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State Jury Trials and Federalism: Constitutionalizing Common Law Concepts

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STATE JURY TRIALS AND FEDERALISM: CONSTITUTIONALIZING COMMON LAW CONCEPTS

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One of the foundations of the American legal system is the common law right to a trial by jury that existed in England prior to the Declaration of Independence. Traditionally, a jury consisted of twelve jurors who had to reach a unanimous verdict. That is no longer the standard provided for in the United States Constitution or the constitutions of many states. However, the English common law right to a trial by jury is preserved in its entirety in the Delaware Constitution for both civil and criminal cases.

The differences in the right to trial by jury in the Delaware Constitution, as discussed in this article, are illustrative of how the principles of vertical and horizontal federalism are intended to operate within the framework of the United States Constitution.[1] The rights to trial by jury in civil and criminal cases in state constitutions are not an exact mirror image of the corresponding rights in either Article III or the Sixth[2] and Seventh[3] Amendments of the United States Constitution. In addition to differences between state and federal constitutions, each state's own constitutional protections of the right to trial by jury in civil and criminal proceedings are not identical to their counterparts in the constitutions of other states.

The United States Constitution provides for an enumeration of the powers that were relinquished by the states and delegated to the federal

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1 This article is based upon the history of trial by jury in criminal and civil proceedings in Delaware. *See* McCool v. Gehret, 657 A.2d 269 (Del. 1995); Claudio v. State, 585 A.2d 1278 (Del. 1991).

2 The Sixth Amendment pertains to criminal trials and provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. CONST. amend. VI.

3 The Seventh Amendment pertains to civil trials and provides that "[i]n 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." U.S. CONST. amend. VII.

government "in order to form a more perfect Union." Most of the powers conferred upon the federal government were set forth originally in the United States Constitution.[4] As Chief Justice Marshall explained, "it was neither necessary nor proper to define the powers retained by the States. These powers ... [would] remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument."[5] This statement by the Chief Justice coincided with Hamilton's reasoning in The Federalist No. 32.

The Tenth Amendment confirmed the Framers' conception of the states remaining sovereign in many respects. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[6] Accordingly, state sovereignty could be subordinated in the enumerated areas only where Congress was authorized to act, e.g. the Commerce Clause.[7]

The arrangement of dual delegated sovereign powers set forth in the United States Constitution was a revolutionary political theory.[8] Dual sovereignty was predicated upon the principle that the ultimate sovereignty rests in the people themselves.[9] The recognition of ultimate sovereignty in the people meant that "[t]hey can distribute one portion of power to the more contracted circle called State governments; they can also furnish another proportion to the government of the United States."[10]

The right to trial by jury in the Delaware Constitution demonstrates two separate principles of federalism that were established in the dual sovereignty framework of the United States Constitution. The first principle relates to the Supremacy Clause. Congressional enactments pursuant to an enumerated power are made binding upon the states by the Supremacy Clause. Although the Sixth Amendment right to trial by jury in a criminal proceeding has been made binding upon the states by

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4 U.S. CONST. art. I, § 8.

5 Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193 (1819).

6 U.S. CONST. amend. X.

7 *Compare* Gibbons v. Ogden, 220 U.S. (9 Wheat.) 186 (1824), *with* United States v. Lopez, 514 U.S. 549 (1995).

8 *See, e.g.*, United States Term Limits, Inc. v. Thornton, 514 U.S. 799, 838 (1995) (Kennedy, J., concurring).

9 *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 350-52 (1969); *see also* Abraham Lincoln, Gettysburg Address (1863). Ours is a "government of the people, by the people, for the people." *Id.*

10 1 PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, 302 (J. McMaster & F. Stone eds., 1888).

virtue of the Fourteenth Amendment,[11] the United States Supreme Court has thus far declined to hold that the Seventh Amendment right to trial by jury in a civil proceeding is binding upon the states.[12] The second principle of American federalism is that any state may afford its citizens greater protections under that state's own constitution than are otherwise guaranteed by the United States Constitution.[13]

Both principles are extant in the Delaware Constitutions' right to trial by jury in civil and criminal matters. In civil proceedings, the protections of the Delaware Constitution are specific, robust, and operate independent of the Seventh Amendment's provisions. In criminal matters, the Delaware Constitution provides greater protections than the Sixth Amendment rights guaranteed in the United States Constitution.

It is, therefore, surprising that when federalism issues are being discussed, the following question is raised: is there a legitimate basis for a state constitution to provide different and greater protections than a similar or parallel provision in the United States Constitution?[14] The differences between the Seventh Amendment right to trial by jury and corresponding provisions in state constitutions are easily explained, in part, because the Seventh Amendment provisions are not binding upon the states by incorporation through the Fourteenth Amendment. Although the Sixth Amendment right to trial by jury in criminal matters is binding upon the states, its guarantees only provide the minimum protections that a state must afford its citizens.

The declaration of rights or substantive provisions in a state's constitution may, and often does, provide for broader or additional rights.[15] The expansion beyond federally guaranteed individual liberties by a state constitution is attributable to a variety of reasons: differences in textual

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11 Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

12 *See* Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916).

13 Moran v. Burbine, 475 U.S. 412 (1986).

14 *See, e.g.*, Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984).

15 *See* Phyllis W. Beck, *Foreword: Stepping Over the Procedural Threshold in the Presentation of State Constitutional Claims*, 68 TEMP. L. REV. 1035 (1995); John M. Wisdom, *Foreword: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063 (1984).

language, legislative history, pre-existing state law, structural differences, matters of particular concern, and state traditions.[16]

A review of the history and origin of the right to trial by jury in the Delaware Constitution, vis-à-vis the history and origins of that right in the United States Constitution, reveals that the differences in phraseology between the Delaware and the federal right to trial by jury are not merely stylistic. There is, in fact, a significant substantive difference in that historic right, as it has been preserved for Delaware's citizens. The reasons for those differences are explained by the history and evolution of the common law right to trial by jury.[17]

I. JURY TRIAL

A. *English Common Law*

The origin of jury trials in England has been debated for centuries.[18] Some English scholars have traced the origin of the jury to Alfred the Great (871-899 A.D.).[19] Other scholars have cited the laws of Aethelred I (865-871 A.D.), Aethelred the Unready (978-1016 A.D.), and the judgment of twelve witnesses during the reigns of Edgar the Peaceful (959-975 A.D.) and Edward the Confessor (1042-1066 A.D.).[20] Still other scholars contend that William the Conqueror brought the jury to England in 1066.[21] However, a consensus exists among historians that by the 1080s, trial by jury was firmly established in England.[22]

The right to a jury trial was guaranteed by the Magna Charta, signed at Runnymede by King John on June 15, 1215. The Magna Charta provided that no freeman would be disseized, dispossessed, or imprisoned except by judgment of his peers or by "the laws of the land." It further stated, "[t]o none will we well, to none will we deny, to none

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16 State v. Williams, 459 A.2d 641 (N.J. 1983); State v. Gunwall, 720 P.2d 808, 811-13 (Wash. 1986).

