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Preserving the Civil Jury Right: Reconsidering the Scope of the Seventh Amendment

Joseph Czerwien

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— Note —

PRESERVING THE CIVIL JURY RIGHT:
RECONSIDERING THE SCOPE OF THE
SEVENTH AMENDMENT

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INTRODUCTION

The Seventh Amendment provides that “[i]n Suits at common law, . . . the right of trial by jury shall be preserved”¹ To determine whether the amendment provides a jury right, a court must examine the nature of the action and the remedy sought.² If the nature and remedy would historically have required a jury trial, then the amendment provides for a jury right.³ This so-called “historical test” requires a court to investigate eighteenth-century causes of

1. U.S. CONST. amend. VII.

2. *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (“First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.”).

3. *Id.*

action and procedure, but the federal courts have largely applied it without much difficulty.⁴

Despite this relatively straightforward test, many commentators have challenged the current historically rooted test. There is no consensus on what, exactly, is wrong with the test, nor is there agreement on what test should take its place. This Note argues that the Court's historical test is in keeping with the amendment's scope and purpose. The amendment was written to limit the government's power to remove cases from a jury, thus preserving civil parties' right to receive a jury trial. By requiring an inquiry into the eighteenth-century common law, the historical test does serve that purpose. The Court should reexamine the scope of the amendment, however, as there is some historical evidence to suggest that "suits at common law" means all suits which were not properly of equity or admiralty. Defining "suits at common law" in the negative, it follows that the original scope of the Seventh Amendment is broad enough to cover new types of actions, which have no historical analog in the eighteenth century.⁵ The Court has stated that new cases, dealing with "public rights," need not be heard by juries. This "public rights exception" is inconsistent with the amendment's purpose. This Note will examine the historical foundation for the amendment and propose a reworking of the Court's understanding for the Seventh Amendment and the public rights exception. This proposal will not remove the exception entirely but will provide a framework for courts to distinguish those cases where the Seventh Amendment does apply, regardless of forum. In those forums that currently lack a jury, this Note will advance some suggestions for maintaining efficient and effective adjudication.

I. THE CURRENT HISTORICAL TEST

A. *The Supreme Court's Interpretation of the Seventh Amendment*

The central difficulty surrounding the amendment has been determining what civil jury right is "preserved."⁶ Some have suggested

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4. See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707–09 (1999) (analogizing a suit under 42 U.S.C. § 1983 to an eighteenth-century suit in tort); *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 66–67 (2d Cir. 2006) (determining, in one paragraph, that the Seventh Amendment does not cover the remedy sought).
 5. See *Parsons v. Bedford et al.*, 28 U.S. (3 Pet.) 433, 447 (1830) ("In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.").
 6. See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 166 (1973) (Marshall, J., dissenting) ("Some 30 years ago, Mr. Justice Black warned his Brethren against the 'gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh

that the amendment's language refers to the court practices of the states.⁷ Such an interpretation would be unduly complex and lead to numerous difficulties. The amendment requires some level of historical analysis, but the amount required has been the subject of debate for decades. Even some members of the Supreme Court have noted that too rigid a historical approach "may seem to reek unduly of the study, 'if not of the museum.'"⁸

The word "preserved" has been generally considered to refer to the common law of England. In *United States v. Wonson*,⁹ Justice Story, then riding circuit, took up the issue. That case reached the court on appeal, but the appellant conceded that the trial court had not made any reversible errors.¹⁰ Rather than challenge an error below, the appellant sought a new trial by jury at the circuit court level.¹¹ *Wonson*, then, implicated the Seventh Amendment's guarantee that "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."¹² Story concluded that the amendment did not refer to "the common law of any individual state, (for it probably differs in all)" but to "the common law of England, the grand reservoir of all our jurisprudence."¹³ By this interpretation, the right to a jury trial existed in those cases where an English court would have impaneled a jury. Thus, the meaning of the word "preserved" in the amendment was explained, and the right was preserved as it had been in England.

Amendment.' Today, the erosion process reaches bedrock." (quoting *Galloway v. United States*, 319 U.S. 372, 397 (1943) (Black, J. dissenting)); see also Joan E. Schaffner, *The Seventh Amendment Right to Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away*, 31 U. BALT. L. REV. 225, 228 (2002) ("In its analysis of Seventh Amendment jurisprudence, the Court . . . carefully 'preserves' the basic right to jury over the cause of action. However, at the same time, the Court denigrates that right by finding few incidents of the jury right fundamental to the essence of the trial by jury . . .").

7. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 732-34 (1973) (discussing the interpretation that a federal court looks to the state in which it sits for guidance on the scope of the civil jury right).
8. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 232 (2002) (Ginsburg, J., dissenting) (citations omitted) (quoting *Damsky v. Zavatt*, 289 F.2d 46 (2nd Cir. 1961)).
9. 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750) (Story, Circuit Justice).
10. *Id.* at 747.
11. *Id.*
12. U.S. CONST. amend. VII.
13. *Wonson*, 28 F. Cas. at 750.

The Supreme Court defined the scope of the right eighteen years later in *Parsons v. Bedford, Breedlove, & Robeson*.¹⁴ Once again, Justice Story took up the task of interpreting the amendment. Suits at common law, he explained, meant those suits that were distinguishable from suits in equity or admiralty.¹⁵ Suits at common law involved “legal rights,” in distinction from suits over “equitable rights alone.”¹⁶ Thus, the Court set the bounds of the Seventh Amendment—the civil jury right is implicated when a *legal* right is at issue. In *Wonson* and *Breedlove*, Story determined what would eventually become the Court’s “historical test” for Seventh Amendment jurisprudence. A court considers the nature of a case and the remedy sought; if the nature and remedy have analogs in eighteenth-century common law jurisprudence, a court will generally follow the procedure of the eighteenth-century court. The remedy is the more important element of the test.¹⁷

The Court has followed this test into the present day, providing additional guidance along the way. For example, the Court has cautioned that legal claims should only rarely be subordinate to equitable claims.¹⁸ This would, as the Court noted, mean that it is uncommon for equitable issues to preclude a jury trial on any legal rights.¹⁹ Thus, a case involving both legal and equitable claims will often require a jury trial.

Additionally, the Court has held that the right to a jury trial extends to new causes of action beyond those found in eighteenth-century English courts. For example, in *Curtis v. Loether*,²⁰ the Court considered whether a suit under the Civil Rights Act of 1968 implicated the right to a jury trial. That case involved a statutory right with no clear historical analog in eighteenth-century common law. Quoting the court of appeals with approval, the Court stated that “we have considered the applicability of the constitutional right to jury trial in actions enforcing statutory rights ‘as a matter too

14. 28 U.S. (3 Pet.) 433 (1830).

15. *Id.* at 446–47.

16. *Id.* at 447.

17. *See, e.g.*, *Tull v. United States*, 481 U.S. 412, 421 (1987).

18. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510–11 (1959) (“[A] long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.”).

19. *Id.* at 510–11.

20. 415 U.S. 189 (1974).

obvious to be doubted.”²¹ The Court also reaffirmed the distinction of *Parsons*—that the phrase “suits at common law” was meant to “embrace all suits which are not of equity and admiralty jurisdiction”²²

The Court has recognized that the Seventh Amendment did not freeze the jury right as it existed in 1791. The test relies on historical analogies to determine when the amendment applies, rather than requiring strict historical parallels.²³ The Court follows a two-part test to determine whether a case involves a suit at common law. A court is to consider (1) whether there is a historically analogous cause of action in eighteenth-century English common law, and (2) whether the remedy sought is legal or equitable.²⁴ For this analysis, the remedy prong is more important than the historical analogy.²⁵

Even when a case implicates the right to a jury trial, the Court has recognized exceptions for procedural issues. If the case involves a suit at common law, a court next determines whether the substance of the right requires a jury trial on the particular issue.²⁶ A judge may determine a question of law,²⁷ or a procedural issue,²⁸ without implicating the right to a civil jury trial. The Court has suggested that the

