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THE ORIGINAL UNDERSTANDING OF THE SEVENTH AMENDMENT RIGHT TO JURY TRIAL

*Stanton D. Krauss**

I ought to be very angry with my friend Akhil Amar. His new book, *The Bill of Rights: Creation and Reconstruction*,¹ strengthens, develops, and popularizes his strikingly original claim that the meaning of our Bill of Rights must be sought in the understanding of the people who enacted the Fourteenth Amendment, rather than that of James Madison and his contemporaries.² If Akhil carries the day on this question—and I find his arguments quite powerful—,my ongoing research into the original meaning of the Bill will be of interest only to antiquarians.

So why aren't I furious with him? For one thing, this elegantly written book was fun to read. Moreover, it's packed with brilliant insights into our constitutional history. Most importantly, however, it has provoked me to think in different ways and about different aspects of the original meaning of the Bill of Rights than is my wont. And it has helped me achieve a deeper understanding of a subject that I study and teach, and about which I care.

The Bill of Rights had this effect on me because there's more to it than its analysis of the current relevance of how the Bill's Creators understood their work. Drawing heavily upon other scholars' studies of individual parts of the Creators' Bill, the book contends that we wrongly attribute a minority-protective,

* Professor of Law, Quinnipiac College. B.A., 1975, Yale University; J.D., 1978, University of Michigan. I would like to thank Neil Cogan and Stephen Gilles for their helpful comments on earlier drafts of this article. I would also like to blame them for any remaining errors, but they're all my fault.

1. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

2. This book builds upon his earlier work, especially *Some Notes on the Establishment Clause*, 2 *ROGER WILLIAMS U. L. REV.* 1 (1996), *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193 (1992), and *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131 (1991).

individual rights oriented, view of the Bill to its Creators, when we actually owe that vision to its Reconstructors. The original Bill of Rights, it insists, was far more structural and majoritarian in nature than is popularly thought. To correct this misunderstanding, much of *The Bill of Rights* is devoted to a discussion of the structural and majoritarian aspects of each provision of the first ten amendments.

It is that discussion which has proven so helpful to me. In the pages that follow, I express my gratitude to Akhil by giving him something that we both enjoy: an argument. As is only fitting, the argument in this paper concerns something the book says about the original understanding of the Bill of Rights. More appropriately still, it's about a topic *The Bill of Rights* has challenged me to consider anew: the Jury Trial Clause of the Seventh Amendment.

This clause's text—"In Suits at common law . . . the right of trial by jury shall be preserved"³—is puzzling. The interpretive problem posed by this language is simple: given that there were no preexisting federal courts when it was written, and thus no preexisting right to jury trial in those courts to "preserve," and given further that the scope of both the common-law courts' jurisdiction and the right to a civil jury trial were defined differently in different states, what did the Creators of this Clause have in mind?

Though acknowledging that the question is "not free from doubt," *The Bill of Rights* asserts that "the best reading of the [Jury Trial Clause] is probably as follows: if a state court entertaining a given common-law case would use a civil jury, a federal court hearing the same case . . . must follow—must 'preserve'—that state-law jury right."⁴ Furthermore, the forum state's law is to determine what constitutes a "common-law case" for these purposes.⁵ Thus, the book reads the Jury Trial Clause as a federalism-based delegation to the states of the prerogative of determining the minimum scope of the right to jury trial in the federal civil courts.

3. U.S. CONST. amend. VII.

4. AMAR, *supra* note 1, at 89.

5. *See id.*

The Supreme Court thinks that the Creators had something very different in mind when they adopted this Clause. According to the Court, their intent was to “preserve” the right of jury trial “which existed under the English common law when the amendment was adopted.”⁶ The Court has taken this to mean that there can be no right to jury trial under this Clause unless “we are dealing with a cause of action that either was tried at law at the time of the Founding or is at least analogous to one that was.”⁷

I have come to the conclusion that *The Bill of Rights*’ “original understanding” of the Jury Trial Clause is wrong. And I’ve reached the same conclusion about the Supreme Court’s vision of what the Creators of this Clause were trying to accomplish, and the resulting constitutional doctrine that so few academics seem to like.⁸ Before the end of this essay, I hope to have persuaded you that I’m right about these things, and that this provision was actually meant to allow the Congress to decide which cases should be triable to juries in the new federal courts.

I will not, however, begin this effort immediately. First, it will be helpful for me to say something about the circumstances that led James Madison to propose our Seventh Amendment. Next, I will set forth the reasons why I find *The Bill of Rights*’

6. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (quoting *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935)).

7. *Id.* *Markman* added, however, that the Court’s “formulations of the historical test do not deal with the possibility of conflict between actual English common law practice and American assumptions about what that practice was, or between English and American practices at the relevant time.” *Id.* at 376 n.3.

The Clause also governs the determination of questions beyond whether a party is entitled to a jury trial of a particular claim, including the right to jury trial with respect to mixed claims in a unified judicial system and which issues must be left to a jury in a “suit at common law.” For a survey of modern decisions, see CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 649-62 (5th ed. 1994).

8. For a sampling of this doctrine’s unfavorable press, see, for example, Paul D. Carrington, *The Role of the Jury in Civil Dispute Resolution*, 1990 U. CHI. LEGAL F. 33 (1990); Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005 (1992); Martin Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486 (1975); Rachael E. Schwartz, “Everything Depends on How You Draw the Lines”: An Alternative Interpretation of the Seventh Amendment, 6 SETON HALL CONST. L.J. 599 (1996); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

account of the original meaning of the Jury Trial Clause unsatisfactory. I will then explain why I believe the Supreme Court's view (and thus current doctrine) to be in error. Finally, I will present the case for what I deem the best account of the original understanding of the Jury Trial Clause.

I. WHY WE HAVE A CONSTITUTIONAL AMENDMENT ABOUT CIVIL JURY TRIALS

All summer long, no one said one word at the Constitutional Convention about a right to civil jury trial.⁹ Until the final week, that is. On September 12, after the Committee on Style and Arrangement presented its report and the Convention decided to modify its provision concerning the congressional override of presidential vetoes,¹⁰ Hugh Williamson, seemingly out of the blue, "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it."¹¹ The following colloquy ensued:

Mr. Gorham. It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter.

Mr. Gerry urged the necessity of Juries to guard agst. corrupt Judges. He proposed that the Committee last appointed should be directed to provide a clause for securing the trial by Juries.

Col: Mason perceived the difficulty mentioned by Mr. Gorham. The jury cases cannot be specified. A general principle laid down on this and some other points would be sufficient. He wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose. It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.

9. The Convention convened on May 25, 1787, and met regularly through July 26. A week-long recess ensued, during which the Committee on Detail prepared a draft Constitution. The Convention reconvened on August 6 and remained in session until September 17, when the delegates endorsed the Constitution and adjourned. See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 292-93 (1966).

10. See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 616-30 (Adrienne Koch ed., 1987).

11. *Id.* at 630.

Mr. Gerry concurred in the idea & moved for a Committee to prepare a Bill of Rights. Col: Mason 2ded the motion.

Mr. Sherman, was for securing the rights of the people where requisite. The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient. There are many cases where juries are proper which cannot be discriminated. The Legislature may be safely trusted.

Col: Mason. The Laws of the U. S. are to be paramount to State Bills of Rights.

On the question for a Come. to prepare a Bill of Rights
N.H. no. Mas. abst. Ct. no. N.J. no. Pa. no. Del. no. Md.
no. Va. no. N.C. no. S.C. no. Geo. no.¹²

On September 15, two days before the Convention adjourned, the matter came up again:

Art III. Sect. 2. parag: 3. Mr. Pinckney & Mr. Gerry moved to annex to the end, "And a trial by jury shall be preserved as usual in civil cases."

Mr. Gorham. The constitution of Juries is different in different States, and the trial itself is *usual* in different cases in different states.

Mr. King urged the same objections[.]
Genl. Pinckney also. He thought such a clause in the Constitution would be pregnant with embarrassments.

The motion was disagreed to, nem: con.¹³

The Convention's failure to create a constitutional right to civil jury trials was part of an even larger political blunder: its refusal to heed George Mason's eleventh-hour request to add a Bill of Rights to the proposed Constitution.¹⁴ The Antifederalists made the most of the lack of such a Bill in their campaign to prevent ratification of the Constitution, and they almost succeeded as a result.¹⁵ The absence of a guarantee that litigants would have a right to jury trial in civil cases in any new feder-

12. *Id.*

13. *Id.* at 647-48.

14. Charles Pinkney's proposal of August 20 had sought the inclusion of freedom of the press and quartering clauses, see *id.* at 485-86, but the Convention rejected these requests, as well.

15. See CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS ix (Helen E. Veit et al. eds., 1991) [hereinafter Veit, CREATING THE BILL OF RIGHTS].

al courts contributed to what may have been their most potent arguments against the proposed Constitution.¹⁶ Citing Article III's mandate that "[t]he trial of all Crimes . . . shall be by Jury"¹⁷ and its declaration that the Supreme Court's "appellate Jurisdiction" would encompass both "Law and Fact,"¹⁸ the Antifederalists charged that this omission was part of a Federalist conspiracy against civil juries, which had silently been banished from the federal courts. What's more, in the exercise of their appellate jurisdiction, the new Supreme Court justices would be able to gut the authority of state court juries by redefining "Law and Fact."¹⁹ Not even King George had been so boldly tyrannical!

Here, as elsewhere, the Federalists proclaimed their good intentions, but to no avail.²⁰ Only by promising amendments did the Federalists prevail, and only by promising to support amendments did men like James Madison win election to the First Congress. But even then, the Antifederalists' cause was not necessarily lost. North Carolina and Rhode Island had refused to ratify, and Virginia and New York called for a new convention a month after Congress convened. To stem the tide, Madison felt he had to move fast. So he raised the subject of amendments the day before Virginia's petition was presented to the House and then goaded his Federalist colleagues until, almost five months later, twelve amendments were sent to the States for ratification. Ten of these became our Bill of Rights. The seventh article of our Bill was the Federalists' ultimate

16. See, e.g., *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750). The reasons for the Antifederalists' preference for civil juries are explored, for example, in Wolfram, *supra* note 8, at 670-705, and Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, The Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 148-56 (1991). The Antifederalists' arguments, along with the Federalists' responses, are collected in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 521-96 (Neil H. Cogan ed., 1997) [hereinafter Cogan, COMPLETE BILL OF RIGHTS].

17. U.S. CONST. art. III, § 2, cl. 3.

18. *Id.* art. III, § 2, cl. 2.

19. The fact that the Court's appellate jurisdiction was not limited to civil cases, along with the lack of a guarantee that federal criminal juries would be drawn from the vicinage of the crime, were cited by the Antifederalists as demonstrating that the Constitution threatened the right to jury trial in criminal, as well as civil cases. See, e.g., Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 419-77.

20. On the events recounted in this paragraph, see Veit, CREATING THE BILL OF RIGHTS, *supra* note 15, at ix-xvii, 57.

constitutional response to the Antifederalists' concerns about civil juries.

II. *THE BILL OF RIGHTS'* SOLUTION TO THE RIDDLE OF THE JURY TRIAL CLAUSE

Undaunted by the fact that no one seems ever to have endorsed its vision of the original meaning of the Jury Trial Clause before now, *The Bill of Rights* claims that it has "considerable historical support."²¹ And what evidence supports this claim? First, the book cites statements by a number of "commentators in 1788, both Federalist and Anti-, suggest[ing] that dynamic conformity with state jury rules would make good sense."²² Second, it notes that a passage in *The Federalist Papers* shows that several state ratifying conventions proposed civil jury trial guarantees intended to require the federal courts to allow civil jury trials when they would be available in the forum state's courts.²³ Third, it argues that this reading of the Jury Trial Clause would fit nicely with the Antifederalists' confidence in the states as bulwarks against tyranny.²⁴

None of this evidence shows that anyone who had actually read or heard of James Madison's proposed civil jury guarantee

21. AMAR, *supra* note 1, at 89.

22. *Id.* at 90.

23. *See id.* at 89.

24. *See id.* at 92. The book also makes several other arguments in favor of his theory. Two are textual in nature. First, it notes that the Jury Trial Clause was not copied from any of its state counterparts and, unlike many of them, had no "backward-looking language." *Id.* The former observation is true, but proves nothing about the correctness of a "dynamic conformity" interpretation of the Clause. Depending on the meaning of word "preserved," the latter may or may not be true; if it is true, this fact would support the "dynamic" component of the book's reading of the Clause, but it wouldn't necessarily have any particular bearing on the "conformity" aspect thereof. Second, *The Bill of Rights* attempts to connect "preserved" with the "dynamic conformity" thesis by suggesting that its meaning here may be like that of "its etymological cousin, *reserved*, in the Tenth Amendment." *Id.* at 90. However, this argument overlooks the obvious fact that the Creators chose not to use the word "reserved" in the Jury Trial Clause. Finally, the book makes the theoretical point that "[t]he centrality of state-law cases to the Seventh Amendment . . . explains why its jury rules were keyed to state practice whereas the jury rules of the Fifth and Sixth Amendments—dealing overwhelmingly with suits under federal law [and "a Congress bent on evading civil juries could draft statutes sounding in equity, not law"]—were not." *Id.* at 92. I will address this point below, at note 147.

or the Jury Trial Clause that grew out of it believed that either required dynamic conformity with the rights existing in common-law cases tried in the forum state's courts. Most of it does not actually support *The Bill of Rights*' thesis.²⁵ The rest I find unpersuasive. In fact, when other data, not considered by *The Bill of Rights*, is taken into account, I believe that the historical record points strongly away from its "original understanding" of the Clause.

One category of the book's "supporting evidence" consists of two Antifederalists' complaints that the proposed Constitution didn't guarantee the right to civil jury trial in the federal courts. But on closer inspection, these men were demanding something rather different than *The Bill of Rights* suggests. I begin with the comment of Samuel Spencer at the North Carolina ratifying convention. The relevant portion of his remarks reads as follows:

It has been said, in defence of the omission concerning the trial by jury in civil cases, that one general regulation could not be made; that in several cases the constitution of several states did not require a trial by jury,—for instance, in cases of equity and admiralty,—whereas in others it did, and that, therefore, it was proper to leave this subject at large. . . . I think that the respectable body who formed the Constitution . . . might have provided that all those cases which are now triable by a jury should be tried in each state by a jury, according to the mode usually practiced in such state.²⁶

This passage does not demand that the federal courts allow jury trials in what the forum state would deem common-law cases. Rather, it insists upon conformity with state practice even when that meant allowing jury trials in what the forum state regarded as equity or admiralty cases. The same is true of the cited complaint of the Antifederalist essayist who noted that the Constitutional Convention could have "declared, that the citizens of each state shall enjoy [the right of jury trial] con-

25. See AMAR, *supra* note 1, at xi-xv.

26. Remarks of Samuel Spencer, North Carolina Ratifying Convention (July 28, 1788), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 523, 526.

formably to the usage in the state where the tribunal shall be established."²⁷

The Bill of Rights also cites the comments of four Federalists saying that federal civil jury trials might well be made available more or less in conformity to state practice.²⁸ However, none of these men said that the Constitution would or should be amended to require incorporation of the relevant state law: they simply predicted that Congress would more or less accomplish this statutorily. And none of them limited his prediction to common-law cases.²⁹

Finally, the book invokes *The Federalist* No. 83.³⁰ Alexander Hamilton wasn't America's most enthusiastic admirer of civil juries, but he wholeheartedly wanted his state (New York) to ratify the Constitution, and he saw that this required a response to the Antifederalists' charge that it aimed to destroy civil jury trials. This essay was part of his effort to meet that challenge. After denying that the proposed Constitution forbid the use of juries in civil cases tried in the federal courts,³¹ Hamilton undertook to explain that no civil jury guarantee had

27. *Essay by One of the Common People*, reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 566, 567 (Dec. 3, 1787).

28. See Remarks of Christopher Gore, Massachusetts Ratifying Convention (Jan. 30, 1788), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 521, 521; Remarks of Samuel Johnston, North Carolina Ratifying Convention (July 28, 1788), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 523, 525; Remarks of Edmund Randolph, Virginia Ratifying Convention (June 6, 1788), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 537, 537-38; Oliver Ellsworth, *Landholder VI*, in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 401-02 (John P. Kaminski & Gaspare J. Saladino eds., 1983) [hereinafter Kaminski, DOCUMENTARY HISTORY]. *The Bill of Rights* also refers here to Roger Sherman's comments at the Constitutional Convention, which are set forth above, in the text accompanying note 12. Whatever those ambiguous remarks mean, their last two sentences seem clearly to reject dynamic conformity, as a constitutional or statutory principle.

29. Oliver Ellsworth's essay comes the closest to embracing this limitation, saying "[i]n chancery courts juries are never used, nor are they proper in admiralty courts . . ." Oliver Ellsworth, *Landholder VI*, in Kaminski, DOCUMENTARY HISTORY, *supra* note 28, at 401. Nonetheless, inasmuch as the preceding sentence states, "the trials [may] be by jury also in most or all the causes which were wont to be tried by them," *id.*, the most that may be said is that the essay is hopelessly ambiguous on this score.

30. THE FEDERALIST NO. 83 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

31. See *id.* at 495-98.

been included in the Constitution for a benign reason. The reason that he gave was that the differing scope of the right to jury trial in the states,³² coupled with state chauvinism, precluded agreement on the scope of any uniform federal standard, and that deference to diverse state practices would have been

32. See *id.* at 502-06. Hamilton's survey of the thirteen state court systems is worth quoting in full:

In this state [New York], our judicial establishments resemble, more nearly than in any other, those of Great Britain. We have courts of common law, courts of probates (analogous in certain matters to the spiritual courts in England), a court of admiralty, and a court of chancery. In the courts of common law only, the trial by jury prevails, and this with some exceptions. In all the others a single judge presides, and proceeds in general either according to the course of the canon or civil law, without the aid of a jury.* In New Jersey, there is a court of chancery which proceeds like ours, but neither courts of admiralty nor of probates, in the sense in which these last are established with us. In that State the courts of common law have the cognizance of those causes which with us are determinable in the courts of admiralty and of probates, and of course the jury trial is more extensive in New Jersey than in New York. In Pennsylvania, this is perhaps still more the case, for there is no court of chancery in that State, and its common-law courts have equity jurisdiction. It has a court of admiralty, but none of probates, at least on the plan of ours. Delaware has in these respects imitated Pennsylvania. Maryland approaches more nearly to New York, as does also Virginia, except that the latter has a plurality of chancellors. North Carolina bears most affinity to Pennsylvania; South Carolina to Virginia. I believe, however, that in some of those States which have distinct courts of admiralty, the causes depending in them are triable by juries. In Georgia there are none but common-law courts, and an appeal of course lies from the verdict of one jury to another, which is called a special jury, and for which a particular mode of appointment is marked out. In Connecticut they have no distinct courts, either of chancery or of admiralty, and their courts of probates have no jurisdiction of causes. Their common-law courts have admiralty, and, to a certain extent, equity jurisdiction. In cases of importance, their General Assembly is the only court of chancery. In Connecticut, therefore, the trial by jury extends in *practice* further than in any other State yet mentioned. Rhode Island is, I believe, in this particular, pretty much in the situation of Connecticut. Massachusetts and New Hampshire, in regard to the blending of law, equity, and admiralty, jurisdictions are in a similar predicament. In the four Eastern States, the trial by jury not only stands upon a broader foundation than in the other States, but it is attended with a peculiarity unknown, in its full extent, to any of them. There is an appeal *of course* from one jury to another, till there have been two verdicts out of three on one side.

* It has been erroneously insinuated, with regard to the court of chancery, that this court generally tries disputed facts by a jury. The truth is that references to a jury in that court rarely happen, and are in no case necessary but where the validity of a devise of land comes into question.