17 For a further discussion of the history and evolution of the common law right to trial by jury, see *infra* notes 18-45 and accompanying text.

18 *See* Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 5-7 (1993).

19 WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 2 (Lenex Hill Pub. & Dist. Co., 2d ed. 1971) (1878).

20 LLOYD E. MOORE, THE JURY: TOOLS OF KINGS, PALLADIUM OF LIBERY 23-29 (1973).

21 Arnold, *supra* note 18, at 6.

22 Arnold, *supra* note 18, at 7.

will we delay right or justice." The English monarchs reaffirmed the Magna Charta thirty-eight times during the next one hundred years.

The foundations of the English common law began during the reign of Henry II (1154-1189 A.D.).[23] During that time, it was settled, at common law, that a jury should be composed of twelve persons.[24] In 1376, during the rule of Edward III (1327-1377 A.D.), the requirement of a unanimous verdict by twelve jurors was firmly established.[25] By the 1600s, the right to trial by jury had become one of the great palladiums of English liberty.[26]

B. Colonial America

The English common law form of trial by jury was transported to the American colonies through the influence of the common law writers such as Coke, Hale, and Blackstone. The 1606 Charter to the Virginia Company incorporated the right to a jury trial. By 1624, all trials in Virginia, both civil and criminal, were by jury. In 1628, the Massachusetts Bay Colony introduced jury trials. The right to a jury trial was codified in the Massachusetts Body of Liberties by 1641. The Colony of West New Jersey implemented trial by jury in 1677, as did New Hampshire in 1680, Pennsylvania in 1682, Massachusetts in 1641, Rhode Island in 1647, New Jersey in 1683, and South Carolina in 1712.

It is probable that a jury was empaneled in Delaware as early as 1669.[27] By 1675, trial by jury had become a fixed institution in Delaware.[28] In 1727, Delaware adopted the Magna Charta's specific language as part of *An Act of Privilege to a Free Man*, which provided:

> That no free man within this government shall be taken or imprisoned, or disseized of his freehold or liberties, or be outlawed or exiled, or other ways hurt, damnified or destroyed, nor to be tried or condemned but by the

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23 J. Pope, *The Jury*, 39 TEX. L. REV. 426, 431-32 (1961).

24 *Id.*

25 *Id.* at 436 (citing J. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 295, 297 (1892)).

26 MOORE, *supra* note 20, at 65; *see, e.g.*, TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800 (J.S. Cockburn & Thomas A. Greed eds., 1988).

27 1 J. SCHARF, HISTORY OF DELAWARE 519 (1888).

28 *Id.*

> lawful judgment of his twelve equals, or by the laws of England, and of this government.[29]

In 1723, an American jury acquitted John Peter Zenger from the royal charge of criminal libel.[30] As tension grew between the American colonies and the King of England, it became apparent that the jury was the ultimate protection of each citizen. In colonial America, violations of the statutes enacted by Parliament at the behest of King George III could not be enforced without a conviction by an independent jury. Accordingly, the King and Parliament realized that, if possible, the power and independence of the jury had to be circumvented.

When the Stamp Act was promulgated in May of 1765, its enforcement was placed under the jurisdiction of the Admiralty Courts. This meant the complete denial of a jury trial. The American colonies resented this blatant interference by the King and Parliament with the right to trial by jury.[31] According to John Adams:

> But the most grievous innovation of all, is the alarming extension of the power of courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! ... We cannot help asserting, therefore, that this part of the act will make an essential change in the constitution of juries, and it is directly repugnant to the Great Charter [Magna Charta] itself.[32]

On October 14, 1774, the First Continental Congress declared, "[t]hat the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."[33] Consequently, the Declaration of Independence listed the denial of the benefits of trial by jury as one of the grievances which led to the American Revolution.[34]

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29 1 LAWS OF THE STATE OF DELAWARE 119 (1797).

30 VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 32-37 (1986).

31 Duncan v. Louisiana, 391 U.S. 145, 152 (1968).

32 Pope, *supra* note 23, at 445.

33 *Id.*; *see also* 2 J. KENT, COMMENTARIES ON AMERICAN LAW 13 (13th ed. 1884).

34 *See Duncan*, 391 U.S. at 152.

II. FIRST DELAWARE CONSTITUTION: COMMON LAW JURY TRIAL

Following the Declaration of Independence from England, the exercise of general sovereignty accrued separately to each of the former colonial states. As new sovereign entities, each state drafted its own constitution.[35] Those efforts were influenced by philosophers such as Charles Montesquieu, Jean Jacques Rousseau, and John Locke; and by English common law scholars like Edward Coke, Henry deBracton, and William Blackstone.[36] The first state constitutions attempted to set forth universal principles in writing.

Eight state constitutions were written in 1776. Delaware's initial constitution was typical by differing from the colonial charter it replaced in two important respects: it provided for more legislative and less executive power, and it was preceded by a Declaration of Rights.[37] Delaware's constitution was the first state constitution to be drafted by a convention elected expressly for that purpose. That convention met in Delaware at New Castle on August 27, 1776.[38]

The first Constitution of the State of Delaware was enacted on September 20, 1776. The primary authorship of Delaware's 1776 Constitution and Declaration of Rights is traditionally ascribed to Thomas McKean. He was a Delaware lawyer and signatory of the Declaration of Independence.[39]

McKean had studied the English common law at the Middle Temple in London. He was a contemporary of William Blackstone,[40] who wrote an authoritative treatise entitled *Commentaries on the Laws of England*

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35 *See* W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 4 (1980); Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911 (1993).

36 *See* SAMUEL HUTCHINSON BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM (1993).

37 *See* Wood, *supra* note 35, at 921.

38 1 SCHARF, *supra* note 27, at 233.

39 Randy J. Holland, *Introduction* to THE DELAWARE BAR IN THE TWENTIETH CENTURY xix, xxviii (Helen L. Winslow et al. eds., 1994).

