

WE NEED A FRESH START: REPEAL THE SEVENTH AMENDMENT

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Amendment VII

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 by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment XXVII

Section 1. The seventh article of amendment to the Constitution of the United States is hereby repealed.

Section 2. Except as otherwise provided by Congress, in civil actions brought in any court of the United States, all questions of fact shall be tried by a judge.

Should we maintain the right to a jury trial in civil actions?¹ It is a question that we have been debating unabated for decades, and one that continues to fill the literature.² The battle lines are drawn, the debate ensues, but it always seems to end up in something of a draw. More often than not, where one stands seems to depend on where he sits. The plaintiffs' bar is enamored of the jury and its high verdicts. The defense bar does not trust the institution. When explaining the differences between common law adversarial justice and civil law

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1. My remarks and proposal are limited to civil actions brought in federal court. The Seventh Amendment right to a civil jury trial has never been held to be applicable to the states. At this late date, it is probably a moot point, given that the states have made that right a part of their own constitutions. Nevertheless, my proposal has equal bearing at the state level.

2. See, e.g., PAULA DiPERNA, JURIES ON TRIAL (1984); VALERIE HANS & NEIL VIDMAR, JUDGING THE JURY (1986); MARK FINDLAY & PETER DUFF, THE JURY UNDER ATTACK (1988); REID HASTIE, STEVEN PENROD & NANCY PENNINGTON, INSIDE THE JURY (1983).

inquisitorial adjudication in criminal cases, one of my law school professors told us that if the accused actually committed the offense, then he stood a better chance of being acquitted in a common law court. If he were truly innocent of the charges, then his chances of acquittal were higher in a civil law court. I am not sure if this was meant as an indictment of the jury or of the adversary system as a whole, but it certainly had a sobering effect on me.

Should jury trials in civil cases be abolished? I have a proposal that takes a middle-of-the-road approach and is therefore guaranteed to offend everyone: abolish the Seventh Amendment right to a jury trial in civil cases, but leave with Congress the power to authorize trial by jury in specific federal cases. If Congress does not grant the right in a class of civil lawsuit, then such actions would be tried to the judge.

Why this task should be left to Congress I think can best be understood by considering the arguments that have been arrayed, pro and con, in the context of civil jury trials.

I. THE ARGUMENTS AGAINST JURY TRIAL IN CIVIL CASES

At least seven arguments have been made against civil jury trials. Judge Jerome Frank, one of the strongest critics of the jury system, launched the contemporary debate.³ The most vocal modern critic of juries is Judge Edward Devitt.⁴ I will summarize their arguments and add a few thoughts of my own.

A. America Stands Alone in its Allegiance to Civil Jury Trials.

Defenders of the jury system wax eloquent about how it is one of the great achievements of English and American jurisprudence. "An instrument of justice, a little parliament, the lamp that shows that freedom lives," in the words of Lord Devlin. But today the United States stands virtually alone in

3. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 109-23 (1949).

4. Edward Devitt, *Federal Civil Jury Trials Should Be Abolished*, 60 A.B.A. J. 570 (1974).

the world with its retention of the right to trial by jury in civil cases. The right to trial by jury in England—the source of the right in the United States—has been all but abolished in civil cases. Canada and Scotland have abandoned it, as have most civil law jurisdictions. In the words of Judge Frank, “It will not do then to make Fourth-of-July speeches about the glorious jury system, to conceal its grave defects, or merely to palliate them with superficial, cosmetic-like, remedies.”

If one of the primary justifications for adoption of the Seventh Amendment was that the right to civil jury trial existed in England in 1791, then by a parity of reasoning the fact that England has all but abolished civil jury trials should be an adequate reason for abolishing that right in the United States.

B. The Process of Jury Decision Making is a Black Box.

Most jury verdicts are general verdicts. Although two procedural devices, the special verdict and general verdict with interrogatories, are ways of poking a tiny hole into that black box we call the jury room, those devices are rarely used. When a federal judge sits as the trier of fact, her decision making process is transparent because she must submit written findings of fact and conclusions of law. Reasoned decision making is the kind that we have come to expect in this country and the only kind that we will accept from governmental authorities. When a jury is empaneled and sworn, it certainly is as much an arm of government as the judge who presides over the trial. Yet when a jury returns a general verdict, it does not report what facts it has found, only in which parties' favor it has ruled. Its verdict is unexplained. We do not accept that from any other governmental authority, yet we accept it from a jury.