Id. at 502-03.

irrational, subversive of law, and (particularly with respect to prize cases) a threat to national security.³³

As the Antifederalists forcefully reminded the public,³⁴ Hamilton's premises might have led to the conclusion that Congress would be equally unable to agree upon a statutory civil jury trial right, and that there would be no such right in the new federal courts. But Hamilton was emphatically not suggesting that this would happen. And why not? The reason, I suspect, is that Hamilton understood (and approved of the fact) that Congress would be authorized to enact such civil jury trial rules as a simple majority of the members of each House deemed prudent from time to time.³⁵ Of course, he also understood that the resulting rules would leave some people disappointed. Hamilton didn't want to say anything about the latter point during the ratification controversy, however, because his goal was to promote ratification, not jeopardize it. As such, it was prudent to ignore the prospect that a congressional majority might accept a uniform national standard, and to pretend (without actually saying) that no state had proposed one.

To that end, Hamilton reviewed only the first two proposed civil jury trial amendments, both of which (he claimed) were meant to require federal courts to allow civil jury trials in conformity with state practice. Having been stymied in their state's convention, Pennsylvania's Antifederalist delegates issued a minority report and proposed amendments in December, 1787.³⁶ One of these proposals, building upon two provisions of the Keystone State's Constitution, was, "That in controversies respecting property, and in suits between man and man, trial by jury shall be as heretofore, as well in the federal courts, as in those of the several states."³⁷ While Hamilton reasonably

33. *See id.* at 504-09.

34. *See, e.g.,* CINCINNATUS NO. 3 (Nov. 15, 1787), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 563, 563-64.

35.

36. *See* The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 146-67 (Herbert J. Storing ed., 1981).

37. Pennsylvania Minority Proposal, Pennsylvania State Convention (Dec. 12, 1707), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 507, 507. The relevant provisions of Pennsylvania's 1776 Constitution may be found in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 516.

interpreted this proposal to require the incorporation of existing state jury trial rights into federal law,³⁸ he noted that it did not limit this mandate to what a Briton or a New Yorker would have regarded as common-law cases. Quite the contrary, he complained, it would obligate federal courts to let juries decide what he deemed admiralty cases in Connecticut and equity cases in Pennsylvania.³⁹

Hamilton then turned to the amendment tendered by Massachusetts' ratification convention. This submission looked very different from the Pennsylvania minority's offering of several months earlier. It stated that "[i]n civil actions between Citizens of different States every issue of fact arising in Actions at common law shall be tried by a Jury if the parties or either of them request it."⁴⁰ Despite its facial limitation to "Actions at common law," which he defined as cases tried "in a court of common law,"⁴¹ Hamilton argued that (with respect to diversity suits) this proposal meant the same thing as the Pennsylvania minority's—i.e., that since Pennsylvania's equity jurisdiction, unlike New York's, was lodged in common-law courts, the federal courts in the former state, but not the latter, would be bound to let a jury decide equity diversity cases.⁴² Thus, with respect to diversity suits, Hamilton read this proposal as incorporating the forum state's view of what constitutes an "Action at common law."

This comes much closer than any of the other evidence reviewed thus far to showing that somebody actually believed that there should be a federal jury trial right of the type identified by *The Bill of Rights*. But was Hamilton's interpretation of the Bay State proposal correct? Even if it was, what would that imply with respect to the meaning of our Jury Trial Clause?

I begin with the former question. The Pennsylvania Antifederalists' formulation had been widely circulated for months, yet the Massachusetts convention chose not to endorse

38. See THE FEDERALIST NO. 83, *supra* note 30, at 503-04.

39. See *id.*

40. Massachusetts Proposal, Massachusetts State Convention (Feb. 6, 1788), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 507, 507.

41. THE FEDERALIST NO. 83, *supra* note 30, at 506-07.

42. See *id.* On the jurisdiction of Pennsylvania and New York courts of common law, see *supra* note 32.

it. Nor did they craft a proposal that said, for example, "In civil actions between Citizens of different States every issue of fact arising in Actions *triable by jury in the common law courts of each State, respectively*, shall be tried by a Jury if the parties or either of them request it."⁴³ Instead, the Bay Staters wrote a different proposal, one which limited the civil jury trial right to diversity "Actions at common law" and deleted the Keystone Staters' references to prior practice and the state courts. Presumably, they did so for a reason.

That reason would not have been the narrow chauvinism noted by Hamilton. The text of this amendment was not derived from the jury trial guarantee in Massachusetts' Constitution, and it provided for jury trial in a much narrower class of cases—diversity cases rather than "all controversies concerning property, and . . . suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, . . . unless in causes arising on the high seas, and such as relate to mariner's wages, the legislature shall thereafter find it necessary to alter it."⁴⁴ As a result, if federal courts and state courts were vested with concurrent jurisdiction over cases involving ambassadors or federal questions, for example, the convention's proposal would not have ensured that the parties would have the same jury trial rights in both sets of courts.

In light of the fact that the historical record contains no other explication of this proposal during the ratification debate,

43. The italicized words are modeled on the language of portions of the Judiciary and Process Acts of 1789 that are quoted in the text accompanying notes 90 and 91, below. The Maryland minority's criminal jury trial proposal stated "[t]hat there shall be a trial by jury in all criminal cases, according to the course of proceeding in the state where the offence is committed." Maryland Minority Proposal, Maryland State Convention (Apr. 26, 1788), *reprinted in* Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 401, 401. While the Massachusetts convention couldn't copy these as-yet-unwritten texts, they prove that competent draftsmen of the time knew how to write a clear state-law-incorporation rule. Indeed, two months before the Bay Staters wrote their civil jury proposal, an essay in the Boston Gazette noted that the Constitutional Convention could have "declared, that the citizens of each state shall enjoy [a right to jury trial in civil cases] conformably to the usage in the state where the tribunal shall be established." *Essay by One of the Common People*, *reprinted in* Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 566, 567 (Dec. 3, 1787).

44. MASS. CONST. (1780), *reprinted in* Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 509, 509-10.

there is no reason to believe that he was relying on common knowledge or private information.⁴⁵ Nor can the explanation be that Antifederalist ideology required that the proposal be assumed to incorporate state jury practices, because the amendment proposed by the Maryland Antifederalists—the only extant offering that Hamilton failed to mention in this essay—clearly articulated a single, uniform, standard for determining the right to civil jury trial in the federal courts.⁴⁶ (Incidentally, that standard was not the English standard enshrined in the State's Constitution.⁴⁷) Moreover, the Maryland minority's proposal demonstrates the logical fallacy in inferring from the political difficulty of persuading states to accept a non-conformity-based rule that no proposal could have been meant to embody such a standard. Indeed, with Hamilton's support, his home state would shortly belie this assumption by endorsing a constitutional amendment guaranteeing federal litigants "the trial by Jury in the extent that it obtains by the Common Law of England,"⁴⁸ which, coincidentally, seems to have described New York's constitutional law and practice.⁴⁹ Massachusetts' amendment, too, could have contemplated a uniform standard for determining the scope of a "common law" court's jurisdiction, be it a single standard already in use in one or more states, a new federal standard, or British practice.

So why did Hamilton read the Massachusetts proposal to require conformity with state law, a position he dismissed in this same essay as offensive to "every well-regulated judgment?"⁵⁰ Although his failure even to mention the Maryland minority's proposal shows that he was willing to shade the truth in order to "win" a rhetorical argument about the virtue

45. Indeed, Hamilton strongly implied that he had no extrinsic evidence of the meaning of this proposal. See THE FEDERALIST NO. 83, *supra* note 30, at 506.

46. See Maryland Minority Proposal, Maryland State Convention (Apr. 26, 1788), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 506, 506-07.

47. See Maryland: Declaration of Rights (1776), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 508, 508.

48. New York Proposal, New York State Convention (July 26, 1788), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 507, 507.

49. The civil jury provisions of New York's state constitution may be found in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 514, 514. On the similarity between the right to jury trial in civil cases in New York and England, see note 32, *supra*.

50. THE FEDERALIST NO. 83, *supra* note 30, at 504.

of the Founders' intentions without further inflaming anyone's concerns about the future federal right to jury trial in civil cases, I believe that Hamilton had a non-tactical reason to interpret the Massachusetts amendment as he did: his interpretation was faithful to the intent of its creators. In my view, the key to understanding this provision lies in its restriction to diversity cases. This limitation seems to me to be linked to, and to shed light on, the proposal's confinement of the right to jury trial to "Actions at common law."

What's the connection? I believe that the Bay State's amendment was designed to ensure that the creation of a new federal forum for litigating disputes arising under state law would not unjustifiably deprive Americans of a right to jury trial that they otherwise would have had in the state courts.⁵¹ That is, Massachusetts recognized a legitimate federal interest in deciding who would find the facts in suits under federal or international law,⁵² and in actions (such as contract or tort suits involving foreigners) in which state law might apply but predominating federal concerns like international relations could justify overriding state policy. In the absence of such considerations, however, this proposal required that the federal courts respect the forum state's desire to allow the parties to civil litigation to submit their case to a jury. Although this analysis could offer no better explanation than careless drafting

51. This is not the same as a principle that the sovereign whose substantive law governs a case should also determine the litigants' right to trial by jury. (*The Bill of Rights* suggests that the Jury Trial Clause embodies this principle. See AMAR, *supra* note 1, at 91-92.) On the one hand, in the absence of a federal law or treaty, state law might govern tort suits brought against Americans by foreign ambassadors, but the proposal didn't ensure a right to jury trial in these cases. On the other hand, I doubt that the authors of this provision believed that, in an "equity" suit filed (say) in New York by a New Yorker against a visiting Bostonian, if Massachusetts' substantive law governed the dispute, the New York courts would have had to allow a jury trial whenever the Massachusetts courts would, or that, were the situation reversed, Massachusetts' courts would have been bound to try the case without a jury whenever New York's would. (If the dispute involved property, for example, a refusal to allow a jury trial in the latter situation would seem clearly to have violated the state's Constitution, which is excerpted in the text accompanying note 44, above.)

52. Even Thomas Jefferson favored denying a right to jury trial in admiralty cases. See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 592, 592; see also Letter from Thomas Jefferson to Uriah Forrest (Dec. 31, 1787), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 593, 593.

for the provision's apparent distinction between states in which equity claims were tried in the common-law courts and those in which they were tried to a jury in chancery, it would explain both the limitation of the proposed right to diversity cases and the proposal's insistence upon conformity to the forum state's rules on the availability of jury trial in those cases.⁵³

As far as the surviving historical record shows, no one else said one word about the meaning of this amendment during the ratification controversy. This silence doubtless reflects three things. First, the incompleteness of our information. Thus, while New Hampshire endorsed this proposal,⁵⁴ there are virtually no surviving records of what was said at the New Hampshire convention,⁵⁵ so if anyone said anything there to clarify its meaning, we don't know about it. Second, by the time *The Federalist* No. 83 appeared in print, the newspaper controversy over the Constitution was winding down, and it had all but ended in New England, where Massachusetts and Connecticut had ratified and Rhode Island's leaders refused to convene a ratifying convention.⁵⁶ Third, as the following account makes clear, the Bay State's civil jury proposal had little apparent impact on the states that had yet to ratify the Constitution. To the best of my knowledge, no one outside of Massachusetts' former appendage and (with respect to political and constitu-

53. It would also suggest that Hamilton's comments about the "diversity" limitation, see *THE FEDERALIST* NO. 83, *supra* note 30, at 506, were disingenuous.

54. See New Hampshire Proposal, New Hampshire State Convention (June 21, 1788), reprinted in Cogan, *COMPLETE BILL OF RIGHTS*, *supra* note 16, at 507, 507.

55. See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *TEX. L. REV.* 1, 21 (1986).

56. The status of the ratification process on May 28, 1788, when *The Federalist* No. 83 was printed, can be ascertained by examining the table found in DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 216 (1990). A perusal of the Table of Contents of Cogan, *COMPLETE BILL OF RIGHTS*, *supra* note 16, indicates the paucity of commentary published nationally after that date. And the relevant volume of Herbert Storing's collection of Antifederalist literature includes no subsequent essays written in New England. See 4 *THE COMPLETE ANTI-FEDERALIST* (Herbert Storing ed., 1981).

tional issues) current satellite, New Hampshire,⁵⁷ so much as mentioned it during the rest of the ratification debate.

In any event, it left no mark on the text of the proposed civil jury guarantee of any state other than New Hampshire. Three other ratifying states (along with North Carolina, which refused to ratify the Constitution) recommended civil jury trial amendments before the first twelve congressionally approved amendments were transmitted to the states for ratification. As noted above,⁵⁸ Maryland's minority had proposed an explicitly uniform jury trial guarantee prior to the publication of *The Federalist* No. 83. Virginia's ratification followed New Hampshire's, and its civil jury trial proposal was an almost verbatim reiteration of the portion of its Declaration of Rights that had found its way into Pennsylvania's Constitution,⁵⁹ and from thence into the Pennsylvania Antifederalists' offering. This tendered amendment (which was also endorsed by North Carolina⁶⁰) read "[t]hat in controversies respecting property, and in suits between man and man, the ancient trial by Jury is one of the greatest Securities to the rights of the people, and ought to remain sacred and inviolable."⁶¹ Finally, New York, in which "the boundaries between actions at common law and actions of

57. With respect to New Hampshire's one-time union with Massachusetts, see JERE R. DANIELL, *COLONIAL NEW HAMPSHIRE—A HISTORY* 39-79 (1981). The political/constitutional influence the Bay State wielded over its smaller neighbor in 1788 can be gauged by comparing their respective constitutions of 1780 and 1784. Compare MASS. CONST. (1780), reprinted in 3 *THE FEDERAL AND STATE CONSTITUTIONS 1888-1911* (Francis Newton Thorpe ed., 1909), with N.H. CONST. (1784), reprinted in 4 *THE FEDERAL AND STATE CONSTITUTIONS 2453-70* (Francis Newton Thorpe ed., 1909). For a comparison of the constitutional amendments proposed by the respective ratifying conventions, see Massachusetts Proposal, Massachusetts State Convention (June 8, 1789), reprinted in Veit, *CREATING THE BILL OF RIGHTS*, supra note 15, at 14, 14; New Hampshire Proposal, New Hampshire State Convention (June 21, 1788), reprinted in Veit, *CREATING THE BILL OF RIGHTS*, supra note 15, at 16, 16.

58. See supra note 46 and accompanying text.

59. See Virginia: Declaration of Rights (1776), reprinted in Cogan, *COMPLETE BILL OF RIGHTS*, supra note 16, at 517, 517; Pennsylvania: Declaration of Rights art. XI, reprinted in Cogan, *COMPLETE BILL OF RIGHTS*, supra note 16, at 515, 516.

60. See North Carolina Proposal, North Carolina State Convention (Aug. 1, 1788), reprinted in Cogan, *COMPLETE BILL OF RIGHTS*, supra note 16, at 507, 507.

61. Virginia Proposal, Virginia State Convention (June 27, 1788), reprinted in Cogan, *COMPLETE BILL OF RIGHTS*, supra note 16, at 508, 508. This praiseful admonition calls to mind the request made at the Constitutional Convention by George Mason, the author of Virginia's Declaration of Rights, see Wolfram, supra note 8, at 667, for "[a] general principle laid down on" the right to jury trial, which may be found in the text accompanying note 12, above.

equitable jurisdiction [were] ascertained in conformity to the rules which prevail[ed] in England,"⁶² recommended the adoption of the following provision: "That the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate."⁶³

Two months before the scheduled opening of the First Congress, an anonymous writer broke this silence. The *Foreign Spectator*, who wrote twenty-eight essays on the amendments proposed by the various states,⁶⁴ devoted most of his twentieth number to a discussion of the first three tendered civil jury proposals.⁶⁵ Like Hamilton, *The Spectator* argued that the extent of any jury trial guarantee must be the same in federal courts throughout the Nation and condemned the proposals that he reviewed.⁶⁶ Unlike Hamilton, he purported to be unsure as to whether the Pennsylvania minority's proposal had been meant to mandate conformity to the forum state's civil jury trial right or to Pennsylvania's. However, I believe he agreed with Hamilton that the Massachusetts amendment's reference to "Actions at common law" left the definition of "that species of causes"⁶⁷ to state law.⁶⁸

62. THE FEDERALIST NO. 83, *supra* note 30, at 506.

63. New York Proposal, New York State Convention (July 26, 1788), *reprinted in* Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 507, 507. Unfortunately, we don't know whether this provision spoke of "the Common Law of England" rather than "at Common Law" in order to clarify a perceived ambiguity in Massachusetts' proposal, to signify a different standard, or for some other reason.

64. See Veit, CREATING THE BILL OF RIGHTS, *supra* note 15, at xiv.

65. See *Remarks on the Amendments to the Federal Constitution proposed by the Conventions of Massachusetts, New Hampshire, New York, Virginia, South and North Carolina with the Minorities of Pennsylvania and Maryland by a Foreign Spectator*, Number XX, FED. GAZETTE, AND PHILA. EVE. POST, Jan. 6, 1789, at 2 [hereinafter *The Spectator*]. *The Spectator* didn't discuss the Virginia/North Carolina jury trial proposal, but this seems to have been because their other amendments (which he did mention) would have virtually eliminated the federal courts' non-admiralty original jurisdiction. He said nothing at all about New York's proposal, from which I infer that he favored it. Perhaps, as a "Foreigner," he was reluctant to endorse a suggestion explicitly to incorporate "foreign" law into the Constitution. Maybe this would even have been true if the "Foreigner" was actually an American Hamiltonian, or Hamilton himself. Cf. *infra* text accompanying note 156.

66. Like Hamilton, he didn't review them all. See *supra* note 65; text accompanying note 46.

67. THE FEDERALIST NO. 83, *supra* note 30, at 506.

68. *The Spectator's* interpretation of this proposal is itself vague:

The different boundaries of equity jurisdiction would render this clause

But even if we assume that Massachusetts (and New Hampshire), like the Pennsylvania minority, sought some kind of conformity-based civil jury guarantee, and read New York's as a request to "preserve" New York's civil jury-trial rights in the federal courts sitting in that state—even if we assume further that the Antifederalists in Maryland, Virginia, and North Carolina secretly longed for this also—we can't take it for granted that their quest succeeded. A parallel Antifederalist failure illustrates the point perfectly.

Although *The Bill of Rights* doesn't dwell on it,⁶⁹ even with Madison's help, the Antifederalists didn't get a dearly-wanted constitutional guarantee that federal criminal juries would be drawn from the vicinity of the crime.⁷⁰ A House-passed proposal provided for the right to "an Impartial Jury of the Vicinage"

ambiguous. The same causes might, as matters of equity, be referred to the court of chancery in one state, and in another be deemed actions at common law, because determinable in a court at common law which has the usual powers of a court of chancery. Besides, this eventual introduction of juries, in cases of equity, would not be proper, nor generally agreeable.

The Spectator, *supra* note 65, at 2. I believe that his use of the word "ambiguous" in this passage was meant to parallel Hamilton's comment, about the same language, that "there are no expressions more vague and indeterminate than ['Actions at common law'] to characterize *that* species of causes which it is intended shall be entitled to a trial by jury." THE FEDERALIST NO. 83, *supra* note 30, at 506.

69. In fact, the book devotes very little attention—about a page and a half—to the Creators' District Clause, principally pointing out that it differs from Article III's Jury Trial Clause (a structural requirement that crimes be tried by jury within the state where they occurred) by giving defendants a waivable right to a jury from the district where the crime occurred. See AMAR, *supra* note 1, at 104-08. On the one hand, that's far more than the parenthetical comparison to the Double Jeopardy Clause that is *The Bill of Rights'* entire discussion of the Reexamination Clause of the Seventh Amendment. See *id.* at 96. But on the other hand, it's equally reflective of the fact that the chapter on juries is far more focused on the Founders' view of juries than on the waivable jury-related rights they gave criminal defendants and civil litigants in the Sixth and Seventh Amendments.

