"EVERYTHING DEPENDS ON HOW YOU DRAW THE LINES": AN ALTERNATIVE INTERPRETATION OF THE SEVENTH AMENDMENT

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"And the same rune, ideally, would connect the main centers of Templar esotericism: Amiens, Troyes — Saint Bernard's domain at the edge of the Fôret d'Orient — Reims, Chartres, Rennesle-Château, and Mont-Saint-Michel, a place of ancient druidic worship. The rune also recalls the constellation of the Virgin."

"I dabble in astronomy," Diotallevi said shyly. The Virgin has a different shape, and I believe it contains eleven stars. . . ."

The colonel smiled indulgently. "Gentlemen, gentlemen, you know as well as I do that everything depends on how you draw the lines. You can make a wain or a bear, whatever you like, and it's hard to decide whether a given star is part of a given constellation or not. Take another look at the Virgin, make Spica the lowermost point corresponding to the Provençal coast, use only five stars, and you'll see a striking resemblance between the two outlines."

"You just have to decide which stars to omit," Belbo said.

"Precisely," the colonel agreed.[1]

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[1]UMBERTO ECO, FOUCAULT'S PENDULUM 124 (1988). In Eco's novel, the colonel, a member of a mystic sect, believes he has found a message left centuries earlier by the Knights Templar, and that the message is a part of the key to world power. *Id.* at 102. He is determined to publish what he knows in order to attract someone who can help him reconstruct the secret. *Id.* at 125. Diotallevi and Belbo are skeptical editors who work for a book publisher, and the narrator, Casaubon, is a graduate student friend of theirs. *Id.* at 53, 62-63. Out of a morbid curiosity, they encourage the colonel. *Id.* at 126 ("I hadn't taken to the colonel, yet he had piqued my interest. You can be fascinated even by a tree frog if you watch it long enough."). The deluded colonel's attempt to reconstruct the secret of the Templars in some respects resembles the process of constitutional interpretation (particularly interpretation of the Seventh Amendment) as it is sometimes practiced.

I. INTRODUCTION

The Seventh Amendment to the United States Constitution provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved."[2] Since the nineteenth century, the federal courts have generally interpreted the Seventh Amendment to guarantee the right to a jury in a civil case if English law would have provided for a right to jury trial had the case been tried in the year 1791, the year in which the Seventh Amendment became effective.[3] Thus, traditionally, the cases in which juries are guaranteed are those that involve legal rights or remedies derived from English common law[4] prior to 1791, in contrast to equity[5] or admiralty suits. This static doctrine, however, has proven unworkable. More importantly, the arguments asserted for and against the Seventh Amendment's ratification illustrate that an alternative interpretation that does not provide an absolute guarantee is the more accurate view.

The case generally regarded as the wellspring of Seventh Amendment doctrine, *United States v. Wonson*,[6] held that the Seventh Amendment provides for a guarantee to a jury trial because "[a]t the time when the [C]onstitution was submitted to the people for adoption, one of the most powerful objections urged against it was, that in civil causes it did not secure the trial of facts by a jury."[7] Circuit Judge Story's opinion in *Wonson* further held that in order to determine in which cases the right applies, courts could not look to the common law of the states because of the divergence in their jury trial practices. Rather, the "common law here alluded to . . . is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary . . . to expound the grounds of this opinion, because

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[2]U.S. CONST. amend. VII.

[3]5 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 38.08, at 42 (Daniel R. Coquillette, et al., eds., 2d ed. 1995) [hereinafter 5 MOORE'S FEDERAL PRACTICE].

[4]Common law "is all the statutory and case law background of England and the American colonies before the American revolution." BLACK'S LAW DICTIONARY 250 (5th ed. 1979).

[5]Equity is "[j]ustice administered according to fairness as contrasted with the strictly formulated rules of common law." *Id.* at 484.

[6]28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

[7]*Id.* at 750.

they must be obvious to every person acquainted with the history of the law."[8]

In a subsequent opinion in *Parsons v. Bedford*,[9] Justice Story, then a Supreme Court Justice, said that suits at common law were:

> [S]uits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit.[10]

In the *Parsons* opinion, Justice Story provided approximately as much support for the conclusion as he had for the one in *Wonson*, apparently believing it to be equally obvious to any person of even minimal perspicacity.[11]

Subsequently, however, the "grand reservoir of all our jurisprudence" began to curtail the types of civil lawsuits in which a party could demand a jury.[12] The test was made static when the Supreme Court fixed a photograph of the English common law, as it existed in 1791, to be used as a reference point. Courts began to ask whether the case would have involved legal, as opposed to equitable, rights or remedies as of 1791, rather than

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[8]*Id.*

[9]28 U.S. 433 (1830).

[10]*Id.* at 447.

[11]As one commentary, discussing the adequacy of the *Parsons* decision, has said, "the [Supreme] Court has in the past not deemed Justice Story's opinions to be immune from subsequent reconsideration in other contexts." Martin H. Redish & Daniel J. LaFave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional History*, 4 WM. & MARY BILL RTS. J. 407 (1995). In support of this statement the authors note that, for example, Justice Story's "famed opinion" in Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) (holding that a federal court in a diversity case need not follow the state court's precedents but may look to "the general principles and doctrines of commercial jurisprudence") was overruled by Erie Railroad v. Tompkins, 304 U.S. 64, 78 (1938) (stating that "[t]here is no federal general common law"). Redish & LaFave, *supra*, at 435, n.145.

[12]SIR PATRICK DEVLIN, TRIAL BY JURY 130-33 (2d ed. 1960). The limited cases included libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, and fraud. *Id.* at 13-31.

whether the action would be considered legal at the time the case was being heard. This approach was first applied by the Supreme Court in the 1898 case *Thompson v. Utah*.[13] Although *Thompson* was a criminal rather than a civil case, the Supreme Court has since applied the static test in cases involving civil juries as well.[14]

Despite the long-standing nature of the traditional Seventh Amendment construction, commentators have often challenged it as being tortured, impractical, and unsupported by evidence of the Framers' intent.[15] Judges,

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[13]170 U.S. 343, 350 (1898). The Court stated:

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

Id. *Thompson* was a criminal rather than a civil case, and thus involved an interpretation of Article III and the Sixth Amendment rather than the Seventh Amendment. *Id.* at 346. Neither Article III nor the Sixth Amendment use the word "preserved." One might infer from this that the use of the word "preserved" has a significance other than an implication that a static test should be used.

[14]*E.g.*, Tull v. United States, 481 U.S. 412, 427 (1987) (noting that the Seventh Amendment guarantees jury trial to determine liability in actions by the government to seek civil penalties and relief under the Clean Water Act); Parklane Hosiery v. Shore, 439 U.S. 322, 337 (1979) (holding that application of the collateral estoppel doctrine in a suit by corporate shareholders against defendants who previously had been sued in non-jury action by Securities and Exchange Commission did not violate Seventh Amendment); Curtis v. Loether, 415 U.S. 189, 193-94 (1974) (asserting that the Seventh Amendment requires jury trial on demand by either party in an action for damages under the fair housing provisions of the Civil Rights Act of 1968); Dimick v. Schiedt, 293 U.S. 474, 486-88 (1935) (stating that under the Seventh Amendment the Court was without power to increase plaintiff's awarded damages where the jury verdict was found inadequate and plaintiff insisted upon a new trial, despite defendant's consent to the additur, but remarking that the Court would have had power to order a decrease in damages with plaintiff's consent to a remittitur, even in the face of a defendant's demand for new trial).

