhard* was intended merely to provoke an observable reaction from a waiting legal

18. See, e.g., F. JAMES, JR., CIVIL PROCEDURE § 8.2, at 342-43 (1965).

19. Cf. Note, 84 HARV. L. REV., *supra* note 15, at 176-177 n.26.

world. In any event, for those who would be disquieted were the Court seriously to consider a functional approach, some reassurance may be extracted from the fact that the Court did not even attempt in its opinion to consider whether a jury could better determine the complex corporate questions involved in shareholder derivative litigation. Standing as it does, thus alone, this fleeting expression in *Ross v. Bernhard* of infidelity to the centrality of the traditional historical test in seventh amendment determinations would hardly justify an announcement that the historical test has been superseded in the federal courts. It nonetheless underscores the present importance of determining the historical justification for that test.

Parallel developments in Supreme Court decisions involving the sixth amendment also suggest that history has a role to play in jury trial determinations that is different from that portrayed by blind adherence to the traditional historical test. Although possibly explicable on the ground of a significant difference in the language employed in the Constitution, the Court has treated historical references very differently in deciding questions of the application of the sixth amendment. The sixth amendment, of course, applies only to criminal trials:²⁰

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

Contrary to the apparently well-settled view that the seventh amendment does not apply to the states, and thus that states

20. U.S. CONST. amend. VI. See also *id.* art. III, § 2, cl. 3:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

That the Constitution as originally proposed contained this guarantee of jury trial in criminal cases but omitted a similar guarantee for civil cases was a source of grave political difficulty to those who argued in the course of the state ratification debates that there was no need to have furnished a guarantee of civil jury trial in order to preserve it as a preferred mode of trial in the federal courts. See note 89 *infra*.

The guarantee of criminal jury trial in the original Constitution was itself thought insufficient because it seemed to permit trial of the accused far from his home, if the venue was laid anywhere within the state in which the crime was committed. The criminal jury trial venue of article III only required trial "in the State" of alleged commission. It was chiefly to correct this "vicinage" objection that the sixth amendment was adopted. See generally F. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION* 25-34 (1951).

may freely dispense with trial by jury in civil cases,²¹ the Supreme Court has recently established the proposition that the sixth amendment right of jury trial in criminal cases does apply to the states.²² And in the process the Court showed little patience with arguments that it should be confined by the historical meaning of the right to jury trial in criminal cases as of the time of the adoption of the Constitution. In *Bloom v. Illinois*,²³ the Court held that the sixth amendment required a jury trial in a state court prosecution for a serious criminal contempt despite a strong historical argument that no such requirement was known to the common law. The majority opinion of Mr. Justice White stated:²⁴

We do not find the history of criminal contempt sufficiently simple or unambiguous to rest rejection of our prior decisions

21. The major questions of the applicability of the seventh amendment to the state courts have been fairly well settled by decisions of the Supreme Court. The Court held at an early date that the seventh amendment did not of its own force require that a jury sit in any non-federal civil action in the state courts. *Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 551-52 (1833). See also *Edwards v. Elliot*, 88 U.S. (21 Wall.) 532 (1874); *Justices v. Murray*, 76 U.S. (9 Wall.) 274 (1870). This result followed from Mr. Chief Justice Marshall's decision in *Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), that the protections of the Bill of Rights did not by their terms apply to the states. In *Walker v. Sauvinet*, 92 U.S. 90 (1876), the Court held that the seventh amendment was not made applicable to the states through the privileges and immunities or due process clauses of the fourteenth amendment. In *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972), a three-judge federal court held that the *Walker v. Sauvinet* result would be reaffirmed by the Supreme Court today. The prediction proved accurate when the Court unanimously affirmed *sub nom.* *Davis v. Edwards*, 93 S. Ct. 908 (1973) (per curiam). But cf. *Inman v. Baltimore & O. Ry.*, 361 U.S. 138, 146 (1959) (dissenting opinion of Douglas, J.).

In *Justices v. Murray*, *supra*, the Court held that the seventh amendment prohibition against federal court reexamination of jury fact findings precluded a federal court on habeas corpus from trying de novo facts previously found by a state court jury. At one level of analysis this is not an application of the seventh amendment to the states but a consistent restriction against the substitution of the fact findings of a federal judge for those of a jury. The case serves nicely to underscore the point that the seventh amendment is not a rule of mere judicial administration, but rather a protection personal to litigants against judicial interference with the determinations of civil juries.

22. *Bloom v. Illinois*, 391 U.S. 194 (1968); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

23. 391 U.S. 194 (1968).

24. *Id.* at 199-200 n.2. One is tempted to speculate broadly on the coincidence that Mr. Justice White was also the author of the expansive dictum in *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970). See text accompanying note 14 *supra*.

entirely on historical grounds In any event, the ultimate question is not whether the traditional doctrine is historically correct but whether the rule that criminal contempts are never entitled to a jury trial is a necessary or an acceptable construction of the Constitution.

In its resolution of the latter question the Court took a consciously functional approach and attempted to determine the values that the sixth amendment sought to protect and then to determine whether those values called for the protection of the sixth amendment in the kind of case before the Court.²⁵

A reading of the opinions in *Bloom* and in the companion case of *Duncan v. Louisiana*,²⁶ indicates that the Court in applying the requirement of criminal jury trial to the states is proceeding, speaking very strictly, only under the due process clause of the fourteenth amendment and not under the sixth amendment itself. But if this were to cause a divergence in the treatment of state and federal criminal jury trial cases, it would result in a widely disparate approach because in the Supreme Court decisions preceding *Bloom* and *Duncan* which squarely raised issues of the scope of the sixth amendment as applied in the federal courts, the Court indicated a sometimes surprisingly rigid historical view. Thus, in *United States v. Barnett*,²⁷ which held that punishment of criminal contempt by a federal court of appeals could be accomplished in a proceeding without a jury, the Court stated (through Mr. Justice Clark) that "[o]ur inquiry concerns the standard prevailing at the time of the adoption of the Constitution, not a score or more years later."²⁸ This was said in the course of rejecting an argument that a limitation upon the power to punish summarily for criminal contempt should be inferred from the fact that several states in years following the adoption of the Constitution had imposed statutory limitations upon the power.²⁹ In the final analysis, however, the narrow and restrictive view of history portrayed by *Barnett* seems to have been effectively replaced by a broader, more

25. 391 U.S. at 201-08.

26. 391 U.S. 145 (1968).

27. 376 U.S. 681 (1964).

28. *Id.* at 693. *Barnett* has not been overruled by the holding in *Bloom v. Illinois*, 391 U.S. 194 (1968), that any criminal contempt sentence of a greater severity than six months imprisonment must have been tried to a jury. The *Barnett* majority carefully noted that the alleged contempt had not yet been tried and thus left open the question whether a severe sentence might require jury trial. 376 U.S. at 694-95 n.12.

29. See Brief for Defendants at 31 n.21, *United States v. Barnett*, 376 U.S. 681 (1964).

functional approach in *Bloom v. Illinois*.³⁰ And it is doubtful in the extreme that the Court would apply any less flexible an approach to federal criminal jury trial cases than it has shown itself willing to apply to the states.

By apparent contrast, in *Ross v. Bernhard*³¹—the only seventh amendment case decided by the Court since these sixth amendment decisions—the Court has given only the slightest hint that the confinement of the traditional historical test was subject to question. It might be argued that the apparently different treatment of functionality in the interpretation of the two jury trial provisions of the Constitution is dictated by the different wording of the respective provisions: the seventh amendment refers to “Suits at common law” while the sixth amendment refers to “all criminal prosecutions.” Moreover, there might be aspects of the history of the seventh amendment such as those alluded to by Mr. Justice Story in his opinion in the *Wonson* case³² that dictate the more rigidly historical approach to the resolution of questions that arise under it.

The work of scholars dealing with the judicial doctrines developed under the seventh amendment seems to accept the basic thrust of the historical test.³³ To be sure, several scholars have

30. 391 U.S. 194 (1968).

31. 396 U.S. 531 (1970).

32. 28 F. Cas. 745 (No. 16,750) (C.C.D. Mass. 1812).

33. See 5 J. MOORE, FEDERAL PRACTICE ¶ 38.08[5](4), at 79 (1971) (“[T]he common law alluded to in the Amendment is the common law of England as of the time (1791) the Amendment was adopted”); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2301, at 14 (1971). Cf. James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 657-64 (1963); James, *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L.J. 1022, 1023-25 (1936); McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967); Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442, 448 (1971).

If I may be indulged a tangent, I feel the opportunity should not pass without commenting on the title and content of the last-cited article. It makes very clear what is often rather veiled—that the constitutional values represented by the seventh amendment are at a low state of importance in the minds of some, perhaps many, scholars. The article takes the position that the decision of the Fifth Circuit in *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971) (collateral estoppel effect cannot be given to former adjudication by judge in equity where subsequent action is at law for damages) was reached “without serious analysis of history, precedent, or policy.” Shapiro & Coquillette, *supra*, at 442. This was asserted in a writing which specifically denied the necessity of defending the policies of the doctrine of collateral estoppel. *Id.* at 445. Nor did the authors apparently feel the need to seek an accommodation between the values of the seventh

suggested, in one way or another, the introduction of flexibility into the process of applying the historical test in modern courts, primarily in order to achieve accommodation between the static nature of the historical test and the changing face of modern procedure—particularly the merger of the systems of law and equity.³⁴ Nonetheless, the acceptance of the historical test as the basic orientation to questions of the application of the seventh amendment has remained a firmly embedded part of legal orthodoxy.

B. THE NATURE OF THE PRESENT INQUIRY

Several events in recent years have brought to the forefront the institution of civil jury trial in the federal courts. Perhaps of least importance in this regard have been several recent cases, including at least three in the Supreme Court,³⁵ which have attempted in somewhat unconvincing fashion to determine the applicability of the seventh amendment guarantee to the type of case before the court. Of more widespread impact have been certain changes in the institution of the civil jury trial itself in

amendment and of the doctrine of collateral estoppel. This might have been accomplished, for example, by proposing an avoidance of the result in *Rachal v. Hill* only in cases where an advisory jury has been employed in the determination in the first proceeding which later is sought to be used as collateral estoppel. (See Fed. R. Civ. P. 39(c).) The obvious implication, which other portions of the article in question make clear, is that the seventh amendment jury in civil cases is such a drag on efficient judicial administration (Shapiro & Coquillette, *supra*, at 442, 457-58) and results in such inflated damage awards (*id.* at 458), that it should be avoided (here, in favor of the undefended values of collateral estoppel) 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. Its recurrence in discussions of the seventh amendment perhaps suggests that a lack of sympathy for the objectives of the seventh amendment is an important reason for continuation of a rigid and functionally meaningless application of the historical test in the hands of some judges. See *id.* at 543-44.

34. By far the best treatment of the subject is McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967).

35. *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).

federal courts. A large number of federal district courts recently have provided by local rule for civil jury trial by less than twelve jurors.³⁶ It is probably only a matter of time before serious proposals are brought forward for non-unanimous federal civil jury verdicts.³⁷ A case is currently pending in the Supreme Court that tests the validity of the federal six-person jury rules³⁸ and litigation doubtless would arise over the legality of majority verdicts in the federal courts if such a rule were put into effect. Also contending for attention are proposals which would remove the jury from federal civil cases altogether by re-

36. See Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507, 535-542 (1973) (giving the text of the local rules in fifty-four districts that have reduced the size of federal civil juries). The opposing views on the merits of six-person civil jury trial are well represented by Lumbard, *Trial by Jury and Speedy Justice*, 28 WASH. & LEE L. REV. 309 (1971) (favorable), and Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971) (opposed). The literature in support of a six-person jury is more numerous, much of it written by judges or, in the case of the Fisher article, *supra*, by a person in the Administrative Office of the United States Courts. See REPORT OF PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5-6 (1971) (approval in principle by the Conference of a reduction in size of juries in civil trials in United States district courts); Devitt, *Six-Member Civil Juries Gain Backing*, 57 A.B.A.J. 1111 (1971); Devitt, *The Six Man Jury in the Federal Court*, 53 F.R.D. 273 (1971); Kaufman, *Harbingers of Jury Reform*, 58 A.B.A.J. 695 (1972); Lumbard, *supra*; Thompson, *What is the Magic of "12"?*, 11 JUDGES J. 88 (1972); Wiehl, *A State Looks at the Six-Member Jury*, 11 JUDGES J. 31 (1972).

The recency of interest in six-person juries in the federal courts is explicable by the date of decision in *Williams v. Florida*, 399 U.S. 78 (1970). The Court there held that a state could, consistently with the due process limitations of the fourteenth amendment, provide for trial by less than twelve jurors (six were used in the actual case) of a serious criminal charge. But the Court stated explicitly that it was not deciding whether a jury of less than twelve would be permissible under the seventh amendment and noted the possibility that "additional references to the 'common law' that occur in the seventh amendment might support a different interpretation." 399 U.S. at 92 n.30.

37. See Kaufman, *Harbingers of Jury Reform*, 58 A.B.A.J. 695, 698-99 (1972). Speculation stems from the Supreme Court's 5-4 decisions in *Johnson v. Louisiana*, 406 U.S. 356 (1972); and *Apodaca v. Oregon*, 406 U.S. 404 (1972), that the Constitution does not require unanimous verdicts in state criminal trials.

38. *Colgrave v. Battin*, cert. granted, No. 71-1442, 93 S. Ct. 44 (1972), to review 456 F.2d 1379 (9th Cir. 1972). The Ninth Circuit held that neither the seventh amendment, the Federal Rules of Civil Procedure nor the Rules Enabling Act was violated by a local district court rule (U.S.D.C. MONT. R. 13(d)(1), effective Sept. 1, 1971) requiring that trial by jury in all civil actions be before a six-person panel. The case was argued in the Supreme Court on January 17, 1973 (see 41 U.S.L.W. 3407 (Jan. 23, 1973)) and at the time this Article was put in print had not yet been decided.

peal of the seventh amendment. Because of the prominence of their sponsors, these proposals probably must be taken seriously.³⁹

These developments have refueled the ongoing debate over the future of civil jury trial in the federal courts in the approaching third century of life of the Constitution. It is not my purpose to reinvestigate the arguments that have been made for and against the use of jury trial in civil cases. On both the scholarly and the popular levels, the volume of such writing is considerable.⁴⁰ Surprisingly, however, very little attention has been paid to the history of the seventh amendment, an aspect of the controversy which logically would seem anterior to much of the professional and lay discussion that has already transpired.⁴¹ This Article examines the historical materials to attempt to determine what its proponents sought to accomplish by adoption of the seventh amendment, or, to employ the sometimes unfortunate phraseology of fourteenth amendment scholarship, what was the "original understanding" of the proponents of the seventh amendment.

39. See, e.g., *New Constitution for United States?* TRIAL, Aug.-Sep., 1970, at 5 (reporting a proposal by Chief Justice Burger to abolish civil jury trial); Landis, *Jury Trials and the Delay of Justice*, 56 A.B.A.J. 950 (1970) (proposing the abolition of jury trial in civil cases).

40. For a recent collection of references to some of the best writings critical of the civil jury, see Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442, 457 n.60 (1971). See also H. KALVEN, JR. & H. ZEISEL, *THE AMERICAN JURY* 4 n.2 (1966), and the extensive collection of materials prepared by Professor Kalven heaping both praise and blame on the civil jury, *Memorandum Regarding Jury System*, in *Hearings on Recording of Jury Deliberations Before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess., 63-81 (1955).

41. It was not until 1966 that any serious work attempted to examine the historical materials for an understanding of the intended functioning of the seventh amendment, and then the examination was confined to a discussion of the power of judges to control the fact-finding functions of juries. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966). See also Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507 (1973). Unfortunately, the Henderson article attempted only to refute the view, attributed to Mr. Justices Black and Douglas, that the jury was the final decider of facts under the seventh amendment. The recounting of the events surrounding the adoption of the seventh amendment is sparse. See *id.* at 291-99. Moreover, the Henderson article did not question that the historical test is appropriately employed in determining the respective powers of judge and jury. See *id.* at 289-91. The Fisher article, *supra*, argues that there is no historical support for the requirement of a twelve-person jury. It also accepts the legitimacy of the traditional historical test. See *id.* at 511, 533.

Since this Article concentrates primarily upon historical materials as a possible aid to understanding legal questions, it would be well to formulate at the outset the methodological constraints to which a study of this nature is subject. First, as is true of many efforts to achieve a perspective on the original understanding of constitutional provisions, the most that can be said of the results set out here is that the original understanding can be only imperfectly perceived today. The almost total absence of any record of debate in the Senate during its consideration of the Bill of Rights,⁴² if nothing else, should preclude one from believing that he has found the historical "key" to resolution of any contemporary issue of seventh amendment constitutionalism. Second, no matter how clear the original understanding is thought to be, no decent theory of constitutional thought or adjudication can afford to give totally controlling weight to the product of historical method alone. The risks of inaccuracy inherent in historical work are too great. Forces contending for accommodation today are too insistent. The demands of traditions that have intervened since the occurrence of the originating events have created their own inertia. Nonetheless, at a minimum, ignorance of the teachings of the history surrounding the adoption of the seventh amendment is a luxury which courts and scholars have needlessly afforded. History has a part to play. Its importance depends on the clarity of the historical lessons and the susceptibility of particular issues to clarification by resort to the original sources. It ought also to be pointed out that the "history" here recounted is of a limited nature. First, the source materials are limited to those that have appeared in published anthologies or other collections of primary materials. No research has been attempted into previously unpublished original sources. Second, with but a limited retrospective glance at the more distant antecedents of the seventh amendment, this study commences with the writing of the Constitution in 1787.⁴³ Much remains to be discovered concerning the pre-Constitution operation of the civil jury—both

42. See note 266 *infra*. In addition to the absence of records of debates in the Senate, one is also confronted by a paucity of materials concerning the debate in the Constitutional Convention itself, in the state ratification conventions and in the state legislative sessions that approved the seventh amendment.

43. Among the questions left unanswered for lack of sufficient published materials dealing with the matter was the entire question of the jury trial practices of the states under their guarantees of civil jury trial in the various revolutionary constitutions adopted by the states beginning in 1776. See note 49 *infra*.

in this country and in England—before a clear understanding of the position of the seventh amendment in the libertarian scheme of the Bill of Rights can be attained.

Subject to these reservations, it will be seen that more is knowable from history about the intended functioning of the seventh amendment than has previously been thought to be the case. Specifically, it is clear that the amendment was meant by its proponents to do more than protect an occasional civil litigant against an oppressive and corrupt federal judge—although it certainly was to perform this function as well. There was substantial sentiment to preserve a supposed functioning of the jury that would result in ad hoc “legislative” changes through the medium of the jury’s verdict. Juries were sought to be thrust into cases to effect a result different from that likely to be obtained by an honest judge sitting without a jury. The effort was quite clearly to require juries to sit in civil cases as a check on what the popular mind might regard as legislative as well as judicial excesses. Some of the implications of these conclusions will be reviewed briefly after an examination of the historical materials themselves.

II. THE HISTORY OF THE ADOPTION OF THE SEVENTH AMENDMENT

A. THE SETTING: PRE-1787 DEVELOPMENT OF THE AMERICAN JURY

The institution of jury trial in civil cases was a familiar and well-ensconced feature of pre-1787 political life. The English, of course, had been using it in some form for centuries—although perhaps in fact not for as long a time and not under as firm a guarantee as many of the colonists and early constitutionalists were prone to think.⁴⁴ Legal writers and political theorists who

44. The framers all seem to have agreed that trial by jury could be traced back in an unbroken line to the provision in Magna Charta in which King John guaranteed trial by one’s peers. The only argument was whether Magna Charta preserved the right of trial by jury against interference both by the King and by Parliament. William Grayson argued for the antifederalists in the Virginia ratification convention that this was the effect of Magna Charta. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 569, 583 (J. Elliot ed. 1891) [hereinafter cited as ELLIOT, DEBATES]. Edmund Randolph argued for the federalists that Magna Charta did not limit Parliament, but only the King. See *id.* at 573.

Historians no longer accept the Magna Charta pedigree for jury trial. See F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION 15 (1951); 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 173 n.3 (2d ed. 1909).

were widely read by the colonists were firmly of the opinion that trial by jury in civil cases was an important right of freemen.⁴⁵ Civil jury trial was a part of the familiar pattern of judicial administration in courts of general jurisdiction in each of the colonies, although with local variations in the kinds of cases in which it was used and the procedures which accompanied its use.⁴⁶ A deeply divisive issue in the years just preceding the outbreak of hostilities between the colonies and England in 1774-1776 had been the extent to which colonial administrators were making use of judge-tried cases to circumvent the right of civil jury trial.⁴⁷ One of the stirring pre-Revolutionary memories

45. By far the most widely read of these was Blackstone who praised civil jury trial as "the glory of English law". See W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (Robert Bell ed., Philadelphia, 1771-72). See also, e.g., ANONYMOUS, THE COUNTY AND TOWN OFFICER: OR AN ABRIDGMENT OF THE LAWS OF THE PROVINCE OF MASSACHUSETTS-BAY 147 (Boston, 1768); BURN'S JUSTICE OF THE PEACE AND PARISH OFFICER 202 (J. Greenleaf ed., Boston, 1773).

46. Alexander Hamilton described the differences between the civil jury trial practices of the original thirteen states in THE FEDERALIST No. 83, at 565-66 (J. Cooke ed. 1961). In her scholarly article, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 299-320 (1966), Edith Henderson has collected a large number of previously published cases from the thirteen original states to demonstrate that the practices of the states differed widely with respect to the control that a judge could exert over the verdict of a jury in civil cases.

47. See R. POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 71 (1947). Late in 1772, the Boston town meeting passed a resolution charging that the right of trial by jury was in jeopardy from the power of the vice-admiralty courts. SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION, 1764-1788, at 94 (2d ed. S. Morison 1929). Later, George Mason's Letter To the Committee of Merchants in London, June 6, 1766, asserted that threats to the accepted practice of trial by jury and injustices perpetrated by the vice-admiralty courts had become points of dispute between the American colonies and England. 1 THE PAPERS OF GEORGE MASON 65, 67 (R. Rutland ed. 1970); R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, at 34 (1955).

While the vice-admiralty courts chiefly dealt with criminal offenses against the parliamentary customs and revenue measures, there were also implications for civil actions, such as the preclusion of a right of recovery of damages in a common-law action (before a jury) because of a prior decree of condemnation of a vessel before the vice-admiralty courts. See C. UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 68 (1960). And even if the person whose ship had been condemned successfully defended the condemnation, he could not recover costs nor could he maintain a common-law action for conversion if the vice-admiralty judge had certified that there was probable cause for the seizure. This and other machinations employed to prevent the use of the common-law civil jury as a check on unfounded (or perhaps only locally unpopular) seizures are listed in J. GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 86 n.170 (1971). In addition, the colonists before

was the jury acquittal of the printer John Peter Zenger in New York in 1734. While the trial itself was a criminal case, the popular imagination could probably still recall that one of the articles for which Zenger had been prosecuted was a strong denunciation of Governor Cosby of New York for attempting to recover a debt in an equity court in order to evade the debtor's right to a jury trial in the common-law courts.⁴⁸ In all of the thirteen original states formed after the outbreak of hostilities with England, the institution of civil jury trial was continued, either by express provision in a state constitution, by statute, or by continuation of the practices that had applied prior to the break with England.⁴⁹ In fact, "[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions . . ."⁵⁰ The attachment to this form of trial was so strong that it was even prescribed to be used in prize cases that were triable to the only central judicial authority created by the states under the Articles of Confederation.⁵¹

the Revolution had strongly protested against the trial of certain non-criminal cases—for example, suits for wages by shipwrights and laborers in shipyards—in the vice-admiralty courts. The colonists also claimed the "right" of jury trial in these cases, conveniently ignoring the point that trial of similar cases in England would also have been in a court of admiralty without a jury. See *id.* at 185-86.

48. See R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 69-71 (1957); L. RUTHERFORD, *JOHN PETER ZENGER* 67-68 (1904) (text of the information).

49. GA. CONST. OF 1777 art. LXI, in 2 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS* 785 (F. Thorpe ed. 1909); MD. CONST. OF 1776 art. III, in 3 *id.* at 1686-87; MASS. CONST. OF 1780 art. XV, in 3 *id.* at 1891-92; N.H. CONST. OF 1784 art. XX, in 4 *id.* at 2456; N.J. CONST. OF 1776 art. XXII, in 5 *id.* at 2598; N.Y. CONST. OF 1777 art. XLI, in 5 *id.* at 2637; N.C. CONST. OF 1776, Declaration of Rights, art. XIV, in 5 *id.* at 2788; PA. CONST. OF 1776, Declaration of Rights, art. XI, in 5 *id.* at 3083; S.C. CONST. OF 1778 art. XLI, in 6 *id.* at 3257; VA. CONST. OF 1776, Bill of Rights, § 11, in 7 *id.* at 3814.

50. L. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY—LEGACY OF SUPPRESSION* 281 (1963 reprint).

51. ARTICLES OF CONFEDERATION, art. IX, in 1 *THE FEDERAL & STATE CONSTITUTIONS*, *supra* note 49, at 12. Several prize cases were tried to juries under this provision. See C. UBBELOEDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 195-201 (1960); Wroth, *The Massachusetts Vice-Admiralty Court and the Federal Admiralty Jurisdiction*, 6 *AM. J. LEG. HIST.* 250, — (1962). The surprising aspect of these proceedings is that the cases came within the admiralty jurisdiction and would not have been tried to a jury either in England or under the later practice in the federal courts after adoption of the seventh amendment.

General Charles Colesworth Pinckney complained before the South Carolina legislature in 1788 that juries had been so willful in some of these capture cases that local juries had condemned even the property of friendly powers and sister states. "It was, therefore, by universal

Moreover, when Congress framed the Northwest Ordinance in 1787 for the governance of the territories to the West of the Appalachians, it included a specific guarantee of jury trial in civil cases.⁵²

In short, the nascent American nation demonstrated at virtually every important step in its development that trial by jury was the form of trial in civil cases to which people and their politicians were strongly attached. Against this background it is remarkable to observe the Constitutional Convention of 1787 winding toward the conclusion of its business in Philadelphia without making any provision for civil jury trial in the new federal courts.

B. THE CONSTITUTIONAL CONVENTION OF 1787:
THE FEDERALISTS' POSITION

The general outline of the adoption of the original Constitution, the struggle for ratification, and the subsequent adoption of the Bill of Rights (and with it the seventh amendment) is familiar history and can be sketched briefly. The Philadelphia Convention in 1787 considered the question of incorporating a set of protections for individual liberties only very cursorily, and that at a comparatively advanced stage of the development of the Constitution. The idea of a bill of rights was rejected as unnecessary by the framers, but this proved politically almost fatal to the proposed Constitution when it came before the state ratification conventions. Ratification was ultimately achieved probably only on the strength of assurances that the basic protections of a bill of rights would be incorporated as amendments (or enacted as statutes, according to some assurances) at the first meeting of the Congress provided for under the Constitution. True to these political promises, after the first Congress had gotten through some basic housekeeping legislation it turned to the question of amendments to the Constitution proposed by James Madison.

consent and approbation, laid aside in cases of capture. As the ordinance which regulated these trials was passed by Congress, they had the power of altering it, and they exercised that power." 4 ELLIOT, DEBATES, *supra* note 44, at 307. See also James Wilson in the Pennsylvania ratification convention, 2 *id.* at 493-94, 518; THE FEDERALIST No. 83, at 568 (J. Cooke ed. 1961) (A. Hamilton).

52. NORTHWEST ORDINANCE OF 1787 art. II, in 2 FEDERAL & STATE CONSTITUTIONS, *supra* note 49, at 960-61: "The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law."

The chief argument in favor of their adoption was that they were a necessary response to complaints and objections that had been raised during the ratification conventions. After surprisingly little discussion, what ultimately became the first few amendments were approved by Congress and became effective in 1791 after their approval by the requisite number of states. This general history of the background and adoption of the Bill of Rights usually brings to mind images of great constitutional debates over the freedoms of speech and press, the non-establishment of religion, the protections of due process, safeguards for those accused of crime and the like. It is, therefore, somewhat incongruous to a twentieth-century reader to learn that the entire issue of the absence of a bill of rights was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases.

The matter first arose in the convention five days before it was to adjourn. The members of the various state delegations had been laboring through one of the hottest summers that Philadelphians could remember. The convention had been in continuous session for two months (May 25 to July 26), debating the great issues of states rights and the power of the national executive. A working adjournment from July 27 to August 6 had permitted a Committee on Detail to prepare a draft based on the proposal of Edmund Randolph of Virginia. On August 6 the meetings of the convention resumed with the presentation of the draft of the Committee on Detail. Up to this point, there is no surviving record of any discussion of civil jury trial even though there had been some discussion of the federal judiciary in prior meetings.⁵³ The Randolph draft constitution did not contain any provision for jury trial, even in criminal cases. This last omission was cured by action of the Committee on Detail before its report of August 6,⁵⁴ but there is no indication in the histori-

53. For a sketch of this portion of the work of the Convention, see H. HART, JR. & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 2-8, 11-22 (2d ed. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler 1973); J. GOEBEL, JR., *supra* note 47, at 204-50.

54. See 2 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 137-50 (M. Farrand ed. 1911) [hereinafter cited as *FARRAND, RECORDS*]. The copy of the Randolph plan which Farrand here sets out indicates that an emendation in John Randolph's handwriting (2 *id.* at 137 n.6) added: "That Trials for Criml. Offences be in the State where the Offe was comd—by Jury . . ." 2 *id.* at 144. The printed copy of the proposed Constitution submitted to the convention by the Committee on Detail on August 6 included almost the same language with an exception for cases of

cal record whether there had been a similar proposal to provide for civil jury trial or, if there was such a proposal, why it had not been included. The second session of the constitutional convention was to last from August 6 to September 17. August was taken up with consideration of the structure and powers of the proposed federal government. The proposed judiciary article was discussed on August 27 and 28 but no mention was made of jury trial. When consideration of the work of the Committee on Detail had advanced sufficiently to indicate clearly the direction the Convention would take, a Committee on Style and Arrangement was appointed to work out the final form of the document.