40 SIR LYDEN MACARREY, MIDDLE TEMPLARS' ASSOCIATION WITH AMERICA 27 (1998).

("*Commentaries*").[41] Article twenty-five of that first Delaware Constitution stated:

> *The common law of England*, as well as so much of the statute law as have been heretofore adopted in practice in this state, *shall remain in force*, unless they shall be altered by a future law of the Legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights, agreed to by this convention.[42]

The Delaware Declaration of Rights was enacted contemporaneously with the 1776 Delaware Constitution, but as a separate document. It was influenced by existing drafts of the Virginia, Pennsylvania, and Maryland Declarations of Rights.[43] The 1776 Delaware Declaration of Rights was also based upon English common law rights. In his *Commentaries*, Blackstone wrote:

> Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. . . . [T]he founders of the English law have with excellent forecast contrived, that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the *unanimous* suffrage of *twelve* of his equals and neighbours, indifferently chosen and superior to all suspicion.[44]

The Declaration of Rights and Fundamental Rules of the State of Delaware was adopted by the convention on September 11, 1776. Section 13 of that declaration provided, "[t]hat trial by jury of facts where they arise is one of the greatest securities of the lives, liberties, and estates of the people."[45] Thus, Delaware commenced its existence as an

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41 3 WILLIAM BLACKSTONE, COMMENTARIES *109, *cited in* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

42 DEL CONST. (1776), *in* Vol. 1, Del. C. § 118 (1974).

43 Rodman Ward, Jr. & Paul J. Lockwood, *Bill of Rights: Article I, in* THE DELAWARE CONSTITUTION OF 1897: THE FIRST ONE HUNDRED YEARS 73, 76 (Randy J. Holland & Harvey Bernard Rubenstein eds., 1997).

44 4 WILLIAM BLACKSTONE, COMMENTARIES *349-50 (emphasis added); *see also* Duncan v. Louisiana, 391 U.S. 145, 151-52 (1968).

45 DEL CONST. (1776), *in* Vol. 1, Del. C. § 110 (1974).

independent state with an unambiguous expression of its intention to perpetuate the right to trial by jury, completely as it had existed at English common law, for its citizens.

III. ARTICLES OF CONFEDERATION

Following the American Revolutionary War, the independent states united pursuant to the Articles of Confederation. Each state's own sovereignty was made paramount to the national sovereignty.[46] Since "the Articles of Confederation asserted no authority over individuals," it also afforded no individual protections.[47] Therefore, the citizens in each state continued to be protected by enactments such as the Declaration of Fundamental Rights and the Constitution which had been adopted by Delaware in 1776. The Articles of Confederation proved to be an unsuccessful form of government.

IV. JURY TRIAL IN ARTICLE III: UNITED STATES CONSTITUTION

In 1787, after the Constitutional Convention convened, the Framers adopted "a plan not merely to amend the Articles of Confederation but to create an entirely new National Government."[48] John Dickinson and Richard Bassett were two of Delaware's delegates to the 1787 Constitutional Convention in Philadelphia.

"The institutions written into the American Constitution were heavily dependent upon colonial experience and practice, as well as upon the framers' experience of having written and lived under eighteen state constitutions between 1776 and 1786."[49] In fact, many of the features of the United States Constitution were modeled on the earlier state constitutions. The Framers, however, did not include either a comprehensive adoption of the English common law or a declaration of rights. These omissions "stood in sharp contrast to the state constitutions, then extant virtually all of which contained explicit provisions"[50] dealing with the retention or limited

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46 W. POWELL, A HISTORY OF DELAWARE 179 (1928).

47 Pope, *supra* note 23, at 446.

48 *See generally* Wesberry v. Sanders, 376 U.S. 1, 10 (1964); J. Roche, *Constitutional Convention of 1787, in* I ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 360 (1986).

49 DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 1-2, 45 (1980); *see also* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 97 (1988).

50 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 137 (1996) (Souter, J., dissenting).

reception of English common law[51] and included declarations of rights, often based upon common law antecedents.[52]

By 1787, although each state constitution had provisions that were based on the English common law, the particulars were often very different. After the Declaration of Independence, the manner and extent of the English common law reception in each new state constitution had been subject to careful consideration.[53] "The common law was not the same in any two of the Colonies," Madison observed "in some the modifications were materially and extensively different."[54] As a result of the diverse development of the common law in the various state constitutions, the Framers decided to recognize only particular common law concepts. Therefore, the United States Constitution did not provide for a general preservation of the common law heritage from England.[55]

John Dickinson became one of the leading and most respected Federalist writers, endorsing ratification of the proposed Constitution in the *Letters of Fabius*.[56] With Richard Bassett's leadership, Delaware became the first State to ratify the proposed Constitution on December 7, 1787.[57] However, when the Constitution of the United States was being considered for ratification in other states one of the overriding concerns expressed by many was the effect that the presence of a strong central government and the absence of a federal Bill of Rights would have on fundamental rights which had existed at English common law, e.g., trial by jury.

Article III of the federal Constitution provided that "[t]he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed."[58] "The 'very scanty

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51 *Id.* at 162 n.55.

52 Ellen A. Peters, *Common Law Antecedents of Constitutional Law in Connecticut*, 53 ALB. L. REV. 259, 261 (1989).

53 *See, e.g.*, Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 796 (1951).

54 Report on Resolutions, House of Delegates, Session of 1799-1800, Concerning Alien and Sedition Laws, *in* 6 WRITINGS OF JAMES MADISON 373 (G. Hunt ed., 1906).

55 *See* Letter from John Marshall to St. George Tucker (Nov. 27, 1800), *reprinted in* Stewart Jay, *Origins of the Federal Common Law: Part II*, 133 U. PA. L. REV. 1231, Appendix A at 1326 (1985) (stating "I do not believe one man can be found" who maintains that the "common law of England has . . . been adopted as the common law of America by the Constitution of the United States.").

56 1 SCHARF, *supra* note 27, at 206.

57 *Id.* at 206, 269.

58 Williams v. Florida, 399 U.S. 78, 93 (1970).

history of this provision in the records of the Constitutional Convention' sheds little light either way on the intended correlation between Article III's 'jury' and the features of the jury at common law."[59]

In John Dickinson's view, however, the provision in Article III perpetuated the right to trial by jury in criminal matters as it had existed at common law in England. In stating that view in 1788 and urging other states to follow Delaware's lead in ratifying the federal Constitution, John Dickinson described several aspects of the common law right to trial by jury in detail. Dickinson's understanding of the correlation between Article III and the English common law right to trial by jury was as follows:

> It seems highly probable, that those who would reject this labour of public love [the proposed Constitution], would also have rejected the Heaven-taught institution of trial by jury, had they been consulted upon its establishment. Would they not have cried out, that there never was framed so detestable, so paltry, and so tyrannical a device for extinguishing freedom, and throwing unbounded domination into the hands of the king and barons, under a contemptible pretence of preserving it? What! . . . Why then is it insisted on; but because the fabricators of it know that it will, and intend that it shall reduce the people to slavery? Away with it—Freemen will never be enthralled by so insolent, so execrable, so pitiful a contrivance.
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> Happily for us our ancestors thought otherwise. They were not so over-nice and curious, as to refuse blessing, because, they might possible be abused. . . .
>
> Trial by Jury is our birth-right; and tempted to his own ruin, by some seducing spirit, must be the man, who in opposition to the genius of United America, shall dare to attempt its subversion. . . .