70. The leading study of the American law of vicinage is Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801 (1976) [hereinafter Kershen I]; 30 OKLA. L. REV. 1 (1977). The Antifederalists' insistence upon a guarantee of local criminal juries is discussed in Kershen I, at 816-17, 833-44. The story of Madison's fight to secure such a guarantee is recounted in Kershen I at 818-28. It should be noted, however, that Kershen was misled by Edward Dumbauld about one fact: the District Clause was adopted by the Conference Committee and included in its Report of September 24, 1789, which also incorporated Madison's criminal jury trial amendment into another article concerning the rights of criminal defendants. Compare *id.* at 825-28, 856-57 with Conference Committee Report (Sept. 24, 1789), reprinted in Cogan, *supra* note 16, at 396-97.

in criminal cases,⁷¹ yet the Senate refused to accept the "local" aspect of this jury right,⁷² and Madison was unable to persuade the Senate Conferees to yield on the matter. The best he could get was the District Clause, which stipulates that, *if* Congress chose to create judicial districts within any state, a defendant charged with committing a crime within that state could insist that the jury come from "the . . . district wherein the crime shall have been committed."⁷³

In a letter to Edmund Pendleton, Madison explained the problem in this manner:

In many of the States juries even in criminal cases are taken from the State at large—in others from districts of considerable extent—in very few from the County alone. Hence a dislike to the restraint with respect to *vicinage*, which has produced a negative on that clause. . . . The difficulty of uniting the minds of men accustomed to think and act differently can only be conceived by those who have witnessed it.⁷⁴

He returned to this subject nine days later in another, slightly more revealing, letter to Pendleton:

[The Senate] are . . . inflexible in opposing a definition of the *locality* of Juries. The *vicinage* they contend is either too vague or too strict a term: too vague if depending on limits to be fixed by the pleasure of the law, too strict if limited to the County. It was proposed to insert after the word juries—'with the accustomed requisites'—leaving the definition to be construed according to the judgment of professional men. Even this could not be obtained. The truth is that in most of the States the practice is different, and hence the irreconcilable difference of ideas on the subject. In some States, jurors are drawn from the whole body

71. House Resolution, Article the Tenth (Aug. 24, 1779), reprinted in, Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 391, 391.

72. See Further Senate Consideration (Sept. 9, 1789), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 394, 394-95.

73. U.S. CONST. amend. VI. In full, this provision reads, "In all criminal prosecutions the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been ascertained by law . . ." *Id.*

74. Letter from James Madison to Edmund Pendleton (Sept. 14, 1789), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 480, 480.

of the community indiscrim[in]ately; In others, from large districts comprehending a number of Counties; and in a few only from a single County.⁷⁵

So the Senators also wanted local juries, but each preferred conformity with his own state's vicinage rule. Madison desperately wanted to broker a deal in order to pacify the Antifederalists (and maybe he also thought local juries are best), but he couldn't. As a result, the Sixth Amendment left the federal government free to try a man in Richmond, before a jury of Richmonders, for a crime committed in Kentucky (then part of Virginia), which was precisely what the Antifederalists had demanded the Constitution be amended to forbid.⁷⁶

The obvious question about this story, from the perspective of the present inquiry, is why the Conferees didn't quickly and painlessly resolve their problem by adopting a provision requiring a federal court to follow the vicinage rule used in the forum state's courts. Why didn't anyone in Congress (apparently) even propose this approach, which had been suggested by the Antifederalist minority at the Maryland ratifying convention?⁷⁷

75. Letter from James Madison to Edmond Pendleton (Sept. 23, 1789), *reprinted in* Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 480, 480-81.

76. For Antifederalist concerns that this hypothetical case might occur under the unamended Constitution, see, for example, Remarks of John Marshall, Virginia Ratifying Convention (June 20, 1780), *reprinted in* Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 432, 439-42; CENTINEL NO. 2 (Oct. 24, 1787), *reprinted in* Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 449, 450; BRUTUS NO. 2 (Nov. 1, 1787), *reprinted in* Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 451, 451-52.

The District Clause did not preclude this possibility because it didn't require that Congress create districts smaller than a State. *See* U.S. CONST. amend. VI. Accordingly, the Clause gave defendants nothing they would not have already gotten under Article III. *See* Kershen I, *supra* note 70, at 857. Therefore, although "the concept of vicinage was given constitutional status" by the District Clause, *see id.*, I cannot agree with Kershen or *The Bill of Rights* that it was a symbolic victory for the Antifederalists, or a compromise. *See id.* at 827, 857-58; AMAR, *supra* note 1, at 106. It was a fig leaf covering a surrender, and the Antifederalists lost. Happily, though, as the Senate hoped, *see* Letter from James Madison to Edmund Pendleton (Sept. 23, 1789), *reprinted in* Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 480, 481, the Judiciary Act of 1789 did quiet the Antifederalists' fears, *see* Kershen I, *supra* note 70, at 858-60. (Here, too, Kershen errs in one respect: the Judiciary Act made Kentucky and Maine separate judicial districts, which spoke directly to the hypothetical case mentioned in the text. *See* Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73.)

77. Their proposal provided "[t]hat there shall be a trial by jury in all criminal cases, according to the course of proceeding in the state where the offence is commit-

Why didn't Madison, whose civil Jury Trial Clause was allegedly conformity-based?

The simplest explanation for all of this—and the best—is that, as much as the Federalist Senators on the Conference Committee may have wanted their state courts' vicinage rules to apply to federal courts sitting in their states, they abhorred the idea of constitutionally compelled conformity even more. Moreover, like Hamilton, the *Foreign Spectator*, James Wilson and James Iredell, they felt the same way about constitutionally mandated incorporation of state civil jury trial rights.⁷⁸ And so did the House Conferees, including James Madison.⁷⁹

An examination of the legislative history and text of our Seventh Amendment Jury Trial Clause supports the notion that it wasn't meant to incorporate state practice. Madison's initial proposal to the House provided that "[i]n suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."⁸⁰ This proposition was largely, but not entirely, borrowed from Virginia's proffered amendment.⁸¹ However, the critical language, for present purposes, was inserted by Madison, who added the words "at common law." Perhaps Madison had in mind *The Federalist* No. 83's discussion of Massachusetts' tendered amendment and meant by these words to signify that the forum state's definition of common-law jurisdiction was to obtain in a federal court. But this is neither the only, nor the

ted." Maryland Minority Proposal, Maryland State Convention (Apr. 26, 1788), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 401, 401.

78. Wilson and Iredell's opposition to a conformity-based civil jury trial rule is noted in AMAR, *supra* note 1, at 90, n.*.

79. The latter portion of the comments that House Conferee Roger Sherman made about civil juries at the Constitutional Convention indicate that he, too, would have opposed an incorporation-based right to jury trial in civil cases. See *supra* text accompanying note 12.

80. Proposal by Madison in House (June 8, 1789), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 493, 493.

81. That amendment is set forth above, in the text accompanying note 61. Virginia based its ode to juries on the New York convention's, which may be found above, in the text accompanying note 63. Madison, who had been a member of the committee that wrote the Virginia proposal, see Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1235-36 (1990), returned to New York's amendment when drafting his own, now substituting its "inviolable" for Virginia's "sacred and inviolable."

most likely, possibility. For one thing, Madison didn't limit the jury trial right to diversity suits. Nor did his proposal use the phrase "Actions at common law." While it did refer to "common law," so did New York's requested guarantee, which Madison had read,⁸² and which was (1) not limited to diversity suits and (2) definitely not about dynamic conformity. More importantly, this language would have been familiar to Madison, or any other gentleman, and connected in their minds with the right to civil jury trial, which had traditionally been universally recognized in the common-law courts. Thus, if he was thinking about Hamilton's essay when he wrote his civil jury trial amendment, Madison might have had in mind its definition of "Actions at common law" as those "tried in a court of common law."⁸³ Even if he remembered Hamilton's interpretation of the Bay State's proposal, Madison might have disagreed with it or felt that others might find the meaning of this language unclear, removed as it was from the context of that proposal. Otherwise, if Madison wished to follow in Massachusetts' footsteps, why didn't he use the phrase "Actions at common law"? If he wanted to use his own words to constitutionalize a civil jury trial right based on the principle of dynamic conformity to the forum State's law (and why would he have wanted to do so here, but not in defining a vicinage requirement for criminal juries?), why wouldn't he have expressed his intent less obscurely? Why, for example, wouldn't he have taken a lesson from the Maryland minority's vicinage proposal, which read, "That there shall be a trial by jury in all criminal cases, according to the course of proceeding in the state where the offence is committed"?⁸⁴

Whatever Madison's private understanding of his proposal, the Jury Trial Clause only became part of the Bill of Rights by

82. See Letter from Fisher Ames to Thomas Dwight (June 11, 1789), reprinted in Veit, *CREATING THE BILL OF RIGHTS*, *supra* note 15, at 247, 247.

83. See *THE FEDERALIST* NO. 83, *supra* note 30, at 506-07.

84. Maryland Minority Proposal, Maryland State Convention (Apr. 26, 1788), reprinted in Cogan, *COMPLETE BILL OF RIGHTS*, *supra* note 16, at 401, 401 (emphasis added). Note that another Madison proposal, which ultimately became the Reexamination Clause, referred to facts "triable by jury, according to the course of common law." Proposal by Madison in House (June 8, 1789), reprinted in Cogan, *COMPLETE BILL OF RIGHTS*, *supra* note 16, at 493, 493. The differences between this language and the Jury Trial Clause's "Suits at common law" will be considered below, in the text accompanying notes 171-204.

passing both Houses of Congress. There is no evidence that anyone else in either House understood it to require dynamic conformity with state jury practice.⁸⁵ And it isn't clear why any other member of Congress would have supported that type of civil jury clause when he wouldn't support a similar criminal jury vicinage provision. Further, if the Congress did intend to satisfy a popular demand for an incorporation-based civil jury right, why wouldn't it have revealed this fact to the people more clearly than through Madison's opaque language? After all, each House did modify Madison's text. The House Committee of Eleven, of which Madison was a member, broadened and edited it to read, "In suits at common law, the right of trial by jury shall be preserved."⁸⁶ Subsequently, the Senate added, and then modified, an amount-in-controversy requirement.⁸⁷ But no one seems ever to have tried to make a dynamic conformity principle more explicit.

This point is particularly striking given the fact that the First Congress contemporaneously used plain language to incor-

85. The only known remark that might even arguably reflect a Member of Congress' pre-passage interpretation of the Jury Trial Clause was made by Representative Samuel Livermore of New Hampshire on June 8, 1789, the day Madison first read his proposals to the House. (Indeed, the Congressional Register's notes of this session suggest that Livermore's comment was made shortly after Madison finished speaking.) Livermore is reported to have said that "[h]e could not agree to make jury trials necessary on every occasion; they were not practiced even at this time, and there were some cases in which a cause could be better decided without a jury than with one." Debate in the House of Representatives (June 8, 1789), *reprinted in* Veit, *CREATING THE BILL OF RIGHTS*, *supra* note 15, at 69, 92. Assuming that this is an accurate account of Livermore's statement, *but see* Hutson, *supra* note 55, at 38, and that he correctly understood Madison's civil jury proposal in the first place, it's not clear what we should make of this evidence. The crux of the problem is that it's hard to see how Livermore could have construed the proposed amendment to require jury trials "on every occasion." That "they were not practiced even at this time" might suggest that he understood it to be altering state practice. Alternatively, he could have believed that Madison sought to require conformity with state practice and been objecting that the New England/Georgia practice of trying every case to a jury was not "practiced . . . at this time" in every state, though this would have been an odd objection for a New Englander to make. All in all, I'm inclined to believe that this report is unreliable.

86. House Committee of Eleven Report (July 28, 1789), *reprinted in* Cogan, *COMPLETE BILL OF RIGHTS*, *supra* note 16, at 495, 495.

87. Further Senate Consideration (Sept. 7, 1789), *reprinted in* Cogan, *COMPLETE BILL OF RIGHTS*, *supra* note 16, at 499, 500-01.

porate state rules in the Judiciary Act of 1789⁸⁸ and the Process Act.⁸⁹ Thus, section 29 of the Judiciary Act provided that

Jurors in all cases to serve in the courts of the United States shall be designated by lot or otherwise in each State respectively according to the mode of forming juries therein now practiced, so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest courts of law of such State⁹⁰

Section 2 of the Process Act, which was enacted five days after the Judiciary Act, read as follows:

[T]he forms of Writs and Executions except their Style; and modes of Process and rates of fees, except fees to Judges, in the Circuit and district Courts, in suits at common law, shall be the same in each State respectively as are now used or allowed in the supreme Courts of the same. And the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law; and the rates of fees the same as are or were last allowed by the states respectively in the court exercising supreme jurisdiction in such causes.⁹¹

As Wilfred Ritz observed, these statutes show that the First Congress “had no difficulty” making it clear when they wanted federal courts to “apply the law of a particular state.”⁹² Moreover, the text of this particular provision was studied and altered in the House and the Senate. Under the circumstances, I can’t imagine why such a relatively obscure way of incorporating state law jury rights in the federal constitution would have gone uncorrected, much less (as far as we know) unnoticed and unchallenged, by any member of Congress.

88. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

89. Process Act of 1789, ch. 21, § 2, 1 Stat. 93.

90. Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88.

91. Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93-94.

92. WILFRED RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 141 (Wythe Holt & L.H. LaRue eds., 1990).

In fact, I believe these Acts prove that the First Congress did not mean the Jury Trial Clause to require that federal jury trial rights conform with State practice. As Hamilton reminded the public in *The Federalist* No. 83, not all of the states limited the right of jury trial to true "law" cases: some used juries in admiralty cases tried in admiralty courts, and others did so by trying what had traditionally been regarded as equity and admiralty cases in common-law courts.⁹³ The First Congress, which included many lawyers and judges, as well as prominent gentlemen familiar with the workings of their state courts, was doubtless well aware of these variations in state practice.⁹⁴ But the idea of deferring to state jury practice was plainly rejected in the Judiciary Act. Thus, section 9 provided for exclusive federal district court jurisdiction over

all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it;⁹⁵

and expressly withheld from those cases a right to trial by jury.⁹⁶ Thus, without regard to the prior practice in the state courts, this type of case evidently would not be tried by juries in the federal courts.⁹⁷ Secondly, the Act withheld the right to jury trial from equity cases, which section 16 differentiated from "suits of a civil nature at common law"⁹⁸ and "actions at

93. See *supra* note 32.

94. For some amusing evidence that Senators were well aware of other states' equity practices, see The Diary of William Maclay, (July 1, 1789), reprinted in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 95-96, 109 (Charlene B. Bickford et al., 1972-) [hereinafter DHFFC].

95. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

96. See *id.*

97. Nothing in the language of the statute would have prohibited a judge from allowing trial by jury as a matter of grace, but I am unaware that this ever happened.

98. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. This provision gave federal circuit courts concurrent jurisdiction over certain "suits of a civil nature at common law or in equity." *Id.* District courts had jurisdiction over some "Suits at common

law"⁹⁹ in this manner: "suits in equity shall not be sustained in [the federal courts] . . . in any case where plain, adequate and complete remedy may be had at law."¹⁰⁰ While the last eight quoted words from section 9 and the definition of equity jurisdiction can be read to mean that a jury trial would be available after the adoption of the Judiciary Act when the forum state's common-law courts would previously have provided one,¹⁰¹ it is inconceivable that the authors of the Act, who were otherwise so meticulous about being explicit when they wanted to require conformity to State practice, would have been so vague about it in these critical provisions.¹⁰² Moreover, this interpretation would defeat the purpose of each of these statutes—section 9's being to oust the state courts of at least "hard core" admiralty cases like prize cases, section 16's to create a common boundary between law and equity in all the federal courts, even those in states whose courts recognized no such distinction. Indeed, the whole reason why the Process Act adopted state "forms and modes of proceeding" in "Suits at common law" but not in equity or admiralty/maritime cases (where the "forms and modes of proceeding" of civil law were to apply), was that many states tried the latter cases in common-law courts and had no equity or maritime courts, forms, or modes, and the federal courts were not going to conform to this practice.

Not only am I unaware of any evidence that anyone in Congress has ever thought the Jury Trial Clause incorporated state law; as far as I know, there is no evidence that any member of

law," but no equity jurisdiction. *See id.* § 9, 1 Stat. at 77.

99. The Supreme Court had jurisdiction over legal and equitable claims, but unlike section 11, section 13 referred to the cases in which there would be a right of jury trial as "actions at law." *See id.* § 13, 1 Stat. at 81. *See infra* notes 290-92 and accompanying text.

100. *See id.* § 16, 1 Stat. at 82.

101. Textually, this would involve reading section 9's "the common law" and section 16's "law" to mean "the forum state's common-law courts."

102. *See* 1 JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 475 (1971) (suggesting clause meant "to restore the jurisdictional balance between admiralty and common law courts as it had existed in the colonies"). The interpretation of section 9 suggested in the previous footnote would have erased federal admiralty jurisdiction entirely in some states, a result that not even jury-enthusiast Thomas Jefferson would have desired. *See supra* note 52.

the federal judiciary has ever so understood the Clause. On the contrary, there is affirmative evidence that early judges believed otherwise. Thus, as far as I know, no prize cases were tried to a jury, and federal judges routinely presided over juryless equity trials in the eight states where the right to jury trial extended to equity cases.¹⁰³ Beyond this, rulings in a number of unreported decisions from the early 1790s demonstrate that some of the first federal judges didn't understand the Seventh Amendment to require that federal courts allow civil jury trials whenever state common-law courts would. Finally, the first reported opinions shedding light on the matter all point away from an incorporation-based view of the Jury Trial Clause.

Hazzard v. Burrell,¹⁰⁴ an action on a bond brought in the United States Circuit Court for the District of Connecticut, was a "Suit at common law" by anybody's lights. In the October Term, 1791, after Hazzard had demurred to Burrell's plea, one of them moved for a jury determination of Hazzard's damages.¹⁰⁵ The Seventh Amendment had not yet been ratified,¹⁰⁶ but the Judiciary Act spoke to this motion, and if we assume, as I have, that it is to be read *in pari materia* with the Jury Trial Clause, that fact should make no difference.

The court denied the motion by a 2-1 vote. None of the judges made any allusions to Connecticut law in the opinions recorded in the court's journal. Chief Justice Jay and District Court Judge Richard Law explained their votes against the

103. The point isn't merely that these trials were juryless: if "Suits at common law" meant suits that would have been tried in the forum state's common-law courts, these would all have been "actions at common law" in the federal courts, and they shouldn't have been tried in federal equity, with or without a jury. For a discussion of the startup problems in implementing federal equity jurisdiction in these states, see GOEBEL, *supra* note 102, at 583-85. (The number of states in this situation is derived from Hamilton's survey of state practice, which may be found in note 32 above.)

104. (C.C.D. Conn. Oct. Term 1791), *in* District of Connecticut-Journal of the Circuit Court (Oct. 25, 1791) (on file with Yale University Library, Manuscripts and Archives, Baldwin Family Papers, MS Group 55, Series IV, Box 70, Folder 849) [hereinafter Journal].

105. The Journal does not disclose the substance of this plea or the identity of the party seeking a jury trial on the quantum of damages.