The Committee on Style and Arrangement filed its report on September 12, five days before the Convention was to adjourn. It was at this late point that Hugh Williamson,⁵⁵ a North Carolina delegate, first⁵⁶ raised an objection to the lack of a

impeachment. 2 *id.* at 187. The final version is now contained in U.S. CONST. art. III, § 2, cl. 3.

55. Williamson played an active, although not a particularly central, role in the convention. On August 31 he had been appointed a member of the committee on unfinished parts of the Constitution (see 2 FARRAND, RECORDS, *supra* note 54, at 473). Professor Farrand speculates that Williamson possibly was here reacting to his failure to persuade that committee to report certain changes that he had proposed. M. FARRAND, THE MAKING OF THE CONSTITUTION 184 (1913). Immediately prior to the colloquy quoted in the text (see text accompanying note 57 *infra*), Williamson had successfully moved to reconsider the clause (now article I, section 7, clause 2 of the Constitution) that would have required a three-fourths vote of each house of Congress in order to override a presidential veto. 2 FARRAND, RECORDS, *supra* note 54, at 585-87 (J. Madison). In Madison's notes the quoted portion on civil jury trial follows immediately after the recording of the vote on the veto-override motion.

56. It is conceivable that the first recorded introduction of the subject of civil jury trial was made, not by Williamson, but by the troublesome twenty-nine year old delegate from South Carolina, Charles Pinckney. The work of the younger Pinckney at the Philadelphia Convention is sullied by his subsequent claim to virtual authorship of the original draft of the Constitution. It is accepted that Pinckney introduced a plan for a Constitution on May 29. J. Madison, *Debates in the Federal Convention*, in 1 FARRAND, RECORDS, *supra* note 54, at 23; R. Yates, *Secret Proceedings and Debates of the Convention*, in 1 *id.* at 24. Probably some time shortly after the Philadelphia Convention adjourned, Pinckney published a pamphlet which purported to contain the plan as he had introduced it on May 29. Many parts of it bore a very marked resemblance to the Constitution as it had come from the Committee on Detail on August 6. See 3 *id.* at 106-23. According to Pinckney's pamphlet, this May 29 version contained provision for "the Trial by Jury in all cases, Criminal as well as Civil . . . [an] essential in Free Government." 3 *id.* at 122. Professor Max Farrand, 3 *id.* at 122 n.1 (and see 3 *id.* at 609 n.3), has opined that the whole paragraph in the pamphlet of which the quoted language is a part is not "in keeping

guarantee of civil jury trial:⁵⁷

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

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

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

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

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

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

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

Gerry's motion to have a committee prepare a bill of rights was then defeated by a vote of all the states, with Gerry's own state

with the rest of the document and it may well be a later insertion." In 1818, John Quincy Adams was at work preparing an official edition of the journal of the Philadelphia Convention and wrote to Pinckney to request a copy of the plan that he had introduced on May 29. Pinckney's reply (see 3 *id.* at 427-28) enclosed a copy of a document (see 3 *id.* at 595-601) that does not contain any reference to civil jury trial but which itself is almost certainly spurious. See 3 *id.* at 601-04.

Later in the convention, on August 20, Pinckney submitted to the convention for transmittal to the Committee on Detail a series of proposals which included several phrases such as "the liberty of the Press shall be inviolably preserved." 2 *id.* at 334 (Journal); *id.* at 341 (J. Madison). There is no mention in these entries of the right of trial by jury. The conclusion seems rather inescapable that the alleged May 29 Pinckney proposal for "the Trial by Jury in all cases, Criminal as well as Civil" was conceived later for inclusion in his pamphlet. This language even differs significantly from the proposal that Pinckney and Gerry made on September 15 for trial by jury "as usual in civil cases." See text accompanying note 59 *infra*. It is interesting to speculate what the shape of federal jurisprudence would have been under the spurious Pinckney proposal, which did not even limit civil jury trial to "law" or to the "usual" cases, but purported to extend it to "all." Given its clear spuriousness, however, it should be ignored in attempting to give meaning to the language that eventually was employed in the seventh amendment.

57. J. Madison, *Debates in the Federal Convention*, in 2 FARRAND, RECORDS, *supra* note 54, at 587-88.

of Massachusetts abstaining. It should be emphasized that this exchange came over a month after the draft of the Committee on Detail was first placed before the Convention and over a month and a half after it had become evident that no general bill of rights had been proposed for inclusion in the Constitution.⁵⁸

Three days later—on Saturday, September 15—Charles Pinckney of South Carolina and Elbridge Gerry of Massachusetts came forward with specific language to add to article III to provide for civil jury trial in the proposed federal courts:⁵⁹

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

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

Mr. [Rufus] King [of Massachusetts] urged the same objections

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

The motion was disagreed to nem: con:

This ends the recorded discussion of the jury in civil cases at the Philadelphia convention.⁶⁰

The reasons for the failure of the framers to include a provision guaranteeing the right of jury trial in civil cases—and for that matter the reasons for the failure to provide for a detailed

58. For the August 6 draft of the Committee on Detail, see 2 FARRAND, RECORDS 177-89.

59. J. Madison, *Debates in the Federal Convention*, in 2 FARRAND, RECORDS 628 (emphasis in original). Gerry was one of the three delegates (Mason and Randolph of Virginia were the other two) who refused to sign the Constitution. One of the reasons that Gerry stated at the last meeting of the Convention for his refusal to sign was that the "rights of the Citizens . . . rendered insecure . . . by the general power of the Legislature . . . to establish a tribunal without juries, which will be a Star-chamber as to Civil cases." 2 *id.* at 633.

60. Although the surviving records of the proceedings of the Philadelphia Convention are sketchy, it is almost certain that altogether not more than an hour or so was spent on the subject of jury trial. Given the nature of other issues before the Convention, that was all the time that it separately should have been accorded. Certainly the later assertion before the North Carolina ratification convention by Richard Dobbs Spaight (a delegate to the Philadelphia Convention) that the subject of civil jury trial was "before" the body in Philadelphia for "three or four days" (4 ELLIOT, DEBATES, *supra* note 44, at 208) can be true only in a most hyperbolic sense. The subject was first raised on September 12 (2 FARRAND, RECORDS, *supra* note 54, at 587-88) and again on September 15 (*id.* at 628), on each occasion for probably only a brief discussion. There is no indication that the matter was discussed in the intervening days.

bill of rights—are understandable, even if ultimately insufficient. By the middle of September, when the large issues of the shape and powers of the national government had at last been compromised to a solution, the delegates must have felt enormous time pressures. They had in almost every instance long exceeded their intended stay in Philadelphia with consequent neglect of their family and business responsibilities. Their stay had been uncomfortable physically because of intolerably hot weather and inadequate accommodations. The matters that had been addressed and debated almost up to the close of the convention were those divisive matters that had most recently been in the minds of observers of the operation of the national government under the Articles of Confederation and these did not directly involve questions of individual liberties.

It is clear now that a stronger national government poses obvious threats to personal liberties. But this was a matter that lay too much in the future to concern the enthusiastic nationalists who were forming a model government. If the framers had considered the matter of individual liberties intensively, they probably could have framed an acceptable bill of rights, although at this point in time some delicate problems would have arisen because of the differences between the bills of rights of the several states.⁶¹ But most delegates were probably genuinely surprised when Williamson first implied that the new government that they were shaping could pose any serious threat to personal freedoms. The collective judgment of the tired delegates at this late date was that the work entailed in drafting a bill of rights was both substantial and unnecessary; the public would perceive the purity of their intentions. The assumption proved to be an almost fatal blunder.

61. It was claimed by the antifederalists during the ensuing ratification debates that it would have been a matter of a few hours work to have devised a bill of rights in the original constitutional convention. It is true that various clauses were inserted into the original Constitution—such as the provision for jury trial in criminal cases (art. III, § 2, cl. 3), the prohibition against bills of attainder and ex post facto laws (art. I, § 9, cl. 3), and the guarantee of the writ of habeas corpus (art. I, § 9, cl. 2)—which were obviously designed as libertarian protections against the powers of the proposed national government. But these seem to have arisen to handle special problems and not as any comprehensive attempt to enumerate all the rights that were not to be infringed. Had the latter task been undertaken, as the history of the debate in the first Congress over the provisions of the first ten amendments suggests, a good deal of drafting effort and debate would have ensued.

Even before the Philadelphia Convention adjourned, plans were being laid to attack the Constitution that was eventually proposed because of the absence of any guarantee of civil jury trial in the new federal courts.⁶² Although the framers might have been caught off their guard when Williamson's proposal was made in Convention, the delegates and their allies in favor of adoption of the Constitution regrouped after adjournment of the Convention and soon formulated a "party" position on the failure to include a civil jury trial guarantee. This position had in fact already been adumbrated in several of the speeches in the Philadelphia Convention,⁶³ when the two attempts were made by Williamson on September 12 and again by Pinckney and Gerry on September 15 to provide for civil jury trial in the original document.

The first argument against a constitutional guarantee of civil jury trial was that of Roger Sherman of Connecticut. Sherman argued that the state bills of rights were not repealed by the proposed constitution and thus, presumably, that by force of these provisions juries would be required to sit in federal courts in states which had such provisions. And, again presumably, this requirement would be subject to the exceptions provided in the applicable state bill of rights or statutes. Sherman's argument was repeated during the ratification debates by other federalists.⁶⁴ But it was based on an incorrect understanding of the

62. See note 78 and accompanying text *infra*.

63. See text accompanying notes 57-59 *supra*.

64. Governor Edmund Randolph in the Virginia convention, 3 ELLIOT, DEBATES, *supra* note 44, at 68; cf. Richard Dobbs Spaight in the North Carolina convention, 4 *id.* at 144. Alexander Hamilton in THE FEDERALIST No. 83, at 567-68 (J. Cooke ed. 1961), derided a proposal to have the right to jury trial depend on the constitutional provisions of the state in which the federal court was sitting:

The capricious operation of so dissimilar a method of trial in the same cases, under the same government, is of itself sufficient to indispose every well regulated judgment towards it. Whether the cause should be tried with or without a jury, would depend in a great number of cases, on the accidental situation of the court and parties.

Hamilton was here refuting a proposal by the Pennsylvania ratification convention that, as Hamilton read it, would vary the constitutional protection by the incorporated content of state law in each state. See also *id.* at 570-71 (Massachusetts proposal).

Such a proposal was denounced as "manifestly injudicious, impolitic, and unjust" and as "an absurdity" by James Iredell in the North Carolina convention. *Id.* at 165. The federalist Governor Thomas Johnston had argued earlier that it might be wise for Congress to pass such an act to accommodate the conflicting demands for civil jury trial of the several states. *Id.* at 150. (A similar proposal was made in the Massachusetts ratification convention by the Boston federalist

relationship between state law and the federal courts. The premise of the argument certainly would have been ignored by the federal courts if the first Congress had not itself provided for jury trial in the federal courts. In the original September 12 exchange, the antifederalist George Mason astutely recognized that this would be the probable interpretation of the supremacy clause.⁶⁵

The second argument against a guarantee of civil jury trial was advanced by Nathaniel Gorham of Massachusetts in response to the first proposal to include a civil jury trial provision made by Williamson on September 12. Gorham thought it would be difficult to draft constitutional language that would distinguish intelligently between those cases in which a jury would be appropriate and those in which it would not, and this apparently even without regard to the variant practices in the different states. The assumption implicit in this position was that the then existing divisions between jury-tried and judge-tried cases were unacceptable and that a new approach to the matter was desirable. Perhaps even the antifederalist George Mason agreed with Gorham: "The jury cases cannot be specified."⁶⁶ The answer that Mason then gave to this conceded drafting problem contains the germ of the difficulties that have plagued the federal courts in later attempts to ascertain the meaning of the seventh amendment: "A general principle laid down on this and other points would be sufficient . . ."⁶⁷ As will be seen, this problem of clear drafting was alluded to subsequently but was never adequately faced up to before passage of the seventh amendment. In any event, it was an obstacle to a

lawyer Christopher Gore. See 2 *id.* at 112.) After Johnston had spoken, the suggestion was taken up by the antifederalist Judge Samuel Spencer who asked why this could not have been inserted into the Constitution itself. It was upon this suggestion that Iredell then unleashed his barrage, obviously hitting one of his own men as well.

65. See text accompanying note 57 *supra*.

66. *Id.*

67. *Id.* From the context, it appears that Mason (who was not formally trained as a lawyer but was quite well grounded in many areas of the law) is here arguing that it would be sufficient simply to include in the Constitution general language to the effect that civil jury trial was one of the rights of the citizen, without any attempt to define when the right was to attach. The same suggestion was made in the state ratification conventions. See, e.g., John Smilie in the Pennsylvania ratification convention, 2 ELLIOT, DEBATES, *supra* note 44, at 517-18. The proposal would have attempted to solve the problems of drafting by ignoring them. This was, however, the approach that had already been taken in most of the state declarations of rights. See references cited at note 49 *supra*.

constitutional guarantee that could be appreciated only by those with more than the usual lay understanding of the operation of the legal system. Many members of the public probably viewed it as a technical quibble.

The third argument against a civil jury trial guarantee was that it was wiser to leave the matter to Congress for flexible regulation and future adjustment, rather than to create the strait-jacket of a constitutional guarantee. Both Gorham and Sherman made this argument on September 12 in the Constitutional Convention and it was repeated in the subsequent ratification debates.⁶⁸ Politically, the argument seems to have foundered because it gratuitously ignored one of the reasons why a constitutional guarantee of civil jury trial was insisted upon: to guard against unwanted legislation passed by a misguided national legislature.⁶⁹ Certainly the same potentially op-

68. See, e.g., John Marshall in the Virginia convention, 3 ELLIOT, DEBATES, *supra* note 44, at 561; George Nicholas in the Virginia convention, *id.* at 247 (Nicholas purported to fear that a constitutional guarantee of jury trial must inflexibly require jury trial of equity suits); James Iredell in the North Carolina convention, 4 *id.* at 144-45, 165, 170-71; Richard Dobbs Spaight, *id.* at 144; Governor Thomas Johnston, *id.* at 150-51; Archibald Maclaine, *id.* at 151-52; General Charles Cotesworth Pinckney in the South Carolina legislature, *id.* at 307-08; James Wilson in the Pennsylvania Convention, 2 *id.* at 488, 494, 517-18; Christopher Gore in the Massachusetts convention, *id.* at 112; THE FEDERALIST No. 83, at 573 (J. Cooke ed. 1961) (A. Hamilton).

69. See discussion accompanying notes 183-186 *infra*. Several federalists attempted to brush this objection aside on the general ground that Congress would have no conflict of interest with the public and thus could be trusted to provide for civil jury trial by statute. See, e.g., Governor Edmund Randolph in the Virginia convention, 3 ELLIOTT, DEBATES, *supra* note 44, at 203-04:

The trial by jury is supposed to be in danger. . . . It is not relinquished by the Constitution; it is only not provided for. Look at the interest of Congress to suppress it. Can it be in any manner advantageous for them to suppress it? . . . I will rest myself secure under this reflection—that it is impossible for the most suspicious or malignant mind to show that it is the interest of Congress to infringe on this trial by jury.

See also *id.* at 205; James Iredell in the North Carolina convention, 4 *id.* at 145 ("It is not to be presumed that the Congress would dare to deprive the people of this valuable privilege. Their own interest will operate as an additional guard, as none of them could tell how soon they might have occasion for such a trial themselves."), 166, 171; James Wilson in the Pennsylvania convention, 2 *id.* at 487, 488 ("[T]he power of making regulations with respect to the mode of trial may certainly be placed in the legislature; for I apprehend that the legislature will not do wrong in an instance from which they can derive no advantage."); Christopher Gore in the Massachusetts convention, *id.* at 112 ("Very few governments (certainly not this) can be interested in depriving the people of trial by jury, in questions of *meum et tuum.*"); Thomas Dawes in the Massachusetts convention, *id.* at 114; Tenche Coxe

pressive legislature that might pass obnoxious legislation could not be trusted to preserve a right of jury trial in cases arising under that legislation. The only federalist response to this was a rather lame plea to assume that decent men would be elected to Congress⁷⁰ or that, if Congress legislated to take away the right to jury trial in civil cases, the public in some unspecified way would "instantly resist."⁷¹

The fourth argument against a guarantee of civil jury trial was that the provision of a civil jury varied widely among the several states. This was actually a three-fold objection. First, any national constitutional provision would not be able to reflect the practices of every state and thus would be subject to attack in those states whose provision for jury trial differed from that in the Constitution, thereby presenting a needless obstacle to adoption of the proposed Constitution.⁷² Second, the great variety of state practices would frustrate any attempt to solve the general problem of drafting a provision that would intelligently distinguish between jury and non-jury cases by reference to state practices.⁷³ Finally, resolution of the conflicting

(writing as "An American Citizen") in *An Examination of the Constitution for the United States of America* 20 (1788), in P. FORD, *PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES* 150 (1888). Cf. John Marshall in the Virginia convention, 3 ELLIOTT, *DEBATES*, *supra* note 44, at 558, 559-62.

Somewhat related to this was the argument of Hamilton in THE FEDERALIST No. 83, at 561-62 (J. Cooke ed. 1961), that at least after an initial surge of cases, the federal courts probably would not try a very large percentage of civil cases because of the limited grants of jurisdiction to the federal courts. See also Madison in the Virginia convention, 3 ELLIOTT, *DEBATES*, *supra* note 44, at 537-38.

70. See, e.g., Governor Edmund Randolph in the Virginia convention, 2 ELLIOTT, *DEBATES*, *supra* note 44, at 68 ("It will be the interest of the individuals composing Congress to put . . . [civil jury trial] on this convenient footing. Shall we not choose men respectable for their good qualities? Or can we suppose that men tainted with the worst vices will get into Congress?"); Governor Thomas Johnston in the North Carolina convention, 4 *id.* at 150; General Charles Cotesworth Pinckney in the South Carolina legislature, *id.* at 308; James Wilson in the Pennsylvania convention, 2 *id.* at 486-87.

71. James Iredell in the North Carolina convention, 4 ELLIOTT, *DEBATES*, *supra* note 44, at 148. See also James Madison in the Virginia convention, 3 *id.* at 535.

72. See, e.g., Governor Edmund Randolph in the Virginia convention, 2 *id.* at 468; James Iredell in the North Carolina convention, 4 *id.* at 145, 165-66, 170; THE FEDERALIST No. 83, at 566-67, 572 (J. Cooke ed. 1961) (A. Hamilton).

73. See James Iredell in the North Carolina convention, 4 ELLIOTT, *DEBATES*, *supra* note 44, at 165; James Wilson in the Pennsylvania convention, 2 *id.* at 488; Thomas Dawes in the Massachusetts convention, *id.* at 114. See Patrick Henry's counterargument in the Virginia convention, 3 *id.* at 541-42,

desires and practices of the states with respect to jury trial would have required the Convention to draft an elaborate provision; this would have been an impracticable task in the convention and the resulting complicated provision would have been inappropriate in a document of first principles.⁷⁴ Nor, argued the federalists, would it have been appropriate to solve the problems presented by the variant state practices by drafting a vague and general provision that ignored them. This would simply have shifted to Congress the additional task of first determining the meaning of an entirely opaque and basically unresolvable constitutional mandate before it could pass to the problem of regulating civil jury trial.⁷⁵ It was thought better simply to leave the entire matter to be worked out by Congress without any confusing and unnecessary urging from the framers.

In the end, the defenders of the proposed constitution were reduced almost entirely to defending the omission of a guarantee of jury trial as a problem of technical draftsmanship. The federalists repeatedly promised that this would be disposed of by appropriate legislation as one of the first items of business of the new Congress. This assurance was asserted amidst a chorus of federalist disclaimers of any intent to limit jury trial in civil cases in the proposed federal courts.⁷⁶

74. See THE FEDERALIST No. 83, at 572 (J. Cooke ed. 1961) (A. Hamilton); Christopher Gore in the Massachusetts convention, 2 ELLIOT, DEBATES, *supra* note 44, at 112; Alexander Contee Hanson (writing as "Aristides"), *Remarks on the Proposed Plan for a Federal Government* (1787-1788?), in P. FORD, PAMPHLETS ON THE CONSTITUTION 241 (1888); James Iredell, in a pamphlet of unknown title, *id.* at 361.

75. This seems to be the import of some of the objections to the Pinckney-Gerry proposal for jury trial "as usual in civil cases." See text accompanying note 59 *supra*.

A more extreme form of this argument was occasionally made. Under this version it was asserted that a constitutional guarantee of jury trial simply would not work, citing legislative evasions of civil jury trial despite a bill of rights provision in the speaker's or some other state. See THE FEDERALIST No. 83, at 574 (J. Cooke ed. 1961) (A. Hamilton); James Wilson in the Pennsylvania convention, 2 ELLIOT, DEBATES, *supra* note 44, at 489.

76. See, e.g., Edmund Pendleton in the Virginia convention, *id.* at 546; James Iredell in the North Carolina convention, 4 *id.* at 166, 170-71; Tenche Coxe (writing as "An American Citizen") in *An Examination of the Constitution for the United States of America* 19-20 (1788), in P. FORD, PAMPHLETS ON THE CONSTITUTION 148-50 (1888); Oliver Ellsworth (writing as "A Landholder") in the Connecticut Courant, December 10, 1787, in P. FORD, ESSAYS ON THE CONSTITUTION 165 (1892).

Alexander Hamilton seems to have gone further than any other federalist who published during the ratification debates in doubting the wisdom of jury trial in civil cases. See THE FEDERALIST No. 83, at 562-64 (J. Cooke ed. 1961). He thought that the arguments that the jury

C. THE ANTIFEDERALISTS⁷⁷ AND THE RATIFICATION DEBATES

George Mason, one of the few delegates who did not sign the Constitution, emerged as one of the most effective polemicists against the proposed Constitution during the subsequent ratification controversy. Mason left the Philadelphia convention before its adjournment, according to his biographers, because he had already decided that the resulting document would be incurably pernicious. As the carriage of the prominent Virginia planter and slaveowner pulled away from Convention Hall he jotted down his basic objections on blank portions of the final committee report of the Constitution. The first and most prominent of these was the omission of a bill of rights; one of the most important of the omitted rights was the right to a jury trial in civil cases.⁷⁸

Mason's reaction seems suspiciously political. To be sure, he had been the draftsman of the Declaration of Rights for Virginia in 1776⁷⁹ and might understandably have been concerned over the failure of the convention to insert similar protections in the basic plan for the federal government. But he and other delegates who subsequently attacked the Constitution had been present for weeks during the convention and had not raised the

was the safeguard of liberty and the "very palladium of free government" (*id.* at 562) were possibly true of the jury in criminal cases but had no connection with civil jury trial. But, despite some misgivings (*id.* at 563-64), Hamilton was prepared to concede that the civil jury was perhaps useful as a check against a bribed judge. He concluded:

Notwithstanding therefore the doubts I have expressed as to the essentiality of trial by jury, in civil cases, to liberty, I admit that it is in most cases, under proper regulations, an excellent method of determining questions of property; and that on this account alone it would be entitled to a constitutional provision in its favour, if it were possible to fix the limits within which it ought to be comprehended.

Id. at 564.

77. One of the earliest successes of the "federalists," the party that eventually won the battle over the adoption of the Constitution, was to foist upon their opponents the appellation "antifederalists." The connotations of opposition to a system of state-national governments and of sheer obstructionism were well appreciated by the "antifederalists" who vigorously argued that the name was better deserved by the supporters of the Constitution, who in fact should not be regarded as "federalists," but rather as "consolidationists" or "nationalists." See J. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788*, at xi-xiii (1961). Despite the probable merit of this argument, the opponents of the Constitution are known to history as the "antifederalists," the supporters as "federalists," and so they shall be known here.

78. R. RUTLAND, *GEORGE MASON* 91 (1961).

79. See *id.* at 49-63.

point until nearly the eve of adjournment.⁸⁰ It is difficult to escape the feeling that the "bill of rights" and "civil jury trial" issues that were to play so prominent a part in the ensuing struggle against ratification in the states were, at least for Mason and some of his fellow delegates who opposed ratification, make-weight arguments designed mainly to stimulate public opposition to the Constitution. This strategy would indirectly bolster an attack that was founded on more strongly felt misgivings that could not be made with the same assurance of popular support, such as the threatened loss of local political influence.⁸¹

But an appreciation of the possible "political" motive which caused many of the antifederalists to raise the civil jury trial issue should not be permitted to obscure the constitutional significance of public reaction to the issue. Historians of the period unanimously agree that the attack on the proposed Constitution by the antifederalists based on its omission of a bill of rights struck a very responsive chord in the public.⁸² This obviously was the political appraisal of the situation by the anti-

80. The significance of Mason's silence during the convention did not elude the federalists. Oliver Ellsworth (writing as "The Landholder") published a pamphlet in December 1787 which was widely read and copied and which, in intemperate language that characterizes much of the pamphlet polemics of the ratification controversy, pointed out that many of the arguments that Mason had made against the Constitution since the Philadelphia Convention had not been made during it. See 3 FARRAND, RECORDS, *supra* note 54, at 165; P. FORD, ESSAYS ON THE CONSTITUTION 161, 165 (1892). See also James Wilson in the Pennsylvania ratification convention, 2 ELLIOT, DEBATES, *supra* note 44, at 453.

81. See, e.g., M. JENSEN, THE MAKING OF THE AMERICAN CONSTITUTION 131 (1964); R. RUTLAND, ORDEAL OF THE CONSTITUTION 213 (1966).

82. I. BRANT, THE BILL OF RIGHTS 39 (1964); R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 122-24, 140 (1955); C. WARREN, THE MAKING OF THE CONSTITUTION 509-10 (1937). Alexander Hamilton devoted Number 83 of *The Federalist* entirely to the effort of persuading his fellow-New Yorkers that the omission of a civil jury trial provision from the proposed Constitution, then pending for ratification in New York, was not a serious objection to the document:

The objection to the plan of the convention, which has met with most success in this state, and perhaps in several of the other states, is *that relative to the want of a constitutional provision for the trial by jury in civil cases.*

THE FEDERALIST No. 83, at 558 (J. Cooke ed. 1961) (emphasis in original).

Thomas Jefferson, who maintained neutrality of a kind throughout the ratification debates, was more inclined to the Constitution than opposed to it. But he too objected to the absence of a bill of rights (as well as to the failure to prevent the President from succeeding himself perpetually). Among the rights that he wished had been explicitly guaranteed was that of "a trial by jury in all cases determinable by the laws of the land." Thomas Jefferson to Francis Hopkinson (from Paris), March 13, 1789, 5 U.S. BUREAU OF ROLLS & LIBRARY, DOCUMENTARY HISTORY OF THE CONSTITUTION, 1786-1870, at 159-60 (1905).

federalists. And this reading of the public mind appears to have been shared by the federalists who themselves sought to assuage the libertarian fears of members of the public through their writings in the pamphlet and newspaper war that accompanied the process of ratification and, once ratification was achieved, through prompt adoption of a Bill of Rights at the inception of the new government.⁸³

It therefore seems irrelevant to the issues of constitutionalism that underlie the seventh amendment (and presumably other portions of the Bill of Rights as well) that arguments against the original Constitution were perhaps pandering to public fears and beliefs that were unfounded. The fact remains that the ratification process brought to light strongly felt popular beliefs about government and its relationship to the person in the street and the importance of the civil jury in preserving that relationship. The fact that these popular beliefs might have been ill-founded or for some other reason unwise or unacceptable does not vitiate their vitality as components of the political reality to which the framers of the Bill of Rights subsequently responded. Certainly a sound process of assigning meaning to the language of the seventh amendment would today ultimately refuse to give effect to the idiosyncratic ravings of an antifederalist pamphleteer. But if an antifederalist argument for constitutional protection of the right of civil jury trial is based on a perception which, although unreasonable or distorted in one's present view, nonetheless was widely shared at that time by speakers (and thus, inferentially, by members of the public), it would seem acutely relevant to a determination of the intended reach of the amendment.⁸⁴

83. In his speech to the first Congress proposing the first amendments to the Constitution, James Madison clearly acknowledged the politically volatile nature of the absence of protections such as a guarantee of civil jury trial:

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

1 ANNALS OF CONG. 433 (1789).

84. For example, one could agree, at least for the sake of argument, that the reasons for permitting the jury unfettered power to acquit one accused of crime are not in any way applicable in civil cases. See Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 327 (1966). But it does not follow that a widespread popular conviction at the time of adoption of the seventh amendment that a jury in a civil case has the right to "decide the law"—a conviction based perhaps in part on arguments drawn from criminal libel cases—can be

What, then, were the reasons why opponents of the proposed Constitution expressed concern over the absence of a constitutional guarantee of jury trial in civil cases? Whatever conclusions one does draw from the incomplete records of the constitutional debates surrounding the adoption of the seventh amendment or from the inconclusive nature of much of the discussion that was preserved, one must reject at the outset the conclusion that the arguments of the antifederalist "dealt with nothing more specific than the general proposition that civil juries were a good thing."⁸⁵ To the contrary, surviving materials demonstrate that the antifederalists advanced several distinct and specific arguments in favor of civil jury trial: the protec-

dismissed as the groundless musings of less acute minds. Cf. Henderson, *supra*, at 335. Perhaps in the final analysis one might conclude that the belief was too inarticulately related to the eventual passage of the seventh amendment to be of decisive weight, but relevant it surely is.

85. Henderson, *supra* note 84, at 292. See also *id.* at 336. One might be led to the conclusion that the antifederalists were simply general enthusiasts if one concentrates too much upon the oratory employed in praise of the civil jury. No rhetorical excess seems to have been discountenanced. Patrick Henry, to take only one example, in speeches in the Virginia ratification convention used the following sobriquets to describe jury trial (sometimes referring confusingly to either civil or criminal jury trial): (a) one of the "rights dear to human nature," (b) "Trial by jury is the best appendage of freedom," (c) a "sacred right," (d) "that invaluable blessing," and (e) "that trial by jury which our ancestors secured their lives and property with," "that noble palladium," "that excellent mode of trial," "the transcendent excellency of this trial, its essentiality to the preservation of liberty, and the extreme danger of substituting any other mode." 3 ELLIOT, DEBATES, *supra* note 44, at 314, 324, 462, 583, 544. See especially Henry's long peroration on the threat to liberty by the loss of civil jury trial and by the absence of a requirement that federal juries in criminal cases be taken from the immediate "vicinage." *Id.* at 545-46. And see John Dawson in the Virginia convention, *id.* at 610-11 ("that inestimable privilege (the most important which freemen can enjoy,) the trial by jury in all civil cases, has not been guarded by the system").