C. Jury Verdicts are the Product of Compromise, Not Group Deliberation and Rational Decision Making.

Why do we throw a cloak of secrecy over the deliberative processes of the jury? We say that it is for the jurors' protection: to insulate them from pressures. This is the explanation given for the evidentiary rule prohibiting impeachment of the verdict on the basis of a juror's testimony as to any matter that

occurred during the course of deliberations, excepting improper outside influences.⁵ In fact, the blanket of darkness does protect the integrity of the verdict because few jury verdicts could stand the blinding light of truth. Judge Frank states that juries again and again arrive at their verdicts either by the quotient method (the amount each juror wants to award is added up and the sum divided by the number of jurors) or the flip of a coin. In fact, the cloak of secrecy is for *our* protection. We prefer to be kept in the dark about how juries actually behave, because the truth would not only be too painful, the truth would force us to abandon trial by jury as it is currently used. Judge Learned Hand realized this problem in *Jorgensen v. York Ice Machinery Corp.*⁶ In the course of explaining the rationale for the evidentiary rule prohibiting jurors from impeaching their own verdict, Judge Hand stated:

[I]t would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. *It is doubtful whether more than one in a hundred verdicts would stand such a test*; and although absolute justice may require as much, the impossibility of achieving it has induced judges to take a middle course, for they have recognized that the institution could not otherwise survive; they would become Penelopes, forever engaged in unravelling the webs they wove. Like much else in human affairs, its defects are so deeply enmeshed in the system that wholly to disentangle them would quite kill it.⁷

Judge Hand's candor is refreshing. He had the solution to his dilemma at his fingertips, but he pulled back his hand, or was repelled at the thought. The honest, but perhaps painful, solution to the impermissible compromise and bias that is the jury verdict is to abandon jury trial.

D. Jurors Do Not Understand the Instructions or the Evidence.

When a judge sets aside a jury verdict and either grants a new trial or enters judgment notwithstanding the verdict, it is

5. FED. R. EVID. 606(b).

6. 160 F.2d 432 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947).

7. *Id.* at 435 (emphasis added).

a drastic step. If the judge was correct in setting aside the jury's verdict—and many reported appellate decisions attest to the correctness of the trial judge's action in this regard—then the judge's action means that somewhere along the line something serious went wrong with the jury process. Several possibilities exist. Excluding bribery or tampering with the jury, it could mean that the jury drew an impermissible inference from the evidence adduced at trial, either because it ignored certain evidence or misunderstood the evidence. It could also mean that the jury ignored or misunderstood the instructions given by the presiding judge on the applicable law.

In Michigan, the clerk administers the following oath to jurors:

Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.⁸

Let us give jurors the benefit of the doubt and assume that they attempt in good faith to follow their oath. If you look at pattern jury instructions, the drafting and publishing of which has become something of a cottage industry for lawyers, it is easy to see how a juror might misunderstand the law. Before an instruction receives the imprimatur of a "pattern" instruction, it is crafted by judges and lawyers over the course of several years, using as guideposts appellate decisions approving and disapproving of different verbal formulations. The instructions are reworked, honed, and refined, until they finally become pattern instructions. Then they are left to ossify. "Why tinker with language that has been approved by an appellate court," lawyers and judges ask themselves, "and run the risk of reversal?"

Reading some of them makes one wonder if any thought was given by the lawyers who drafted them and the courts which approved them to whether a layperson could ever have any hope of understanding them. They are complex and prolix.

8. MICH. CT. R. 2.511(G).

Take, for example, Michigan's Standard Jury Instructions in an automobile collision case.⁹ The standard instructions go on for over a dozen pages, delivered orally in open court, without the benefit of notes to refresh the jurors' recollections. Even a simple legal concept such as preponderance of the evidence can tie a court up in verbal knots when it tries to give an instruction defining it. Consider the following pattern jury instruction from New York:

The burden of proof rests on the plaintiff. That means it must be established by a fair preponderance of the credible evidence that the claim the plaintiff makes is true. The credible evidence means the testimony or exhibits that you find to be worthy to be believed. A preponderance means the greater part of such evidence. That does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, that is, its convincing quality, the weight and effect it has on your minds. The law requires that, in order for the plaintiff to prevail, the evidence that supports his claim must appeal to you as more nearly representing what took place than that opposed to his claim. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, then you must resolve the question in favor of the defendant. It is only if the evidence favoring the plaintiff's claim outweighs the evidence opposed to it that you can find in favor of plaintiff.¹⁰