106. The ratification process was completed in December 1791. See FARBER & SHERRY, *supra* note 56, at 243-44.

motion in terms of section 26 of the Judiciary Act, which provided that, where a defendant's liability on a bond was established by default, confession, or demurrer (i.e., without need for a jury trial),

the court before whom the action is, shall render judgment therein for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury.¹⁰⁷

That is, they both stated that, as the damages were certain, no jury would be necessary. Dissenting Justice Cushing, on the other hand, is reported simply to have asserted, "In all cases if the party desire it a Jury must be had."¹⁰⁸

Almost everything about this scenario is contrary to *The Bill of Rights'* thesis. First, if the original understanding was that federal civil litigants had a right to jury trial at least as broad as they would have enjoyed in state courts, it's not clear why section 26 wouldn't have had a proviso to the effect that the parties could even demand a jury determination of certain damages if they would have that right in the state courts.¹⁰⁹ Second, if the judges shared this original understanding, it's hard to see how the two judges who voted to deny the request for a jury trial could have said nothing about the relevant Connecticut law.¹¹⁰ Third, this silence would be particularly hard to understand because Richard Law, who had co-authored the

107. Judiciary Act of 1789, ch. 20, § 26, 1 Stat. 73, 87.

108. *Hazard v. Burrell* (C.C.D. Conn. Oct. Term 1791) in *Journal*, *supra* note 104, at Oct. 29, 1791.

109. If state law determines the right to jury trial on the question of liability, it presumably ought also to determine whether that right extends to the determination of damages. *Cf. Tull v. United States*, 481 U.S. 412 (1987) (applying constitutional principles used to determine the right to a jury trial on the merits to decide if the right applies to the determination of the amount of penalty). It is unclear, however, whether any state then recognized a right even to a jury determination of uncertain damages under these circumstances. The issue is broached in *Brown v. Van Braam*, 3 U.S. 344 (1797), and Scheiner, *supra* note 16, at 156 n.69.

110. In several instances, the journal does report that a dispute concerned the applicability or application of Connecticut law. *See Hazzard v. Burrell* (C.C.D. Conn. Sept. Term 1792), in *Journal*, *supra* note 104; *Motion to Reduce Clerk's Sealing Fee* (C.C.D. Conn. Oct. Term 1791), in *Journal*, *supra* note 104, at Oct. 31, 1791; *Bates v. Ward* (C.C.D. Conn. Oct. Term 1791), in *Journal*, *supra* note 104, at Oct. 27, 1791.

revision of Connecticut's statutes that was adopted in 1784, sat on the state's Superior Court since 1784 and served as its Chief Judge from 1786 until he joined the federal bench in 1789,¹¹¹ surely knew that Connecticut law provided no right to jury trial in this case.¹¹² Fourth, given that Cushing seems not to have (indeed, could not have) disputed his fellow judges' claim that the sum due was not "uncertain", and that, as an "out-of-stater," he presumably would have deferred to Law's expertise on state law, Connecticut law couldn't have been the basis for the right he believed all litigants (at least in common-law cases) had to juries on demand.¹¹³ Thus, this decision gives no evidence that any of these three original federal judges believed that the Jury Trial Clause incorporated state law, and it suggests that they may have had a contrary understanding.

The journal's report of a second case bolsters this argument. *Bache v. Skinner*¹¹⁴ was a common-law case tried before a jury on the first day of the October Term, 1791. The defendants won a favorable verdict, and Bache requested a stay of execution until he could file a petition for a new trial, a request the defendants naturally opposed. The Judiciary Act, which the parties invoked, made the issuance of such stays discretionary,¹¹⁵ and counsel debated whether Bache had any plausible ground to seek a new trial. The resolution of that question, in turn, would have been governed by section 17 of the Judiciary Act, which provided that federal courts could only grant new trials

111. With respect to Law's work on the revised statutes, see John D. Cushing, *Editorial Note*, in *THE FIRST STATE LAWS OF THE STATE OF CONNECTICUT* at v, vi (John D. Cushing ed., 1982). Regarding his service on the state court, see 2 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1798-1800*, at 49 (Maeva Marcus et al., 1985-) [hereinafter *DHSC*].

112. See 2 *ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 267 (Arno Press 1972) (1795).

113. Although Justice Cushing appears to have agreed there was no factual dispute in this case, his stated view resonates with the pro-jury spirit and language of the Bay State's proposed amendment, which would have recognized a right to a jury trial of "every issue of fact . . . if the parties or either of them request it" in civil diversity cases such as this. For another possible example of Cushing's generous attitude towards civil jury trials, see *infra* notes 229, 235 and accompanying text.

114. (C.C.D. Conn. Oct. Term 1791), in *Journal*, *supra* note 104, at Oct. 25, 1791 and Nov. 3, 1791.

115. See Judiciary Act of 1789, ch. 20, § 18, 1 Stat. 73, 83 (1789).

“for reasons for which new trials have usually been granted in the courts of law.”¹¹⁶

If, as *The Bill of Rights*' thesis would require, the reference to “common law” in the Jury Trial Clause and “the common law” in section 9 of the Judiciary Act meant “the forum state's common-law courts,”¹¹⁷ the last three words of the Seventh Amendment's Reexamination Clause, which provides that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law,”¹¹⁸ would presumably have meant the same thing.¹¹⁹ So would section 17's reference to “the courts of law.” Thus, the proper resolution of the motion in *Bache* would have turned on the rules governing the award of new trials in the Connecticut courts.

Yet in *Bache*, even more obviously than in *Hazzard*, Jay and Cushing gave no deference to the opinion of Judge Law, who was now the dissenter. The Court granted Bache's motion on the ground that the reasons proffered by his counsel might justify a new trial. While the journal doesn't report whether the judges delivered any opinions in connection with this ruling, it is (to put it mildly) rather unlikely that the judges disagreed about the proper interpretation or application of Connecticut law. Thus, it is unlikely that they believed that the Jury Trial Clause was about conformity with state law.¹²⁰

The third unreported eighteenth-century case I have found is *Higginson v. Greenwood*,¹²¹ an important piece of litigation in-

116. *Id.* ch. 20, § 17, 1 Stat. at 83.

117. As to section 9, see *supra* note 101 and accompanying text.

118. U.S. CONST. amend. VII.

119. This would make sense as a matter of theory. If the Jury Trial Clause was intended to preserve state-created jury trial rights by requiring federal courts to provide a jury trial whenever the forum state's courts would, it would be natural for the Reexamination Clause to preserve those rights by prohibiting federal courts from exceeding the forum state's limitations on the reexamination of juries' factual determinations. I will discuss the meaning of “the rules of the common law” below, in the text accompanying notes 158-85.

120. In fact, if these provisions both mandated conformity with state jury trial rights, every federal appeal decided without a jury in New England and Georgia would have been decided unconstitutionally. See *supra* note 32. The only evidence of federal appellate jury trials of which I am aware is discussed below, in the text accompanying notes 232-35 and in note 239.

121. (C.C.D.S.C. 1792). This case was widely and extensively reported in the press.

volution the controversial question of the liability of American debtors to creditors residing in England for interest on debts that were not paid during the Revolutionary War. In this case, the debt was owed by an American partnership to an Anglo-American partnership whose surviving American partner was also one of the debtor/defendants. The English partner filed the case as an equity bill in the Federal Circuit Court in South Carolina seeking money due under an agreement and a discovery of assets. According to a widely reprinted newspaper story, the discovery having been completed, the following events occurred in October, 1792, before a bench consisting of Justice William Paterson and Federal District Judge Thomas Bee:

[T]he counsel for the defendants applied to the court . . . to have this cause referred to a jury, to find the quantum of debt due; suggesting that as the object of the bill in equity was answered (viz. a discovery assets) therefore *plain, adequate* and *complete* remedy could now be had at law. Judge Paterson was for retaining the cause to be determined in equity: Judge Bee for sending it to a jury to assess the balance then due. The court being divided, the motion [failed].¹²²

What was the ground for the judges' disagreement? Given that Paterson had been a member of the First Senate, helped draft the Judiciary Act of 1789, and served on the Conference Committee on the Bill of Rights,¹²³ it's hard to believe that Bee challenged his interpretation of the Jury Trial Clause or section 16 of the Judiciary Act, the provision cited by counsel. If the dynamic conformity thesis is correct, Bee presumably believed that the defendants would have had a right to a jury

The account that I present here is taken from the following sources: *Federal Circuit Court*, CITY GAZETTE & DAILY ADVERTISER (Charleston), Nov. 13, 1793, at 2; S.C. GAZETTE (Columbia), May 21, 1793, at 4; CITY GAZETTE & DAILY ADVERTISER (Charleston), May 23, 1792, at 3. On the significance of the British merchants' use of the new circuit courts to bring suits on pre-War debts, see Wythe Holt, "The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects": The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793, 36 BUFF. L. REV. 301, 322-24 (1987).

122. *Federal Circuit Court*, CITY GAZETTE & DAILY ADVERTISER (Charleston), Nov. 13, 1793, at 2.

123. See 4 DHSC, *supra* note 111, at 36 n.98; Further Senate Consideration (Sept. 21, 1789), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 501, 502.

determination of the amount due in South Carolina's common-law courts. But is it really likely that the Justice from New Jersey was rejecting this former state court judge's insight into South Carolina practice?¹²⁴

The first official case reports that shed any light on the original understanding of the Jury Trial Clause are even more strongly antithetical to *The Bill of Rights'* theory. In 1810, we learn that Harry Innis, who had been the federal district court judge in Kentucky since 1789, had recently announced that he would no longer emulate the state courts by routinely employing advisory juries to find facts in equity cases involving land.¹²⁵ The leading student of Innis' judicial activities does not attribute his previous conformity with Kentucky practice to a belief that it was mandatory,¹²⁶ but Innis' renunciation of the practice proves that he didn't believe it was constitutionally required. Moreover, Joseph Story's 1812 opinion referring approvingly to Innis' action¹²⁷ shows that he didn't think so either.

An opinion handed down six years later is evidence that the rest of the Supreme Court agreed. One issue before the Court in *Robinson v. Campbell*¹²⁸ was whether a federal circuit court had erred in refusing to allow a party to raise an equitable defense in an action at law when that would have been permitted in the forum state's courts. As the Court saw it, this raised a question of statutory interpretation involving section 34 of the Judiciary Act of 1789 (the Rules of Decision Act) and the Process Act of 1792. The first of these provisions, familiar to generations of first year law students, provided "[t]hat the laws of the several states except where the constitution, treaties or

124. On Bee's service on the state court, see Circuit Court Journal, District of Georgia (Oct. 15, 1790), reprinted in 2 DHSC, *supra* note 111, at 102-03.

125. Innis' tenure on this federal district court is the subject of Mary K. Bonsteel Tachau's pathbreaking book, *Kentucky Courts in the Early Republic: Kentucky 1789-1816* (1978). His use of these juries is discussed in *id.* at 179-82. Kentucky's recognition of a right to a jury determination of the facts in these cases is noted in *id.* at 180 n.31. The official reports signaling Innis' decision not to follow state law on this subject are *Massie v. West*, 10 U.S. (6 Cranch) 148, 148 (1810), and *United States v. Wonson*, 28 F. Cas. 745, 749-50 (C.C.D. Mass. 1812) (No. 16,750).

126. See TACHAU, *supra* note 125, at 180-82.

127. See *Wonson*, 28 F. Cas. at 749-50.

128. 16 U.S. (3 Wheat.) 212 (1818).

statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply."¹²⁹ The latter, which is less familiar to modern lawyers, stated

[t]hat the forms of writs, executions and other process, except their style and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of the [Process Act of 1789], in those of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the [Judiciary Act of 1789], . . . subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same¹³⁰

As Justice Todd described it for the Court, the question presented in *Robinson* was

whether it was the intention of Congress, by [these laws], to confine the courts of the United States in their mode of administering relief to the same remedies, and those only, with all their incidents, which existed in the courts of the respective states. In other words, whether it was their intention to give the party relief *at law*, where the practice of the state courts would give it, and relief *in equity* only, when according to such practice, a plain, adequate, and complete remedy could not be had at law.¹³¹

The Court unanimously ruled that Congress had not meant so to restrict federal equity. If this holding wasn't incompatible with a conformity-based understanding of the Jury Trial

129. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

130. Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.

131. *Robinson*, 16 U.S. (3 Wheat.) at 222.

Clause, Justice Todd's rationale was. His analysis bears repeating in full:

In some states in the union, no court of chancery exists to administer equitable relief. In some of those states, courts of law recognise and enforce in suits at law, all the equitable claims and rights which a court of equity would recognise and enforce; in others, all relief is denied and such equitable claims and rights are to be considered as mere nullities at law. A construction, therefore, that would adopt the state practice in all its extent, would at once extinguish, in such states, the exercise of equitable jurisdiction. The acts of Congress have distinguished between remedies at common law and in equity, yet this construction would confound them. The court, therefore think, that to effectuate the purposes of the legislature, the remedies in the courts of the United States, are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles.¹³²

Robinson was not a fluke. The following year, the Court unanimously reaffirmed Todd's position. One issue in *United States v. Howland & Allen*¹³³ was whether a Massachusetts statute creating a novel legal remedy deprived a federal court sitting in that state of the equity jurisdiction that it otherwise would have had. John Marshall's response for the Court was a more abbreviated restatement of Todd's view, but it was no less inconsistent with that of *The Bill of Rights*. "[A]s the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision," the Chief Justice wrote, "its jurisdiction in Massachusetts must be the same as in other states."¹³⁴

The Court has never wavered in its commitment to this principle. More broadly, as far as I can tell, no federal official has ever—even implicitly—endorsed a dynamic conformity understanding of the Jury Trial Clause. Also, as far as I am aware,

132. *Id.* at 222-23.

133. 17 U.S. (4 Wheat.) 108 (1819).

134. *Id.* at 115.

no previous commentator has ever expressed such a view.¹³⁵ In fact, the only eighteenth century exegeses of the Jury Trial Clause that I have found likewise indicate that this wasn't the original understanding of the Seventh Amendment.

The backdrop of these commentaries was the question of the status of the common law as federal law.¹³⁶ In a 1799 grand jury charge, Oliver Ellsworth, now Chief Justice of the United States Supreme Court, said that the grand jury had the authority to enforce not only federal statutes and international law, but the common law's proscription of "acts manifestly subversive of the national government, or of some of its powers specified in the constitution."¹³⁷ The common law, Ellsworth continued,

brought from the country of our ancestors, with here and there an accommodating exception, in nature of local customs, was the law of every part of the union at the formation of the national compact; and did, of course, *attach* upon or apply to it, for the purposes of exposition and enforcement.¹³⁸

A Jeffersonian from Virginia who called himself *Citizen* wrote an essay attacking this doctrine,¹³⁹ which he feared would make the federal government all-powerful and the state governments "useless burthens."¹⁴⁰ One reason he gave for denying that the Constitution had adopted the common law as federal law was that the only place in that document in which the

135. As *The Bill of Rights* notes, see AMAR, *supra* note 1, at 91, Charles Wolfram deemed this "the theory [of the Jury Trial Clause] that is best supported by the historical materials," but rejected it nonetheless. See Wolfram, *supra* note 8, at 732-34; see also Klein, *supra* note 6, at 1020 & n.72, 1034-36 (mentioning theory as one possible interpretation of Clause but rejecting it).

136. Some of the leading studies of this question are cited in 3 DHSC, *supra* note 111, at 322 n.28.

137. Oliver Ellsworth's Charge to the Grand Jury of the Circuit Court for the District of South Carolina (May 7, 1799), reprinted in 3 DHSC, *supra* note 111, at 357.

138. *Id.* at 358.

139. See Letter from "Citizen" to Oliver Ellsworth, Chief Justice of the United States (Aug. 9, 1789), reprinted in 3 DHSC, *supra* note 111, at 375. I infer that *Citizen* was a Virginian from his use of the word "we" to describe them. See *id.* at 378.

140. *Citizen* discusses the implications for the federal system of the incorporation of the common law into the national law in *id.* at 379-80. The quoted language appears in *id.* at 379.

words "common law" appeared was the Seventh Amendment, which only used them "to narrow the jurisdiction of the federal court."¹⁴¹ He explained,

By the constitution, as originally formed, the supreme court had appellate jurisdiction, both as to law and fact; under this judicial power, it was feared that the use of juries would be destroyed, to prevent which, it is provided in the [seventh] amendment, that "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 reexamined, in any court of the United States, than according to the rules of the common law;" the words common law are here used to distinguish the case meant to be provided for [i.e., cases at common law] from chancery cases. It would be singular indeed, if this clause of the constitution, which was evidently intended to abridge the power of the federal court should by a forced and false construction be made to extend it.¹⁴²

Later that year, the issue resurfaced in the prosecution of Isaac Williams for violating Jay's Treaty with Britain by accepting a commission from the French Government to commit hostile acts against British shipping.¹⁴³ Williams' defense was that he had renounced his American citizenship and become a Frenchman. Chief Justice Ellsworth declared that this evidence was inadmissible, because under the common law of England, which still obtained in this Nation, Williams lacked the authority unilaterally to renounce his citizenship. Judge Law, who sat with Ellsworth, seems to have been unsure of the law and felt the matter should be resolved by the jury, so the government's motion to exclude the evidence was overruled. Nonetheless, Williams was convicted.

A pseudonymous author (Francis Wharton suggested that he was Philip Nicholas, a fervid Jeffersonian from Virginia¹⁴⁴)

141. *Id.* at 377.

142. *Id.* at 377-78. For later court opinions limiting the protection of the Reexamination Clause to "Suits at common law," see *infra*, text accompanying notes 236-37, 262-63.

143. For a report of this case, see FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 652 (1849) and *United States v. Williams*, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708).

144. See WHARTON, *supra* note 143, at 658, 694-95, 726. An able lawyer (he be-

wrote a series of widely circulated essays criticizing Ellsworth's view, particularly the notion that there was a national common law.¹⁴⁵ In the course of attacking the proposition that the British common law applied federally, *Aristogiton* explored the meaning of the Seventh Amendment. His comments on the Jury Trial Clause read as follows:

There is only one part of the constitution in which the common law is mentioned; this is the [Seventh Amendment]. This article however I contend does not establish that law. What does that article say? . . .

This is evidently intended to preserve the trial by jury. The words common law are made use of to distinguish them from causes in equity. The first part of the article then, when rightly construed runs thus: "Congress shall not prescribe any other mode of trial, than the trial by jury, for such legal pecuniary causes as are of twenty dollars value, and which are cognizable in the courts of the United States; but in such legal pecuniary causes as are of less than twenty dollars value, and in such equity causes as are cognizable in the federal courts, congress *may* prescribe some other mode of trial than the trial by jury."¹⁴⁶

If the Jury Trial Clause was understood to delegate to the states the authority to determine the minimum scope of the jury trial rights of civil litigants in the federal courts within their borders, it is incomprehensible that any Jeffersonian polemicist would have failed emphatically to make this point. This is particularly true inasmuch as the nub of each of these two essays was that if the entire common law of England was federal (and therefore supreme) law, there could be virtually no state law at all, and the states' power would be extinguished by

came the Attorney General of Virginia at 21), Nicholas helped defend James Callender in one the most famous trials ever held in this country, *United States v. Callender*. See *United States v. Callender*, 10 AM. ST. TRIALS 813, 821 & n.5. (C.C.D. Va. 1800).

145. See *Remarks on Judge Ellsworth's decision, in the case of Isaac Williams*, 1 National Magazine, or, A Political, Historical, Biographical, and Literary Repository, No. 3, at 256 (1799) [hereinafter *Remarks*]; *Remarks on Judge Ellsworth's late judicial decision, that an American citizen cannot expatriate himself*, 1 National Magazine, or, A Political, Historical, Biographical, and Literary Repository No. 4, at 385 (1799). For evidence of the wider publication of these essays, see 3 DHSC, *supra* note 111, at 322 n.34, and WHARTON, *supra* note 143, at 658.