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[59] *Id.*

> *In the proposed confederation, it is preserved inviolable in criminal* cases, and cannot be altered in other respects, but when United American demands it.[60]

V. INDIVIDUAL RIGHTS CONCERNS STATES PROPOSE AMENDMENTS

Despite the assurances from John Dickinson and other Federalist writers, fears continued to be expressed that Article III's provision failed to preserve *all of the common law rights* to trial by jury, e.g., the right to be tried by a "jury of the vicinage."[61] That concern, along with the desire "to preserve the right to jury in civil as well as criminal cases, furnished part of the impetus for introducing amendments to the Constitution that ultimately resulted in the jury trial provisions of the Sixth and Seventh Amendments."[62]

Massachusetts was the first state to officially propose amendments, which it sent to Congress along with its ratification of the United States Constitution. The widespread demand for a Bill of Rights was also reflected in the recommendations for amendments submitted by five other states as well as by the Pennsylvania minority, the Maryland Committee, and the conditional amendments voted upon by the North Carolina Convention.[63] In Madison's and Jefferson's home state of Virginia, the sharp division over the Bill of Rights issue resulted in ratification of the Constitution by a closely divided vote.

In 1788, George Washington wrote to the Marquis de Lafayette that the provisions in Article III for jury trials reflected the difficulty in establishing a mode for trial by jury that would not interfere with "the fixed modes of any of the States, [and had] . . . induced the convention to leave it as a matter of future adjustment."[64] By the next year, however, it became apparent to then President Washington that the "future adjustments" with respect to the certain fundamental rights, including the right to trial by jury, could not be postponed. When President

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60 John Dickinson, *Letters of Fabius, 1788, letter IV, in* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 548-49 (1971) (emphasis added).

61 *Williams*, 399 U.S. at 93.

62 *Id.* at 94.

63 *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 469 (Jonathan Elliot ed., 1836).

64 11 THE WRITINGS OF GEORGE WASHINGTON 254-59 (1891), *reprinted in* 2 SCHWARTZ, *supra* note 60, at 988.

George Washington gave his first annual message to Congress in 1789, he noted that demands for amendments to the United States Constitution were widespread.[65]

VI. FEDERAL BILL OF RIGHTS COMMON LAW JURY TRIAL CONTROVERSY

On June 8, 1789, not long after President Washington's first annual message to Congress, James Madison addressed the House of Representatives. The proposed amendments to the United States Constitution, which were described by Madison in that address, covered all of the provisions which eventually became the federal Bill of Rights.[66] On July 21, Madison made a motion that the House go into a Committee of the Whole, to consider the amendments to the federal Constitution which he had proposed on June 8.

The House instead voted to send Madison's proposals, as well as the amendments proposed by the various states, to a select committee for study. John Vining of Delaware was elected the Chairman of the House Committee Select which had studied Madison's proposals.[67] The Committee of Eleven honored John Vining by choosing him, rather than Madison to be its chairman. The Committee Select was confronted with a formidable assignment. It has been calculated that 210 different amendments were proposed by various states during the ratification process, and with duplications omitted, these included nearly one hundred different substantive provisions.[68]

On July 28, John Vining filed the Committee Select's report with the House of Representatives. The Committee Select's version "made no substantial alteration in the original Madison draft. The Committee did, however, make certain stylistic changes which brought many of the amendments closer to the final Bill of Rights version."[69]

The amendment relating to jury trial in criminal cases, as introduced by James Madison in the House, would have provided that: "'The trial

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65 1 ANNALS OF CONG., 27-30 (1834), *reprinted in* 2 SCHWARTZ, *supra* note 60, at 1009-12.

66 1 THE DEBATE AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES 449-53 (Washington, D.C. 1834).

67 *See* 2 SCHWARTZ, *supra* note 60, at 1050.

68 Randy J. Holland, *The Bill of Rights and John Vining, the First State's First Congressman*, 9 DEL. LAWYER 33 (1991).

69 2 SCHWARTZ, *supra* note 60, at 1050.

of all crimes ... shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites.'"[70] That Amendment passed the House of Representatives in substantially the same form in which it was originally submitted by Madison and approved by the Committee Select.[71]

It is important to note the common law form in which the right to trial by jury originally passed in the United States House of Representatives because, after more than a week of debate in the Senate, Madison's proposed amendment with regard to trial by jury was returned to the House in a considerably altered form.[72] Significantly, one of Delaware's first two United States Senators was Richard Bassett. Senator Bassett voted in favor of providing for all of the common law rights to trial by jury, as originally proposed by Madison and recommended by the House Committee Select, chaired by Delaware's John Vining.

The records of the actual Senate debates about the right to a jury trial in criminal proceedings are not available. However, a letter from Madison to Edmund Pendleton on September 14, 1789, indicates that:

> [O]ne of the Senate's major objections was to the "vicinage" requirement in the House version. A conference committee was appointed. As reported in a second letter by Madison on September 23, 1789, the Senate remained opposed to the vicinage requirement, partly because in its view the then-pending judiciary bill—which was debated at the same time as the Amendments—adequately preserved the common-law vicinage feature, making it unnecessary to freeze that requirement into the Constitution. "The Senate," wrote Madison: "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

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70 Williams v. Florida, 399 U.S. 78, 94 (1970) (citing 1 ANNALS OF CONG. 435 (1789)).

71 *Id.*

72 *Id.*

> definition to be construed according to the judgment of professional men. *Even this could not be obtained.* . . . The Senate suppose, also, that the provision for vicinage in the Judiciary bill will sufficiently quiet the fears which called for an amendment on this point."[73]

A motion was made in the United States Senate to reconsider the criminal jury trial provision, and to restore the words following: "The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger) shall be by an impartial jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites."[74] Senator Richard Bassett of Delaware voted in favor of the motion. The motion was defeated by an equally divided vote.[75]

VII. FEDERAL JURY TRIAL RIGHTS: COMMON LAW COMPROMISED

The disagreement about the wording of the proposed amendments, including the right to trial by jury in a criminal proceeding were referred to a Senate-House Conference Committee.