One commentator has said of a similar instruction, "Gobbledygook."¹¹ If jurors cannot understand these words and phrases, that is, if they cannot understand the governing legal rules, then the parties' reliance on those rules, although justified, is nonetheless misplaced.¹²

Assuming that jurors do understand the legal rules they are instructed to apply to the facts as determined by them, can the jurors understand the evidence introduced at trial? The odds against seem high. First of all, the evidence is not presented all at once; it is not presented in any logical or orderly fashion;

9. ROBERT DEAN, MICHIGAN COURT RULES PRACTICE § 102.09 (1985).

10. NEW YORK PATTERN JURY INSTRUCTIONS 1:23 (2d ed. 1974).

11. DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 433-34 (1963).

12. A 1979 empirical linguistic study showed that jurors did not understand standard jury instructions. Robert Charrow & Veda Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979).

and it is presented in an atmosphere that will often be emotionally charged. Is it reasonable to expect jurors to suspend judgment until the end of the case? Secondly, the latter half of the twentieth century has witnessed the phenomenon of complex litigation, where the legal issues (such as antitrust or securities fraud) are complicated and the trials seemingly interminable. Are jurors adequately equipped as fact-finders in complex cases?¹³ The tantalizingly cryptic footnote ten in the Supreme Court's *Ross v. Bernhard*¹⁴ decision suggests that they may not be, and when they are not, there is no Seventh Amendment right to a jury trial.

E. The Various Judicial Controls Over Jury Action Show That We Really Do Not Trust Juries.

When you consider the variety of judicial controls that circumscribe jury action, you have to ask yourself whether we truly trust juries with the law and the evidence. Juries are controlled by the procedural devices of directed verdict, judgment notwithstanding the verdict, and new trial. With the last device, the judge actually is permitted to second-guess the jury, to act as a thirteenth (or seventh) juror, and weigh the evidence and make credibility resolutions. This distrust of juries is further reflected in the rules of evidence, in particular the hearsay rule, which keep from jurors witnesses' second-hand accounts of what someone else said. Even though most daily activities are conducted in reliance on hearsay, jurors are not considered competent to make allowance for the second-hand nature of such testimony and, as a consequence, are prevented from hearing it at all.

F. In Honoring the Seventh Amendment's Command to "Preserve" the Right to Jury Trial, the Supreme Court Has Created an Analytical Swamp.

The Supreme Court's Seventh Amendment jurisprudence leaves a lot to be desired. To describe the Court's civil jury

13. See Daniel Margolis & Evan Slavitt, *The Case Against Trial by Jury in Complex Civil Litigation*, 7 *LITIG.*, Fall 1980, at 19.

14. 396 U.S. 531 (1970). The Court stated that "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." *Id.* at 538. In footnote 10, the Court added: "As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries" *Id.* at 538 n.10.

trial cases as result-oriented and intellectually indefensible would not be an exaggeration. In *Dairy Queen, Inc. v. Wood*,¹⁵ the Court had no hesitation in recharacterizing the relief sought (an accounting which had historically been equitable in nature) as actually being a claim for damages, a legal remedy. A similar result was achieved in *Ross v. Bernhard*,¹⁶ where a shareholder's derivative action—a procedural device that was a creation of equity—was labeled as being legal because the underlying claim sought damages on behalf of the corporation. Cosmetic surgery on the face of history is hardly a substitute for rigorous legal analysis.

In some instances the problem has not been of the Court's making, however. Take, for example, the situation where Congress enacts legislation creating a private civil action but is invariably silent on the question of jury trial. The question is ultimately dumped in the lap of the Court to answer. From *Curtis v. Loether*,¹⁷ to *Tull v. United States*,¹⁸ to *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*,¹⁹ the Court has wrestled with the question of what is the proper analytical approach to take in resolving this problem. Should the Court look to historical analogues, as it does? That exercise invariably proves futile. It ends up in a draw, with the party who is resisting a jury trial arguing persuasively that the specific cause of action is analogous to certain historical equitable actions, and the party who is arguing for a jury trial contending just as persuasively that the correct analogy is to actions historically legal in nature. The Court then ends up examining the nature of the remedy sought, and as was the case in *Dairy Queen* and *Ross*, characterizing the remedy as either equitable or legal, and reaching a decision. None of these decisions is ever unanimous, with Justices disagreeing over history and the proper analogies. In the end, trying to "preserve" in 1991 a right as it existed in 1791 is quixotic. It would probably be more

15. 369 U.S. 469 (1962).

16. 396 U.S. 531 (1970).

17. 415 U.S. 189 (1974) (right to jury trial in title VIII housing discrimination cases).