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21. *Id.* at 193 (quoting *Rogers v. Loether*, 467 F.2d 1110, 1114 (7th Cir. 1972)).
 22. *Id.* at 192–93 (quoting *Parsons v. Bedford, Breedlove, & Robeson*, 28 U.S. (3 Pet.) 433, 447 (1830)) (internal quotation marks omitted).
 23. *See, e.g., id.* at 193 (“Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time.”).
 24. *See Tull v. United States*, 481 U.S. 412, 417–18 (1987) (“First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. . . . Second, we examine the remedy sought and determine whether it is legal or equitable in nature.”).
 25. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).
 26. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (“If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.”).
 27. *See, e.g., id.* at 388–90 (holding that because patent construction would be better settled by judges than juries, it will be treated as an issue of law rather than fact).
 28. *See, e.g., Galloway v. United States*, 319 U.S. 372, 392 (1943) (holding that the Seventh Amendment “was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details”).

practical limitations of juries were a consideration, but it has not explicitly included this in its analysis.²⁹

The Court has recognized an exception for public rights.³⁰ When Congress creates a public right by statute, it may delegate the adjudication of a claim involving that right to a forum not governed by Article III.³¹ Congress, then, has the discretion to create a new forum and to determine whether a jury is required.³² This exception is invoked in numerous cases, including bankruptcy proceedings and administrative actions.³³

While the public rights exception is consistent with the boundaries of Article III, it is inconsistent with the purpose of the Seventh Amendment. Commentators have proposed solutions to the interpretive inconsistencies—from the strictly historical³⁴ to the practical.³⁵ This Note argues that the right to a civil jury does apply in those cases heard in non–Article III courts. This understanding has a significant impact on the public rights exception.

In the centuries since *Wonson*, courts have treated the Seventh Amendment as preserving the civil jury in those cases where it would

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29. *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970) (“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.”).
 30. A public right is a statutory cause of action arising from and closely related to a federal regulatory scheme. *See Granfinanciera*, 492 U.S. at 54–55.
 31. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 449–50 (1977) (holding that in public-rights cases, Congress may delegate “the factfinding function . . . to an administrative forum with which the jury would be incompatible.”).
 32. *See id.*
 33. *See generally* Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765 (1986) (discussing the public rights exception in non–Article III courts).
 34. *See* JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 15 (2006) (“The Seventh Amendment historical test has become an American legal fiction in application, since many more things were lodged with juries in England in 1791 than modern American courts”); *see also* Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 489 (1975) (“[B]ecause jury trial is inefficient, we should employ a strictly historical test.”).
 35. *See* Joseph A. Miron Jr., Note, *The Constitutionality of a Complexity Exception to the Seventh Amendment*, 73 CHI.-KENT L. REV. 865 (1998) (arguing that a complexity exception is consistent with the Seventh Amendment’s historical test).

have been granted under English common law. This approach does have some advantages. First, the states were not uniform in their legal regimes. Second, many more treatises deal with English common law of that time period and lastly England had a longer record of trial practice for courts to examine.

There are, however, some important differences between the English common law right and the colonial American understanding of the right to a jury trial in civil cases. While this Note does not argue that the term “suits at common law” requires a federal court to follow specific state procedure, this Note does contend that the amendment refers to a broader understanding of the common law right to a jury trial in civil cases. This distinction can be seen by comparing historical English practice with the courts of the early American republic.

B. English Courts, American Courts, and the Civil Jury

The English courts’ relationship with civil juries is a long one, though hardly consistent. The use of juries emerged in the early English courts.³⁶ Yet, the English court system was complex. Only courts of common law could impanel juries; courts of equity and local “courts of conscience” operated without juries.³⁷

These court systems did interact at times. Edward Coke noted that the chancery court, in some circumstances, must return cases to a common law court for trial by jury on the issues.³⁸ Some cases were appropriately heard only in courts of common law, when those courts alone could grant an adequate remedy. Thus, law and equity had some overlap, although they were largely treated as separate systems.

William Blackstone remarked that there was significant overlap between the courts of common law and equity.³⁹ Fraud, accident, and trust actions could properly be brought in a court of equity, but many of those same cases could also be brought in a court of common law.⁴⁰

36. See OLDHAM, *supra* note 34, at 3 (noting that the “modern model of trial by jury” developed in England in the sixteenth century).

37. JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 459–62 (2009) (quoting Conor Hanly, *The Decline of Civil Jury Trial in Nineteenth-Century England*, 26 J. LEGAL HIST. 253, 260 (2005)).

38. EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS 79 (1809).

39. 3 WILLIAM BLACKSTONE, COMMENTARIES *429–30 (1803) (“Whereas every definition or illustration to be met with, which now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to a certain degree.”).

40. See *id.* at *431–32.

The essential difference between the two courts was procedural.⁴¹ Thus, a case could potentially be brought in either court, so long as the plaintiff was able to convince the judge that the forum was appropriate.

The jurisdiction of English courts of equity had gradually expanded over time.⁴² Blackstone noted with approval how courts of equity had expanded beyond hearing “rare and extraordinary matters.”⁴³ Still, plaintiffs in a court of equity were required to at least state that they were without relief in a court of common law.⁴⁴ And in the court of chancery, any factual issues to be resolved were sent to the Court of the King’s Bench for a jury trial.⁴⁵ While it would be several decades before the civil jury trial fell out of favor,⁴⁶ many English courts were designed and expected to function without juries.

Even when English courts used a jury, the jury had a limited role. For example, jury nullification was not generally favored in England’s courts. Although commentators like Blackstone praised the jury system,⁴⁷ jurors who acted on their own accord could find themselves in trouble with the judges presiding over the cases. One seventeenth-century jury was fined and imprisoned for failing to change its verdict

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41. *Id.* at *436 (“[The difference] principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief.”).
 42. *Id.* at *437 (“[F]or want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account.”).
 43. *Id.* at *440 (quoting William Lambard) (internal quotation marks omitted).
 44. *Id.* at *442 (noting that plaintiffs in equity must demonstrate that they were “wholly without remedy at the common law”).
 45. *Id.* at *452 (“[A]s no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of king’s bench.”).
 46. *See* LANGBEIN ET AL., *supra* note 37, at 461 (“By the end of the 1840s and across the 1850s . . . hostility toward the civil jury trial became a recurring theme in the legal journals.”).
 47. *See* BLACKSTONE, *supra* note 39, at *379 (“Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law.”).

after the court ordered it to reconsider.⁴⁸ Although it was not the norm, this was hardly a unique experience.⁴⁹

Story's observation that England is "the grand reservoir of all our jurisprudence"⁵⁰ is, no doubt, correct. The federal court system, like the state court systems, derived much of its procedure and law from the English common law. There is reason to believe, however, that the attitudes toward civil juries were different in the early United States. At the time, the common law was not considered an inherited legal tradition from England but a "form of universal natural law."⁵¹ Those who believed that the "common law was derived from the law of nature and of revelation"⁵² would not have hesitated to break from English tradition when they believed that the English court system was incorrect.

The distinction between the two views first arose in the decades before the Revolution. In the states, the right to a jury trial was considered one of the natural rights of all people. It was no accident that the right to a jury appears in "a conspicuous place" in many early state constitutions and declarations.⁵³ By the time the Bill of Rights was written, American jurisprudence had developed an enlarged view of the role of jurors in the court system. It is that view that was "preserved" in the Seventh Amendment.

Some of the first grievances about civil jury trials came with the Sugar Act of 1764,⁵⁴ the Stamp Act of 1765,⁵⁵ and the Townshend

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48. See JOHN PROFFATT, A TREATISE ON TRIAL BY JURY, INCLUDING QUESTIONS OF LAW AND FACT 56 (1877). The fines and charges were subsequently overruled, but this was not an isolated case of punishing jurors. See *id.* at 55–57 (detailing other cases in which the jury was intimidated to change its verdict).
 49. See LANGBEIN ET AL., *supra* note 37, at 419–39 (detailing English courts' attempts to sway jury verdicts and, if all else failed, punishment of the jury).
 50. *United States v. Wonson*, 28 F. Cas. 745, 750 (Story, Circuit Justice, C.C.D. Mass. 1812) (No. 16,750).
 51. Calvin Woodard, *Is the United States a Common Law Country?*, in *ESSAYS ON ENGLISH LAW AND THE AMERICAN EXPERIENCE* 120, 127 (Elisabeth A. Cawthon & David E. Narrett eds., 1994).
 52. JESSE ROOT, *REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT OF ERRORS FROM JULY, A.D. 1789 TO JUNE, A.D. 1793*, at iv (1798). Root goes on to state that "[w]e need only compare the laws of England with the laws of Connecticut, to be at once convinced of the difference which pervades their whole system. This is manifest in . . . the forms of civil processes, and the mode of trial, the appointing and returning jurors." *Id.* at viii.
 53. PROFFATT, *supra* note 48, at 121.
 54. 4 Geo. 3, c. 15 (1764), *reprinted in* PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 4–8 (Edmund S. Morgan ed., 1959).