The federalists were not adverse to overblown rhetoric extolling the civil jury when it suited their purpose. See, e.g., the Pennsylvania federalist writing as "Nestor" in the *Independent Gazetteer*, September 29, 1787, in PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 133 (J. McMaster & F. Stone eds. 1888) [hereinafter cited as MCMASTER & STONE] (the right of civil jury is "the first privilege of freemen—the noblest article that ever entered the constitution of a free country—a jewel whose transcendent lustre adds dignity to human nature."); John Dickinson, *Letter of Fabius IV* (1788) in P. FORD, PAMPHLETS ON THE CONSTITUTION 185-86 (1888).

By whichever party produced, all this is simply evidence of a pyrotechnic style that thankfully has largely passed from fashion. It should not be permitted to obscure the real substance of the arguments being made in favor of, and against, the civil jury under the proposed Constitution.

tion of debtor defendants; the frustration of unwise legislation; the overturning of the practices of courts of vice-admiralty; the vindication of the interests of private citizens in litigation with the government; and the protection of litigants against overbearing and oppressive judges.

There is, moreover, a generalized but weighty premise that underlies every one of the antifederalist arguments in favor of constitutional protection of the right of jury trial in civil cases. It is unquestionable, but nonetheless sometimes overlooked, that the general intention of antifederalist agitation for mandatory jury trial was to achieve results from jury-tried cases that would not be forthcoming from trials conducted by judges alone. Clearly the antifederalists were not arguing for jury trial on the ground that it was a more efficient form of trial or in some procedural way inherently superior to trial by the court.⁸⁶ It is common today to oppose the institution of the civil jury and its preservation in the seventh amendment on the asserted ground that trials in which juries sit are long, expensive, prone to unseemly forensics, and sometimes productive of decisions that are probably at odds with the substantive rules that the judge instructs the jury to apply.⁸⁷ But the antifederalists were not arguing for the institution of civil jury trial in the belief that jury trials were short, inexpensive, decorous and productive of the same decisions that judges sitting without juries would produce. The inconveniences of jury trial were accepted precisely because in important instances, through its ability to disregard substantive rules of law, the jury would reach a result that the judge either could not or would not reach. Those who favored the civil jury were not misguided tinkerers with procedural devices; they were, for the day, libertarians who avowed that im-

86. The jury was, however, often praised as being a better agency for fact finding because jurors heard testimony in the presence of persons testifying and thus could judge the truth by observing the countenance of the witness. See, e.g., James Wilson in the Pennsylvania Convention, 2 ELLIOT, DEBATES, *supra* note 44, at 516. (Wilson limited this observation, however, to those cases where "jurors can be acquainted with the characters of the parties and the witnesses,—where the whole cause can be brought within their knowledge and their view.") This was in contrast to the operation of the courts of chancery which even in that day had acquired a reputation for obtuseness and delay because of the necessity of obtaining evidence by depositions which were then subjected to continued reexamination by the hierarchy of courts. Cf. *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents* in McMASTER & STONE, *supra* note 85, at 470, 473-75.

87. See generally materials cited at note 40 *supra*.

portant areas of protection for litigants in general, and for debtors in particular, would be placed in grave danger unless it were required that juries sit in civil cases.⁸⁸

One more general matter should be emphasized concerning the debate between the supporters of the proposed Constitution and the antifederalists who unsuccessfully attempted to prevent its adoption: on the matter of civil jury trial the antifederalists won. While many of their arguments concerning the form of the national government and the extent of its powers were ultimately rejected, the antifederalist arguments concerning civil jury trial (and other guarantees that were enacted into the Bill of Rights) ultimately prevailed.⁸⁹ Since the antifederalists were

88. The implications of this seem rather clear for modern-day procedural reformers who would abolish or restrict the civil jury in the interest of efficiency in judicial administration. See notes 36, 37, 39 *supra*. Due regard for our constitutional beginnings would seem to require that these reformers accept the challenge of the original conceptions and attempt to demonstrate either that the threats the jury was to meet in 1791 are today insufficiently important to require the constitutional solution of mandatory jury trial or that the jury in fact did not perform, or no longer performs, the function ascribed to it by the originators of the seventh amendment.

89. One of the antifederalist arguments that was given very wide currency in the ratification debates was rendered moot by the passage of the seventh amendment. For several reasons it was argued that civil trial by jury would be abolished under the new Constitution.

First, it was argued that there had been an implied limitation on the powers of Congress to provide for civil jury trial because the judiciary article provided for trial by jury in criminal cases but failed to mention civil cases. See, e.g., *Letters of Centinel No. 1*, in McMASTER & STONE, *supra* note 85, at 575. Thus the proposed Constitution allegedly had destroyed altogether the right of jury trial in civil cases in the federal courts. The federalist response was that this was hardly a commonsense reading of the judiciary article. See, e.g., THE FEDERALIST No. 83 at 558-62 (J. Cooke ed. 1961) (A. Hamilton); John Marshall in the Virginia convention, 3 ELLIOT, DEBATES, *supra* note 44, at 557-58; Thomas Dawes in the Massachusetts convention, 2 *id.* at 113. In addition, Hamilton argued in Number 83 of *The Federalist* that the power granted to Congress in article I to create inferior federal courts implied the power to prescribe the mode of trial. THE FEDERALIST No. 83, *supra* at 559. The antifederalist rejoinder was that matters of the importance of civil jury trial should not be left to implication, but that the document should be amended, prior to its approval, to provide expressly for civil jury trial. See, e.g., Patrick Henry in the Virginia ratification convention, 3 ELLIOT, DEBATES, *supra* note 44, at 579, 651-52. This rejoinder was part of the familiar second-convention strategy of arguing for prior amendments to the proposed Constitution which would require a new convention at which, it was hoped, more substantial concessions could be extracted, such as limitations on the taxing and trade regulation powers of Congress.

A second variation on the implied-abolition argument cropped up in the Massachusetts and Virginia ratification conventions where it ap-

the generative force behind the seventh amendment, it seems that their arguments should be given due weight in determining the purpose behind the seventh amendment and should be resorted to as an aid in resolving interpretative problems that arise under its language. It is true that the first Congress that enacted the Bill of Rights and several of the state legislatures which approved the amendments were controlled by federalists. But there is no surviving evidence that the shape of the seventh amendment enacted by a federalist Congress and approved by federalist state legislatures varied significantly from what the antifederalists had been arguing for during the ratification process.

1. *The Protection of Debtors*

a. Debtor-Creditor Conflict and the Constitutional Convention

One cannot read through Jonathan Elliot's collection of debates in the state ratification conventions without being struck by the repeated connection made by antifederalist speakers (and by federalist speakers in response) between the right of jury trial in civil cases and the plight of debtors who would be re-

parently was argued that the references in article III to "court" or "courts" amounted to an implied prohibition against the use of juries. It was pointed out that it was familiar legislative usage to employ the generic term "court" when referring to all modes of trial in such courts, including trial by jury. Thomas Dawes in the Massachusetts convention, 2 ELLIOT, DEBATES, *supra* note 44, at 113; John Marshall in the Virginia convention, 3 *id.* at 557-58.

A third antifederalist argument was that the right to jury trial was implicitly abolished by the provision in article III, section 2, that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact." It was argued by the antifederalists that this would be read as an incorporation of the "civil law" (because of the allegedly extensive powers of review of facts and because of the use of the term "appeal") and thus that the civil jury had, by implication, been prohibited. See the discussion by the antifederalist John Smilie in the Pennsylvania ratification convention, Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention*, 22 WM. & MARY Q. 301, 311 (1964); James Wilson in the Pennsylvania convention, 2 ELLIOT, DEBATES, *supra* note 44, at 515, 518-19. A much more telling antifederalist argument was that the unlimited power given to the Supreme Court to review facts in all cases would effectually emasculate the powers of the jury, even if a jury were provided for. See, e.g., Patrick Henry in the Virginia convention, 3 *id.* at 540-41; George Mason in the Virginia convention, 3 *id.* at 528. Hamilton's response to such arguments was uncommonly lame. Hamilton's argument was merely that Congress would probably limit the Supreme Court's admittedly extensive powers to review jury findings. THE FEDERALIST No. 81, at 549-52 (J. Cooke ed. 1961).

quired to defend debt actions in the new federal courts under the diversity of citizenship and alienage jurisdictions. Beneath these allusions, most of them otherwise strangely detached and incomplete, lies a rather familiar segment of American post-revolutionary history that helps to make these veiled allusions intelligible.⁹⁰

In the scheme of government set up during the American Revolution under the Articles of Confederation, requisitions for funds were made to each state by the central Congress. As the hostilities wore on, the states increasingly resorted to the expedient of printing paper money in great quantities to meet their obligations and in order to provide temporary relief for debtors. The inevitable economic result was that the currencies of many of the states became highly unstable and often came to be valued at a fraction of their face amounts. As one result, during some economic periods in several states, persons often entered into contracts which called for payment of a sum that was greatly inflated because of the relatively worthless local currency. Those who were unable to pay off their indebtedness with the currency when it was at the highly inflated figure, as contemplated in the bargain, were confronted after the Revolution with the threat of deflation. Creditors were now calling for payment of the contract price at a time when the available currency had often become much "harder" and thus more difficult to obtain through the sale of goods or services. In addition, several states during the Revolution had enacted, primarily as revenue measures, escheat statutes under the terms of which a debtor could discharge his debt to a British subject by making the payment to the state. These escheat statutes were attacked along with those that more straightforwardly directed the seizure of British property. Presumably some debtors had also at-

90. In D. HENDERSON, *COURTS FOR A NEW NATION* 72-89 (1971), the author discusses the general economic background of the federal judicial structure and the early utilization of the federal courts for the collection of debts, primarily by British creditors whose claims had been frustrated in the state courts prior to the adoption of the Constitution. For general discussions of the economic policies of the states during the period prior to the adoption of the Constitution, particularly with respect to the issuance of paper money and the British debts, see I. HARRELL, *LOYALISM IN VIRGINIA* 26-29, 123-161 (1926); M. JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789*, at 265-81, 313-26 (1950); A. McLAUGHLIN, *THE CONFEDERATION AND THE CONSTITUTION* 53-88, 138-153 (1905). For a collection of some of the materials, particularly unanthologized newspapers discussing the issue of the jury and the collection of pre-war British debts, see J. GOEBEL, JR., *supra* note 47, at 284-85.

tempted to pay off their British creditors with the inflated state currency. Understandably, the British merchants to whom debts of these kinds were owed had clamored for payment in full and in a sound sterling currency. Domestic creditors also found little favor with some of the state governments. "Stay" laws were passed which prevented secured creditors from selling pledged or mortgaged property. So-called "tender" laws were enacted that required creditors to accept payment for debts in inflated local currency.⁹¹ Some southern states enacted "pine barren" laws that required that creditors accept worthless land in surrender of their claims for payment.

Steps had already been taken prior to the adoption of the Constitution to attempt to assure foreign creditors that the nation would stand behind the indebtedness of its citizens, particularly through the Treaty of Peace with Great Britain of 1783. The United States agreed that no legal impediments would be used to frustrate the claims of British creditors and that the confiscation of the property of British subjects would not be continued.⁹² These treaty assurances had often been ignored by the states.⁹³ The harassed debtor thus could hope that his

91. Ironically, some of the tender laws were so severe that they raised civil liberties issues of the same kind that had troubled the earlier colonists under the customs and revenue measures of Great Britain. For example, in Rhode Island the tender law could be enforced against a person who refused to accept paper money in payment of a debt by proceeding against him by information and without a jury. This provision produced one of the earliest judicial determinations apparently refusing to enforce an enactment because of its unconstitutionality. See J. GOEBEL, JR., *supra* note 47, at 137-41.

92. Definitive Treaty of Peace with Great Britain, September 3, 1783, art. IV, 8 Stat. 80, T.S. No. 104: "It is agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted." *Id.* art. VI: "[t]here shall be no future confiscations made." Under article VII, the British agreed that "his Britannic Majesty shall, with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants, withdraw all his armies, garrisons and fleets from the said United States . . ." Virginia refused to repeal its law sequestering British assets on the excuse that Britain had not complied with this portion of the treaty, nor had Virginians been paid for slaves that allegedly had been stolen during the Revolution. Other states also procrastinated. The unsatisfactory state of affairs was responsible for the Jay Treaty, November 19, 1794, 8 Stat. 116, T.S. 105, under the terms of which (article VI) the United States itself agreed to pay any bona fide debt owed to a British subject which could not be collected because of an impediment created by a state statute. See generally D. HENDERSON, *COURTS FOR A NEW NATION* 72-75 (1971).

93. M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 46 (1913); I. HARRELL, *LOYALISM IN VIRGINIA* 125-156 (1926); M.

creditor would be forced to bring suit in the debtor's local court where, under the protection of favorable local laws, the debtor might receive a sympathetic hearing before a jury composed of his friends and relatives. It had become clear by the mid-1780's that creditors probably would obtain little relief from the states and that the Confederation was relatively powerless to assist in the collection of the full claimed value of debts.

Some historians have maintained that the entire movement for a strong national government after the cessation of hostilities with Great Britain can be explained on these and related eco-

JENSEN, *THE MAKING OF THE AMERICAN CONSTITUTION* 96-97 (1964); A. NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION* 644-56 (1924).

In the well-known article by the later Judge Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928), this background is used as historical support for the thesis that the diversity and alienage jurisdictions were incorporated into the Constitution in order to permit the federal courts to enforce the provisions of the Treaty of 1783 with respect to the repayment of British debts.

The existence of the provisions of the Treaty of 1783 with respect to collection of British debts (*see note 92 supra*) would seem today clearly to have invalidated much of the state debtor legislation. And it was later so held in *Ware v. Hylton*, 3 U.S. (3 Dall.) 175 (1796). But it was by no means clear prior to the adoption of the Constitution that state courts, even were they so disposed, would assert the power to declare a state statute void because in conflict with a national treaty. *See J. GOEBEL, JR., supra note 47, at 131-42 (1971)*. On several occasions separate state courts had declared state laws invalid. *See Nelson, Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166, 1172-73 (1972). Interestingly, in one of those cases, *Den ex dem. Bayard v. Singleton*, 1 Martin 42, 44-45 (N.C. 1787), the court held invalid a provision in a North Carolina statute that required the courts to dismiss on motion all cases concerning confiscated British property if the defendant produced an affidavit that he held the disputed property under a sale from a commissioner of forfeited estates. The court held that the statute violated the state's constitutional guarantee of civil jury trial. The Rhode Island Superior Court reached the same result in a very similar case in 1786 in *Trevett v. Weeden*. *See J. GOEBEL, JR., supra at 137-41*. In *Rutgers v. Waddington* (1784), in *SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY* 302 (R. Morris ed. 1935), the court intimated that it would refuse to enforce a state statute in conflict with a treaty of the United States. No other case seems to have gone so far. The combination of the paucity of state court decisions invalidating state debtor legislation and the large number of claims for repayment of British debts that persisted into the 1790's suggests that the state courts were avoiding the conflict by a time-honored method—delaying ruling on these cases. *See James Madison's defense of the diversity of citizenship jurisdiction in the Virginia ratification convention*, 3 ELLIOT, *DEBATES, supra note 44, at 533*: "We know what tardy, and even defective, administration of justice has happened in some states . . ."; William R. Davie in the North Carolina convention, 4 *id.* at 159 (quoted at note 95 *infra*). *Cf. J. GOEBEL, JR., supra at 285 n.123.*

conomic grounds alone.⁹⁴ Whatever the merits of this particular controversy, it is indisputable that the debtor orientation of many of the states played an important part in the drafting of the Constitution and in the subsequent ratification process.

Creditors as a class generally found the relief in the Constitutional Convention that had been denied them in the states. Several portions of the proposed Constitution bore particularly on the creditor-debtor conflict. The first clause of article I, section 10, prohibited any state from issuing bills of credit, making anything but gold and silver coin legal tender, or passing any ex post facto law or law impairing the obligation of contracts. In part to cope with the problem of state debtor laws, the framers included within the judiciary article provisions for federal judicial jurisdiction in suits arising under a federal treaty or statute, and in controversies between citizens of different states and between aliens and citizens.⁹⁵

94. The classic exposition of this interpretation of the founding of the Constitution is C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913). More recently, the theories of Beard have been challenged. See, e.g., R. BROWN, *CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION"* (1956); F. McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1958). And now a middle school has emerged. See L. BENSON, TURNER AND BEARD: *AMERICAN HISTORICAL WRITING RECONSIDERED* (1960); J. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788* (1961). Selections from the writings of Beard and his detractors and supporters can be found in *ESSAYS ON THE MAKING OF THE CONSTITUTION* (L. Levy ed. 1969).

95. Compare Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 *HARV. L. REV.* 483 (1928), with Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 *U. PA. L. REV.* 869 (1931). See also Frank, *Historical Bases of the Federal Judicial System*, 13 *L. & CONTEMP. PROB.* 3, 22-28 (1948). For contemporary references, see, e.g., James Wilson in the Pennsylvania convention, note 134 *infra*; William R. Davie in the North Carolina ratification convention, 4 *ELLIOT, DEBATES*, *supra* note 44, at 159 (emphasis in original):

The security of impartiality is the principal reason for giving up the ultimate decision of controversies between citizens of different states. It is essential to the interest of agriculture and commerce that the hands of the states should be bound from making paper money, instalment laws, or *pine-barren acts*. By such iniquitous laws the merchant or farmer may be defrauded of a considerable part of his just claims. But in the federal court, real money will be recovered with that speed which is necessary to accommodate the circumstances of individuals. The tedious delays of judicial proceedings, at present, in some states, are ruinous to creditors. In Virginia, many suits are twenty or thirty years spun out by legal ingenuity, and the defective construction of their judiciary. A citizen of Massachusetts or this country might be ruined before he could recover a debt in that state. It is necessary, therefore, in order to obtain justice, that we recur to the judiciary of the United States, where justice must be equally administered, and where a debt may be re-

The admiralty and maritime jurisdiction was intended in part to bring into the federal courts shipping cases that might affect the credit of the United States economic interests.⁹⁶ The grant to the Supreme Court of appellate jurisdiction "both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make" was explained by at least one speaker in the ratification debates as necessary in order to prevent juries from making determinations based on local biases that might give affront to foreign economic interests and to those in other states.⁹⁷ Finally, the new Congress was granted power to reinvigorate the national economy, including the power to pay the debts of the United States and to regulate interstate and foreign commerce. In article VI it was provided that the indebtedness of the states under the Articles of Confederation should remain. The supremacy clause declared that national laws (the Constitution and federal laws and treaties) were to prevail over the constitutions and laws of the states.

Among those who stood to lose from the adoption of this strong form of government were debtors who relied on local state currencies, statutes, courts and juries for protection against the claims of creditors.⁹⁸ The proposed Constitution threatened debtors with suit in the federal courts by creditors from other states and foreign countries. Since the proposed Constitution itself seemed to invalidate state "tender" laws and similar debtor relief legislation, the last resort for the hounded debtor was a hopefully sympathetic jury in his local federal court. But no

covered from the citizen of one state as soon as from the citizen of another.

96. See Governor Edmund Randolph in the Virginia ratification convention, 3 ELLIOT, DEBATES, *supra* note 44, at 471 (emphasis in original):

Cases of admiralty and maritime jurisdiction cannot, with propriety, be vested in particular state courts. As our national tranquility and reputation, and intercourse with foreign nations, may be affected by admiralty decisions; as they ought, therefore, to be uniform; and as there can be no uniformity if there be thirteen distinct, independent jurisdictions,—this jurisdiction ought to be in the federal judiciary.

See also Governor Randolph, 3 *id.* at 203; Madison in the Virginia ratification convention, 3 *id.* at 532.

97. Madison in the Virginia ratification convention, 3 ELLIOT, DEBATES, *supra* note 44, at 534-35. Cf. J. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, at 266-81 (1961).

98. One federalist pamphleteer accused the antifederalists of having united to defeat the Constitution in order to permit the states to continue to issue their paper money. See Alexander Contee Hanson, (writing as "Aristides"), *Remarks on the Proposed Plan of a Federal Government* in P. FORD, PAMPHLETS ON THE CONSTITUTION 243-44 (1888).

provisions had been made in the Constitution for jury trial in federal courts in civil actions. Moreover, the Supreme Court had been granted the power in article III, section 2, to exercise "appellate Jurisdiction, both as to Law and Fact." This suggested that even if a jury trial were provided an appellate court might undertake to reexamine the validity of the jury's findings or that, if this reexamination were performed by another jury (as it was in some of the New England states), that it would be performed only at the distant seat of government where the Supreme Court would be held. The predictable outcry from those who would be expected to speak for the debtor class was heard, particularly, but by no means exclusively, in the more debt-ridden southern states.

b. Debtors and the Civil Jury in the State Ratification Debates

A state-by-state examination of the surviving records of the debates in the state ratification process reveals that the resulting concern for local debtors faced with the threat of suit in a federal court, without a jury, was one of the chief motivations for opposition to the Constitution.

South Carolina. In the South Carolina legislature⁹⁹ the anti-federalist leader and former state governor Rawlins Lowndes coupled his attack on the limitation on state currency powers and the absence from the Constitution of a guarantee of civil jury trial as follows:¹⁰⁰

Paper money, too, was another article of restraint, and a popular point with many; but what evils had we ever experienced by issuing a little paper money to relieve ourselves from any exigency that pressed us? We had now a circulating medium which every body took. We used formerly to issue paper bills every year, and recall them every five, with great convenience and advantage. Had not paper money carried us triumphantly through the war, extricated us from difficulties generally supposed to be insurmountable, and fully established us in our independence? and now every thing is so changed that an entire stop must be put to any more paper emissions, however great our distress may be. It was true, no article of the Constitution declared there should not be jury trials in civil cases; yet

99. Much of the South Carolina debates published in Elliot took place during the debate in the South Carolina legislature over a bill to call a convention to consider ratification of the Constitution. The debate here seems to have been as full as that preserved from the subsequent ratification convention. See R. RUTLAND, *THE ORDEAL OF THE CONSTITUTION: THE ANTI-FEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788*, at 162-69 (1965).

100. 4 ELLIOT, *DEBATES*, *supra* note 44, at 289-90.

this must be implied, because it stated that all crimes, except in cases of impeachment, shall be tried by a jury. But even if trials by jury were allowed, could any person rest satisfied with a mode of trial which prevents the parties from being obliged to bring a cause for discussion before a jury of men chosen from the vicinage, in a manner conformable to the present administration of justice, which had stood the test of time and experience, and ever been highly approved of? Mr. Lowndes expatiated some time on the nature of compacts, the sacred light in which they were held by all nations, and solemnly called on the house to consider whether it would not be better to add strength to the old Confederation, instead of hastily adopting another; asking whether a man could be looked on as wise, who, possessing a magnificent building, upon discovering a flaw, instead of repairing the injury, should pull it down, and build another.

In the minds of debtors and their representatives, an automatic connection was surely made between Lowndes' discussion of the relief of debtors and his discussion of trial by jury in civil cases: if issues of paper money were to be stopped, then at least a debtor should have the opportunity of attempting to convince a jury that the creditor's claim was unjust or inflated.

Strangely, however, the point seems either to have been lost on the federalist speakers who responded to Lowndes, or else they loftily chose to ignore the idea that persons should be enabled not to pay their bills.¹⁰¹ The federalist Judge Robert Barnwell, responding to Lowndes, argued that there certainly were instances in which even the greatest advocate for the right to civil jury trial would yield his right to it. The instance in which Barnwell asserts that this would be done is where a citizen of South Carolina finds it necessary to try his claim for a debt against a citizen of Georgia in the defendant's state, presumably before the defendant's friends.¹⁰²

What is the consequence? Why, the citizen of this state must rest his cause upon the jury of his opponent's vicinage, where, unknown and unrelated, he stands a very poor chance for justice against one whose neighbors, whose friends and relations, compose the greater part of his judges. It is in this case, and

101. Two general and interrelated questions are raised by the speech of the antifederalist Lowndes and the response of the federalists. As will be seen, these same issues are raised by similar behavior in the debates in other states as well. First, why were the antifederalists so reticent about making explicit the connection between the debtors and civil jury trial that I suggest was the intended impression? Second, if a connotation of debtor relief through jury trial was intended, why were the federalists—many of them astute politicians—so apparently obtuse about meeting it on its own terms? The central importance of these recurrent issues requires that they be dealt with separately. See text accompanying notes 176-81 *infra*.

102. 4 ELLIOT, DEBATES, *supra* note 44, at 295.

only in cases of a similar nature with this, that the right of trial by jury is not established; and judging from myself, it is in this instance only that every man would wish to resign it, not to a jury with whom he is unacquainted, but to an impartial and responsible individual.

The lines were thus rather clearly drawn. The difficulty with the civil jury from the federalist point of view was that it could not be trusted rigorously to enforce claims of creditors. The antifederalists agreed with the federalist understanding of jury behavior but assigned an entirely different value to it: the refusal of jurors to award damages on certain claims was precisely the reason why its guarantee was sought.

North Carolina. The antifederalist Matthew Locke delivered a speech before the first, and abortive, North Carolina ratification convention¹⁰³ that was very similar to that of Lowndes in the South Carolina legislature. Locke went to some length to defend the necessity of enacting "*pine-barren* and *installment* laws" and of "making paper money."¹⁰⁴ He then attacked the absence of a guarantee of civil jury trial. These remarks came in the course of an attack on the federalist argument that the diversity of citizenship jurisdiction should be given to the federal courts because in some cases state judges could not be trusted to enforce the laws without partiality toward local citizens. The sequence of defending the state court judges and the pine barren and tender laws and of then decrying the absence of civil jury trial in the federal courts again did everything but make explicit the connection that must have been obvious to Locke's listeners:¹⁰⁵

For my part, I think it derogatory to the honor of this state to give this jurisdiction to the federal courts. It must be supposed that the same passions, dispositions, and failings of humanity which attend the state judges, will be equally the lot of the federal judges. To justify giving this cognizance to those courts, it must be supposed that all justice and equity are given up at once in the states. Such reasoning is very strange to me. I fear greatly for this state, and for other states. I find there has a considerable stress been laid upon the injustice of laws made heretofore. Great reflections are thrown on South Carolina for passing *pine-barren* and *instalment* laws, and on this state for making paper money. I wish those gentlemen who made those observations would consider the necessity which compelled us

103. The North Carolina convention was the only convention which originally voted not to ratify the Constitution but to insist instead on prior amendments. See 4 ELLIOT, DEBATES, *supra* note 44, at 250. North Carolina finally ratified the Constitution after it had become effective by the acts of ratification of nine other states.

104. 4 ELLIOT, DEBATES, *supra* note 44, at 169 (emphasis in original).

105. *Id.* at 170.

in a great measure to make such money. I never thought the law which authorized it a good law. If the evil could have been avoided, it would have been a very bad law; but necessity, sir, justified it in some degree. . . . Necessity compelled them to pass the law, in order to save vast numbers of people from ruin. I hope to be excused in observing that it would have been hard for our late Continental army to lay down their arms, with which they had valiantly and successfully fought for their country, without receiving or being promised and assured of some compensation for their past services. . . . Congress was unable to pay them, but passed many resolutions and laws in their favor, particularly one that each state should make up the depreciation of the pay of the Continental line, who were distressed for the want of an adequate compensation for their services. This state could not pay her proportion in specie. To have laid a tax for that purpose would have been oppressive. What was to be done? The only expedient was to pass a law to make paper money, and make it a tender. . . . This subject has for many years embroiled the state; but the situation of the country, and the distress of the people are so great, that the public measures must be accommodated to their circumstances with peculiar delicacy and caution, or another insurrection may be the consequence. As to what the gentleman said of the trial by jury, it surprises me much to hear gentlemen of such great abilities speak such language. It is clearly insecure, nor can ingenuity and subtle arguments prove the contrary. I trust this country is too sensible of the value of liberty, and her citizens have bought it too dearly, to give it up hastily.

Earlier in the same day on which Locke spoke, his fellow-antifederalist James M'Dowall had made a related argument that seems to have been calculated to appeal to similar economic interests. M'Dowall's argument proceeded from an antifederalist attack on the bestowal of the entire federal judicial jurisdiction on one supreme court which they charged would sit only in the seat of the national government, which was presumed to be Philadelphia. It was also claimed that the Supreme Court's power under the proposed judicial article to exercise an appellate review "both as to Law and Fact" would require a complete retrial of cases before a distant supreme court even in cases that had been tried locally in a federal court.¹⁰⁶ M'Dowall argued that this arrangement would give undue advantage to the rich litigant:¹⁰⁷

106. See, e.g., Samuel Spencer in the North Carolina convention, *id.* at 138-39. A similar attack was made by antifederalists in other states as well. See, e.g., George Mason in the Virginia ratification convention, 3 *id.* at 525-30; Patrick Henry, *infra* note 110.

107. 4 ELLIOT, DEBATES, *supra* note 44, at 143. See also Samuel Spencer in the North Carolina convention, *id.* at 136, who raised the spectre of a stamp duty being enacted by Congress that would require that all contracts be on "stamp paper" in order to be enforceable. This imagined enactment would give the federal courts federal question

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

The passage is too ambiguous to determine this with certainty, but it might well be that M'Dowall's reference to cases involving "land affairs" was an allusion to the situation of rival claims to land that had arisen under some of the same debtor-relief laws that his colleague Locke later discussed in more detail.¹⁰⁸

Virginia. The discussion of the economic effect of the proposed Constitution was extensive in the Virginia ratification convention, the ratification convention for which the reports of the debates are by far the most complete.¹⁰⁹ Economics and the civil jury figured very prominently in one of the longer speeches of the arch-antifederalist Patrick Henry. Henry first questioned the wisdom of conferring extensive powers upon the national legislature without first enacting a bill of rights.¹¹⁰

Of what advantage is it to the American Congress to take away this great and general security? I ask, Of what advantage

jurisdiction over all contract cases. After complaining about the army of federal judges that would be created and the erosion of the power of state courts, Spencer complained about the absence of a bill of rights. *Id.* at 137-38.

