ARTICLES

The Seventh Amendment: Some Bicentennial Reflections

Paul D. Carrington†

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

—US Const, Amend VII

For two centuries, we Americans have nurtured our faith in the civil jury. The institution seems a well-worn and accustomed feature of our culture. Yet it has been so adapted over two centuries of use that the civil jury is scarcely its original self. And while there is no sign of flagging faith, there is ample reason to question whether the institution as we now know it is as serviceable as we are wont to believe.

I here propose no alternatives to the civil jury. I do not suggest the repeal of the Seventh Amendment. My objective is merely to demonstrate that our old institution is not the one that was put in place two centuries ago, and that what has evolved is an institution flawed by incoherence.

Perhaps this should be no surprise. Two centuries is old for any human institution. No single mind or group of minds has had the responsibility or even the opportunity to maintain over time any sense of institutional mission that could provide coherence. Judicial institutions may be especially vulnerable to wear because

† Chadwick Professor of Law, Duke University; Reporter, Advisory Committee on the Civil Rules, Judicial Conference of the United States. The views expressed here, of course, do not reflect the views of the Judicial Conference or any of its committees or members of its committees. Work on this paper was supported by the E.T. Boat Fund of the Duke University School of Law. I am grateful for helpful comments by Elizabeth Gibson, Dickson Phillips, Jefferson Powell, Thomas Rowe and Alvin Rubin.
they attract the sustained efforts of adversarial individuals and
groups to gain advantage by finding and exploiting institutional
weaknesses. The muddled state of the civil jury trial may therefore
be inevitable.

I. THE ROLE OF THE CIVIL JURY IN THE
FEDERAL CONSTITUTIONAL SCHEME

A. The Political Origin of the Seventh Amendment

The original mission of the civil jury was to constrain the
power of the federal judiciary. The Constitutional Convention but
grudgingly conferred on Congress the power to establish a federal
judiciary subordinate to the Supreme Court. Ratification of the
Constitution was then stoutly resisted by Antifederalists in every
state, with fear of the faceless federal judiciary a major tenet of
their resistance.

Many Antifederalists, such as Patrick Henry in Virginia, were
expert in arousing reverse class bias. They predicted that these
life-tenured robed autocrats would soon bring the federal power
down upon the necks of poor debtors everywhere. They argued,
not erroneously, that the judicial power created under Article III
could "by legal ingenuity" be extended to every civil case, "and
thus absorb the State judiciaries." Substantive rights long recog-

1 Max Farrand, ed, 1 The Records of the Federal Convention of 1787 124-28 (Yale
University Press, 1937).

* The Pennsylvanians Antifederalists, for example, prepared the most coherent state-
ment of the reasons for opposing ratification. They gave a prominent, if not primary, place to the
threatening character of the federal judiciary resulting from the failure of the Constitution to
guarantee the right to jury trial in civil cases. Cecelia M. Kenyon, ed, The Antifederalists

* This fear was occasioned in part by the knowledge that Shays’s Rebellion, a challenge
by Massachusetts farmers against mortgage foreclosures, had been an important impetus to the
Convention at Philadelphia, which assembled in response to the fear that republican
governments in the states would soon disintegrate into chaos, from which would come despo-
tism. This sequence was in fact predicted in Montesquieu, The Spirit of Laws Bk II, § 2,
† 13 (Hafner Publishing Co., 1949), the book most widely read among the Revolutionary
generation:

The public business must be carried on with a certain motion, neither too quick
nor too slow. But the motion of the people is always either too remiss or too vio-
lent. Sometimes with a hundred thousand arms they overturn all before them; and
sometimes with a hundred thousand feet they creep like insects.

Compare Federalist 10 (Madison) in Clinton Rossiter, ed, The Federalist Papers 77-81
(Mentor, 1961); Jean-Jacques Rousseau, The Social Contract Bk III, ch 4-5 (1762), in Rous-

* Kenyon, The Antifederalists at 45 (cited in note 2).
nized by state courts might vanish in the hands of carpet-bagging, upper-class federal judges.

Antifederalists also apprehended that the power of the Supreme Court to determine both law and fact authorized and even foretold the establishment of a continental civil law system. Such a system, they feared, would empower the aristocracy directly to control the property and livelihoods of citizens in America as on the continent of Europe.\(^6\) Citizens of ordinary means caught in the toils of federal civil litigation would be borne down by "intolerable delay, [!] enormous expense, and infinite vexation" to the advantage of the wealthy.\(^6\)

The Seventh Amendment was offered to comfort Antifederalist fears. It sold well.\(^7\) Advocates of the Seventh Amendment included not only Antifederalists, but also those who, like Thomas Jefferson, supported ratification of the federal Constitution with reluctance born of concern for its elitist incongruence with the Declaration of Independence. And the Amendment was favored even by some ardent Hamiltonian Federalists, such as Justice James Wilson, who served at the Constitutional Convention as the architect of the Presidency, and who favored a strong national government reinforced by maximum popular participation.\(^8\)

Although he was himself no friend of popular, democratic institutions, Alexander Hamilton, in *The Federalist*, acknowledged that

> [t]he objection to the [Constitution] which has met with most success in [New York], and perhaps in several of

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\(^5\) William Blackstone, in his *Commentaries*, made frequent comparison to the civil law system, always for the purpose of decorating the common law system as highly superior to any other. He was, lamentably, the primary source of American information about such matters for several decades. See, for example, William Blackstone, *1 Commentaries on the Laws of England* (1765, reprinted by University of Chicago Press, 1979)("But we must not carry our veneration [of the civil law] so far as to sacrifice our Alfred and Edward to the names of Theodosius and Justinian: we must not prefer the edict of the praetor, of the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament; unless we can also prefer the despotic monarchy of Rome and Byzantine . . . to the free constitution of Britain . . . ").

\(^6\) Kenyon, *The Antifederalists* at 51 (cited in note 2).


\(^8\) In his lectures as Professor of Law at the University of Pennsylvania, Wilson repeatedly professed his love and admiration for trial by jury of civil cases, and saved his most elaborate treatment for an historical analysis of the institution of the jury. Robert Green McCloskey, ed, 2 *The Works of James Wilson* 492, 503-46 (Belknap Press, 1967).
the other states, is *that relative to the want of a constitutional provision* for the trial by jury in civil cases.\(^9\)

Hamilton had misgivings.\(^10\) Perhaps others did as well, but these were seldom heard. Those favoring ratification were apparently willing to accept the civil jury if necessary to secure the assent of Jeffersonians to the general scheme of the new government.

Despite, or perhaps because of, this political unanimity, there was never an adequate statement made of the case for the Amendment, much less a statement of the difficulties it might present. In the political environment of 1790, it was clear only that the civil jury was essential to ratification to quiet the fears aroused by Article III of the Constitution.

B. The Broader Constitutional Functions of the Civil Jury

While the political origins of the Seventh Amendment confirm that it was a qualifying addendum to Article III, the political debate did not adequately explain the institutional function of the civil jury in the Constitutional scheme as so amended. The attachment of Federalists, as well as Antifederalists, to trial by jury was derived from broader concerns than mere reverse class bias or a misinformed notion of the relative costs of English and Scottish civil procedure. The "original intent," or legislative purpose underlying the Seventh Amendment,\(^11\) was broader than any explicitly stated by those who demanded it.\(^12\)

Reverse class bias was not the source, we can be sure, of Jefferson's provision in the Declaration of Independence specifying the deprivation of jury trial as a justification for revolution.\(^13\) Jefferson's concern had to do with what Patrick Henry described as the Constitution's "squint[] toward monarchy."\(^14\) As Jefferson ex-

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\(^9\) Federalist 83 (Hamilton) in *The Federalist Papers* at 495 (cited in note 3) (emphasis in original).

\(^10\) Hamilton was especially concerned about the threat of civil juries to effective collection of federal taxes. See, generally, Federalist 83, id. For comment, see Wolfram, 57 Minn L Rev at 705 (cited in note 7).


\(^12\) The Antifederalists were, after all, the winners in the Seventh Amendment debate, but their views were reflective of broader and deeper thinking than was voiced by them. Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 Va L Rev 1055 (1964).

\(^13\) The Declaration of Independence states: "To prove this, let Facts be submitted to a candid world. . . . He has . . . given his Assent to [Parliament's] Acts of pretended Legislation. . . . For depriving us in many cases, of the benefits of Trial by Jury."

\(^14\) Kenyon, *The Antifederalists* at 257 (cited in note 2).
plained, it was his aim "to introduce the people into every department of government as far they are capable of exercising it."\textsuperscript{15}

In the terms of Montesquieu, whose work structured the thinking of the generation of Americans who signed and supported the Declaration and ratified the Constitution, the civil jury is an island of pure republicanism in a constitutional sea of mostly monarchical powers.\textsuperscript{16} In the constitutional scheme, only the House of Representatives was directly accountable to the people, with the Senate and the President once removed from direct election, and the judiciary twice removed. This element of republicanism was therefore needed, in the minds of many, to offset the aristocratic—or, in Montesquieu's terms, monarchical—tendencies of the federal judiciary.

The federal courtroom thus "unites dour elitism and zealous populism in intrinsic discord."\textsuperscript{17} The civil jury was the last best assurance that the power of the national government would flow up from the people and not down from the president and the nobility.

So far as I have been able to find, the first thoughtful elaboration on the role of the civil jury in the architecture of the Constitution appears in the 1853 work of Francis Lieber,\textsuperscript{18} a German emigre, a strong Anglophile, and apparently an ardent admirer of Alexander Hamilton.\textsuperscript{19} Among the useful and interrelated effects of the civil jury listed by Lieber are:

1. It allows the judge to stand, as the independent organ of the law, not only above the parties, hostiley arranged against each other, but also above the whole practical case before the court;

\textsuperscript{15} Paul Leicester Ford, ed, 5 Writings of Thomas Jefferson 103 (G.P. Putnam's Sons, 1895) (letter to L'Abbe Armond, July 19, 1789).

\textsuperscript{16} Montesquieu defined a republic as a government in which power is exercised by the people, and a monarchy as a government in which power descends hierarchically, but is divided among institutions that are accountable to one another. See Montesquieu, The Spirit of Laws at Bk II, §§ 2 & 4 (cited in note 3).

\textsuperscript{17} Doug Rendleman, Chapters of the Civil Jury, 65 Ky L J 769, 798 (1977).


(2) It enables plain, common, and practical sense properly to admix itself with keen professional and scientific distinction . . . ;

(3) It makes a participation of the public in the administration of justice possible without having the serious evil of courts consisting of multitudes or mobs . . . ;

(4) It obtains the great advantage of a mean of views of facts, regarding which Aristotle said that many persons are more just than one . . . without incurring the disadvantages and the injustice of vague multitudes;

(5) It makes the administration of justice a matter of the people and awakens confidence;

(6) It binds the citizen with increased public spirit to the government of his commonwealth, and gives him a constant and renewed share in one of the highest public affairs, the application of the abstract law to the reality of life . . . ;

(7) . . . it is the greatest practical school of free citizenship;

(8) . . . it elevates the citizen while it legitimately strengthens the government;

(9) It does not only elevate the judge, but makes him a popular magistrate, looked up to with confidence and favor; . . .

(10) It alone makes it possible to decide to the satisfaction of the public those cases which must be decided, and which nevertheless, do not lie within the strict limits of the positive law;

(11) It is with the representative system one of the greatest institutions which develop the love of the law, and without this love there can be no sovereignty of the law in the true sense; and

(12) It gives to the advocate that independent and honored position which . . . liberty requires . . . .

Lieber, with this list, adequately explains why the institution of the civil jury is abidingly and warmly approved by many trial

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20 Lieber, Civil Liberty at 234-37 (cited in note 18).
judges,\textsuperscript{31} trial lawyers and citizen jurors and why, therefore, it is not likely soon to recede from the American scene.

C. Negative Consequences Inherent in Lay Decisionmaking

Enthusiastic as Lieber was, he did not deny the existence of serious problems in the employment of lay decisionmakers.\textsuperscript{22} Indeed, although such criticism was suppressed during the ratification debates, the civil jury has not since that time lacked for critics to decry it as clumsy, and therefore expensive, and as a result of its expense, unjust; or as a source of dissonant emotionalism and irrationality and thus of unpredictability in a system intended to effect disinterest and rationality in the enforcement of the law.\textsuperscript{23} Among the diverse critics of the civil jury in recent years has been former Chief Justice Burger.\textsuperscript{24} These critics remain, like their predecessors, a small voice having little effect on a popular institution.

There are at least four indirect costs of the civil jury that are, however, seldom noted even in critical assessments of the civil jury. One indirect cost of the jury is its effect on the process of proof, an effect embodied in the law of evidence. The strictures on the admissibility of evidence are designed in part to protect the lay jury from beguilement and inflammation by sharp lawyering, but they serve also to complicate trials, to preclude the admission of some evidence that might be deemed useful, to constrain the initiative of parties and counsel, and to enlarge the possibility of mistrial or new trial. In cases not tried to a jury, we need worry less that the professional judge will be beguiled or inflamed and can wisely take a more relaxed view of the proprieties of proof. Perhaps unwisely, the Federal Rules of Evidence were written to apply to all civil proceedings, whether conducted before a jury or not.\textsuperscript{25} And the common law strictures on proof were generally relaxed, with consequences that have not been entirely benign.

