



1991

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Recommended Citation

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PREGNANT WITH EMBARRASMENTS: AN INCOMPLETE THEORY OF THE SEVENTH AMENDMENT*

IAN AYRES**

INTRODUCTION

The first motion at the Federal Constitutional Convention to include a guarantee of jury trials in civil cases was made only two days before the end of active session.¹ General Charles Pinckney of South Carolina and Mr. Elbridge Gerry moved to supplement Article III's guarantee of jury trial in criminal cases with the words: "And a trial by jury shall be preserved as usual in civil cases."² Mr. Nathaniel Gorham criticized this guarantee both because it was "not possible to discriminate equity cases from those in which juries are proper" and because "[t]he constitution of Juries is different in different States and the trial itself is *usual* in different cases in different States."³ General Pinckney concluded the discussion (before the motion was defeated) by observing that "such a clause in the Constitution would be pregnant with embarrassments."⁴

This phrase makes an apt title for this piece for two reasons. First, it undoubtedly describes the piece that you are about to hear.⁵ I approach this topic with great humility and fear. I am not a constitutional scholar nor an historian. The average member of this audience could bring to bear broader and

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** Visiting Professor, Yale Law School; Professor, Stanford Law School (beginning 1992). This piece has been deeply influenced by the seminal historical analysis contained in Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966) and Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973). I would like to thank Jennifer Brown, Laura Dooley, John Jeffries, John Langbein, John McCoid, Eben Moglin, Colleen Murphy and Peter Schuck for helpful comments. Akhil Amar went far beyond the call of collegiality by going to great lengths to educate me in this area. The remaining errors are my own. Jennifer Gonzalez provided excellent research assistance.

1. Notes of James Madison, on the proceedings of Federal Convention (Sept. 12, 1787), in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 at 587 (Max Farrand ed., 1934). See also Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966).

2. *Id.* at 628.

3. *Id.*

4. *Id.*

5. This interpretation is inspired by Jack Balkin's wonderful book review of LAW AND LITERATURE: A MISUNDERSTOOD RELATION by RICHARD POSNER (1988). See Jack Balkin, *The Domestication of Law and Literature*, 14 L. & SOC. INQUIRY 787 (1989):

deeper knowledge of this topic. Saying that I am unencumbered by the blinders that previous scholarship and categorization might impose, provides small succor for me and I would suggest for you. Consider then this paper as being "posted": continue on at your own risk.

The title also relates to my thesis. The drafting embarrassments infected not only the initial attempt to guarantee civil jury trials but the final version of the Seventh Amendment as well. Scholars should stop looking for a complete theory to explain the contours of the Seventh Amendment mandate, because a complete theory does not exist. In this paper, I will try to explain what a complete theory of the Amendment would need to do and why the search for such a theory is somewhat quixotic. I will also focus some attention on the often forgotten sibling of the Amendment, the "Reexamination Clause," and argue that this clause can help us, in small ways, to interpret not only the "Preservation Clause" but also other parts of the Constitution.

I. A FLAWED TEXT

The text of the Seventh Amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.⁶

I would argue that even before struggling with the substantive contours of these guarantees the text itself is slightly embarrassing. The second half of the Amendment -- the Reexamination Clause -- contains what appears to be a clear error in punctuation. The Amendment includes a comma in the phrase "and no fact tried by a jury [comma] shall be otherwise re-examined . . ."⁷ What is the significance of this comma? Commas are sometimes used to set off parenthetical expressions and nonrestrictive clauses that could be dropped from sentences without destroying the central meaning.⁸ For example, "where the value in controversy shall exceed twenty dollars" could be deleted from the first half of the Amendment without destroying the grammatical structure of the

6. U.S. CONST. amend. VII.

7. The errant comma is included in the original version of the Bill of Rights transmitted by Congress to the states. DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870, at 323 (1894). The individual states usually appended this original transmission with their ratifying documents. *Id.* Some reproductions of the Constitution have removed the comma without comment.

8. See WILLIAM STRUNK, JR. & E. B. WHITE, THE ELEMENTS OF STYLE 2-3 (3d ed. 1979) [hereinafter STRUNK & WHITE]; HENRY WATSON FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 587 (2d ed. 1965) [hereinafter FOWLER].

preservation clause. But to do this with the last two commas would require dropping the core reexamination verb. Following this especially strained interpretation might lead to the conclusion that prohibition of reexamination was not central to the Framers' intent.

Alternatively, one could suggest that the Framers did not err by placing in too many commas but erred by failing to punctuate enough.⁹ The second half of the Amendment could be saved this embarrassment in punctuation by adding an additional comma -- so that the clause said "and no fact [comma] tried by jury [comma] shall be otherwise re-examined in any Court of law . . ." Yet this interpretation is also strained -- for while it retains the grammatical integrity of the sentence, it would marginalize what we have until now taken to be the core of the Reexamination Clause: that it only prohibits reexamination of facts found *by juries*.