108. Many land disputes had arisen under state escheat laws that purported to confiscate the property of British subjects, despite the provisions of the Treaty of Peace of 1783. See note 93 *supra*. Just such a disputed claim was at the heart of the legal controversy that led to the landmark decision in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). See H. HART, JR. & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 442 (2d ed. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler 1973).

109. The Virginia debates take up an entire volume of Jonathan Elliot's *Debates* (volume 3). The reported debates in the other twelve states fill only two other volumes (volume 2 and part of volume 4).

110. 3 ELLIOT, *DEBATES*, *supra* note 44, at 317.

is it to the public, or to Congress, to drag an unhappy debtor, not for the sake of justice, but to gratify the malice of the plaintiff, with his witnesses, to the federal court, from a great distance? What was the principle that actuated the Convention in proposing to put such dangerous powers in the hands of any one? Why is the trial by jury taken away? All the learned arguments that have been used on this occasion do not prove that it is secured. Even the advocates for the plan do not all concur in the certainty of its security.

Henry's argument proceeds from the same set of antifederalist premises concerning the operation of the federal judicial system as did M'Dowall's argument before the North Carolina ratification convention.¹¹¹ It also makes the same juxtaposition between the plight of the hapless debtor in the federal courts and the absence of civil jury trial. Henry returned to the subject at a later point in the same speech:¹¹²

I admit that the American Union is dear to every man. I admit that every man, who has three grains of information, must know and think that union is the best of all things. But, as I said before, we must not mistake the end for the means. If . . . the

111. See note 106 *supra* and accompanying text. In a speech near the end of the convention, Patrick Henry again alluded to the possibility of a federal litigant being required to try his case on the merits before a federal court at the seat of government:

He left it to the candor of the honorable gentleman to say whether those persons who were at the expense of taking witnesses to Philadelphia, or wherever the federal judiciary may sit, could be certain whether they were to be heard before a jury or not.

3 ELLIOT, DEBATES, *supra* note 44, at 578.

A somewhat related argument was made by George Mason in the Virginia convention. Mason's particular concern was the clause in article I, section 8, that gave Congress exclusive power "in all cases whatsoever," over the ten-mile square seat of the national government. Mason argued that, even if juries were provided for in civil cases,

[w]hat chance will poor men get, where Congress have the power of legislating in all cases whatever, and where judges and juries may be under their influence, and bound to support their operations? Even with juries the chance of justice may here be very small, as Congress have unlimited authority, legislative, executive, and judicial.

Id. at 431.

Mason, although not a lawyer, well understood the uses of juries in debt cases. In 1783, while a member of the Virginia House of Delegates, Mason had proposed a measure that would have restored British sympathizers to full citizenship. In response to arguments that this would permit British subjects to sue in Virginia courts for debts (which Virginia law at that time prohibited), Mason responded that "the account of British creditors could be safely trusted to Virginia juries." See I HARRELL, *LOYALISM IN VIRGINIA* 139 n.94 (1926). The proposal did not pass because of strong opposition. *Id.*

112. 3 ELLIOT, DEBATES, *supra* note 44, at 318-19. Henry was not alone among the antifederalists in defending paper money. See J. MAIN, *THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788*, at 166-67 (1961).

rights of the Union are secure, we will consent. It has been sufficiently demonstrated that they are not secured. It sounds mighty prettily to gentlemen, to curse paper money and honestly pay debts. But apply to the situation of America, and you will find there are thousands and thousands of contracts, whereof equity forbids an exact literal performance. Pass that government, and you will be bound hand and foot. There was an immense quantity of depreciated Continental paper money in circulation at the conclusion of the war. This money is in the hands of individuals to this day. The holders of this money may call for the nominal value, if this government be adopted. This state may be compelled to pay her proportion of that currency, pound for pound. Pass this government, and you will be carried to the federal court, (if I understand that paper right,) and you will be compelled to pay shilling for shilling. I doubt on the subject; at least, as a public man, I ought to have doubts. A state may be sued in the federal court, by the paper on your table. It appears to me, then, that the holder of the paper money may require shilling for shilling. If there be any latent remedy to prevent this, I hope it will be discovered.

In a subsequent speech Patrick Henry noted the effect of the prohibition (in article I, section 10) against the enactment of an *ex post facto* law by a state:¹¹³

If no *ex post facto* laws be made, what is to become of the old Continental paper dollars? Will not this country be forced to pay in gold and silver, shilling for shilling? Gentlemen may think that this does not deserve an answer. But it is an all-important question, because the property of this country is not commensurate to the enormous demand. Our own government triumphs, with infinite superiority, when put in contrast with that paper. The want of a bill of rights will render all their laws, however oppressive, constitutional.

Several days later the debates began to focus on the portions of the proposed Constitution that dealt with the power of the federal judiciary. James Madison, speaking for the federalists, made a calculated appeal to the self-interest of Virginia merchants:¹¹⁴

Let me observe that, so far as the judicial power may extend to controversies between citizens of different states, and so far as it gives them power to correct, by another trial, a verdict obtained by local prejudices, it is favorable to those states which carry on commerce. There are a number of commercial states which carry on trade for other states. Should the states in debt to them make unjust regulations, the justice that would be obtained by the creditors might be merely imaginary and nominal. It might be either entirely denied, or partially granted. This is no imaginary evil. Before the war, New York was to a great amount a creditor of Connecticut. While it depended on

113. 3 ELLIOT, DEBATES, *supra* note 44, at 461-62. Fears concerning the size of the public debt and the evil of speculation in paper money were reawakened during the same session of the Virginia convention when article I, section 10, clause 1, was discussed. See *id.* at 471-81.

114. *Id.* at 534-35.

the laws and regulations of Connecticut, she might withhold payment. If I be not misinformed, there were reasons to complain. These illiberal regulations and causes of complaint obstruct commerce. So far as this power may be exercised, Virginia will be benefited by it. It appears to me, from the most correct view, that, by the word *regulations*, authority is given them to provide against the inconveniences; and so far as it is exceptionable, they can remedy it. This they will do if they be worthy of the trust we put in them. I think them worthy of that confidence which that paper puts in them. Were I to select a power which might be given with confidence, it would be judicial power.

Madison's argument here proceeds on the assumption either that the federal supreme court could review fact findings in jury cases appealed from the state courts, or that the Congress would provide for jury trial in diversity cases. In either event, the prospect of appellate reversal of a judgment in favor of a debtor by authorization of Congress would predictably be abhorrent to the antifederalists.

At a later point in the same speech, Madison again alluded to the diversity jurisdiction and attempted to justify the federalist desire to bring cases involving debtors into the proposed federal courts. Madison conceded that at "this moment of time, it might happen that there are many disputes between citizens of different states." But, he seems to suggest, the federal judiciary would soon dispose of this backlog and thereafter most litigation would be in the state courts.¹¹⁵ Madison then con-

115. 3 *id.* at 538. In the paragraph immediately preceding this, Madison had responded to the objection made "yesterday, that there was no provision for a jury from the vicinage." He argued that it "might so happen that a trial would be impracticable in the country. Suppose a rebellion in a whole district; would it not be impossible to get a jury?" He noted that there were "deviations" from jury trial in England and "yet greater deviations have happened here." "It is a misfortune in any case that this trial should be departed from; yet in some cases it is necessary. It must be, therefore, left to the discretion of the legislature to modify it according to circumstances." *Id.* at 537.

This passage has been assumed to refer to the "vicinage" problem in criminal jury trials. See *Williams v. Florida*, 399 U.S. 78, 93 n.35 (1970). This assumption is almost certainly inaccurate; it is more likely that Madison was here discussing civil jury trial, not criminal jury trial. First, there is nothing in the passage other than the reference to "a rebellion" that even suggests criminal trial. And the "rebellion" alluded to was very likely Shay's Rebellion which less than two years previously had closed the civil courts in western Massachusetts in order to frustrate tax and debt collection suits. See M. JENSEN, *THE MAKING OF THE AMERICAN CONSTITUTION* 34 (1964). Second, the passage occurred in the midst of a discussion by Madison of the federal judges' salaries, civil jurisdiction and appeals in civil cases—most of which obviously have little to do with criminal jury trial. Third, Madison was responding to antifederalist "vicinage" arguments made, according to Madi-

tinued:¹¹⁶

As to vexatious appeals, they can be remedied by Congress. It would seldom happen that mere wantonness would produce such an appeal, or induce a man to sue unjustly. If the courts were on a good footing in the states, what can induce them to take so much trouble? I have frequently, in the discussion of this subject, been struck with one remark. It has been urged that this would be oppressive to those who, by imprudence or otherwise, come under the denomination of debtors. I know not how this can be conceived. I will venture one observation. If this system should have the effect of establishing universal justice, and accelerating it throughout America, it will be one of the most fortunate circumstances that could happen for those men. With respect to that class of citizens, compassion is their due. To those, however, who are involved in such encumbrances, relief cannot be granted. Industry and economy are the only resources. It is vain to wait for money, or temporize. The great *desiderata* are public and private confidence. No country in the world can do without them. Let the influx of money be ever so great, if there be no confidence, property will sink in value, and there will be no inducement or emulation to industry. The circulation of confidence is better than the circulation of money. Compare the situation of nations in Europe, where justice is administered with celerity, to that of those where it is refused, or administered tardily. Confidence produces the best effects in the former. The establishment of confidence will raise the value of property, and relieve those who are so unhappy as to be involved in debts. If this be maturely considered, I think it will be found that, as far as it will establish uniformity of justice, it will be of real advantage to such persons.

Patrick Henry followed Madison. Henry again pointed to the absence of a guarantee of civil jury trial, deriding the arguments that drafting of a suitable constitutional guarantee was attended with great difficulty.¹¹⁷

You find, by the observations of the gentleman last up, that, when there is a plenitude of power, there is no difficulty; but when you come to a plain thing, understood by all America, there are contradictions, ambiguities, difficulties, and what not. Trial by jury is attended, it seems, with insuperable difficulties, and therefore omitted altogether in civil cases.

son, "yesterday." The only such argument recorded in Elliot's *Debates* is one by George Mason. (Madison had indicated at the outset of his speech that at least in part he was replying to Mason. See 3 ELLIOT, *DEBATES*, *supra* note 44, at 531.) Mason's long speech (*id.* at 521-30) in opposition to the judicial article had mentioned criminal cases in only one sentence (3 *id.* at 528). But several times Mason had alluded to the prospect of a civil litigant of limited means being required to travel hundreds of miles to an inconvenient federal forum (*id.* at 524, 525, 526, 528, 529). In order to prevent this, as well as other potential abuses, Mason proposed amendments to the Constitution that would have sharply restricted the original and appellate jurisdiction of the federal courts.

116. *Id.* at 538.

117. *Id.* at 541.

Then, after briefly commenting on the absence of sufficient protections for criminal jury trial, Henry spoke against the diversity of citizenship jurisdiction:¹¹⁸

I shall give my voice for the federal cognizance only where it will be for the public liberty and safety. Its jurisdiction, in disputes between citizens of different states, will be productive of the most serious inconveniences. The citizens of bordering states have frequent intercourse with one another. From the proximity of the states to each other, a multiplicity of these suits will be instituted. I beg gentlemen to inform me of this—in what courts are they to go and by what law are they to be tried? Is it by a law of Pennsylvania or Virginia? Those judges must be acquainted with all the laws of the different states. I see arising out of that paper a tribunal that is to be recurred to in all cases, when the destruction of the state judiciaries shall happen; and, from the extensive jurisdiction of these paramount courts, the state courts must soon be annihilated.

It may be remarked that here is presented to us that which is execrated in some parts of the states—I mean a retrospective law. This, with respect to property, is as odious as an *ex post facto* law is with respect to persons. I look upon them as one and the same thing. The jurisdiction of controversies between citizens, and foreign subjects and citizens, will operate retrospectively. Everything with respect to the treaty with Great Britain and other nations will be involved by it. Every man who owes any thing to a subject of Great Britain, or any other nation, is subject to a tribunal that he knew not when he made the contract. Apply this to our citizens. If ever a suit be instituted by a British creditor for a sum which the defendant does not in fact owe, he had better pay it than appeal to the federal Supreme Court. Will gentlemen venture to ruin their own citizens? Foreigners may ruin every man in this state by unjust and vexatious suits and appeals. I need only touch it, to remind every gentleman of the danger.

Henry then noted the provision for jurisdiction in the proposed federal courts of disputes between a state and citizens of another state. James Madison had previously argued for the federalists that this would extend jurisdiction only where the state was a plaintiff.¹¹⁹ Henry responded that this was a tortured construction of the language of the document.¹²⁰ He continued:¹²¹

To hear gentlemen of such penetration make use of such arguments, to persuade us to part with that trial by jury, is

118. *Id.* at 542-43.

119. *Id.* at 533. Article III, section 2, clause 1, speaks of the federal judicial power extending to controversies "between a State and Citizens of another State." The Supreme Court very early held that this jurisdiction could be exercised even where the State was defending against a suit by a citizen of another state. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

120. 3 ELLIOT DEBATES, *supra* note 44, at 543-44.

121. *Id.* at 544.

very astonishing. We are told that we are to part with that trial by jury which our ancestors secured their lives and property with, and we are to build castles in the air, and substitute visionary modes of decision for that noble palladium. I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common-law suits. The unanimous verdict of twelve impartial men cannot be reversed. I shall take the liberty of reading to the committee the sentiments of the learned Judge Blackstone, so often quoted, on the subject.

[Here Mr. Henry read the eulogium of that writer on this trial. *Blackstone's Commentaries*, iii. 319.]

The opinion of this learned writer is more forcible and cogent than any thing I could say. Notwithstanding the transcendent excellency of this trial, its essentiality to the preservation of liberty, and the extreme danger of substituting any other mode, yet we are now about to alienate it.

The antifederalist William Grayson supported Henry's arguments against the federal alienage jurisdiction on the ground that it would bring cases into the federal courts where they would be tried without a jury. He complained that this would unjustly destroy prior expectations, particularly with respect to the claims of British creditors against domestic debtors:¹²²

Citizens or subjects of foreign states may sue citizens of the different states in the federal courts. It is extremely impolitic to place foreigners in a better situation than our own citizens. This was never the policy of other nations. It was the policy, in England, to put foreigners on a secure footing. The statute merchant and statute staple were favorable to them. But in no country are the laws more favorable to foreigners than to the citizens. If they be equally so, it is surely sufficient. Our own state merchants would be ruined by it, because they cannot recover debts so soon in the state courts as foreign merchants can recover of them in the federal courts. The consequence would be inevitable ruin to commerce. It will induce foreigners to decline becoming citizens. There is no reciprocity in it.

How will this apply to *British creditors*? I have ever been an advocate for paying the British creditors, both in Congress and elsewhere. But here we do injury to our own citizens. It is a maxim in law, that debts should be on the same original foundation they were on when contracted. I presume, when the contracts were made, the creditors had an idea of the state judiciaries only. The procrastination and delays of our courts were probably in contemplation by both parties. They could have no idea of the establishment of new tribunals to affect them. *Trial by jury* must have been in the contemplation of both parties, and the *venue* was in favor of the defendant. From these premises it is clearly discernible that it would be wrong to change the nature of the contracts. Whether they will make a law other than the state laws, I cannot determine.

Shortly thereafter in the same speech Grayson argued that the appellate power given the Supreme Court over "fact" as

122, *Id.* at 565-66,

well as law under regulations prescribed by Congress would invest Congress with the effective power of depriving a party of a jury trial. Grayson expressed the concern that in the absence of civil jury trial class relationships might be significantly altered:¹²³

I lay it down as a principle, that trial by jury is given up to the discretion of Congress. If they take it away, will it be a breach of this Constitution? I apprehend not; for, as they have an absolute appellate jurisdiction of facts, they may alter them as they may think proper. It is possible that Congress may regulate it properly; but still it is at their discretion to do it or not. There has been so much said of the excellency of the trial by jury, that I need not enlarge upon it. The want of trial by jury in the Roman republic obliged them to establish the regulation of *patron* and *client*. I think this must be the case in every country where this trial does not exist. The poor people were obliged to be defended by their *patrons*.

Patrick Henry returned in a later speech to the plight of the debtor who might be brought into the jury-less federal courts. After an exchange with John Marshall over the effect of the provision for civil jury trial in the Virginia bill of rights, Henry complained that in federal criminal cases defendants might be brought to trial in a federal court¹²⁴

five hundred miles from where the party resides—no neighbors who are acquainted with their characters, their good or bad conduct in life, to judge of the unfortunate man who may be thus exposed to the rigor of that government. Compare this security, then, sir, in our bill of rights with that in the new plan of government; and in the first you have it, and in the other, in my opinion, not at all. But, sir, in what situation will our citizens be, who have made large contracts under our present government? They will be called to a federal court, and tried under the retrospective laws; for it is evident, to me at least, that the federal court must look back, and give better remedies, to compel individuals to fulfil them.

The slip in Henry's speech from the situation of the accused in criminal cases to that of the defendant in civil cases seems to have been the conscious attempt of a skillful orator to reflect on the defendant in a civil action some of the sympathy that Henry apparently anticipated his audience would feel for the person accused of a crime.

Henry then repeated his complaints about the failure of the criminal jury trial provision of article III, section 2, to require trial in the defendant's community and took a brief excursion into the problem of Indian land sales. Henry concluded with this peroration:¹²⁵

123. *Id.* at 568.

124. *Id.* at 578-79.

125. *Id.* at 579-80.

If previous amendments are not obtained, the trial by jury is gone. British debtors will be ruined by being dragged to the federal court, and the liberty and happiness of our citizens gone, never again to be recovered.

In a later response to an antifederalist speech by James Monroe, who had complained of the threat of the same defendant being required to defend in both the federal and state courts because of their concurrent jurisdiction,¹²⁶ Madison for the federalists again defended the diversity and alienage jurisdictions as necessary to permit foreign creditors to collect debts which local courts and juries refused to enforce:¹²⁷

We well know, sir, that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us. There are also many public debtors, who have escaped from justice for want of such a method as is pointed out in the plan on the table.

Pennsylvania. The record¹²⁸ of the proceedings at the first ratification convention to be called, in Pennsylvania, portrays a scene much like that in Virginia and the Carolinas. Each side developed their respective positions on the same themes of debtor-creditor conflict focusing on the prohibition against state paper money, the diversity of citizenship jurisdiction, the provi-

126. *Id.* at 582.

127. *Id.* at 583. The final word in the Virginia convention was uttered by the good burgher Zachariah Johnson. He went a bit further than Madison. Apparently imagining that he had a solution for the plight of the antifederalist's debtor-defendant, Johnson lectured those antifederalists who had argued that the new government would be unfairly oppressive toward the poor:

They object to this government because it is strong and energetic, and, with respect to the rich and poor, that it will be favorable to the one and oppressive to the other. It is right it should be energetic. This does not show that the poor shall be more oppressed than the rich. Let us examine it. If it admits that private and public justice should be done, it admits what is just. As to the indolent and fraudulent, nothing will reclaim these but the hand of force and compulsion. Is there anything in this government which will show that it will bear hardly and unequally on the honest and industrious part of the community? I think not.

3 ELLIOT, DEBATES, *supra* note 44, at 646.

128. Elliot reprinted in his *Debates* only the truncated version of the Pennsylvania debates that the federalists had authorized. This consisted only of the speeches of the federalist leader James Wilson and one speech by his colleague Thomas McKean. See 2 ELLIOT, DEBATES, *supra* note 44, at 415, 542. For the story of the Thomas Lloyd pamphlet which Elliot reprinted, see McMASTER & STONE, *supra* note 85, at v, 14-15. The McMaster and Stone work collected many previously unpublished materials from the newspaper and pamphlet wars that raged outside the convention. See also Fields, *The Convention Notes of Anthony Wayne*, 16 MANUSCRIPTS 18 (Winter 1964); Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention*, 22 WM. & MARY Q. 301 (1965).

sion for Supreme Court review of "facts" and the absence of a guarantee of civil jury trial.

The antifederalists in Pennsylvania were very likely foredoomed because of the strong grip that the federalist party held on the state governmental machinery.¹²⁹ Nonetheless, the antifederalists made a spirited attack on the proposed Constitution, and in the process propounded arguments that were to be repeated by antifederalists allies in subsequent ratification conventions in other states.¹³⁰ One of the key points of this opposition was, from a very early date, the absence of a guarantee of civil jury trial in the federal courts.¹³¹

The surviving record of the debates in the ratification convention itself is rather sparse, but nonetheless sufficient to indicate that civil jury trial was extensively debated.¹³² Much of

129. The conduct of the Pennsylvania federalists at the state legislative session that passed the necessary laws for an election of delegates to the ratification convention demonstrates the federalists' high-handed tactics. Because of the absence of some federalist members from the legislature, the number of federalists alone was insufficient by one to constitute a quorum. The antifederalists purposefully absented themselves in order to prevent a quorum and thus to frustrate what otherwise would have been certain passage of the enabling legislation. But a federalist mob carried one of the antifederalist legislators to the legislative chambers and the mob and the federalists prevented him from leaving, thus enabling the "quorum" to pass, with but one dissent, the enabling legislation. See MCMASTER & STONE, *supra* note 85, at 60-72 (Minutes of the Pennsylvania Assembly).

130. The antifederalists relied heavily on committees of correspondence, emulating the methods—and, they hoped, the success—of similar groups at the outbreak of the Revolution against Great Britain. The resulting documentation was distributed throughout the states and was freely copied by newspapers and pamphleteers elsewhere. See J. GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 257 (1971); MCMASTER & STONE, *supra* note 85, at 26.

131. See the "Address" of the antifederalists dated September 29, 1787, complaining about the manner in which the ratification convention had been called, and about the objectionable features of the proposed Constitution. MCMASTER & STONE, *supra* note 85, at 73-79 (from the Philadelphia Packet, October 4, 1787). The minority derisively asked readers to determine "whether the trial by jury in civil causes is becoming dangerous and ought to be abolished." *Id.* at 78.

132. See MCMASTER & STONE, *supra* note 85, at 352-54 (James Wilson in the convention); 359 *et seq.* ("Saturday, December 8th. The whole of this day was taken up with a debate on the failure of the Constitution to provide for trial by jury in civil cases. Twice in the course of it the members came to personalities, and once almost to blows."); 376-77 (Thomas McKean); 403-07 (second speech on jury trial by Wilson); 421 *et seq.* (introduction of the minority's fifteen points); 780-84 (notes of James Wilson). For more detail on the December 8 jury trial debate, see Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention*, 22 WM. & MARY Q. 301, 311-13 (1965).

the substance of antifederalist speeches has been lost. Yet it is possible to discern in the speeches of the federalists James Wilson and Thomas McKean some reflection of the concerns of the antifederalists that the federalists were attempting to rebut. In the early part of a speech on December 6, Wilson made one of the classic defenses of the difficulties that had prevented the Philadelphia Convention from including a guarantee of jury trial in the Constitution.¹³³ Wilson also defended the treaty portion of the "arising under" jurisdictional grant on the ground that various states had passed legislation to frustrate the provision of the Treaty of Paris dealing with the payment of British debts.¹³⁴

This clause, sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may.

Wilson made similar remarks with respect to state "tender laws," "instalment acts, and other acts of a similar effect" and the need for the diversity and alienage jurisdictions to permit federal judges to override them.¹³⁵

Is it not an important object to extend our manufactures and our commerce? This cannot be done, unless a proper security is provided for the regular discharge of contracts. This security cannot be obtained, unless we give the power of deciding upon those contracts to the general government.

Finally, Wilson defended the exercise of appellate jurisdiction "both as to Law and Fact" on the basis of the historical argument that during the revolution it had been necessary to give the court of appeals in capture cases extensive fact-review powers because the juries in such cases, according to Wilson, were making egregiously erroneous determinations.¹³⁶ In a long

133. 2 ELLIOT, DEBATES, *supra* note 44, at 488-89. Two days previously, on December 4, 1787, Wilson had excoriated the state "tender" acts and similar legislation that had prompted the provisions of article I, section 10. 2 *id.* at 486. The federalists themselves were somewhat vulnerable on this point. The argument was made by one antifederalist that the federalists had participated fully in the passage of these "tender" laws and thus they could hardly blame "the states" as if these were alien countries with whom the federalist framers of the Constitution had had no contact or influence. See *Letter of Centinel, No. XXII*, in MCMMASTER & STONE, *supra* note 85, at 685-88.

134. 2 ELLIOT, DEBATES, *supra* note 44, at 490.

135. 2 *id.* at 492. See also 2 *id.* at 492-93.

136. 2 *id.* at 493-94. The antifederalist Robert Whitehill the same day had objected to "Appeals . . . to the Supreme Court, which will put it in the Power of the wealthy to oppress the poor." MCMMASTER & STONE, *supra* note 85, at 779.

speech on December 11, Wilson had answered the objections that had been advanced against the Constitution by previous speakers. In again defending the failure of the plan to guarantee trial by jury in civil cases, Wilson had spoken of the "excellences" of the jury in civil cases, but in a way that seemed limited to cases where the jury is familiar with both the plaintiff and the defendant. He stated that in the kinds of cases that are within the judicial power of article III, section 2, "they all extend beyond the bounds of any particular state," thus suggesting that these cases might not be as appropriate for jury trial.¹³⁷ Wilson concluded by commenting upon a particular suggestion of a prior antifederalist speaker:¹³⁸

The member from Westmoreland (Mr. Findley) tells us that the trial between citizens of different states ought to be by a jury of that state in which the cause of action rose. Now, it is easy to see that, in many instances, this would be very improper and very partial; for, besides the different manner of collecting and forming juries in the several states, the plaintiff comes from another state; he comes a stranger, unknown as to his character or mode of life, while the other party is in the midst of his friends, or perhaps his dependants. Would a trial by jury, in such a case, insure justice to the stranger? But again: I would ask that gentleman whether, if a great part of his fortune was in the hands of some person in Rhode Island, he would wish that his action to recover it should be determined by a jury of that country, under its present circumstances.

As the Pennsylvania convention drew to a close, the antifederalists retreated from their previous position that the proposed Constitution should be rejected outright and insisted instead that the document should be substantially revised before ratification. This strategy was widely followed by antifederalists elsewhere. The Pennsylvania antifederalists presented a list

137. See 2 ELLIOT, DEBATES, *supra* note 44, at 516-17.

138. 2 *id.* at 517. See also Wilson's defense of the scope of appellate review of facts, 2 *id.* at 518-19. Wilson's colleague, Chief Justice Thomas McKean also defended the action of the Convention in providing for appellate review of facts while failing to provide for jury trial:

From this it is inferred that the trial by jury is not secured; and an objection is set up to the system, because they have jurisdiction between citizens of different states. Regulations under this head, are necessary; but the Convention could form no one that would have suited each of the United States. It has been a subject of amazement to me to hear gentlemen contend that the verdict of a jury shall be without revision in all cases. Juries are not infallible because they are twelve in number. When the law is so blended with the fact as to be almost inseparable, may not the decision of a jury be erroneous? Yet, notwithstanding this, trial by jury is the best mode that is known. Appellate jurisdiction, sir, is known in the common law, and causes are removed from inferior courts, by writs of error, into some court of appeal.

2 *id.* at 539-40.

of fifteen proposed amendments to the Constitution. Among them was the following:¹³⁹

That in controversies respecting property and in suits between man and man, trial by jury shall remain as heretofore, as well in the federal courts, as in those of the several States.

As the antifederalist minority explained it, the proposed amendment was needed in order to prevent the oppression of the poor by the rich through the agency of courts of equity:¹⁴⁰

The powers of a court of equity, vested by this constitution in the tribunals of Congress—powers which do not exist in Pennsylvania, unless so far as they can be incorporated with jury trial—would, in this State, greatly contribute to this event [a consolidation of the states under one government]. The rich and wealthy suitors would eagerly lay hold of the infinite mazes, perplexities and delays, which a court of chancery, with the appellate powers of the Supreme Court in fact as well as law would furnish him with, and thus the poor man being plunged in the bottomless pit of legal discussion, would drop his demand in despair.

Similar themes were repeated during the extensive and bitter newspaper and pamphlet battle between federalists and antifederalists that took place outside the ratification convention. The antifederalist Judge Samuel Bryan, writing as "Centinel," produced a theoretical rationale for the need for civil juries in light of class conflict. Quoting Blackstone, Judge Bryan argued that civil juries are needed because any group of judges appointed by a government will, in spite of their integrity, have

a bias towards those of their own rank and dignity; for it is not to be expected, that the few should be attentive to the rights of the many. This therefore preserves in the hands of the people, that share which they ought to have in the administration

139. MCMMASTER & STONE, *supra* note 85, at 421. The text quoted by McMaster and Stone is from a newspaper report of the proceedings in the *Pennsylvania Packet*, December 14 (?), 1787. The same fifteen points were published in "The Address and Reasons of Dissent of the Minority" which the antifederalists prepared soon after the convention ended. See also *id.* at 461.

140. MCMMASTER & STONE, *supra* note 85, at 470. The text is from "The Address and Reasons of Dissent of the Minority" which the antifederalists prepared soon after the convention ended. See *id.* at 454. This document was published both in newspapers and as a broadside and was widely circulated. In this way it was very influential in suggesting an antifederalist tactic that was followed in other states. See J. GOEBEL, JR., *supra* note 130, at 336-37. Professor Goebel opines that one reason for the form of the amendment proposed by the minority was to assure that trial in debt cases would be by a jury of the vicinage, which presumably would be hostile to foreign creditors. *Id.* at 285 n.123. Another suggested amendment of the minority would have prohibited Congress from making any laws "which shall alter . . . the regulation of contracts in the individual States." MCMMASTER & STONE, *supra* note 85, at 423.

of justice, and prevents the encroachments of the more powerful and wealthy citizens.¹⁴¹

This does not seem to be the conventional argument in favor of jury trial to the effect that juries can inform the judge of the lay perception of value judgments through their verdicts to enable the judge to use these collective perceptions in molding the law. Instead, Bryan was arguing that the rich, with whom the judges assumedly will identify, will at least unconsciously tend to neglect the interests of the poor unless the poor are able to speak through the jury verdict. The continual presence of the jury is required, then, in order to hold the class instincts of the judge in check. And it is not a matter of educating the judge for, apparently, class instinct is not something that can be corrected by a process of education through jury verdicts.