A second indirect consequence is the rigidity that the civil jury imparts to civil procedure. This rigidity is caused by the need for jurors to make of a trial a single, compact, continuous event, if pos-

\textsuperscript{31} Maurice Rosenberg, The Trial Judges' Verdict on the Civil Jury, Trial Judges' J 5 (Jan 1966).
\textsuperscript{22} Lieber, Civil Liberty at 233 (cited in note 18).
\textsuperscript{23} See, for example, Jerome Frank, Courts on Trial: Myth and Reality in American Justice 114-15 (Princeton University Press, 1950).
\textsuperscript{24} See, for example, Warren E. Burger, Thinking the Unthinkable, 31 Loyola L Rev 205 (1985).
\textsuperscript{25} FRE 101.
sible. Once we have assembled a civil jury, the court is rightly reluctant to grant prolonged adjournments that make it problematic whether the same jury can be reconvened. If it be assumed that the trial is to be such a compact event, and that a party cannot expect to secure prolonged adjournments to secure evidence responding to an adversary's presentation, it becomes important that the parties be thoroughly prepared for all eventualities before the presentation of evidence is commenced. The problem of surprise at trial is thus a feature of the jury system. On its account, great importance was attached to common law and code pleading requirements. And, on its account, modern American civil procedure has replaced the arcane pleading rules with perhaps excessively ample discovery mechanisms. In a system not bound to conduct trials to suit the convenience of jurors, it would be easier to design a mechanism for gathering evidence that would be more efficient than the one we know, for discovery could then be limited to information for which there is a specific and immediate need in the ongoing but discontinuous trial.

Still deeper beneath the surface, a third consequence of the civil jury may be to build a political constituency not only for courts, but for those laws administered by juries, particularly those calling for the exercise of moral judgment; that is, the law of torts. There are many who say, and not without cause, that the American law of torts is a great sorrow, for it diverts funds otherwise available for the compensation of victims to the asocial purpose of providing nice incomes for the professionals who staff the system but whose services add little real value to the benefits ultimately received by victims. Proponents of various schemes to displace tort

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\[\text{Footnotes:}\]


\[\text{Note 27:}\] There may today be some movement in Germany away from the discontinuous trial. In the context of that legal culture, discontinuity may presently be a source of delay. Arthur Taylor von Mehren, Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules, 63 Notre Dame L Rev 609, 614-22 (1988).

\[\text{Note 28:}\] See, for example, Jeffrey O'Connell, Bhopal, the Good Lawyer, and the American Law School: A Torts (and Insurance) Professor's Perspective, 36 J Legal Educ 311 (1986); Peter W. Huber, Liability: The Legal Revolution and Its Consequences (Basic Books, 1988).
law with insurance are confronted with a deeply-seated conservatism that may be associated with the self-reassuring experience of many Americans who have sat as jurors,\textsuperscript{28} believe that they themselves did justice, and hence approve of the system placing them in a position of trust and authority.

A fourth possible deep effect of the civil jury may have been to provide an outlet for demagoguery within the American legal system. The jury trial is, like radio, a "hot medium" that calls for strongly evocative, rousing artistry, in contrast to the "cool medium," the non-jury trial, that, like television, calls for understated artistry. Consequently, there are often differences in styles and personal values of jury lawyers and non-jury lawyers. Legal professions in other countries, lacking the civil jury system, seem seldom to produce persons having the flamboyance of American jury lawyers. Perhaps this is their misfortune, but for those who prefer greater dignity in the legal system, it is an adverse consequence of the civil jury system that it rewards the abilities of the demagogue.

D. An Anachronism?

These unavoidable costs of lay judicial decisionmaking have led to its disuse in much of the world claiming allegiance to English legal traditions.\textsuperscript{30} Changes in the American social and political environment occurring over the last two centuries suggest that our own need for the civil jury is at least different from what it was 150 to 200 years ago.

First, the constitutional function performed by the civil jury, providing a popular element in an elitist government, is no longer so great a need. The direct election of the President and the Senate of the United States\textsuperscript{31} has provided much more democracy in the legislative and executive branches than the original Constitution contemplated. A popularly elected President and Congress are much better positioned to balance the elitist impulses of federal judges than were those offices as originally designed.

Second, the institution of the jury emerged as an expression of community. The jury's verdict was in the mists of history regarded as an embodiment of community moral judgment, and so a jury

\textsuperscript{28} Jurors' approval of their roles is almost assured by the general human need to resolve cognitive dissonance. See, generally, Jack W. Brehm and Arthur R. Cohen, Explorations in Cognitive Dissonance (John Wiley & Sons, 1962).

\textsuperscript{29} P.S. Atiyah and Robert Summers, Form and Substance in Anglo-American Law 170 (Clarendon Press, 1987).

\textsuperscript{31} US Const, Amend XVII.
verdict may have been as recently as a few decades ago. But any contemporary assessment of the jury ought take account of the reality that “community” in America is a pale imitation of the social condition that gave rise to the institution of the jury. America is today far more an aggregation of individuals than a community, and the conception of a verdict as an expression of community morality is simply in most places quaint. The important practical consequence of this sea change is to relax the moral constraints that in former times operated to enhance the moral responsibility of jurors and to channel their conduct predictably.

On the other hand, there has also been the evolution of the political role of the federal courts. Disuse of the civil jury has generally occurred in systems where the legislature is supreme and the political role of the judiciary modest.32 One good reason for the survival of the civil jury in America may be the large role played by the federal judiciary in our polity.33 Given this role, our federal judiciary may have greater need for the diffusion of personal responsibility and the other meta-political benefits that are associated with the civil jury than does the judiciary of, for example, the United Kingdom,34 or than our own federal judiciary a century ago.

E. State Courts and State Law in Federal Courts

The function of lay decisionmakers under the Seventh Amendment is explicitly a feature of “Courts of the United States,” that is, those institutions established by Congress pursuant to Article III. The Supreme Court has wisely declined to treat the civil jury trial as a requirement of due process imposed on state judiciaries by the Fourteenth Amendment.35 In fact, of course, the states have adhered to federal leadership and have retained the institution of the civil jury, albeit with significant differences in practice. Even when state courts are called upon to en-

32 Atiyah & Summers, Form and Substance at 298-335 (cited in note 30).
33 Professor Yeazell suggests that the enlarged role of the judiciary is tolerated in part because of the trust of the federal judiciary derived in some measure from the existence of the civil jury. Stephen Yeazell, The New Jury and the Ancient Jury Conflict, 1990 U Chi Legal F 87. This seems likely to be a mutually reinforcing relationship.
force federally created rights, the Court has not required state court conformity to Seventh Amendment standards of jury practice except when it has inferred from the legislation that Congress so intended.\textsuperscript{38}

The wisdom of this non-extension of the Seventh Amendment to the states by incorporation into the Fourteenth Amendment is confirmed by the political structure of state courts. Where judges are elected, especially if for short terms, the \textit{raison d'etre} of the civil jury is materially reduced, for the hazards of aristocracy against which the jury protects are absent.\textsuperscript{37} Moreover, it would have been somewhat ironic in the name of due process of \textit{law} to command the states to employ an institution designed in part to introduce elements of non-rational emotionalism into the making of decisions purporting to enforce the law.

For complementary reasons, the Supreme Court has not, even in the heyday of \textit{Erie},\textsuperscript{38} treated state law governing the conduct of civil jury trials in state courts as applicable in federal courts, even when the federal courts are enforcing state-created rights.\textsuperscript{39} Indeed, the meeting of \textit{Erie} with the Seventh Amendment jury marked the end of \textit{Erie}'s unchallenged preeminence. The decision in \textit{Byrd v Blue Ridge Rural Electric Cooperative}, holding state jury practice inapplicable to federal diversity litigation,\textsuperscript{40} resolved an issue that was at the precise heart of Antifederalist and Jeffersonian concern that state-created rights might be entrusted for enforcement to aristocratic federal judges unconstrained by juries. That a state trusts its own (perhaps elected) judges to make a decision without such a constraining democratic influence says nothing about the state’s legislative intent when the judge making the decision is appointed for life by the President of the United States. If \textit{Blue Ridge} had been decided otherwise, the worst Antifederalist fears would have been realized.

II. \textbf{JUDICIAL CONTROL OF JURY VERDICTS}

One major change in the institution of the civil jury that has been wrought since ratification of the Seventh Amendment pertains to the relation between the civil jury and the federal judge

\textsuperscript{37} This is not to say that the jury is useless in states having elective judiciaries; many of the functions enumerated by Lieber remain. See text accompanying note 20.
\textsuperscript{38} \textit{Erie R.R. v Tompkins}, 304 US 64 (1938).
\textsuperscript{39} \textit{Byrd v Blue Ridge Rural Electric Cooperative, Inc.}, 356 US 525, 538 (1958).
\textsuperscript{40} Id.
presiding at trial. Group lay decisionmaking necessitates professional leadership in the conduct of proceedings; the role of that officer is thus an unavoidable issue. The American reaction to that issue has changed drastically over time.

The Antifederalists were preoccupied with the power of the civil jury to make decisions unfettered by judicial controls. Even in the Federalist bastion of Massachusetts, radical Republicans fought for the absolute prerogative of the jury to decide the law as well as the facts, in civil cases as well as criminal.\textsuperscript{41} While James Wilson early contended for at least a small role for the trial judge\textsuperscript{42} in instructing and controlling the jury, there were many who resisted any such role and who further denied any role for an appellate court to control the outcome of the common law jury trial.

This position had historical roots in English jury practice\textsuperscript{43} that were reflected in the text of the no reexamination clause of the Seventh Amendment. For much of the century following ratification of the Amendment, federal civil juries were told that they were responsible for deciding law as well as fact, giving such attention as they might choose to the judge’s instructions on the law.\textsuperscript{44} No doubt the autonomy of the jury was reinforced by frontier conditions, where the professional qualifications of the judges were especially marginal and suspect.\textsuperscript{45}

A. The Emergence of Judicial Controls: The Fifth Amendment Trumps the Seventh

The erosion of the federal civil jury’s prerogative has been an event of the last century or so.\textsuperscript{46} We have come to take seriously the obligation of trial judges and appellate courts to ensure that promiscuous factfinding by the civil jury not override the clearly controlling legal rights of any federal court litigant. The power and

\textsuperscript{41} Richard E. Ellis, \textit{The Jeffersonian Crisis} 201-03 (Oxford University Press, 1971).

\textsuperscript{42} But see 2 \textit{The Works of James Wilson} at 540-42 (cited in note 8).

\textsuperscript{43} See, generally, John Guinther, \textit{The Jury in America} 6-27 (Roscoe Pound Foundation, 1988).

\textsuperscript{44} Mark DeWolfe Howe, \textit{Juries as Judges of Criminal Law}, 52 Harv L Rev 582, 599 (1939).

\textsuperscript{45} Thus we are told of the Illinois frontier jury foreman who returned from the jury room to question the judge: “The jury want to know whether that ar what you told us, when we first went out, was raly the law, or whether it was ony jist your notion.” Thomas Ford, \textit{History of Illinois from Its Commencement as a State in 1818 to 1847} 85 (S. Griggs and Co., 1854).

\textsuperscript{46} The trend was resisted in many states by ratifying constitutional provisions to shield jury verdicts from reexamination by judges. See Edson R. Sunderland, \textit{The Inefficiency of the American Jury}, 13 Mich L Rev 302, 307-08 (1915).
responsible to the United States District Judge to set aside a verdict that is against the weight of the evidence and to order a new trial has now become an entrenched feature of the civil jury trial. The demurrer to the evidence has given way to the directed verdict and the judgment notwithstanding the verdict has become the means by which the judge ensures that no judgment shall be entered on a verdict that is not supported by the evidence.

The evolution of judicial control over jury verdicts was animated in part by a concern for "reckonability" in commercial law. It was perceived that allowing a party to a bargain to argue equities to a jury without the constraining effect of judicial oversight was too threatening to the value of bargains. And a similar risk of aberrant, emotional decisionmaking in tort actions may be to deter investment in activities that are exposed to tort liability. Economic activity of all kinds is a function of social and political stability that facilitates planning; nineteenth-century American law was much concerned with encouraging economic activity.

Moreover, as noted, jury nullification in civil cases was also a great concern with respect to an important public issue that was not primarily economic: the fugitive slave law. And, at the very time that the federal government feared nullification of fugitive slave laws by Massachusetts jurors, federal jurors in South Carolina were being encouraged by their fellow citizens to nullify the 1828 Tariff, partly in protest against the ineffectiveness of federal enforcement of fugitive slave laws. And elsewhere, southern juries generally employed their power and authority to nullify laws enacted to protect slaves from mistreatment. Such experiences com-

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41 See Aetna Casualty & Surety Co. v Yeatts, 122 F2d 350, 352-53 (4th Cir 1941).
42 See Galloway v United States, 319 US 372, 402-04 (1943) (Black dissenting), for a discussion of the differences between this device and the directed verdict. Chief among these was that the party demurring to the evidence had to stake all on the success of the motion.
43 FRCP 50(a). See also Parks v Ross, 52 US 362, 372-73 (1850).
44 FRCP 50(b).
bined with economic concerns to generate the evolution of jury control mechanisms in the nineteenth century.