> The version that finally emerged from the Committee was the version that ultimately became the Sixth Amendment, ensuring an accused: "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[76]

The provisions spelling out such common-law features of the jury as "unanimity," or "the accustomed requisites" were gone.[77] The "vicinage" requirement "had been replaced by wording that reflected a compromise between broad and narrow definitions of that term."[78] Thus, it was left to Congress to determine the actual size of the

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73 *Id.* at 95-96 (emphasis added).
74 2 SCHWARTZ, *supra* note 60, at 1154.
75 *Id.*
76 *Williams*, 399 U.S. at 96.
77 *Id.*
78 *Id.*

"vicinage" through the establishment of judicial districts.[79] Nevertheless, with regard to the Seventh Amendment, providing for jury trial in civil cases, the Conference Committee explicitly added 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."[80]

The United States Supreme Court has concluded that three significant features may be observed in the history of the enactment of the United States Constitution's Sixth Amendment jury trial provisions.[81] "First, even though the vicinage requirement was as much a feature of the common-law jury as was the twelve-man requirement, the mere reference to 'trial by jury' in Article III was not interpreted to include that feature."[82] "Second, provisions that would have explicitly tied the 'jury' concept to the 'accustomed requisites' of the time were eliminated."[83] "Finally, contemporary legislative and constitutional provisions indicate that where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect,"[84] for instance, the final text of the Seventh Amendment. Unlike the Sixth Amendment, which made no reference to the common law, the Seventh Amendment referred to the common law twice: once to define the types of cases triable before a jury, and once to specify the circumstances under which the jury's verdict could be reviewed.

The United States Supreme Court has concluded that it is not "able to divine precisely what the word 'jury' imported to the Framers, the First Congress, or the States in 1789.... *But there is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the [United States] constitutional and common-law characteristics of the jury.*"[85] Thus, when the debates about the federal Bill of Rights were over, John Dickinson's interpretation of the phrase "trial by jury" in Article III, as completely preserving the common law right to trial by jury, had been proven incorrect.[86] Moreover, Congress had made an express decision not to preserve all of the features of the common law right to trial by

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79 *Id.*
80 *Id.* at 97.
81 *Id.* at 96.
82 *Id.*
83 *Id.* at 96-97.
84 *Id.* at 97.
85 *Id.* at 98-99 (emphasis added).
86 *Id.* at 96.

jury, when it could have done so in the Sixth and Seventh Amendments to the United States Constitution.[87] Accordingly, despite the original urging of James Madison, the subsequent endorsement of that recommendation by the House Committee Select, chaired by Delaware's Congressman John Vining and the support of Delaware's Senator Richard Bassett, the effort to preserve *all* of the common law rights to trial by jury in the federal Bill of Rights had not prevailed.

VIII. COMMON LAW JURY CONTINUED: DELAWARE CONSTITUTION REWRITTEN

States began to rewrite their constitutions almost immediately following the ratification of the United States Constitution.[88] In exercising their residual sovereign powers, states adopted constitutions which continued to adhere to the same basic principles, but from their own unique perspectives.[89] These documents, for example Delaware's 1792 Constitution, reaffirmed each state's commitment to its own declaration of rights and common law traditions.

The Bill of Rights became a part of the United States Constitution on December 15, 1791, with Virginia's ratification. On September 8, 1791, the Delaware General Assembly called for a state constitutional convention.[90] The Delaware Constitutional Convention assembled at Dover, on Tuesday, November 29, 1791. Delaware's United States Senator, Richard Bassett, who had been a delegate to the state constitutional convention in 1776, was also a delegate to the Delaware Constitutional Convention in 1791.[91]

The President of the 1792 Delaware Constitutional Convention was John Dickinson, who had studied the common law of England at the Middle Temple in London with Thomas McKean and, thus, was also a contemporary of William Blackstone.[92] In his Commentaries, Blackstone had warned against permitting inroads into the common law right to trial by jury for the sake of judicial economy:

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87 *Id.* at 96-99.

88 *See, e.g.*, DEL. CONST. (1792); *see also* Claudio v. State, 585 A.2d 1278 (Del. 1991).

89 *See generally* DEL. CONST. (1792).

90 1 SCHARF, *supra* note 27, at 270.

91 *Id.*

92 Johnson v. State, 711 A.2d 18, 24 (Del. 1998); *see also* Dennis R. Nolan, *Sir William Blackstone and the New Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 743 n.63 (1976).

> So that the liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, . . . And however *convenient* thee may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.[93]

John Dickinson's involvement in the debates about the right to trial by jury in Article III, during the ratification process of the United States Constitution in 1788, as well as Congressman John Vining's and Senator Richard Bassett's involvement with the debates on that subject, preceding the enactment of the federal Bill of Rights in 1791, provide important historical insight into what happened in 1791, when Delaware decided to amend its own constitution. After the debates were finished about the meaning of the term "trial by jury" in Article III and the provisions on that subject to be included in the Sixth and Seventh Amendments, Delawareans, especially John Dickinson and Richard Bassett, were acutely aware of the need to set forth an intention to perpetuate in unambiguous language all of the fundamental rights, as they had existed at common law.

The right to a trial by jury in the 1792 Delaware Constitution[94] was not phrased identically to its corollary in Article III, Section 2, Clause 3 of the original United States Constitution or the Sixth and Seventh Amendments in the federal Bill of Rights.[95] In fact, the language in the 1792 Delaware Constitution regarding the right to a jury trial was strikingly similar to that right in the 1790 Pennsylvania Constitution.

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93 4 WILLIAM BLACKSTONE, COMMENTARIES *350; *see also* MOORE, *supra* note 20.

94 DEL. CONST. art. I, §§ 4, 7 (1792).

95 U.S. CONST. amends. VI, VII.

The Pennsylvania Ratifying Convention had approved the United States Constitution on December 15, 1787, by a vote of forty-two to twenty-three. The Pennsylvania minority submitted fifteen amendments as a condition of their approval, including one amendment which provided that "trial by jury shall be as heretofore." Hamilton's opposition to that particular suggestion is found in *The Federalist* No. 83 (A. Hamilton). The Pennsylvania recommendation to retain the complete English common law right to trial by jury did not prevail in either the debates preceding the ratification of the United States Constitution or in the debates about federal Bill of Rights. However, in 1790, Pennsylvania amended its own state constitution to provide that "trial by jury shall be as heretofore, and the right thereof remain inviolate."[96]

Thomas McKean wrote the 1776 Delaware Constitution, which had included the common law right to trial by jury. When McKean worked on the 1776 Delaware Constitution, he lived in Philadelphia. One year later, he became the Chief Justice of Pennsylvania and served in that position for the next twenty-two years. Significantly, McKean also played an important role in Pennsylvania's second constitutional convention in 1789-90. In fact, McKean was the leading proponent of perpetuating the English common law right to trial by jury with the words "as heretofore" in the 1790 Pennsylvania Constitution.