Many months after the bitter struggle over ratification in Pennsylvania, the antifederalists met in Harrisburg on September 3, 1788, and published a record of their proceedings.¹⁴² The antifederalist group consisted of most of the antifederalist delegates to the ratification convention. They urged citizens to respect the government that would be established under the new Constitution which by that time had been approved by the minimum nine states. But they called for a second constitu-

141. *Letters of Centinel, No. II*, from the *Freeman's Journal*, October 24, 1787, in McMASTER & STONE, *supra* note 85, at 584. Bryan is here quoting from an English edition of Blackstone. The only American edition of *Blackstone's Commentaries* that had yet been published, see note 45 *supra*, contains slightly milder language and omits entirely the last sentence in the quotation above. Professor Goebel, *supra* note 130, at 284-85, has criticized the accuracy of some of Bryan's arguments, particularly that which stated broadly that Chancery customarily sent disputed issues to the law courts for jury trial. Bryan also recalled the case of *Forsey v. Cunningham* (see J. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 390-414 (1950)) in which the colonial Governor Colden of New York had raised a furor in 1764 by attempting to reconsider the facts found by a jury and to reassess the damages awarded. See J. GOEBEL, JR., *supra* note 130, at 284; Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention*, 22 WM. & MARY Q. 301, 311-12 (1965).

An assessment of the effect of civil jury trial similar to that of Bryan was advanced in an anonymous letter to the *Independent Gazetteer* (Philadelphia). This antifederalist accused the federalists of having the following as one of their objectives:

That the trial by jury, whether in civil or criminal cases, ought to be entirely abolished, and that the judges only of the new federal court, appointed by the well-born in the ten-mile-square, should determine all matters of controversy between individuals.

McMASTER & STONE, *supra* note 85, at 549, quoting from the *Independent Gazetteer*, May 10, 1788.

142. See 2 ELLIOT, *DEBATES*, *supra* note 44, at 542-46.

tional convention at which amendments could be considered. Some of the group's suggested amendments would have (1) prohibited Congress from establishing any court other than the Supreme Court, except for admiralty cases (Pennsylvania at this time had no courts of equity), and (2) added a proviso at the end of the second clause of article III, section 2, to the effect that "in all cases of common-law cognizance" the appellate jurisdiction of the Supreme Court was to be "confined to matters of law only" and, in any event, was not to be exercised unless the matter in controversy exceeded the value of three thousand dollars.¹⁴³

New York. The surviving record of the debates in the ratification convention in New York contains little that bears on the civil jury trial issue. But on close inspection, it appears that trial by jury in civil cases and the scope of review by the Supreme Court was an important issue.¹⁴⁴ When the convention was considering article III, a motion was introduced to amend the Constitution to permit Congress to create federal trial courts only for admiralty cases and otherwise to restrict the judicial power of the federal courts to the entertainment of appeals by the Supreme Court from decisions of state courts in cases of the kind described in article III, section 2.¹⁴⁵ The appeals part of the motion was later changed to limit the Supreme Court's review powers to those which, "according to the course of the common law," would be appropriate on writ of error.¹⁴⁶

John Lansing, the New York antifederalist delegate who had left the Philadelphia Convention early when he discovered

143. *Id.* at 546. Compare the suggested constitutional amendments of the antifederalist John Lansing that had been approved by the New York ratification convention. See text accompanying notes 149-53 *infra*.

144. Caution must be employed in using materials from the record of the New York debates and, for that matter, from the records of most of the other states as well. One may otherwise be misled into concluding that what has survived is all that was said. Cf. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 298 (1966) (in most state ratification conventions other than Pennsylvania "the civil jury was barely mentioned"). The surviving record of the New York debates indicates, for example, that a nearly verbatim record was kept of the speeches from June 17, 1788, through July 2. See 2 ELLIOT, DEBATES, *supra* note 44, at 205-406. During all this time the convention was making slow progress through the first seven sections of Article I. At this point recording of the speeches ceases. Among the missing materials are two speeches—one said to be "of some length"—in support of an amendment to confine the judicial power of the federal courts. See text accompanying notes 145-46 *infra*.

145. 2 ELLIOT, DEBATES, *supra* note 44, at 408.

146. 2 *id.* at 408-09.

that substantial alterations were planned in the Articles of Confederation¹⁴⁷ and who was also a leading anti-constitutionalist at the New York convention, succeeded in having a set of proposed amendments to the Constitution made a part of the ratification document.¹⁴⁸ Among these was the following:¹⁴⁹

That the trial by jury, in the extent that it obtains by the common law of England, is one of the greatest securities to the rights of a free people, and ought to remain inviolate.

Also included were declarations that would have made it clear that the constitutional prohibitions against ex post facto laws¹⁵⁰ extended only to laws concerning crimes and, modeled on the amendment introduced earlier, would have limited the Supreme Court's review to writ of error "according to the course of the common law."¹⁵¹ The document of ratification concluded with an exhortation to New York's future congressional delegation to exert every effort to obtain ratification of the several listed amendments "and in all laws to be passed by the Congress, in the mean time, to conform to the spirit of the said amendments, as far as the Constitution will admit."¹⁵² Included among these proposed amendments was one that would have sharply restricted the original jurisdiction of the federal courts to admiralty cases, thus presumably obviating the need for a constitutional amendment to guarantee the right of jury trial in federal cases.¹⁵³

Massachusetts. The record of the Massachusetts convention

147. See the joint letter of Lansing and his antifederalist colleague, Robert Yates, who had left the Philadelphia Convention with him. 1 ELLIOT, DEBATES, *supra* note 44, at 480-82. Yates was a busy antifederalist propagandist. His *Letters of Brutus* in the *New York Journal* were written in a successful attempt to return an antifederalist majority to the ratification convention. In *Letters of Brutus, No. II*, in DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, 1788, at 382 (B. Peirce & C. Hale eds. 1856), Yates noted that "for the purpose of securing the property of the citizens," a right to jury trial in civil cases was guaranteed "by all the States" and objected to its omission from the proposed Constitution.

148. See 2 ELLIOT, DEBATES, *supra* note 44, at 410-413; 1 *id.* at 327-31.

149. 1 *id.* at 328. Hamilton, in THE FEDERALIST No. 83, at 565 (J. Cooke ed. 1961), expressed the view that jury trial practice in New York was more nearly like that of Great Britain than was the law of any other state.

150. The declaration presumably was meant to apply both to the ex post facto clause in article I, section 9, clause 3 (as to Congress), and in article I, section 10, clause 1 (as to the states).

151. 1 ELLIOT, DEBATES, *supra* note 44, at 328, 329. With respect to the reference to "common law," see text accompanying notes 235-40 *infra*. See also note 149 *supra*.

152. 1 ELLIOT, DEBATES, *supra* note 44, at 329.

153. 1 *id.* at 331.

regarding the right of civil jury trial is fragmentary but it is known that debtor laws and civil jury trial were antifederalist issues.¹⁵⁴ While it can be seen from the recorded speeches of the federalists Christopher Gore¹⁵⁵ and Thomas Dawes¹⁵⁶ that antifederalists objected to the absence of a constitutional guarantee of civil jury trial, none of the antifederalist speeches has survived. The only reference in the speeches of Gore and Dawes to particular arguments that antifederalist speakers might have made in favor of civil jury trial occurred when Dawes attempted to correct an allegedly inaccurate historical allusion by antifederalist speakers. The antifederalists apparently had asserted that the absence of a guarantee of civil jury trial in the federal courts created the same dangers as the pre-revolutionary trials without juries in British vice-admiralty courts. Dawes argued that this item from history was beside the point since that old dispute had involved the right to criminal, not civil, jury trial.¹⁵⁷

At the start of the last week of the convention, Governor John Hancock proposed a form of ratification with suggested amendments, "to remove the doubts and quiet the apprehensions of gentlemen . . ." ¹⁵⁸ In a subsequent speech in support of Hancock's proposition, Samuel Adams stated: ¹⁵⁹

154. See S. HARDING, *THE CONTEST OVER THE RATIFICATION OF THE FEDERAL CONSTITUTION IN THE STATE OF MASSACHUSETTS* 25, 27 n.1, 32, 41, 43, 54, 79, 88-89 (1896; reprint 1970). The surviving record of debate in the Massachusetts convention consists of the speeches in Elliot's *Debates* and private "Minutes" kept by Chief Justice Parsons. See *DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, 1788*, at 285-320 (B. Peirce & C. Hale eds. 1856). Unfortunately, Parson's minutes were kept only during the convention's discussion of the first several sections of the first article dealing with the powers of Congress.

155. 2 ELLIOT, *DEBATES*, *supra* note 44, at 112.

156. 2 *id.* at 113.

157. 2 *id.* at 113-14. Dawes was, however, in error. While the dominant jury trial issue in the vice-admiralty conflict concerned criminal trials, there were also important civil jury issues. See note 47 *supra* and accompanying discussion.

158. 2 ELLIOT, *DEBATES*, *supra* note 44, at 123. Hancock's amendments were referred to a committee and, as amended by the committee, the proposals were later adopted by the convention. 2 *id.* at 147-48. Hancock's original proposals have been printed in *DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, 1788*, at 79-81 (B. Peirce & C. Hale eds. 1856). Included was the following: "Eighthly. In civil actions between citizens of different States, every issue of fact arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it." *Id.* at 80. This language was preserved in the committee's report, see *id.* at 84, and was eventually adopted by the convention.

159. 2 ELLIOT, *DEBATES*, *supra* note 44, at 132-33. The record in Elliot contains subsequent reference to discussions of the amendments,

Your excellency's next proposition is, to introduce the indictment of a grand jury, before any person shall be tried for any crime, by which he may incur infamous punishment, or loss of life; and it is followed by another, which recommends a trial by jury in civil actions between citizens of different states, if either of the parties shall request it. These, and several others which I have mentioned, are so evidently beneficial as to need no comment of mine. And they are all, in every particular, of so general a nature, and so equally interesting to every state, that I cannot but persuade myself to think they would all readily join with us in the measure proposed by your excellency, if we should now adopt it.

The recommended civil jury trial amendment along with others was approved by the convention and the future Massachusetts congressional delegation was directed "to exert all their influence, and use all reasonable and legal methods" to obtain corresponding amendments to the Constitution.¹⁶⁰ In addition, the convention also approved proposed amendments that would have limited the Supreme Court's appellate powers in diversity cases¹⁶¹ to those in which the matter in dispute involved at least three thousand dollars, and would have limited the original jurisdiction in diversity cases to those in which the matter in dispute involved at least fifteen hundred dollars.¹⁶² I have discovered nothing that would explain why these proposals, including that for civil jury trial, were limited to diversity of citizenship cases.

New Hampshire. In New Hampshire, for which only one speech (opposing slavery) survives from the ratification convention, the form of ratification closely followed that of Massachusetts.¹⁶³ Included were the following, modeled on the similarly numbered suggested amendments¹⁶⁴ to the Constitution that had been previously approved in Massachusetts:¹⁶⁵

VII. All common-law cases between citizens of different states shall be commenced in the common-law courts of the

but without indicating which amendments were discussed or what was said. See 2 *id.* at 140-41.

160. 2 *id.* at 177, 178.

161. The Supreme Court, of course, has never been given by Congress any power to review state court cases solely on the ground that they are disputes between diverse citizens or that one of the parties is an alien.

162. These appeared in the seventh suggested amendment. See 2 ELLIOT, DEBATES, *supra* note 44, at 177.

163. See 2 *id.* at 203-204. See also J. WALKER, A HISTORY OF THE NEW HAMPSHIRE CONVENTION 3-4 (1888). Walker doubted the authenticity of the anti-slavery speech of Joshua Atherton which Elliot nonetheless printed as authentic.

164. See note 158 *supra*.

165. 1 ELLIOT, DEBATES, *supra* note 44, at 326.

respective states; and no appeal shall be allowed to the federal court, in such cases, unless the sum or value of the thing in controversy amount to three thousand dollars.

VIII. In civil actions between citizens of different states, every issue of fact, arising in actions at common law, shall be tried by jury, if the parties, or either of them, request it.

Maryland. In Maryland, the federalists held a large majority and easily obtained ratification of the Constitution without suggested amendments.¹⁶⁶ The antifederalists, however, had strenuously argued for amendments, one of which would have provided for trial by jury in the federal courts at the request of either party "in all actions on debts or contracts, and in all other controversies respecting property . . ."¹⁶⁷ This provision was not limited to "actions at law" or the like and might have been intended to apply to equitable and admiralty proceedings as well. Appeals to the Supreme Court would have been limited "only as to matter of law." A proposal was also made to limit all original federal trial court jurisdiction to cases involving more than an unspecified minimum dollar amount. In addition,

166. *Id.* at 324.

167. *A Fragment of Facts Disclosing the Conduct of the Maryland Convention* in 2 ELLIOT, DEBATES, *supra* note 44, at 550. The non-existence of records of the speeches at the Maryland ratification convention is not accidental. Thomas Lloyd, who had been involved in the recording of the debates in Pennsylvania (*see* note 128 *supra*), also recorded the speeches in the Maryland convention. He is supposed to have expressed concern during the convention that many of the antifederalist speeches were not answered by the federalist majority. Later, however, the federalists took up a collection "to defray his expenses" and Lloyd announced his intention not to publish. *See* Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention*, 22 WM. & MARY Q. 301, 302 n.3 (1965).

Among the badly outnumbered antifederalists who were delegates to the Maryland convention was Luther Martin whose pamphlet *Genuine Information* was one of the popular tracts opposing ratification. *See* 1 ELLIOT, DEBATES, *supra* note 44, at 344-389. The pamphlet purports to be a reprint of a letter sent by Martin to the Speaker of the Maryland House of Delegates and his speech to this body reporting on Martin's activities as a delegate to the Philadelphia Convention. The letter, which appears to have been written shortly after the speech, is dated January 27, 1788. Martin reports in his speech that he vigorously opposed the provisions of the Constitution which limited the power of legislatures to provide for debtor relief in times of great financial distress. 1 *id.* at 376-77. Martin's opposition to the judiciary article was apparently compounded by the misapprehension under which he suffered that the jurisdiction there conferred on the federal courts was exclusive. *See* 1 *id.* at 380-81. *See also* W. MACLAY, SKETCHES OF DEBATE IN THE FIRST SENATE OF THE UNITED STATES IN 1789-90-91, at 87 (1969 reprint). Under this circumstance Martin's raillery against the absence of a guarantee of civil jury trial was very strong, but he did not expressly mention the need for a jury in debtor cases. *See* 1 ELLIOT, DEBATES, *supra* note 44, at 381-82.

"there may be an appeal, in all cases of revenue, as well to matter of fact as law" and Congress would be empowered to give the state courts concurrent jurisdiction in such cases.¹⁶⁸

Rhode Island. Rhode Island did not ratify the Constitution until May 29, 1790, by which time the First Congress had already passed the Bill of Rights and sent it to the states. The Rhode Island document of ratification made the following declaration:¹⁶⁹

That in controversies respecting property, and in suits between man and man, the ancient trial by jury, as hath been exercised by us and our ancestors, from the time whereof the memory of man is not to the contrary is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolable.

Perhaps because the Rhode Island convention was satisfied with the seventh amendment as passed by Congress and sent to the states, the convention did not include among its suggested amendments any on jury trial. It did suggest amendments, however, which would have precluded the federal courts from exercising jurisdiction in any case involving the redemption of paper money issued by a state or in any case that originated before the ratification of the Constitution with the exception of territorial disputes or debts due the United States.¹⁷⁰

Connecticut, Delaware, New Jersey, Georgia. The Connecticut ratification convention, strongly dominated by federalists, lasted only one week and the ratification was without qualification.¹⁷¹ Only the speeches of four federalist speakers have been preserved and none of these dealt with jury trial.¹⁷² Delaware had become the first state to support the Constitution when, on December 7, 1787, its convention unanimously ratified it.¹⁷³ Not surprisingly, there is no indication of any qualification to the ratification or of any suggested amendments. No record survives of whatever debate there might have been.¹⁷⁴ The New Jersey convention unanimously and unqualifiedly ratified the Constitution on December 18, 1787, being the third state

168. 2 *id.* at 550.

169. 1 *id.* at 334-35.

170. *Id.* at 336. Opposition to the prohibition of paper money by the new federal Constitution was largely responsible for the refusal to call a ratification convention in Rhode Island until such a late date. See J. MAIN, *THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788*, at 213 (1961).

171. 1 ELLIOT, *DEBATES*, *supra* note 44, at 321-22.

172. 2 *id.* at 185-204.

173. 1 ELLIOT, *DEBATES*, *supra* note 44, at 319.

174. See J. MAIN, *supra* note 170, at 193-94.

to do so.¹⁷⁵ Georgia, the sixth state to ratify, followed suit on January 2, 1788.¹⁷⁶ In neither state ratification convention were the debates recorded.

c. Political Considerations in the Debtor Jury Trial Debates

As can be seen from the above review of the ratification debates in the states, a clear pattern emerges from the ratification debates of joint reference to jury trial and suits against debtors without much attempt to state unequivocally that jury trial was desirable because it would protect the debtor against his creditor. The reasons for this lack of candor must be sought in the instincts of public morality and in the politics of the day. In the first place, even when the argument was addressed to a group known to contain a goodly number of debtors, most speakers probably knew that even many antifederalists would be forced to object in a public forum that jurors should not consciously find against a creditor with a legally valid claim. By keeping the discussion at a sufficient level of generality—which, to be sure, was not the invariable case¹⁷⁷—the antifederalist speaker could produce the desired response in his listeners. Enough was conveyed to remind sympathetic listeners of the problem and of one possible means of solution, but the speaker remained in a position to resist strenuously the charge that he was proposing something “dishonest” or that he was intimating that juries were useful because they could be lawless.

In the second place, many antifederalists were creditors, and many federalists debtors. While the tendency was for debtors to be found in antifederalist ranks and creditors among the federalists, this was by no means uniform.¹⁷⁸ Thus, speakers on

175. 1 ELLIOT, DEBATES, *supra* note 44, at 320-21. See R. McCORMICK, NEW JERSEY FROM COLONY TO STATE 1609-1789, at 171-74 (1964).

176. 1 ELLIOT, DEBATES, *supra* note 44, at 323-34. See J. MAIN, *supra* note 170, at 196 n.22.

177. Particularly in Pennsylvania (see text accompanying notes 140-41 *supra*) and in Rhode Island (see note 170 *supra*) the debtor-versus-creditor conflict seems to have been very sharp and virulent.

178. J. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788, at 277-78 (1961), posits the thesis that the conflict between federalists and antifederalists cannot be explained on debtor-creditor divisions alone. As Main points out, many of the cities which could be expected to contain large populations of debtors nonetheless solidly supported the Constitution. And many persons of wealth and without significant debts opposed it. The general division that Main sees is “that the struggle over the ratification of the Constitution was primarily a contest between the commercial and the non-commercial elements in the population . . .” *Id.* at 280. Thus one would not be sur-

either side were motivated to keep allusions to debts-and-juries sufficiently obscure so that some of their own adherents would not be alienated by the position being taken. This would go a long way toward explaining the apparently different attitudes that federalist speakers demonstrated toward two seemingly similar issues, paper money and the British debts. The paper money issue, which had been receding in importance in the two or three years prior to 1787¹⁷⁹ and which was an issue related to but not specifically involved in the British debts, was one on which the federalists strongly attacked the antifederalists. But on the matter of British debts the federalists were markedly more reticent. Consistency with the federalist position on paper money would have suggested a similarly strong position in favor of collection of the British debts. The difference between the two issues from the federalist point of view was that there were few voters who were British creditors. By contrast, a substantial number of voters wished to be rid of the inflationary effect of paper money.¹⁸⁰ Thus the "justice" of repaying valid debts to British subjects was not emphasized by the federalists, but the "injustice" of paper money was argued quite vocally.

The more or less purposeful ambiguity concerning the intended role of the civil jury that the debates over ratification of the Constitution displayed is not peculiar to that discussion or that time. It is an ambiguity that has always inhered in the subject of jury trial but which must probably always remain unresolved. As mentioned before,¹⁸¹ there can at bottom be only one reason for insisting that a jury rather than a judge decide a case—to reach a result that differs from that which the judge would reach. This necessarily suggests the judge's decision would be "wrong." Such a frontal assertion can comfortably be made if, as was true of Alexander Hamilton,¹⁸² the intended role of the jury is to serve as a check on the occasional corrupt judge. But in many other instances, as with the paper money claims and the British debts, the only "wrong" is that the judge would apply the law as written and previously declared. Thus,

prised to see a certain reticence among those who attacked the Constitution because it was anti-debtor; too strong an attack might alienate the non-commercial antifederalists who were also creditors or who at least were not sympathetic to debtor legislation.

179. See J. MAIN, *supra* note 170, at 167 n.99.

180. See J. MAIN, *supra* note 170, at 268-70.

181. See notes 86-88 *supra*.

182. THE FEDERALIST No. 83, at 563-65 (J. Cooke ed. 1961); see text accompanying notes 191 and 192 *infra*.

as will be obvious to many who have troubled themselves previously with the uses of the civil jury, the antifederalist argument is basically an argument that civil juries should sit in paper money and British debt cases in order to permit the jury to find against the law, perhaps not in all cases, but at least in those in which the lay perception of the "justice" of the situation of the parties would compel a finding against the law.

2. *The Frustration of Unwise Legislative and Administrative Policies.*

The paper money and British debt claims were the most prominently discussed civil jury trial issues during the ratification debates. There were others, however, which proceeded on the same general theme of the utilization of the jury because of its presumed willingness to act "lawlessly." Only fragments of these arguments survive, but enough remains to furnish support for the proposition that the concerns of the antifederalists for the protection of civil jury trials went beyond issues that, as with paper money and the collection of British debts, might be regarded as peculiar to the immediate post-Revolutionary years.

In his Number 83 of *The Federalist*, which is devoted entirely to the civil jury trial question, Hamilton examined at some length one of the many objections that were made by antifederalists to the absence of a guarantee of civil jury trial: "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."¹⁸³ Were it not for this unequivocal

183. THE FEDERALIST No. 83, at 563 (J. Cooke ed. 1961). In reply to the argument that the right of civil jury trial was desirable in order to prevent the imposition of unjust taxes by the government, Hamilton replied rather aridly that the jury would be helpless because: (1) "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 . . ." (emphasis in original); (2) taxes were usually levied in most states by summary proceedings, such as distress and sale, which did not provide for jury trial; (3) it was undesirable to have juries sit in tax collection cases because a "dilatatory" jury trial "would neither suit the exigencies of the public, nor promote the convenience of the citizens . . ."; and (4) improper conduct of revenue officers was taken care of by the provision of a jury in criminal cases. *Id.* Hamilton seriously undercut these points, however, by arguing a few pages later (*id.* at 568) that juries should not be permitted to sit in prize cases involving relations with foreign nations because of the danger of jury disregard of the law and "[t]hrough the proper province of juries be to determine matters of fact, yet in most cases legal consequences are complicated with fact in such a manner as to render a separation impracticable."

indication of the antifederalist interest in the utilization of juries in tax collection cases, one would be hard pressed—on the basis of other materials—to assert that the matter was given any but rather indirect attention by antifederalists. Yet other suggestions of the antifederalist argument as to the taxing and other legislative powers can be found.

At one point in a speech in the Virginia ratification convention, James Monroe argued against the broad powers given Congress in the absence of a bill of rights. To illustrate his argument he pointed to the broad powers of taxation given to Congress and imagined Congress passing a taxation law and, under the necessary and proper clause:¹⁸⁴

suppose they should be of opinion that the right of the trial by jury was not one of the requisites to carry it into effect; there is no check in this Constitution to prevent the formal abolition of it. . . . They are not restrained or controlled from making any law, however oppressive in its operation, which they may think necessary to carry their powers into effect. By this general, unqualified power, they may infringe not only on the trial by jury, but the liberty of the press. . . . Our great unalienable rights ought to be secured from being destroyed by such unlimited powers, either by a bill of rights, or by an express provision in the body of the Constitution.

The most that can fairly be argued from this alone is that Monroe might have been expressing a more than hypothetical concern that Congress actually might attempt to conjoin a tax measure with a provision setting aside trial by jury in tax cases.

At a later point in the Virginia debates, and during consideration of article III, Patrick Henry noted that the federal judiciary very likely would have jurisdiction over disputes arising out of the collection of federal taxes. He expressed the fear that the federal courts would sit several hundred miles from the place where federal tax collectors were operating, perhaps illegally. Henry then noted that Congress might or might not provide for trial by jury in civil cases.¹⁸⁵ Perhaps the conjoined references to difficulties in the enforcement of federal

The latter, no doubt, was precisely the point of those who wished to have juries sit in taxation cases.

The federalists realized full well that one consequence of having a jury decide a case is that the result might be against the declared law that should govern the case. See, e.g., the federalist Hugh Henry Brackenridge in *The Pittsburgh Gazette*, April 1788, in P. FORD, *ESSAYS ON THE CONSTITUTION* 320 (1892); James Wilson in the Pennsylvania ratification convention, 2 ELLIOT, *DEBATES*, *supra* note 44, at 516-17.

184. 3 ELLIOT, *DEBATES*, *supra* note 44, at 218.

185. *Id.* at 577-78. Cf. Patrick Henry in the Virginia ratification convention, *id.* at 503, 512-13.

taxation laws and trial by jury in civil cases was intended to suggest to the mind of the listener the same idea of salvation through jury law-making that seems also to have been implied by the repeated simultaneous references to debtors and the civil jury. There were similar joint references to the civil jury trial problem and Congress' broad powers in the speeches and writings of other antifederalists.¹⁸⁶

186. See George Mason in the Virginia ratification convention, 3 ELLIOT, DEBATES, *supra* note 44, at 441-42. See also Robert Whitehill in the Pennsylvania ratification convention, McMASTER & STONE, *supra* note 85, at 780 (treaty power). Writing as "A Farmer" in the *Philadelphia Independent Gazetteer*, April 22, 1788 (McMASTER & STONE, *supra* note 85, at 539), an anonymous antifederalist joined his objections to the extensive spending and taxing powers of Congress and the absence of a guarantee of civil jury trial:

The Congress, by the proposed system, have the power of borrowing money to what amount they may judge proper, consequently to mortgage all our estates, and all our sources of revenue. The exclusive power of emitting bills of credit is also reserved to Congress. They have, moreover, the power of instituting courts of justice without trial by jury, except in criminal cases, and under such regulations as Congress may think proper to decide, not only in such cases as arise out of all the foregoing powers, but in the other cases which are enumerated in the system.

The antifederalist John Smilie objected in the Pennsylvania ratification convention to the absence of a guarantee of civil jury trial. Among other problems, Smilie worried that "[t]here may be Danger in the Execution of the judicial Department as in the Case of a rigorous Collection of direct Taxes.—A Quarrel between a Collector and a Citizen would drag the Citizen into the Court of Congress." McMASTER & STONE, *supra* note 85, at 780.

In his pamphlet *The Genuine Information* (1788), the then antifederalist Luther Martin of Maryland also discussed the question of the enforcement of the federal tax laws and the federal courts in the context of the taxpayer being required to go to undue expense—because of the necessity, alleged by the antifederalists, of being required to re-try factual questions before the Supreme Court—in order ultimately to prevail against a tax collector. Martin did not, however, mention jury trial in this context. See 1 ELLIOT, DEBATES, *supra* note 44, at 382. The antifederalists had argued during the Maryland ratification convention (in which Martin served as delegate and presumably was a leading figure) in favor of an amendment to the Constitution that would have made it clear that appeals in revenue cases were to reach "as well to matter of fact as law." 2 *id.* at 550; see note 168 *supra* and accompanying text. This provision must be viewed, however, in the light of its accompanying amendment which would have limited federal court jurisdiction in all cases, revenue cases included, to those in which the amount in controversy exceeded a sum to be set in the amendment. Probably the antifederalists intended this figure to be high enough so that the litigant, for example in a revenue case, would not be unduly inconvenienced by the greater expense of litigating in federal courts. See also the altercation in the Pennsylvania ratification convention over the issue of civil jury trial in Sweden (McMASTER & STONE, *supra* note 85, at 359-65); and the argument of George Mason in the Virginia

Another important function of the civil jury, according to the antifederalists, was to provide the common citizen with a sympathetic forum in suits against the government. "A Democratic Federalist" writing in the *Pennsylvania Packet* on October 23, 1787, reminded readers of a recent outrageous search by a constable who was subsequently mulcted in damages by a jury in a civil action. The writer stated that it was quite predictable that a "lordly court of justice" sitting without a jury in the federal courts would likely be "ready to protect the officers of government against the weak and helpless citizens. . . . What refuge shall we then have to shelter us from the iron hand of arbitrary power?"¹⁸⁷

3. *Civil Juries and Corrupt Judges*

It is familiar legend that juries in civil cases were intended to guard private litigants against the oppression of judges. This general reaction was also shared by the antifederalists. For ex-

ratification convention with respect to the danger of control by Congress over the decisions of juries in civil cases in the courts at the seat of government. 3 ELLIOT, DEBATES 431; see note 111 *supra*.

187. McMASTER & STONE, *supra* note 85, at 154. The account given by the antifederalist author is interesting:

Suppose, therefore, that the military officers of Congress, by a wanton abuse of power, imprison the free citizens of the United States of America; suppose the excise or revenue officers (as we find in Clayton's Reports, page 44, Ward's case)—that a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift—suppose, I say, that they commit similar or greater indignities, in such cases a trial by jury would be our safest resource [*sic*], heavy damages would at once punish the offender and deter others from committing the same

I have not been able to locate the case to which the author refers.