Acts of 1767.⁵⁶ These acts expanded the jurisdiction of admiralty courts, which had no juries.⁵⁷ This prompted action by the colonists. Nine of the thirteen colonies formed the Stamp Act Congress, which declared that “by extending the jurisdiction of the courts of admiralty beyond its ancient limits, [the acts] have a manifest tendency to subvert the rights and liberties of the colonists.”⁵⁸ The Pennsylvania Assembly separately noted that “Authority in the Courts of Admiralty to decide in Suits relating to the Stamp Duty” did violence to “one of their most darling and acknowledged Rights, that of Trial by Juries.”⁵⁹

The colonists reacted strongly because they saw juries as an important factor in a more representative government. John Adams noted that principles of popular government meant that a jury had as much a final say on the law as a judge.⁶⁰ This frustrated the colonial governors, who found that the jurors often disapproved of the laws and voted accordingly.⁶¹ But the idea that juries could change or ignore the law, regardless of the judge’s opinion, was an important part of the early American notion of justice.

A decade after the Sugar and Stamp Acts, the states began drafting their own constitutions. The right to a civil jury was an important feature in many. Georgia’s constitution provided that “[t]he jury shall be judges of law, as well as of fact.”⁶² Pennsylvania provided for the right to a jury trial “in controversies respecting property, and in suits between man and man.”⁶³ Massachusetts provided for a jury trial in all cases except for those where a jury had

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55. 5 Geo. 3, c. 12 (1765), *reprinted in* PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 35–43 (Edmund S. Morgan ed., 1959).
56. 7 Geo. 3, c. 41, 46 (1767).
57. LANGBEIN ET AL., *supra* note 37, at 483.
58. *Id.*
59. Pa. Assemb., Resolves on the Stamp Act § 8 (1765), *reprinted in* PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764–1766, at 51–52 (Edmund S. Morgan ed., 1959).
60. *See* LANGBEIN ET AL., *supra* note 37, at 483–84 (quoting Adams as supporting juries having “as complete a control” over the law as judges).
61. *Id.* at 480–82 (discussing *Erving v. Cradock*, a case in which the jury explicitly ignored the judge’s instructions to enter a verdict for the defendant).
62. GA. CONST. of 1778, art. XLI.
63. PA. CONST. of 1776, art. XI (“[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.”).

not been previously used.⁶⁴ By contrast, New York required a jury only in “cases in which it hath heretofore been used.”⁶⁵ Thus, Massachusetts’s constitution restricted the type of juryless cases, whereas New York’s constitution prevented the expansion of the right to a civil jury. This meant that the states would inevitably vary in their treatment of those cases in the middle ground—new types of cases that had not been previously litigated in the states. All the same, even those states that continued to mirror the English court system noted in their constitutions that the jury trial was an important right.⁶⁶

It follows that the early state court systems varied widely. In some states, all cases were tried by jury;⁶⁷ others followed the English model.⁶⁸ Even in those states that had juryless equity proceedings, some historians have suggested that actions in equity were still very limited.⁶⁹ This contrasts with England, where cases in courts of equity were becoming more common. As one scholar has noted, the American legal system was a mix of English common law and “indigenous colonial product.”⁷⁰

Records from the Constitution’s drafting reveal that the civil jury trial was not one of the prominent issues discussed at the convention.⁷¹ When the delegates did discuss civil jury trials, one delegate pointed out the obvious difficulty: “The jury cases cannot be specified.”⁷² Others noted that it was “not possible”⁷³ to separate

64. See MASS. CONST. art. XV (“In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have a right to trial by jury . . .”).

65. N.Y. CONST. of 1777, art. XLI.

66. See, e.g., N.C. CONST. of 1837, sec. 14 (“[I]n all controversies at law, respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.”).

67. See SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW* 48–49 (1990) (discussing Rhode Island, Connecticut, and New York as states where juries decided both law and fact).

68. See, e.g., THE FEDERALIST NO. 83, at 423–24 (Alexander Hamilton) (noting the numerous differences in trial practice among the states).

69. See William E. Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904 (1978) (“[E]quitable actions . . . were nonexistent in some colonies and narrowly limited in the rest . . .”).

70. Stimson, *supra* note 67, at 56.

71. Wolfram, *supra* note 7, at 658–60 (quoting the Records of the Constitutional Convention).

72. *Id.* at 659.

equity cases from common law cases and that the practices of the states' courts were different.⁷⁴ This limited record might appear to suggest that the civil jury right was not considered fundamental. The context in which it was discussed, however, is revealing. In an attempt to ensure constitutional recognition of the civil jury right, Elbridge Gerry of Massachusetts moved to add a bill of rights.⁷⁵ Rather than the right to freedom of speech, it was the lack of a civil jury right that prompted the first discussions to amend the Constitution. This shows just how important the civil jury right was to the drafters. Unsurprising, however, were the protests of the other members of the delegation that it would be too difficult to draft appropriate language to protect the civil jury right.⁷⁶

Of course, Gerry's proposal failed, and the Constitution initially lacked a bill of rights. Absent stronger protections of rights, it faced criticism from Antifederalists. A significant portion of this criticism was directed at the lack of protection for civil jury trials.⁷⁷ This critique prompted a response from Alexander Hamilton in *Federalist Paper No. 83*.⁷⁸ There, Hamilton remarked that the states had highly divergent views on the civil jury right, making it difficult to craft a satisfactory amendment.⁷⁹ But, ultimately, the Antifederalist desire for juries "to guard against unwise legislation" and protection against "non-jury proceedings" carried the day.⁸⁰

Once again, the debate over what language would be sufficient to protect the civil jury right arose. James Madison proposed a version of what is now the Seventh Amendment that contained only a provi-

73. *Id.*

74. *Id.* at 660.

75. *Id.* at 657 ("It is . . . 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.").

76. *Id.* at 659–60.

77. See *THE FEDERALIST NO. 83*, *supra* note 68, at 418 (Alexander Hamilton) ("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.").

78. *Id.*

79. *Id.* at 424–25.

80. Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 *GEO. WASH. L. REV.* 183, 186 (2000).

sion preventing reexamination of facts determined by a jury.⁸¹ That version did not gain much traction, however, as it failed to address the complaint that the federal courts would operate without juries in civil cases. The House of Representatives eventually passed seventeen amendments, one of which read as follows: “In suits at common law, the right of trial by Jury shall be preserved.”⁸² The Senate pared down the list of amendments and added the amount-in-controversy requirement to the civil jury right.⁸³ It was the Senate’s version that was submitted to, and approved by, the states.

Given the pressure to include a bill of rights with a civil jury provision, it is no surprise that the Judiciary Act of 1789 had a broad provision for the right to a jury. The First Congress was drafting the Judiciary Act and Bill of Rights simultaneously, and the Act came into effect just days before the Bill of Rights passed through Congress.⁸⁴ During the debate over the act, vocal opponents of the equity courts “describe[d] the evils of the chancery system in England.”⁸⁵ The Act required trial by jury in all circuit court cases “except those of equity, and of admiralty, and maritime jurisdiction.”⁸⁶

Applying this definition to the Seventh Amendment, it seems possible that the phrase “suits at common law” means those cases which are not suits of equity, admiralty, or maritime jurisdiction. This approach would be similar to the approach, noted above, in the Constitution of Massachusetts which restricted civil trials without a jury based on prior practice. Such an interpretation is consistent with the demonstrated importance of the civil jury right to the drafters, especially the vocal Antifederalists. This interpretation would, in effect, require a jury in all civil cases except those that had previously proceeded without juries. The implications of this interpretation will be explored below.

81. RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* 267 (2006) (containing Madison’s proposed amendments to the Constitution in Appendix I).

82. *Id.* at 274.

83. *Id.* at 276.

84. The Judiciary Act was signed into law on Sept. 24, 1789. Congress passed the final version of the Bill of Rights one day later, on Sept. 25, 1789.

85. WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 176–77 (1990) (describing the debate in Congress over the scope of equitable jurisdiction).

86. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 80 (1789). Section 9 of that act also provided that, in the district courts, all issues of fact would be determined by jury except in admiralty and maritime cases.

II. THE LIMITATIONS OF THE CURRENT APPLICATION OF THE HISTORICAL TEST

A. *Reconciling the Historical Record with the Historical Test*

As currently applied, the historical test requires some adjustment. A court faced with a Seventh Amendment issue looks to the nature of the action and the remedy sought.⁸⁷ Of those two factors, the remedy sought is the more important.⁸⁸ The right does apply to statutory actions created by Congress,⁸⁹ but the Supreme Court has recognized an explicit exception for those cases where “public rights” are at issue.⁹⁰ These public rights are created when Congress exercises its Article I powers.⁹¹ If Congress puts these cases in federal court, the Seventh Amendment guarantees a civil jury.⁹² But Congress may move these cases to a non–Article III forum, which does not use a jury.⁹³

One concern about the application of the test is its focus on both the nature of the case and the remedy. At least one commentator has proposed that the test focuses exclusively on the remedy sought.⁹⁴ In

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87. *See, e.g.*, *Chauffeurs, Teamsters, & Helpers v. Terry*, 494 U.S. 558, 565 (1990) (“[W]e examine both the nature of the issues involved and the remedy sought.”).
88. *Id.* (“The second inquiry is the more important in our analysis.”).
89. *See, e.g.*, *Tull v. United States*, 481 U.S. 412, 417 (1987) (“This analysis applies not only to common-law forms of action, but also to causes of action created by congressional enactment.”).
90. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 455 (1977).
91. *Id.* at 452 (“Familiar illustrations of *administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.*”).
92. *Id.* at 455 (stating that when Congress chooses to place a case in federal court rather than in an administrative agency, “it must preserve to parties their right to a jury trial”).
93. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (“If . . . a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder.”).
94. Suja A. Thomas, *A Limitation on Congress: “In Suits at Common Law,”* 71 OHIO ST. L.J. 1071, 1071 (2010) (“This two-prong examination has occurred despite the fact that whether a jury heard a claim in England in 1791 was based, with very few exceptions, only on the second prong—the relief sought, with damages being heard by juries. . . . The inquiry as to whether a jury trial right exists under the Seventh Amendment should be based only on the relief sought . . .”).

practice, the Court has focused more of the analysis on the remedy sought, likely because there is a clearer line between those remedies available at common law and those in equity.⁹⁵ But as the Court has noted, some remedies are not exclusively equitable or legal, requiring a renewed focus on the nature of the case.⁹⁶ In cases involving restitution, both a legal and equitable remedy, the “more important” prong is essentially made redundant.

Additionally, there is the crucial question of exactly what historical record a court should investigate. The Supreme Court has stated that the historical record is English common law as it existed in 1791, when the Bill of Rights was ratified. Even assuming that the amendment meant to refer only to the common law of England, there is some doubt about the scope of the jury right in that system.⁹⁷ The nature of a common law system is that of continual, albeit slow, change, and recent historical scholarship has suggested that American courts have not accurately followed the English common law system.⁹⁸

Further, there is some reason to doubt that the Seventh Amendment was meant to reflect only the historical practices of England. As Professor Wolfram noted, there is some evidence to suggest that the amendment was intended to model the federal courts after the states in which they sat.⁹⁹ But that interpretation would carry great difficulty, as it would allow for forum shopping.¹⁰⁰ Indeed, had that been the original meaning of the amendment, there would likely have been even stronger Antifederalist arguments against it.¹⁰¹

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95. *Cf.* *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002) (“Rarely will there be need for any more ‘antiquarian inquiry,’ . . . than consulting, as we have done, standard current works such as *Dobbs*, *Palmer*, *Corbin*, and the *Restatements*, which make the [distinction between equitable and legal remedies] clear.” (citation omitted)).
96. *Id.* at 214–15 (noting that restitution was available both at law and in equity).
97. *See* OLDHAM, *supra* note 34, at 15 (suggesting that the right to a civil jury trial was broader in English courts than American courts have suggested).
98. *Id.* (“The Seventh Amendment historical test has become an American legal fiction in application, since many more things were lodged with juries in England in 1791 than modern American courts . . . are prepared to acknowledge.”).
99. Wolfram, *supra* note 7, at 732–34 (discussing the interpretation that a federal court looks to the state in which it sits for guidance on the scope of the civil jury right).
100. *See id.* at 733–34 (discussing the difficulties of implementing this test).
101. *Cf.* LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 228–29 (1999) (noting that objections to the lack of an explicit guarantee of a civil jury right included fears that “the federal courts would ‘supersede the state courts’”).

It is unlikely that an amendment that allowed for inconsistency between federal courts in the states would have passed.

Another suggested reading is that the right should be applied consistently, but only to the extent provided in the most narrowly interpreting state at the amendment's adoption.¹⁰² The wide variation in state jury rights cuts against this argument; it is unlikely that citizens of Pennsylvania, where the right was quite broad, would have agreed to narrow their federal rights to the level of a state like New York, which generally followed English practice.¹⁰³

The historical record reveals that the Seventh Amendment does incorporate, at least to some extent, the experiences of the early American courts.¹⁰⁴ Through these experiences as colonies and early states, the American court system had developed a stronger preference for jury trials than English law. The question is this: to what extent do the disparate states' practices affect the analysis? Simply put, there are inherent difficulties in a right that would vary in each state. Taking a more global view of the civil jury right as it existed in 1791 offers the advantage of avoiding the specific idiosyncrasies of each state. This broader view requires looking at the historical experiences of the American states collectively. Colonists had objected to laws removing cases to equity and admiralty courts, which operated without juries. And where England sought to subject jurors to control by judges, American colonists pushed back by encouraging juror participation and nullification as an important feature of democratic society. The civil jury right was considered so essential that its exclusion at the Constitutional Convention prompted the first proposal to add a bill of rights.

In light of these experiences, the phrase "suits at common law" was meant to denote those suits not in admiralty, equity, or some other specialized type of proceeding. Rather than freeze the right to a jury trial only in those cases where a jury would have been impaneled, the amendment instead limits the expansion of equity and admiralty jurisdiction in order to protect against encroachment on the civil jury right.¹⁰⁵

102. See Kenneth S. Klein, *Is Ashcroft v. Iqbal the Death (Finally) of the "Historical Test" for Interpreting the Seventh Amendment?*, 88 NEB. L. REV. 467, 487 (2010) ("[T]he point of reference would be the sphere of responsibility of the chancery courts in the broadest of the then-existing state systems.").

103. Compare PA. CONST. of 1776, art. XI (requiring jury trial in all civil cases), with N.Y. CONST. of 1777, art. XLI (following English practice).

104. See Wolfram, *supra* note 7, at 734 ("[T]he geographical element of the historical test—the reference to England—is relatively unimportant and can be disregarded.").

105. The Supreme Court has recognized that the Seventh Amendment applies to causes of action created by Congress as well as traditional

Taking the view that the Seventh Amendment was meant to limit civil cases without juries, the public rights exception becomes difficult to maintain, at least as it is currently formulated. If the amendment requires civil juries in new forms of action, on what grounds is the public rights exception founded? A review of the exception's development is useful for purposes of this analysis.