Finally, we might read the comma to be the usage of many college sophomores -- that is, simply implying that we should pause and perhaps take a breath: "and no fact tried by a jury [suitable pause] shall be otherwise re-examined . . ." Under this interpretation, we might sense that the Framers had such reverence for the fact-finding function of jurors that they were moved to a tributary silence after its mention.¹⁰

I would argue, however, that these interpretative inventions are at most cute. The stronger inference to draw from the presence of this comma is that the Framers made a mistake in punctuation.¹¹ In a trivial sense, it is impossible to provide even a complete theory for the punctuation of the Amendment, because one cannot construct a persuasive justification for an error. Dwelling at length (as I have) on what seems to be a clear error underscores *the fallibility of the text*.¹² Indeed, I would suggest that from now on whenever the

9. "[W]hether the interruption is slight or considerable, [the writer] must never omit one comma and leave the other. There is no defense for such punctuation as

Marjorie's husband, Colonel Nelson paid us a visit yesterday."

STRUNK & WHITE, *supra* note 8, at 2.

10. Notice, however, that the authors were not moved to pause similarly when using the phrase "the right of trial by jury shall be preserved" earlier in the same sentence. It is difficult to discover why the framers were moved to insert a comma between the word "jury" and "shall" in the second instance but not the first.

11. FOWLER'S begins its discussion of commas with the example: "The charm in Nelson's history, is, the unselfish greatness," *supra* note 8, at 587, and then concludes that "[i]n the foregoing examples the commas are manifestly wrong." *Id.* The comma in the Seventh Amendment violates the rule against "[s]eparating inseparables, e.g., a verb from its subject . . ." *Id.*

12. The text also displays a small amount of fallibility concerning its definitiveness. Although the text of the amendment transmitted by Congress includes a hyphen in the word "re-examination" there is some heterodoxy regarding its usage. Cf. DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870, at 323 (1894) *with, e.g.,* STEPHEN B. PRESSER &

Seventh Amendment is written it should include a bracketed "sic" after this offending piece of punctuation.¹³ The failure of most, if not all, constitutional scholars and editors to even see this error¹⁴ might indicate an overly reverential attitude toward the text.¹⁵ If we can see that the Framers failed in something that we can objectively judge, maybe it will allow us to see other weaknesses in

JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY 1074* (2d ed. 1989).

Akhil Amar has similarly reported several discrepancies between alternative drafts of the initial Constitution. Akhil Reed Amar, *The Forgotten Constitution: A Bicentennial Essay*, 97 *YALE L.J.* 281 (1987). Amar notes for example that the printed version of the original Constitution that was distributed to the several states for ratification had obvious errors (for example, referring to "inferior court" instead of "inferior courts" in Article III). These errors underscore that the authors are in Amar's words "quite human." *Id.* at 291.

13. It is possible that at the time there were different rules of grammar that allowed for the use of commas between subject and verb. I have been unable, however, to uncover contemporaneous grammar books with alternative rules. See R.C. ALSTON, *BIBLIOGRAPHY OF ENGLISH LANGUAGE* (1985). It is with some trepidation that I make this assertion of punctuation error. How could the Framers err in any way? Will I, like the statisticians who wrote to lecture Marilyn vos Savant on the meaning of probability theory, later have to eat humble pie? See John Tierney, *Behind Monty Hall's Doors: Puzzle, Debate and Answer?*, *N.Y. TIMES*, July 21, 1991, § 1, at 1. Like Emily Litella, am I in effect saying "What's all this I hear about the mistaken punctuation in the Constitution . . ." only to end this long diatribe with a sheepish "never mind."

It is interesting to note that the earliest Supreme Court cases interpreting the Reexamination Clause omitted the comma when quoting the Amendment. See, e.g., *The Justices v. Murray*, 76 U.S. (9 Wall.) 274 (1869); *Chicago, Burlington and Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

14. Of course there are alternative explanations for the failure of scholars to focus on this point. A leading explanation might simply be that scholars saw the error but considered it to be too trivial or harmless an error to mention. This explanation is partially falsified by an extremely informal poll of constitutional scholars who owned up to never noticing the error. Moreover, I would suggest that it is difficult for textualists and strict constructionists of the document to casually dismiss this aspect of the document and not others. To marginalize this mistaken comma is to arbitrarily privilege other parts of the text.

15. One might also quibble with the usage or at least placement of the word "otherwise." Coming as it does between "shall be" and "reexamined," the word has no antecedent and is difficult to understand until the reader encounters the last phrase "than according to the rules of the common law." The stronger placement would be "and no fact tried by jury shall be reexamined in any Court of the United States, other than according to the rules of the common law." Could the (mis)placement of this word somehow relate to the (mis)use of the comma?

The penchant to second-guess an author's usage or to alter his or her voice is ingrained in many law review editors but curiously forgotten by many constitutional scholars. The t-shirt produced and proudly worn by Volume 95 of the *YALE LAW JOURNAL* sported the following redacted version of the Preamble to the Declaration of Independence:

~~We hold these truths to be self-evident, It is true that all men people are created equal, and that they are their Creator endowed by their Creator them with certain unalienable Rights, that among these which are Life, Liberty and the pursuit of ability to pursue Happiness.~~

In this vein, note the Reexamination Clause's intolerable use of the passive voice. Imagine the generations of law review editors who would have changed the reexamination clause to read: "and no Court of the United States shall reexamine any fact tried by jury, other than according to the rules of the common law."

the text as well. Courts, realizing that they are interpreting a document written by people who could not even get the grammar correct, might feel more comfortable giving evolving meanings to the underlying mandate.¹⁶