The decision to preserve the complete common law right to trial by jury "as heretofore" in the 1792 Delaware Constitution, in terms almost identical to the 1790 Pennsylvania Constitution, is not surprising in view of Dickinson's and Bassett's prior relationship with McKean. John Dickinson, who had studied the common law in England with McKean, was the President of Delaware's 1792 Convention. Dickinson had unsuccessfully tried to perpetuate all features of the common law right to trial by jury in Article III of the United States Constitution. Along with McKean, Richard Bassett had agreed to perpetuate the common law of England in the 1776 Delaware Constitution, but was unsuccessful in working with Madison and Vining to accomplish that in the Sixth Amendment.

John Dickinson, Richard Bassett, and the other framers of Delaware's 1792 Constitution wanted to incorporate all of the well-established common law principles of trial by jury into the protections afforded by

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[96] PA. CONST. art. I, § 6 (amended 1790).

Delaware's 1792 Bill of Rights. When the amendments to the United States Constitution, as they had been proposed by James Madison, were being discussed by the House of Representatives' Committee Select, John Vining had urged "a plainness and simplicity of style on this and *every other occasion*, which should be easily understood."[97] John Vining's advice was followed by Dickinson, Bassett, and the other delegates to the 1791 Delaware Constitutional Convention.

When the convention concluded its work on December 31, 1791, its draft of the proposed Delaware Constitution provided that "trial by jury shall be as heretofore," i.e., the provision in the 1776 Delaware Constitution perpetuating all of the guarantee of trial by jury as they had existed at common law.[98] Thus, Delaware's unambiguous commitment to the preservation of the common law right to trial by jury was evidenced with a "simplicity of style."

The draft was signed by the members of the Delaware Constitutional Convention on January 12, 1792.[99] The signatures of the long-time champions of the common law right to trial by jury, John Dickinson and Richard Bassett, signify their satisfaction and approval of the provision that "trial by jury shall be as heretofore" in the December 31, 1791 draft.[100] That draft was adopted, without change, as Delaware's Constitution in 1792.[101]

IX. CIVIL JURY RIGHTS: DELAWARE CONSTITUTION

When Delaware adopted its Constitution in 1792, its citizens were guaranteed the right to trial by jury "as heretofore."[102] In doing so, the 1792 Delaware Constitution expressly preserved all of the fundamental features of the jury system as they existed at common law for both criminal and civil proceedings.[103] A *sine qua non* of that common law jurisprudence is the principle that either party shall have the right to demand a jury trial upon an issue of fact in a civil action at law.

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97 2 SCHWARTZ, *supra* note 60, at 1068.

98 Nance v. Rees, 161 A.2d 795, 799 (Del. 1960); *see also* Vol. 1, Del. C. § 121 (1974); 1 SCHARF, *supra* note 27, at 270.

99 POWELL, *supra* note 46, at 191.

100 Vol. 1, Del. C. § 137 (1974).

101 1 SCHARF, *supra* note 27, at 270-71.

102 *See* Claudio v. State, 585 A.2d 1278, 1298 (Del. 1991).

103 *Id.*; *see also Nance*, 161 A.2d at 795.

The 1776 Delaware Declaration of Rights, which was preserved by the "heretofore" text in the 1792 Constitution, had referred to the right to trial by jury regarding factual issues as "one of the greatest securities of the lives, liberties and estates of the people." John Dickinson, one of Delaware's leading statesmen, called trial by jury a "heaven-taught institution" which was one of the "cornerstones of liberty" and the birthright of every American citizen.[104] Thomas Jefferson described the fact finding function of jurors in a letter to Pierre S. DuPont of Delaware, as follows:

> the very essence of a Republic. . . . We of the United States . . . think experience has proved it safer for the mass of individuals composing the society to reserve to themselves personally the exercise of all rightful powers to which they are competent. . . .
>
> Hence, with us, the people . . . *being competent to judge of the facts occurring in ordinary life, . . . have retained the functions of judges of facts under the name of jurors*. . . .
>
> I believe . . . that action by the citizens, in person in affairs within their reach and competence, and in all others by representatives chosen immediately and removable by themselves, constitutes the essence of a Republic.[105]

The Delaware General Assembly enacted a statute in 1855 that, with the agreement of all the parties, purportedly allowed judges to decide issues of fact without a jury in civil actions at law.[106] Nevertheless, because the Delaware Constitution preserved the right to trial by jury as "heretofore," Delaware judges took the position that, absent constitutional amendment, the General Assembly could not alter the right by statute.[107] They concluded that the Delaware Constitution required a jury to decide such questions. Therefore, notwithstanding the enactment of the 1855 statute by the General Assembly, Delaware judges remained reluctant to decide issues of fact in a civil action at law.

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104 Dickinson, *supra* note 60, at 546-50; *see Claudio*, 585 A.2d at 1292.

105 Letter from Thomas Jefferson to Pierre S. DuPont (April 4, 1816), *in* 4 ANNALS OF AMERICA 414 (1976); *see* 2 J. KENDALL FEW, IN DEFENSE OF TRIAL BY JURY 456 (1993).

106 11 Del. Laws 270 (1855).

107 *See* 3 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF DELAWARE 1730 (1958) [hereinafter CONSTITUTIONAL DEBATES].

When the present Delaware Constitution was rewritten in 1897, the General Assembly included several significant provisions regarding the right to trial by jury. In 1897, one of the new sections added to Article IV of Delaware's Constitution[108] was section 20 which provided that, "[i]n civil causes where matters of fact are at issue, if the parties agree, such matters of fact shall be tried by the court, and judgment rendered upon their decision thereon as upon a verdict by a jury."[109] According to the constitutional debates, the purpose of the new section was to address the concerns of Delaware's jurists about the constitutionality of the 1855 statutory authorization for litigants to waive a trial by jury in an action at law on an issue of fact.

> WILLIAM C. SPRUANCE: Mr. Chairman, that is new, but it is a provision found in many Constitutions, and it is substantially a restatement of a statute which exists today.
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> But the difficulty is, that some of our Judges—very wise and good men though they be—have taken very solemn oaths that they would not try questions of fact. They said they would not try questions of fact, even though that was put upon them by the Legislature, that the Legislature had no right to put it upon them; and I know one eminent Judge who said in "nautical" language that he would not do it.[110]

Article IV, section 19 was another new addition in the 1897 Constitution and provided: "Judges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law."[111] The reason given during the constitutional debates for the adoption of section 19 was to ensure "that Judges shall confine themselves to their business, which is to adjudge the law and leave juries to determine the facts."[112]

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108 The text of Article IV, section 20 originally appeared as section 23 in 1897.