This evolution was complicated by legal anachronisms found in the Seventh Amendment. It was at one time held that the judgment notwithstanding the verdict violated the Amendment, although a directed verdict did not. It was necessary to resort to an innocent fiction to eliminate an irrational distinction and confirm the belated motion as part of the federal practice. Another historic curiosity of Seventh Amendment law is the decision holding that an additur violates the Constitution, although a remittitur does not.

Today, we are in the process of renovating Rule 50 of the Federal Rules of Civil Procedure to delete the anachronistic provisions regarding directed verdicts and to provide for a single motion, denominated a motion for judgment as a matter of law, as the device by which the judge takes a case from the jury, whether before or after verdict.

As the Advisory Committee Notes to the proposed revisions of Rule 50 reflect, we have now progressed perhaps even to the point of regarding the duty of the court to employ Rule 50 as a constitutional duty imposed by the Fifth Amendment. Even a federal civil jury may not deny due process of law by rendering a verdict unsupported by evidence. Furthermore, it would arguably be a violation of the Fifth Amendment for a federal judge in a civil case to instruct a jury that it might disregard instructions on the law if they found the law so described to be unjust.

This idea would have astonished the Antifederalists. Yet one can readily foresee its possible application to state courts by force of the Fourteenth Amendment due process clause, if there be any

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58 See Baltimore & Carolina Line v Redman, 295 US 654, 661 (1935) (treating a judgment notwithstanding the verdict as reconsideration of an earlier motion for directed verdict).
59 Dimick v Schiedt, 293 US 474, 484-87 (1935).
60 See the first three sentences of subdivision (a) of FRCP 50.
62 Advisory Committee Notes to Rule 50, id at 97.
states still allowing juries to render verdicts immune from any judicial scrutiny under a standard comparable to that governing proceedings under Rule 50.66

B. Delegation of Power and Responsibility for Jury Control

1. Delegation in General.

The responsibility for professional control of the lay jury has until recently always been borne by United States District Judges. Must this responsibility be exercised directly by an Article III judge, or could other professionals perform it? In a universe of rapidly depleting federal judicial resources,68 it may be increasingly tempting to delegate this task.

District Judges are now often surrounded by surrogates: bankruptcy judges,67 magistrates,68 special masters,69 and court-annexed arbitrators70—to say nothing of law clerks, or their law clerks, the interns. Judge Posner has therefore described some district court chambers as “beehives of delegation.”71 Increasingly, at both trial and appellate levels, the signature of a federal judge may be more a trademark than a confirmation of firsthand authorship of an opinion or even a judicial action.

To what extent can district judges assign to a subordinate professional their duties to ensure jury fidelity to law? The Seventh Amendment explicitly guarantees a jury, but not an Article III judge to instruct and supervise the jury.72 In Capitol Traction Co. v Hof,73 the Supreme Court almost a century ago demurred to the use of lay officers to preside at jury trials for the stated reason that some qualified officer must be present to instruct the jury on the law. It was assumed that the officer giving instructions would be a

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66 See Herron v Southern Pacific Railroad Co., 283 US 91 (1931), holding that a state requirement that a finding of contributory negligence must be made by a jury was not binding on a federal court sitting in that state.
67 The “war on drugs” presently occupies the bulk of the energies of United States District Judges; we are told that the war will escalate and that more federal prosecutions will result. See, for example, Stephen Wermiel, Drug Cases Crowd Out Civil Federal-Court Trials as Judge Calls Business Litigation a “Stepchild,” Wall St J A18 (Feb 6, 1990).
70 FRCP 53.
72 This remark was made at the Northeastern University conference commemorating the 50th Anniversary of the Federal Rules of Civil Procedure in October 1988.
73 Bankruptcy Act Revision, Hearings on HR 31 and 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong, 2d Sess 2702 (1976) (statement of Professor David Shapiro).
74 174 US 1 (1899).
judge, for the judge was then the only available professional officer of the court.

The legislation governing the appointment and use of magistrates proscribes the conduct of jury trials by magistrates except with consent of the parties, and constrains moral suasion by the judge at pretrial to encourage such consent. But it does not prohibit Congress, by the provisions of the Speedy Trial Act giving docket preference to criminal litigation, from providing an inducement to civil parties to consent to jury trials before magistrates.

As Elizabeth Gibson has pointed out, the Supreme Court has implicitly approved the conduct of Seventh Amendment jury trials by judges who were not appointed pursuant to Article III. This happened in Pernell v Southall Realty, when the Court remanded the case for trial by jury in the Superior Court of the District of Columbia, whose judges were appointed by the President for 15-year terms. One might take that action to imply approval of a delegation to any learned person competent to rule on questions of evidence and to instruct the jury on the law. On the other hand, the court offered some cautionary dicta in a more recent case, and it has suggested that arrangements for the governance of the District of Columbia may be sui generis.

The possibility of delegation is not limited to the use of magistrates to conduct civil jury trials. As we shall see, the question arises with respect also to bankruptcy judges. And, imaginably, a judge could appoint a learned special master to preside at a jury trial. Would such arrangements as these violate the Seventh Amendment? Or Article III? These questions are not remote.

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75 28 USC § 636(c)(2) (1988) ("The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate.")


77 Gibson, 72 Minn L Rev at 1036-38 (cited in note 74).


81 FRCP 53.
Indeed, the question of delegability was presented to the Supreme Court in 1989 in *Granfinanciera, S.A. v Nordberg*, but was not decided.\(^8\) The Court there decided that a defendant who had filed no claim against the bankrupt estate was entitled to a civil jury trial on the fraudulent conveyance claim made by that estate against him, but left it to the lower courts or perhaps to Congress to determine whether a jury trial could be conducted in the bankruptcy court that would satisfy the requirements of the Constitution.\(^8\)

Because of the currency of the issue, I pause to consider the bankruptcy context in which it arises.

2. *Delegation in Bankruptcy.*

It is not clear whether the present Bankruptcy Act authorizes a bankruptcy court to conduct a jury trial.\(^8\) The text of the Act makes no provision for such a trial, but neither does it prohibit such proceedings. Thus, the statute expressly saves the right to jury trial in personal injury and wrongful death claims,\(^6\) and does not specify that such proceedings shall be conducted by an Article III judge rather than by a bankruptcy judge.

Also, the Act identifies fraudulent conveyance claims, such as those at issue in *Granfinanciera*, as among those to be treated as “core” proceedings\(^6\) to be “hear[d] and determine[d]” by bankruptcy judges\(^7\) authorized to enter final judgment with respect to such proceedings.\(^8\) Perhaps the bankruptcy court, in order to save its jurisdiction under the statute, should read the Act as authorizing the bankruptcy judge to do the “hearing and determining” by means of a civil jury, but this is not a comfortable interpretation of the statute.

The Act also authorizes the bankruptcy court to entertain “noncore” actions.\(^6\) These could plausibly include jury-triable claims. But in non-core proceedings under the Act, the bankruptcy court is required to make findings and conclusions in the manner of Rule 52,\(^6\) which governs non-jury trials. Moreover, its determi-
nations are to be reviewed de novo by the district court before any final judgment is entered. De novo review is fundamentally at war with the no reexamination clause, perhaps even if the de novo review were conducted by a second jury. If a proceeding resulting in a jury verdict taken by a bankruptcy judge were treated as “non-core,” the district court could perhaps save the statutory scheme by denying effect to the de novo review provision when basing its judgment on the jury verdicts, restricting the party challenging the verdict to a motion conforming generally to the pattern set by Rule 50.

If, by any of these three methods, the Act were read to authorize trial by jury in the bankruptcy court, there would remain a question whether such a mode of trial conforms to the Seventh Amendment and to Article III: Is there a difference between bankruptcy judges and District of Columbia Superior Court judges in their fitness to conduct jury trials? Under the 1984 amendments, bankruptcy judges are appointed not by any politically accountable officer, as Superior Court judges are, but by Article III judges. This feature could be said to make a jury trial conducted by the bankruptcy court more likely to provide the appropriately independent and apolitical professional judgment perhaps required to preside over a Seventh Amendment trial. Perhaps the bankruptcy court, in order to save its jurisdiction under the statute, should read the Act as authorizing the bankruptcy judge to do the “hearing and determining” by means of a civil jury. This is not an altogether comfortable interpretation of the statute, but it has been sustained by the Second Circuit.

On the other hand, it is arguable that if there is to be a jury trial of an issue of fact conducted under the auspices of a United States District Court, Article III requires that it be conducted and controlled by the district judge and not delegated to a subordinate, even one serving under the elevated circumstances of a bankruptcy judge or magistrate. The argument against delegation proceeds from the premise that the most important tasks performed in the

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82 See, for example, The Justices v Murray, 76 US 274 (1870) (holding that an Act of Congress which provided for the removal of state jury verdicts to the Circuit Court was void under the Seventh Amendment); United States v Wonson, 28 F Cases 745, 750 (D Mass 1812).
83 FRCP 50(c).
85 In re Ben Cooper, Inc., 896 F2d 1394 (2d Cir 1990).
Article III courts should be performed by the Article III judges themselves in the first person, and not through surrogates; that the judicial power is associated with personal, not institutional, responsibility; and that the Article III judge is, in short, constitutionally disallowed to become a mere trademark. The argument also assumes that the exercise of control over civil juries, a power itself conferred by the Due Process Clause of the Fifth Amendment,** is one of the central tasks associated with an Article III judgeship. It seems likely that we will soon receive an authoritative assessment of this argument.

III. THE PERSONAE OF THE CIVIL JURY

Eighteenth-century partisans of the civil jury were advocating the use of a group of twelve persons who would bring to bear on the resolution of disputes the best lay wisdom of the community. The most visible transformation of the civil jury in the ensuing two hundred years has been the fundamental change in its personae, change reducing the jury’s number and randomizing its selection from a social environment that admits of little community. One wonders what the reactions of Jefferson and Wilson and the Anti-federalists might be if they were to ponder a modern “jury.”

A. Jury Size

What could be said to explain to such observers the use of the six-member or half jury? The opinion of the Court in Colgrove v Battin,** purporting to explain the halving of the jury by local court rule, has been described by Geoffrey Hazard as “monumentally unconvincing.”*** To some, it may not be even that persuasive.

The decision upheld the validity of a rule of court promulgated by the District Court for the District of Montana that appeared to many to violate the Seventh Amendment, the Rules Enabling Act,** and Rule 83 of the Federal Rules of Civil Procedure authorizing the promulgation of local rules not inconsistent with the national rules.

It is true, as the Court said, that not everyone who supported the Seventh Amendment would have insisted on the precise num-

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** See text accompanying notes 62-64.
ber of 12 jurors. James Wilson, for example, argued against a firm rule of 12. 166 But certainly the traditional number was well established at that time, if not precisely and universally employed. Sir Edward Coke defined a verdict as a decision of 12 men. 161 If the Seventh Amendment did not require 12, it was a clear implication that the number of jurors would approximate 12. While the number is not a magic one, a group of that size is small enough to be responsible and large enough to speak with representative authority.

Whatever was meant by those who ratified the Amendment, the intent of Congress in enacting the Rules Enabling Act 162 was quite clear: rulemakers should not tinker with the right to jury trial, but should leave any tinkering that might be needed to Congress. By 1934, the number 12 was deeply entrenched in our traditions. Perhaps a halving of the jury did not literally "abridge" the right to jury trial, but it would seem to have substantially "modified" it.

Moreover, Congress had established a right to a fixed number of three peremptory challenges to be exercised in the selection of a civil jury. 163 That number was fixed in relation to a jury size of 12. By halving the jury, the district court of Montana doubled the power of Montana attorneys to influence the selection of jurors through the exercise of peremptory challenges.

The Montana Rule was also plainly at odds with the provisions of the Federal Rules, and was therefore a rule not permitted by the provision authorizing local rules. 164 Rule 48, 165 in authorizing the parties to consent to a jury of less than 12, is all but explicit in its expression of an expectation that there will be 12 jurors in the absence of consent. The Montana local rule cannot be reconciled to Rule 48, and is therefore not authorized by Rule 83. Because the present text of that rule is rendered meaningless by the halving of the jury, it is now necessary to revise the rule, lest it

166 "When I speak of juries, I mean a convenient number of citizens...." 2 The Works of James Wilson at 503 (cited in note 8).
164 FRCP 83.
165 FRCP 48.
mislead parties and counsel in light of the reality established by the local rules.\textsuperscript{106}

The Montana Rule is also inconsistent with the provisions of Rule 47,\textsuperscript{107} authorizing the use of alternate jurors. Alternate jurors are needed to fill out the number of 12 when one or more jurors become ill or are otherwise excused or disqualified during the trial; if not needed, they are sent away when the jury retires. The institution of the alternate juror made sense only as long as the number of persons participating in a verdict was to be a fixed number, such as the 12 contemplated by the Federal Rules. If the size of the jury is a free-floating number, there is no reason to send alternate jurors home at the close of the evidence and they should be allowed to remain and participate in the decision.

Thus, in a swoop, the Montana Rule overturned two centuries of constitutional tradition, rewrote the provisions of the Judicial Code bearing on jury selection, and defied the limitations on local rulemaking. Not only did the decision effect a displacement of the common law jury by the half jury, but it also unleashed a flood of local rulemaking on other topics that now poses a substantial problem in the maintenance of reasonable uniformity in the usage of the national rules.\textsuperscript{108}

All that can be said in favor of juries so reduced in size is that there may be administrative savings in effort and coin,\textsuperscript{109} that half-jury duty may come around less frequently, that possibly there may be fewer hung juries, and that the parking problem may be eased at many federal courthouses. But all of this would say to our eighteenth-century observers that, despite our affluence, we have fewer resources to spend on lay decisionmaking than they did.