II. PREREQUISITES FOR A COMPLETE PRESERVATION THEORY

A. *The Current Contours of the Preservation Clause*

In this section, I want to argue that the text is normatively flawed as well because it is difficult to articulate a justification for the current contours of the Preservation Clause. What are those contours? Roughly stated, the Amendment preserves the right of jury trials for actions "at common law" in federal courts. Actions not "at common law" are not covered; therefore, federal suits in equity or under the admiralty jurisdiction need not be tried by juries. Much scholarly ink has been spilled arguing over whether a suit is at common law or not. The Supreme Court has traditionally used an historical test to determine whether specific types of actions would have been tried to a jury under the common law of England in 1791 (when the Seventh Amendment was adopted).¹⁷ I will not be addressing here the traditional issues of whether complex issues must be tried by jury or whether new administrative causes of action are better viewed as action "at law" or "in equity." For my purposes, it is important to note that the right of jury trial in federal civil suits is not absolute -- that there are substantial numbers of federal civil actions that need not be tried to jury.¹⁸ This constitutional right has also not been incorporated against the states so that litigants have no federal right of jury trial for civil suits in state courts.¹⁹

B. *The Difficulty in Articulating a Complete Normative Theory*

At a minimum, a complete apology for the Preservation Clause would need to explain why: a) jury trials in federal suits at common law are desirable; b) this limited right of jury trial needs constitutional protection; and c) non-common law federal suits and all state suits do not need constitutional protection.

16. Making inferences about errors in substance from errors in procedure is, however, fraught with danger. A law professor of mine, untutored in statistics, once denigrated the econometric analysis of witnesses because they misspelled two words on the cover of their report. Given the difficulty of evaluating the underlying empiricism -- such inferences often provide the best inferences. The uneasy conclusion is that it may be most productive to look for a lost item under the street light, even if there is a smaller chance that it was lost in that vicinity.

17. *United States v. Wonson*, 28 F. Cas. 745 (No. 16,750) (C.C.D. Mass. 1812); *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935); *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935).

18. The legislature may, for example, abolish common law actions and substitute administrative remedies. See *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917).

19. Nearly every state constitution, however, contains a similar guarantee. See, e.g., CAL. CONST. art I, § 7; CONN. CONST. art I, § 21.

I am willing to assume for the sake of argument the desirability of jury trials, yet even this is not beyond doubt.²⁰ There are, however, severe problems in articulating a theory that can simultaneously fulfill the second and third requirements.

To explain why the right to jury trial needs to be given constitutional status, one must go beyond describing the general efficacy of juries. Specifically, a normative theory would need to explain why you would need a countermajoritarian constitutional constraint. For example, a theory that the Amendment protects "an occasional civil litigant against an oppressive and corrupt judge"²¹ would not explain why Congress would ever pass legislation to restrict the right of jury trial.²² A complete theory needs to explain why subsequent Congresses might be tempted to undermine or restrict trials by jury.

The standard answer to this question is that the Framers were wary that the central government might later restrict the jury functions in civil actions to enforce unjust and unpopular laws. The fear was in large part actuated by the colonists' experiences under British rule with the enforcement of the Stamp Act and other tax regulations.²³ Colonial juries had failed to impose civil penalties on defendants who refused to pay these taxes and tariffs. The British responded to jury nullification by passing legislation that allowed enforcement proceedings to be brought in vice-admiralty courts which did not have juries.²⁴

Civil suits tried by juries could also protect citizens against tortious behavior by government officials -- especially involving overreaching in governmental searches and seizures. Antifederalists warned the public of an

20. See, e.g., Martin H. Redish, *The Seventh Amendment Right to Jury Trial*, 70 NW. U. L. REV. 486 (1975).

21. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653 (1973).

22. Wolfram also suggests that the Framers might have been motivated by a desire to protect debtors from British and other states' creditors. *Id.* at 671. But it is similarly difficult to think why a popularly elected government would oppressively restrict jury right in this class of cases.

23. Wolfram notes: "A deeply divisive issue in the years just preceding the outbreak of hostilities between the colonies and England in 1774-1776 had been the extent to which colonial administrators were making use of judge-trying cases to circumvent the right of civil jury trial." Wolfram, *supra* note 21, at 654. See also ROSCOE POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 74 (1957). John Peter Zenger had been criminally prosecuted for criticizing New York's governor for attempting to recover a debt in an equity court in order to evade the debtor's right to a jury trial in the common-law courts. The usefulness of criminal juries to protect against parallel government oppression is found by the jury's acquittal of Zenger. Wolfram, *supra* note 21, at 655.

24. The Framers also rhetorically invoked the excesses of the Star Chamber to buttress their argument that the central government, by circumventing jury trials, could oppress the democratic process.

outrageous search by a constable who “was subsequently mulcted in damages by a jury in a civil action.”²⁵ The Antifederalist author argued that a “lordly court of justice” sitting without a jury would likely feel inclined “to protect the officers of government against the weak and helpless citizens.”²⁶ This author, the self-named “Democratic Federalist” then elaborated on the parade of horrors that might attend the evisceration of the jury right:

Suppose, therefore, that the military officers of Congress, by a wanton abuse of power, imprison the free citizens of the United States of America; suppose the excise of revenue officers (as we find in Clayton’s Reports, page 44, Ward’s case)—that a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift—suppose, I say, that they commit similar or greater indignities, in such cases a trial by jury would be our safest resource [sic], heavy damages would at once punish the offender and deter others from committing the same. . .²⁷

Jury trials, under this view, could protect the general public from the abuse of central power both by allowing the jury to nullify unpopular civil prosecutions undertaken by the government and by allowing the jury to force the government to compensate victims of government abuse. The jury could stand between the Leviathan and the individual in civil actions both when the government was the plaintiff and when the government was the defendant.