109 DEL. CONST. art. IV, § 20 (1897).

110 3 CONSTITUTIONAL DEBATES, *supra* note 107, at 1730; *see also* Graham v. State Farm Mut. Auto. Ins. Co., 565 A.2d 908, 912 (Del. 1989) (explaining that parties to Delaware actions are entitled to request a jury trial, but that they may waive that right if they "so intend").

111 DEL. CONST. art. IV, § 19 (1897).

112 3 CONSTITUTIONAL DEBATES, *supra* note 107, at 1730; *see* Storey v. Camper, 401 A.2d 458, 463 n.4 (Del. 1979).

In *Storey v. Camper*, the court characterized section 19 as perpetuating Delaware's commitment to trial by jury in civil actions at law with regard to issues of fact. In examining when a trial judge may set aside a jury verdict, the court described Delaware's long history of commitment to trial by jury. The court explained that section 19 reaffirmed Delaware's commitment to the common law principles regarding trial by jury:

> In the policy of the law of this state, declared by the courts in numberless decisions, the jury is the sole judge of the facts of a case, and so jealous is the law of this policy that by express provision of the Constitution the court is forbidden to touch upon the facts of the case in its charge to the jury.[113]

In interpreting section 19, the Delaware Supreme Court has emphasized that only the jury may judge the facts and the court is prohibited from commenting on the facts in the charge to the jury.[114] The purpose of this provision in the Delaware Constitution is to protect the provinces of the jury on factual issues. A similar provision was inserted in the Tennessee Constitution prior to the Civil War to stop the English practice of "summing up," which consists of telling the jury what had been proven by the respective litigants at trial.

Article I of the 1897 Delaware Constitution was denominated for the first time as the "Bill of Rights." Most importantly, section 4 of that article provided for the right to trial by jury as "heretofore" with regard to both civil and criminal trials by jury.[115]

X. FEDERAL JURY TRIALS: ESSENTIAL COMMON LAW FEATURES—NOT TWELVE AND NOT UNANIMOUS

While protecting the right to a trial by jury in criminal cases, neither Article III nor the Sixth Amendment specifies the number of jurors required to satisfy these constitutional guarantees. In 1898, the United

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113 *Storey*, 401 A.2d 458, 462 (quoting Phil., Balt. & Wash. R.R.. Co. v. Gatta, 85 A. 721, 729 (Del. 1913)).

114 *Gatta*, 85 A. at 729.; *see also* Porter v. State, 243 A.2d 699, 701 (Del. 1968); Guthridge v. Pen-Mod, Inc., 239 A.2d 709, 711 (Del. Super. Ct. 1967); Girardo v. Wilmington and Phil. Traction Co., 90 A. 476, 477 (Del. Super. Ct. 1914).

115 That same "heretofore" right had been set forth in all of Delaware's preceding Constitutions since 1792. *See* Hopkins v. J.P. Ct. No. 1, 342 A.2d 243, 245-46 (Del. Super. Ct. 1975).

States Supreme Court stated that the Sixth Amendment guarantees all criminal defendants the right to a jury of twelve citizens.[116] In 1899, the Supreme Court, in *Capital Transaction Co. v. Hof,* stated, "[t]rial by jury, in the primary and usual sense of the term at the common law and in the American constitutions ... is a trial by a jury of twelve men, in the presence and under the superintendence of a judge."[117] Similarly, in 1897, the Court determined that the right to jury given by the Seventh Amendment included the right to a unanimous verdict.[118] In 1913, the Court held that the right to jury trial "preserved is the right to have the issues of fact presented by the pleadings tried by a jury of twelve, under the direction and superintendence of the court."[119]

Nevertheless, in 1970, in the case of *Williams v. Florida,*[120] the United States Supreme Court held that a Florida rule of criminal procedure allowing six-person juries was constitutional. In *Williams,* the Court held that the Florida rule did not violate the Sixth Amendment to the United States Constitution as applied to the states through the Due Process Clause of the Fourteenth Amendment. Justice White, writing for the majority, stated: "We conclude ... the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance except to mystics."

Three years after *Williams,* in the case of *Colgrove v. Battin,*[121] the Supreme Court held that the Seventh Amendment to the United States Constitution did not mandate twelve-person juries in civil cases. In holding that the six-person jury was compatible with the Seventh Amendment civil jury trial right, the Supreme Court cited its conclusion in *Williams* that the number twelve was "a historical accident." The Supreme Court reasoned that a twelve-member jury is not a substantive aspect of the right to a trial by jury, and that a reduction in the number of jurors does not affect the purpose of a jury in civil cases—"to assure a fair and equitable resolution of factual issues."[122] It distinguished *Capital Traction Co. v. Hof* and other prior Supreme Court cases by stating that the references to civil juries of twelve were dicta.

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116 Thompson v. Utah, 170 U.S. 543 (1898).
117 174 U.S. 1, 13 (1889).
118 Am. Publ'g Co. v. Fisher, 166 U.S. 464 (1897).
119 Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 397 (1913).
120 399 U.S. 78 (1970).
121 413 U.S. 149 (1973).
122 *Id.* at 157.

No mention of the common law unanimity requirement exists in the jury trial protections in Article III nor the Sixth and Seventh Amendments. Just as six-member juries were found to be constitutional in *Williams*[123] and *Colgrove*, non-unanimous verdicts were held to be constitutional in *Apodaca v. Oregon*[124] and *Johnson v. Louisiana*.[125] Focusing on the function served by the jury in contemporary society, i.e., providing a safeguard against overzealous prosecutors or biased judges, the *Apodaca* Court "perceive[d] no difference between juries required to act unanimously and those permitted to acquit by votes of ten-to-two or eleven-to-one."[126]

The relaxation of traditional size and verdict requirements is now reflected in some state constitutions.[127] The Delaware Constitution, however, continues to provide for the complete protections of the common right to trial by jury in both criminal and civil proceedings. That includes the right to the unanimous verdict of twelve persons.

XI. INCORPORATION DOCTRINE: CRIMINAL JURY NOT CIVIL JURY

Prior to the adoption of the Fourteenth Amendment to the United States Constitution, in a unanimous decision written by Chief Justice John Marshall in 1833, the United States Supreme Court specifically held that the federal Bill of Rights afforded no protection against any state's action.[128] In that opinion, Chief Justice Marshall explained that the entire federal Bill of Rights was intended solely as a limitation on the exercise of power by the government of the United States, and was not applicable to the legislation of the states.