One of the lowest blows in the vigorous newspaper and pamphlet war that was waged over the question of the ratification of the Constitution was aimed by Eldridge Gerry, the Massachusetts antifederalist who had refused to sign the Constitution. Writing as "a Columbian Patriot" in his otherwise anonymous pamphlet *Observations on the New Constitution, and on the Federal and State Conventions*, Gerry quoted from Blackstone and Hale in praise of the civil jury and then asked:

[S]hall this inestimable privilege be relinquished in America—either thro' the fear of inquisition for unaccounted thousands of public monies in the hands of some who have been officious in the fabrication of the *consolidated system*, or from the apprehension that some future delinquent possessed of more power than integrity, may be called to a trial by his peers in the hour of investigation.

P. FORD, PAMPHLETS ON THE CONSTITUTION 9-10 (1888). In addition to the obvious scurrilities intended, it would also appear that Gerry is implying that federal judges might in some cases not be sufficiently firm to enforce the law as it should be.

ample, Elbridge Gerry had supported the provision for civil jury trial in the Philadelphia Convention "to guard [against] corrupt Judges."¹⁸⁸ He later wrote that he had opposed the absence of a jury trial guarantee because "a federal judiciary, with the powers above mentioned, would be as oppressive and dangerous, as the establishment of a star-chamber . . ."¹⁸⁹ It is surprising, however, that more frequent and lengthy discussions of this concern by antifederalists cannot be found. The theme appears only as a minor motif.¹⁹⁰

For Alexander Hamilton, however, the use of the jury to guard against the corruption of judges was the only argument in favor of civil jury trial that he found persuasive. Hamilton based this on his view (shaped, perhaps, by the rough and tumble of New York politics) that there was simply a greater opportu-

188. Madison, *Debates in the Federal Convention* in 2 FARRAND, RECORDS, *supra* note 54, at 587. See text accompanying note 57 *supra*.

189. Writing in an unsigned letter to the New York Journal, April 30, 1788, in P. FORD, *ESSAYS ON THE CONSTITUTION* 131 (1892). Gerry had earlier used the "Star Chamber" simile in the Constitutional Convention. 2 FARRAND, RECORDS, *supra* note 54, at 633; see note 59 *supra*.

190. Coincidentally, most of the other allusions to this matter by antifederalists occurred during the course of the ratification debates in Pennsylvania. The antifederalist William Findley argued in the Pennsylvania ratification convention that "the Liberties of the People are always safest when Juries (who never go wrong by System) are called in and control the Conduct of the Judges." Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention*, 22 WM. & MARY Q. 301, 311 (1964). The theme of the utility of the jury to guard against judicial corruption was also alluded to by an antifederalist writer in Pennsylvania who warned of "the oppression, injustice and partiality that may take place in the trial of questions of property between man and man . . ." (McMASTER & STONE, *supra* note 85, at 154). A Pennsylvania antifederalist writing as "One of the People" in the *Philadelphia Independent Gazetteer* of December 11, 1787, connected the right of civil jury trial with the freedom of the press, referring the reader to an episode involving one Judge Jeffries. The same judge was alleged to be cooperating with James Wilson to remove the trial by jury in civil cases "and in the place of it to be tried by corrupted judges . . ." McMASTER & STONE, *supra* note 85, at 452-53. That very afternoon in a speech in the ratification convention Wilson stole some of the antifederalist thunder by conceding that the civil jury was desirable because while jurors "may indeed return a mistaken, or ill founded verdict," still "their errors cannot be systematical" as would be the errors of a judge. 2 ELLIOT, DEBATES, *supra* note 44, at 516. Cf. Thomas Jefferson to Colonel Humphreys (from Paris), March 18, 1789, in 5 U.S. BUREAU OF ROLLS & LIBRARY, *DOCUMENTARY HISTORY OF THE CONSTITUTION, 1786-1870*, at 165 (1905): "[T]here are instruments for administering the government, so peculiarly trust-worthy, that we should never leave the legislature at liberty to change them. [T]he new constitution has secured these in the executive & legislative departments; but not in the judiciary. [I]t should have established trials by the people themselves, that is to say by jury . . ."

nity to tamper with a regular corps of judges than with a jury summoned only for the occasion of trying a single case.¹⁹¹ Hamilton did not believe that a jury would be free of corruption; on the contrary, the fact that civil juries would be assembled by sheriffs and clerks of court would leave open the possibility of "the touch of corruption." The jury might be selected more "to serve the purpose of the party" than to do impartial justice. But in that event, in order for the corruption to be successful, it would be necessary to corrupt both the jury and the judge because the judge could correct an egregiously erroneous jury verdict by granting a new trial. On balance, therefore, Hamilton believed that the jury was in most cases "under proper regulations, an excellent method of determining questions of property." On this ground alone he was prepared to give it a constitutional guarantee, except for the insurmountable problem of drafting a suitable constitutional provision.¹⁹²

4. *The Occasions and Incidents of Civil Jury Trial*

Generalized rhetoric, as will later be suggested,¹⁹³ is nonetheless helpful in determining the reach of the protection of the seventh amendment. But we should first determine whether the historical materials hold promise of more particularized utility. Specifically, is there anything in the ratification debates that demonstrates what the framers conceived to be the preferable answers to the questions of, first, in what kinds of cases should juries sit and, second, in cases in which juries sit under the compulsion of a constitutional guarantee, what should be the specific roles of judge and jury? In the last analysis there is really very little in the historical materials that can provide helpful specific guidance.

a. Civil Cases Necessary for Jury Trial

The courts customarily have assumed that a static reference to history is the only operable method of determining under a constitutional guarantee which civil cases are to be set for jury trial.¹⁹⁴ But it is submitted that it is hardly "obvious"¹⁹⁵ that a

191. THE FEDERALIST No. 83, at 563-64 (J. Cooke ed. 1961) (A. Hamilton).

192. *Id.* 564-65.

193. See text at notes 306-08 *infra*.

194. See notes 2 and 8 *supra*.

195. See *United States v. Wonson*, 28 F. Cas. 745 (No. 16,750) (C.C.D. Mass. 1812). See the discussion of *Wonson* at notes 2-10 *supra*.

reference to the common law of England at one particular point in time was the only satisfactory method of resolving the admitted differences in the jury trial practices in the states which were claimed by the federalists to have created the constitutional impasse over the guarantee of civil jury trial. Several other methods could have occurred to the delegates during the ratification debates as alternative resolutions with at least some logical plausibility. First, the Constitution could have been amended to incorporate from all of the states the requirements for jury trial that were the most favorable to expansion of the right,¹⁹⁶ or, alternatively, to incorporate only those requirements that all states shared.¹⁹⁷ Second, the Constitution could have required a local federal court to afford a right of jury trial whenever, and to the extent that, it was required by the law of the state in which the federal court is sitting.¹⁹⁸ Third, the right to jury trial could be determined, quite apart from the practice in any state, solely by reference to the purposes for which it was adopted. Fourth, the right could be defined by reference to the law of only one state.¹⁹⁹ Or, fifth, it could be argued that at least some of the applications of a general constitutional guarantee should be determinable by Congress, much as Parliament historically provided additions to, and checks upon,

196. Implementation of such a guarantee would require jury trial in virtually all cases since that was the situation that obtained at least in the state courts in Pennsylvania at the time of adoption of the seventh amendment. See THE FEDERALIST No. 83, at 565-66 (J. Cooke ed. 1961) (A. Hamilton). There is no reason to believe that either federalists or antifederalists were prepared to accept this solution immediately in 1787-1791.

197. This would avoid the difficulty presented in note 196 *supra*, but would create problems of its own. First, the selection of "common" features of jury trial would have been as senseless, as a principle, as the selection of those features most favorable to jury trial. Second, there would have been substantial resistance among antifederalists and some federalists to such a "de minimis" approach.

198. A further problem would be that of determining whether such a reference should be static, as of 1791, or dynamic and subject to change by action of each state. It would also be necessary to determine the required shape of jury trial in states admitted to the union after the adoption of such an amendment. For further discussion, see text accompanying notes 282-311 *infra*.

199. Such an approach was specifically rejected at several points by the federalists as it would create an unnecessary affront to those states whose jury trial practices were not followed in the federal courts. See, e.g., James Iredell in the North Carolina ratification convention, 4 ELLIOT, DEBATES, *supra* note 44, at 165-66. See also sources cited at note 72 *supra*. Of course, the effect of the historical test of the seventh amendment is precisely this. By adopting the common law of England in 1791, it foisted upon all states a practice that obtained in only a few.

the common law of England.²⁰⁰ The slight mentions of the problem of defining criteria that can be found in the historical materials lend some support to the second, third, and fourth approaches and, very slightly, to the historical test itself with its allusion to the practice of courts in England. These will be separately considered under the headings of state-law incorporation, the functional approach, and incorporation of the English common law.

State-Law Incorporation. Some evidence—and it is hardly overwhelming—suggests that the explicit standard by which at least many of the antifederalists who spoke of the matter would have measured the right of jury trial in federal civil proceedings was the practice of the state in which the federal court was sitting. This approach, which has never been suggested in any of the cases since the adoption of the seventh amendment, also has the strong appeal of resolving the differences among the several states as to the manner of providing for jury trial. This would have satisfactorily dealt with the persistent federalist argument that any civil jury trial guarantee should not depart significantly from the practice in any state.²⁰¹ Moreover, the federalist arguments against this approach during the ratification debates—chiefly based on the notion that the federal courts would in some way be crippled by a requirement of conformity to the jury trial practices of each state in which a federal court might sit—were belied by a dominantly federalist Congress even before the adoption of the seventh amendment. For one of the major provisions of the Judiciary Act of 1789 and the Process Act passed at virtually the same time required just such conformity, not only with respect to many matters of practice and proce-

200. Cf., e.g., James Madison in the Virginia ratification convention, 3 ELLIOT DEBATES, *supra* note 44, at 537 (emphasis in original): "The trial by jury is held as sacred in England as in America. There are deviations from it in England; yet greater deviations have happened here, since we established our independence, than have taken place there for a long time, though it be left to the legislative discretion. It is a misfortune in any case that this trial should be departed from; yet in some cases it is necessary. It must be, therefore, left to the discretion of the legislature to modify it according to circumstances. This is a complete and satisfactory answer." See also the materials cited at note 68 *supra*. In none of these discussions, however, is the speaker suggesting that a constitutional guarantee of civil jury trial should be written so as to permit substantial legislative modification. In each case, the argument is directed against a constitutional guarantee and the purpose of the speaker is to retain legislative discretion as to the provision of civil jury trial.

201. See text accompanying note 72 *supra*.

dure²⁰² but also with respect to the provision in the new federal courts of civil jury trial itself.²⁰³

202. The Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73-93, was enacted one day before Congress enacted the first amendments to the Constitution and sent them to the states for approval or rejection. Section 34 of the act ("Rules of Decision") left it uncertain whether procedure was to be governed by reference to the laws of the states. Five days later, on September 29, 1789, Congress enacted the Process Act, 1 Stat. 93, which unequivocally and comprehensively required that "in suits at common law" the procedures in the various federal courts "shall be the same in each state respectively as are now used or allowed in the supreme courts of the same." See H. HART, JR. & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 668 (2d ed. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler 1973).

203. The Judiciary Act of Sept. 24, 1789, § 29, 1 Stat. 88, directed that the selection and qualifications of jurors was to be the same as that of the state in which the federal court sat. The Act also contained several provisions requiring trial by jury in stated instances. Some of these provisions are, frankly, bewildering, but in ways that are not immediately relevant. Section 9 of the Act (1 Stat. 76-77) gave the district courts jurisdiction over various types of proceedings, including maritime cases, seizures, "all causes where an alien sues for a tort only in violation of the laws of nations or a treaty of the United States," "all suits at common law where the United States sue," and "all suits against consuls or vice-consuls." The last sentence of the section states: "And the trial of issues in [sic] fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." Bewilderment stems from the implicit rule that equity suits, for example, against vice-consuls would be triable to a jury. The omission might have been an oversight. Sections 11 and 12 of the Act (1 Stat. 78-80) defined the jurisdiction of the circuit courts and the last clause of section 12 provided: "and the trial of issues in [sic] fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury." Section 13 (1 Stat. 80-81) defined the original jurisdiction of the Supreme Court; the third sentence provided: "And the trial of issues in [sic] fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury." Section 16 (1 Stat. 82) provides: "That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law."

See also section 26 (1 Stat. 87) which provided that in an action on a contract or for a forfeiture where the defendant defaulted, confessed judgment or was ruled against on demurrer, the court was to "render judgment therein for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury."

With respect to appellate review, section 17 (1 Stat. 83) provided: "That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law . . ." Section 22 (1 Stat. 84-85) provided that on writ of error "there shall be no reversal . . . for any error in [sic] fact." See *generally* *Capital Traction Co. v. Hof*, 174 U.S. 1, 10 (1899).

As is true of other readings of the doctrines and history of the seventh amendment suggested in this Article, the argument that the framers conceived that the seventh amendment would apply in each state according to the dictates of the jury-practice law of the state finds some of its strongest support in the federalist, *locum classicum* on the civil jury, Alexander Hamilton's Number 83 of *The Federalist*.²⁰⁴ As part of his elaborate defense of the omission from the proposed Constitution of a specific guarantee of civil jury trial, Hamilton had attempted to show that the amendments on this matter offered by antifederalists in Pennsylvania and in Massachusetts were unacceptable.²⁰⁵ The antifederalists at the Pennsylvania ratification convention had unsuccessfully proposed, among others, a suggested constitutional amendment that would have required civil jury trial "as heretofore."²⁰⁶ Hamilton argued that, for several reasons, this "would be absolutely senseless and nugatory."²⁰⁷ First, there was no such thing as this right "in the United States as such" because before the adoption of the Constitution the national government had no judiciary power whatever.²⁰⁸ If the amendment were intended to refer to the United States it would be "destitute of a precise meaning, and inoperative from its uncertainty."²⁰⁹ Second, the only sensible alternative that Hamilton could see was, "if I apprehend that intent rightly, . . . I presume it to be, that causes in the federal courts should be tried by jury, if in the state where the courts sat, that mode of trial would obtain in a similar case in the state courts"²¹⁰

To this Hamilton had essentially two objections. One was that the provision of a jury trial would be "capricious" and "would depend in a great number of cases, on the accidental situation of the court and parties."²¹¹ Second, the "greatest objection" was that "there are many cases in which the trial by jury is an ineligible one."²¹² Chief among these were cases, such as prize cases, where the issues involved relationships with for-

204. THE FEDERALIST No. 83, at 567-71 (J. Cooke ed. 1961) (A. Hamilton).

205. See text at notes 148-158 *supra*.

206. See text at note 139 *supra*.

207. THE FEDERALIST No. 83, *supra* note 204, at 567.

208. *Id.* at 567 (emphasis in original). Hamilton was, of course, conveniently overlooking the national Prize Courts set up under the Articles of Confederation. See note 51 and accompanying text *supra*.

209. *Id.* at 567.

210. *Id.*

211. *Id.* at 567-68.

212. *Id.* at 568.

eign nations.²¹³ Also included were equity cases which Hamilton found utterly inappropriate for trial to a jury.²¹⁴

Hamilton then turned to the antifederalist proposal adopted by the Massachusetts ratification convention that would have amended the Constitution to provide for civil jury trial in "*actions at common law*."²¹⁵ The suggestiveness of Hamilton's criticism of the Massachusetts proposal, in the light of the ultimate adoption a year later of the seventh amendment with its identical language, deserves to be quoted in full:²¹⁶

If we advert to the observations already made respecting the courts that subsist in the several states of the union, and the different powers exercised by them, it will appear, that there are no expressions more vague and indeterminate than those which have been employed to characterise *that* species of causes which it is intended shall be entitled to a trial by jury. In this state the boundaries between actions at common law and actions of equitable jurisdiction are ascertained in conformity to the rules which prevail in England upon that subject. In many of the other states, the boundaries are less precise. In some of them, every cause is to be tried in a court of common law, and upon that foundation every action may be considered as an action at common law, to be determined by a jury, if the parties or either of them chuse it. Hence the same irregularity and confusion would be introduced by a compliance with this proposition, that I have already noticed as resulting from the regulation proposed by the Pennsylvania minority. In one state a cause would receive its determination from a jury, if the parties or either of them requested it; but in another state a cause exactly similar to the other must be decided without the intervention of a jury, because the state judiciaries varied as to common law jurisdiction.

It is obvious therefore that the Massachusetts proposition, upon this subject, cannot operate as a general regulation until

213. *Id.*

214. *Id.* at 568-70. For Hamilton's reasons for finding trial by jury of equity suits inappropriate, see notes 227-28 *infra*.

215. THE FEDERALIST NO. 83, at 570 (J. Cooke ed. 1961) (A. Hamilton) (emphasis in the original). Hamilton's quotation of the Massachusetts proposal—in which he supplied the emphasis to the words "actions at common law"—agrees with the text of the Massachusetts proposal contained in 1 ELLIOT, DEBATES, *supra* note 44, at 323, except that the more emphatic "shall" is used in the Elliot version in place of the "may" which Hamilton quotes. Hamilton argued, rather unpersuasively, that this limitation to "actions at common law" suggested either that the reach of the amendment was quite modest and thus that its omission should not be considered a material imperfection in the Constitution or that its framers found it impracticable to devise a better formula, in which case it would have been better to leave the matter for resolution by Congress. The latter argument implies that the framers of the Massachusetts proposal had wrought something of which they were not aware and perhaps would not intend.

216. THE FEDERALIST NO. 83, *supra* note 215, at 570-71 (emphasis in original).

some uniform plan, with respect to the limits of common law and equitable jurisdictions shall be adopted by the different states. 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 with the several state institutions.

As disturbing as the statement may be, Hamilton here clearly asserted that a guarantee of civil jury trial in the identical language that ultimately was employed by Congress in the seventh amendment would require that the practice of jury trial in any federal court must be taken from the law of the state in which the federal court was sitting. Moreover, support for this view can also be found in the records of the debates of the North Carolina and Virginia ratification conventions.

At the first, and abortive,²¹⁷ North Carolina ratification convention the antifederalist Judge Samuel Spencer strongly attacked the absence of a guarantee of civil jury from the Constitution. In rebuttal of the stock federalist argument that variations among the states precluded a common approach, Spencer replied:²¹⁸

They might have provided that all those cases which are now triable by a jury should be tried in each state by a jury, according to the mode usually practiced in such state. This would have been easily done, if they had been at the trouble of writing five or six lines. Had it been done, we should have been entitled to say that our rights and liberties were not endangered.

The suggestion was seized upon by the federalist James Iredell and condemned in very strong terms:²¹⁹

Had it, then, been inserted in the Constitution, that the trial by jury should be as it had been heretofore, there would have been an example, for the first time in the world, of a judiciary belonging to the same government being different in different parts of the same country. What would you think of an act of Assembly which should require the trial by jury to be had in one mode in the county of Orange, and in another mode in Granville, and in a manner different from both in Chatham? Such an act of Assembly, so manifestly injudicious, impolitic, and unjust, would be repealed next year.

217. See note 103 *supra*.

218. 4 ELLIOT, DEBATES, *supra* note 44, at 155.

219. *Id.* at 165. As mentioned previously, note 64 *supra*, Iredell was also impliedly criticizing the view of one of his own party (Governor Thomas Johnston) who had spoken in favor of the proposal of Spencer to provide for civil jury trial in the federal courts on an incorporation-of-state-law basis. Iredell's reference to a proposal to guarantee trial by jury "as it had been heretofore" (a phrase which Judge Spencer did not use) suggests that Iredell might have been thinking of the same Pennsylvania provision that Hamilton attacked in Number 83 of *The Federalist*. See note 139 *supra*.

But what would you say of our Constitution, if it authorized such an absurdity? The mischief, then, could not be removed without altering the Constitution itself. It must be evident, therefore, that the addition contended for would not have answered the purpose.

The allusion in the Virginia ratification debates to a standard for federal jury by incorporation of the practice in the states is more veiled. Governor Edmund Randolph offered the following apology for the absence of a guarantee of civil jury trial during the course of a typically equivocal²²⁰ defense of the Constitution:²²¹

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

On analysis,²²² however, these remarks by Randolph probably

220. Randolph had refused to sign the Constitution at Philadelphia. His defense of it during the Virginia ratification convention initially was rather lukewarm, but he eventually aligned with the federalists and voted in favor of it. See J. GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 249-50, 377 (1971).

221. 3 ELLIOT, DEBATES, *supra* note 44, at 68. The substance of these remarks was repeated in a later speech by Randolph. *Id.* at 203-04. Cf. another Randolph speech, *id.* at 368-69.

222. One wishing to do so could perhaps read the quoted remarks of Randolph as being premised upon the notion that Congress would be powerless, even in the absence of a further amendment to the Constitution, to take away the right of civil jury trial guaranteed by the state constitutions. This reading is reinforced by the theme which soon was to prevail in the Virginia Convention (and ultimately find expression in the compromise form of ratification that the convention adopted) to the effect that the federal government could not take away any rights of persons that were not expressly surrendered in the draft Constitution. See text of the Virginia ratification in 1 ELLIOT, DEBATES, *supra* note 44, at 327. While only "the liberty of conscience, and of the press" are expressly listed, these are said to be only some "among other essential rights." And civil jury trial clearly seems to have been considered among rights thought by many to be "essential".

There are reasons, however, to doubt that Randolph was conceding to the states the power to affect the course of jury trial in the federal courts. First, Randolph's reference to the guarantee of jury trial in state constitutions might also be read simply as an illustration of the

add little support to the view, which only Hamilton expressed with clarity, that the right of jury trial in the federal courts should be determined with reference to state law.

A Functional Approach. Briefly stated, a "functional" approach to the definition of a constitutional guarantee of civil jury trial would attempt to ascertain the reasons why a civil jury was thought to be so necessary as to constitutionally require it. The resulting standards would attempt to effectuate these "reasons." An attempt will be made at a later point to define functionality for seventh amendment purposes.²²³ What is sought at this point is historical support in the ratification debates for the proposition that a constitutional guarantee of civil jury trial should be so formulated as to achieve certain functions and that these functions should serve as guidelines for the application of the guarantee. It probably must be concluded that there is no direct historical support for employing this approach. This is not to say, however, that an approach to the seventh amendment that is unable to muster explicit legislative history is invalid. Such a principle would preclude all but the test of incorporating the civil jury trial standard of the state in which the federal court sits, a test which on further analysis must be rejected.²²⁴

Scattered references can be found—during the ratification

extent to which the right of jury trial in civil cases had been universally accepted in the states in order to suggest that there was really no controversy with respect to its acceptability for the federal courts. Second, the burden of his remarks follows closely the by then orthodox pro-ratification arguments of the federalists. (See notes 68-75, *supra*.) Third, a concession by Randolph that the state constitutional jury trial guarantees applied by their own force to the federal courts would be inconsistent with his subsequent remarks concerning the regulation of the jury trial by Congress in such a way as to suit every state. If Congress has the power to legislate with respect to the jury, presumably they are thought to have some usual legislative discretion in the matter. Fourth, Randolph shortly afterward derided Patrick Henry's complaints about the guarantees of the Virginia constitution being taken away by the federal government. Randolph pointed out that even the Virginia declaration of rights, which was not technically part of the Virginia constitution, was often ignored. He cited as an example the case of one Josiah Phillips who had been executed without trial by vote of the Virginia General Assembly, an action which Patrick Henry continued to defend. See 3 ELLIOT, DEBATES, *supra* note 44, at 236. Henry had been directly involved in the Josiah Phillips episode while governor. See J. GOEBEL, JR., *supra* note 220, at 380. Randolph in a later speech amplified his misgivings about the effectiveness of a bill of rights into virtual contempt for its effectiveness. See 3 ELLIOT, DEBATES, *supra* note 44, at 190-91.

223. See discussion in text accompanying note 312 *infra*.

224. See text accompanying notes 272-78 *infra*.

debates and before it was settled that there would be a constitutional guarantee of jury trial—to the utility of jury trial in certain kinds of cases. But none of these seem to have contemplated that these issues of utility could be evolved into a standard for determining the extent of the right to jury trial. For example, during the course of the Virginia ratification debates, the eventually federalist Governor Edmond Randolph referred to the inadvisability of having juries determine equity and admiralty suits: “In equitable cases, it ought not to prevail, nor with respect to admiralty causes; because there will be an undue leaning against those characters, of whose business courts of admiralty will have cognizance.”²²⁵ At a later point in the same debates the federalist George Nicholas argued that it would have been unwise to include a civil jury trial guarantee in the original constitution because if it were included, “[i]t will extend to all cases. Causes in chancery, which, strictly speaking, never are, nor can be, well tried by a jury, would then be tried by that mode, and could not be altered, though found to be inconvenient.”²²⁶ The most elaborate attempt to demonstrate that there were functional considerations that precluded jury trial in certain kinds of cases was that of Alexander Hamilton in his now familiar Number 83 of *The Federalist*. Hamilton’s main argument was that equity cases were singularly (Hamilton came close to saying designedly)²²⁷ inappropriate for trial by a jury because of the large degree of discretion that was typically committed to the chancellor by the rules of equity and because equity cases were often too complex and time-consuming for trial by a group of lay jurors.²²⁸

At some points during the ratification debates antifederalists argued that in the new federal courts juries should be used in

225. 3 ELLIOT, DEBATES, *supra* note 44, at 203. See also *id.* at 468-69: “In admiralty causes it is not used. Would you have a jury to determine the case of a capture? The Virginia legislature thought proper to make an exception of that case. These depend on the law of nations, and no twelve men that could be picked up could be equal to the decision of such a matter.”

226. *Id.* at 247. Nicholas, an attorney who later served as the first attorney general of Kentucky, might be referring here only to the peculiar mode of trying equity cases at that time, entirely by written depositions which were reviewed by the chancellor. Nicholas did not explain his assertion that any constitutional guarantee would necessarily “extend to all cases.” One wonders whether Nicholas would have read the seventh amendment to require the trial by jury in equity cases that he seemed to be arguing would be the result of such a guarantee.

227. See note 291 *infra*.

228. THE FEDERALIST No. 83, at 566-70, 572 (J. Cooke ed. 1961) (A. Hamilton).

cases that would have been tried by the chancellor alone in England. Reflecting, perhaps, his Pennsylvania background more than his grasp of English equity practice, Judge Samuel Bryan asserted that the custom in England was to have the chancellor send questions of "legal rights" to the common-law courts for trial by jury with no subsequent re-examination of any fact found by the jury.²²⁹ Perhaps responding to Judge Bryan, Hamilton in Number 83 of *The Federalist* referred to the suggestion by "men of enthusiastic tempers" that the Constitution should have guaranteed trial by jury in all cases.²³⁰ But Hamilton was convinced that "every sober mind" would agree that such "would have been an unpardonable error in the plan," referring his reader generally to his prior discussion of the inadvisability of having jurors sit in equity cases.²³¹

But, as is also true of the reference by other speakers and writers to the utility or non-utility of civil jury trial in particular kinds of cases, Hamilton was not arguing here that any constitutional guarantee of civil jury trial should be defined with respect to these general considerations concerning their functioning. To the contrary, Hamilton argued (ultimately unsuccessfully in the light of the adoption of the seventh amendment) that the matter was too complex for a constitutional guarantee of any kind.²³²

Incorporation of the English Common Law. Apparently no federal court has felt the need to justify the historical test by reference to any of the historical materials surrounding the adoption of the seventh amendment. The common approach has been that first taken by Mr. Justice Story in his *Wonson* opinion

229. *Letters of Centinel, No. II* in McMASTER & STONE, *supra* note 85, at 581. While the chancellor did occasionally send feigned issues to law courts for jury trial, it was by no means the unvarying practice nor did the chancellor always abide by the facts found by the jury. See J. GOEBEL, JR., *supra* note 220, at 284. Hamilton made much the same rejoinder to Bryan in THE FEDERALIST No. 83, at 565 n. (J. Cooke ed. 1961).

Judge Bryan's fellow antifederalist and Common Pleas judge, William Maclay, sat in the United States Senate from Pennsylvania during the First Congress that considered the Bill of Rights. His *Diary*, note 266 *infra*, contains several references castigating the courts of equity and praising trial by jury. Many of Maclay's complaints about the workings of equity jurisdiction bear a striking resemblance to the *Bleak House* arguments that were made in England decades later in favor of the abolition of the equity jurisdiction and its merger with law.

230. THE FEDERALIST No. 83, at 572 (J. Cooke ed. 1961).

231. *Id.* See also the textual discussion at note 228 *supra*.

232. THE FEDERALIST No. 83, at 572 (J. Cooke ed. 1961).

which initiated the historical test.²³³ Mr. Justice Story seemed to base the test entirely on the observation that the practices in the original states as to the provision of jury trial differed "in all" and thus that the need to resort to the English common law was "obvious."²³⁴ Moreover, no court seems to have attempted to justify the static nature of the test, other than by general reference to the language of the seventh amendment.

The historical materials furnish very little justification for the historical test's reference to the English common law. One reference to "the common law of England" as a definition of the right of jury trial can be found in the declaration of rights that accompanied the ratification by the New York convention.²³⁵ But there are two major obstacles to an attempt to read this bit of history as support for the idea that the differently worded seventh amendment²³⁶ later adopted should refer to the same body of law. First, as Hamilton established in *The Federalist*, New York had followed the English practice more closely than any other state.²³⁷ Thus, a New York declaration of rights would quite naturally employ that familiar referent. But this hardly suggests that the same referent would have been acceptable in other states which sometimes departed radically from the English model.²³⁸ Second, the same ratification document also proposed to limit the jurisdiction of the federal courts to only admiralty cases.²³⁹ Thus the "declaration" must have been intended to refer mainly, if not exclusively,²⁴⁰ to a right that

233. *United States v. Wonson*, 28 F. Cas. 745, 750 (No. 16,750) (C.C.D. Mass. 1812). See text accompanying notes 2-9 *supra*.

234. *United States v. Wonson*, 28 F. Cas. 745, 750 (No. 16,750) (C.C.D. Mass. 1812).