[15]The challenges to this interpretation are too numerous to list. For a few examples, see CHARLES ALAN WRIGHT AND ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302 (1995) (discussing difficulties in distinguishing legal from equitable claims under the static test); Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005 (1992); Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEG. FORUM 33 (1990); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

The civil jury system itself has also been subjected to much criticism. It is asserted that juries do not render just verdicts, primarily because of bias or difficulty in

including Justices of the Supreme Court, have expressed frustration that the static test is difficult to apply and produces unreasonable results.[16] Because the Supreme Court has recently expressed an interest in examining the issue of civil jury trials once more,[17] another contribution to the body of academic writings on the subject seems, if perhaps not exactly welcome, at least timely.

This Article will examine an alternative interpretation of the Seventh Amendment. This alternative posits that the Seventh Amendment is not a guarantee of civil jury trial at all. Rather, it is an authorization to Congress to pass laws requiring jury trials in cases in which the legislature sees fit and an assurance that such laws will not violate the Constitution. When the Seventh Amendment dictated that the right to civil jury trial was preserved, it meant that it was not abolished. What was "preserved" by the Seventh Amendment was not an embalmed corpse of jury trial law as of 1791, but rather the essential life of the civil jury, subject to maturation as Congress sees fit.

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comprehending complicated legal concepts. *See* DAVID MARGOLICK, AT THE BAR 168-69 (1995); STEPHEN J. ADLER, THE JURY (1994); JEROME FRANK, COURTS ON TRIAL 110-11 (1949). It is not the purpose of this Article to address the competency of the American jury.

[16]*See, e.g.*, Galloway v. United States, 319 U.S. 372, 392 (1943) ("In addition, the passage of time has obscured much of the procedure which then may have had more or less definite form, even for historical purposes."); *Dimick*, 293 U.S. at 495 (dissenting opinion by Justice Stone, in which Chief Justice Hughes and Justices Brandeis and Cardozo concurred) ("[S]earch of the legal scrap heap of a century and a half ago may commit us to the incongruous position in which we are left by the present decision . . . ."). "The very careful and learned research by my brother Friendly into the history of the English Court of Exchequer beginning with the twelfth century serves in its fascinating, if uncertain, detail to highlight the artificiality of the chain of reasoning by which this restriction [the constitutional right to jury trial] on twentieth century tax collection is discovered." Damsky v. Zavatt, 289 F.2d 46, 57 (2d Cir. 1961) (Clark, J., dissenting).

[17]The Supreme Court accepted *certiorari* in American Airlines v. Lockwood, *cert. granted*, 115 S. Ct. 2274 (1995) (mem.) in the first half of 1995. *Lockwood* raised the issue of the propriety of a jury trial in a suit for a declaratory judgment to invalidate a patent. The jury trial demand was subsequently dropped and the case was ordered to trial. American Airlines v. Lockwood, 116 S. Ct. 29 (1995) (mem.). *See Supreme Court Tells Judge in California To Try Patent Suit*, WALL ST. J., Sept. 5, 1995, at B7. A few weeks thereafter the Supreme Court accepted *certiorari* in Markman v. Westview Instruments, Inc., 116 S. Ct. 40 (1995) (mem.), an en banc decision of the Court of Appeals for the Federal Circuit. *Markman* held that interpretation of patent claims is a matter of law for the judge, not a matter of fact for the jury, so that the Seventh Amendment was not violated when the district judge granted the defendant's motion for directed verdict after the jury returned a verdict for plaintiff. *Id.*

The alternative interpretation is based on the assertion by those opposed to the original Constitution that the Seventh Amendment actually abolished trial by jury in civil cases because it mandated trial by jury in criminal cases but was silent with respect to civil matters. The Seventh Amendment can be seen as designed to eliminate this argument against the Constitution. Evidence in support of and counter to this interpretation will be examined. The Article concludes that while the alternative interpretation is more plausible than the traditional interpretation, there simply is not sufficient documentation to reach a definitive decision as to the precise meaning of the Seventh Amendment. Neither the traditional nor the alternative interpretations can be considered free from doubt. However, in addition to being better supported by contemporaneous evidence of the Framers' intent, the alternative interpretation has the advantage that it is capable of being applied coherently by the courts.

II. HISTORY OF THE SEVENTH AMENDMENT

The original Constitution had no provision ensuring a right to jury trial in civil cases. It did, however, expressly guarantee a right to jury trial in criminal cases: "The trial of all crimes, except in cases of impeachment, shall be by jury."[18]

The issue of juries in civil cases had been only briefly addressed by the Constitutional Convention. The Convention was in active session from May 25th to July 16th and from August 6th to September 17th of 1787.[19] The matter was not raised on the floor of the Convention until September 12th.[20] Mr. Williamson of North Carolina then noted the absence of such a provision.[21] The Federalists responded that it was impossible to frame a workable rule at that point in time in the sort of general language appropriate for a constitution.[22] Rather, the matter should be left to the federal

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[18]U.S. CONST. art. III, § 2, cl. 3.

[19]Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 292 (1966).

[20]*Id.* at 293.

[21]*Id.*

[22]*Id.* at 294.

legislature to resolve, presumably by statute.[23] On September 15th, the issue was raised again, and Charles Pinckney of South Carolina and Elbridge Gerry of Massachusetts submitted and moved for the following language to be annexed to Article III, section 2, clause 3: "And a trial by jury shall be preserved as usual in civil cases."[24] Other members of the Convention objected that "[t]he constitution of Juries is different in different States and the trial itself is *usual* in different cases in different states."[25] The motion failed.[26]

The Anti-Federalists, who opposed ratification of the new Constitution, vociferously asserted that the promise of criminal juries and the absence of any mention of civil juries meant that the Constitution abolished juries in all civil cases. This argument was publicly made by George Mason and Richard Henry Lee of Virginia as early as October, 1787. It was also made in the legislature of Pennsylvania, the first state to consider the new Constitution, and repeated in others.[27]

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[23]II THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587-88 (Farrand ed., 1966); Henderson, *supra* note 19, at 293-94; Wolfram, *supra* note 15, at 658-60.

[24]II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 628.

[25]Henderson, *supra* note 19, at 294

[26]II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 628 (italics in original). The intent of Gerry and Pinckney in using the word "preserved" was not explained. Gerry, however, ultimately refused to sign the Constitution, giving as one of his reasons that the rights of the people were rendered insecure by the legislature's power "to establish a Tribunal without juries, which will be a Star-chamber as to Civil cases." *Id.* at 633.

[27]Henderson, *supra* note 19, at 295-98; 3 THE COMPLETE ANTI-FEDERALIST 37 (Storing ed., 1981) (Essay by a Maryland Farmer, 21 March 1788). Professor Wolfram also quotes speeches in the North Carolina ("We are giving away our dear bought rights [to trial by jury].") and Virginia ("Why is the trial by jury taken away?") legislatures to the same effect. Wolfram, *supra* note 15, at 683-84.

The Anti-Federalists also argued that the Constitution had effectively abolished the right to a civil jury trial because appellate courts could review a jury's findings of fact made in the lower courts. 3 THE COMPLETE ANTI-FEDERALIST, *supra*, at 36. The notion that the Constitution abolished the civil jury right because of the new appellate scope of review, however, was alleviated by the second part of the Seventh Amendment, the Re-examination Clause: "no fact tried by a jury, shall be otherwise re-examined, in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. The two arguments were sometimes combined in the Anti-Federalist writings regarding the right to a civil jury trial. Henderson, *supra* note 19, at 297; 3 THE COMPLETE ANTI-FEDERALIST, *supra*, at 207, 248; Wolfram, *supra* note 15, at 723 & n.246.