But this standard justification for the clause seems woefully incomplete. The right to jury trial is overbroad because the vast majority of cases at common law do not involve the government or surrogates that the government is likely to privilege.²⁸ But more importantly, the clause coverage is so underinclusive that it provides scant protection against the very abuses that justify the jury right’s constitutional status. The failure of the clause to insure the right of jury trial in cases of equity and admiralty would leave an oppressive central government substantial power to circumvent the checking powers of jury trials. Indeed, the Amendment is not crafted to respond to one of the very motivating historical causes -- the abuses of the vice-admiralty courts under the British. It is hard to justify using an historical standard tied to the state of British common

25. Wolfram, *supra* note 21, at 708, describing PENNSYLVANIA PACKET dated Oct. 23, 1787 authored by “A Democratic Federalist.”

26. PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 154 (John Bach McMaster & Fredrick D. Stone eds., 1888).

27. *Id.*

28. It is possible, however, to argue that the government might privilege the propertied class to the detriment of the masses by restricting the jury trial in a broader range of cases.

law, when that common law had manifestly failed to deter the usurpation of the jury protection.

The possibility of extending the right of jury trial to all civil litigation was a practical reality in some of the individual states when the Amendment was passed: "The Pennsylvania and Connecticut practice of having juries sit in virtually all civil cases was probably common knowledge in other states at the time of adoption of the Seventh Amendment."²⁹ Moreover, several Antifederalists explicitly lobbied to extend the right to all civil trials because of their fear that allowing alternative non-jury jurisdictions could circumvent and thus nullify jury protection. For example, the authors of the Antifederalist pamphlet "The Address and Reasons of Dissent of the Minority" argued that civil juries should govern all "controversies respecting property and in suits between man and man" in order to prevent the oppression of the poor by the rich through the inequitable use of "equity" litigation:

The rich and wealthy suitors would eagerly lay hold of the infinite mazes, perplexities and delays, which a court of chancery, with the appellate powers of the Supreme Court in fact as well as law would furnish him with, and thus the poor man being plunged in the bottomless pit of legal discussion would drop his demand in despair.³⁰

Alexander Hamilton (writing as "Publius") provided two arguments against granting a blanket right to civil jury trials in Number 82 of the Federalist Papers. First, Hamilton argued that trying equity cases by jury would "undermine the trial by jury by introducing questions too complicated for a decision in that mode." By itself, this argument would imply that Hamilton viewed the inability of jurors to decide equity cases to be a greater threat than the threat of central government oppression -- not a surprising result for the champion of federalism. But Hamilton also provided a structural argument suggesting why trying equity suits to courts is desirable:

The great and primary use of a court of equity is to give relief in extraordinary cases, which are exceptions to general rules. To unite the jurisdiction of such cases with the ordinary jurisdiction must have a tendency to unsettle the general rules and to subject every case that arises to a special determination; while a *separation of the one over the other has the contrary effect of rendering one a sentinel over the*

29. Wolfram, *supra* note 21, at 742.

30. MCMASTER & STONE, *supra* note 26, at 470.

*other and of keeping each within the expedient limits.*³¹

It is, however, unlikely that the sentinel of jury trials would effectively keep oppressive government activity at actions of equity “within the expedient limits.” A half-page later Hamilton himself admits that “[t]he nature of a court of equity will readily permit the extension of its jurisdiction to matters of law.”³² The incomplete coverage of the Preservation Clause is unlikely to constrain a government acting in bad faith from oppressing individuals through the ready alternatives of equity, admiralty and administrative courts.

It might be argued, however, that right to jury trial preserves an individual’s ability to prosecute overreaching officials. When the government or its agent is a defendant, the individual plaintiff might theoretically have a greater opportunity to secure a jury’s protection for the simple reason that plaintiffs, in framing the cause of action, traditionally have a greater ability to make the action sound “at law” and hence cloak themselves with the jury right.³³ Yet this limited defense of the clause rings especially hollow 200 years after the Amendment’s passage. For although the Antifederalists argued, as discussed above, that civil actions against government actions could deter unlawful and tortious searches (and compensate victims of such government abuse), it is difficult from our vantage point to argue that constitutional guarantee of jury trials provides a viable or resilient protection. The expansive qualified immunities to government officials under Section 1983 and *Bivens* actions, not to mention the intrusion of the Federal Tort Claims Act, has reduced tort actions as an effective check on government misbehavior.³⁴ Indeed, one of the justifications for the exclusionary rule is that individual tort actions provided too small a threat of liability to deter unlawful police investigations. In the end, a constitutional right to jury trial may empower individual plaintiffs who sue civilly (although it is not clear why constitutional protection is needed to actuate legislatures in this regard), but the right to jury is unlikely to protect individuals either as plaintiffs or as defendants from the ill-effects of government malfeasance.