235. See 1 ELLIOTT, DEBATES, *supra* note 44, at 328: "That the trial by jury, in the extent that it obtains by the common law of England, is one of the greatest securities to the rights of a free people, and ought to remain inviolate." See also note 149 *supra*.

236. The seventh amendment speaks only of the "common law" without any explicit reference such as "of England." See text of the amendment in Introduction *supra*.

237. THE FEDERALIST No. 83, at 565 (J. Cooke ed. 1961).

238. See *id.* at 565-66. The allusion to the common law "of England" in the New York instrument of ratification might, however, be construed as an expression of the desire of the State of New York to retain its own model of the right to jury trial, a circumstance consistent with the state-incorporation theory. See text accompanying notes 72-78 *supra*.

239. See 1 ELLIOTT, DEBATES, *supra* note 44, at 331. See also discussion accompanying note 153 *supra*.

240. The reference would be exclusive on the assumption that the New York framers did not intend to require jury trial in admiralty cases.

would be relevant only in state courts, and the only relevant state courts were those of New York. Other allusions to the common law of England can be found scattered in speeches or writings dealing with civil jury trial, but there is no solid reason to believe that the reference in any of them is other than casual.²⁴¹

It is understandable that federalists would not have advanced the argument that a constitutional guarantee of civil jury trial should refer to the common law of England. To do so would have conceded the feasibility of drafting a suitable guarantee—which the federalists stoutly denied²⁴²—and would have conflicted with their argument that any arrangement for civil jury trial in the federal courts should accommodate the different procedures of the several states.²⁴³ To have adopted the common law of England as the required model for civil jury trial, of course, would have been to give preference to the system employed in only a few of the states.²⁴⁴ This was unacceptable to the federalists, and presumably any constitutional guarantee to which they lent their support should avoid this result.

States such as New York that proposed amendments to the Constitution that would have severely limited the federal judicial power did not seem to have contemplated that these suggestions would be rejected. At least there is no alternative insistence in the New York set of proposed amendments for a guarantee of the right of jury trial in the federal courts if the jurisdiction of those courts were left unchanged and not limited, as New York proposed, to admiralty cases. The feeling perhaps was that the point about jury trial was sufficiently made by inclusion of a right to civil jury trial in the "declaration of rights" that accompanied the proposed amendments.

241. For example, the antifederalist John Smilie in the Pennsylvania convention relied on the following syllogism (as recorded by a federalist; see Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention*, 22 W. & MARY Q. 301, 303 (1965)): "Jury Trials may be superceded in Civil Cases[.] Appellate Jurisdiction is a Civil Law Term[.] There can be no Appeal after Jury Trials. I fear there is an Intention to substitute the Civil Law in the Room of the Common Law[.]" Pittman, *supra*, 311. One implication probably sought to be created by Smilie was that something similar to the "common law" right to jury trial obtained in Pennsylvania. This, of course, was far from the case.

242. See text accompanying note 66, *supra*.

243. See note 72 *supra* and accompanying text. See also James Iredell in the North Carolina ratification convention, 4 ELLIOT, DEBATES, *supra* note 44, at 165-66.

244. According to Hamilton's reckoning in THE FEDERALIST No. 83, at 565-67 (J. Cooke ed. 1961), the jury trial practices of the following states were unlike that of England (and New York): New Jersey, Pennsylvania, Delaware, North Carolina, Georgia, Connecticut, Rhode Island, Massachusetts, and New Hampshire. Only four—New York, Maryland, Virginia and South Carolina—are described as fashioned on the English model.

b. The Incidents of Jury Trial

Even a concession that a constitutional guarantee of civil jury trial applies to a case often does not resolve the "jury trial" issue that may be presented. It is frequently necessary to determine the features of jury trial protected by the constitutional guarantee. For example, does the Constitution require a certain number of jurors? Is the direction of a verdict contrary to a jury's inclination consistent with the guarantee? Does the Constitution require a unanimous jury verdict?

Others have already delved into history for specific answers to these questions and have found none.²⁴⁵ None can be reported from this author's research into the ratification controversy. It is clear that the antifederalists desired a strong and significantly independent role for the jury and there is some indication that this role was envisioned not to involve the risk of correction by the attending judge.²⁴⁶ Nothing has been found

245. See Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507 (1973); Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); cf. Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926) (under the sixth amendment).

246. Several speakers already cited in other connections expressed opposition to the provision in the original judiciary article that would have permitted the Supreme Court to exercise appellate jurisdiction with respect to questions "both as to Law and Fact." See note 89 *supra*. The debates in the Pennsylvania ratification convention probably went into the subject as far as any. The antifederalist speakers made the customary complaint that the provision for fact review would permit the rich to grind down the poor by expensive proceedings (see Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention*, 22 WM. & MARY. Q. 301, 310 (1965) (Robert Whitehill), and that the use of the phrase "appeal" in the Constitution suggested the civil law and its absence of jury trial (*id.* at 311 (John Smilie)). In the extensive debate on the civil jury on December 8 (see note 132 *supra*), the antifederalist John Smilie argued that "Writ of Attaint lies against a Jury for giving a false Verdict . . ." implying that nothing else was available for the correction of a verdict against the weight of the evidence. *Id.* at 311. He asserted that "England corrupt as she is would not fix an Innovation like our Appellate Jurisdiction." *Id.* at 312. The next day the convention met (Monday, December 10), the federalist Chief Justice McKean responded that "The verdicts of Juries should in some Instances be revised—The House of Lords have an Appellate Jurisdiction both as to Law and in Fact—so have the Supreme Courts in Matters in the Orphans Courts. So of the Court of Errors and Appeals in Disputes about Wills—So of Chancery who determines it Jus Testes—In Massachusetts and New Hampshire, cases are removed into the Supreme Court by Appeal instead of Writs of Error." *Id.* at 314. The next day, James Wilson seconded McKean's arguments. "It is well known that there are some cases that should not come before juries;

that bears explicitly on such questions as the size of the jury, the requirement of unanimity, or even the requirement of secrecy for their deliberations.²⁴⁷ It is not at all surprising that discussion of such secondary matters did not arise during the period under review. The major issues of the day were the large stakes of local control versus centralized power. Even at the level of personal rights and privileges, the larger and more critical task was to secure in some form a guarantee of such rights as those of free speech and press and the right to civil and criminal jury trial. Resistance on the part of federalists to the basic idea of a national bill of rights was too general to permit the introduction of matters of such relatively trivial significance as the size of

there are others, that, in some of the states, never come before juries, and in those states where they do come before them, appeals are found necessary, the facts reexamined, and the verdict of the jury sometimes is set aside; but I think, in all cases where the cause has come originally before a jury, that the last examination ought to be before a jury likewise." 2 ELLIOT, DEBATES, *supra* note 44, at 518. From its context, it appears that this last statement by Wilson only expressed what he considered to be preferable legislative restrictions on the review of jury fact-findings that Congress might impose. See also the remarks of Chief Justice McKean, *supra* note 138.

247. One does encounter casual allusions to the civil jury as composed of "twelve." See, e.g., Governor Edmund Randolph quoted in note 225 *supra*; Thomas McKean in note 138 *supra*. Cf. Edmund Randolph in the Virginia ratification convention, 3 ELLIOT, DEBATES, *supra* note 44, at 467 (referring to criminal trials in the federal courts): "There is no suspicion that less than twelve jurors will be thought sufficient." Mr. Fisher in his recent article finds that there is no constitutional obstacle under the seventh amendment to mandatory six-person civil juries in the federal courts, Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507 (1973). But the history adduced hardly supports the conclusion that a civil jury of less than twelve was an acceptable concept in 1791. The only incident that Fisher cites that occurred within decades of the adoption of the seventh amendment, and which did not involve the trial of petty claims, is the decision of the Supreme Court of New Jersey in *Holmes v. Walton*, decided on September 7, 1780. The court there held that the trial of an action for repossession of personal property before a justice of the peace with a jury of only six men was in violation of the New Jersey constitutional provision that "the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony without repeal forever." See R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 190 (1957). Strangely, Mr. Fisher cites this case and then inquires "in light of the foregoing how can it be said that 'common law' mandated a jury of twelve men on all occasions?" Fisher, *supra*, at 531-32 n.88. One cannot escape the impression that this conclusion is based on a misreading of *Holmes v. Walton*. Confusion could result from failure to note that the "plaintiff" for whom the New Jersey Supreme Court gave judgment was the petitioner on the writ of error—the defendant in the lower court who had argued on appeal that the six-person jury was in violation of the New Jersey constitution.

juries or the precise line that should delineate the provinces of jury and judge.

D. THE ANTICLIMACTIC FINALE: ADOPTION
OF THE SEVENTH AMENDMENT

The respective positions of federalist and antifederalist were fairly well defined after the final approval of the Constitution by the requisite ninth state. The federalists had carried the day on the large issue of the general shape of the government, although it was to require a civil war within a century and a catastrophic depression within a century and a half to resolve the matter with finality. Both the Senate and the House of Representatives were solidly federalist.²⁴⁸ But the antifederalists had scored a major, if still problematical, victory. The price of approval of the Constitution in many states was the appending of a list of proposed amendments to the Constitution or agreeing to declarations of rights that contained matters that would have to be included as amendments if the shape of the central government were to remain as the originally drafted Constitution proposed.²⁴⁹ The antifederalist pressure did not relent after the Constitution was finally adopted. Many federalist candidates for elective office in the new federal government, such as Madison, had to promise constituents that a bill of rights would promptly be made a part of the Constitution by amendment.²⁵⁰ Most observers of the new government as it was organized could agree that a matter of primary importance was the preparation of a set of amendments that would still the antifederalist cries for a second convention and a bill of rights.²⁵¹

In response to the pressures for a guarantee of the right of jury trial in civil cases that had been generated during the ratification process, Congress included the seventh amendment in what became the first ten amendments to the Constitution. The amendments cleared Congress on September 25, 1789,²⁵² and they

248. On the political composition of the first elected United States government, see R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at 191, 198 (1955).

249. See textual discussion in section II.B. *supra*.

250. See J. GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 425-27 (1971); F. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION* 28 (1951); R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at 195-96 (1955).

251. See J. GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 415-24 (1971); R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791*, at 194-95 (1955).

252. 1 Stat. 97 (1789). The very preamble of the Act of Congress that sent the first ten amendments to the states is redolent with

became effective on their approval by the Virginia legislature on December 15, 1791, when it became the eleventh approving state and thus the amendments achieved the necessary three-fourths vote of the states.²⁵³ Only slight additional light is shed on the meaning of the seventh amendment by the little that is known about the progress of the amendment through Congress and the state legislatures.

James Madison initiated congressional action by introducing suggested amendments to the Constitution on Monday, June 8, 1789.²⁵⁴ Several members of the House objected that there was more important business to which Congress should first devote its attention.²⁵⁵ Madison eventually responded that he did not wish the House to begin consideration immediately but had introduced the measure in order to show constituents that their representatives were taking a proper attitude "to a subject they have much at heart."²⁵⁶ Among the measures that

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

253. Vermont was admitted to the union before the requisite ten states (three-quarters of the thirteen) of the original thirteen states (including Rhode Island) had approved the first ten amendments, and it was thus necessary to obtain an additional state's approval.

254. 1 ANNALS OF CONG. 423 (1789).

255. See, e.g., James Jackson of Georgia, 1 ANNALS OF CONG. 425 (1789), who argued specifically with reference to the right of jury trial that the bill for establishing the judiciary was then before the Senate and a proper attention was being shown to jury trial: "Indeed, I do not conceive how it could be opposed; I think an almost omnipotent emperor would not be hardy enough to set himself against it. Then why should we fear a power which cannot be improperly exercised?" *Id.* at 425-26.

256. *Id.* at 427. Madison added that if Congress had taken up the matter of amendments as their first business it would have "stifled the voice of complaint, and made friends of many who doubted the merits of the Constitution." *Id.* See also Madison's speech, *id.* at 431-32. Alexander White of Virginia agreed that consideration of amendments "would tend to tranquilize the public mind . . ." *Id.* at 428. And John Page of Virginia cautioned that those favoring amendments might become impatient and increase the clamor for a second general constitutional convention. "How dangerous such an expedient would be I need not mention . . ." *Id.* at 429. Madison agreed with this political analysis. *Id.* at 432-33.

One beneficial effect of Madison's action was to still some of the antifederalist ferment in North Carolina which had previously refused to ratify without prior amendments. According to Madison's federalist informants in North Carolina, the public there were pleased with the amendments that he had offered. The amendments particularly

Madison introduced were two that bore very directly upon the antifederalist's fears concerning the civil jury. The first of these dealt with the vexing question of appellate review of questions of fact.²⁵⁷

Sixthly. That, in article 3d, section 2, be annexed to the end of clause 2d, these words, to wit:

"But no appeal to such court shall be allowed where the value in controversy shall not amount to —— dollars; nor shall any fact triable by jury, according to the course of common law, be otherwise re-examinable than may consist with the principles of common law."

Madison's proposals also would have added a new third clause to

desired by "the honest and serious" citizens included "an abridgement of the jurisdiction of the federal Court in a few instances, and some fixed regulations respecting appeals—they also insist on the trial by jury being expressly secured to them in all cases . . ." William R. Davie to James Madison, June 10, 1789, in 5 U.S. BUREAU OF ROLLS & LIBRARIES, DOCUMENTARY HISTORY OF THE CONSTITUTION, 1786-1870, at 176-77 (1905). See also *id.* at 178 (Tench Coxe to James Madison, June 18, 1789).

257. 1 ANNALS OF CONG. 435 (1789). Along with the rest of Madison's proposals and the proposals for amendments received from several state ratification conventions, eventually Madison's jury trial proposals were sent to a select committee composed of one representative from each of the eleven states then represented in Congress. *Id.* at 664-65. This committee of eleven reported back the appellate review proposal with only slight alterations: (1) the insertion of "one thousand dollars" as the floor for appeals to the Supreme Court; and (2) a change of the last clause to read "than according to the rules" of the common law. *Id.* at 755. As thus amended, the measure was accepted by the House in committee of the whole. The House passed this version with no recorded discussion. *Id.* at 767. The Senate rejected the dollar floor on appeals to the Supreme Court, according to Madison, because of "a fear of inconvenience from a constitutional bar to appeals below a certain value, and a confidence that such a limitation is not necessary . . ." James Madison to Edmund Pendleton, September 14, 1789, in 5 U.S. BUREAU OF ROLLS & LIBRARIES, DOCUMENTARY HISTORY OF THE CONSTITUTION, 1786-1870, at 206 (1905) (emphasis in original). The Senate held to this position in the conference committee that attempted to resolve differences between the draft Bill of Rights that each house had adopted. According to Madison, "It will be impossible I find to prevail on the Senate to concur in the limitation on the value of appeals to the Supreme Court, which they say is unnecessary, and might be embarrassing in questions of national or constitutional importance in their principle, tho' of small pecuniary amount." James Madison to Edmund Pendleton, September 23, 1789, in 5 *id.* at 211 (emphasis in original). The restriction on the review of facts tried by a jury was reworded to its present form and added to the preservation of the right of jury trial to make up the present seventh amendment.

Madison's proposal for limiting appeals to the Supreme Court seems to have been inspired by the amendments suggested by the ratification conventions in Massachusetts (1 ELLIOT, DEBATES, *supra* note 44, at 323) and in New Hampshire (*id.* at 326).

article III, section 2, which among other provisions would have stated:²⁵⁸

In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

The federalist Samuel Livermore, former Chief Justice of New Hampshire, was unbending in his opposition to the amendments relating to the judiciary. In the first place, he thought that the Congress should concentrate on getting the government organized before dallying with a bill of rights. Second,²⁵⁹

258. 1 ANNALS OF CONG. 435 (1789). Madison's civil jury trial provision was apparently taken from the declaration of rights that had been adopted by the Virginia ratification convention. See 3 ELLIOT, DEBATES, *supra* note 44, at 658: "11th. That, in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and to [sic] remain sacred and inviolable." (A similarly worded declaration of right was adopted by the first North Carolina convention. See 4 *id.* at 243-44. For the Rhode Island suggested amendment, see text accompanying note 169 *supra*.) The provision in the Virginia convention's declaration of rights did not find a counterpart in the amendments to the Constitution that were suggested by Virginia (see 3 *id.* at 659-61) apparently because the convention voted to limit the trial court jurisdiction of the federal courts to admiralty cases only. *Id.* at 660. The phrasing of the Virginia ratification declaration respecting civil jury trial was, in turn, taken from the Virginia Declaration of Rights (VA. DECL. OF RIGHTS § 11 (1776) in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3814 (F. Thorpe ed. 1909)), that had been drafted by George Mason in 1776. See R. RUTLAND, GEORGE MASON 49-61 (1961).

The eleven-man select committee of the House of Representatives on constitutional amendments reported out the civil jury trial amendment in the language of the seventh amendment as it now reads, except for the twenty-dollar floor which was added in the Senate. The House, sitting as a committee of the whole, approved, with no recorded debate. 1 ANNALS OF CONG. 760 (1789).

In explaining his proposals, Madison described his jury trial proposals (another would have provided a county-venue system in criminal cases) as follows:

In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the Legislature. In other instances, they specify positive rights, which may seem to result from the nature of the compact. Trial by jury cannot be considered as a natural right, but a right resulting from a social compact, which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.

Id. at 437. See also *id.* at 441 for Madison's explanation of his amendments relating to the judiciary article. Madison expressed the hope that these "will quiet and reconcile the minds of the people to that part of the Constitution."

259. *Id.* at 447. If Livermore was speaking with specific reference to the Madison proposals, his remarks would suggest that he read Madi-

He supposed the judiciary law would contain certain regulations that would remove the anxiety of the people respecting such amendments as related thereto, because he thought much of the minutiae respecting suits between citizens of different States, &c. might be provided for by law. He could not agree to make jury trial necessary on every occasion; they were not practised even at this time, and there were some cases in which a cause could be better decided without a jury than with one.

Madison's proposals finally were referred to a select committee comprised of one congressman from each of the eleven states then represented in Congress.²⁶⁰ This committee of eleven filed its report on July 28, a week after its formation.²⁶¹ Finally, on August 13, the House voted to resolve itself into a committee of the whole for consideration of the committee's report.²⁶² On Tuesday, August 18, the house as a committee of the whole adopted the committee's revised version of Madison's jury trial proposal:²⁶³

The 3d clause of the 7th proposition, as follows, "In suits at common law, the right of trial by jury shall be preserved." was considered and adopted.

Whether this action by the committee of the whole was taken with or without debate is not reflected in the *Annals of Congress*. On the same day, Thomas Tudor Tucker of South Carolina moved the adoption of a long list of antifederalist constitutional amendments, including several that would have substantially compressed the jurisdiction of the federal courts to admiralty cases and diversity suits between citizens of different states claiming the same land under grants from different states. But the House refused to send these to the committee of the whole, thus effectively killing them.²⁶⁴

Out of its condition as committee of the whole, the House passed what became the seventh amendment on Friday, August 21, as attested by the following, without discussion:²⁶⁵

son's proposed reference to "suits at common law, between man and man" to include cases in which Livermore would prefer not to grant the right of jury trial. This would, in turn, indicate that certain federalists were favorable to the idea of a substantial contraction of the civil jury in the federal courts, thus lending some substance to antifederalist fears.

260. See *id.* at 664-65.

261. *Id.* at 672. For a copy of the committee report see 5 U.S. BUREAU OF ROLLS & LIBRARIES DOCUMENTARY HISTORY OF THE CONSTITUTION 1786-1870, at 186-89 (1905).

262. 1 ANNALS OF CONG. 707 (1789).

263. *Id.* at 760.

264. *Id.* at 761.

265. *Id.* at 767.

The House then took into consideration the third clause of the seventh proposition, which was adopted without debate.

All that is known about the action of the Senate with respect to the seventh amendment is that on September 7, the words "where the consideration exceeds twenty dollars" were added.²⁶⁶

Little is known about the debates over the Bill of Rights in the state legislatures that ratified it. It appears from surviving data that the seventh amendment did not attract attention.²⁶⁷ Antifederalist opposition seems to have consisted of scattered objections to total omissions rather than any concerted attack on the detail of particular provisions that had been included in the document. The Bill of Rights finally became effective when Virginia ratified on December 15, 1791, thus completing the process of ratification by the necessary three-fourths of the state legislatures.²⁶⁸

One may say with confidence that this comprises the entire extant record of the adoption of the seventh amendment by Congress and the states. The skeletal nature of the record that has been uncovered hardly affords reassurance in its interpretation.

266. *Id.* at 76. See also note 257 *supra*.

The sessions of the Senate were held behind closed doors, and no record of the debate was recorded until 1794. The only systematic record of the debate in the Senate during these early years is the diary of Senator William Maclay of Pennsylvania. See *SKETCHES OF DEBATE IN THE FIRST SENATE OF THE UNITED STATES* (E. Maclay ed. 1880, 1969 reprint). Unfortunately, during all but two days of the Senate's consideration of the Bill of Rights, Maclay was confined to his rooming house with an inflamed knee. On the 25th of August, Maclay recorded that when the amendments to the Constitution were received from the House, "they were treated contemptuously" by several federalists, Izard of South Carolina moving (unsuccessfully) that their consideration be postponed until the next session of Congress. (*Id.* at 127.) Maclay was also present on September 25 when the Senate gave final approval (see 1 *ANNALS OF CONG.* 88, (1789) but did not mention any debate that might have occurred. See *SKETCHES OF DEBATE, supra*, 151. Maclay makes it clear in his record of the earlier discussions in the Senate on the Judiciary Act of 1789 that he was firmly against equity jurisdiction and strongly attached to the jury (see *id.* at 93-96, 102-104, 111-112).

267. In the Virginia legislature, for example, the civil jury trial provision as well as most of the rest of the amendments were hardly discussed. The opposition that developed was to what became the first and the fifth amendments. See, e.g., James Madison to George Washington, January 4, 1790, in 5 *U.S. BUREAU OF ROLLS & LIBRARIES, DOCUMENTARY HISTORY OF THE CONSTITUTION, 1786-1870*, at 230-31 (1905).

268. See R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS—1776-1791*, at 215-17 (1955).

III. CONCLUSIONS: A SUGGESTION FOR A "DYNAMIC" READING OF THE SEVENTH AMENDMENT

This excursion into the historical materials was motivated by a desire to understand the sense of the seventh amendment, to acquire a feel for the amendment's purposes. This motivation rested upon serious dissatisfaction with the historical test, as already will have been made clear. The most objectionable feature of the historical test is that its usage hardly seems consistent with the traditions of principled constitutionalism that have guided the Supreme Court in the interpretation of other commands of the Bill of Rights. The exception of "equitable" cases from the seventh amendment is insupportable on any principle that readily distinguishes between "law" cases and "equity" cases. For example, it is doubtful, at least today, that "equity" involves the use of any greater discretion than do many of the "legal" remedies that nonetheless are tried to a jury. An assertion that "law" cases tend to be less complicated and thus less likely to require the specialized abilities of a judge trained by experience in the skills of fact finding would seem, in 1791 and today, both to be highly conjectural and to overlook some of the immensely complicated cases that juries determine daily. Moreover, as will be seen,²⁶⁹ there is no reason to believe that simply because a case is complex it might not call for the protective intervention of a jury, perhaps even more so than the ordinary uncomplicated case. It seems clear, then, that the division between law and equity is not maintainable on any category of differences that can support even a pragmatically based constitutional distinction between the two. The only jurisprudential support for the varying command of the Constitution with respect to law and equity cases thus is reduced to the historical accident that in 1791 some kinds of cases were, for reasons that had nothing or at least little to do with the mode of adjudication,²⁷⁰ triable in courts that had no juries. That such an accident of history should continue to control application of the seventh amendment would be justifiable only if there were available no other principled reading of the amendment.

But the problem remains of constructing an approach to the seventh amendment that has greater validity. It is too early to state with absolute confidence that such an alternative exists. Much important work remains to be done on the history of the

269. See textual discussion at note 312 *infra*.

270. See note 291 *infra* and accompanying text.

seventh amendment,²⁷¹ the institution of jury trial,²⁷² and the development of legal institutions and ideas in the United States,²⁷³ before one may confidently speak of the original conception of the institution that was sought to be created by the seventh amendment. Nonetheless, certain conclusions and lines of further development may tentatively be indicated.

First, the test most frequently suggested during the ratification process for determining the application of a constitutional guarantee of civil jury trial would have required the federal courts to look to the jury trial practices of the state in which the court sat.²⁷⁴ The implications of such an approach are enormous, and difficult to accept. This test would be consistent with the language of the seventh amendment,²⁷⁵ at least with respect to the states that originally formed the union. But the problem of dealing with states that were admitted after 1791 seems insuperable. The original states were free to develop their own system of civil trial and there appears to be no viable justification for imposing any particular division of judge-jury functions upon the subsequently admitted states. If it had been thus understood that newly admitted states were free to provide, as a matter of state law, that no cases were required to be tried to a jury,²⁷⁶ then the federal courts in such states would never have

271. Perhaps the least exploited area of inquiry into the history of the seventh amendment is the actual practices of the state courts prior to the time of the adoption of the seventh amendment. Works such as Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966), have rounded out our knowledge of what the published case reports have to tell. These, however, date largely from years following the adoption of the seventh amendment. The great mass of the original court records in the original thirteen states have moldered unpublished and even unresearched. Research into these records might reveal much about the actual functioning of the state courts under their respective guarantees of civil jury trial.

272. See, e.g., the research being conducted in England by Professor Geoffrey C. Hazard, Jr., into the jurisdiction of law courts and equity at the end of the eighteenth century. AMERICAN BAR FOUNDATION, ANNUAL REPORT, 1970-1971, at 16 (1972).

273. Professor William E. Nelson has conducted important research into the development of the American conception of common law that is just beginning to appear in print. See Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166, 1167 n.6 (1972).

274. See textual discussion at notes 201-222 *supra*.

275. The reference to "common law" in the text of the seventh amendment (see Introduction, *supra*) would be read to refer in an undifferentiated and general way to the "law" of the state in which the federal court sat. While the amendment's language would bear this reading, it certainly is forced.

276. Two states, Colorado and Louisiana, have no constitutional guarantee of a right to jury trial in civil cases. COLO. CONST. art. 2,

juries while federal courts in neighboring states might be required by the Constitution to have them in as many as all²⁷⁷ cases. In addition, this reading of the seventh amendment presumably must leave the states free to change, for good reasons or bad, such important aspects as the determination of those cases in which juries were required and the powers of judges in jury-tried cases.²⁷⁸ Neither result seems consistent with the notion of a nationally applicable Bill of Rights.²⁷⁹ This problem could not be avoided by the device of reading the seventh amendment reference to state jury trial practices statically since this would mean that the right to jury trial would exist only in the fourteen original states and not in those admitted after 1791.²⁸⁰ Although one should abandon the theory that is best supported by the historical materials with great reluctance, the

§ 23; LA. CONST. art. 1, § 9. In each, however, the right to jury trial in various kinds of civil cases is afforded by statute. See COLO. R. CRV. P. 38(a); Hubert, *Trial by Jury under the New Code of Civil Procedure*, 35 TUL. L. REV. 520 (1961). The constitutionality of the Louisiana failure to provide for civil jury trial was upheld in *Walker v. Sauvinet*, 92 U.S. 90 (1876) (see note 21 *supra*).

277. In Texas, almost all civil actions, including suits for an injunction and the like, are tried to a jury. The Texas constitutional provision that seems to deal with the matter is traditionally worded ("The right of trial by jury shall remain inviolate." TEX. CONST. art. 1, § 15.) But the Texas courts have interpreted article 5, section 10, to confer the right in "all causes" triable in the courts of general jurisdiction: "In the trial of all causes in the District Courts [which, by article 5, section 8, are given broad general jurisdiction], the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury." See *San Jacinto Oil Co. v. Culbertson*, 100 Tex. 462, 101 S.W. 197 (1907). Under the state-incorporation test, virtually all civil actions triable in the federal courts sitting in Texas would be triable to a jury, while in neighboring states many of these same actions would be triable only to the court.

278. It might be possible to work out, under the state-incorporation test, a rationale for making the seventh amendment "dynamic" for the purpose of applying to newly admitted states, but "static" for the purpose of preventing subsequent changes in the right of jury trial in the federal courts in a particular state. But it is difficult at this point to imagine just what rationale would serve the purpose. A somewhat similar problem, although without the added complexity of making provision for newly admitted states, might explain the motivation behind the later development under the traditional historical test of making the reference to England as of the year 1791 in order to escape the consequences of subsequent developments in England that have nearly resulted in the abolition of civil jury trial. See note 284 *infra*.

279. This, of course, was the initial judgment of the federalists with respect to the state-incorporation proposals.

280. Rhode Island and Vermont would presumably be covered by the seventh amendment in addition to the twelve that sent representatives to the first Congress because both were admitted to the Union prior to the effective date of the Bill of Rights in December 1791.

complexities inhering in the state-law-incorporation theory probably dictate this result. At the least, the great reworking of the right of civil jury trial that would be required after almost two centuries of contrary practices would indicate a high degree of resistance to its assertion at this point in history.

Second, if the state-incorporation theory is put behind, what of the validity of the traditional historical test itself? A place to start is with the language of the seventh amendment. Both courts and commentators have been surprisingly reticent about the wording of the seventh amendment that is thought to require the historical test. Presumably, however, the operative language consists of the two references to "common law" and the verb form "shall be preserved." Although it is obvious that the language of the amendment is compatible with the historical test, it hardly compels it.

For present purposes, the geographical element of the historical test—the reference to England—is relatively unimportant and can be disregarded. Suffice it to suggest that there well might be no basis for an assumption that ordinary usage of the term "common law" in 1789-1791 must perforce have referred to England. The very disparities in jury trial practice among the states, even where the different states purportedly based the right on the "common law," would have made it obvious that different states had different conceptions of the common law and that many of them were conceptions that differed sharply from that of England.²⁸¹ Even Mr. Justice Story in his *Wonson* opinion²⁸² did not deny that the language of the amendment could just as well have been read to refer to the common law in the states as to the common law of England. Only Story's invocation of the history of disparate state jury trial practices was argued to lead to England. Moreover, Mr. Justice Story did not purport to read the amendment statically. This was an additional element of the historical test that crept in only several decades later.²⁸³

Aside from the geographical dimension, a separate issue²⁸⁴ is

281. See discussion in note 290 *infra*.

282. *United States v. Wonson*, 28 F. Cas. 745 (No. 16,750) (C.C.D. Mass. 1812). See discussion at notes 2-9 *supra*.