In response to the Anti-Federalist campaign against the Constitution, the Federalist Papers focused specifically on persuading the State of New York to ratify the Constitution. In Federalist No. 83, dated May 28, 1788, Alexander Hamilton addressed the Anti-Federalists' charge that civil juries were prohibited by the Constitution. Hamilton stated that the Constitution's silence regarding civil juries did not amount to an abolition of civil juries; instead, the Constitution left the fate of the civil jury to the United States Congress. He wrote:

> With regard to civil causes, subtleties almost too contemptible for refutation have been adopted to countenance the surmise that a thing which is only *not provided for*, is entirely *abolished*. . . .
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> The maxims on which they rely are of this nature: "A specification of particulars is an exclusion of generals"; or, "The expression of one thing is the exclusion of another." Hence, say they, as the [C]onstitution has established the trial by jury in criminal cases and is silent in respect to civil, this silence is an implied prohibition of trial by jury in regard to the latter.
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> . . . Is it natural to suppose, that the command to do one thing is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done? . . .
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> A power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the [C]onstitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone. This discretion, in regard to criminal causes, is abridged by the express injunction of trial by jury in all such cases; but it is, of course, left at large in relation to civil causes, there being a total silence on this head. The specification of an obligation to try all criminal causes in a particular mode excludes indeed the obligation or necessity of employing the same mode in civil causes, but does not abridge *the power* of the legislature to exercise that mode if it should be thought proper. . . .[28]

Hamilton then proceeded to elaborate on why the legislature rather than the Constitutional Convention should decide to which cases the right to civil jury trial adheres. He explained the differing practices among the states and the

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[28]THE FEDERALIST No. 83, at 496-97 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original).

need to consider fully which types of cases required civil juries to preserve liberty, and which others would be inappropriate for jury determination because, for example, the matters were too "intricate."[29] In fact, Hamilton was no ardent admirer of the civil jury:

> But I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the convention.[30]

He then admitted, however, that the jury trial could protect against corrupt judges (because it would be necessary to bribe the jury as well), and that it was a useful way to determine "questions of property."[31]

Perhaps each side saw the other as disingenuous. Hamilton probably thought that the Anti-Federalists were simply trying to use a baseless argument to instigate opposition in order to defeat the Constitution entirely. The Anti-Federalists may have read Federalist No. 83 and suspected that Hamilton "protest[ed] too much."[32] Hamilton, however, pretty clearly had the better of the argument. It seems unlikely that the Federalists were plotting affirmative abolition of the civil jury trial.

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[29]*Id.* at 502-06. The difficulty that courts have experienced in applying the traditional Seventh Amendment test has borne out Hamilton's concern about the inability to set down a workable general rule in the Constitution.

[30]*Id.* at 499. This part of Federalist No. 83 follows an oft-quoted statement by Hamilton that the only disagreement existing between the friends and foes of the Constitution regarding the role of the jury was that "the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." *Id.* However, when this paean to the jury is invoked, the quote usually does not extend to include the subsequent language expressing doubts about the efficacy of civil, as opposed to criminal juries. *See, e.g.*, J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 498 (1985).

[31]THE FEDERALIST, *supra* note 28, at 501.

[32]*See* WILLIAM SHAKESPEARE, HAMLET, act III, scene II.

If one accepts Hamilton's arguments, then it appears he simply did not have excessive regard for the civil jury and perhaps hoped that the legislature would not provide for it in too many instances. If one also gives credence to the sincerity of the Anti-Federalist faction, then there was a legitimate disagreement between the two factions about how courts in the future might interpret the Constitution.[33]

But who was speaking plainly and who was not turns out to matter little in this instance. What is significant is that Hamilton's disclaimer that civil juries were not effectively prohibited by the new Constitution did not silence the Anti-Federalist protests on the issue. The contention that the Constitution implicitly abolished the civil jury trial persisted, and was made by Anti-Federalists who had a large measure of credibility with the public, such as Patrick Henry.[34] The Federalists could have decided that rather than continue to point out how tenuous the abolition argument was, they would be more successful if they created a constitutional amendment to express their true intent: that the legislature could constitutionally define the scope of the right to civil jury trial.[35]

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[33]One can hardly expect everyone to have known at the time that *The Federalist Papers* would come to be considered the most authoritative basis for interpreting the Constitution. THE FEDERALIST, *supra* note 28, Introduction, at vii-xii.

[34]5 THE COMPLETE ANTI-FEDERALIST, *supra* note 27, at 207, 248 (speech of Patrick Henry in the Virginia State Ratifying Convention, 16 June 1788) ("This paper . . . in civil controversies excludes trial by jury altogether.").

[35]It may well seem odd that a document like the Constitution should be revised to correct a misimpression that the Federalists contended had no logical basis and which in fact sounds strained. However, the situation of the Seventh Amendment seems analogous to that of the Tenth Amendment, in that both state explicitly, in response to dubious arguments made by the Anti-Federalists, what should have been implicitly understood from the original Constitution. The Tenth Amendment states that "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X. Justice Brennan once characterized the Tenth Amendment as "a truism," meaning that the states had all autonomous sovereign powers except for those not specifically granted to the federal government. National League of Cities v. Usery, 426 U.S. 833, 862 (1976) (Brennan, J., dissenting) (quoting United States v. Darby, 312 U.S. 100, 124 (1941)). Justice Brennan's view of the Tenth Amendment was later vindicated in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, *reh'g denied*, 471 U.S. 1049 (1985) which overruled *National League of Cities*. *Cf.* Wolfram, *supra* note 15, at 669.

> But if an antifederalist argument for constitutional protection of the right of civil jury trial is based on perception which, although unreasonable or distorted in one's present view, nonetheless was widely shared at that time

The Constitution was, of course, ratified, despite the absence of a provision regarding civil jury trials. Clearly, however, many wanted a bill of rights to be appended to the Constitution and it was feared that if Congress did not add one then a second constitutional convention might be called, possibly resulting in evisceration of the new Constitution.[36] The first Congress developed a bill of rights that it recommended to the states on September 25, 1789, and that was in large part ratified by the requisite number of states to become effective in 1791.[37] This bill of rights included the Seventh Amendment.

James Madison introduced the first draft of the suggested amendments on June 8, 1789.[38] The provision regarding civil jury trials read: "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."[39]

Much of Madison's phrasing in his draft amendments to the Constitution appears to have been drawn from existing state constitutions, particularly that of Virginia.[40] With regard to the civil jury trial, the Virginia Constitution at the time provided that "in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred."[41] The precatory-

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> 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.

Id.

[36]1 ANNALS OF CONG. 424-34, 442-50, 660-64 (1789).

[37]5 MOORE'S FEDERAL PRACTICE ¶ 38.08, *supra* note 3, at 42.

[38]1 ANNALS OF CONG., *supra* note 36, at 424, 431-34. Madison's effort to gain the attention of the House on the matter was not unopposed. Some members (particularly those from states that had ratified the Constitution without proposing additional amendments) saw no need to consider amendments at that early stage. Others did not want to interrupt the day-to-day legislative business of the House (including a bill to raise revenue so that the government could operate). *Id.* at 424-31, 442-50, 660-64.

[39]*Id.* at 435.

[40]Wolfram, *supra* note 15, at 728 & n.258.