18. 481 U.S. 412 (1987) (right to jury trial on issue of liability in Clean Water Act cases, but judge decides remedy).

19. 494 U.S. 558 (1990) (right to jury trial in breach of duty of fair representation claim).

meaningful to ask Alexander Hamilton what he thinks about the monetary policy of the Federal Reserve Board. Hamilton, incidentally, acknowledged in *The Federalist No. 81* "that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases."²⁰

G. Jury Trial Creates Delays, Adding to the Costs of a Process That Is Already Beyond the Means of Most.

By one estimate,²¹ jury trials take sixty-seven percent longer than bench trials. The process of empaneling jurors (voir dire); arguments over evidentiary matters; arguments over jury instructions; arguments over whether there is a right to jury trial in the first place; jury deliberation; aborted trials due to hung juries or to counsel misconduct; and aborted trials because the jury misunderstood or misapplied the instructions, the evidence, or both, all add to the delay already endemic to the trial process, which necessarily translates into increased costs for the litigants and means that those who have never had their day in court must wait still another day.

The Supreme Court approved the use of six-person juries in federal civil cases in its 1973 decision, *Colgrove v. Battin*.²² Although the Court did not state it was doing so out of concern for trimming the costs connected with jury trials, the decision implicitly acknowledged the institutional costs of twelve-person juries. If the requirement of a twelve-person civil jury has fallen in the name of efficiency, can the requirement of jury unanimity be far behind? On the other hand, just last term the Court added to the costs associated with civil jury trials by extending *Batson v. Kentucky*,²³ and prohibiting the use of peremptory challenges by a private litigant to systematically remove venirepersons from the jury panel on the basis of race.²⁴ The Court's courage in eliminating this intolerable practice from civil trials must be applauded, but it

20. THE FEDERALIST No. 81 (Alexander Hamilton).

21. HANS ZEISEL, HARRY KALVEN, JR. & B. BUCHHOLZ, DELAY IN THE COURT 71-81 (1959).

22. 413 U.S. 149 (1973).

23. 476 U.S. 79 (1986).

24. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991).

will be muted applause because the trial process will be further protracted, as Justice Scalia pointed out in his dissent in *Edmonson v. Leesville Concrete Co.*²⁵ It will not be surprising if *Edmonson* becomes the genesis of challenges at both the trial and appellate level to an alleged use of racially motivated peremptories. While meritorious challenges should not be discouraged, it must be recognized that all such challenges, meritorious and frivolous, will add to litigation delays.

II. THE ARGUMENTS IN FAVOR OF JURY TRIAL IN CIVIL CASES

At least four arguments have been made in support of the Seventh Amendment right to a jury trial. The arguments are historical, populist, or based on empirical research that has attempted to measure jury performance.

A. Public Participation in the Judicial Process Performs a Legitimizing and Socializing Function.

The law exists to serve the people, not the reverse. To that end, the jury is an important vehicle for conferring legitimacy to the law.²⁶ In a democracy, the average citizen obeys the law not out of fear of punishment but because the average citizen views the law as legitimate. For the law to be responsive to the needs, wants, and desires of the people—in other words, to maintain legitimacy—it is essential that there be public participation in the judicial process, and such participation must include jury service. Public participation is essential to public acceptance of courts as forums for dispute resolution. If the judicial process loses popular acceptance, then the law may be ignored and extralegal methods of dispute settlement, such as self-help, may be resorted to. In addition, not only does the jury allow the average citizen the opportunity to contribute to the legal system, service on the jury educates the average citizen about the legal system.²⁷ Jurors' lives are enriched by the experience.

25. *Id.* at 2096 (Scalia, J., dissenting).

26. VALERIE HANS & NEIL VIDMAR, *JUDGING THE JURY* 248 (1986).

27. *Id.* at 249.

Nearly twenty-five years ago, Judge Irving Kaufman observed that there can be no universal respect for the law unless the people feel that it is their law.²⁸ To that end, the jury plays an indispensable role in making Americans feel that they have a stake in molding the process and making it work. As another commentator has noted, “When large classes of people are denied a role in the legal process—even if that denial is wholly unintentional or inadvertent—there is a sense of alienation from the legal order.”²⁹

B. The Jury Is a Shield Against Possible Corruption.

As noted, Alexander Hamilton did write in *Federalist No. 81* that he could not see any strong link between liberty and civil jury trials.³⁰ He also argued against a constitutional right to a jury trial in civil cases in *Federalist No. 83*, but nevertheless conceded that juries can serve as a bulwark against corrupt judges:

The strongest argument in its favor (i.e., requiring juries) is, that it is a security against corruption. As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than the latter. . . . [T]he trial by jury must still be a valuable check upon corruption. It greatly multiplies the impediments to its success. As matters now stand, it would be necessary to corrupt both court and jury; for where the jury [sic] have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases of little use to practice upon the jury, unless the court could be likewise gained. Here then is a double security; and it will readily be perceived that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity of either.³¹

One factor that motivated the adoption of the Seventh Amendment was bitter memories of justice being meted out

28. Irving R. Kaufman, *A Fair Jury—The Essence of Justice*, 51 JUDICATURE 88, 91 (1967).

29. Lex Hawkins, *The Case for Trial by Jury in Complex Civil Litigation*, 7 LITIG., Fall 1980, at 15 [hereinafter Lex Hawkins].

30. THE FEDERALIST No. 81 (Alexander Hamilton).

31. THE FEDERALIST No. 83 (Alexander Hamilton).

at the hands of the King's judges. Juror protection would have insulated litigants from judicial abuse. Although the King's judges are long gone, there is no reason to believe that the risk of judicial corruption is still not a valid concern. Corruption of a judge need not be as blatant as bribery in order for it to exist. It can come in subtle forms that even the judge may not be cognizant of, such as favoritism to one side or the other because of past associations the judge has developed with counsel.³² In their seminal study of the American jury,³³ Harry Kalven, Jr. and Hans Zeisel found that former prosecutors who became judges were more prone to convict than those who had not held such office.³⁴ The group nature of the jury decision minimizes corruption of the finder of fact.

Judge Charles Joiner of the Eastern District of Michigan summed it up well when he stated that "decisions by juries properly instructed and taught are better than decisions by single judges. . . . The principal reason for this is that the process of deliberation is a process through which the biases of individual jurors are exposed and isolated or controlled"³⁵

C. The Bench and Bar, Not the Jury, Cause the Problems Associated with Jury Trial.

The source of the problems associated with jury trial is at bottom created by the bench and bar, not the jury itself. If trial judges would use Rule 16³⁶ more aggressively to simplify issues, obtain admissions and stipulations, unnecessary proofs could be avoided. The rules of evidence should be used to exclude the introduction of needlessly cumulative evidence.³⁷ Jurors should be permitted to take notes to aid their recollection, just as counsel and judges do. The jury should be given

32. Barry E. Ungar & Theodore R. Mann, *The Jury and the Complex Civil Case*, 6 LITIG., Spring 1980, at 1.

33. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

34. *Id.* at 471.

35. RITA J. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* 23 (1980) (quoting Charles Joiner, *Perspectives on the Function and Value of the Jury in America from the Bench*, in *THE JURY SYSTEM IN AMERICA* 155-56 (Rita J. Simon, ed. 1975)).

36. FED. R. CIV. P. 16.

37. See FED. R. EVID. 403.

preliminary instructions on the law and on the issues so that they do not have to hear evidence in a complete vacuum.³⁸ In Judge Joiner's view, "Judges, lawyers, and court staff have a heavy burden to make the system work. All of them must make jurors feel at home in the strange environment of the courthouse by making certain the jurors understand everything they are asked to do."³⁹

D. Jury Verdicts Are the Product of Rational Deliberations.

In the landmark study conducted by Harry Kalven, Jr. and Hans Zeisel in the mid-1960's,⁴⁰ four thousand jury verdicts in civil cases were compared with the judgments that 550 trial judges said they would have reached in the same cases. The correlation between the judges' judgments and the juries' verdicts was high, with the level of agreement being seventy-nine percent. Kalven and Zeisel concluded that the most probable explanation for the twenty-one percent disagreement was the closeness of the cases. Considering that over ninety percent of all civil cases settle or are otherwise disposed of prior to trial, one would expect only close cases to be actually tried. In close cases, reasonable minds can certainly differ as to what the facts are in the particular case. Being reasonable persons, it should therefore come as no surprise that judges and jurors would have disagreement in close cases. What does come as somewhat of a surprise is that there should be such a high level of agreement between the two groups. Moreover, if the rate of disagreement was zero, then juries would be nothing more than window dressing. Kalven and Zeisel's unequivocal conclusion drawn from this data is that the jury understands its job and performs it competently.