146. *Remarks*, *supra* note 145, at 260.

the federal leviathan. Thus, the failure of the *Citizen* and *Aristogiton* to say more than that the Jury Trial Clause distinguished “legal” and “equitable” cases shows that they could not have understood the Clause in the manner that *The Bill of Rights* suggests.¹⁴⁷

III. THE SUPREME COURT’S “ORIGINAL UNDERSTANDING” OF THE JURY TRIAL CLAUSE

The evidence reviewed in the previous section does more than demonstrate that *The Bill of Rights*’ interpretation of the Creators’ Jury Trial Clause can’t be right. It also calls into question the Supreme Court’s longstanding view of the original meaning of that Clause, and thus the prevailing law on the subject. A more complete examination of the historical record only strengthens my conviction that the Court’s current understanding of the Creators’ intent is in this case wrong.

A. *The Historical Record From the Federalist Era (And Slightly Beyond)*

Very little support was voiced during the ratification debates for a constitutional amendment incorporating the English right

147. Before concluding my discussion of *The Bill of Rights*’ thesis, I shall deliver my promised response to its theoretical argument for its dynamic conformity interpretation of the Jury Trial Clause. See *supra* note 24. Although state law cases may have been the largest group of jury-submissible cases litigated in federal courts in the early years of the New Republic, the Jury Trial Clause was written for the ages, and there is no indication that its potential implication in civil “arising under” cases was less important to the Creators. See RITZ, *supra* note 92, at 60, 223 n.27. That’s part of the difference between our Clause and the guarantee proposed by the Massachusetts ratifying convention. See *supra* text accompanying notes 51-53, 82-83. Be that as it may, the theoretical appeal of an interpretation of the Constitution doesn’t make it the original understanding.

One more point. If we are simply to focus upon the jurisdiction exercised by the early federal courts, one of what the book calls the two “paradigmatic Seventh Amendment cases,” AMAR, *supra* note 1, at 91, can’t have been. That group is trespass suits brought against federal officers who violated the Fourth Amendment. Since there was no reason to believe these men would victimize citizens of other states, and since trial courts weren’t given federal question jurisdiction by the Judiciary Act, these cases presumably wouldn’t have been within the contemplation of the Creators, and they typically couldn’t have been brought in federal court at the time of the Creation.

to civil jury trial. One essayist proposed this solution to the diverse-state-practice problem cited by the Federalists as the principal obstacle to the adoption of a constitutional guarantee of a civil jury trial right.¹⁴⁸ In addition, as Madison knew,¹⁴⁹ the New York convention formally proffered just such a guarantee when it ratified the Constitution, one providing “[t]hat the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate.”¹⁵⁰

Madison didn’t propose this amendment to the House. Had its only shortcoming been that it wasn’t limited to private litigation, he could have amended it to read, “In suits between man and man, the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate.” But he didn’t do that, either. Instead, he performed more extensive surgery on the Virginia proposal, and grafted onto it the words “at common law” to describe the private disputes to which the right to jury trial would extend.¹⁵¹

If Madison meant “Suits at common law” to signify those in which a right to jury trial existed under the British common law, his draftsmanship can only be described as perverse. Hamilton’s essay had recently claimed that the words “Actions at common law” in the Massachusetts proposal denoted “the civil jury rights recognized in the courts of the forum state,” and *The Foreign Spectator* had apparently agreed.¹⁵² It is even possible that this proposal is what led the New York ratifying convention explicitly to spell out its intent to privilege the right to jury trial recognized under “the Common Law of England.”¹⁵³ Whatever the explanation for its wording, that proposal hadn’t generated a perceptible surge of public support for incorporating the British right to civil jury trial in the Constitu-

148. See *A Democratic Federalist*, PA. HERALD, Oct. 17, 1787, reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 554, 554.

149. See *supra* text accompanying note 82.

150. New York Proposal, New York Ratification Convention (July 26, 1788), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 507, 507.

151. See *supra* notes 80-81 and accompanying text.

152. As to my hesitation regarding *The Spectator*, see note 68, above.

153. See *supra* note 63.

tion. Under these circumstances, why would Madison have used the words "Suits at common law" to accomplish this? Why not borrow more heavily from the New York guarantee?¹⁵⁴

I can only think of one reason for Madison not to have tracked the language of New York's proposal if he meant to incorporate its substance in the Constitution. Perhaps he felt it would be politically incorrect to suggest putting the name of the country against which we had recently fought a long and bloody war of independence into the Bill of Rights.¹⁵⁵ Three years later, anti-British feelings were still so high that Oliver Ellsworth's reference to "England" in a revision of the Process Act was unacceptable to the Senate.¹⁵⁶ But if that was the problem,¹⁵⁷ why didn't Madison simply strip New York's amendment of the words "of England?"

Interestingly enough, the phrase "the common law" does appear in the Reexamination Clause, which was written in response to the Antifederalists' concerns about the Supreme Court's appellate jurisdiction over "Fact."¹⁵⁸ In Madison's initial draft of the Bill, the Reexamination Clause was paired with an amount-in-controversy limitation on appeals to the Supreme Court.¹⁵⁹ These two provisions were to be inserted at the end

154. See note 81, above, on Madison's direct and indirect borrowing from New York's proposal. (Maryland's 1776 Declaration of Rights contained another possible model for a civil jury guarantee of this nature. See Maryland: Declaration of Rights (1776), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 508, 508.)

155. See John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 566-68 (1993), on post-War anti-British sentiment in the former colonies and some of its implications for the law.

156. See GOEBEL, *supra* note 102, at 546.

157. I have some doubts on this score. While people with strong anti-British sentiments might have taken offense at a reference to England in the Bill of Rights, given that the use of this phrase in the Jury Trial Clause would have been the Anti-Federalists' idea, what political price would it have entailed? Anyway, if everyone knew that the omitted words were implied by the remaining text, how many of these patriots would have been satisfied by the charade? Cf. Diary of William Maclay (July 10-11, 1789), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 595, 595 (recounting confrontation in which Maclay asked why Sen. William S. Johnson didn't propose a Judiciary Act clause allowing trial of civil cases under civil law procedures, Johnson replied he didn't like the name "Civil law," and Maclay sarcastically responded, "you need not care about the name, since you have got the thing"). But see GOEBEL, *supra* note 102, at 546, 581 (suggesting that this happened in the case of the Process Act of 1792).

158. See *supra* text accompanying notes 16-19.

159. See Proposal by Madison in House (June 8, 1789), reprinted in Cogan, COM-

of Article III, Section 2, Clause 2, which governs the Court's appellate jurisdiction.¹⁶⁰ The Jury Trial Clause, on the other hand, was supposed to become part of Clause 3.¹⁶¹

No State proposed a Reexamination Clause during the ratification debate and none had one in its constitution, but Alexander Hamilton sketched the outlines of a statutory solution to this problem in *The Federalist Papers*. Hamilton's *Publius* suggested that Congress might

provide that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in the original causes by juries. . . . [B]ut if, [because some states let juries decide prize cases] it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.¹⁶²

Possibly drawing on this passage,¹⁶³ Madison wrote a proposal that read "nor shall any fact triable by jury, according to the course of common law, be otherwise re-examinable than may consist with the principles of common law."¹⁶⁴ The House Committee of Eleven, on which Madison served, revised this text. The Committee's language, adopted by the House, was, "nor shall any fact, triable by a jury according to the course of *the* common law, be otherwise re-examinable than according to the rules of common law."¹⁶⁵ The insertion of this "the" before the first, but not the second, "common law," may indicate that the Committee, if not the House, perceived a difference between

COMPLETE BILL OF RIGHTS, *supra* note 16, at 493, 493.

160. *See id.*

161. *See id.*

162. THE FEDERALIST NO. 83, *supra* note 30, at 490-91.

163. In light of Madison's intention that this clause and the appellate amount-in-controversy clause with which it was joined be placed at the end of Article III, Section 2, Clause 2 (i.e., that it be tied with the provision governing the Supreme Court's appellate jurisdiction) and its textual similarities with Hamilton's proposal, a borrowing hypothesis is plausible. But these resonances may simply be coincidental.

164. Proposal by Madison in House (June 8, 1789), *reprinted in* Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 493, 493.

165. Committee Report (July 28, 1789), *reprinted in* Veit, CREATING THE BILL OF RIGHTS, *supra* note 15, at 29 (emphasis added); Further House Consideration (Aug. 21, 1789), *reprinted in* Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 497, 497 (emphasis added).

“common law” and “the common law.” But it may simply reflect a sense that “the course of common law” sounded awkward, while “the rules of common law” didn’t. Naturally (and unfortunately for legal scholars), if anyone said anything about why this “the” mattered, his insight was not preserved for posterity.

On September 4, the Senate amended this article.¹⁶⁶ This amendment accomplished three things. First, it deleted the appellate amount-in-controversy provision, making the Reexamination Clause a freestanding sentence. Second, it specified that the Clause only limited the authority of *federal* courts to reexamine facts. Third, it deleted the article “the” preceding the first “common law” in the House proposal. Thus, this amendment suggests that the Senate, too, may have viewed this article as having some significance.¹⁶⁷ Once again, however, we have no record of what that perceived import might have been.

Five days later, the Senate took up both remaining civil jury proposals. This time, it tinkered with the amount-in-controversy language of the Jury Trial Clause and combined that Clause with the Reexamination Clause to form a new amendment, which became our Seventh. At the same time, it modified the Reexamination Clause. This revision changed “[n]o fact, triable by a jury according to the course of common law” into “no fact tried by a jury” and “the rules of common law” into “the rules of *the* common law.”¹⁶⁸ Yet again, this was done without a surviving word of explanation.

The two parts of the Seventh Amendment are the only two places in the Constitution where the term “common law” appears. The legislative history reviewed above shows that the House and the Senate each changed the text of the Reexamination Clause at least once to switch a “common law” into “the

166. See Further Senate Consideration (Sept. 4, 1789), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 499, 499. As amended, the clause now read, “No fact, triable by a jury according to the course of common law, shall be otherwise reexaminable in any Court of the United States, than according to the rules of common law.” *Id.*

167. It is possible, of course, that the article was deleted for aesthetic reasons, or so that no one would draw any false inferences from the fact that the Clause’s two references to “common law” didn’t look alike.

168. For all of these changes, see Further Senate Consideration (Sept. 9-12, 1789), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 500, 500-01.

common law” or vice versa. The critical question, for present purposes, is whether these changes had any substantive significance.

I am persuaded that the September 9 addition of “the” did. No one had previously thought “the rules of common law” needed another article, so the phrase was presumably not considered lacking in style or grace. Why, then, was it suddenly considered defective?

The reason, I believe, is that the Reexamination Clause was now conjoined with the Jury Trial Clause. Madison’s original proposal provided that the reexamination rules “of common law” would apply to facts “triable by jury, according to the course of common law.”¹⁶⁹ Hamilton’s *Publius* had used “according to the course of canon or civil law,”¹⁷⁰ and Joseph Story would later use “according to the course of common law,” to mean “according to the rules governing proceedings in [the relevant courts].”¹⁷¹ Thus, Madison’s proposal (as modified by the Committee of Eleven), bound the federal courts to observe the reexamination “rules of common law” with respect to facts that were “triable by jury” under the rules governing “common-law courts.” In other words, it limited the power of federal courts to review juries’ factual determinations only in “common-law cases.”

The fact that neither Madison nor anyone else appears to have considered referring in the Reexamination Clause to “facts triable by jury in Suits at common law” suggests that the Jury Trial Clause and Reexamination Clause applied to different groups of cases. The Senate’s actions of September 9 reinforce this inference. It was only when “according to the course of common law” was dropped and “Actions at common law” was placed in the same amendment as “the rules of common law” that the latter term required change.

This suggests that “the rules of the common law” meant something different from “the rules of common law.” If that’s true, the most sensible assumption to make would be that *the*

169. See text accompanying note 164.

170. See *supra* note 32.

171. See *supra* note 32, *infra* text accompanying note 248.

common law” was the common law of *England*.¹⁷² What other (singular) set of common-law reexamination rules was there?

The reexamination rules in the states’ common-law courts would not have fit this bill. In five states, according to Hamilton’s tally,¹⁷³ the strict English common-law rules¹⁷⁴ had been replaced by statutory or constitutional provisions authorizing trial *de novo* as of right on appeal from an adverse decision in a civil case.¹⁷⁵ Thus, if “the rules of the common law” had been meant to incorporate state reexamination rules, as often as not, they wouldn’t have been “common law” rules. Even if the term had merely been meant to require federal conformity with the rules in the state’s common-law courts, to which state’s rules would this amendment have referred, the state in which a federal trial court sat and a jury rendered a verdict, or the state in which the appellate court was being asked to reexamine that verdict? And what if the appellate court sat in the federal district, which was not a state?

By September 9, the Senate had long since passed the Judiciary Act, and (as I have already emphasized) that law bears testimony to the fact that the Senate knew how to write a clear conformity provision. In fact, two of the Act’s principal authors, Oliver Ellsworth and William Paterson,¹⁷⁶ were almost certainly there when the September 9 revisions were made,¹⁷⁷ and the surviving draft of the amendments the Senate adopted that day is in Ellsworth’s hand.¹⁷⁸ It’s hard to believe that

172. Julius Goebel draws the same inference. See GOEBEL, *supra* note 102, at 437, 449. (On the latter occasion, however, he seems to have forgotten that we don’t know what was said in the Senate on September 4.)

173. See *supra* note 32. The variety of new trial rules then followed in the states is noted in GOEBEL, *supra* note 102, at 481-82.

174. See *infra* text accompanying note 236. These rules were recently canvassed in *Gasparini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996).

175. In *United States v. Wonson*, 28 F. Cas. 745, 748 (C.C.D. Mass. 1812) (No. 16,750), Justice Story argued that this modification had been effected by statute in the New England states. In Georgia, it seems to have been accomplished by a constitutional provision. GA. CONST. art. XL (1777).

176. Ellsworth’s contribution to the Judiciary Act, is detailed in 4 DHSC, *supra* note 111, at 36 n.98. He also helped write the Process Act of 1789. See 4 DHSC, *supra* note 111, at 108-10. With respect to Paterson’s work on the Judiciary Act, see the text accompanying note 123, above. His contribution to the Process Act is noted in 4 DHSC, *supra* note 111, at 108.

177. See *Journal of the First Session of the Senate of the United States*, reprinted in 1 DHFFC, *supra* note 94, at 166-68.

178. See *Senate Amendments* (Sept. 9, 1789), reprinted in 4 DHFFC, *supra* note

they had nothing to do with this change, and it's harder still to believe that they would have acquiesced in (much less proposed) the constitutionalization of a conformity rule couched in such obscure language.¹⁷⁹

Still more importantly, a conformity-based reading of the Reexamination Clause would be inconsistent with several provisions of the Judiciary Act of 1789. Section 17 of that Act gave federal courts "power to grant new trials, in cases where there has been a trial by Jury, for reasons for which new trials have usually been granted in the courts of law,"¹⁸⁰ not "in the Courts of law of each state respectively."¹⁸¹ And sections 22 and 25 categorically barred federal appellate courts from "re-examin[ing]" civil judgments or decrees (including those rendered by state courts) "on a writ of error . . . for any error in fact,"¹⁸² without regard to the rules of any state's courts. While the latter omission might be excused on the ground that the Seventh Amendment doesn't prevent a federal court from being more protective of jury verdicts than the relevant state's courts by completely banning fact-reexamination, its plain language would prohibit a federal court from reexamining jury-found facts on any basis—even a more protective one—different from the relevant state's. Thus, if, at the time the Act became law, the prior practice "in Courts of law" had been only to allow the limited appellate reexamination of facts authorized under British law, but the relevant state courts authorized retrials on appeal as of right at the time a party sought reexamination, the Act would have authorized reexamination not conforming to state law, and would to that extent have been unconstitutional.¹⁸³

94, at 43-45.

179. Of course, if the Congress believed it was necessary to write "the common law" to signify conformity with state court rules in this Clause, we would have yet another reason to doubt that the Jury Trial Clause's bare reference to "common law" was meant to mandate such conformity.

180. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

181. See the text accompanying notes 89-92 for the derivation and significance of the italicized language.

182. Judiciary Act of 1789, ch. 20, §§ 22, 25, 1 Stat. 73, 84-87.

183. Note that, unlike the conformity-based interpretation of the Reexamination Clause, the language of section 17 appears to prescribe a static, rather than a dynamic, limitation on reexamination.

It therefore seems clear that the First Congress understood “the rules of the common law” to refer to English law¹⁸⁴ and “Suits at common law” to mean something else.¹⁸⁵ If further evidence was needed that the Congress did not intend “Suits at common law” to signify actions triable in England’s common-law courts, it exists. The Judiciary Act used these very words (among others) to describe “legal,” as opposed to “equitable” or “admiralty/maritime” cases,¹⁸⁶ and that Act did not use this phrase to denote actions that would have been brought in the English common law courts, as opposed to British equity or admiralty courts.

The extent of federal equity jurisdiction was defined in section 16. As previously noted,¹⁸⁷ that provision limited federal

184. “The common law” appears only once in the Judiciary Act, and I believe it was used there in a similar way. *See supra* note 102 and accompanying text. The term does not appear in the Process Act of 1789.

185. This should scarcely be surprising, given that Americans agreed about what “the common law” was and disagreed about the appropriate scope of the common-law courts’ jurisdiction.

186. “Suits at common law” is used in sections 9 and 11 of the Act, “actions at common law” in section 30. *See* Judiciary Act of 1789, ch. 20, §§ 9, 11, 30, 1 Stat. at 76-79. Sections 13 and 15 speak of “actions at law.” *See id.* §§ 13, 15, 1 Stat. at 80-82. (In the latter instance, the statute contrasts these actions with those “in chancery.”) Section 22 distinguishes “civil Actions” from “suits in equity.” *See id.* § 22, 1 Stat. at 84-85. For a discussion of the difference between “Suits at common law” and “actions at law,” *see infra* notes 272-74 and accompanying text.

Rachael Schwartz argues that the civil jury trial provisions of the Judiciary Act must have a different meaning than the Jury Trial Clause because they would otherwise have been superfluous. *See* Schwartz, *supra* note 8, at 620-21. Even if we were to assume that the First Congress shared her feelings about redundancy, they would have been inapplicable here: the Congress couldn’t be sure that the states would ratify the Seventh Amendment. Moreover, although the states ultimately did ratify that amendment, there was an interval during which the Act assured litigants a right to jury trial and the Clause could not. For a decision rendered during this hiatus, *see supra* notes 104-13 and the accompanying text.

Finally, I should note that the Judiciary Act was likely written with the language of James Madison’s proposed civil jury amendment in mind. Madison introduced his proposals in the House on June 8. On June 12, the Senate subcommittee charged with drafting a judiciary bill presented its work to the full committee, which then introduced it in the Senate. *See* Judiciary Act of 1789, *reprinted in* 4 DHSC, *supra* note 111, at 23 (citations omitted). The phrase “suits at common law” was not present in the versions of sections 9 and 11 reported by subcommittee member Caleb Strong to Robert Treat Paine on May 24, but did appear in the June 12 draft. *See* Letter from Caleb Strong to Robert Treat Paine (May 24, 1789), *reprinted in* 4 DHSC, *supra* note 111, at 397; Judiciary Bill (June 12, 1789), *reprinted in* 5 DHFFC, *supra* note 94, at 1178.