[41]*See id.* (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 658 (J. Elliot ed., 1891); *see also* VA. DECL. OF RIGHTS § 11 (1776) in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3814 (F. Thorpe ed., 1909); *see also infra* note

sounding nature of the wording "ought to" rather than "shall" is confirmed by case law interpreting the Virginia Constitution. The language means that while the right as it existed is to be continued, the Assembly may, by positive words, take it away.[42] Moreover, even the Virginia Constitution itself could be changed by ordinary legislation.[43] The alternative interpretation of the final language of the Seventh Amendment that is posited in this Article would achieve essentially the same result with respect to the civil jury trial right as obtained in Virginia: the legislature could define the scope of the right by the majorities required to pass ordinary laws.

Madison's proposal was referred, on July 21st, to a select committee of one congressman from each of the eleven states then represented in Congress.[44] The committee revised the language and filed a report on July 28th.[45] The revised language, which stated that "[i]n suits at common law, the right of trial by jury shall be preserved" was adopted by the House sitting as a committee of the whole on August 18th[46] and passed by the House on August 21.[47] On September 7, 1787, the Senate limited the Amendment to suits involving more than twenty dollars.[48]

What does it mean to say that "the right to jury trial shall be *preserved*"? The history recited above can be read to imply that the Seventh Amendment exists to quell fears that Congress could not provide for civil juries because the Constitution would prohibit it. Or does it mean, as the Supreme Court has read it, that a jury is guaranteed in certain civil cases? As noted above, the Anti-Federalists argued that the proposed Constitution

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96 and accompanying text (citing the Virginia Constitution jury trial provision).

[42]Forbes & Co. v. Southern Cotton Oil Co., 108 S.E. 15 (Va. 1921).

[43]LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 145 (1988).

[44]1 ANNALS OF CONG., *supra* note 36, at 660-65.

[45]*Id.* at 672. The committee's four page report provides no insight into why this change was made. The report is reprinted at V U.S. BUREAU OF ROLLS & LIBRARIES DOCUMENTARY HISTORY OF THE CONSTITUTION 1786-1870, at 186-89 (1905).

[46]1 ANNALS OF CONG., *supra* note 36, at 760.

[47]*Id.* at 767. The foregoing process is also described in Wolfram, *supra* note 15, at 727-30.

[48]1 ANNALS OF CONG., *supra* note 36, at 76. No record was kept of debates in the Senate. *Id.* at 15-16.

abolished the civil jury; but they did not stop there. They also contended that the jury trial right was so important that it was not enough to allow the legislature to provide for it; instead, it should be explicitly promised in the Constitution.[49] The long-standing interpretation of the Seventh Amendment is that the Anti-Federalists succeeded in obtaining such a guarantee.[50]

The next section will first summarize briefly the traditional interpretation of the Seventh Amendment and how the Supreme Court applied it in a recent case. This particular application illustrates some of the problems that courts encounter in applying the static test. Arguments in support of and in opposition to the alternative interpretation will then be examined.

III. INTERPRETING THE SEVENTH AMENDMENT

A. THE TRADITIONAL INTERPRETATION

Under the traditional interpretation of the Seventh Amendment the cases in which juries are guaranteed are those that would have involved legal rights or remedies, in contrast to ones in equity or admiralty, in 1791. Although this general statement of the rule sounds simple, application is a more complicated matter, involving some tenuous historical investigation. Moreover, the Supreme Court Justices have not agreed on the significance of the resemblance between the cause of action today and in 1791, as opposed to the resemblance between the relief sought and the relief available at law or equity in 1791.[51] Thus, each time the parties to a civil litigation disagree about whether the case is to be tried to a jury, the court must conduct an abstruse historical inquiry based on a necessarily incomplete record of two century old legal doctrine and then determine the significance of what it has found.

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[49]*E.g.*, 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 27, at 12 (published essay in the form of a letter addressed to James Wilson from "Cincinnatus"). This letter begins by asserting that the argument that the Constitution implicitly abolished trial by jury was a straw man created by the Federalists and that the true Anti-Federalist argument is that the right to trial by jury was not secured by the Constitution. However, it then goes on to admit a belief that "the trial by jury does seem to be taken away in civil cases." *Id.*

[50]To the degree that after the fact explanations of the Founders' intent are reliable, we have been deprived of the guidance that Hamilton's reaction to the 1812 decision in *Parsons v. Bedford* might have given. Hamilton was killed in a duel with Aaron Burr in July 1804. FORREST MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 359-61 (1979).

[51]*See infra* notes 52-80 and accompanying text (discussing Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990)).

The Supreme Court's recent decision in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*,[52] illustrates the difficulties in applying the static test. In *Terry*, laid-off employees who were discontented with the way their union had handled their grievances against their employer sued the employer for breach of the collective bargaining agreement, as well as the union for breach of the duty of fair representation.[53] Both were statutory actions under federal labor law: the action against the employer under Section 301 of the Labor Management Relations Act ("LMRA")[54] and the action against the union deriving from the union's legal status as the sole representative of the employees.[55] Although the claims against the employer were dismissed when the employer went into bankruptcy, the action against the union remained.[56] In order to prove that the union had breached its duty of fair representation, Section 301 of the LMRA required the employees to show first that the employer had violated the collective bargaining agreement, even though the employer had been dismissed from the case.[57]

Justice Marshall, writing for the Court, reasoned that, under the Seventh Amendment, the employees were entitled to a jury trial in their suit against the union.[58] The Justice stated that the Court had to compare the statutory action to those brought in law and equity in the eighteenth century and then examine the remedy sought to determine whether it was legal or equitable in nature. Justice Marshall asserted that the second inquiry, regarding the remedy, was the more important.[59]

The Court rejected the union's claim that the duty of fair representation action resembled the equitable action to vacate an arbitration award.[60] Justice Marshall was more inclined to accept the argument that the action is

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[52]494 U.S. 558 (1990).

[53]*Id.* at 562.

[54]29 U.S.C. § 185 (1988).

[55]494 U.S. at 563 (citing National Labor Relations Act, 29 U.S.C. § 159(a) (1988)).

[56]494 U.S. at 563.

[57]*Id.* at 561-64.

[58]*Id.* at 573.

[59]*Id.* at 565.

[60]*Id.* at 566-67.

comparable to an equitable action by a trust beneficiary against a trustee for breach of fiduciary duty.[61] The Court also found somewhat persuasive the employees' argument that their action was akin to one for attorney malpractice, a legal action, but ultimately decided that the analogy was less convincing than the comparison to the action for breach of fiduciary duty.[62] Nevertheless, Justice Marshall could not find that the claim was "wholly equitable" because the Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action. The employees had to show as part of their case against the union that the employer had breached its collective bargaining agreement, comparable to a breach of contract claim: a legal issue.[63] Thus, the first part of the analysis left Justice Marshall "in equipoise" on the jury trial issue.[64]

The Court then proceeded to examine the nature of the remedy sought, which was backpay and benefits. Normally, an action for money relief would be considered traditionally legal. Justice Marshall examined the exceptions to this rule — when the damages sought are restitutionary or are incidental to or intertwined with injunctive relief — and found them inapplicable.[65] Justice Marshall also considered the union's argument that the relief was equitable because the Supreme Court had previously determined that backpay in discrimination suits under Title VII of the Civil Rights Act of 1964[66] was an equitable remedy.[67] The Justice distinguished Title VII from the law mandating a duty of fair representation, however. He noted that Title VII's back pay provision was modeled on a provision of the National Labor Relations Act concerning remedies for unfair labor practices, which was intended to vindicate different goals from the law concerning the

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[61]*Id.* at 567-68.

[62]*Id.* at 568-69.

[63]*Id.* at 569-70.

[64]*Id.* at 570.