B. The Public Rights Exception's Development

The exception allowing Congress to place certain cases in non-judicial forums that did not use juries was first recognized in 1855, in the case of *Murray's Lessee*.¹⁰⁶ In that case, the plaintiff and defendant claimed title to the same land. The defendant had purchased the land after the Treasury Department placed liens on the land to collect money owed by a former customs director.¹⁰⁷ The crucial issue was the validity of the lien placed on the property by the Treasury Department. The plaintiff claimed that the property owner could not be denied his right to his property without the intervention of the judiciary. The Court found that, while Article III did require suits to be handled by the judicial branch, "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them . . . but which congress may or may not bring within the cognizance of the courts of the United States . . ." ¹⁰⁸ The Court did not elaborate on the precise definition of a public right but did give an example: the recognition of property rights in ceded territories.¹⁰⁹ The Court did not consider whether the Seventh Amendment had any effect on the analysis; rather, the Court spent the majority of the opinion discussing Article III and the Due Process Clause.¹¹⁰

The public rights exception expanded in the 1930s, with *Crowell v. Benson*.¹¹¹ This expansion was a reaction to the growing use of

common-law causes of action. *See, e.g.*, *Tull v. United States*, 481 U.S. 412, 417 (1987). The development of the public rights exception has restricted this idea from reaching its ultimate end. *See infra* Part II.B.

106. *Murray's Lessee et al. v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855).

107. *Id.* at 274.

108. *Id.* at 284.

109. *Id.*

110. *Id.* at 276–86. The Court did mention the Seventh Amendment in passing, but the bulk of the opinion deals with whether a judicial process is required for "due process of law" in this instance. The Court ultimately determined that it did not. *Id.* at 280–81.

111. 285 U.S. 22 (1932) (holding that because the claims are governed by maritime law and within admiralty jurisdiction, the Seventh Amendment does not require a trial by jury).

administrative agencies to carry out government functions.¹¹² Congress had begun to create agencies that operated with additional autonomy and expertise in promulgating regulations and deciding important issues. Congress granted these agencies the power to find facts and settle some disputes. Although contemporary commentators agreed that these agencies were constitutional, it was unclear to what extent Article III and the Seventh Amendment right to a civil jury applied to agency proceedings.¹¹³

Although it was a maritime case, *Crowell* set the stage for later judicial consideration of the public rights exception and administrative agencies.¹¹⁴ In that case, the law at issue suggested that the factual findings of the deputy commissioner would be considered final.¹¹⁵ The Court held that administrative findings within the agency's "proper sphere" would be final, with district courts able to review only those factual findings outside the scope of expertise of the agency.¹¹⁶ The Court noted that the legislative intent had been "to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact" properly suited for examination by experts.¹¹⁷ The Court had taken the first, but by no means the last, step of deferring findings of fact to administrative agencies.

Several years later, the Court explicitly recognized an exception for administrative proceedings in *NLRB v. Jones & Laughlin Steel Corp.*¹¹⁸ The case centered on an NLRB finding that a corporation had violated the National Labor Relations Act of 1935¹¹⁹ by discriminating against union members.¹²⁰ The corporation challenged the Board's ruling, in part, by arguing that the Act violated Article III

112. See, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671–76 (1975) (describing the growth of administrative law alongside regulation of railroads and other industries since the turn of the century).

113. See generally CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW (Felix Frankfurter & J. Forrester Davison eds., 1932) (surveying the early development of administrative law and providing for its constitutionality).

114. See Young, *supra* note 33, at 779 ("What survives of *Crowell* . . . is its conclusion that non-Article III tribunals can be used extensively by Congress to finally determine most facts . . .").

115. *Crowell*, 285 U.S. at 46.

116. *Id.* at 64–65.

117. *Id.* at 46.

118. 301 U.S. 1 (1937).

119. Ch. 372, 49 Stat. 449 (1935).

120. 301 U.S. at 22.

and the Seventh Amendment. The Court found that a statutory cause of action was not in the nature of a suit at common law, and thus there was no right to a civil jury.¹²¹ On those grounds, the Court held that the amendment did not apply, and the finding by the Board was constitutional.

Where *Crowell* dealt with the scope of Article III, *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*¹²² similarly “lowered the . . . seventh amendment barrier . . . as to the permissibility of agency adjudication under article III.”¹²³ In *Atlas Roofing*, the Court took up the issue of whether Congress could require enforcement of statutory causes of action in administrative proceedings “where there is no jury trial.”¹²⁴ The Court found that when Congress created “new statutory ‘public rights,’” it could permissibly create quasi-adjudicative administrative agencies that did not use juries.¹²⁵ Again, the Court noted policy considerations, stating that “Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation.”¹²⁶

The Court has not set a firm boundary for the public rights exception, however, and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,¹²⁷ a bankruptcy proceeding, revealed a split in the Court. The plurality opinion declined to define a public right but noted that it “must at a minimum arise ‘between the government and others.’”¹²⁸ The four Justices who signed onto the plurality opinion also said, however, that the public rights exception was historically based on the distinction between judicial matters and those that the Executive and Legislative branches could resolve

121. *Id.* at 48–49. Note that this justification was not accepted in later Court opinions. See *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (“[W]e have considered the applicability of the constitutional right to jury trial in actions enforcing statutory rights ‘as a matter too obvious to be doubted.’” (quoting *Rogers v. Loether*, 467 F.2d 1110, 1114 (7th Cir. 1972))).

122. 430 U.S. 442 (1977).

123. Young, *supra* note 33, at 846.

124. 430 U.S. at 444.

125. *Id.* at 454–55.

126. *Id.* at 455 (“This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency.”). It is worth noting that the *Atlas Roofing* Court also called into question the then-recent decision of *Curtis*, by stating that “[the Seventh Amendment] thus did not purport to require a jury trial where none was required before.” *Id.* at 459.

127. 458 U.S. 50 (1982).

128. *Id.* at 69 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

internally.¹²⁹ This distinction seemed to intertwine the scope of Article III with the Seventh Amendment.¹³⁰

The Court later explicitly stated that the Article III and Seventh Amendment analyses were one and the same in *Granfinanciera, S.A. v. Nordberg*.¹³¹ In *Granfinanciera*, the Court upheld the view that the Government need not be a party to a case for it to involve public rights.¹³² Rather, the Court defined a public right as a statutory right closely intertwined with a federal regulatory scheme.¹³³ If a statutory right is not closely intertwined with a regulatory scheme, then the Seventh Amendment requires a civil jury. The Court also held that the plurality opinion in *Northern Pipeline* did not control.¹³⁴

The *Granfinanciera* definition of a public right was recently upheld in *Stern v. Marshall*.¹³⁵ In *Stern*, the central issue was whether a bankruptcy judge could constitutionally resolve a counterclaim.¹³⁶ In a 5–4 decision, the majority reaffirmed that a public right is a statutory right arising from a federal regulatory scheme.¹³⁷ The majority conceded, however, that the Court’s previous discussion of the public rights exception “has not been entirely consistent, and the exception has been the subject of some debate”¹³⁸

After some splits in the Court and vacillating decisions, the public rights exception has been established. The definition has expanded,

129. *Id.* at 68 (citing *Ex parte Bakelite Corp.*, 279 U.S. at 458).

130. See Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 421–27 (1995) (arguing that the Court has wrongly combined the two separate concepts).

131. 492 U.S. 33, 53 (1989) (“Indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.”).

132. *Id.* at 54.

133. *Id.* at 54–55.

134. *Id.* at 54 (discussing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).

135. 131 S. Ct. 2594 (2011).

136. *Id.* at 2600.

137. *Id.* at 2613.

138. *Id.* at 2611. Justice Scalia signed on to the majority opinion but wrote a concurrence to express his view that a public right should be one arising between the government and a private party. *Id.* at 2620–21 (Scalia, J., concurring).

but it requires a narrow view of the Seventh Amendment's scope. The Court has read "suits at common law" to include only those suits required in federal court by Article III. In so doing, the Court has combined the Article III and Seventh Amendment analysis.¹³⁹ But while Congress may permissibly provide for adjudication in "legislative courts," the Court has not offered a consistent rationale for omitting the civil jury right from these proceedings. The practical realities of the situation may explain the Court's reluctance to do so—the growth of administrative agencies requires due consideration and care.¹⁴⁰ If the Court were to require civil juries in all administrative proceedings, it would likely cause significant gridlock as agencies attempted to adapt their practices and accommodate jurors.

All the same, accepting the position that the Seventh Amendment was intended to apply to new forms of action, it is difficult to reconcile the amendment's purpose with its current form, which applies only to those actions taking place in the federal courts. The remainder of this Note puts forward a proposal that attempts to recognize the implications of the civil jury right, while attempting to mitigate some of the inefficiency that would necessarily arise from a broader right to a civil jury than has been previously recognized.