C. Amar’s Apology for Non-Incorporation

A stronger justification can be provided, however, for the largest gap in the

31. THE FEDERALIST NO. 83, at 566-70, 572 (Alexander Hamilton) (Jacob Ernest Cooke ed., 1961) (emphasis added).

32. *Id.*

33. Non-governmental plaintiffs might also be able to protect themselves by bringing suit in state court. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987). The Seventh Amendment does not bolster this independent safeguard.

34. See generally, PETER H. SCHUCK, *SUING GOVERNMENT* (1983).

coverage of right to jury trial: the inapplicability of Preservation Clause to the states. Repeatedly the Supreme Court has held that the right to civil juries is not incorporated in the Fourteenth Amendment's guarantee of due process.³⁵ While this means that the federal constitution does not preserve jury trial for the vast majority of civil cases in the country, it is easier to reconcile this interstice with the above-mentioned normative prerequisites.

Federal constitutional protection for state actions may not be required to protect the citizenry from governmental over-reaching in state civil matters. The federal constitution provides independent substantive protection for oppressive state laws (reducing the need for civil state juries when the state government is the plaintiff) and provides an independent cause of action for tortious state actions under Section 1983 (reducing the need for juries when the state government is the defendant). Moreover, the same forces that produced the federal constitutional protection should be at work and in fact have produced parallel constitutional state protections. A federal guarantee of state civil juries may not be necessary, if we are confident that the same constitutive forces will drive the individual states to enact similar constitutional protections.

Akhil Amar has also recently formulated an additional powerful argument to explain the non-incorporation of the Preservation Clause against the states.³⁶ Amar's argument focuses on the proper interpretation of the Seventh Amendment's common law coverage vis-a-vis the federal government. As persuasively argued by Edith Henderson,³⁷ there was a tremendous diversity in the use of juries among the states at the time of the Amendment's ratification. Many of the Framers seemed to construe the language preserving the right of jury trials in suits at common law to require federal courts to offer jury trials in civil proceedings if a jury trial would have been the "practice of the state in which the federal court was sitting."³⁸ Under this theory, the Preservation Clause would effectuate an incorporation of individual state law procedures. Indeed, The Judiciary Act of 1789 and the Process Act required similar individualized incorporation of state practice and procedure -- including an incorporation of right to civil juries itself.³⁹ This latter provision, for example, explicitly commanded that "in suits at common law" the procedures in the various federal courts "shall be the same in each state respectively as are now

35. See, e.g., *Chicago, Burlington & Quincy Ry. v. Chicago*, 166 U.S. 226 (1897).

36. AKHIL REED AMAR, *THE BILL OF RIGHTS* (forthcoming 1993). See also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) [hereinafter Amar].

37. Henderson, *supra* note 1.

38. Wolfram, *supra* note 21, at 712.

39. The Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73-93. Process Act, 1 Stat. 93.

used or allowed in the supreme courts of the same."⁴⁰

This also was Alexander Hamilton's interpretation of similar language suggested by the Antifederalists. Writing in Number 83 of *The Federalist* Hamilton said: "if I apprehend that intent rightly, . . . I presume it to be, that causes in the federal courts should be tried by jury, if in the state where the court sat, that mode of trial would obtain in a similar case in the state courts" ⁴¹

Professor Amar has had the powerful insight that this interpretation of federal courts' duties to preserve the right to civil juries provides a powerful justification for not implying the Amendment against the states.⁴² Because if the Amendment looks to the individual state's evolving jury practice to determine the contours of the federal guarantee, then making *this* guarantee of civil juries would offer no further protection. In essence, if the Seventh Amendment incorporates state practice, it is unnecessary to incorporate the federal practice against the states. Amar's insight offers an explanation for the partial incorporation of the Bill of Rights. Although Amar's argument satisfies the third requirement for a complete theory of the Preservation Clause, I will suggest later that it might lead to an "embarrassing" result when applied to the Reexamination Clause.

III. EXAMINING THE REEXAMINATION CLAUSE

Having argued that it is difficult to articulate a "complete" normative theory for the current contours of the Preservation Clause, I would now like to turn attention to what is in many ways the forgotten sibling of the Seventh Amendment -- the Reexamination Clause. Instead of exploring the normative justification for prohibiting judicial reexamination of a jury's factual decision, I will argue that probing the descriptive contours of this clause can enhance our understanding of not only the Preservation Clause but also other parts of the Constitution.

I should begin by noting that the Reexamination Clause has received only a fraction of the judicial and scholarly attention that has been paid to the right

40. 1 Stat. 93. See Wolfram, *supra* note 21, at 713 n.202; PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 668 (2d ed. 1973).

41. THE FEDERALIST NO. 83, *supra* note 31, at 567.

42. If the state jury rules are to govern federal courts, one would still need to decide whether the "floor" determined by the law of individual states was static or dynamic -- that is would the contours of the Seventh Amendment change if a state changed its domestic jury rules subsequent to the Bill of Rights ratification. See CHARLES ALLEN WRIGHT, THE LAW OF FEDERAL COURTS § 61 (1983).

to jury trial. While potentially every appellate standard of review could raise reexamination questions, the Reexamination Clause has rarely been used to strike down or constrain government action.⁴³ The scholarly neglect in turn may be a by-product of academia's general reluctance to embrace questions of fact.⁴⁴

The Reexamination Clause could potentially apply to five different permutations involving the federal and state judicial systems that would determine whether:

- (1) a federal court can reexamine facts tried by a federal court jury;
- (2) a federal court can reexamine facts tried by a state court jury;
- (3) a state court can reexamine facts tried by a state court jury in the same state;
- (4) a court in one state can reexamine facts tried by a state court jury in another state; and
- (5) a state court can reexamine facts tried by a federal court jury.