[65]*Id.* at 570-71.

[66]42 U.S.C. § 2000e et seq. (1988 & Supp. V 1993).

[67]Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 571 (1990).

duty of fair representation.[68] Accordingly, the Court concluded that the remedy sought was legal and that the employees were entitled to a jury trial in their suit against the union for breach of the duty of fair representation.[69]

Justice Brennan agreed that a jury trial was required by the Seventh Amendment, but noted that he would decide Seventh Amendment questions solely on the basis of the relief sought.[70] The concurring Justice stated that "our insistence that the jury trial right hinges in part on a comparison of the substantive right at issue to forms of action used in English courts 200 years ago needlessly convolutes our Seventh Amendment jurisprudence."[71] As the Justice explained:

> Requiring judges, with neither the training nor time necessary for reputable historical scholarship, to root through the tangle of primary and secondary sources to determine which of a hundred or so writs is analogous to the right at issue has embroiled courts in recondite controversies better left to legal historians.[72]

Justice Brennan noted that the line between law and equity was not a fixed one and that historical analogues to contemporary actions may not always exist.[73] Nevertheless, the Justice felt it was important to retain a historical test.[74]

Also agreeing that a jury was mandated in the case, Justice Stevens felt that the Court had "made this case unnecessarily difficult by exaggerating the importance of finding a precise common-law analogue to the duty of fair

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[68]*Id.* at 572-73. The prohibition of unfair labor practices primarily concerns the "public interest in effecting federal labor policy"; the concern of fair representation was to target the wrongs done to individual employees. *Id.* at 573 (citations omitted). Justice Marshall did not compare the purpose of Title VII's provisions for individual redress directly with that of the law establishing the duty of fair representation.

[69]*Id.* at 573.

[70]*Id.* at 574 (Brennan, J., concurring in part and concurring in the judgment).

[71]*Id.* at 574-75.

[72]*Id.* at 576.

[73]*Id.* at 577.

[74]*Id.* at 578 & n.7.

representation."[75] The Justice opined that the action was more analogous to the attorney malpractice action than to that for breach of fiduciary duty.[76] Nevertheless, Justice Stevens suggested that "the commonsense understanding of the jury, selected to represent the community, is appropriately invoked when disputes in the factory, the warehouse, and the garage must be resolved."[77] Because duty of fair representation suits are for the most part ordinary civil actions, Justice Stevens saw no ground for excluding them from the jury trial right.[78]

Finally, Justice Kennedy's dissenting opinion, joined by Justices O'Connor and Scalia, agreed with Justice Marshall that the Court was required to compare the action to eighteenth century cases permitted in the law courts of England and to examine the nature of the relief sought.[79] Kennedy also agreed with those members of the Court who found that the duty of fair representation action more resembled an equitable trust action than a suit for malpractice. However, Justice Kennedy would have ended his inquiry at that point and held that no jury was required.[80] His warning that "[i]f we abandon the plain language of the Constitution to expand the jury right, we may expect Courts with opposing views to curtail it in the future"[81] betrayed how open to manipulation by courts the historical test is. Further, the Justice's admission that the answer to the jury trial question might be different if the employer had not gone into bankruptcy shows how the availability of a jury trial on a particular claim — in this case a claim against a union for breach of the duty of fair representation — may be different under different circumstances, even though whether the claim is one suited to jury determination remains unchanged.[82]

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[75]*Id.* at 581 (Stevens, J., concurring in part and concurring in the judgment).

[76]*Id.* at 582.

[77]*Id.* at 583.

[78]*Id.*

[79]*Id.* at 584 (Kennedy, J., dissenting).

[80]*Id.* at 584.

[81]*Id.* at 593.

[82]*Id.* at 594-95.

B. THE ALTERNATIVE INTERPRETATION

In contrast to the traditional interpretation that has caused so much disagreement in cases such as *Terry*, the alternative interpretation focuses on a single, more straightforward question: has Congress statutorily provided for a jury trial in the case at bar? Ease of application, though, is not an indicium of adherence to constitutional text. Examination of the record, however, leads to the conclusion that the alternative interpretation is historically sound.

1. COMPARISON TO CRIMINAL JURY TRIAL GUARANTEE

Perhaps the first obvious argument in favor of the alternative interpretation of the Seventh Amendment lies in a comparison of its language to the words that guarantee jury trial in criminal cases. Article III, section 2 states that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury."[83] In contrast, the Seventh Amendment is ambiguous, not necessarily intended as a guarantee. It is curious that the Framers chose to say that the right to trial by jury shall be "preserved" in suits at common law, rather than follow the language of the existing criminal jury trial guarantee and say that "the trial of all suits at common law, where the value in controversy shall exceed twenty dollars, shall be by jury."[84] As the Supreme Court has often said, if Congress meant to do a thing, "it knew how to use express language to that effect."[85]

The phrasing could mean something other than the right is preserved (i.e., not abolished) so that Congress may define it. One possible reading is

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[83]U.S. CONST. art. III, § 2.

[84]In fact, when Thomas Jefferson, who was in France at the time the Bill of Rights was being drafted, received Madison's draft of the amendments, he suggested language along these lines: "All facts put in issue before any judicature shall be tried by a jury except 1. in cases of admiralty jurisdiction wherein a foreigner shall be interested, 2. in cases cognisable before a court martial . . . , and 3. in impeachments allowed by the [C]onstitution." Letter from Thomas Jefferson to James Madison (Aug. 28, 1789) *reprinted in* 2 B. SCHWARTZ, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 1140, 1143 (1971). The letter is discussed in James S. Campbell and Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PENN. L. REV. 965, 973 (1980).

[85]Colgrove v. Battin, 413 U.S. 149, 162 (1973) (quoting Williams v. Florida, 399 U.S. 78, 97 (1970)). *Colgrove* held that civil juries of six people are constitutionally permissible despite the fact that English common law used juries of twelve. *Williams* had previously held the same with regard to criminal juries.

that trial by jury in criminal cases is mandatory and may not be waived ("the trial of all crimes . . . *shall* be by jury") whereas trial by jury in civil cases is a right that may be waived. The Supreme Court, however, has held that trial by jury in criminal cases may nonetheless be waived by the defendant.[86]

Congress's failure, in drafting the Seventh Amendment, to track the language of the jury trial guarantee that had already been included in the original Constitution, can be explained on the grounds that something other than a guarantee was intended. Merely because the previously ratified language of Article III was an obvious choice, however, does not mean it was the only choice. Accordingly, other grounds in support of the alternative interpretation must be examined.

2. STATE CONSTITUTIONS

If Congress did not choose to borrow from the existing constitutional language guaranteeing a jury in criminal matters when it phrased the Seventh Amendment, the other logical choice would have been to borrow from the state constitutional provisions guaranteeing a civil jury trial. (As discussed in Section II above, it appears that Madison did exactly that in the draft he presented to Congress.)[87] Yet the legislature did not do so with respect to the word "preserved." In none of the state constitutional jury trial provisions did the phrase "shall be preserved" or even the word "preserved" appear.

Through September 24, 1789, the date that the Seventh Amendment was presented, along with the remainder of the Bill of Rights, to the states for ratification, eleven states had ratified the original Constitution and were represented in the first Congress: Delaware, Pennsylvania, and New Jersey ratified in 1787; Georgia, Connecticut, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, and New York ratified in 1788.[88]

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[86]The Supreme Court has held that a criminal defendant may waive his right to trial by jury if the waiver is done expressly and intelligently. *See* Patton v. United States, 281 U.S. 276 (1930).