III. PROPOSING A NEW TEST FOR THE SEVENTH AMENDMENT'S SCOPE

A. *The New Test—What It Is and What It Covers*

The difficulties inherent in the combination of the Article III and Seventh Amendment analyses have been well dissected by commentators.¹⁴¹ The two provisions of the Constitution should be dealt with separately. The difficulty in extending the current test, however, has led many to concede that some additional constitutional uniformity is

139. See, e.g., Redish & La Fave, *supra* note 130, at 409 ("In . . . administrative adjudications and enforcement proceedings as well as actions brought before non-Article III 'legislative' courts, the Supreme Court has all but abandoned the Seventh Amendment right . . .").

140. For an excellent analysis of the difficulties with the current test and the problems facing an expansion of the Seventh Amendment, see Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037 (1999).

141. See, e.g., Redish & La Fave, *supra* note 130, at 409 ("In . . . administrative adjudications and enforcement proceedings as well as actions brought before non-Article III 'legislative' courts, the Supreme Court has all but abandoned the Seventh Amendment right, even though there is absolutely no legitimate, principled basis on which to conclude that a jury trial right is somehow inapplicable to such proceedings." (footnotes omitted)); Sward, *supra* note 140, at 1114 ("[T]here are good reasons for finding that the Constitution requires a jury trial regardless of the nature of the court in which the matter is pending.").

not worth its cost in government efficiency.¹⁴² Concerns over expanding the civil jury right have dissuaded both courts and scholars from announcing a broader standard.¹⁴³ But, as the Court has previously announced, “the fact that a given law or procedure is efficient . . . will not save it if it is contrary to the Constitution.”¹⁴⁴ Given the difficulties in maintaining a joint Article III–Seventh Amendment analysis, it is time for the Court to decide not *whether* the civil jury right should be recognized, but *how*. While an alternative to the current analysis would require a shift in thinking, it is possible to strike a balance between the civil jury right and the status quo.

Given the different attitudes across the states about the jury right, it is difficult to determine conclusively what exactly the amendment was meant to preserve.¹⁴⁵ But on the record that is available, it is possible to see the attitude toward and reasoning behind the Seventh Amendment. The amendment was put in place to prevent the expansion of suits in equity and admiralty, which would have reduced civil jury trials. The Constitution gave Congress the ability to determine federal court jurisdiction without providing any protection for the jury right. The argument against the Constitution’s original silence on the civil jury right was bottomed on the fear of new laws, similar to the Sugar and Stamp Acts, which would improperly remove cases to forums where the jury right was not recognized. As such, the Seventh Amendment was enacted to prevent the expansion of equitable actions, while maintaining congressional flexibility to create proper venues.¹⁴⁶

142. See Redish & La Fave, *supra* note 130, at 450–53 (proposing a means by which the Supreme Court could justify the current administrative arrangement); Sward, *supra* note 140, at 1043 (“I concede that maintaining the status quo, however weak its constitutional base, may be more pragmatic and therefore more attractive. Better the devil we know.”).

143. See, e.g., *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 455 (1977) (“Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field.”).

144. *INS v. Chadha*, 462 U.S. 919, 944 (1983).

145. Cf. Wolfram, *supra* note 7, at 652 (“The almost total absence of any record of debate in the Senate during its consideration of the Bill of Rights, 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.” (footnote omitted)).

146. One current Justice has supported this position, albeit in the context of Article III analysis. See *Stern v. Marshall*, 131 S. Ct. 2594, 2620–21 (2011) (Scalia, J., concurring) (“Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse)

With the amendment's purpose in mind, the public rights exception in its current form requires some changes. If the Court is to apply a historical test, as it should, then the distinction between private and public rights cannot provide an exception for the civil jury right. Such a distinction works in the Article III analysis but not the Seventh Amendment analysis. After all, the amendment's purpose was to ensure that juries would continue to serve, even in new types of actions.¹⁴⁷ The plurality in *Northern Pipeline* is correct, however, that there are some historical actions that must fall outside the scope of the Seventh Amendment. These actions include bankruptcy¹⁴⁸ and tax levies.¹⁴⁹ Thus, any analysis of the Seventh Amendment should recognize that these actions will not require jury trials.

In order to be more consistent with the amendment's scope and purpose, this Note proposes a new form of the historical test. A court should focus, as it currently does, on both the nature of the cause of action and the remedy sought. Unlike the current historical test, however, the remedy would not be the more important prong of the analysis.¹⁵⁰ Rather, the nature of the case should be the dispositive factor. A court should consider the nature of the case in light of the more expansive jury right in the early days of the colonies, rather than English common law practice in 1791. Certainly there was a significant overlap between the two systems. The key distinction is the colonial attitude that the juryless practices of equity and admiralty should not be expanded. Under this test, the nature of the action can be dispositive. Further, if there was a historical analog in equity, admiralty, or another type of specialized practice that did not require a jury—like bankruptcy or tax levies—then the Seventh

by our landmark decision in *Crowell v. Benson*, in my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary." (citation omitted)).

147. See *supra* Part II.A.

148. See generally Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319 (2014) (discussing the historical origins of bankruptcy proceedings).

149. See THE FEDERALIST NO. 83, *supra* note 68, at 422 (Alexander Hamilton) ("The taxes are usually levied by the more summary proceeding of distress and sale. . . . And it is acknowledged on all hands, that this is essential to the efficacy of the revenue laws.").

150. Allowing the remedy sought to become the deciding factor in the analysis misses the point that the distinction between remedies in courts of law and courts of equity was one of procedure rather than substance. See BLACKSTONE, *supra* note 39, at *436 ("[The difference] principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief."). If the civil jury right is to be properly enforced, the remedy sought should not control the outcome.

Amendment does not guarantee any jury right. If there is no clear historical analog and the remedy was not traditionally equitable, then the Seventh Amendment does guarantee a jury right.¹⁵¹

This would have a significant effect on the public rights exception, to be sure. Rather than consider the exception in cases like bankruptcy, as the Court has previously done,¹⁵² this new test would recognize the historical nature of bankruptcy courts as outside the scope of the Seventh Amendment. By recognizing the inapplicability of the Seventh Amendment to these unique actions, the new historical test simplifies the analysis in this regard.

In the situation discussed by the *Northern Pipeline* plurality,¹⁵³ where the executive or legislative branch acts in a way that does not implicate judicial oversight, the amendment would not apply. But such a situation is already kept out of federal courts by the basic principle that purely political lawsuits are not allowed.¹⁵⁴ It is not a justification for keeping the Seventh Amendment out of administrative adjudications, which could have been located in the federal court system if Congress so desired.

One significant impact of this reworking would be on administrative adjudications, which currently receive the public rights exception. This test would apply whether a case is presented before an Article III tribunal. It would not, however, alter the forum. Thus, a civil jury right would apply in many agency proceedings previously covered by the public rights exception.¹⁵⁵

One of the most common arguments in favor of omitting the civil jury has been one of efficiency. The Supreme Court has stated that

151. This is in keeping with the Court's determination in *Curtis v. Loether*, 415 U.S. 189 (1974), that a statutory cause of action does implicate the Seventh Amendment right, even when it was not the sort of action found at common law in 1791.

152. *See, e.g.*, *Stern v. Marshall*, 131 S. Ct. 2594, 2618 (2011) (finding that a counterclaim fell outside the public rights exception, and therefore could not be heard in a bankruptcy court).

153. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) ("The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently . . . judicial.'" (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929))).

154. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) ("[W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political." (alteration in original)).

155. *See, e.g.*, *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977) (employee safety); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (labor relations).

“Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation.”¹⁵⁶ And as Alexander Hamilton noted in the Federalist Papers, requiring a court case for every revenue collection would be a wasteful exercise.¹⁵⁷ But revenue cases existed without a jury long before the Seventh Amendment, so the historical analysis will not alter the status quo.¹⁵⁸ Further, the Seventh Amendment’s preservation of the jury right need not require the district courts to have jurisdiction over the cases. It means merely that the jury right applies regardless of whether the case is brought in a federal court.