As Hans Zeisel and Shari Diamond,\textsuperscript{110} Richard Lempert,\textsuperscript{111} and Michael Saks\textsuperscript{112} have amply demonstrated, the displacement of the jury by the half jury has significant consequences. There are the mathematical certainties that a half jury will be less represen-

\begin{itemize}
\item \textsuperscript{106} Proposed Rules of Civil Procedure, Rule 47 (cited in note 61).
\item \textsuperscript{107} FRCP 47(b).
\item \textsuperscript{109} See, generally, Hans Zeisel, \ldots And Then There Were None: The Diminution of the Federal Jury, 35 U Chi L Rev 710 (1971).
\item \textsuperscript{110} Hans Zeisel and Shari Seidman Diamond, "Convincing Empirical Evidence" on the Six Member Jury, 41 U Chi L Rev 281 (1974).
\item \textsuperscript{112} Michael J. Saks, Small-Group Decision Making and Complex Information Tasks (Federal Judicial Center, 1981).
\end{itemize}
tative, less likely to include individuals able to comprehend complex matters and resist fraudulent blandishments, and more responsive to the influence of single idiosyncratic personalities, and will hence be itself more idiosyncratic and less predictable in its verdicts. There is also an empirical basis for the beliefs that larger groups such as full juries have greater resources of memory and cognitive understanding, provide more competition among views and thus more stimulation and better testing of ideas and reactions, and for these reasons make more accurate factual determinations.

In assessing damages, there is no doubt that the half-jury verdict will swing more widely from a predictable norm than will a full jury verdict. This reduction in predictability of verdicts probably affects settlement rates. There is at least more room for optimism on both sides of a dispute that a clean victory will be won at trial. The available data do not allow an empirical demonstration one way or the other on this point, but it seems likely that at least some of the increase in the gross number of civil jury trials in federal courts is the result of marginal declines in settlement rates caused by the greater disparities in the realistic evaluation of claims slated to be heard by half juries. It is therefore imaginable that the district court rules reducing jury size are a deft shot in the court’s own foot, that the reduction in the size of the jury intended to save time and money actually increases the number of trials, and that the cost of the additional trials more than offsets the saving achieved by having fewer jurors.

If all this is so, it is surely time that we find out whether half juries are indeed more efficient. Intuitive hunches such as the one I just expressed are worth little when it is possible to inform debate with hard facts. We are woefully lacking in hard information.

114 There were 11,389 in 1978, and 12,536 in 1988. In 1978, 28 percent of these trials were conducted with a jury; in 1988, 43 percent were jury trials. See Administrative Office of the United States Courts, Annual Report Table C8 (1978) ("1978 Annual Report"); Administrative Office of the United States Courts, Annual Report Table C8 (1988) ("1988 Annual Report").
115 It seems very unlikely that this expense could be observed only by looking at the appropriated funds used to pay jurors, but the full cost of one trial to the parties as well as the court would more than offset the savings achieved by eliminating six jurors from many trials.
The effects of jury size should be subject to controlled experimentation in the federal courts. So should alternative methods of compensating for the apparent loss of predictability. For example, as Professor Lempert has suggested, it might be possible to compensate in some measure for the reduction in jury size by taking verdicts that are less than unanimous. The presumed effect of a rule taking a verdict of six out of seven would be to drop the most idiosyncratic juror out of the vote, moving the resulting verdict closer to the midpoint on the spectrum of reasonable verdicts. Without empirical study of non-unanimity, we cannot evaluate this suggestion. O, Kalven and Zeisel!

A second unseen consequence of the reduction in the size of the jury is an increase in the frequency with which jury control devices must be called into play. Assuming that half juries will more frequently produce extremely high damage awards, it must follow that occasions for the use of the remittitur device must be more frequent. Likewise, the need for additur, which is not available, is more compelling. By the same token, it seems likely that new trials on the ground that the verdict is against the manifest weight of the evidence will be more numerous. On the other hand, judgments as a matter of law should be unaffected by the size of the jury.

Despite these many serious questions about the political wisdom and practical efficacy of the half jury, there has been little stir outside the academy with respect to the issue. The eagerness of judges to embrace the half jury demonstrates a thin allegiance to the political values that gave rise to the Constitutionalization of the institution. The calm acceptance of the change by the trial bar of what we know, see Guinther, *The Jury in America* (cited in note 43); Valerie P. Hans and Neil Vidmar, *Judging the Jury* (Plenum Press, 1988).


Letter from Richard O. Lempert, December 1989 (on file with author). Professor Lempert makes this point in favoring a non-unanimous jury of 12.

Harry Kalven, Jr., and Hans Zeisel, *The American Jury* (Little, Brown & Co., 1966), remains the most complete empirical study on the jury, despite the 25 years since its publication.

A defense motion for new trial denied on condition that the plaintiff accept a lesser amount than that awarded by the jury. See, for example, *Kennon v Gilmer*, 131 US 22 (1889).

See note 59.

See note 47.

FRCP 50.

This assumes, however, that the Advisory Committee's changes to FRCP 50 are adopted. See text accompanying notes 62-63.
demonstrates that its allegiance to the institution is tactical; as long as the transformation of the institution does not diminish the importance of the members of the bar in the process, they seem willing to accept whatever comes.

Nevertheless, in consideration of the adverse consequences of the half jury, the Supreme Court held in 1978 that it is a denial of due process for a state to convict a person accused of a crime on the unanimous vote of a group of lay persons fewer than six in number,\textsuperscript{125} even though it had earlier upheld a conviction by a jury of six.\textsuperscript{126}

Yet the pressure on the size of the civil jury may not be altogether abated. I have been told, although I cannot demonstrate, that some federal judges may be urging parties to consent to juries of less than six. Their motive, if this is the case, is rooted in patriotic fidelity to the spirit of Gramm-Rudman;\textsuperscript{127} yet smaller juries may spare the judicial budget the cost of the additional jury fees. Projecting trends, we can imagine a growing number of semiconsensual “jury trials” conducted in federal court by a magistrate or master presiding over a lay decisionmaking group of three or four jurors.

The rulemaking committees of the Judicial Conference have, however, moved ever so slightly in a reactionary direction to enlarge federal civil juries. Current proposals for the revision of Rules 47 and 48\textsuperscript{128} are intended to increase slightly the average number of persons participating in federal verdicts. This increase would be effected by abolishing the traditional institution of the alternate juror provided in the present Rule 47(b).\textsuperscript{129} If the number participating in the jury’s deliberation can be any number of six or higher, then there is little reason to send away a juror who has heard the evidence.\textsuperscript{130} The proposed Rule 47 would send into the jury room those persons who, under the present rule, would be sent home after trial and before deliberation, thereby marginally increasing the size of the jury.

\textsuperscript{125} Ballew v Georgia, 435 US 223, 239 (1978).
\textsuperscript{126} Williams v Florida, 399 US 78, 90 (1970).
\textsuperscript{127} 2 USC §§ 901-922 (1989).
\textsuperscript{129} FRCP 47(b).
\textsuperscript{130} A possible reason might be to ensure that the jury be even in number to discourage the group from moving too quickly to a decision controlled by a narrow majority.
B. Jury Selection

An eighteenth-century observer would not only be astonished at the small size of the jury, but would also be surprised by its composition. While we have enlarged the power of the judge to resist lawless behavior by a jury, we have diminished the discretion of the court in the selection of the jury.\footnote{See, generally, Van Dyke, Jury Selection Procedures (cited in note 64).} In earlier times, jurors were selected for the personal knowledge of the events that they brought to the decision;\footnote{James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 90 (Little, Brown & Co., 1898). See also John P. Dawson, A History of Lay Judges 118-29 (Harvard University Press, 1960).} all but a few vestiges of this system had disappeared by 1791.\footnote{William Holdsworth, 1 A History of English Law 332 (Methuen & Co., 7th ed 1956). For the American development, however, see Comment, Ignorance as Bliss? The Historical Development of an American Rule on Juror Knowledge, 1990 U Chi Legal F 457.} So eighteenth-century observers would have expected to find an array of jurors being called, from whom 12 might be selected through a system of challenges.

But the eighteenth-century array would have been assembled by intimate, not impersonal, means; the array was expected to embody the elevated moral judgment of the community. Indeed, until quite recent times, federal courts, like most of their state counterparts, used methods of recruiting jurors that were intended to, and did, produce jury panels that were distinctly middle-class. Eighteenth-century juries were, as Morris Arnold has put it, “the Rotarians of their day.”\footnote{Morris S. Arnold, The Civil Jury in Historical Perspective, in The American Civil Jury at 9, 11 (cited in note 116).} Such a group was thought to be “representative” of the community in the same way that heads of households and property-qualified voters were, and the entitlement of litigants was expressed as an impartial jury, not one reflecting a cross section of the body politic.\footnote{Compare Holland v Illinois, 110 S Ct 803, 814 (1990) (Marshall dissenting).} In many state or federal courts, the usual method of compiling the jury list was with the help of “key men” who identified other citizens of stature who would be deserving of the judicial trust reposed in jurors. In addition, it was common in federal courts until recent decades to maintain a “blue ribbon” list of jurors believed to possess more than ordinary intelligence and experience who might be summoned to decide cases requiring more than ordinary skill on the part of the lay decisionmakers.\footnote{This practice was even being used in criminal cases in New York as recently as 1947. See, for example, Fay v New York, 332 US 261 (1947).} While the court exercised discretion in assem-
bling and administering jury lists, the discretion was not absolute. When Justice Samuel Chase excluded all Democrats from a jury, 137 this was thought to go too far, and it was made an item of grievance when he was impeached in 1805. 138

Traditional methods of recruiting the moral leaders of the community as federal jurors were first called into question in 1946, when the Supreme Court set aside a civil judgment because the jury rendering the verdict was assembled by a method that systematically excluded wage earners. 139 By 1970, our conception of the representativeness of the jury had changed to call for cross-sectional participation. Indeed, in that year, the Supreme Court held that a state “key man” system was a denial of due process in a criminal case where it resulted in systematic underrepresentation of blacks. 140

In 1968, Congress enacted sweeping revisions of the Judicial Code to require federal courts to make strenuous efforts to achieve cross-sectional participation in the selection of federal juries. 141 Jury lists must be based on the most comprehensive list available, not one so limited as a mere list of registered voters, and if the list is not a good cross section, it should be supplemented to make it so. Exemptions from jury duty were greatly reduced, and the grounds for challenge for cause were narrowly defined in order to bring as many citizens as possible into the available pool. In the administration of jury service, many, and perhaps most, federal districts have adopted the “one-day, one-trial” rule as a measure of the service required of a juror, thereby reducing further the number of citizens unable to serve. The result has been to make American juries polychromatic and classically republican to a degree not to be expected by one familiar with the practices of two centuries ago. 142 The federal jury is small, perhaps, but it is nearly the whole vicinage come to judge. 143

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137 United States v Callender, 25 F Cases 239, 258 (Cir Ct Va 1800).
138 The story is told in Ellis, The Jeffersonian Crisis at 81-105 (cited in note 41).
143 But see Holland v Illinois, 110 S Ct 803, 807 (1990), holding that in a criminal case the initial representativeness of the venire may be diminished through peremptory challenges without violating the Sixth Amendment, as that provision requires that a jury be a “fair cross-section” of, not representative of, the community.
This cross-sectional representativeness of the civil jury, whether or not required by the Seventh Amendment, amplifies its effectiveness in serving its original Constitutional purpose, the democratization of the administration of the law in the federal courts. Thus, alone among the major changes in the institution of the jury that have been made over two centuries, the reform of 1968 was solidly congruent with the aims of the institution enunciated by Francis Lieber.144

The profound dissonance of the 1968 reform with the reduction in jury size is apparent. It is mathematically certain that the smaller the jury, the less its chance of being cross-sectionally representative. Less obviously, the worst feature of the smaller jury, that it is more erratic, is magnified by the greater heterogeneity of the pool from which the jury is selected. It would have been more congruent with the effort to make the jury more representative to enlarge rather than to reduce it. Yet both developments occurred at the same time, with little or no conversation between those effecting the two reforms.

The 1968 reform has also proved to be dissonant with the accustomed role of lawyers in the juror selection process. Some trial lawyers want to play a larger role in the selection of federal civil juries than they are now customarily allowed. Many federal courts constrain their participation in order to limit their effectiveness in undoing the cross-sectional representativeness that has been achieved.146

Specifically, lawyers are heard to complain of the process by which particular jurors are selected from the array and assigned to the jury box. Federal judges in civil cases seem prone to perform the questioning of prospective jurors themselves, limiting or precluding direct questioning by counsel. The judges are authorized to exercise such control by Rule 47(a).146 The advantages of maintaining judicial control are three: it takes less time, it causes jurors to maintain greater neutrality toward the parties and counsel, and it discourages efforts by counsel through questioning and peremptory challenges to imbalance the representativeness of the array.