[87]*See supra* notes 38-43 and accompanying text.

[88]The next state to ratify the Constitution was North Carolina, on November 21, 1789. THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 41, at 19.

Eight of the eleven, excepting Delaware,[89] South Carolina, and Connecticut, had constitutional provisions regarding civil jury trials at the time.

> Pennsylvania: "[I]n controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred."[90]
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> New Jersey: "[T]he inestimable right of trial by jury shall remain confirmed as a part of the laws of this Colony, without repeal, forever."[91]
>
> Georgia: "Freedom of the press and trial by jury shall remain inviolate."[92]
>
> Massachusetts: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it."[93]
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> Maryland: [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. . . ."[94]
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> New Hampshire: "In all controversies concerning property, and in all suits between two or more persons, except in cases in

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[89]Delaware had a jury trial provision in Article 13 of its 1776 Declaration of Rights, but not in its Constitution: "That trial by jury of facts where they arise is one of the greatest securities of the lives, liberties, and estates of the people." SOURCES OF OUR LIBERTIES, ch. XI, at 26 (Perry ed., 1959).

[90]*Id.* at 3083.

[91]*Id.* at 2598.

[92]*Id.* at 789.

[93]*Id.* at 1891-92.

[94]*Id.* at 1686-87.

> which it has been heretofore otherwise used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless in causes arising on the high seas, and such as relate to mariners wages, the legislature shall think it necessary hereafter to alter it."[95]
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> Virginia: "[I]n controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred."[96]
>
> New York: "[T]rial 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."[97]

If Congress had meant to guarantee generally the trial by jury, it had readily available to it more direct language than it actually used. The legislature could have said that the parties "have a right to trial by jury" (Pennsylvania, Massachusetts, and New Hampshire), are "entitled to trial by jury," or even that the trial by jury "shall be established and remain inviolate forever." And if in fact Congress had intended to guarantee specifically a trial by jury according to the rules of English common law (the traditional interpretation),[98] the Maryland language seems to express the thought more felicitously than does the wording employed by the Seventh Amendment. Yet, with these examples near at hand, the Framers chose to say that the right to jury trial "shall be preserved."

One might argue that Congress decided to ignore the existing state jury trial provisions in order to avoid charges of favoritism. But the legislature would have been open to that charge in any event if the Supreme Court's

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[95]*Id.* at 2456.

[96]*Id.* at 3814.

[97]*Id.* at 2637.

[98]United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (stating that federal judges, when determining if a right to jury trial exists in a case, must look not to the common law of the states, because of the divergence in their practices, but to the "common law of England, the grand reservoir of all our jurisprudence")

interpretation[99] of the Seventh Amendment is the correct one because only a few states determined the right to jury trial by English practice.[100]

The failure to borrow from existing state jury trial guarantees is indirect evidence only, but it supports the alternative thesis that the Seventh Amendment is something other than a guarantee of the right to jury trial.

3. THE JUDICIARY ACT OF 1789

On September 24, 1789, the same day that Congress agreed on the final form of the twelve amendments to the Constitution that were to be submitted to the states, President Washington signed the Judiciary Act of 1789.[101] The Judiciary Act had been put in final form by Congress a mere three days earlier.[102] Section 9(d) of the Judiciary Act provided that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."[103] Section 12 made similar provision for the circuit courts,[104] and Section 13 for the Supreme Court.[105]

It is difficult to understand why Congress would use the Judiciary Act to guarantee the right to civil jury trial if the same right was to be guaranteed by a constitutional amendment that was being considered at the same

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[99]*See supra* Section III.A., notes 51-82 and accompanying text (discussing Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990)).

[100]Wolfram, *supra* note 15, at 722.

[101]Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789). The Judiciary Act set up the federal courts, their jurisdiction, and various standards that they were to follow.

[102]Charles Warren, *New Light on the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 131 (1923).

[103]Section 9(d), 1 Stat. 77 (1789). At the time, district courts had no equity jurisdiction. Warren, *supra* note 102, at 75, n.61.

[104]"[T]he trial of issues in fact in the circuit courts shall, in all suits except those of equity, and of admiralty, and maritime jurisdiction, be by jury." 1 Stat. 80 (1789).

[105] "And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury." 1 Stat. 81 (1789).

time.[106] The Seventh Amendment, if construed as a guarantee of the right to a jury trial in civil cases, would seem to render Sections 9(d), 12, and 13 of the Judiciary Act superfluous.[107] This is not a result to be favored when construing acts of Congress.[108] If construed as an assurance that the Judiciary Act would withstand constitutional scrutiny, however, the superfluity disappears.

The question calls for closer examination of the timing of the two congressional products. The Judiciary Act was first debated in the Senate, which passed the Act on July 17, 1789. The House began debate in August and passed the Act on September 17, 1789. The differences between the two bills were reconciled by a conference committee that met from September 17th through 21st and the new Judiciary Act became law when it was signed by President Washington on September 24, 1789. The Bill of Rights was first presented to the House by Madison on June 8, 1789 and debated in the House in August. The House adopted its version of the Seventh Amendment on August 24, 1789. The Senate debated the Bill of Rights from September 2nd through September 10th and then sent its version of the amendments to the House. A conference committee that met from September 10th through the 24th reconciled the differences.[109]

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[106]"Not only was the Judiciary Act a compromise, but its final form was closely tied up with, and largely dependent upon, the fate of the various Amendments to the Judiciary Article of the Constitution which were being debated in Congress during the debates over the Judiciary Act itself." Warren, *supra* note 102, at 54.

[107]"[T]he Seventh Amendment's guarantee of a civil jury trial was both responsive to the proposals to amend the Constitution and redundant of provisions in the Judiciary Act of 1789." WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789 at 21 (1990). Sections 9 and 12 of the Judiciary Act of 1789 were eventually repealed. 5 MOORE'S FEDERAL PRACTICE, *supra* note 3, ¶ 38.08, at 41 n.9.

[108]*See* Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991) ("But of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

[109]A more detailed chronology of each is as follows:

Judiciary Act

April 6-13, 1789:	Senate Committee organized to draft Judiciary Act. Warren, *supra* note 102, at 57.
June 12:	Bill reported to the Senate. *Id.* at 63.
June 22-July 17:	Senate debate on bill (including jury trial provisions). *Id.* at 65, 75, 96-97, 109.
July 17:	Senate passes bill. *Id.* at 109.
July 20:	Bill taken up by House but not acted upon. *Id.* at 111.

The House, debating the Judiciary Act as of September 10th, knew that the two houses of Congress were in agreement that the proposed Bill of Rights would guarantee a right to jury trial. Members of the House could not help but realize that the jury trial provisions of the Judiciary Act were superfluous. The same is true of the conference committee that met from September 17th to September 21st to reconcile differences in the two bills. Why did Congress not remove the extraneous provisions? Was the reason merely legislative inertia? This is possible, although it seems unlikely in light of Congress' preceding efforts to make the two documents consistent. It is at least as plausible (and more correct according the legal principles of statutory construction)[110] to believe that Congress simply thought that the Seventh Amendment was a clarification that it would be constitutional to pass the Judiciary Act, rather than a guarantee that would render portions of the Judiciary Act redundant.