187. *See supra* notes 98-100 and accompanying text.

equity suits to situations in which no "plain, adequate and complete remedy may be had by law."¹⁸⁸ In light of my earlier observations about the Act's drafting, the most striking thing about this provision is what it doesn't say, and it doesn't say anything looking like a clear reference to English practice. Unlike Ellsworth's proposed amendment to the Process Act of 1792,¹⁸⁹ it doesn't explicitly mention the English courts. Perhaps Ellsworth, too, thought that politically unacceptable in 1789.¹⁹⁰ But section 15 of the Judiciary Act did speak of "the ordinary rules of proceeding in chancery,"¹⁹¹ and this euphemism is also absent here. Nor does section 16 even refer, as did the Process Act of 1792, to "the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from Courts of common law."¹⁹² Most important of all, unlike the Reexamination Clause and section 9 of the Judiciary Act, which excepted certain cases from the juryless admiralty jurisdiction,¹⁹³ it doesn't make equity jurisdiction turn on the remedies available under "the common law."

This linguistic analysis suggests that section 16 wasn't meant to give federal courts the same equity jurisdiction as their British counterparts, and its legislative history bolsters this inference.¹⁹⁴ Federal equity was the subject of great controversy in the Senate, because it implicated the right to jury trial. When the Judicial Bill was introduced, section 16 provided that federal courts couldn't exercise equity jurisdiction "in any case where remedy may be had at law."¹⁹⁵ Equity enthusiasts first

188. Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82.

189. Ellsworth's amendment, which was previously mentioned in the text accompanying note 156, read that "the modes of proceeding in causes of equity & of admiralty & maritime jurisdiction shall be, except where the laws of the United States otherwise provide, according to the course of proceedings heretofore accustomed in causes of similar jurisdiction in the respective courts of England . . ." 4 DHSC, *supra* note 111, at 197.

190. *Cf.* GOEBEL, *supra* note 102, at 546, 581 (suggesting this is why Ellsworth's 1792 amendment to the Process Act failed).

191. Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 73, 82.

192. Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276. I believe the Supreme Court understood this passage to refer to the respective English courts. *See* GOEBEL, *supra* note 102, at 547, 581.

193. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77.

194. *See* RITZ, *supra* note 95, at 175-77.

195. Senate Bill, section 16 (July 13, 1789), *reprinted in* 4 DHSC, *supra* note 111,

changed this to “complete remedy” and then threw out the whole thing, preferring to leave the line between law and equity unregulated by statute. Their opponents, relatively pro-jury men, fought back. They got their statutory restriction on equity jurisdiction, but at a price: it was even more watered down, as the legal remedy had to be “plain, adequate and complete” to oust equity.¹⁹⁶

William Maclay was right: this was not a federalization of English Chancery jurisdiction.¹⁹⁷ It's not just the fact that there was no directive to look to the English Chancellors' decisions to gauge when a legal remedy fit the bill. As Maclay recognized,¹⁹⁸ a legal remedy didn't have to be “plain, adequate and complete” to bar equity jurisdiction in Britain.¹⁹⁹ Moreover, as Justice Baldwin noted in 1831, the English Chancery sometimes exercised concurrent jurisdiction with the common-law courts, even though the same relief was available in both.²⁰⁰

One final point would seem conclusive. Section 16 doesn't make the availability of federal equity jurisdiction turn on the existence of a “plain, adequate and complete [legal] remedy” at any particular historical moment prior to the time of suit. It's a dynamic rule, not a static one, and it's impossible to believe that anybody would have intended the jury trial rights of future litigants to turn on future legal developments in a country from which Americans had already been independent for years.

at 74.

196. Thus, I think Eric Grant underestimated the scope of federal equity jurisdiction and overstated the right to jury trial. See Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 NW. U. L. REV. 144, 170 (1996).

197. See Diary of William Maclay (July 13, 1789), 9 DHFFC, *supra* note 94, at 107. In the end, the courts did not construe this standard in the way Maclay did; they equated it with the comparable English Chancery rule. See, e.g., *Harrison v. Rowan*, 11 F. Cas. 666, 667 (C.C.D.N.J. 1819) (Washington, J.). However, it should be noted that the Senate proceedings in 1789 were held in secret and that Justice Washington had no access to Senator Maclay's diary, which remained unpublished until many years later. (A highly abridged version was first published in 1880. See 9 DHFFC, *supra* note 94, at xvii. The full surviving text was not published until 1988.)

198. See 9 DHFFC, *supra* note 94, at xvii.

199. See *Baker v. Biddle*, 2 F. Cas. 439, 445 (C.C.E.D. Pa. 1831) (No. 764) (Baldwin, J.).

200. See *id.* at 445-46. Justice Washington seems to have forgotten this in *Harrison*, 11 F. Cas. at 667-68.

Now consider the scope of admiralty jurisdiction under the Act. Section 9, part of which is set forth above, broadly defined the district courts' "admiralty and maritime jurisdiction" and then excluded therefrom those cases in which "the common law" could provide "a common law remedy."²⁰¹ Julius Goebel speculated that, given the lack of a clear sense of the scope of maritime jurisdiction under English law and the expansive definition given to it in some of the states since independence, this caveat represented a refusal to exercise the full scope of the potential federal jurisdiction to the detriment of jury trial rights existing under "the common law."²⁰² If he's right, the Act didn't regard British law as limiting the permissible scope of the federal courts' admiralty and maritime jurisdiction, either. And as many as three early Supreme Court cases may have held that neither the Act nor the Constitution so confined these heads of federal jurisdiction.²⁰³

In my view, this analysis demonstrates that the First Congress did not intend the Jury Trial Clause to constitutionalize the right to civil jury trial that was recognized in the common-law courts of England in 1791. But even if that had been Congress' intention, only clairvoyant ratifiers could have known, and there probably weren't many of them around.²⁰⁴ In fact, there is not a single shred of evidence indicating that anyone in the First Congress, or any ratifier, thought that the parameters of the right to jury trial preserved by the Clause had been fixed by the English courts in 1791.

Nor is there any hint in the historical record that any federal judge so understood the Clause during the Nation's first two decades of existence. In fact, the unreported eighteenth-century

201. See *supra* text accompanying note 95.

202. See GOEBEL, *supra* note 102, at 474-75; see also Ritz, *supra* note 92, at 65.

203. See *United States v. The Schooner Betsey & Charlotte*, 8 U.S. (4 Cranch) 443 (1808); *United States v. The Schooner Sally*, 6 U.S. (2 Cranch) 406 (1805); *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796); see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1799-1888*, at 23-25 (1985).

204. The Senate met behind closed doors for the first six years. Like James Madison's notes on the Constitutional Convention (which were published in 1840), William Maclay's diary, which sheds some light on what went on in the Senate from 1789-91, wasn't published until many years later. See 9 DHFFC, *supra* note 197. The historical record includes no further information that could have helped the ratifiers understand the meaning of the Jury Trial Clause.

cases mentioned above point in the opposite direction. Although their decision may well have been consistent with English law,²⁰⁵ Chief Justice Jay and Judge Law seem to have been following section 26 of the Judiciary Act in *Hazzard*.²⁰⁶ However, Justice Cushing's insistence that there was a right to a jury trial on the plaintiff's damages despite section 26 couldn't have been based on English law. His opinion therefore indicates that he may not have felt that English law was the touchstone of our constitutional right to jury trial. Moreover, as nothing in his colleagues' opinions suggests that they found his generous view of the scope of the right to jury trial to be illegitimate, they may have agreed.²⁰⁷

Similarly, it's hard to believe that Justice Paterson and Judge Bee disagreed about the legitimacy of retaining equity jurisdiction after the completion of discovery in *Higginson* because they had different opinions about whether an English equity court would refuse specifically to enforce the parties' contract on the ground that a debt suit would give the plaintiff an adequate legal remedy.²⁰⁸ Moreover, given Paterson's involvement in the adoption of the Jury Trial Clause and the Judiciary Act,²⁰⁹ I doubt that they disagreed about which legal standard to apply. Rather, I suspect that both men felt the one set forth in section 16 of the Judiciary Act (and invoked by counsel) was to govern their decision, and that it (and the Jury Trial Clause) allowed them to make up their own minds about the sufficiency of the legal remedy. In other words, I think that William Paterson, who had tried to delete, and then dilute, section 16 when he was in the Senate,²¹⁰ was simply implementing a more expansive view of American equity jurisdiction than Judge Bee in this case.²¹¹

205. See, e.g., *Brown v. Van Braam*, 3 U.S. (3 Dall.) 344, 348 (1797).

206. This case is discussed in the text accompanying notes 104-13, above.

207. Of course, it's possible that the opinions were poorly reported in the journal. However, Simeon Baldwin, the clerk who wrote it, was a first-rate lawyer, and there's no reason to assume that he omitted important aspects of the opinions he chose to record.

208. This case is discussed in the text accompanying notes 121-24, above.

209. See *supra* note 123 and accompanying text.

210. This story is recounted in the text accompanying notes 173-75, above. For Paterson's positions in these debates, see RITZ, *supra* note 76, at 176, and Diary of William Maclay (July 1, 1789 & July 10, 1789), reprinted in 9 DHFFC, *supra* note 94, at 95, 106.

211. Thus, my analysis would be the same if Paterson had felt the case was gov-

The earliest officially reported decisions may be even more tantalizing, but they're even more opaque. *La Vengeance*,²¹² *The Schooner Sally*,²¹³ and *The Schooner Betsey & Charlotte*²¹⁴ were libels tried as admiralty and maritime cases in the lower federal courts, without a jury. Between 1796 and 1808, each of them wound up before the Supreme Court, and in each case it was asserted that the libel didn't fall within the federal courts' civil admiralty and maritime jurisdiction. *The Schooner Sally* was decided (on the basis of the Court's prior ruling in *La Vengeance*) without oral argument, and the challenged jurisdiction upheld. In the other two cases, Charles Lee argued that Article III limited federal admiralty and maritime jurisdiction to the scope that it had in English law at an historic moment²¹⁵ and that, as the libels in question could only have been brought in the common-law courts under the relevant English law, the lower courts had violated the Judiciary Act by trying them without a jury.²¹⁶ In his 1808 argument in *The Schooner Betsey & Charlotte*, he went even further, asserting as well that, "[b]y the 7th amendment, in suits at common law the right of trial by jury shall be *preserved*, i.e. continued as it then was. At the time all [cases like this] were triable at common law."²¹⁷ While he didn't spell it all out, Lee's logic was clear—just as Article III incorporated the jurisdictional limitations on English admiralty existing in 1789, the Jury Trial Clause constitutionalized the scope of the jury trial right available in the English common-law courts in 1791.²¹⁸

erned by the Process Act of 1792.

212. 3 U.S. (3 Dall.) 297 (1796).

213. 6 U.S. (2 Cranch) 406 (1805).

214. 8 U.S. (4 Cranch) 443 (1808).

215. In *La Vengeance*, he argued that the Revolution was the critical moment. See 3 U.S. at 300. In *The Schooner Betsey & Charlotte*, he declared that it was the adoption of the Constitution. See 8 U.S. at 447.

216. See *The Schooner Betsey & Charlotte*, 8 U.S. at 451; *LaVengeance*, 6 U.S. at 299-300.

217. 8 U.S. at 451.

218. This theory raised potential questions like which date was the one at which federal equity jurisdiction was fixed and what to do if any developments occurred during the two year gap, but these questions were ultimately of minimal significance. This is, however, but one proof of the fact that modern scholars are wrong to suggest that the idea that the Jury Trial Clause "preserved" the right as it existed on some specified date was a post-Reconstruction development. See, e.g., Schwartz, *supra* note 8, at 601-02; Wolfram, *supra* note 8, at 6-7, 734 & n.284. More proof may be found in note 269, below.

While this made Lee the first person known to have claimed that the Jury Trial Clause defined the civil jury right according to the English precedents of 1791, it did not make him a winner in court. In fact, he lost both cases. Each time, the Court's published opinion was maddeningly vague about whether the Court was rejecting his interpretation of Article III.²¹⁹ If it was, as many people (including Chief Justice John Marshall) believed,²²⁰ the ruling(s) would have had obvious implications for Lee's interpretation of the Jury Trial Clause.²²¹

Lee's argument also failed to make him the first person to take a public position on the relevance of eighteenth-century English practice to our Jury Trial Clause. *Aristogiton* beat him to the punch by almost a decade. In the portion of his 1799 essay that was quoted and discussed above,²²² *Aristogiton* denied that the Jury Trial Clause meant to signal the incorporation of English common law into federal law. Immediately thereafter, he quoted the Reexamination Clause and remarked, "This admits that the rules of the common law relative to the re-examination of causes [are] in force in the United States but does not admit that any other rules of that law are in force."²²³ Including, it would seem, the rules of the common law relative to the right to trial by jury in civil cases. Plainly, if this essayist had wanted to say the Jury Trial Clause incorporated those rules into the Constitution, he knew how to do so, and he chose not to. Presumably, that is because he read the Seventh Amendment's two clauses differently, because he didn't read the Jury Trial Clause the way Charles Lee would in 1808, or the Supreme Court does today.

219. Maybe the problem lay with the messenger. A lawyer who had reason to know claimed that the Court's opinion in *La Vengeance* had been poorly reported. See GOEBEL, *supra* note 102, at 777 n.50. That may also have been true of Marshall's opinion in *The Schooner Betsey & Charlotte*.

220. See, e.g., *Waring v. Clarke*, 46 U.S. (5 How.) 440, 457-58 (1847); CURRIE, *supra* note 203, at 23, 24 n.150; 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 347-51 (1826). *But see* *United States v. McGill*, 4 U.S. 429-30 (C.C.D. Pa. 1806) (Washington, J.) (instructing the jury that "the words of the constitution must be taken to refer to the admiralty and maritime jurisdiction of England . . .").

221. Of course, the opposite is also true.

222. See the text accompanying notes 143-47, above.

223. *Remarks*, *supra* note 145, at 261.

B. Nineteenth Century Revisionism: On Joseph Story

Thus far, I have shown that there is every reason to believe that the people who wrote and ratified the Jury Trial Clause didn't understand it to incorporate the right existing in the British common-law courts in 1791, and that no one saw things differently during the rest of the eighteenth century. In fact, the first identifiable advocate of anything resembling the modern interpretation of the Clause was a losing litigant before the Supreme Court in 1808.²²⁴ How, then, did that view get to be the revealed Truth?

The received wisdom is that Joseph Story is responsible for this transformation. According to one account, his 1812 circuit court decision in *United States v. Wonson*²²⁵ turned the tide.²²⁶ Another version²²⁷ credits the opinion he wrote in 1830 for the Supreme Court in *Parsons v. Bedford*.²²⁸ On closer inspection, however, it turns out that neither opinion actually advocated the modern interpretation of the Jury Trial Clause. In fact, I haven't found evidence that any lawyer or judge did so before Story's death in 1845,²²⁹ when my search ends.

Wonson was a debt case brought by the government to collect a penalty for violation of one of the federal embargo laws.²³⁰ After losing a jury trial in the federal district court in Massachusetts, the United States appealed.²³¹ Unsuccessfully.

224. Lee's position wasn't identical to the modern Court's. He described a static right, while the Court also extends it to cases analogous to those which could be tried to a common-law jury in England in 1791. See *supra* text accompanying note 7. But the question wasn't raised by the facts of *La Vengeance*, so Lee hadn't necessarily considered and rejected today's variant of his doctrine.

225. 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

226. See, e.g., *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996); 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2302 n.4 (2d. ed. 1995); Klein, *supra* note 8, at 1020-23; Schwartz, *supra* note 8, at 600-01, 619; Wolfram, *supra* note 8, at 640-41.

227. See, e.g., Grant, *supra* note 196, at 168, 170-71; Redish, *supra* note 8, at 490, 519-20.

228. 28 U.S. (3 Pet.) 433 (1830).

229. See R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY 380-81 (1985).

230. See *Wonson*, 28 F. Cas. at 745.

231. See *id.* at 745, 747.

Justice Story's son gave us the inside story of this decision:

Upon first coming to the Bench, my father found the docket in his Circuits overloaded with penal actions and cases of seizure arising under the embargo and non-intercourse systems, which had been suffered to accumulate in consequence of the age and infirmity of his predecessor in office, Mr. Justice Cushing. From a similar reason, a great number of Common Law cases had been brought up to the Circuit Court on appeal from the District Court. The docket was almost appalling at first. It had been the former practice of the Circuit Court, following that of the State Courts, to permit appeals from the District to the Circuit Court in jury cases at Common Law; but immediately upon my father's assuming his judicial functions, he delivered the elaborate judgment of *United States v. Wonson*, in which he held that no appeal lay from the District to the Circuit Court in other than civil causes within the Admiralty and Maritime Jurisdiction, and that when a cause had been once tried by a jury in the lower Court, it could not be brought up on appeal, to be tried by another jury in the superior Court [as was the practice in the State Courts] but could come up only by writ of error on some grounds of law. By this decision, in which the District-Attorney acquiesced, no less than one hundred and thirty cases were at one blow struck from the docket.²³²

Story's opinion in *Wonson* was, as his son said, "elaborate." To begin with, the Justice argued that the 1803 statute authorizing "appeals" from the district courts applied only to admiralty and maritime cases. Civil cases at common law (including debt cases) could only be brought to the appellate courts by writ of error, which authorized review of legal questions alone.²³³ Not content to rest his decision on such narrow grounds, however, Story went further. Even if the case was properly before the court on appeal (rather than error), he proclaimed, the government lacked the right (which it would have had in the state courts) to a jury trial *de novo* in the circuit court. In the first place, no law appeared to have created such a right. The 1803 law intended to authorize appellate jurisdic-

232. 1 LIFE AND LETTERS OF JOSEPH STORY 221 (William W. Story ed., 1851) (citation omitted).

233. See *Wonson*, 28 F. Cas. at 745-47.

tion, not a second jury trial, and the Rules of Decision Act didn't bind federal courts to follow the rules of practice (including the use of juries) in the state courts.²³⁴ But if there was any doubt about either law's meaning, Story added, it should not be read to authorize this mode of proceeding, because it would then be unconstitutional.²³⁵

It is this final step in Story's reasoning that is relevant to the present inquiry. Because I think this part of his analysis has been misunderstood in recent years, I will set it out in full:

The constitution of the United States provides "that the supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as congress shall make." At the time when the constitution was submitted to the people for adoption, one of the most powerful objections urged against it was, that in civil causes it did not secure the trial of facts by a jury. And that the appellate jurisdiction of the supreme court, both as to law and fact, would enable that court, with or without a new jury, to re-examine the whole facts, which had been settled by a previous jury. The advocates of the constitution endeavored to remove the weight of this objection by showing, that it was within the authority of congress to provide in all cases for the trial by jury; and that the appellate jurisdiction of the supreme court as to facts, did not necessarily include a re-examination of the facts so settled by a jury; and further, that it might be with the strictest propriety held, that when a writ of error is brought from an inferior to a superior tribunal, the latter had jurisdiction of the fact as well as of the law, and this was all the constitution intended. Whoever will read the commentary on the constitution, entitled "The Federalist," will learn how deeply the subject at that time interested the several states of the Union, and with what singular zeal and acuteness it was discussed. I advert to this work with the more readiness, because it is the acknowledged production of three eminent statesmen, of whom one was afterwards elevated to the

234. See *id.* at 747-50. The latter point, which Story hammered home by referring approvingly to another federal circuit court's decision that it was not bound to use an advisory jury in equity cases in conformity with the forum state's practice, see *id.* at 749-50 (citing lower court decision in *Massie v. West*, 10 U.S. (6 Cranch) 148 (1810)), obviously rejects *The Bill of Rights'* conformity-based interpretation of the Jury Trial Clause.

235. See *id.* at 750.

highest judicial office in the country, and to him the comments on the judicial department have been generally attributed. 2 *The Federalist*, No. 81, No. 83.