This test would have a significant impact on a number of administrative proceedings.¹⁵⁹ It is important, then, to note what this interpretation would not do. The Court’s distinction between substance and procedure would remain intact, allowing for motions to dismiss¹⁶⁰ and for summary judgment¹⁶¹ to remain an important part of federal procedure. Similarly, a new understanding of the amendment’s scope does not impact decisions like *Markman v. Westview Instruments, Inc.*,¹⁶² where the Court separated questions of law from questions of fact in the specific context of patent litigation. Nor would this interpretation require juries to determine all factual issues in federal court; cases with historical similarities to equity and admiralty would continue unaffected. The test proposed here would not alter these established principles.

156. *Atlas Roofing Co.*, 430 U.S. at 455.

157. THE FEDERALIST NO. 83, *supra* note 68, at 422 (Alexander Hamilton) (“[The omission of juries] is essential to the efficacy of the revenue laws.”).

158. See Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court’s Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1294–95 (1978) (“The typical eighteenth century collection procedure . . . was nonjudicial and did not involve the courts at any stage from assessment to collection.”).

159. *Cf. Crowell v. Benson*, 285 U.S. 22, 51 (1932) (“Familiar illustrations of administrative agencies . . . are found in connection with . . . interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.”).

160. *But see* Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009) (arguing that heightened pleading standards violate the Seventh Amendment).

161. *But see* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (arguing that summary judgment is unconstitutional because no such procedure existed in eighteenth-century common law).

162. 517 U.S. 370 (1996).

B. Implementing the New Test and Maintaining Efficient Proceedings

If it is accepted that the civil jury right would apply to administrative adjudication, this raises some serious questions: how would a jury be involved, and what type of a jury? Administrative proceedings, after all, are valued both for their efficiency and expertise in finding certain facts. Adding a lay jury into the process could undermine both values. Indeed, these practical concerns have convinced scholars that administrative proceedings should involve no jury right.¹⁶³ The remainder of this Note argues, however, that these justifications are not as strong as they might initially appear and that a civil jury could be incorporated into administrative adjudications.

There are two ways to involve a jury in these actions. First, a jury could be the finder of fact at the initial administrative hearing. Second, when a court reviews an appeal from an administrative decision, there might be a means by which a jury could be used.

Impanelling a jury on appeal would likely prove difficult. Administrative decisions are not uniform in their appeals processes. Some decisions are reviewed in the district courts,¹⁶⁴ while others are heard in the appellate courts.¹⁶⁵ This disparity would make uniform application of an appellate jury right impossible. Additionally, involving a jury at the appellate stage would require, at least to some degree, two levels of fact-finding—hardly an efficient solution. For these reasons, the more practical solution would be to involve a jury at the initial stages of the process but adapt it for an administrative proceeding.

It may appear inconsistent to suggest both that a civil jury right must apply and that the right should be tailored to fit the administrative process. But the Due Process Clause has applied to parties in agency adjudication (at least in some cases) for almost as long as those proceedings have existed.¹⁶⁶ And the Supreme Court has already

163. See, e.g., Redish & La Fave, *supra* note 130, at 450–52 (noting inconsistency in the Court’s Seventh Amendment jurisprudence and proposing an alternative ground on which to exclude the civil jury right from non–Article III adjudication); Sward, *supra* note 140, at 1141–42 (discussing difficulties with incorporating the civil jury right into non–Article III proceedings and proposing a choice between forums).

164. See, e.g., Califano v. Sanders, 430 U.S. 99, 105–06 (1977) (finding that the amendment to 28 U.S.C. § 1331 conferred jurisdiction on the district courts, subject to any “preclusion-of-review statutes”).

165. See, e.g., Natural Res. Def. Council v. Abraham, 355 F.3d 179, 193 (2d Cir. 2004) (noting that Congress may opt for administrative appeals to be placed in the appellate courts); Nat’l Parks & Conservation Ass’n v. FAA, 998 F.2d 1523, 1528 (10th Cir. 1993) (finding that the FAA Act granted jurisdiction to the Courts of Appeals).

166. See, e.g., Londoner v. Denver, 210 U.S. 373, 385–86 (1908) (holding that due process of law applies to administrative taxing procedures). *But see*

provided a model for the incorporation of constitutional rights into administrative law, with its Fourth Amendment jurisprudence.

1. The Fourth Amendment and Administrative Inspections

Administrative agencies began earnestly developing “in the latter part of the nineteenth century.”¹⁶⁷ This development occurred well before the Court reconsidered the scope of the Fourth Amendment.¹⁶⁸ As such, the Court initially held that the Fourth Amendment’s warrant requirement did not apply in situations where a state regulatory agency was conducting an inspection for violation of city health ordinances.¹⁶⁹ The Court reasoned that, because the search at issue was an administrative inspection rather than a search for criminal wrongdoing, the Fourth Amendment offered no protection.¹⁷⁰ In dicta, the Court noted that were a search warrant to be required for an administrative inspection, it would need to fit the “rigorous constitutional restrictions” that applies to all search warrants.¹⁷¹ The issue was contentious—four justices dissented, arguing that the warrant requirement did not apply only to “mere criminal prosecutions.”¹⁷² Because it was concerned about unduly burdening regulatory agencies and officials, the majority declined to require a warrant for administrative inspections.

The next time the Court considered warrantless administrative searches, it changed course. In *Camara v. Municipal Court of San Francisco*,¹⁷³ the Court overruled *Frank*, holding that the warrant requirement did extend to administrative searches.¹⁷⁴ The Court noted

Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 894–96 (1961) (finding, five decades after *Londoner*, that due process applied when a woman was denied an “opportunity to work” on a military base).

167. See Stewart, *supra* note 112, at 1671 (noting that administrative agencies began a robust period of growth to regulate growing businesses like the railroads).

168. See, e.g., *Katz v. United States*, 389 U.S. 347, 351 (1967) (holding that Fourth Amendment protection may extend to “what [a person] seeks to preserve as private”).

169. *Frank v. Maryland*, 359 U.S. 360 (1959) (5–4 decision).

170. *Id.* at 367 (“Inspection without a warrant, as an adjunct to a regulatory scheme . . . and not as a means of enforcing the criminal law, has antecedents deep in our history.”).

171. *Id.* at 373.

172. *Id.* at 377 (Douglas, J., dissenting).

173. 387 U.S. 523 (1967).

174. *Id.* at 534 (“[A]dministrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment . . .”).

that an administrative warrant need not be based on probable cause of finding a violation, but could issue when “a valid public interest justifies the intrusion contemplated.”¹⁷⁵ That same day, the Court also decided *See v. City of Seattle*.¹⁷⁶ In that case, the Court held that commercial premises were also protected against warrantless administrative searches.¹⁷⁷ The Court noted that the warrant requirement would be a “minimal limitation[] on administrative action.”¹⁷⁸

Although these cases established that administrative inspections required a warrant, the issue was far from settled. In dissent, three justices argued that adding a warrant requirement would cause “enormous confusion” for regulators.¹⁷⁹ The dissenters noted the multitude of administrative inspections across the nation and expressed concern that a new warrant requirement would jeopardize these inspections.¹⁸⁰ Practical concerns, as well as historical practice, seemed to favor warrantless administrative inspections.

The Court did consider these practical concerns in subsequent cases. As a result, it developed an exception to the warrant requirement for heavily regulated industries. In *Colonnade Catering Corp. v. United States*,¹⁸¹ the Court held that a warrantless search was permissible because it involved alcohol—an “industry long subject to close supervision and inspection.”¹⁸² Because of that long history of regulation, “Congress has broad authority to fashion standards of reasonableness for searches and seizures”¹⁸³ relating to the liquor industry. Later cases applied this exception to other heavily regulated industries, like firearms¹⁸⁴ and mining.¹⁸⁵ But the Court did not hesitate to strike down a statute that would have granted authority

175. *Id.* at 539.

176. 387 U.S. 541 (1967).

177. *Id.* at 545.

178. *Id.*

179. *Id.* at 547 (Clark, J., dissenting).

180. *Id.* at 551 (“In the larger metropolitan areas such as Los Angeles, over 300,000 inspections (health and fire) revealed over 28,000 hazardous violations.”).

181. 397 U.S. 72 (1970).

182. *Id.* at 77.