August 24-31:	House debates bill and then suspends debate. The House took up debate on the bill immediately after it sent to the Senate the constitutional amendments it had just passed. *Id.* at 122-23. The House suspended debate in early September because changes to the amendments were under consideration by the Senate. *Id.* at 125.
September 8-14:	House committee considers bill. *Id.* at 130 n.177.
September 14-16:	House considers bill. *Id.*
September 17:	House passes bill. *Id.* at 130.
September 17-21:	Differences in House and Senate bills reconciled. *Id.* at 130-31.
September 24:	Bill signed by President. *Id.* at 131.
Bill of Rights	
June 8, 1789:	Draft constitutional amendments presented to House. *Id.* at 112.
July 21:	Amendments referred to select committee of House. *Id.* at 116.
August 13:	House select committee reports on amendments. *Id.* at 117.
August 14-24:	House debates amendments. *Id.* at 118.
August 21:	House adopts what became Seventh Amendment. Wolfram, *supra* note 15, at 729.
August 24:	House adopts amendments and sends them to Senate. Warren, *supra* note 102, at 120.
September 2-10:	Senate debates amendments. *Id.* at 125, 128.
September 7:	Senate adds twenty dollar floor to Seventh Amendment. Wolfram, *supra* note 15, at 730.
September 10:	Senate sends its version of the amendments to House. Warren, *supra* note 102, at 128.
September 10-24:	Conference committee reconciles different versions. *Id.* at 128-31. There were no differences regarding the words "In suits at common law, the right of trial by jury shall be preserved". The Senate added the twenty dollar floor. *See supra* note 48 and accompanying text.

[110] *See supra* note 108.

C. COUNTER-ARGUMENTS

1. FEARS OF AN OPPRESSIVE LEGISLATURE

It has been argued that the Framers would not have left definition of the jury trial right to the legislature because such an approach "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."[111] The Anti-Federalists feared that the legislature would pass oppressive laws and refuse to provide for jury trials in cases under them, so that there would be no jury to nullify their application.[112]

The problem with the argument that a constitutional guarantee of the jury trial right is needed to protect citizens from the legislature is that the Seventh Amendment does not, in fact, stymie Congress' ability to avoid jury nullification of what many would characterize as oppressive laws. For example, one of the pillars of the Anti-Federalist position was that the jury would be a safeguard against oppressive taxation.[113] This has not, however, been the case under the traditional interpretation of the Seventh Amendment. When the Internal Revenue Service assesses a deficiency against a taxpayer, the taxpayer can litigate in one of three forums: the Tax Court, a federal district court, or the Court of Claims.[114] If the taxpayer

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[111]Wolfram, *supra* note 15, at 664. Other reasons given in support of the civil jury trial were: protection of debtor defendants; overturning of the practices of courts of vice admiralty; vindication of the interests of private citizens in litigation with the government; and protection of litigants against overbearing and oppressive judges. *Id.* at 670-71. Each of these goals can be accomplished at least as well under the alternative interpretation of the Seventh Amendment as under the traditional interpretation. Because these goals do not involve frustration of legislative purposes, the Congress is not motivated to refuse to authorize jury trials to accomplish them.

[112]*Id.* at 664-65. The jury had the ability to disregard the law if it felt that application of the law would produce an unjust result. *Id.* at 671. Judges had no such power, but were bound to follow the law. *Id.*

The Federalist response was that decent men would be elected to the legislature. Alternatively, they contended that the legislature would find no advantage in eliminating the civil jury trial and so the right would be safe. If Congress did refuse to provide for civil jury trials, another argument went, the people would resist. *Id.* at 664-65, 665 n.69.

[113]THE FEDERALIST, *supra* note 28, at 499.

[114]*See* 26 I.R.C. §§ 6213, 7441, 7422 (1995) and 28 U.S.C.A §§ 1346(a)(1) (1988 & Supp. V 1993), 1402(a)(1) (1988), 1491 (1988 & Supp. V 1993).

chooses the Tax Court, she can litigate without first paying the assessment;[115] however, she must pay first and sue for a refund if she wishes to have her case tried by the district court or Court of Claims.[116] "Because the sue-now, pay-later option is confined to the Tax Court, the taxpayer's choice is often virtually predetermined by a shortage of cash or by a desire to use all available funds for business opportunities that cannot be postponed."[117] A jury trial, however, is not available in Tax Court.[118] Indeed, Hamilton recognized in Federalist No. 83 that a constitutional guarantee would not effectively prevent abusive taxation, although not for exactly this reason.[119]

Congress can bypass the jury trial guarantee in other ways. Under the traditional interpretation[120] of the Seventh Amendment, the jury trial right attaches only to suits at common law and not to suits in equity.[121] Congress can create new causes of action that will not be characterized as belonging to the common law, and therefore not requiring a jury, by passing statutes creating "public rights."[122] It can also authorize administrative proceedings to enforce those rights and to create judicial enforcement of administrative orders without providing for a jury.[123] While this exact line of legal reasoning might not have been foreseen in the 1700's, certainly it

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[115]26 I.R.C. § 6512 (1995).

[116]*Id.*

[117]BORIS BITTKER, 4 FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 115.1 (1981).

[118]*See* Swanson v. Commissioner, 65 T.C. 1180 (1976).

[119]THE FEDERALIST, *supra* note 28, at 499-501.

[120]*See, e.g.*, Chauffers, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990) ("[T]his Court has carefully preserved the right to trial by jury where legal rights are at stake."); *supra* note 3 and accompanying text; *supra* note 98.

[121]*See supra* notes 2-3 and accompanying text.

[122]*See* Redish & LaFave, *supra* note 11, at Part II (discussing the public rights exception to the jury trial requirement).

[123]*E.g.*, Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 449 (1977) ("Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred.").

should not have come as a surprise that Congress could create new equitable causes of action and that jury trials for them would not be mandated by the Constitution.

Another flaw appears in the argument that the Framers would not have left definition of the jury trial right up to the legislature for fear that it would be unduly narrowed. If the traditional interpretation of the Seventh Amendment is correct, the Framers did something the Anti-Federalists considered even more risky: they left it to the courts to define. As the opinions in the *Terry* case[124] show, the traditional interpretation of the Seventh Amendment leaves much room for judges, if they are so inclined, to reach results in accord with their own views on the benefits and detriments of using a jury in any particular case. The Anti-Federalists were even more suspicious of the tendency of the judiciary to corruption, bias, and overreaching than they were of the legislature. They felt that judges in lawsuits would be biased in favor of the executive or of wealthy private parties to litigation over the common people.[125] Some, but not all, of this suspicion arose out of the colonists' experiences with courts that the British had established in America.[126]

It is true that under the alternative interpretation of the Seventh Amendment, Congress would not be prevented from enacting oppressive legislation that could not be nullified by civil juries. However, the Supreme Court's interpretation of the Seventh Amendment also fails to prevent Congress from enacting un-checkable laws. The Federalists, in part, foresaw this inherent problem.[127] Thus, the fear of unwise legislation might not have been the predominant motivating factor in the minds of those who framed the Seventh Amendment (and who, as legislators themselves, may have been less than willing to concede the sort of congressional venality that

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[124]*See supra* Part III.A., notes 51-86 and accompanying text.

[125]*See* Henderson, supra note 19, at 328-33 (noting that English common law was predicated on judges' findings, not jury determinations, and that the colonists were adamant in their position that the British government provide the colonists with jury trials); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 595, 599-600 (1993) (reviewing the theories offered in support of a jury trial requirement in the Seventh Amendment); Alan Howard Scheiner, *Note, Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 150-53 (1991) (examining the Anti-Federalist position supporting jury trials as a means to protect all citizens in contrast to the judiciary's tendency to favor the rich).

[126]*See supra* note 125.