With this view of the defects of the constitution as to the trial by jury, and of the apprehensions entertained of new trials by the appellate courts, we shall be able to comprehend the scope and object of the amendment, which was proposed, and almost immediately and unanimously adopted, as part of the constitution. It is in these words: "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." *Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence.* It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law. Now, according to the rules of the common law the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a venire facias de novo is awarded. This is the invariable usage settled by the decisions of ages. Upon a writ of error, the appellate court can examine in general errors of law only, and never can re-try the issues already settled by a jury, where the judgment of the inferior court is affirmed.

According to the obvious intention of the amendment, the legislature then could have no authority to give an appellate jurisdiction, the power to re-examine by a jury the former decision of another jury, while the judgment below stood unreversed. . . .

On the whole, on this last point I am clearly of opinion, that an appeal in a common law suit from the district court removes errors of law only for the consideration of this court; and that we are bound to deny a new trial of the facts by a new jury.²³⁶

236. *Id.* (emphasis added).

This discussion clearly declared that the retrial of Wonson's case would violate the Reexamination Clause, and that this clause incorporated the reexamination rules of the English common-law courts. In other important respects, however, it is ambiguous. Why, for example, did Story restrict his stated holding to "an appeal in a common law suit?" And why did he review the background and quote the text of the Jury Trial Clause? Finally, and (for present purposes) most significantly, what was the referent of the word "here" in the italicized passage above?

I believe that the key to answering the first two questions lies in Story's account of the ratification controversy. As Story told it, the Antifederalists raised a single civil jury-related objection to the Constitution: it failed to protect the right to trial by jury in civil cases, both by not affirmatively guaranteeing the availability of jury trials and by permitting appellate reexamination of the facts found by any juries the states or the new government might (in its generosity) permit civil litigants to use. The Seventh Amendment answered the Antifederalists' objection, he suggested, by protecting this right in both ways they had requested. But only with respect to one class of cases, "Suits at common law." This history therefore established that the decision in this case could apply only to appeals in those actions.

It is widely believed that the sentence I have italicized in the second excerpted paragraph above was meant to define "Suits at common law" as well as "the rules of the common law" referred to in the Reexamination Clause.²³⁷ From this perspective, Story was interpreting the Seventh Amendment as a static provision, constitutionalizing both the right to jury trial as it existed in the English common law courts at some unspecified time and their ancient protective reexamination rules.

If this theory is correct, Story's opinion is rather strange. For one thing, no one seems to have denied that this was a common-law case. For another, Story's opinion only discussed the application of this interpretation of "the common law" to the Reexamination Clause. Third, whether or not it would have

237. See, e.g., Schwartz, *supra* note 8, at 600.

been "obvious to every person acquainted with the history of the law"²³⁸ that "the common law" meant England's, it would have been anything but obvious to "anyone acquainted with" *The Federalist* No. 83 and the text of the Jury Trial Clause (not to mention *Aristogiton's* essay or the decisions in *La Vengeance* and its progeny) that "Suits at common law" incorporated the English common-law right to jury trial. (In fact, if Story's son's history was correct,²³⁹ wouldn't "anyone acquainted with" the seemingly established appellate practice in Justice Cushing's court have thought it "obvious" that these jury trials *de novo* were constitutional? Didn't the United States Attorney think so?)

Three other facts appear to confirm my suspicion that "the common law alluded to" referred exclusively to the text of the Reexamination Clause. First, that clause speaks of "the common law," while the Jury Trial Clause does not. Second, although Joseph Story was a widely respected Justice, *Wonson* wasn't cited as an interpretation of the Jury Trial Clause in any reported decision rendered during his lifetime, not even by him. Third, eighteen years later, when Story explicitly wrote about the original meaning of the Jury Trial Clause, he said something different.

The failure of later cases to cite *Wonson* on the meaning of the Jury Trial Clause can't be attributed to a lack of opportunities. Story served on the Court until his death in 1845,²⁴⁰ and judges and lawyers had plenty of chances to cite *Wonson* before then. Consider *Mayer v. Foulkrod*,²⁴¹ an equity case in which the plaintiff sought discovery and an accounting to recover a legacy. The defendant demurred, alleging that because Pennsylvania's law courts made a "full, adequate, and complete remedy at law" available to the plaintiff, there could be no

238. 28 F. Cas. at 750.

239. Kent Newmyer's outstanding study credits the notion that Cushing allowed appellate jury trials *de novo* in common-law cases. See NEWMYER, *supra* note 229, at 99-100. (This is the other example of Cushing's generous attitude towards jury trials, which was alluded to in note 113, above.) On the other hand, the last line of Story's opinion in *Wonson* remarks, "no instance has ever occurred, in which a new trial by the jury has been allowed in the appellate court." *Wonson*, 28 F. Cas. at 750-51. But this may have been a reference only to the practice of other circuits. See *id.*

240. See NEWMYER, *supra* note 229, at 381.

241. 16 F. Cas. 1231 (C.C.E.D. Pa. 1823) (No. 9,341).

federal equity jurisdiction over the case.²⁴² The plaintiff's lawyers responded by citing a number of cases, including *Wonson*.²⁴³ Speaking through Bushrod Washington, the court overruled the demurrer. Initially, he denied that Pennsylvania's legal remedy was "full, complete and adequate."²⁴⁴ After remarking that only the availability of such a remedy in federal court would deprive a federal court of equity jurisdiction, Washington rejected the defense claim that the Rules of Decision Act bound federal courts to provide the same remedies available in the forum state's courts, and he cited *Wonson* as "correctly stat[ing]" the law on that question.²⁴⁵ The governing federal law, he maintained, was the Process Act of 1792. In the absence of court rules or judicial modification, he continued, that law "prescribed a rule, by which the line of partition between the law and the equity jurisdiction of [federal] courts is distinctly marked."²⁴⁶ Under this rule,

[t]he only inquiry . . . must be, what are the principles, usages, and rules of courts of equity, as distinguished from courts of common law, and (to borrow the expressions of the supreme court in the case of *Robinson v. Campbell*), "defined in that country, from which we derive our knowledge of those principles." The case just referred to, is indeed an authority which so completely covers the present subject of inquiry, as to render the further investigation of it superfluous, and we shall merely add to that authority, the decision of the supreme court in the case of *U.S. v. Howland*; which is conclusive, not only of this particular point, but of the question respecting the general jurisdiction of a court of equity, in a case where there is a remedy at law, though not as complete as that which a court of equity can offer.²⁴⁷

242. *Id.* at 1232.

243. *See id.* at 1233.

244. *Id.* at 1234.

245. *Id.*

246. *Id.* at 1235.

247. *Id.* (citations omitted). It might be objected that *Wonson* was a distinguishable, constitutional, decision. But I wouldn't find this a satisfactory explanation for Washington's failure to mention it. First, *Wonson* itself shows that judges didn't automatically shy away from the resolution of constitutional issues at that time. Second, Washington could have cited *Wonson* as a decision on an important question lurking in the background, even if he thought it unnecessary to resolve that question to decide this case. Third, it isn't clear to me how Washington could have believed his

Four years earlier, in *Harrison v. Rowan*,²⁴⁸ Justice Washington had considered a comparable question, and cited no authority whatsoever in support of his conclusion. *Harrison* involved an equity bill brought by a trustee and beneficiaries of a testamentary trust who claimed that some of the decedent's land should have passed under the trust.²⁴⁹ They sought possession and the muniments of title from a legal heir and her spouse, the administrator of the decedent's estate, who was also in possession of the land. The defendants objected to the exercise of equity jurisdiction, arguing that ejectment would provide an adequate legal remedy.²⁵⁰ Before presenting the precise reasons that led him to reject this plea, Washington delivered a general address to the bar about the meaning of section 16 of the Judiciary Act:

[t]he expressions used in that section, "plain, adequate and complete," . . . go no farther than to recognize and adopt the long and well established principles of the English court of chancery, upon the subject of the ordinary jurisdiction of a court of equity. Any other construction would unsettle those great land marks which have hitherto separated the two jurisdictions of the common law and equity courts; and would introduce all that uncertainty which is usually attendant upon every new system. . . . [T]here are a number of cases in which a concurrent jurisdiction is exercised by the two courts; and in many of them, the ground of the equity jurisdiction is not that the common law courts are incompetent to afford a remedy, but that such a remedy is less complete than the court of equity, from the nature of its organization, is capable of affording. . . . We hold it, therefore, to be perfectly clear, that where a case is otherwise proper for the jurisdiction of a court of equity, it is no objection to its exercise that the party may have a remedy at law. On the other hand, we do not mean to lay it down that the mere circumstance that a more complete remedy can be afforded in the former, than in the latter courts, is of itself a ground of jurisdiction. The inquiry must always

description of *Robinson* to be accurate had he understood *Wonson* to have raised the point to a constitutional level.

248. 11 F. Cas. 666 (C.C.D.N.J. 1819) (No. 6,143).

249. *Id.* at 666-67.

250. *See id.*

be, whether the case is within any of the general branches of equity jurisdiction, as claimed and exercised by that court. The court has deemed it proper to make these general observations upon the equity jurisdiction of this court; not because the case under consideration rendered them necessary, but to correct what we consider to be an erroneous construction of the act of congress, referred to on this subject.²⁵¹

Of course, it is possible that Washington's refusal to cite *Wonson* in these cases was due to an unwillingness to broach constitutional questions unnecessarily,²⁵² or to his uncertainty about (or disagreement with) the constitutional analysis that Story is said to have expounded in that case. And the same could be said for the Supreme Court's failure to cite *Wonson* in other "statutory interpretation" cases like *Robinson* and *Howland*. But these considerations wouldn't explain why none of the lawyers in any of these cases is reported to have cited *Wonson* in support of a "backup" argument that the relevant federal statutes "had to" be interpreted in a particular way, lest they be unconstitutional. In fact, the arguments of counsel included in the published reports of federal decisions do not indicate that any lawyer ever cited it as an interpretation of the Jury Trial Clause, not even when they were arguing the meaning of that Clause before the Court on which Justice Story sat!²⁵³

251. *Id.* at 667-68. For my view on the original meaning of section 16, see the text accompanying notes 187-203, above.

252. *But see supra* note 247.

253. I have found two possible exceptions to this rule. The first, *Mayer*, is discussed in the text accompanying notes 241-47, above. The reporter's notes don't tell us for precisely what proposition counsel cited *Wonson* in that case, but I assume that it was invoked for its remarks about the Rules of Decision Act, because that is the context in which Justice Washington referred to it.

The other, *Eaken v. United States*, 8 F. Cas. 232, 232 (S.D.N.Y. 1822) (No. 4,235), is a suit by the Government against a former employee whom it claimed owed it money. The defendant moved to submit the accounts to referees, as was authorized under a New York law he asserted to apply by virtue of the Rules of Decision Act and the rules of the district court. The report notes that *Wonson* was one of the cases he cited. It also states that "[t]he counsel for the United States read the seventh article of the amendments of the constitution of the United States, and cited" four cases, the first being *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 344 (1819), and the second *Wonson*. *Id.* Judge Van Ness is not reported to have cited any cases, but he granted the motion on the authority of the Act. Under the circumstances, I suspect that the aspect of *Wonson* being discussed here (as in *Mayer*) was its analysis of the Rules of Decision Act.

I am referring, of course, to *Parsons v. Bedford*.²⁵⁴ Plaintiffs brought this suit in the Louisiana courts to recover for tobacco sold to defendants but not paid for.²⁵⁵ Since the parties were citizens of different states, defendants were able to remove the case to federal court.²⁵⁶ A federal law passed in 1824 required that court in civil cases to conform to the modes of practice followed in Louisiana's courts, unless it had made contrary rules (and there was no evidence that it had).²⁵⁷ Louisiana's courts were heavily influenced by the civil law, and their procedures were unique.²⁵⁸ They used neither the common law forms of process and pleading nor those of chancery, but novel forms somewhat closer to the latter. The categories law and equity did not exist, but jury trial was available on demand in any case. However, either party could require that the jury be limited to returning a special verdict. In addition, whether litigants opted for a bench trial, a special verdict, or a general verdict, either party could insist that the testimony be made part of the record, which would allow a superior court to reexamine the facts in the event of an appeal.²⁵⁹

The plaintiff won a favorable judgment, and the defendant filed a writ of error in the Supreme Court, complaining that the Court should order a new trial because the lower court had refused to put the testimony on the record, as required under Louisiana practice and the federal conformity law.²⁶⁰ The Court affirmed the judgment below, ruling that any error in this regard was harmless. Speaking through Justice Story, it decided that the federal conformity statute should not be read "to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial, by a re-examination of the facts tried by the jury."²⁶¹ As in *Wonson*, one reason Story gave for so interpreting this law was that a contrary construc-

254. 28 U.S. (3 Pet.) 433 (1830).

255. *See id.* at 434-35.

256. *See id.* at 441.

257. *See id.* at 444-45.

258. On the state court procedures mentioned in the text, see *id.* at 450-51 (McLean, J., dissenting).

259. Although Justice McLean wrote that this procedure could be employed when the parties obtained a special verdict, see *id.* at 451, Justice Story disagreed, see *id.* at 443.

260. *See id.* at 441-42.

261. *Id.* at 448.

tion would call in question its constitutionality. And once again, the provision that this law threatened to violate was the Reexamination Clause. Story's constitutional analysis was as follows:

The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares, that "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 once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law." At this time there were no states in the union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no states were contemplated, in which it would not exist. The phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution had declared, in the third article, "that the judicial power shall extend to all cases in *law and equity* arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority," . . . and to all cases of *admiralty and maritime jurisdiction*. It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By *common law*, they meant what the constitution denominated in the third article "law;" not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to

be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And congress seems to have acted with reference to this exposition in the judiciary act of 1789, ch. 20, (which was contemporaneous with the proposal of this amendment); for in the ninth section it is provided, that "the trial of issues in fact in the *district courts* in all causes, except civil causes of *admiralty and maritime jurisdiction*, shall be by jury;" and in the twelfth section it is provided, that "the trial of issues in fact in the *circuit courts* shall in all suits, except these of *equity*, and of *admiralty and maritime jurisdiction*, be by jury;" and again, in the thirteenth section, it is provided, that "the trial of issues in fact in the *supreme court* in *all actions at law* against citizens of the United States, shall be by jury."

But the other clause of the amendment is still more important; and we read it as a substantial and independent clause. "No fact tried by a jury shall be otherwise re-examinable, in any court of the United States, than according to the rules of the common law." This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings. The judiciary act of 1789, ch. 20, sec. 17, has given to all the courts of the United States "power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law." And the appellate jurisdiction has also been amply given by the same act (sec. 22, 24) to this court, to redress

errors of law; and for such errors to award a new trial, in suits at law which have been tried by a jury.²⁶²

In a number of respects, this discussion bears a striking resemblance to its counterpart in *Wonson*. As in 1812, Story brought up the Jury Trial Clause in a case involving a possible violation of the Reexamination Clause. And then there's the fact that neither of these paragraphs, like their predecessors, says one word about the facts of the case at bar. What was Justice Story up to?

I believe that the answers to these questions lie in the arguments of defense counsel and the dissenting Justice McLean. They posited that the Reexamination Clause, like the Jury Trial Clause, extended only to common-law cases. Therefore, its prohibition would have no application to this case unless this case was a "Suit at common law," which they thought it was not.²⁶³

Justice Story's lengthy disquisition on the meaning of "Suits at common law" thus went to the heart of this controversy. But Story never acknowledged that. He never even said why he was talking about the Jury Trial Clause or why this case was a "Suit at common law."

In part, I suspect, this was because Story was merely playing defense. Because he agreed with McLean and the defense lawyers that the Reexamination Clause only limited review of facts found by juries in common-law cases, Story saw no need to address the point. Story disagreed with their claim that this was a federal civil case outside the courts' common law, equity, or admiralty/maritime jurisdiction—he thought it a non-sequitur—,so he spoke to that issue. Given their concession that this case wasn't an action in equity or admiralty/maritime law, however, it was unnecessary for Story to prove it was an action at law, the residuary class of federal cases, so he didn't.²⁶⁴

262. *Id.* at 446-48.

263. *See id.* at 437-39, 446-48 (arguments of Messrs. Livingston and Webster for plaintiff in error); *id.* at 454-58 (McLean, J., dissenting).

264. This theory may also explain Story's similar omissions in *Wonson*, where it was conceded that the case was a "Suit at common law" and perhaps (the arguments of counsel aren't reported) no one denied that the Reexamination Clause only limited judicial reexamination of jury factfinding in those cases.

That may not, however, be the whole story. If any action to determine a legal right is a "Suit at common law," Justice McLean asked late in his opinion, what did this decision imply for the Louisiana land titles that had been confirmed by Congress based upon the decisions of commissioners authorized by it to determine (without a jury) which competing claimants had good claims?²⁶⁵ Once again, Justice Story didn't reply. This time, perhaps, he wanted to steer clear of controversy. If so, maybe this desire strengthened his resolve to say nothing about why the case before the Court was a "Suit at common law."

But if *Parsons* resembled *Wonson* stylistically, it was a dramatic departure from *Wonson's* constitutional doctrine, as that doctrine is commonly understood. *Wonson*, you will recall,²⁶⁶ is widely thought to have enunciated a "unified field theory" of the Seventh Amendment, in which both clauses were read to have mummified English common-law rules concerning the right to jury trial in civil cases. *Parsons* abandoned that vision, if Story had ever truly held it. While *Parsons* continued to maintain that the Reexamination Clause had permanently embedded the traditional English common-law reexamination rules into federal law, and nothing more, Story now articulated a view of the Jury Trial Clause that was far more dynamic. There were, of course, fixed points in this new constitutional firmament, including the division of all federal civil jurisdiction (like Gaul) into three parts and the irrevocable assignment of the old common law writs to the "common law" class. Yet Story made it clear that this class could grow over time. Thus, he proclaimed, the Clause's protection also extended to new causes of action (even those yet to be created) in which legal rights were to be settled.

The potential scope of the class of cases denominated "Suits at common law" was unclear. On the one hand, Story failed to explain how courts should distinguish "legal" from "equitable" rights, which is to say "Suits at common law" and "equity," once the easy cases were left behind. Thus, cases brought under the old common-law writs were simple: although they meant to do more, the Creators did mean to "preserve" the right to jury

265. See *Parsons*, 28 U.S. (3 Pet.) at 457-58 (McLean, J., dissenting).

266. See *supra* text accompanying note 237.

trial in "suits, which the *common* law recognized among its old and settled proceedings."²⁶⁷ New rights created by common-law judges would *ipso facto* be just as plainly "legal," so the Jury Trial Clause would apply in any case in which these rights would be "ascertained and determined."²⁶⁸ The Creators, it seems, were "preserving" the distinction between three heads of jurisdiction, and the right to jury trial was an incident of "common-law" jurisdiction. But how would the "legal" or "equitable" character of new, statutorily created, rights be ascertained? And if a legislature created a new right and deemed it "legal," could it later "equitize" that right and banish federal litigation about it to juryless federal equity courts? Could it "equitize" a newly minted "legal" right created by common-law judges? And if the Congress authorized federal common-law courts to compel defendants to submit to discovery, declared that those courts should regard a lack of consideration as a "legal" (rather than an "equitable") defense to suits for breach of contract, or declared that "equitable" rights to specific performance of contracts would thenceforth be deemed "legal" and remediable on the common-law side of the federal courts, would the traditional equity jurisdiction of the English Chancery have been ousted? Or did the Constitution also "preserve" the scope of English equity jurisdiction as it stood on the undisclosed magic date? Justice Story's opinion answered none of these questions.²⁶⁹ Nor did it specify how the limits of admiralty and maritime jurisdiction, as opposed to the content of the law to be applied therein, were to be determined for the purposes of the Jury Trial Clause.