A 1983 study⁴¹ analyzed jurors' ability to recall the facts and the law. Reid Hastie, Steven Penrod, and Nancy Pennington

38. See Lex Hawkins, *supra* note 29, at 18.

39. Charles Joiner, *Perspectives on the Function and Value of the Jury in America from the Bench*, in *THE JURY SYSTEM IN AMERICA* 23 (Rita J. Simon, ed. 1975).

40. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

41. REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* (1983).

found that although individually jurors' memories were moderately good at recalling the facts and the law, collectively juries remembered ninety percent of the evidence and eighty percent of the instructions.⁴² The conclusion they reached is that the major obstacle to proper jury decision is the trial judge's instructions. They make the modest proposal that a written transcript or videotape of the instructions accompany the jury into the jury room.

III. REPEAL THE SEVENTH AMENDMENT; LET CONGRESS SETTLE THE DEBATE.

Let's face it: if Congress wanted to, it could effectively repeal the Seventh Amendment by flexing the muscle given it in Articles I and III. Congress has the exclusive power under Article III to create (and abolish) lower federal courts and to limit their jurisdiction when it does create them. Congress has also reserved to itself its Article III power to approve or reject proposed rules of procedure and evidence applicable in the federal courts.⁴³ Congress, if it so desired, could throw the baby out with the bath water, that is, it could effectively repeal the Seventh Amendment in a number of ways, or at least whittle the Amendment down considerably. For example, Congress could abolish all lower federal courts, mooting the question of whether there is a constitutional right to trial by jury in civil cases. Congress could repeal all jurisdictional grants to lower federal courts in civil cases, and again moot the Seventh Amendment question. Or Congress could entrust the adjudication of federal statutory rights and remedies to an administrative agency, once again bypassing the jury.⁴⁴

That Congress has not taken any of these steps is, I think, an indication that Congress as a body has no institutional bias in favor of or against jury trials. It is some indication, concededly not overwhelming, that Congress can be trusted with the task of deciding in a dispassionate and balanced way whether and when a right to jury trial should exist in given

42. *Id.* at 81.

43. 28 U.S.C.A. § 2074 (West Supp. 1991).

44. *See Atlas Roofing Co. v. OSHA*, 430 U.S. 442 (1977).

cases. A reason why Congress should be trusted with this task can be found in Article III. A quick review of that Article reminds us that the framers entrusted the critical questions of the creation of lower federal courts, the jurisdiction of those courts, and their rules of procedure with the legislative branch. I do not think that trust was misplaced. In addition, Congress is aware of and has shown a sensitivity to the issues of expense and delay in civil litigation, as evidenced by the Civil Justice Reform Act of 1990.⁴⁵ That Act mandates that every judicial district develop a civil justice expense and delay reduction plan that will address techniques of litigation management and methods of reducing cost and delay.⁴⁶

The arguments for and against civil jury trial raise as many questions as they answer. What significance, if any, should we place on the decline of the jury trial in other democracies? Are not the proofs the abolitionists rely on to show the existence of sympathy and prejudice in jury verdicts anecdotal rather than the product of systematic empirical research? On the other hand, do the systematic empirical approaches of the advocates prove that jury verdicts are free of prejudice and sympathy? Is there any proof that judges are better able than juries at recalling evidence? Is there any proof that sympathy and prejudice are absent from a judge's judgment? What empirical demonstration is there that juries, rather than the judges and the bar, are responsible for court delay? These are all important questions. To the extent definitive answers exist for them, those answers could go a long way toward stilling the debate. None of them, however, can be answered by a court. Finding answers to these questions requires the active participation of and direction from the legislative branch.

The American litigation explosion never could have been anticipated by the founding fathers. I am sure that to a man they would blanch upon learning of the volume of pending cases on the federal civil docket. We need a fresh start. My proposal is to wipe the slate clean by repealing the Seventh Amendment and leaving it with Congress to decide whether

45. Pub. L. No. 101-650, 104 Stat. 5089 (1990) (to be codified at 28 U.S.C. §§ 471-482).

46. See 28 U.S.C.A. §§ 471-473 (West Supp. 1991).

litigants have a right to a jury trial in a given class of cases. Congress can commission studies, hold public hearings, and ultimately make findings that take into account and balance all of the political benefits and economic costs of trial by jury. Armed with the facts—facts that no court can assemble—Congress would be in the best position to make a judgment as to whether a right to jury trial should be accorded in any particular class of civil case. The Supreme Court would be relieved of the tortuous task of trying to determine whether a litigant has a constitutional right to a jury trial when Congress creates a new statutory right enforceable in federal court. If Congress has not spoken, then there would be no such right.