The objections of some to this increasingly common "federal method" of voir dire reflect a premise that a good jury is not necessarily representative of the community, but is one that is dis-
posed to find for their clients.\textsuperscript{147} Many further suppose that their questioning is more effective in revealing good causes for challenge,\textsuperscript{148} such as possible racial bias.\textsuperscript{149} Some lawyers also nourish the hope of influencing jurors by asking the questions, interlarded with comment, that will evoke favorable sympathies toward their client.\textsuperscript{150} For these reasons, some trial lawyers have mounted a political effort to effect a change in the federal practice to assure them an opportunity to question prospective jurors,\textsuperscript{151} an effort that has been resisted by the Judicial Conference of the United States.\textsuperscript{162}

It is possible that the ability of lawyers to advance their clients' interests by influencing the selection of jurors can be enhanced, albeit at considerable cost, through the use of what is euphemistically called "Litigation Science."\textsuperscript{153} The litigation scientist can develop a profile of seemingly disconnected questions that are proven to correlate with a predisposition to hold for a particular kind of litigant. Thus, I have been told by one litigation scientist that he advised a criminal defense lawyer that there was a very high correlation between a propensity to convict his client and a knowledge of the names of players on the East Carolina University football team. A lawyer in a federal civil action so advised would perhaps be guilty of malpractice if, given the opportunity, he failed cheerfully to invite prospective jurors to discuss the prospects of

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\item[149] But see \textit{Rosales-Lopez v United States}, 451 US 182, 192-93 (1981) (affirming, under the facts of the case, the trial judge's refusal to question prospective jurors about racial bias).

\item[150] "In many cases [trial counsel] does not try to get an impartial jury, but a jury which he can handle. He wants jurors having prejudices which he can play upon, sympathies which he can appeal to, foibles which he can capitalize for his own profit." Edson R. Sunderland, \textit{The Inefficiency of the American Jury}, 13 Mich L Rev 302, 310-11 (1915). For an example that will astonish those unfamiliar with Texas practice, see Thomas Petzinger, Jr., \textit{Oil and Honor: The Texaco-Pennzoil Wars} 296-303 (G.P. Putnam's Sons, 1987).

\item[151] See, for example, HR 3462, 100th Cong, 1st Sess (Oct 9, 1987).


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the East Carolina Pirates in the coming season. Whether the system should allow such an examination is, however, another matter; to do so puts a premium on the ability of one side or both to pay the cost of an expensive service that adds nothing to the quality of the judgment ultimately rendered. The value of such services in civil cases has been enhanced by the halving of the jury without a parallel reduction in the number of peremptory challenges. At the same time, it must be allowed, sharp curtailment of the lawyer's participation in the examination of prospective jurors may increase the incentive to employ such "science" by diminishing the opportunities to employ unvarnished intuition.

Two recent Supreme Court decisions are pertinent in reflecting judicial attitudes toward adversary participation in juror selection. In one case, the Court held that the discretion of the prosecutor to exercise peremptory challenges is constrained by the obligation of the state to protect the cross-sectionally representative jury guaranteed by the Constitution. At least one court of appeals has held that this same constraint also applies to the government when it acts as a civil litigant. If this is so for a city, it is likely to be so for a city's adversary as well. In Edmonson, Judge Alvin Rubin explained that the attorney as officer of the court is engaged in "state action" while participating in the selection of jurors, and cannot pursue a course that the state itself cannot lawfully pursue. If this latter holding gains general acceptance, it will have considerable significance as a constraint on the participation of counsel in jury selection. In truth, many peremptory challenges are exercised on the basis of stereotypes; this is true even for those that are exercised "scientifically," on the basis of social science

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144 Batson v Kentucky, 476 US 79 (1986). But see Holland v Illinois, 110 S Ct 803 (1990) (holding that the Sixth Amendment was not violated by the exclusion of black jurors from the jury that convicted a white rapist). In Holland, a majority of the Court was prepared to hold that the rights of black citizens to equal protection of the law are infringed by racially motivated exclusions from juries, without regard to the color of the defendant. See id at 811-12 (Kennedy concurring); id at 813-14 (Marshall, with whom Brennan and Blackmun joined, dissenting); and id at 820-22 (Stevens dissenting). It seems unlikely that this principle would be limited to cases involving African-Americans as distinguished from other ethnic groups.

145 Reynolds v City of Little Rock, 893 F2d 1004, 1008 (8th Cir 1990) (holding that a city attorney cannot peremptorily strike African-American jurors in a civil action against an African-American adversary).

146 See, for example, Edmonson v Leesville Concrete Co, 860 F2d 1308, 1314 (5th Cir 1988).

147 Id at 1312.

148 Hans and Vidmar, Judging the Jury at 63-78 (cited in note 116).
data gathered for the purpose of an important trial. A Queens personal injury lawyer may, for example, attribute his professional success to his wisdom in keeping Westchester County residents off his juries, thereby protecting his clients from what he recognizes as “Westchester anathetics.” Many of these stereotypes, if exposed to public view, would be seen as the bigotry they are, and as totally inappropriate for the state action of dismissing a person from public service. As the dissenting Judge Gee in Edmonson observed, however, the holding reduces the peremptory challenge to a shadow of its former self, a kind of challenge for “semi-cause.” This is so because the stereotype is central to the conventional task of the lawyer exercising challenges.

In the second case, the Supreme Court held that a defendant convicted of a capital offense in state court who was deprived of a peremptory challenge as a result of the court’s failure to grant a justified challenge for cause was not denied due process of law. This case confirms the implication of a 1984 decision that a similar loss of a challenge in a civil case is not reversible error, unless in an egregious circumstance that is hard to imagine. These decisions reflect the Court’s modest estimate of the value of lawyer participation in the selection process. That estimate must reflect in part the Court’s knowledge that private lawyers think that it is their duty to defeat cross-sectional representativeness when they can.

IV. Trials Making Extraordinary Demands on Jurors

The reforms of 1968 are also disharmonious with recent changes in the law of procedure and evidence that have transformed civil trials. The incongruity derives from the fact that fed-

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160 Id at 79-94.
162 Edmonson, 860 F2d at 1317.
163 Van Dyke summarizes: Trial lawyers have for centuries attempted to categorize people in their eternal quest for “the right juror.” The traditional trial-lawyer lore dictates, for instance, that in complicated cases the young should be preferred over the old and men over women. When a child is either the victim or the plaintiff, women jurors are considered desirable, but when women are parties, female jurors should be avoided because they are hard on their own sex. The Irish, Italians, Jews, French, blacks, Chicanos and those of Balkan heritage are said to sympathize with plaintiffs in civil suits and defendants in criminal actions. The English, Scandinavians, and Germans allegedly have the opposite perspective.
164 Van Dyke, Jury Selection Procedures at 153 (cited in note 64).
eral civil trials are longer and expose juries to greater risks of deception and obfuscation than would have been the case a few decades ago, before the move to cross-sectional representativeness. Considerably more is asked of civil jurors in 1990 than 20 or one hundred years ago. These developments might have suggested a need for juries that are larger and more sophisticated, rather than smaller and more randomly selected. Instead, they have been an additional source of tension within the system.

A. Length of Trials

Over the last few decades, the length of civil trials has materially increased. Where the standard common law civil jury trial was a one-day affair, a one-day civil jury trial in a federal court is now the exception. As recently as 1968, 26 percent of federal civil jury trials were still completed in a single day;\textsuperscript{166} in 1988, the percentage of civil jury trials completed in a single day had dropped to 14 percent.\textsuperscript{168}

The extended trial has become common. In 1968, there were 75 civil trials that extended for 10 trial days or more;\textsuperscript{167} in 1978, the number was 132.\textsuperscript{168} In 1988, there were 359.\textsuperscript{169} This increase is disproportionate to the increase in the number of federal civil trials during the same period.\textsuperscript{170}

An obvious and erroneous explanation of this phenomenon is that the world has grown more complex in the last twenty years. The actual causes are multiple, some of them reflecting changes that appeared as many as three decades ago, but which took time to become fully assimilated by the profession and by the courts.

One cause of trial length is the cumulative effect of the practice of billing by the hour for legal services. This practice was an exception to the general practice of billing according to the worth to the client of the service rendered. Hourly billing was limited to the most elite firms until after World War II. Lawyers paid by the hour, like authors paid by the page, tend to be more elaborate in their presentations. This effect has, I suspect, been compounded in recent decades by the growth of very large law firms that are de-

\textsuperscript{166} 836 of 3210. Administrative Offices of the United States Courts, Annual Report Table C8 (1968) ("1968 Annual Report").

\textsuperscript{166} 1988 Annual Report at Table C8 (cited in note 114).

\textsuperscript{167} 1968 Annual Report at Table C8.

\textsuperscript{168} 1978 Annual Report at Table C8 (cited in note 114).

\textsuperscript{169} 1988 Annual Report at Table C8.

\textsuperscript{170} See 1968 Annual Report at Table C8; 1978 Annual Report at Table C8; 1988 Annual Report at Table C8.
pendent on ever-increasing numbers of billable hours to sustain their fiscal health, and perhaps even their viability. The effect is not limited to the presentations of those firms feeling the need to generate billable hours, for an hour invested by one side in litigation is likely to require the investment of at least part of an hour on the other side, even if the lawyer on the other side is working on a contingent fee.

A second cause has been the elaboration of discovery under the 1938 Rules.171 Although it may have taken a few decades to get the word out, litigators have fully mastered the use of discovery. Perhaps more importantly, the effect of those rules has been magnified by federal laws requiring the keeping of extensive business records, by the invention of the duplicating machine, and the computer. The information available to be discovered is several multiples of what it was in 1938. As this abundant information is discovered, it is likely to be presented at trial, thereby adding significantly to the length of trials.

A third, related cause may be the effect of professional liability tort law. The concept of defensive medical practice is now widely understood. It is possible that we are also witnessing some defensive law practice by litigators reluctant to concede a point that someone might later demonstrate to be favorably disposi-
tive.172 This impulse is most likely to be manifested in more discovery, and more discovery means longer trials.

A fourth cause of long trials has been another major innovation of the 1938 Rules, liberal joinder.173 In the interest of economizing on the number of different lawsuits arising out of a single fray ed relationship, Charles Clark and the committee he served made a strenuous effort to enable a party to bring everything into a single lawsuit,174 leaving the trial judge with discretion under the pretrial conference rule175 and the rule on separate trials176 to shape the length of the trial. This discretion has been used more often to extend the length of trials in order to preclude fragmented

171 FRCP 26-37.
173 FRCP 18-25.
175 FRCP 16.
176 FRCP 42(b). See also FRCP 21.
or repetitive litigation than to provide for shorter and more manageable trials. This may or may not be good judicial economics. There is no doubt that it has contributed to the length and complexity of trials.

An important fifth cause of longer and more complex trials has been the 1975 enactment of the Federal Rules of Evidence,\(^\text{177}\) which have allowed a massive increase in the use of expert testimony to influence triers of fact, whether judges or jurors. Where a few decades ago, a juror could expect perhaps to hear a medical expert, there is now an armory of expertise that is available to lawyers. A veritable industry has grown up, with substantial numbers of professional careers invested in the giving of testimony.\(^\text{178}\) An adversarial presentation of conflicting expert opinions is rarely brief.

The longer trial increases the burden on jurors in several respects. It increases the financial cost to the juror of jury service and diminishes the willingness of citizens to serve. The long trial also challenges the attention span of jurors. The sheer volume of information that the jury is asked to assimilate can be the equivalent of one or several college courses, required courses at that, and required to be taken by students who do not have the prerequisites. The outcome, all too often, alas, is dropout.\(^\text{179}\)

The problem is illustrated by a long trial conducted in the Middle District of North Carolina in 1989-1990. The dispute was between two major corporate enterprises and involved antitrust, price discrimination and trademark claims. Perhaps $300 million was in dispute. The trial lasted more than 100 days, and much of the testimony presented economic analysis bearing on business judgments.\(^\text{180}\) The jury was six persons, none of whom had continued academic study after high school.

Their general intelligence was perhaps the equal of any of the lawyers or businessmen engaged in the dispute, and there is no doubt that they took their responsibility very seriously. Yet one

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\(^{179}\) This was foretold by Alexander Hamilton in The Federalist 83. Such proceedings are incompatible with the genius of trials by jury. They require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations, and obliged to decide before they were permitted to return to them. Federalist 83 (Hamilton) in The Federalist Papers at 501 (cited in note 3).

\(^{180}\) For a brief account, see Stephen J. Adler, Can Juries Do Justice to Complex Suits?, Wall St J 2-1 (Dec 21, 1989).
could forgive them if at some point they despaired of their roles in such a proceeding. It is likely that at one or more points it was in the interest of one side or the other to impede rather than advance the jury's understanding of the issues and data, to prolong rather than dispatch the presentation of particular data. At least some citizens contemplating the fortieth or fiftieth day of such a trial might be sorely tempted to call in sick. Thus, one federal judge of my acquaintance has informed me that he hates long trials because they impose on him a duty to lie to jurors about the scheduled date of termination. If he admits that the trial will continue another week or two or longer, they begin in numbers to call in sick. Particularly if the long trial is to be liberally sprinkled with dry and perhaps impenetrable expert opinion, such juror rebellion is foreseeable. The available data suggest that the juror alienated by the long trial is the exception,\(^{181}\) but alienation need not be universal or even general in order to pose a serious systemic problem.