To the extent that the Reexamination Clause applies in any of these settings it would seem to preclude reexamination by second juries as well as by judges for the textual reason that the Amendment precludes reexamination "*in any Court*" and not "*by any Court.*"

The opportunity for factual reexamination is fairly well determined in three of these five permutations. The Amendment on its face precludes reexamination in the first permutation (federal courts reexamining facts tried to federal juries). The fourth permutation (one state reexamining the factual determination of another state's juries) is independently precluded by the "Full Faith and Credit" clause of Article IV.⁴⁵ And our federal structure severely limits the opportunities for state courts to reexamine either law or factual determinations

43. In *The Justices v. Murray*, 76 U.S. (9 Wall.) 274 (1870), the Supreme Court voided a congressional statute that allowed removal from state court after a jury trial. More recently, Justice Brennan in *New York Times v. Sullivan*, 376 U.S. 254, 284-85 (1964) held that the Seventh Amendment's "ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts."

44. As a student, I remember a teacher who had misstated the defendant's actions in a case defending himself by saying "I'm a professor of law not of fact." Law and economics scholars have particularly shied away from demonstrating the efficiency of adversarial fact finding or rules of evidence. Even Posner's efficiency hypothesis only concerns the stated rules of courts and is agnostic whether these rules are faithfully or efficaciously applied to the facts of cases. See Ian Ayres, *A Theoretical Fox Meets Empirical Hedgehogs: Competing Approaches to Accident Economics*, 82 NW. U. L. REV. 837 (1988).

45. The clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

of federal courts (the fifth permutation).⁴⁶

The applicability of the Reexamination Clause to the second and third settings -- concerning the reexamination of state jury findings in federal and state courts -- is, however, not straightforward. It is to these settings that I now turn.

A. Reexamining State Jury Findings In Federal Court

A superficial reading of the text might lead to the conclusion that the Reexamination Clause does not restrict federal courts from reexamining the factual findings of state juries. To the extent that the reference to "trial by jury" in the Preservation Clause only denotes federal juries, it is a natural reading to ascribe the same meaning to facts "tried by jury" in the second half of the same sentence. Indeed, it was this argument that initiated the Supreme Court's consideration of this issue in *The Justices v. Murray*:

It must be admitted that, according to the construction uniformly given to the first clause of this Amendment, the suits there mentioned are confined to those in the Federal courts; and the argument is, perhaps, more than plausible, which is that the words, "and no fact tried by a jury," mentioned in the second, relate to the trial by jury as provided for the previous clause.⁴⁷

The opinion, however, ultimately rejected this argument and found that federal courts could not reexamine state jury findings.⁴⁸ The Court's rejection of the textual argument rested on Justice Story's earlier holding that the reexamination protection "should be read as a substantial and independent clause."⁴⁹

The decision concluded that extending the clause's reach to state jury findings "[is] not only within the words, but also within the reason and policy of the Amendment."⁵⁰ According to *Murray*, the Bill of Rights included a Reexamination Clause because of the Antifederalists' concerns about the Supreme Court's appellate jurisdiction under Article III. After defining the Court's original jurisdiction, Article III provides: "In all other cases before mentioned the Supreme Court shall have appellate jurisdiction *both as to law and fact*, with such exceptions and under such regulations as Congress shall make."⁵¹

46. There are few situations in which states have jurisdiction to review federal proceedings.

47. 76 U.S. (1 Wall.) 274, 277 (1869).

48. This conclusion was reaffirmed in *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1896).

49. 76 U.S. at 277 (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447-48 (1830)).

50. *Id.*

51. U.S. CONST. art. III. (emphasis added).

The Antifederalists claimed that granting the Supreme Court the power to review facts would lead to the abolition of both state and federal juries. Hamilton, again in *The Federalist No. 83*, conceded that this clause would, without more, allow the Supreme Court to usurp the state jury's fact-finding mission.⁵²

Finding that the Reexamination Clause did not restrict federal review of state jury decisions would mean, however, that the Supreme Court's appellate jurisdiction under Article III was only partially amended. Under this interpretation, the Supreme Court would still have jurisdiction "both as to law and fact" with regard to state court decisions -- and thus potentially could make *de novo* review of state factual findings if not constrained by congressional limitations on its appellate power. It is this construction that was rejected by the *Murray* court as being contrary to the history of the Amendment's ratification.

There is, however, an alternative interpretation of the Amendment that would lead to a different result. If Amar is correct that the common law coverage of the Preservation Clause was intended to incorporate the local state practices for the various sitting federal tribunals, one could apply an analogous rule to divine the appropriate coverage of the Reexamination Clause. Under the Amar-like interpretation, if an individual state allowed appellate courts to reexamine factual findings of its state juries then federal courts sitting in that state (or the Supreme Court on appeal from that state's tribunals) would also be empowered to reexamine jury decisions to the same extent. This interpretation gets its power not from the dual usage of "jury" in both clauses, but from the parallel usage of the term "common law" under both halves of the Amendment.⁵³ The interpretation that the common law refers to the evolving individual laws in the Preservation Clause suggests an analogous interpretation for the rule against reexamination other "than according to the common law."