These omissions left the door open to several different theories of the Jury Trial Clause. It could have led to an understanding that the Clause did nothing more than guarantee a jury trial for the determination of an historically fixed set of rights. Alternatively, it could have heralded a vision in which the Clause further limited the scope of legislative discretion and

267. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830).

268. *Id.*

269. Contrary to the impression one might get from the scholarly literature, see, e.g., Wolfram, *supra* note 8, at 642, 734 & n.284, the identity of this date was discussed in contemporary judicial opinions, and see, e.g., *Bains v. The James & Catherine*, 2 F. Cas. 410, 418 (C.C.D. Pa. 1832) (No. 765) (Baldwin, J.) (noting two different views). Also see note 218 and accompanying text, above.

extended the right to some wider group of cases. Finally, if the reach of federal admiralty and maritime jurisdiction could increase over time, the Clause could have been thought not even to have ensured the availability of a jury trial in every case in which one of the historically fixed set of rights could have been so determined in the English courts on the unspecified magic date. In other words, while this opinion may have opened the door for modern Jury Trial Clause doctrine, *Parsons* neither adopted nor required it.

Whatever its precise scope, the interpretation of the Jury Trial Clause that Justice Story propounded in *Parsons*, which he claimed to reflect the original understanding of its Creators, was pure *ipse dixit*. Worse yet, it seems clearly to have been wrong.

Let's start with his assertion that "Suits at common law" was intended to be the equivalent of the civil side of Article III's "Cases . . . in Law."²⁷⁰ Story's "argument" in support of this theory is purely textual: the Jury Trial Clause speaks of "common law,' . . . in contradistinction to equity, and admiralty, and maritime jurisprudence;"²⁷¹ Article III speaks of law, equity, and admiralty/maritime jurisdiction; therefore, "common law" must mean "law." To begin with, this suggestion is intuitively problematic. If the Creators of the Seventh Amendment had wanted the scope of their guarantee to be coextensive with the Constitution's civil "Cases . . . in Law," why didn't their Amendment say "civil Suits at Law," a formulation that no one even proposed? Moreover, this construction seems inadmissible by Story's own canons of interpretation. Sensibly enough, he suggested that the Judiciary Act of 1789 could be used to test his theory. But a more thorough examination of that Act reveals its inconsistency with his position. Section 13, which Story cited, vested the Supreme Court with original jurisdiction

270. In an essay first published in 1800 and then reissued as part of his edition of *Blackstone's Commentaries*, St. George Tucker opined that "Cases . . . in Law" included criminal as well as civil cases. See St. George Tucker, *Of the Unwritten, or Common Law of England, and its Introduction Into, and Authority Within the United States*, reprinted in 1 BLACKSTONE'S COMMENTARIES 418-21 app. (Augustus M. Kelley pub. 1969) (St. George Tucker ed., 1803) [hereinafter Tucker, BLACKSTONE'S COMMENTARIES].

271. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830).

[over] all controversies of a civil nature, where a State is a party except between a State and its Citizens[,] . . . all such suits or proceedings against Ambassadors, or other public Ministers, or their domestics or domestic servants, as a Court of law can have or exercise consistently with the law of Nations[,] . . . [and] of all suits brought by Ambassadors, or other public Ministers, or in which a Consul or Vice-Consul shall be a party.²⁷²

It then continued, in language partly quoted in Story's opinion, "And the trial of issues in fact in the Supreme Court, in all actions at law against Citizens of the United States, shall be by Jury."²⁷³ This last sentence clearly implies that Congress believed it was giving the Court original jurisdiction over some "actions at law" (and why didn't it call them "suits at common law"?) that were not "against Citizens of the United States," or that qualifying phrase would have been superfluous. Yet the Act did not extend the right to jury trial to those cases, so they must not have been regarded as "Suits at common law." This confirms my belief that, contrary to Story's assertion, the First Congress didn't consider the Seventh Amendment to guarantee a right to jury trial in all civil "Cases . . . in Law."²⁷⁴

However, Story's assertion that the Creators meant by "Suits at common law" to incorporate the English common-law right "plus" was even more indefensible. In the interest of accuracy, I guess I should go back a step. Story never actually *said* this. He said that the Creators meant "Suits at common law" to signify "Law," and then he fabricated a definition of the term they didn't use to define the one they did.

Now why would anybody do such a strange thing? Why not consider the evidence available to show what the Creators thought about the language they did use? For example, why not consider *The Federalist* No. 83, which Story had cited in

272. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 (1789).

273. *Id.*, 1 Stat. at 81.

274. This congressional understanding may also help explain why section 9 of the Judiciary Act avoided the term "Suits at common law" in giving district courts jurisdiction over suits against consuls or vice consuls and tort suits brought by aliens under international law or American treaties. Could it be that some of the cases referred to in section 13 were not "Suits at common law" but "suits under international law?" See Tucker, BLACKSTONE'S COMMENTARIES, *supra* note 270, app. at 420.

Wonson? Can it be a coincidence that this essay isn't mentioned here? That *Wonson* isn't?

Further, why didn't Story mention the way previous judges had interpreted this clause? Had John Marshall forgotten about *The Schooner Betsey & Charlotte*? Was Story missing that volume of Cranch's Reports? In *Wonson*, he had invoked the results of his own informal survey of the practice in other circuits to show that there was no precedent for allowing appellate jury trials in the federal courts.²⁷⁵ Had none of the other sitting judges ever expressed an opinion on this issue on circuit? Had none of their predecessors?

There's something else that bothers me about this opinion. As I have already observed, Story's decision rejected a "unified field theory" of the Seventh Amendment, endorsing a fairly dynamic interpretation of the Jury Trial Clause and a completely static interpretation of the Reexamination Clause. Yet both clauses spoke of "common law." How could they be interpreted so differently?²⁷⁶ And if textual analysis mattered, why not look to the Reexamination Clause for the meaning of the Jury Trial Clause, or at least explain why it wasn't advisable to do so? Why did Story say nothing about any of this?²⁷⁷

It has probably occurred to you by now that I don't think Story was being serious about the idea that his decision was based on, or justified by, the original understanding or the text of the Jury Trial Clause. This point would be even clearer if, contrary to my belief, *Wonson* was simply a first draft of *Parsons*. *Wonson* made a similar appeal to the original understanding of the Seventh Amendment, but consider what Story did in that opinion. He cited *The Federalist* No. 83 (which he incorrectly attributed to John Jay) as evidence of the careful attention given to the civil jury trial issue during the ratification

275. See *supra* note 239.

276. This question has been asked before, but not answered. See, e.g., 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1057 n.* (1953); CURRIE, *supra* note 203, at 112 n.141.

277. Note that, while *Parsons* construed "common law" in a paragraph on the Jury Trial Clause, *Wonson* interpreted "the common law" in *Wonson's* discussion of the Reexamination Clause. Was Story aware of the textual distinction and merely failing to point out that it justified the different interpretations he placed on these two clauses in these opinions?

controversy and then forgot about it when he announced that it was "obvious" that "the common law here alluded to" could only have been the common law of England. What's more, if our account is to be trusted,²⁷⁸ after only three months on the job, the thirty-two year old Justice claimed to have greater insight into the original meaning of the Seventh Amendment than William Cushing, who had been on the Supreme Court since the beginning.²⁷⁹ And he did so without having spent much time at the elbow of John Marshall, armed with nothing but his survey and the text of the Seventh Amendment (which he inaccurately transcribed as two separate sentences). Clearly, this decision was the work of a brash young reformer,²⁸⁰ not a serious historian or textualist. And *Parsons* was cut from the same cloth.

Of course, even a brash young reformer can get it right now and then. In fact, for the reasons I will explain below, I believe that Story was right about the original understanding of the Reexamination Clause. However, I am equally persuaded that he was wrong about the Jury Trial Clause. Nothing in his opinion controverts any of the evidence discussed in the previous section of this paper. Story simply ignored the Clause's text and history in favor of a result he preferred.²⁸¹

278. See *supra* text accompanying notes 232, 238.

279. Story's birth date is reported in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 841 (Kermit L. Hall ed., 1992). He took office on Feb. 3, 1812, see *id.* at 966, and decided *Wonson* that May, see *Wonson*, 28 F. Cas. at 745.

280. On the reforms Story introduced in the First Circuit in 1812, see NEWMYER, *supra* note 229, at 99-100. On his early readiness to reform Supreme Court decisions of which he disapproved, see, e.g., *id.* at 100-05.

281. Not to beat a dead horse, but it's hard to resist noting that Story also ignored the fact he and the Court had repeatedly intimated or decided that the federal courts' admiralty/maritime jurisdiction was not limited by the limits of British admiralty, and continued to do so after *Parsons* had become law. See CURRIE, *supra* note 203, at 23-25, 117-19, 257-59, for broad and narrow interpretations of these decisions. To the extent that this was so, Americans could be denied the right of jury trial in cases in which Britons would have had such a right in 1791, contrary to one possible version of *Parsons'* thesis.

IV. MY "ORIGINAL UNDERSTANDING" OF THE JURY TRIAL CLAUSE

Now that I've said so much about what I don't think the Jury Trial Clause originally meant, it's time to say a few words about what I think its Creators had in mind. As a civil libertarian, I'm not particularly happy about what I'm going to say. However, the theory I will elaborate best accommodates the early evidence I have found, so I must accept it for now.

I believe that the Jury Trial Clause had both a number of purposes, and a number of levels of meaning. At the most basic level, it responded to the Antifederalists' charge that the new Constitution had abolished or prohibited civil jury trials. In this respect, it proclaimed, "There may be civil jury trials in our courts!"²⁸²

Beyond this, it was a statement of "general principle" of the kind that George Mason had requested at the Philadelphia Convention.²⁸³ In the spirit of the many precatory "declarations of rights" in the state constitutions,²⁸⁴ it trumpeted, "America still values its tradition of civil jury trials in the common-law courts!"

Of course, it was also a guarantee that there would be a right to jury trial in "Suits at common law." But which cases were those? I have argued above that this phrase did not mean cases in which there would have been such a right in the state, or the British, courts. Nor did it refer to equity or admiralty/maritime cases; but if (as I have indicated) the Constitution didn't adopt the definitions of those categories set forth in the state or British precedents, which cases were they?

The answer, I believe, is that the Seventh Amendment left the determination of which civil cases would be regarded as

282. To this extent, I agree with Rachael Schwartz, *see* Schwartz, *supra* note 8, at 603-04, and with *The Bill of Rights'* intuition that the Jury Trial Clause is structural in nature.

283. For Mason's request, *see supra* text accompanying note 12.

284. The civil jury trial provision in Virginia's Declaration, which Mason wrote, and which was the basis of Virginia's proposed amendment to the federal Constitution, was one such statement. *See supra* notes 60-62 and accompanying text.

“Suits at common law”—i.e., the extent of the right to jury trial in civil cases in the federal courts—entirely to the discretion of the Congress.²⁸⁵ Thus, it gave Hamilton what he’d asked for, just as it had Mason.²⁸⁶ And satisfying both of those men was no mean feat!

In fact, I believe that this was the principal object of the Seventh Amendment, and that it was a complete success. In that respect, I think it was exactly like the Sixth Amendment’s District Clause.²⁸⁷ The District Clause responded to the Anti-Federalists’ demand that local juries be used in criminal trials by saying, “If we decide to give you local juries, you’ll get local juries.” But the public accepted this provision because the Judiciary Act created district courts for Kentucky and Maine and provided that juries in capital cases should generally at least largely be drawn from the county where the crime occurred.²⁸⁸

285. I don’t think the Creators intended the courts to give content to this indeterminate term, and here are a few of the reasons why. In the first place, although numerous Federalists, including Hamilton, argued that Congress should be given this authority, no one is known to have thought that it should be left in the hands of the judiciary. Secondly, what we know about the Senate debates over section 16 of the Judiciary Act, *see supra* notes 192-94 and accompanying text, doesn’t suggest that anyone thought that the line there drawn between law and equity would be subject to constitutional second-guessing by the Supreme Court, and I presume that Senator Maclay would certainly have made and recorded that point had it been deemed plausible. We know less about the discussion concerning section 9, but I find it equally unlikely that Congress believed the Supreme Court could hold that section unconstitutional for overly expanding admiralty/maritime jurisdiction at the expense of the right to jury trial. Third, while federal judges in the early cases, officially reported and otherwise, often considered whether federal statutes allowed or required them to forego a jury, there is no indication that anyone questioned the constitutionality of these statutes insofar as they purported to justify proceeding in equity. This would be odd if the courts, not the Congress, were the ultimate arbiter of the line between law and equity. Finally, if I am right that Congress rejected the idea of constitutionalizing British or state-based rights to jury trial, what standard would anyone have expected the Court to use to distinguish “Suits at common law” from others? I find it hard to believe that the Creators silently agreed to give the federal courts plenary authority to undertake this essentially legislative task, subject only to correction by constitutional amendment.

286. In a letter to Samuel Griffin dated September 8, 1789, Mason announced his pleasure with the amendments that the House had passed, although noting, among other things, that he still wished to see one “confining the federal Judiciary to Admiralty & Maritime Jurisdiction, and to Subjects merely federal.” *See* Letter of George Mason to Samuel Griffin (Sept. 8, 1789), *reprinted in* Veit, *CREATING THE BILL OF RIGHTS*, *supra* note 15, at 292, 292.

287. The story of the District Clause is set forth in the text accompanying notes 69-79, above.

288. *See* Judiciary Act of 1789, ch. 20, §§ 2, 29, 1 Stat. 73, 88 (1789). On the suc-

That is, the Act convinced the people that the Congress wouldn't act tyrannically, and the people were satisfied.

Similarly, I believe that the Jury Trial Clause meant that federal civil litigants would be entitled to a jury trial whenever the Congress deigned to allow them to have one.²⁸⁹ But the Judiciary Act so generously provided for civil jury trials that the people's fears were calmed on this score, too.²⁹⁰ Their paranoid fantasies about the new government's importation of civil law (or worse) had been dispelled.

While this "original understanding" of the Jury Trial Clause may not be attractive to civil libertarians, it best accommodates the available evidence of what its Creators had in mind. Thus, it makes sense of critical linguistic choices made during its drafting and amendment. For example, it explains why Congress chose to describe the class of civil cases to which the right of jury trial applied in indeterminate language, language different from that used in the civil jury provisions of all of the proposed amendments and all of the extant state constitutions. It also explains why this term was not used in the Reexamination Clause. In fact, it provides a textual basis for Joseph Story's intuition—which still lies at the heart of the law—that the constitutional reexamination rules, unlike the set of civil cases subject to the right of jury trial, are completely static. And it sheds light on a third constitutional provision by suggesting a principled reason why the Creators apparently didn't even consider a conformity-based solution to the Sixth Amendment vicinage problem.

This theory respects the text and spirit of the Judiciary Act of 1789 and the several Process Acts, which so strongly betoken plenary congressional authority to determine the scope of equity jurisdiction (down to the cognizability at law of equitable defenses) in federal courts. That sense of freedom is nowhere

cess of this approach in pacifying the people, see *supra* note 76.

289. In those cases, the Seventh Amendment forbade federal judges to deny litigants what Congress has given them. This reflects the fact that the House Committee of Eleven changed Madison's precatory "ought to remain inviolate" to "shall be preserved." See House Committee of Eleven Report, First Congress (July 28, 1789), reprinted in Cogan, COMPLETE BILL OF RIGHTS, *supra* note 16, at 495, 495.

290. It also didn't hurt that the Judiciary and Process Acts directed considerable conformity with state process, practice, jury selection, and substantive law.

more clearly expressed than in the legislative history of section 16 of the Judiciary Act. The Senate debates on this provision, culminating in the enactment of a novel, indulgent, definition of the boundary of the Chancellors' domain, show that there were no sacred cows, and nothing in the Bill of Rights that the Senate would soon endorse seems to have given anyone second thoughts about that question.

My analysis takes into account the fact that the ratifiers of the Jury Trial Clause, even after reading the Judiciary and Process Acts of 1789, would have had no way of knowing that the Clause had some more determinate meaning. And it explains why all parties to the ratification-era debate about a civil jury guarantee seem to have emerged happy with the outcome.

This theory can account for all of the reported cases mentioned above that were decided in the federal courts' early years. It explains, for example, why there is so little evidence that anyone other than Charles Lee suggested before *Parsons* that the Seventh Amendment trumped a federal statute allowing an issue to be tried without a jury.²⁹¹ It makes it clear why cases like *Robinson* and *Howland & Allen* treated jury trial questions as questions of pure statutory interpretation. At the same time, the mysteries of two of the three unofficially reported decisions quickly disappear if my analysis is correct: Judge Law's dissent in *Bache* presents no problem because the Reexamination Clause isn't conformity-based, and the *Higginson* judges may have disagreed about the discretionary judgments they were required to make under section 16 of the Judiciary Act. (William Cushing's dissent in *Hazzard* is hard to explain, period, but maybe the Justice who allowed appellate jury trials was merely taking the position that he would insist on using advisory juries in cases under section 26 of the Judiciary Act where the sum due was "certain" if either party so wished.) What's more, my interpretation of the Jury Trial Clause is consistent with the judges' understanding of the limits of federal admiralty and maritime jurisdiction.

291. As far as I am aware, the only other case decided during this period in which the report hints that such a claim may have been made is *Eaken v. United States*, 8 F. Cas. 232 (S.D.N.Y. 1822) (No. 4,235), which is discussed in note 253, above.

Finally, my argument coheres with the only eighteenth century exegeses of the Jury Trial Clause that I know of. It makes sense of the Jeffersonians' failure to claim that the Clause obliged federal courts to adopt their forum state's jury trial rules. It justifies *Aristogiton's* acknowledgment that the Reexamination Clause adopted English law, as well as his judgment that the Jury Trial Clause didn't. *The Citizen* and *Aristogiton* may not have said the indeterminate "Suits at common law" was to be given content by the Congress, but they didn't deny it, either: given their party's growing distrust of the governing Federalists, the notion that Congress had such power may well have been too disturbing to mention.

In sum, the theory that the Jury Trial Clause gave Congress plenary authority to determine the extent of the right to civil jury trial in the federal courts comports with all of the early historical evidence. No other explanation of the Jury Trial Clause can make that claim. Until one of those conditions changes, that theory should be considered the original understanding of the Seventh Amendment right to jury trial.²⁹²

292. Three final points. First, Kenneth Klein has written that the Clause wasn't meant to distinguish cases involving judicially created rights from cases involving statutory rights, but that it should be read as if it had. See Klein, *supra* note 6, at 1035, 1036 & n.146. I think it's clear that he was right the first time. Second, while it might be attractive to argue that section 16 of the Judiciary Act reflected a tacit understanding that the Clause was "preserving" the notion that, admiralty/maritime cases aside, a right to trial by jury in civil cases could only be trumped by equity (and then only if the traditional prerequisite for the exercise of equity jurisdiction was satisfied), in light of the facts that no one ever seems to have suggested this approach or thought it was our law, the freedom with which modifications of section 16 were enacted and revoked, and the fact that it did not, in the end, embody the traditional "inadequacy" standard, see *supra* text accompanying notes 194-200, I find this unlikely to have been the case. Even if I'm wrong, however, unless some incorporation notions were thrown into the mix, federal authorities would still have complete discretion to determine which actions and remedies were legal and when those remedies were "inadequate." Finally, whereas *The Bill of Rights* argues that this Clause was about federalism, I think it was about calming the Nation, standing up for mom and apple pie, and making it clear that Congress could and (under the Judiciary Act) would give civil litigants a chance to obtain a fairer, or at least a more satisfying, resolution of their (predominately) private disputes when that was the sensible thing to do.