A system accommodating such long trials might select only jurors genuinely willing and able to serve for substantial periods. This happened in the case noted above, but with the result that cross-sectional representation of the jury was diminished by the elimination of many persons on the high end of the spectrum of educational qualifications. This might make the verdict resulting from a long jury trial vulnerable to possible attack based on the lack of representativeness of the jury.\(^{182}\) Certainly, the aim of the 1968 federal legislation has been defeated when all those jurors unable or unwilling to invest half a year of their lives in a single trial have been excused. Could it even be a denial of due process to select a jury restricted to such volunteers willing to spend so much of their lives in this form of public service? Our commitment to cross-sectional representativeness suggests an approach contrary to the trend of longer trials.

That commitment points us toward a search for methods to shorten trials, to be more mindful of the reasonable limits of the lay citizen's attention span. As Judge John Gibbons persuasively


\(^{182}\) See Thiel v Southern Pacific Co, 328 US 217 (1946) (setting aside a civil judgment because the jury that rendered the verdict was chosen by a means which systematically excluded wage-earners). But note that in Thiel the jury lists excluded wage-earners. Id at 221-22. The Court's dicta in Holland, however, indicates that while jury lists must be representative, actual juries need not be. 110 S Ct at 807.
urged in *Japanese Electronics,* 183 part of the answer to the problem of jury competence lies in more frequent use of the court's discretion under Rule 42 to sever issues for separate trial before separate juries. The tool of liberal joinder is a flexible tool that is intended to serve the aims of "just, speedy, and inexpensive"184 dispute resolution, and was never intended to be a means of overbearing and confounding citizens called to perform their public duty.

Given the established composition of federal civil juries, it might be an appropriate rule of thumb for district judges at pre-trial to schedule all jury trials for completion within ten trial dates. If the court is persuaded by counsel that more time is genuinely needed to present all the proof, then a rebuttable presumption might operate to favor a division of the case into parts that can be separately managed within that time, taking special verdicts185 on one or several issues at a time, and building toward a final judgment that might rest on the verdicts of several or even many juries.

A consequence of such a time constraint would be to push courts and lawyers in the direction of presenting much more evidence in the form of videotaped depositions. A proposed revision of Rule 30186 would facilitate and encourage the taking of videotaped depositions. The videotapes could be edited to eliminate objectionable or redundant proof, and inconsequential patter, including evidentiary objections. An informed guess might be that the time required for the presentation of some testimony at trial could be reduced by as much as 75 to 80 percent. If that is true, we may be approaching a time when the Rules or the district court, acting on its own or by local rule, should and will induce counsel to make this form of presentation the primary form of evidence presented to juries. For jurors accustomed to spending many hours a week in front of television sets, this will prove no substantial hardship.

B. Slick Salesmanship in Court

Another modern development which has contributed to the confounding of juries has been the penetration of business advertising ethics and techniques into the presentation of cases in court.

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183 *In re Japanese Electronic Products Antitrust Litigation,* 631 F.2d 1069, 1091 (3d Cir. 1980) (Gibbons dissenting).
184 FRCP 1.
185 FRCP 49.
186 FRCP 30.
It would be extremely difficult to demonstrate that trial tactics are slicker today than they were in 1968 or 1938 or 1791, and I will not make any attempt to do so. There are, however, several reasons why one might believe that they are. Some of the apparent causes of slick salesmanship may be the same as those operating to increase the length of trials.\(^{187}\) The effect of slick salesmanship, however, is quite independent of the effect on the length of trials.

Carefully rehearsed testimony is one phenomenon common in today's federal courts that would have shocked our forebears, and even today shocks international observers.\(^{188}\) The practice of careful "witness preparation" was probably not unknown in ancient Babylon, but the frequency and openness of preparation in contemporary American practice is at least unusual, and may be partly a response to deposition practice under the modern discovery rules.\(^{189}\)

The deposition is a stunningly effective tool for trial preparation. Indeed, it is risky to allow an important witness to be deposed without preparation for the examination. As a result, much important testimony presented at trial has been carefully rehearsed both informally and under battle conditions before it is presented to a jury. As little as possible is left to spontaneity.

Indeed, in the big case, not only are the witnesses prepared, but counsel may prepare before mock juries, testing different forms of presentation on jurors having different socio-economic profiles. A secondary purpose of such preparation is to inform the "scientific" exercise of the right of peremptory challenge, so that both lawyer and witness are tuned to a jury "scientifically" selected to be one that will respond positively to the canned presentation.

These methods may produce trials that are effective in being smooth and unsurprising to the lawyers. But the value of the demeanor evidence presented at such a trial may often be negative. Perhaps especially in using less sophisticated but cross-sectionally representative juries at such trials, we incur an obligation to train lay citizens to discount the worth of any instincts they may feel about the truth or falsity of testimony based on the appearance of witnesses, for that appearance is so often contrived.

Similarly, some expert witnesses, by giving essentially the same testimony many times, become quite polished in their

\(^{187}\) See text accompanying notes 171-78.

\(^{188}\) Atiyah & Summers, Form and Substance in Anglo-American Law at 164 (cited in note 30).

\(^{189}\) FRCP 30.
presentations, creating a special challenge not only to cross-examiners but also to triers of fact obligated not only to comprehend but also to discount appropriately their testimony.

Many experts contribute positively to the court's and the jury's understanding of difficult technical issues of fact. Yet there is also little doubt that many expert witnesses practice a significant amount of hyperbole and even fraud. The ordinary constraints of science and professional responsibility seem to have little play once the expert dons the livery of an adversary and becomes a special kind of advocate.\(^1\) Expert witnesses are not presented in court because of their deep knowledge of their fields, but because of their forensic ability.

The forensic expert who is on top of his presentation can be loaded with repartee with which to defeat even well-prepared cross-examination. A few have developed style and techniques that seem to be adapted from "televangelism." Evaluating the testimony of such persons may call for experience; laymen, almost no matter what their experience, may be quite vulnerable to persuasion by a strong voice and a quick wit that is selling soft soap or snake oil. Vulnerability may be even greater when the selling is done in person under oath on a witness stand than when the selling is done in the citizen's living room through the television commercial.

Still another modern development is the widespread and effective use of demonstrative evidence.\(^2\) Good trial lawyers have in recent times mastered the media skills of Hollywood and Madison Avenue to enhance trial exhibits and presentations with graphic displays,\(^3\) some illuminating and others obscuring reality. In the very big case, the media are themselves manipulated to influence prospective jurors.\(^4\)


\(^2\) See, for example, Mark A. Dombroff, Innovative Developments in Demonstrative Evidence Techniques and Associated Problems of Admissibility, 45 J Air L & Comm 139 (1979). And see, generally, McCormick on Evidence §§ 212-17 at 663-83; 4 Wigmore on Evidence §§ 1150-69 at 321-84.


\(^4\) See, for example, Hirschkop v Snead, 594 F2d 356, 377 (4th Cir 1979) (Phillips concurring).
For several decades, we have had the benefit of continuing education seminar after continuing education seminar at which trial lawyers share these skills of manipulation. The methods are often useful and effective in expressing otherwise complex facts, or facts beyond the experience of the trier of fact. Many good cases have been won on account of the effectiveness of these modern "trial techniques."

On the other hand, "modern" methods do have the effect, especially when used in company with thoroughly prepared witnesses and highly professional forensic experts, to pose a heightened challenge to the trier of fact. The inexperienced and unsophisticated are at materially greater risk of being overborne.194

This may be only to say that there was more wisdom in some of the common law of evidence than our modern reformers allowed. Particularly those rules that inhibited the use of forensic experts and demonstrative proof may have been useful protections of the integrity of a tribunal dependent on lay citizens to determine facts. Those who made the common law of evidence supposed a jury comprised of the moral leaders of the community and undertook to take appropriate account of these citizens' lack of experience in dealing with liars, cheats and hucksters, and to protect their deliberations from influences calculated to arouse their "passion" or exploit their inexperience.

I do not advocate repeal of the Federal Rules of Evidence that loosened these constraints. Doubtless the common law of evidence was too restrictive in excluding expert testimony and other matters that are useful in deciding issues of fact, and needed to be reformed. There is, however, an incongruence between the changes we have been making in the jury and the changes we have been making in the evidence presented to the jury. By extending the margins of admissible proof, we have increased the challenges to the trier of fact. At the same time, by reducing the size and randomizing the selection of the jury, we have diminished the capacity of the tribunal to meet those increased challenges. Accuracy in factfinding by federal courts seems almost certainly to have diminished as a result of this incongruity.

We may, in fact, now be witnessing some of the adverse economic consequences that our late nineteenth-century forebears sought to avoid by reining in the civil jury by means of the di-

rected verdict. Enterprises that see themselves as "repeat players" in a game in which small and unsophisticated juries may subject them to large liabilities on the basis of slick but questionable expert assessments may perceive the risks as being too hard to distribute and too great to bear. There is thus some reason to believe that the unpredictability of outcomes in product liability litigation may be a contributing cause of the abandonment by most pharmaceutical companies of all efforts to develop effective birth control devices. If this is so, we may be paying an enormous social price for such "reforms" as half juries and liberal admission of "expert" opinion.

C. Technical Issues of Fact

Additionally, there is the well-considered problem of the jury's responsibility for technical issues that are said to overtax the average intellect of the cross-sectionally representative jury.

Here I speak not of misleading testimony of bogus experts, but of the inscrutability of questions to which expertise may be addressed. The small and underqualified (in formal measures) jury may be overborne not merely by the length, gloss and turgidity of trial, but by the genuine intellectual difficulty of the economic issues to be resolved. This concern has now given rise to an extensive literature addressing the historical authenticity of an exception to the Seventh Amendment for "complex cases."

Doubtless there are issues that are confoundingly technical, that one cannot possibly understand without being comfortable in the use of calculus or other intellectual techniques that are beyond the ken of us who are made of common clay. As the court

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200 See, for example, Alvin B. Rubin, Trial by Jury in Complex Civil Cases: Voice of Liberty or Verdict by Confusion?, 462 Annals of the Am Academy of Pol & Social Science 87 (1982).
204 See, for example, Francis C. Dykeman, Forensic Accounting: The Accountant as Expert Witness (John Wiley & Sons, 1982).
noted in *Japanese Electronics*. Such issues are likely to confound any trier of fact, judge as well as juror, who is not very specially qualified.

The truly complex technical issue is not, it seems, a common problem of contemporary federal civil litigation. A factual issue can control the outcome of litigation only if it is first sufficiently understood by lawmakers that they are able to designate it as controlling. A jury is never required to understand everything about a particular chaological phenomenon, to name a current intellectual mystery as an example, but only those aspects previously understood by a judge or a legislator.

Moreover, it will seldom repay a trial lawyer to diminish the self-esteem of jurors by presenting material that they will recognize to be beyond their competence. While lawyers may often deliberately confound a jury for tactical reasons, they will rarely do so by any means that calls attention to the felt inadequacies of jurors.

When these universal conditions are considered, the risk is modest that many truly confounding issues or obviously confounding presentations are submitted to juries. A cross-sectionally representative jury is therefore more likely to be overborne by the sheer length of today's trial, or by Madison Avenue techniques and expert hokum, than by the confounding complexity of the issues to be resolved.

A problem is more likely to arise from the contortion of legal issues to bring the associated factual issues within the range of the common experience shared by jurors. It is not sensible to frame a legal right or liability in terms that require a jury or half jury enforcing it to consider data that cannot be presented without the use of calculus or other intellective skills not likely to be present in the group. I cannot offer an example of such a contortion of the law to accommodate the modern half jury, but I speculate that it

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206 For the accommodation of substantive law to fit the development of the class action, see Geoffrey B. Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 FRD 307 (1973); Comment, *The Impact of Class Actions on 10b-5*, 38 U Chi L Rev 337 (1971).
has happened. If it has or will, then it is a cost of the present system that it limits the development of the substantive law.

V. Establishing the Boundaries of the Right: A Neglected Duty of Congress

In light of these numerous adverse consequences that can result from the use of the civil jury or half jury, one might suppose a need to make intelligent decisions about its use. James Wilson may have been the first partisan of the jury to caution against overuse, but surely over the last two centuries there have been many who questioned the proper scope of its use. Almost never, however, has there been serious deliberation about the practical advantages or limitations of the civil jury trial. It is almost as if there were a centuries-old conspiracy to avoid such discussions. As a consequence, the scope of the right to a civil jury trial seems to be the one exception to the general willingness to transform the institution. Despite the radical change undergone in the institution preserved by the Seventh Amendment, we cling to the one appearance of a tradition that the right to a jury trial applies in 1991 at least to those cases or issues that would have been decided by jury in a federal court in 1791.

The text of the Seventh Amendment set forth above this article is brief and delphic. It makes clear only that Congress may not assign to courts created pursuant to Article III the power and responsibility to enforce rights that are state-created or rooted in the common law writs unless those courts employ juries to determine disputed facts. Extensions of the right to trial by jury in civil cases beyond this irreducible core are matters for construction.