Interpreting the Reexamination Clause as providing a flexible floor defined by individual states could significantly change federal practice. For example, if a state adopts an expansive definition of what issues constitute questions of fact (and thus have a more deferential standard of review), then the Supreme Court reviewing a jury decision concerning this issue would be bound by this standard of review (even if it might otherwise review the issue *de novo* as a

52. Hamilton argued, however, that Congress could be trusted to limit the appellate jurisdiction through Article III's "with such exceptions" power.

53. Although there has been significant scholarship on the extent to which juries were employed to varying degrees, *see, e.g.*, Henderson, *supra* note 1; Wolfram, *supra* note 21, I am not aware of similar work assessing to what degree states varied on the extent to which jury decisions were re-examined. Although in Connecticut a final judgment was not achieved until two juries found for the same side. Wolfram, *supra* note 21, at 422.

mixed question of law and fact).⁵⁴

Amar's flexible floor approach also parallels the Supreme Court's procedural bar doctrine in *habeas corpus* suits. In essence, the individual states' procedural bar rules define a floor beyond which the federal courts cannot review. Extended to reexamination of state factual findings, the flexible floor approach would mean that in federal *habeas* proceedings that federal courts could only reexamine jury findings to the extent allowed under the state's *habeas* proceedings.

This theory of individual state incorporation on its face would also govern how federal courts could reexamine federal jury findings. The Federal Rules of Civil Procedure, for example, could be preempted by individual states that restricted the ability of their judges to reexamine jury findings. Thus, if a state abolished the right of its trial judges to grant judgement *non obstante veredicto*, then federal courts in this state would be precluded from entering such a judgment after a federal jury decision.⁵⁵ Such a construction would place a constitutional limit on the *Erie* doctrine -- by forcing federal courts in diversity actions to apply state procedural rules regarding reexamination issues.⁵⁶

Amar's flexible floor provides an important explanation for why the Preservation Clause need not be incorporated against the states, but application of the same argument to the Reexamination Clause leads to much less sanguine results.⁵⁷ The potentially far-reaching reexamination implications alternatively give us a separate window to judge whether the theory is appropriate for the Preservation Clause.

B. Reexamining State Jury Findings in State Court

Although the Supreme Court has consistently held that the Seventh Amendment does not bind state courts, these opinions almost universally concern whether state courts have an obligation to preserve the litigant's right to jury

54. This interpretation seems to conflict with *New York Times v. Sullivan*, 376 U.S. 254, 284-85 (1964). See *supra* note 43, and accompanying text; *BATOR ET AL.*, *supra* note 40, at 610.

55. The potential of the Seventh Amendment to constrain the Federal Rules of Civil Procedure has been noted before. Justices Hugo Black and William Douglas opposed transmission to Congress of the 1963 amendments to the Federal Rules of Civil Procedure, see *Amendments to the Rules of Civil Procedure For the United States District Courts*, 374 U.S. 861, 865 (1963). See also *Galloway v. United States*, 319 U.S. 372, 396 (1943) (Black, J., dissenting).

56. *Erie v. Tompkins*, 304 U.S. 64 (1938).

57. The application of Amar's flexible-floor theory to reexamination issues can also give rise to the same sorts of criticism that have been made concerning individual state incorporation of jury trial standards. Wolfram, *supra* note 21; Amar, *supra* note 12.

trial.⁵⁸ The *Murray* case in dicta found that the reexamination prohibition did not apply to state courts: “[T]he Seventh Amendment could not be invoked in a State court to prohibit it from re-examining, on a writ of error, facts that had been tried by a jury in the court below.”⁵⁹

As before, accepting Amar’s flexible floor theory would make especially persuasive the finding that reexamination prohibition should not be incorporated against the states via the Fourteenth Amendment. If the nature of the protection is defined by reference to current and evolving state practice, then it would be circular to make a state’s duty -- growing out of the Fourteenth Amendment’s due process clause -- turn on the federal protection.

C. Revisiting The Jury’s Right to Judge the Law

The Reexamination Clause can also inform our reading of the Preservation Clause.⁶⁰ Specifically, the limitation in the Reexamination Clause to questions of fact tried by jury might help answer whether the Amendment’s first clause was intended to preserve the jury’s right to judge questions of law. There is some historical evidence that, at the time of the Bill of Rights’s passage, juries were routinely empowered to decide issues of law as well as of fact.⁶¹ Thomas Jefferson in his *Notes on Virginia*, for example, wrote:

[I]t is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury [may] undertake to decide both law and fact.⁶²

58. See, e.g., *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916); *Walker v. Sauvinet*, 92 U.S. 90 (1875).

59. *The Justices v. Murray*, 76 U.S. (1 Wall.) 274, 278 (1869).

60. In this section, I attempt in a very small way to follow Akhil Amar’s suggestion to read the individual clauses of the Bill of Rights more holistically. See Amar, *supra* note 34.

61. William E. Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 916 (1978) (“[J]uries in most, if not all, eighteenth-century American jurisdictions normally had the power to determine law as well as fact in both civil and criminal cases.”).

62. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 140 (J. W. Randolph ed., 1853). Similarly Chief Justice Jay in a jury trial in the original jurisdiction of the Supreme Court charged the jury:

It may not be amiss here, gentlemen, to remind you of the good old rule, that on questions of fact it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.