183. *Id.*

184. *See United States v. Biswell*, 406 U.S. 311, 315 (1972) (upholding an inspection of a firearms dealer because the inspection was “undeniably of central importance” to the entire regulatory scheme).

185. *See Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (“[T]he warrantless inspections required by the Mine Safety and Health Act do not offend the Fourth Amendment.”).

to search “any factory, plant, establishment, construction site, or other area”¹⁸⁶ as overly broad.¹⁸⁷

This reasoning could be applied to the Seventh Amendment. For efficiency reasons, the Fourth Amendment protection against warrantless search and seizure was initially inapplicable to administrative agencies.¹⁸⁸ But the Court soon reconsidered, finding that a warrant requirement would not unduly impair administrative agencies. Yet the Court did recognize that administrative searches differed from criminal investigations. By allowing for the “closely regulated industry” exception, the Court balanced the efficiency concerns of agencies with the constitutional requirements of the Fourth Amendment.

Thus, the precedent for incorporating additional requirements into administrative law has been set. If the Court decides that the civil jury right applies in non–Article III adjudication, it need not adopt the right as it pertains to federal district courts. Rather, a tailored civil jury could be employed to maintain the benefits of administrative adjudication.

2. Tailoring the Civil Jury Right to Fit Administrative Adjudication

Administrative adjudications are generally more efficient than federal litigation.¹⁸⁹ That is undoubtedly a factor in why Congress established agency adjudication in many regulatory areas.¹⁹⁰ In order to maintain the benefits of the process, whatever jury right is added to the proceeding will need to fit within the existing process in a way that does not unduly burden agencies or the parties. It is important to note, however, that the use of a jury in civil cases also implicates significant values. In addition to giving members of the public some power to decide cases,¹⁹¹ jurors tend to have a more favorable view of

186. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 309 n.1 (1978) (quoting the Occupational Safety and Health Act of 1970, 84 Stat. 1598, 29 U.S.C. § 657(a) (1970) (current version at 29 U.S.C. § 657(a) (2012))).

187. *Id.* at 313 (noting that warrantless administrative searches have only been upheld in “relatively unique circumstances”). That case relied on Congress’s power to regulate interstate commerce; but this general regulatory authority was not sufficient to allow warrantless searches.

188. *See Frank v. Maryland*, 359 U.S. 360, 372 (1959) (noting that city inspections would be “greatly hobbled” by the requirements of obtaining a warrant).

189. *See, e.g., Paul R. Verkuil, The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279 (1978) (noting that administrative proceedings are intended to be “efficient and low-cost”).

190. *See, e.g., Sward, supra* note 140, at 1044 (noting that administrative agencies handle significantly more cases each year than federal courts).

191. *See supra* notes 60–62 and accompanying text.

the judicial system after serving.¹⁹² It is reasonable to expect that if administrative agencies began using juries in adjudications, the jurors might also come away with a greater understanding of the administrative process.¹⁹³

One of the main objections to jury involvement in administrative adjudication has been to keep the proceedings efficient.¹⁹⁴ While incorporating a jury might slow down the process, it could be tailored to preserve only the “substance” of the right.¹⁹⁵ After all, the Court has shown with its administrative search cases that allowing for some concessions for administrative functionality is perfectly compatible with maintaining a constitutional right. The Court must find a balance between administrative efficiency and the essential substance of the right.

That raises this question: what is the substance of the civil jury right? A jury brings the community’s values and knowledge to the case; as such, the jury pool would still need to “be drawn from a source fairly representative of the community.”¹⁹⁶ A full jury of twelve is not necessary to preserve the substance of the right.¹⁹⁷ A smaller jury would suffice, so long as the jury pool fairly reflects the community and can effectively deliberate. The Court would likely find that a minimum number of six jurors was required.¹⁹⁸

192. See Sward, *supra* note 140, at 1111 (“[S]tudies have shown that citizens who have served on juries have considerably more respect for the judicial system after their service than they had before.”).

193. Cf. Reeve T. Bull, *Making the Administrative State “Safe for Democracy”: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611, 627 (2013) (“[P]ublic participation can both enhance the quality of agency decisionmaking and imbue citizens with a sense of investedness in the workings of the administrative state.”).

194. See, e.g., *Crowell v. Benson*, 285 U.S. 22, 46 (1932) (noting that Congress intended to provide a “prompt, continuous, expert and inexpensive” alternative to trial in federal court). *But see* David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1501–03 (2013) (arguing that administrative juries could be employed in ways that minimize costs).

195. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (noting that only the “substance” of the common-law right must be preserved to satisfy the analysis).

196. *Duren v. Missouri*, 439 U.S. 357, 363 (1979) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975)).

197. See Fed. R. Civ. P. 48(a) (allowing for as few as six jurors in a district court case); see also *Colgrove v. Battin*, 413 U.S. 149, 157 (1973) (“[W]e think it cannot be said that 12 members is a substantive aspect of the right of trial by jury.”).

198. The Supreme Court has determined that the Constitution requires a minimum of six jurors in criminal cases. *Ballew v. Georgia*, 435 U.S.

Using a different juror procedure could also mitigate a loss of efficiency. Rather than convene for each adjudication, the administrative jury could be modeled after the grand jury system.¹⁹⁹ Impanelling jurors for multiple actions would have some benefits. It would allow the jurors to develop some familiarity with any technical or legal complexities.²⁰⁰ Further, experience working within an agency would also give the jury the ability to make more thoughtful comments and decisions.²⁰¹

It is true that one of the features of a jury trial is to prevent “oppression by the Government,”²⁰² but there are reasons to promote a civil jury trial beyond suspicion of governmental overreach. Allowing the community to express its values through verdicts and encouraging civic participation are just as valuable today as they were two hundred years ago.²⁰³ Use of a jury in an administrative proceeding may be even more important now, given concerns about agency legitimacy and accountability.²⁰⁴ The right to a civil jury trial is as much a right of the community as it is the parties to the litigation.

CONCLUSION

If “suits at common law” is read to mean all suits not encompassing equity or admiralty, then the Seventh Amendment’s

223, 239 (1978) (“[T]he assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six.”). Because “progressively smaller juries are less likely to foster effective group deliberation,” a minimum of six jurors is desirable. *Id.* at 232.

199. See Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 509–514 (1992) (proposing a grand jury system to oversee administrative adjudication and policymaking).

200. *Cf. id.* at 514–17 (arguing that using advisors to educate the jury would allow for greater deliberation).

201. See Arkush, *supra* note 194, at 1496–98 (proposing that administrative juries could make straightforward decisions or, alternatively, “provide open-ended suggestions, questions, or comments”).

202. *Williams v. Florida*, 399 U.S. 78, 100 (1970).

203. See, e.g., LANGBEIN ET AL., *supra* note 37, at 484 (“[S]everal eminent American lawyers and statesmen contended that juries had the right—not just the power—to decide the law as well as the facts in civil and criminal cases.”).

204. See, e.g., Bull, *supra* note 193, at 614 (noting the “general anxiety” of American citizens that agencies are not directly accountable to voters); Wright, *supra* note 199, at 465 (“Although the government affects their lives profoundly, citizens interact with government agencies without any conviction that they could influence an outcome.”).

right to a civil jury reaches further than courts have previously recognized. In effect, it changes the focus of the historical test from common law cases in 1791 to those brought in equity. If a case was not previously subject to the jurisdiction of an equity or admiralty court, then the Seventh Amendment implicates some form of a jury right.

The clearest implication of this view is that a right to a civil jury applies regardless of the forum. Thus, this view would have an impact on those administrative proceedings that are not analogous to cases in equity from 1791. This would require some reworking of current practice, to be sure. But the alternatives would be to either ignore the civil jury right's scope or to amend the Constitution to limit the civil jury right to Article III proceedings. While neither choice would offer the benefits of a jury, the latter would at least acknowledge the importance of the Seventh Amendment.

If the Court does decide to recognize the broader reach of the civil jury right, the jury at an administrative action need not be identical to a jury in a civil suit in federal court. The proceeding could be designed to incorporate a jury in the least disruptive manner. Some loss in efficiency may be inevitable, but it is a small price to pay for recognizing a constitutional right as such.

Joseph Czerwien[†]

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