A. A Sacred Text?

We might attempt the task of construction by means of a functional analysis of the role of the jury in the constitutional architecture. Among the appropriate referents for such a functional definition of the constitutional right to jury trial in a particular class of disputes in federal court would be the stakes, the number and character of the issues to be decided, the nature of the information or skill needed to make the decision with acceptable accuracy and fairness, and the risk that an unduly emotional response of jurors might subvert the substantive law by systematically over-

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208 See Parsons v Bedford, 28 US 433, 441-48 (1830).
extending or abridging the particular rights at issue. While on at least one occasion the Supreme Court has indicated a willingness to consider such matters in applying the Seventh Amendment, the federal courts have generally eschewed consideration of these practical political consequences.

There may be a good reason for judicial reluctance to embark on functional construction of the Amendment. Its text expresses, if nothing else, popular mistrust of the federal judicial office. Hence, the federal judges interpreting the Amendment are placed in the self-dealing position of defining their own constraints, of prescribing the limits within which they themselves shall be trusted. Perhaps because they have sensed the potential appearance of impropriety, the federal courts have searched for formalistic measures of the Amendment's meaning and applicability. This has generally resulted in an historical approach that seems to give undue emphasis to the word "preserved" as it appears in the text of the Amendment.

Congress has been of lamentably little help. It seems that few legislative votes can be won for any right-creating bill by including a provision specifying a mode of trial for actions to enforce the rights created. There may even be a risk of losing votes. It is thus as if the text of the Amendment has a sacred quality and is less appropriate as a topic of earnest debate than, for example, the crime of flag-burning. Accordingly, Congress has passively allowed its enactments to become anchors to a large, intricate web of judge-made constitutional anachronism that determines the mode of trial to be employed in the enforcement of federally created rights.

This is a forlorn plea to Congress to be a bit less reverent and a bit more assertive, to the end of relieving the legal system of the dusty cobweb that is the law of the Seventh Amendment.

B. Law-Equity Distinction

The most familiar example of constitutional anachronism is the embalming of the law-equity distinction. Merger of law and equity was substantially effected in America over a century ago, and yet we find ourselves still entangled in its ancient and irra-

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209 See, for example, Ross v Bernhard, 396 US 531, 538 n 10 (1970).
211 Clark, Code Pleading at 78-123 (cited in note 174). Another vestige of the distinction in the federal practice was recently abolished in Gulfstream Aerospace Corp v Maya-
tional intricacies when it comes to an application of the Seventh Amendment. If the Seventh Amendment can be taken to forbid Congress' denying the right to jury trial in actions to enforce rights of its own creation that are roughly analogous to those actions formerly brought pursuant to common law writs, it surely does not forbid the extension of the right to actions analogous to eighteenth-century suits in equity. Such an extension by Congress of the right to a civil jury trial could be seen as a consummation of the marriage of law and equity first announced in 1848.

I do not mean on this occasion to be so quixotic as to advocate this idea, for it may be too shocking to the Hamiltonians among us. Yet such a reform could eliminate a needless source of complexity in federal civil procedure. To try a case to a jury if the plaintiff demands damages, but not if the plaintiff seeks only injunctive relief, as we presently do, is not functionally justifiable—it is irrational. This irrationality is rooted in the assumption that the line between law and equity was set in concrete in 1791.

There have been proponents for such radical reform in some states. Thomas Jefferson was one. As Governor of Virginia he persuaded the Commonwealth to extend the right to jury trial to suits in equity. His experiment was declared a failure and abandoned a few years later. Reasons for the reversal are not recorded, or at least I have not found them. It was probably relevant that law and equity had not been merged in Virginia at that time. We can also surmise that some of the matters in equity in the Virginia


See Pernell v Southall Realty, 416 US 363, 375 (1974); Dairy Queen, Inc. v Wood, 369 US 469, 476-77 (1962); Beacon Theatres, Inc. v Westover, 389 US 500, 504 (1959). Because Congress was silent in the statutes involved in these cases, the Court has never had to apply its antiquarian techniques to the end of invalidating an explicit statutory provision for non-jury trial.

This was one of the important announced aims of the Field Code of Civil Practice, 1848 NY Laws, ch 379. See, generally, David Dudley Field, First Report of the New York State Commissioners on Practice and Pleadings (Charles Van Benthuysen, 1848).

See Dairy Queen, 369 US at 469.

But see the discussion in Pernell, 416 US at 374-75.

Sunderland, 13 Mich L Rev at 307-08 (cited in note 46), recounts the nineteenth-century political movement to protect and enlarge the jury's prerogatives in civil litigation in state courts.

An Act for establishing a High Court of Chancery, Va Stat ch 15, § 26 (1777). The provision was repealed in October 1783. The story is told in William Blackstone, 3 Commentaries on the Laws of England 57 n 15 (St. George Tucker, ed, 1803).

Compare Buchanan v Buchanan, 170 Va 458, 471, 197 SE 428, 432 (1938).
practice of the time pertained to family relations that the litigants would have preferred to expose to less public scrutiny than a jury trial required. That is, however, a concern that has no application to modern federal equity.  

C. Congressional Inertia and Guidance

It is, of course, even more difficult for Congress to consider limiting the use of juries by means of a provision specifying that a particular federally created right shall be enforced by an action to be tried to the court without a jury. Contrary to the Antifederalist fears, Congress can be absolutely trusted not to savage this popular democratic institution. Two hundred years of experience confirm that a Congress standing every biennium for re-election by voters who are also sometime jurors is structurally incapable of taking a step to "eviscerate the Seventh Amendment's guarantee by assigning" all cases to courts of equity. We can stop worrying about that. And if Congress were imaginably willing so to affront citizen-jurors, we can be sure that the trial bar is sufficiently organized to meet any political challenge that would "eviscerate" its collective livelihood.

It would, however, be constructive if Congress could more frequently address the issue of mode of trial in litigation conducted pursuant to its enactments, and even perhaps exercise some interstitial authority to define the limits of the Seventh Amendment right as it applies to the enforcement of rights that it creates. There are several well-established methods by which Congress can, and sometimes has, exercised this responsibility.

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190 Alexander Hamilton, in Federalist 83, argued that suits in equity were too complex for a decision in the mode of a civil jury verdict. Clinton Rossiter, ed., The Federalist Papers at 501-10 (cited in note 9). If suits in equity were more complex than actions at law in 1787, that would not seem to have been true in the federal courts for many decades.


192 A proof of this is found in the frequency with which Congress has acceded to the Court's presumption in favor of civil jury trials. See, for example, Pernell v Southall Realty, 416 US 363; Fleitsman v Welsbach Street Lighting Co., 240 US 27 (1916); Hepner v United States, 213 US 103 (1909). For current uncertainty, see, for example, United Transportation Union, Local 74 v Consolidated Rail Corp., 881 F2d 282 (6th Cir 1989); and Leach v Pan American World Airways, 842 F2d 285 (11th Cir 1988), which illustrate a circuit split on the issue of the right to trial by jury in actions brought to enforce the federal duty of fair representation.
D. Congress's Power to Avoid Trial by Jury

Congress unquestionably has the Constitutional power to preclude the operation of the Seventh Amendment on actions brought to enforce rights that the Congress itself creates by assigning the jurisdiction for the enforcement of any or all such rights to state courts, where the Seventh Amendment is clearly inapplicable.\textsuperscript{223} This was the situation with respect to all federally created rights from 1789 to 1875, when Congress for the first time authorized the federal courts to entertain actions arising under federal law.\textsuperscript{224} Before that time, a state court jury often considered factual issues in civil actions brought to enforce federal statutory rights, but only because state law so provided. And a federal court jury might decide such a case if federal jurisdiction were invoked on the basis of the citizenship of the parties.

This certain power further confirms that the Seventh Amendment is a limitation on the power of Congress to confer jurisdiction under Article III, but is not directly linked to the power of Congress to create substantive rights in the exercise of its power under Article I of the Constitution. We may conclude that the federal right to a jury trial is a feature of the federal forum, not the federal source of the right.

It is equally clear that the Seventh Amendment has no application to action taken by the Executive or Legislative branches of the federal government. Thus, Congress can create an administrative agency within the Executive branch to find facts bearing on the enforcement of statutory rights by the Executive without offense to the Seventh Amendment.\textsuperscript{225} At least if the agency is a politically accountable element of the executive branch of the government, the most elementary aim of the Seventh Amendment, to prevent the vesting of factfinding power in elitist life-tenure judges, is not brought into play.

This distinction is less clear when the administrative agency is provided with political independence and its factfinding responsibility is vested in administrative law judges appointed for long terms and protected from political accountability by a network of

\textsuperscript{223} See text accompanying note 37.

\textsuperscript{224} Act of March 3, 1875, 18 Stat (Part 3) 470. For discussion, see Felix Frankfurter and James M. Landis, The Business of the Supreme Court 64-69 (MacMillan, 1928).

civil service provisions, so that the administrative tribunal is an imitation of an Article III court. Yet no federal court has yet perceived any such administrative tribunal to be an Article III court in disguise. This seems to hold true even where Congress has authorized the administrative agency to entertain enforcement proceedings initiated by private parties.

Congress also has constitutional power to authorize the Executive to bring a civil action in a federal court to enforce a statutory right without trial by jury where the right can be characterized as a "public right." For example, Congress could authorize suits by the United States to enforce the Clean Water Act and effectively preclude the use of the jury in such proceedings.

Unfortunately, Congress did not speak in the Clean Water Act to the issue of mode of trial. So the issue was presented to the Court without legislative guidance in the recent case of *Tull v United States*. There, suit was brought by the United States to recover civil penalties from persons found to have dredged or filled a navigable waterway. The Court held that only the issue of liability under the Act, not the issue of the amount of that liability if found, must be submitted to a civil jury. To reach this awkward result, the Court labored over fundamentally meaningless eighteenth-century analogies to ascertain whether a civil penalty was recoverable on a writ of debt.

If Congress had made an explicit provision for non-jury trial in the Clean Water Act, would the Court nevertheless have made its antiquarian study of the common law writs and substituted its construction of the Seventh Amendment for that of Congress? It seems unlikely, at least if Congress were sufficiently artful to prescribe the action as one to enforce a "public right" to restitution for the intangible harm caused by the defendant's otherwise irremediable unlawful conduct:

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226 For a demonstration of the difficulty of distinguishing a "Court of the United States" from an administrative officer of the executive branch, see Martin Shapiro, *Courts* 20-28 (University of Chicago, 1981).
228 See *Granfinanciera, S.A. v Nordberg*, 109 S.Ct at 2802-04 (Scalia concurring); *Crowell v Benson*, 285 US 22, 50-51 (1922); *Murray's Lessee v Hoboken Land and Improvement Co.*, 59 US 272, 283-84 (1856).
Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders. But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury.\footnote{Granfinanciera, 109 S Ct at 2795.}

Another way in which Congress might provide for non-jury trials in the enforcement of federally created rights without expressly limiting the Seventh Amendment right is to restrict enforcement proceedings to a special tribunal that is a part of the Article III judiciary. This device should not work if the rights at issue are state-created, for then it is a mere gambit to frustrate the central purpose of the Seventh Amendment. But for federally created rights that are not mere displacements of state-created rights, the question is open whether Congress can direct the judicial traffic to a special Article III forum in which there is no civil jury.

The Supreme Court, in *Granfinanciera*, was recently confronted with a Congressional enactment that seemed to provide for non-jury trials in specialized Article III fora, the bankruptcy courts. The Bankruptcy Act that created these courts\footnote{The Bankruptcy Reform Act of 1978, Pub L No 95-598, 92 Stat 2549, 2657 (1978), codified at 28 USC §§ 151-58 (1988).} was a major reform that aimed to elevate the role and status of the bankruptcy referee.\footnote{See, generally, Gibson, 72 Minn L Rev 967 (cited in note 74). Before that enactment, it had been established that so-called summary proceedings before a referee, because they involved claims on the disputed res that was the bankrupt’s estate, were equitable. Hence, such proceedings were not subject to the Seventh Amendment right to jury trial, even though the claims asserted might rest on state-created common law contracts and would have been subject to the right to jury trial if asserted against the bankrupt himself.\footnote{Katchen v Landy, 382 US 323, 336-38 (1966). It was equally clear that claims brought on behalf of the bankrupt estate against persons making no claim against it were to be asserted in a so-called plenary proceeding in federal or state court, as if brought by the bankrupt, and were subject to the same right to jury trial.\footnote{Schoenthal v Irving Trust Co., 287 US 92 (1932).}} Before that enactment, it had been established that so-called summary proceedings before a referee, because they involved claims on the disputed res that was the bankrupt’s estate, were equitable. Hence, such proceedings were not subject to the Seventh Amendment right to jury trial, even though the claims asserted might rest on state-created common law contracts and would have been subject to the right to jury trial if asserted against the bankrupt himself.\footnote{Katchen v Landy, 382 US 323, 336-38 (1966). It was equally clear that claims brought on behalf of the bankrupt estate against persons making no claim against it were to be asserted in a so-called plenary proceeding in federal or state court, as if brought by the bankrupt, and were subject to the same right to jury trial.\footnote{Schoenthal v Irving Trust Co., 287 US 92 (1932).}}
as the bounds of the authority and competence of the newly created bankruptcy judge. Some matters, such as actions to set aside fraudulent conveyances, that had formerly been resolved in plenary proceedings, were brought within the jurisdiction of the bankruptcy court. Perhaps in enlarging the bankruptcy jurisdiction in this way, some Congressmen meant to preclude the use of the civil jury, but the Act is not that explicit.\textsuperscript{237} Congress reaffirmed the existing right to jury trial\textsuperscript{238} without specifying the extent of that right as applied to proceedings in the restructured bankruptcy forum.