Under this theory, one might read the Preservation Clause as requiring that civil juries be given broader rights to decide questions of law.⁶³ It wasn't until 1895 that the Supreme Court in *Sparf v. United States* rejected the claim as applied to criminal juries.⁶⁴

For present purposes, I would simply like to assess whether the Reexamination Clause can be brought to bear on this issue. The fact that the drafters of the Seventh Amendment only precluded reexamination of any "fact tried by jury" seems to indicate that the jury's law finding at a minimum is not a core function.

One can argue by the maxim of interpretation -- *expressio unius est exclusio alterius*⁶⁵ -- that, by not prohibiting reexaminations of jury decisions, the drafters were at least acknowledging that the jury served other functions -- at the same time that they were deciding not to protect them.⁶⁶ After all, the Framers certainly appreciated the difference between questions of law and questions of fact since Article III explicitly gives the Supreme Court appellate jurisdiction with respect to both.

The stronger inference to make from the Seventh Amendment is that juries have no constitutional right to decide questions of law. The Reexamination Clause grew out of the fear that the Supreme Court could obliterate trial by jury through its appellate jurisdiction. To leave a constitutional function of the Preservation Clause uncovered by the Reexamination Clause would allow future legislatures to obliterate the right -- possibly by requiring special verdicts and by separating the application of law from the finding of facts. However, given

Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 at 4 (1794). See also Henderson, *supra* note 1, at 310-21.

63. For further information concerning the historical evidence, see STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 228-47 (2d ed. 1989); Amar, *supra* note 36, at 1191-95 (assessing limited power of jury to refuse to follow unconstitutional laws). See also Mark D. Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964); Douglas King, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581 (1984).

There is a recently formed organization, the Fully Informed Jury Association (FIJA) that has been arguing that juries have a right to address questions of law. They have lobbied for a constitutional amendment to confirm and clarify this right. Stephen J. Adler, *Courtroom Putsch?, Jurors Should Reject Law They Don't Like, Activist Group Argues*, WALL ST. J., Jan. 4, 1991, at A1.

64. *Sparf v. United States*, 156 U.S. 51, 102 (1895) ("[I]t is the duty of juries in criminal cases to take the law from the court.").

65. The expression of one thing is the exclusion of another. *Burgin v. Forbes*, 169 S.W.2d 321, 325 (Ky. 1943).

66. The clause could have even more explicitly mandated that "jury decisions both as to law and fact shall not be re-examined . . .".

my earlier argument that the Preservation Clause is unartfully drafted to constrain future overreaching legislation, it is possible that the restriction to questions of fact in the Preservation Clause is also a by-product of unartful drafting and should not be the basis for fine linguistic differentiation.

CONCLUSION

The constitutional status of the limited right to civil juries remains enigmatic. Even before the advent of the administrative state, the equity and admiralty qualifications of the right substantially eviscerated the jury's power to check overreaching or abusive government action. There may have been (and may be today) the empirical need to try certain classes of cases to courts or administrative agencies, but the preservation of such substantial occasions for non-juries threatens to throw much of the baby out with the bath water. Because the government has substantial flexibility for civilly prosecuting unpopular regulation through non-jury adjudication, the exceptions to the Seventh Amendment do not constrain the government as a plaintiff. And while the Amendment seems to offer more palpable protection to individuals who choose to sue government in jury tried causes of action, casual empiricism shows that the government as defendant can today immunize itself from liability notwithstanding the plaintiff's jury right.

This paper has also sought to elaborate on two interconnections between the Preservation Clause and the Reexamination Clause. First, Amar's interpretation of the common law reference in the Preservation Clause has important implications for defining the coverage of the Reexamination Clause. It is possible that the common law standard in both clauses mandates that federal courts be governed by the jury rules of the state in which they sit and that these rules mandate a flexible and evolving floor for federal courts. If individual state reexamination rules are likewise incorporated to the local federal courts, then individual state law could preempt or constrain less deferential federal rules of civil procedure governing the review of: (1) federal juries (deciding both diversity and federal question cases); (2) state juries on appeal to the Supreme Court; or (3) state juries through federal *habeas corpus* review. Secondly, the restriction of the Reexamination Clause to issues of fact undermines the argument that judging the law was a core jury function -- because at the very least the Amendment does not limit the judicial usurpation of any role that the jury might have in deciding questions of law.

Let me end by emphasizing again the fallibility of the text. The notion that civil juries should be constitutionally insured was not raised until the very end of the Constitutional Convention in Philadelphia. While the Antifederalists then made much about the ability of the Supreme Court to abolish the right to juries through its appellate jurisdiction "both as to law and to fact", there was little

discussion to improve on or elucidate the common law contours of either the Preservation or Reexamination Clause. The unconsidered nature of the text is not only reflected in the trivial punctuation error, which I have overly belabored, but also in failure of the document to respond to the very vice-admiralty abuses that were one of its motivating causes. Appreciating the difficulty of articulating a complete normative theory for the right to civil juries may empower judges to bring more evolving principles of interpretation to the text. Whatever may be the proper role of judges in constitutional adjudication in other areas,⁶⁷ delegating to judges the job of filling in the gaps may be especially appropriate for an Amendment that twice invokes our common law tradition.

67. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985).