283. See discussion at notes 8-10 *supra*.

284. It seems likely that the reference to England required by the traditional historical test influenced the further requirement that the reference be read statically. At least after the passage of several decades and the occurrence in England of such substantial modifications as the Common Law Procedure Act of 1854 and the Judicature

whether the references in the seventh amendment to "preservation" of the right of jury trial and to the "common law" require that the protection be read statically, cabined for all time within the confines of jury trial practice in 1791. Here also there are ample indications that the answer should be negative. First, a claim that the verb "preserve" commands a static reading of the amendment seems quite insubstantial.²⁸⁵ The argument gives an unduly cribbed meaning to the word in isolation and ignores its semantic relationship to its object. What is said to be preserved is not the institution of jury trial as it then existed (or words to like effect), but rather the "right" to jury trial.²⁸⁶ For example, the committee of eleven in the first Congress might have chosen to draft the first amendment guarantee of the freedom of the press in terms of its "preservation" as at least some constitutionalists would have phrased it.²⁸⁷ One may nonethe-

Act of 1873 (see notes 294 and 295 *infra* and accompanying text), and the later gradual but substantial diminution by Parliament of the right to jury trial in civil cases (see P. DEVLIN, TRIAL BY JURY 129-35 (1956)), a non-static reference to jury trial practice in England would have forced parliamentary choices upon the United States because of the courts' reading of the seventh amendment. This circumstance might explain why the dating portion of the historical test (see authorities cited at note 8 *supra*) emerged so long after the first statement of the reference to England in Mr. Justice Story's *Wonson* opinion (see text accompanying note 6, *supra*) and why the problem was sought to be avoided by selecting the otherwise arbitrary date of 1791.

285. *But see, e.g.,* Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442, 448 (1971) ("The reference [in the seventh amendment] to preservation of a right suggests the relevance of the nature of that right in 1791, when the seventh amendment became effective . . ."); *Ross v. Bernhard*, 396 U.S. 531, 543 (1970) (dissenting opinion).

286. The same point has been made on occasions where the thrust of the writer's arguments was that a certain practice did not intrude upon a protection of the seventh amendment. *See, e.g.,* *Capital Traction Co. v. Hof*, 174 U.S. 1, 23 (1899) (seventh amendment right of jury trial is not infringed by, *inter alia*, provision requiring substantial filing fee in order to obtain jury trial); Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507, 532-34 (1973) (federal district court rules providing for civil jury trial by six-person juries do not violate seventh amendment).

287. For example, the 1784 Constitution of New Hampshire provided in article XXII of its Bill of Rights that "The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved." 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 2456 (F. Thorpe ed. 1909). The Constitution of Georgia of 1777 declared in article LXI "Freedom of the press and trial by jury to remain inviolate." 2 *id.* at 785. *See also* the proposal submitted to the 1787 Constitutional Convention by Pinckney for a clause providing that "the liberty of the Press shall be inviolably preserved," note 56 *supra*.

less safely assume that the first amendment right would not have been mechanically locked into 1791 conceptions of the press, thus excluding protection of more recent devices such as motion pictures.²⁸⁸

Nor does the term "common law" necessarily require a static reference. Even if one is confined to the meaning of that phrase as understood in 1791, by that time a commonly understood concept of "common law" had become that of a process characterized by occasional flexibility and capacity for growth in order to respond to changing social pressures, rather than that of a fixed and immutable body of unchanging rules.²⁸⁹ The widely ac-

288. See, e.g., *Burstyn v. Wilson*, 343 U.S. 495 (1952) (motion pictures protected under First Amendment); Note, *Motion Pictures and the First Amendment*, 60 *YALE L.J.* 696 (1951).

289. See generally R. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 176-77, 179-80, 206 (1971); J. SMITH, *DEVELOPMENT OF LEGAL INSTITUTIONS* 469-98 (1965). The changeability of the common law by legislation was recognized in all of the states. This is evidenced by the provisions of several State constitutions adopted after the break with England that expressly declared that the "received" common law was subject to modification by the legislature of the state. J. SMITH, *supra*, 469-70. Several significant changes in the common-law rules relating to the entailment of estates, quit-rents, the suffrage, and master-servant relationships had been achieved in the individual states during the Revolution through corrective legislation. See J. JAMESON, *THE AMERICAN REVOLUTION CONSIDERED AS A SOCIAL MOVEMENT* 20-21, 24-26, 30-42 (1926); D. SMITH, *THE CONVENTION AND THE CONSTITUTION* 10 (1965). Changeability was also a recognized feature even of the common law as expressed in decisions of judges. See 1 Z. SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 41 (1795-1796): "Courts however are not absolutely bound by the authority of precedents. If a determination has been founded upon mistaken principles, or the rule adopted by it be inconvenient, or repugnant to the general tenor of the law, a subsequent court assumes the power to vary from or contradict it."; T. Reeve, *Law Lectures Delivered at Litchfield Law School, Connecticut* (1802?), in J. SMITH, *supra*, 479-81. See also Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 *U. PA. L. REV.* 1166, 1179-80 (1972). The thesis of Professor Morton J. Horowitz (*The Emergence of an Instrumental Conception of American Law, 1780-1820*, in *LAW IN AMERICAN HISTORY* 287 (D. Fleming & B. Bailyn eds. 1971)) is that in the forty years after 1780 American courts and lawyers moved from a conception of the common law as a "body of essentially fixed doctrine" in which the role of the judge was regarded as essentially that "of discovering and applying preexisting legal rules" to a view of the law as an instrument by which judges could consciously use the law as an instrument of social change. The characterization of the immediately post-Revolutionary state of mind is sketchy and hardly demonstrates that "common law" was regarded in 1790-1791 as the rigid, changeless system that the traditional historical test imagines. Moreover, Professor Horowitz makes no attempt to assert that the former conception of a rigid body of immutable rules held sway more

knowledge of variations in the "common law" protection of the right of jury trial would here also strongly suggest such a perception.²⁹⁰

than generally at the year chosen as the beginning point (1780) or that it was still general ten years later.

In R. POUND, *THE SPIRIT OF THE COMMON LAW* 95-103 (1921), the argument of a legal realist is that the framers of the Constitution conceived of the "common law" as "final" in the sense that certain rights of man were always under the protection of the law that was applied in England from very ancient times and in the states since the Revolution. This well might be an accurate description of the framer's conception as revealed in their public oratory and in declamations condemning alleged usurpations by Britain and justifying the American Revolution. At another place, Pound acknowledged that Blackstone's image of the common law as an English castle made over into a more modern house reflected a view of the common law as "something made over by men for their own needs, by constant adaptations of and additions to the old materials . . ." R. POUND, *INTERPRETATIONS OF LEGAL HISTORY* 40 (1923).

In *De Lovio v. Boit*, 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815), Mr. Justice Story himself made it quite evident that "common law" need not necessarily refer to England or to a changeless and static condition. In a decision that has obvious implications for the right of jury trial in "admiralty" cases, Story held that the substantial differences between the expansive jurisdiction of the courts of vice-admiralty that operated in the colonies prior to the adoption of the Constitution (that is, prior to 1777 when the American revolutionists put an end to them) and the more restricted jurisdiction of the courts of admiralty in England, demonstrated that the common law restrictions on the latter had not been received as part of the common law in the United States. See 7 F. Cas. at 442-43. For a criticism of Story's reading of the history of the vice-admiralty courts, see Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 AM. J. LEG. HIST. 250, 347, 364-66 (1962). This has a direct bearing upon the right of civil jury trial under the seventh amendment, of course, because the determination that a matter is within the admiralty or maritime jurisdiction means that it is not a "common law" action to which the seventh amendment extends. See *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 300 (1796). See also *The Betsey and Charlotte*, 8 U.S. (4 Cranch) 443, 446 n. (1808) ("The reason of the legislature for putting seizures of this kind on the admiralty side of the court was, the great danger to the revenue, if such cases should be left to the caprice of juries.") (separate opinion of Chase, J.).

290. The variations in the state laws providing for civil jury trial are discussed at note 49 and notes 72-75 *supra*. Several of the state constitutional guarantees of jury trial made reference to the "common law" or to the practice "as heretofore" as the definition of the right. See, e.g., MD. CONST., Declaration of Rights, art. III (1776) in 3 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS* 1686-87 (F. Thorpe ed. 1909) ("[T]he inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law . . ."); N.Y. CONST. art. XLI (1777), in 5 *id.* 2637 ("trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever . . ."). Even under identically worded guarantees, the actual provision

If "common law" in 1791 was understood by the framers of the seventh amendment as a process, rather than as a set of perpetually static rules, then one must ask whether, with the passage of time, the historical test has caused the amendment to diverge from the original conception. Continued application of the historical test in the face of this understanding would be valid only on the assumption that the frozen state in which the law-equity division is thus fixed represents an accurate view of the divisions of jurisdiction between the law courts and the chancellor. But something more like the opposite is true. During the centuries of their coexistence, the jurisdictions of the law courts and the chancellor, until they were merged, were subject to an unstatic process of accretion and erosion. At some periods there was intense competition for judicial business and each would create new occasions for aggrandizing their subject matter jurisdiction. At other times, one would expand while the other remained quiescent.²⁹¹ What remains constant over the history of this process, however, is the tendency toward expansion and enrichment of the remedies provided by the law courts.²⁹² While the law courts in recent centuries never attempted directly to warn the chancellor off territory that had been claimed for the law courts, it seems rather certain that between the two the equity court was destined to have its powers circumscribed. By the late eighteenth century in England, the courts of law and the chancellor had entered into a period of

of the right was sometimes different. For example, both the Constitution of Pennsylvania of 1776 (art. XI of Declaration of Rights in 5 F. THORPE, *supra*, at 3083) and the Virginia Declaration of Rights of 1776 (§ 11 in 7 *id.* 3814) provided that "in controversies respecting property, and in suits between man and man" there was a right to jury trial. But the actual provision of jury trial was very different in these states. See THE FEDERALIST No. 83, at 565-66 (J. Cooke ed. 1961) (A. Hamilton).

291. The distinctions between the respective jurisdictions of law and equity were almost certainly developed without any great regard for the utility of the various modes of trial or for the preservation of the right of jury trial. See Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442, 456 n.52 (1971) (eighteenth and early nineteenth centuries). To be sure, an occasional reference may be found in an English case to the effect that equity should defer in favor of a jury determination in an action at law. See, e.g., *Todd v. Gee*, 34 Eng. Rep. 106, 107 (Ch. 1810). But there is no evidence that such considerations played a major role at any period of significant development, F. JAMES, JR., CIVIL PROCEDURE 344-46 (1965).

292. See F. JAMES, JR., CIVIL PROCEDURE 340-46 (1965); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 188-89, 190, 193-95, 197-98, 209-212 (5th ed. 1956); cf. G. SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 417-18 (1955).

mutual forbearance and even cooperativeness.²⁹³ During the first half of the nineteenth century there were reforms of procedure in England that led eventually to the Common Law Procedure Act of 1854 and the Judicature Act of 1873. By the terms of the former, the law courts were finally given full injunctive and other equitable powers;²⁹⁴ under the latter the systems of courts were merged into a unitary system for the administration of civil justice and separate "law" and "equity" courts ceased to exist.²⁹⁵ With variations, this history was repeated in the United States.²⁹⁶ As a result of merger, it was commonly held in the United States that the right to jury trial in civil cases was to be determined as of the date of merger, or by reference to the practices that obtained at some earlier date, such as the adoption of the jurisdiction's constitutional provision for civil jury trial.²⁹⁷

Imagine for a moment that the merger of law and equity had not taken place instantaneously, through legislative fiat. In this state of development of legal institutions, it doubtless would have occurred one day to an innovative common-law judge that there was, after all, no sufficient reason why he could not issue an injunction as a remedy enforceable "at law"—and presumably, because of constitutional requirements, after trial by a jury.²⁹⁸ And, if this had occurred, it seems inevitable either

293. See T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 210-11 (5th ed. 1956); G. SMITH, *A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND* 432-37, 458-59 (1955).

294. Common Law Procedure Act of 1854, 17 & 18 Vict., c. 125, §§ 74-86. See T. PLUCKNETT, *supra* note 293, at 211.

295. Judicature Act, 1873, 36 & 37 Vict., c. 66, § 24. See T. PLUCKNETT, *supra* note 293, at 211.

296. See J. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 90-92 (1950). See also C. CLARK, *CODE PLEADING* 17-31 (2d ed. 1947); F. JAMES, JR., *CIVIL PROCEDURE* 16-17 (1965).

297. See, e.g., F. JAMES, JR., *CIVIL PROCEDURE* § 8.5, at 349-51 (1965).

298. This would assume, of course, that the judicial system had not previously created the straitjacket of a traditional historical test requiring the court to grant a demand for jury trial only if it would have been granted at some chosen date in the past. In the instances where substantial merger of law and equity has occurred, it has been accomplished by legislation. Typically, the legislation has included a provision to the effect that merger is not to be taken to affect the pre-existing right to jury or court trial. See, e.g., FED. R. CIV. P. 38(a), 39(b). See also 28 U.S.C. § 2072 (1970) ("[Rules of civil procedure for the district courts] . . . shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."). Although the matter has not been extensively considered, it would appear that section 2072 and the rules well might be open (or might be required to be read to refer) to the same kind of "dynamic" expansiveness as that which seems indicated for the seventh amendment.

that the conscientious chancellor henceforth would have relegated equity suitors to their injunctive remedy at law,²⁹⁹ or, if

It might be objected that "equitable" relief would not be appropriate for administration by a jury because of the degree of discretion that the chancellor had traditionally exercised. Equity at an earlier stage doubtless was characterized by the great degree of "discretion" claimed for the chancellor, but by the middle of the eighteenth century, equity has been said to have achieved "its new form of a consistent and definite body of rules, and the chancellors accept the conclusion that equity has no place for a vague and formless discretion; in short, equity is now, for practical purposes, a body of law which can only be defined as the law which was administered by the chancellors . . ." T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 692 (5th ed. 1956). To the extent that the administration of previously equitable remedies would still desirably involve control by the judge rather than the jury, the judge could submit the case to a jury for a determination of all non-discretionary matters; for example, utilizing a special verdict form of submission, he could retain the discretion to grant or refuse the equitable relief depending on the jury's responses to underlying issues. Such devices are hardly untested. For example, in Pennsylvania the "law" courts administered a vast and imaginative range of "equitable" remedies in jury-tried cases. See W. LLOYD, *THE EARLY COURTS OF PENNSYLVANIA* 201-209 (1910); Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in *LAW IN AMERICAN HISTORY* 257, 271 (D. Fleming & B. Bailyn eds. 1971). These Pennsylvania courts in the eighteenth century developed the "conditional verdict" under which the jury, at the court's direction, would find large damages that would be released only if the defendant complied with the terms of the verdict. See *Clyde v. Clyde*, 1 Yeate's Repts. 92 (Pa. Cir. Ct. Easton 1791).

The Supreme Court in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 507 (1959), formulated an "adequacy of legal remedies" test for the right to jury trial under the seventh amendment and the Federal Rules of Civil Procedure: "Inadequacy of remedy and irreparable harm are practical terms As such their existence today must be determined, not by precedents decided under discarded procedures, but in the light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules." (Footnote omitted.) See also *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478-79 (1962). It would seem that the existence of such devices as the special verdict under Federal Rule of Civil Procedure 49(a) would have obviated whatever need might previously have existed to deny jury trial in injunction and other equitable remedies cases. *But cf.* *Katchen v. Landry*, 382 U.S. 323, 338-40 (1966). The sword in the bed that still prevents the union of law and equity thus retains its obstructive character only because of the unwillingness of courts to overthrow completely the historical test.

299. The majority of nineteenth century American equity cases are said to have taken the position that the "adequacy" test was to be read as of the time of the creation of the court or some earlier date, and thus that the creation of a new legal remedy did not deprive the courts of equity jurisdiction that had previously been exercised. See generally 1 J. POMEROY, *EQUITY JURISPRUDENCE* § 344 (5th ed. 1941). A substantial minority held to the contrary. *Id.* at 762-63. Even in the federal courts, where the division between law and equity also determined the existence of the right to jury trial under the seventh amendment, when remedies became available at "law" the federal "equity" courts still

the chancellor had not stayed his hand, that legislation would have prevented the wasteful duplication of functions by both equity and law courts. If any question had arisen as to whether the injunctive power should be taken from the law courts or from the chancellor, presumably the constitutional guarantee of jury trial would invalidate any attempt by legislation to take away the injunction suitor's right to a jury trial. Should it make a difference that the process of merger was accomplished by legislation and thus, in historical terms, hurriedly? It would seem that after a century of merger in the states and over a quarter century of merger in the federal courts, one can claim that we might well have passed the point in time when, except for the anticipatory legislation that conferred on "law" courts the power that eventually they would have claimed as of historical right and without legislation, a party could have asserted a constitutional right to jury trial in an action that claimed a remedy that an antiquarian could identify as "equitable."

To attempt to determine the now imaginary date when this link would have been forged in the chain of historical development that was effectively cut off by the process of merger is, of course, idly speculative.³⁰⁰ But it seems inevitable that it should have occurred. If one agrees with this evaluation of history, then all that prevents the application of the seventh amendment in cases "purely equitable" is the inflexible time referent of the historical test to an arbitrarily frozen state of English law in 1791.

Another line of inquiry might be pursued which, at the end,

continued to exercise their older jurisdiction. See *id.* § 295. These decisions are obviously valid under the seventh amendment only on a static reading; if the amendment is applied with regard to currently available "legal" remedies, then the refusal of the chancellor to relegate equity suitors to their jury trial at law would clearly violate a "dynamic" seventh amendment. At least in the clearer cases, this seems to be the position which the Supreme Court has reached in recent years. See discussion in text at note 18 *supra*.

300. Because of the unequal periods of quiescence and movement in the struggle for jurisdiction between the law courts and equity, it would be impossible to construct a convincing argument that would even roughly point to a predictable time when jury trial over all or most matters formerly tried to the chancellor in equity would have been extended as of constitutional right (assuming a non-static Constitution) in the absence of merger. This should not, however, indefinitely prevent the implementation of the constitutional theory based on the very predictable direction of growth of common-law remedies. To continue for the indefinite future to refuse to give effect to what the Constitution tends toward would obviously perpetually frustrate the constitutional purpose of the seventh amendment.

will be seen to have led to the same point. The argument above has emphasized the linguistic and general legal setting of the seventh amendment. But it has also been shown that the seventh amendment was part of a political process of federalist response to pressures against the Constitution generated during the ratification debates. Viewed from a political perspective, the traditional historical test arguably has caused a gradual but certain distortion in the terms of a political compromise that the text of the amendment only imperfectly reflects. The nature of this compromise is suggested by asking why the antifederalists did not insist on a seventh amendment that explicitly extended jury trial to equity and admiralty cases. After all, there had been more than a little agitation for just such an expansive constitutional guarantee during the ratification debates.³⁰¹ Perhaps a mental block, and not a conscious compromise of principle, might be offered as the explanation. Perhaps, it might be argued, it was simply too visionary for most antifederalists—at least those outside of Pennsylvania and Connecticut where, according to Hamilton,³⁰² this was an accomplished fact—to foresee even the merger of law and equity that was to be accomplished generally in this country (and then not always with respect to jury trial) only after many more years of agitation and development. Perhaps antifederalists in most states simply could not imagine a jury sitting in an otherwise familiar equity suit. This thesis, however, seems dubious. The Pennsylvania and Connecticut practice of having juries sit in virtually all civil cases was probably common knowledge in other states at the time of adoption of the seventh amendment.³⁰³ Moreover, at the time of the adoption of the seventh amendment, there was a very widespread opposition to the idea of a court of equity and to some of the precepts of equity jurisprudence.³⁰⁴ At least some constitutionalists that were not tied to

301. See notes 139-40, 229-31 *supra* and accompanying text.

302. THE FEDERALIST No. 83, at 565-66 (J. Cooke ed. 1961) (A. Hamilton).

303. See *id.*

304. See F. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM 131 n.49, 166 n.58 (1940); R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 223 (1971); A. LAUSSAT, JR., ESSAY ON EQUITY IN PENNSYLVANIA 28-31 (1826); Fisher, *The Administration of Equity Through Common Law Forms*, 1 L. Q. REV. 455 (1885); Woodruff, *Chancery in Massachusetts*, 5 L. Q. REV. 370, 377-84 (1889). On steps subsequently taken in Pennsylvania, see W. LLOYD, EARLY COURTS OF PENNSYLVANIA 193-200 (1910).

Alexander Hamilton strenuously opposed the suggestion that matters traditionally tried in equity should be transferred to the law courts

the Pennsylvania experience were in favor of the extension of jury trial to virtually all civil cases.³⁰⁵

If not explicable by means of the mental block thesis, then acceptance by the antifederalists of trial in the federal court without a jury in cases not describable in 1791 as "common law" cases seems difficult to reconcile logically with their reasons for insisting upon a guarantee of civil jury trial in the first place. As has already been seen, the chief complaint of the antifederalists was that the absence of a civil jury would unduly expose civil litigants in the federal courts to the risk of being unjustly adjudicated indebted to persons from other states or from Britain.³⁰⁶ While it is true that most of the kinds of proceedings which a creditor could bring in order to compel payment of a debt were actions at law, in many states there were rather generally available methods of securing a trial before an equity chancellor of several kinds of creditor claims.³⁰⁷ Moreover, an-

because it would necessitate the trial by jury of "questions too complicated for a decision in that mode." *THE FEDERALIST* No. 83, at 570 (J. Cooke ed. 1961). But Hamilton was hardly typical in his favorable view of equity courts. "Indeed no colonial institution was the object of such sustained and intense political opposition as the courts dispensing equity law." Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in *LAW IN AMERICAN HISTORY* 257-58 (D. Fleming & B. Bailyn eds. 1971).

305. In a letter from Thomas Jefferson to James Madison written August 28, 1789, which doubtless reached Madison only after Congress had approved the proposed Bill of Rights, Jefferson commented on the proposals for amendments that Madison had sent to him. Jefferson approved the proposals as far as they went, but would have added (among other things) the following with respect to civil jury trial: "[A]ll facts put in issue before any judicature shall be tried by jury except 1. in cases of admiralty jurisdiction wherein a foreigner shall be interested, 2. in cases cognisable before a court martial concerning only the regular officers & souldiers of the U.S. or members of the militia in actual service in time of war or insurrection, & 3. in impeachments allowed by the constitution." See 5 U.S. BUREAU OF ROLLS & LIBRARY, *DOCUMENTARY HISTORY OF THE CONSTITUTION, 1786-1870*, at 198 (1905).

306. See notes 80-182 *supra*.

307. A casual search in *Desassure's Equity Reports* for South Carolina has unearthed a number of instances that demonstrate that equity could be resorted to by a creditor. See, e.g., *Carmichael v. Abrahams*, 1 Des. Eq. Repts. 113 (So. Car. Ct. Ch. 1785) (action of account); *Salvador v. Rapley*, 1 Des. Eq. Repts. 125 (So. Car. Ct. Ch. 1785) (action of account); *Clarke v. Todd*, 1 Des. Eq. Repts. 111 (So. Car. Ct. Ch. 1784) (suit on account tried to "a jury of merchants" at direction of chancery court). If other of the original states followed the then current English practice, equity could be resorted to for specific performance (2 J. STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* 44-48 (1836)), to foreclose a pledge of chattels (*id.* at 298), for equitable replevin (*id.* at

other of the prominently mentioned specific complaints of the antifederalists related to the abuses of the British courts of vice-admiralty that had been imposed on the colonies during the strife that preceded the formal break with England.³⁰⁸ Unless these complaints were sheer propaganda, one would have expected the antifederalists to attempt to obtain the protective intervention of a jury in these cases as well as in the cases in which juries more familiarly sat. It is entirely unlikely that the antifederalists believed that judges in equity or in admiralty courts had been, or would be, any less oppressive, high-handed, hurtful to political minorities and destructive of local interests than judges sitting without juries in common-law courts.

From the perspective of the static historical test, therefore, either the antifederalist position was inconsistent or else they were only partially successful in influencing the reach of the seventh amendment. Under this latter view, the antifederalists were forced to accept through a vaguely worded seventh amendment a political trade-off with anti-jury forces that would preserve trial by judge for the indefinite future in equity and admiralty in exchange for retention of the limited guarantee of civil jury trial as Englishmen then enjoyed it. This theory shares with every other, except the rejectable state-incorporation theory, a total absence of explicit support in the historical record. At bottom, one is also left with the reaction that it would have been inherently unreasonable for the framers to have intended to force upon the national courts a division of function between judge and jury that was both destined to become anti-historical and one that could not have been modified without an amendment of the Constitution.

The most appealing view of the political settlement achieved by the seventh amendment is the version suggested by the argument that the term "common law" in the seventh amendment was probably intended to refer to a process of legal development, rather than to an immutable and changeless state of the law. If that was a widely shared understanding of the nature of the "common law" at the time of the adoption of the seventh amendment, then the future development of the "common law" should also be regarded as part of the political bargain that was struck. If future development was contemplated—and if it is correct to view that development as largely one of the expan-

17-20), to recover on an equitable lien (*id.* at 462-70), to enforce a trust in favor of creditors (*id.* at 491), and the like.

308. See note 47 *supra*.

sion of the remedies available at "common law"—then it would seem to follow that the "common law" of the seventh amendment was intended to have a changing meaning over time. While the day might then have been some distance in the future, it would not have been unintended to have the right extend at some future point in time to the trial by jury of what in 1791 would have been termed "equity" or "admiralty" cases.

I wish to suggest, therefore, that the seventh amendment two centuries after its adoption could justifiably be read to refer neither to the law of England nor to the law of any of the states and certainly not to an arbitrary point in time, but rather to the distinctive common-law process of adjudication and law-making that then and now, in England and in the United States, was recognized as flexible and changing. Principally because this process cannot with fidelity be locked into any particular point in time and in order to emphasize its characteristics as a process, this may fittingly be called the "dynamic" reading of the seventh amendment.

The principal objection to a "dynamic" reading of the seventh amendment has nothing essentially to do with the language or history of the amendment. Rather it would be that it is too open-ended and would lead to a great degree of judicial and legislative discretion with respect to the right of civil jury trial.³⁰⁹ It might be argued that the discretionary nature of a dynamic approach would conflict rather sharply with the instincts of the antifederalists evidenced during the ratification debates. A fear frequently expressed by the anti-federalists and by some federalists as well was that judges were not to be trusted in a significantly large number of cases—either because the judges would apply harsh legal rules without regard to the individual circumstances of litigants, because the judges would apply unjust laws without regard to their unjustness, or because the judges were susceptible to corruption.³¹⁰ The legislature also might enact harsh or unjust laws, or simply laws that large masses of the population would not like; for lawsuits generated by such laws, the protection of the civil jury was also needed.³¹¹

The objection is well taken, but its acceptance does not inevitably lead away from a dynamic interpretation of the seventh amendment. The challenge to the dynamic approach

309. Cf. F. JAMES, JR., *CIVIL PROCEDURE* 347 (1965).

310. See notes 90-182, 188-92 *supra*.

311. See notes 183-87 *supra*.

would be to accommodate the developments after 1791 and the expansion of the "common law" remedies with continued vindication of the objectives of the framers of the seventh amendment. One possibility would be to recognize as constitutionally valid only those post-1791 changes in common-law remedies and practices that would have the effect of enlarging the occasions for civil jury trial and the prerogatives of the civil jury. While this concededly would be the tendency of a dynamic approach to the application of the seventh amendment, it would by no means be a necessary result in every instance. For example, it does not seem necessary, now that the use on appeal of the verbatim trial transcript is universally established, to continue to be as concerned as previously with the possible arbitrary use of power by a trial judge in refusing to accept the findings of jurors.

A less procrustean solution—one which would purposefully admit the possibility of constriction of the occasions for jury trial and of the civil jury's functions—would attempt to develop a functional approach to the application of the seventh amendment. The main difficulty with the development of such an approach to date has been the hitherto stubborn task of achieving agreement on the reasons why, as a constitutional matter, trial by jury might be thought to be superior to trial by a judge. In short, the chief difficulty has been that of defining functionality for this purpose. Some apparently assume that emphasis should be placed upon such factors as the lay level of familiarity with legal rules and standards and the typical juror's assumed inexperience with complicated business dealings.³¹² But these factors are irrelevant to the protection afforded by the seventh amendment. The antifederalist jury trial advocates of the pre-Bill of Rights era preferred civil trial by a jury because of its assumed willingness to prevent injustice. For example, the "common man" might become, even if infrequently, enmeshed in the toils of a transaction or relationship that results in complex litigation.

The dynamic approach to the seventh amendment would therefore reject the notion that the guarantee of jury trial should be determined by reference to matters of trial convenience or the relative "difficulty" of the legal or factual issues in the case. To the contrary, the alleged difficulty of issues in a

312. See Note, *The Right to a Nonjury Trial*, 74 HARV. L. REV. 1176, 1189-90 (1961); cf. F. JAMES, JR., *CIVIL PROCEDURE* 377-78 (1965); *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970).

case might argue more strongly than otherwise for the intervention of a jury, for this would permit some form of public scrutiny of the proceedings in order to assure that the "justice" of the case is not permitted to be lost in the maze.

Detailed elaboration of the implications of a dynamic approach to the seventh amendment must await another day. Enough has been said here to indicate its historical legitimacy and general plausibility. Perhaps it is too late for wholesale abandonment of the historical test, a relatively firmly imbedded part of the law for over a century and a half. But recent musings of the Supreme Court³¹³ suggest that a re-thinking of the historical test might not be precluded by stare decisis. If precedent is not an insurmountable obstacle, then one may hope that the time is near when the dead hand of the historical test will be lifted from the seventh amendment.

313. See *Ross v. Bernhard*, *supra* note 312, and discussion *supra* at notes 10-12.