The mystery deepened when the Court held in Northern Pipeline Construction Co. v Marathon Pipe Line Co.\textsuperscript{239} that the 1978 revision violated Article III of the Constitution in authorizing non-Article III bankruptcy judges to hear and decide actions arising under state law without the consent of the parties. In 1984, Congress sought to repair the Act\textsuperscript{240} by reducing the authority of the bankruptcy judges, and included a provision explicitly reaffirming the right to jury trial in personal injury and wrongful death actions.\textsuperscript{241}

It will be recalled that the Court in Granfinanciera\textsuperscript{242} did not decide whether a civil jury trial could be conducted in the bankruptcy court. But the Court did hold that an action against a non-claimant to the bankrupt estate to set aside a fraudulent conveyance is an action at law within the meaning of the Seventh Amendment, and is therefore subject to the right to trial by jury even if within the jurisdiction of the bankruptcy court. By this holding, the Court for the first time signalled a willingness to disturb a decision of Congress that appeared to limit the role of the jury in civil litigation.

The Court was right to do so. The bankruptcy court is an element in the structure of the Article III courts. Even if bankruptcy judges are not appointed pursuant to Article III, they are appointed by Article III judges. Authorized as they are by the Bankruptcy Act to enter final judgments in private disputes, these courts are exercising precisely the sort of jurisdiction that the

\textsuperscript{237} See, generally, Gibson, 72 Minn L Rev 967 (cited in note 74).
\textsuperscript{239} 458 US 50 (1982).
\textsuperscript{241} 28 USC § 1411 (1988).
\textsuperscript{242} 109 S Ct 2782 (1989).
Framers had in mind when they drafted the provisions of Article III bearing on the process and terms of judicial appointments. Moreover, the rights in question were essentially state-created contract and property rights that were subjected to federal enforcement. If the bankruptcy court looks like an Article III court, moves like an Article III court and sounds like an Article III court, then it ought to be regarded as subject to the provisions of Article III. And if an Article III court is found enforcing common law contract and property rights, it is unquestionably subject to the Seventh Amendment.

It is possible that the Congress will now prescribe the method by which the Seventh Amendment right will be honored in bankruptcy litigation. That would be a step in a hopeful direction. If an accommodation made by Congress were reasonably faithful to the purposes of the Amendment, one hopes that the Court would abide the legislative decision, thereby encouraging Congressional attention to such matters, and not again plumb arcane depths of historical forms of action at law to solve what is, after all, a simple issue.

Whatever Congress may do with respect to bankruptcy, it should be understood that the holding of Granfinanciera rests on the nature of the substantive rights at issue. That holding poses no obstacle to the creation of an Article III patent court, for example, so long as that forum is not employed to determine state-created claims without a jury. Manifestly, the line between federally created and state-created or common law rights is not always easily drawn, but it is, nevertheless, an appropriate boundary of the Congressional power to provide for non-jury trials of private disputes heard in specialized Article III courts.

There remains the question of Congressional authority to provide for private enforcement of federally created rights in the regular Article III courts. This question may be analytically the same as that just put with respect to a specialized Article III court. Yet there is a practical difference between the use of an enforcement apparatus that is tailored to a particular substantive federal right and the use of the regular federal courts that employ a "trans-substantive" procedure that can, on short notice, be adapted to the use of a civil jury.

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Rarely has Congress seriously considered taking action to preclude the service of the civil jury in private litigation of any kind conducted in a regular Article III court. The Supreme Court has on occasion, however, signalled a willingness to defer to Congress on the matter of mode of trial if the preclusion of the jury trial is not offensive to the considerations that gave rise to the Seventh Amendment.\textsuperscript{244}

The major example of Congressional preclusion of the civil jury is found in the Fugitive Slave Acts of 1793\textsuperscript{245} and 1850,\textsuperscript{246} which ensured slave owners of summary, non-jury adjudication of actions to recover slaves.\textsuperscript{247} It seems likely that Congress was correct in its expectation that juries would nullify the Fugitive Slave Act, for aiders and abettors of fugitives were often exonerated by juries when prosecuted in federal courts.\textsuperscript{248} However we may now regard this repressive legislation, it was enacted to enforce a right of slaveowners that was itself assured by an explicit provision of the Constitution.\textsuperscript{249} When Massachusetts enacted a statute creating a jury-tribable action in which the individual defendant could prove that he was not in fact a slave, its own Supreme Judicial Court held the act unconstitutional on supremacy grounds.\textsuperscript{250} The hateful laws signaled a significant stage in the evolution of mechanisms for preventing jury subversion of national law.

A quarter century ago, extended discussion was held on Capitol Hill with a view to possible delimitation of the right to jury trial in connection with the Civil Rights Act.\textsuperscript{251} Arguably, civil rights legislation enacted pursuant to the Fourteenth Amendment

\textsuperscript{244} See Albermarle Paper Co. v Moody, 422 US 405, 419-21 (1975); Note, Congressional Provision for Nonjury Trial Under the Seventh Amendment, 83 Yale L J 401 (1973).
\textsuperscript{245} Act of February 12, 1793, 1 Stat 302.
\textsuperscript{246} Act of September 18, 1850, 9 Stat 462 (authorizing proceedings before a commissioner).
\textsuperscript{248} For example, Van Metre v Mitchell, 28 F Cases 1036 (WD Pa 1853); Norris v Newton, 18 F Cases 322 (D Ind 1850); Vaughan v Williams, 28 F Cases 1115 (D Ind 1845).
\textsuperscript{249} The Fugitive Slave Clause of the Constitution provided that a slave escaping to another state "shall be delivered up on claim of the" owner. US Const, Art IV, § 2. There were, to be sure, strenuous arguments mounted on the Seventh Amendment, chiefly by James Birney, the leading advocate for fugitives. The story is told in Robert M. Cover, Justice Accused 159-91 (Yale University Press, 1975).
is exempt from the Seventh Amendment. Section 5 of the Fourteenth Amendment does explicitly authorize Congress to enforce “by appropriate legislation” the minoritarian rights set forth in the preceding provisions.\textsuperscript{232} Appropriate legislation, it would seem, might well preclude the use of a civil jury that expresses the moral sense of a community when the rights it seeks to create are known to be unrecognized by the community from which the jury would be selected. Especially given the requirement of jury unanimity, a minority plaintiff whose action is tried by jury is at risk of having a right denied by the lawless act of a single bigot selected for the jury.

Perhaps this practical political concern might be viewed in a different light in 1990. Given changes in the communities affected as well as in the personnel of the federal courts and the institution of the civil jury, a wise civil rights lobby might prefer to risk plaintiffs’ cases on the verdict of the modern half jury, rather than on the findings of a district judge.\textsuperscript{233} The issue seems pre-eminently one to be resolved by Congressional enactment, not by constitutional interpretation.

Congress, however, as usual avoided the jury trial issue, leaving it to the courts to resolve without explicit legislative expression one way or the other. The federal courts, in their accustomed manner, consulted antiquity. They reached the Solomonic result that the civil jury is available under the fair housing provisions of Title VIII,\textsuperscript{234} but not the employment discrimination provisions of Title VII of the Act,\textsuperscript{235} a result that cannot be persuasively explained to the practical political observer.

The Court did, however, succeed in returning to Congress the responsibility for that curious result. It did so by emphasizing that the text of Title VII of the Civil Rights Act, by characterizing the relief provided as “equitable,” expressed a Congressional purpose that Title VII actions not be tried by jury.\textsuperscript{236} Whether Congress

\textsuperscript{232} US Const, Amend XIV, § 5.
\textsuperscript{233} See Beesley v Hartford Fire Ins Co., 717 F Supp 781 (ND Ala 1989).
\textsuperscript{235} See Harkless v Sweeney Independent School District, 427 F2d 319, 323-24 (5th Cir 1970); Comment, The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom, 68 NW U L Rev 503 (1973). For adverse comment on Sweeney, see Dan B. Dobbs, Remedies § 2.6 at 78-79 n 47 (West, 1973). Many Title VII plaintiffs desiring trial by jury were able to secure one by joining a Title VII claim with a claim under 42 USC § 1981; that device may now be foreclosed by the decision in Patterson v McLean Credit Union, 109 S Ct 2363 (1989).
\textsuperscript{236} The Court, in Curtis v Loether, 415 US 189, 196-98 (1974), emphasized this textual difference between Titles VII and VIII of the Act. See Sweeney, 427 F2d at 324.
intended its use of that magic word to resolve the jury trial issue may be doubted, but it did enable the Court to lay at the feet of Congress the political responsibility for the use of the civil jury. The case also suggests a means by which Congress can deny the right to a civil jury in private actions without risking explicit language; the approved method is to refer to a particular remedy as "equitable."

The political issue of jury trials in civil rights litigation had a different aspect when the substance of the dispute was alleged discrimination against the aged. The problem, if there was one, was the opposite of the problem with discrimination against a member of a minority group, for the risk was that juries would be too compassionate with elderly plaintiffs, all jurors being perhaps too ready to see themselves in the plaintiff's role, with the result that the legislation could perhaps become an unintended and delicate form of unemployment insurance for persons of mature years. This concern seems to have proved to be unfounded: there appears to be no evidence of concern that civil juries have been unduly considerate of senior plaintiffs.

It is, however, unfortunate that Congress was unable to bring its wisdom to bear on the issue. The Court, in the absence of legislative guidance, practiced its custom of resolving the issue formally. With respect to age discrimination cases, this was achieved by means of a presumption of legislative intent favoring juries.

Even in the field of civil rights to which the Fourteenth Amendment has application, the power of Congress to provide for non-jury trials of private actions brought in federal court to enforce federal rights is restrained by the Seventh Amendment. Where the federally created right is a displacement of state-created private rights, it cannot be determined by life-tenure federal judges without a jury.

Granfinanciera, although not a civil rights case, again affords a recent example of such a displacement of common law rights by federal law that is not effective to preclude the application of the Seventh Amendment. It was in that case unsuccessfully argued that the action to set aside a fraudulent conveyance was an assertion of a "public right" because Congress had impliedly made it so.

358 Lorillard v Pons, 434 US 575 (1978). The Court distinguished Title VII with still more antiquarianism. Id at 584.
by providing for its enforcement in a non-jury proceeding in the bankruptcy court. The Court rejected the argument, saying that "[w]holey private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated" in the concept of "public rights" that may be enforced without regard for the Seventh Amendment.

Insofar as the interests at stake in the fraudulent conveyance case are state-created property rights, the Court was on solid historical and practical political ground. As Douglas Baird and David Currie have separately argued, the fact that there is in some sense a "public interest" in the restructuring of debtor-creditor relations does not entitle Congress to subject traditional state-created rights to the hazards of federal court non-jury trials.

On the other hand, insofar as the issue to be litigated is whether a particular event was a violation of federal law, one may question the constitutional wisdom of dicta that condition the authority of Congress to designate a mode of trial in right-creating legislation on the presence of a government agency as the primary enforcer of the created right. Recent decades have demonstrated the superior effectiveness of the private civil action brought to enforce federal laws. In light of that experience, Congress today may well conclude that the most effective means of enforcing a particular federally created right is to use the Article III courts as the forum, and harmed individuals as private attorneys general. The Clean Water Act, for example, might be given additional bite by authorizing neighbors to bring deterrent enforcement actions. Whatever the political and economic wisdom of such a proposal, it would be unsound to freight the legislative decision with a rigid notion that the Seventh Amendment applies to require the use of

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263 Compare James and Hazard, Civil Procedure § 8.2 at 417 (cited in note 95): "[T]he legislature has some latitude to change the scope of the jury-trial right if doing so is a reasonably necessary incident to other procedural or substantive objectives and does not withdraw jury trial in an area where historically it was firmly established."
the modern half jury to determine all claims of private right in regular Article III courts.

The appropriate role of the Supreme Court in these matters is to encourage Congressional leadership in providing a reasoned construction of the Seventh Amendment. Only by practicing appropriate deference to Congress can the Court liberate us from the uncharacteristically rigid conception of the Seventh Amendment that we have imposed upon ourselves. That conception is unduly rigid not only because it invests our law forever in the quagmire of common law pleading, but also because it is an artificial constancy in an environment of radical change. The modern federal half jury is scarcely a counterpart to its eighteenth-century ancestor, and it is anomalous, as well as anachronistic, to try to measure its availability by eighteenth-century standards as if it were the institution of old.

CONCLUSION

It is partly my point that these sundry observations about the present state of the federal civil jury have no theme. The institution of the federal civil jury has been subject to waves of change, coming first from one direction and then from another, seldom surging in response to the historic mission of the institution. And sometimes these waves have collided. The result has been the declining effectiveness of an esteemed institution.

We seem to be collectively incapable of thinking coherently about what it is that we want the civil jury to achieve. Hence, we cannot shape the institution to reflect a sense of purpose. Form, alas, cannot follow an uncertain function. Only the 1968 reform of jury selection, of the several radical changes, was true to the function of the jury prescribed by the constitutional architecture of 1791. Any chance we have to regain coherence for the Seventh Amendment depends on the willingness of Congress, properly encouraged by the Court, to reform. While coherence in legal institutions may be a dispensable luxury, it is an appropriate wish for the federal courts as they continue into their third century.