[127]THE FEDERALIST, *supra* note 27, at 496-97.

would lie at the heart of this concern). Moreover, the traditional interpretation of the Seventh Amendment necessarily implies that Congress decided that the courts would be more trustworthy than legislators to determine the precise scope of the right to jury trial, despite the fact that distrust of courts seems to have run more deeply than that of the legislature.

2. CONDITIONAL RATIFICATIONS OF THE CONSTITUTION BY STATES

In a dissenting opinion in *Galloway v. United States*,[128] Justice Black asserted that "[o]f the seven States which, in ratifying the Constitution, proposed amendments, six included proposals for the preservation of jury trial in civil cases."[129] The six the Justice listed were Massachusetts, New Hampshire, Virginia, New York, North Carolina, and Rhode Island.[130] According to Justice Black, this showed that "in response to widespread demands from the various State Constitutional Conventions, the first Congress adopted the Bill of Rights containing the . . . Seventh Amendment[], intended to save trial in . . . common law cases from legislative or judicial abridgment."[131] The fact that some of the state ratifying conventions proposed civil jury trials does not, however, necessarily imply that the intent of the Seventh Amendment was to provide a guarantee of civil jury trials rather than to establish that such trials were not abolished by the Constitution.

For purposes of determining the intent behind the Seventh Amendment, it is necessary to examine the proposals of only four of the six states mentioned in Justice Black's *Galloway* dissent. North Carolina and Rhode Island did not ratify the Constitution until after the Bill of Rights was

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[128]319 U.S. 372 (1943). *Galloway* concerned an action to recover insurance benefits from the United States government arising from a psychological disability allegedly caused by the petitioner's military service during World War I. *Id.* at 373-74. The Supreme Court affirmed the directed verdict against the plaintiff, holding: (1) that the evidence offered by the plaintiff to prove that his disability was a result of his service with the armed forces was insufficient; (2) the Seventh Amendment right to a jury trial for suits at common law did not apply because the suit sought to enforce a monetary claim against the federal government; and (3) the directed verdict did not deprive the petitioner of his Seventh Amendment jury trial right because he failed to meet the statutory burden of proving total and permanent disability. *Id.* at 386-96.

[129]319 U.S. at 399 n.3 (Black, J., dissenting).

[130]*Id.*

[131]*Id.* at 398 (Black, J., dissenting). The words deleted from the quote make reference to the Sixth Amendment and criminal cases.

submitted to the states by Congress.[132] If the first Congress felt obliged to adopt these proposals (or the essence of them) as a *quid pro quo* for these states' ratification of the Constitution, this would undercut the alternative interpretation of the Seventh Amendment.

The proposals of the four states were as follows:

> Massachusetts: "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."[133]
>
> Virginia: "That, in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and to remain sacred and inviolable."[134]
>
> New York: "That the trial by jury, in the extent 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."[135]
>
> New Hampshire: "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 one of them, request it."[136]

The proposals of Massachusetts, Virginia, and New Hampshire seem to fall into the category of jury trial "guarantees." The presence of admonitory, rather than mandatory, language in the New York proposal leaves the question open as to whether trial by jury is really a guarantee or simply a recognition that juries are worth having.

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[132]THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 41, at 19.

[133]THE ANTIFEDERALISTS 426 (Kenyon ed., 1966).

[134]*Id.* at 430. It is interesting to note that this proposal omits the precatory language ("ought") of the Virginia Constitution. *See supra* notes 40-42 and accompanying text.

[135]Wolfram, *supra* note 15, at 698.

[136]*Id.* at 701.

Apparently, the federal Congress was expected by many to prepare some sort of amendments to the Constitution. However, there was no formal commitment to do so, and the states did not indicate in their proposed amendments that their ratification of the Constitution was contingent on the passage of amendments. Instead, the deal offered by the Federalists has been characterized as "a gentlemen's agreement to work for amendments after ratification according to the procedures provided in the Constitution."[137] Moreover, the litany of proposed amendments was, for each state, quite extensive. No state could have expected that the Congress would definitely have adopted its particular list of proposals, given the differences among the states. Not all states felt compelled to propose amendments of any sort,[138] and, of those that did, not all addressed the civil jury trial. Accordingly, one cannot reasonably infer that Congress felt obliged, based on these state proposals, to present the states with a jury trial provision that fits the traditional, as opposed to the alternative, interpretation of the Seventh Amendment.

3. CONTEMPORANEOUS USAGE OF "PRESERVED"

One of the dangers of interpreting language over two centuries old is that the meaning of language evolves. Phrasing that was used to convey a particular concept in the 1780's may sound odd to the late twentieth century ear. Such may be the case with the word "preserved." A contemporary writer might be unlikely to use the term "preserved"[139] to effectuate the grant of a guaranteed right, particularly when the scope of the right granted — if the traditional interpretation is correct — is different from the right as it existed in most states prior to the grant. However, the framers of the Bill of Rights might have found the phrasing quite apt.

Take, for example, a speech given by James Wilson, a Pennsylvania Federalist, to a Philadelphia meeting on October 6, 1787. Wilson there refuted the claim that trial by jury was abolished in civil cases by attributing the absence of mention of it in the Constitution to the inability to set forth a general rule, particularly given the diversity of practice among the states.[140]

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[137]THE ANTIFEDERALISTS, *supra* note 133, at 421.

[138]*Supra* note 38.

[139]Webster's defines "preserve" as: "to keep from harm, damage, danger, evil . . . protect; save." WEBSTER'S NEW WORLD DICTIONARY 1141 (3d ed. 1994).

[140]III RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 101 (App. A, CXXV).

Wilson went on to say that "the oppression of the government is effectually barred by declaring that in all *criminal* cases, the trial by jury shall be *preserved.*"[141] Thus, the word "preserved" was used to describe the Constitution's Article III provision for jury trials in criminal cases, which is known to be a guarantee.

Wilson's statement does not mean that the word "preserved" in the Seventh Amendment must be read as a guarantee of the civil jury trial. The way he used the word in his speech does not mean that he intended exactly the same thing every other time he used the same word. Further, even if Wilson was perfectly consistent every time he used the word "preserved," that does not mean that all of the Founders meant exactly the same thing as Wilson did whey they used the same word. Wilson's use of "preserved" does, however, indicate that to read the word "preserved" as a guarantee of the jury trial right would not be unreasonable as a matter of semantics, odd as it may sound to modern lawyers.

IV. CONCLUSION

At the time of the framing of the Constitution and the Bill of Rights there was much disagreement, both between the Federalists and Anti-Federalists and within each faction, about the proper scope of the civil jury trial right and the proper instrument and words for expressing it. The Federalists believed that Congress could be trusted to set the scope of the jury trial right through legislation. The Anti-Federalists questioned whether this was truly what the Federalists wanted to accomplish and in any event disagreed with the approach. Without further documentation, it is difficult to determine to an absolute certainty which position prevailed.

Nevertheless, the alternative interpretation of the Seventh Amendment does provide the best explanation for the deviation from the language of other jury trial guarantees and for the apparent redundancy of the Seventh Amendment and parts of the Judiciary Act of 1789.[142] The alternative interpretation is supported by writings of the time, both on the Federalist and Anti-Federalist sides.[143] The alternative interpretation places the judgment as to when specific types of civil cases are best tried by juries in the hands of Congress. This interpretation not only accords with the expressed intentions of the Framers (demonstrated by contemporary writings), but also

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[141] *Id.* (emphasis added).

[142] *See supra* Part III.B., notes 87-110 and accompanying text.

[143] *See supra* Part II, notes 18-50 and accompanying text.

provides a far more workable standard for the courts to apply because they will no longer have to conduct an obscure historical investigation of law and equity as of 1791.