> In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against

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123 *Williams*, 399 U.S. 78.

124 406 U.S. 404 (1972).

125 406 U.S. 356 (1972).

126 *Apodaca*, 406 U.S. at 411.

127 *See* DAVID B. ROTTMAN ET AL., U.S. DEPARTMENT OF JUSTICE, STATE COURT ORGANIZATION 1988 tbl. 42 (2000) (stating jury size and verdict requirements for all 50 states).

128 Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833).

> those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This Court cannot so apply them. Accordingly, from the Declaration of Independence until the Civil War, state constitutional declarations or bills of rights were the primary guarantors of individual liberties against infringement by state governments.[129]

The Fourteenth Amendment fundamentally altered the original balance of power in the United States Constitution, by expanding federal power at the expense of state autonomy.[130] Until the adoption of the Fourteenth Amendment in 1868, the Federal Bill of Rights protected individual rights solely against encroachment by the federal government.[131] In 1925, there was a paradigm shift in the operation of America's state and federal jurisprudence. Thereafter, the United States Supreme Court began to hold that selected provisions of the Federal Bill of Rights also afforded protection against state action by virtue of the Due Process clause of the Fourteenth Amendment.[132] That is now known as the incorporation doctrine.[133]

When the Delaware Constitution of 1792 was adopted, the right to trial by jury set forth in the federal Bill of Rights as the Sixth and Seventh Amendments to the United States Constitution was only a protection against action by the federal government.[134] The Sixth Amendment right to trial by jury in criminal proceedings has been deemed to have been incorporated by the Due Process clause and now also provides protection against state action.[135] Nevertheless, the United States Supreme Court has not held that the Seventh Amendment's guarantee of

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129 *Id.* at 247.

130 City of Rome v. United States, 446 U.S. 156, 179 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976); *see also* WILLIAM NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988).

131 *Barron*, 32 U.S. (7 Pet.) at 247-48.

132 Gitlow v. New York, 268 U.S. 652, 666 (1925).

133 *See* Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

134 *Barron*, 32 U.S. at 243.

135 Duncan v. Louisiana, 391 U.S. 145 (1968).

jury trials in civil proceedings was made applicable to the states by the incorporation doctrine with the adoption of the Fourteenth Amendment to the United States Constitution.[136] Accordingly, the right to a jury trial in civil proceedings has always been and remains exclusively protected by provisions in the constitution of Delaware and in each other state constitution.

XII. DELAWARE CONSTITUTION: COMMON LAW COMMITMENT

Delaware's constitutional commitment to continue to guarantee the right to trial by jury for its citizens, as it existed at common law, was expressly recognized in the arguments presented to then Judge Richard Bassett, in the earliest reported decision to construe the phrase "trial by jury shall be as heretofore" in the Delaware Constitution of 1792:

> [t]he [Delaware] Constitution is express that "trial by jury shall be as heretofore," plainly intending to secure both the form and the substance, the trial and the constitution of the jury.
>
> [t]he framers of the [Delaware] Constitution of 1776 were aware of that importance, when they declared (1 Del.Laws, Appendix 81) it to be a fundamental rule "that trial by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people." *The provision in the present Constitution is stronger and more positive, "Trials by jury shall be as heretofore."*
>
> A comparison of the [Delaware] Constitution or System of Government and Declaration of Rights of 1776 with the present Constitution will convince any one, if a doubt exists on the subject, that *the Convention of 1792 had the old Constitution before them and made it in fact the groundwork of their labors*; for many of its most important provisions are inserted in the present Constitution without the slightest variation even of the expressions, while other principles of the old system are adopted in

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[136] Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916); Walker v. Sauvinet, 92 U.S. 90 (1876); *see also* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 654 n.47 (1973).

> language differing but little in its terms, and bearing precisely the same purport. The fourteenth section of the Declaration of Rights is made the seventh section of first article of the present [Delaware] Constitution, with this important exception, that it is not provided in the latter, as in the former, that no person shall be found guilty without the unanimous consent of an impartial jury. But are we therefore to suppose that it was intended to vest the legislature with the power of enacting that a person accused of a criminal offense might be convicted upon the finding of a majority of a jury? By no means. It was considered that this principle was secured by the fourth section, which says that "*trial by jury shall be as heretofore,*" and a *repetition of it was deemed unnecessary.*[137]

The teaching of *Oldfield* was ratified and reaffirmed by the Delaware Supreme Court one hundred and fifty years later:

> It is of course fundamental under our law that the verdict of a jury must be unanimous. This follows from Article I, § 4 of the Delaware Constitution, Del.C.Ann. providing that, "The right to trial by jury shall be as heretofore." This provision of our Constitution guarantees the right to trial by jury as it existed at common law.... Unanimity of the jurors is therefore required to reach a verdict since such was the common law rule.[138]

One year earlier, in 1970, the Delaware Constitution Revision Commission had written in its study commentary:

> Article I, [s]ection 4, of the present constitution deals with three distinct subjects: (1) Right of trial by jury in civil cases; (2) right of trial by jury in criminal cases; and (3) requirement, composition, and conduct of the grand jury. Since the three types of juries, including special juries, existed *at common law, the 1792 Constitution's adoption of the right of trial by jury "as heretofore," and its*

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137 Wilson v. Oldfield, 1 Del. Cas. 622, 624-27 (1818) (emphasis added).

138 Fountain v. State, 275 A.2d 251, 251 (Del. 1971).

> *carryover in successive constitutions to date, brings forward to the present day reliance on the common law as to right of the petit jury in civil and criminal actions,* the special jury in civil actions, and the grand jury. *Because of this situation, reference must always be made to common law to properly interpret the meaning of the present constitution.*[139]

The entire Delaware Bill of Rights has remained virtually intact since those provisions were adopted in the 1792 Constitution. The Delaware Constitution of 1831 retained the 1792 version of the bill of rights. The members of the 1897 Convention also felt strongly that changes should not be made in the Bill of Rights.[140] As a result, no significant changes to the Delaware Bill of Rights, as originally stated in 1792 and restated verbatim in 1831, were made in the Constitution of 1897. Similarly, no significant amendments to the Delaware Bill of Rights have been made since 1897.

Article I, section 4 of the Delaware Constitution still provides that "[t]rial by jury shall be as heretofore." This language has appeared in Article I, section 4 of three successive Delaware constitutions—1792, 1831 and 1897. This language was left unchanged when Article I, section 4 was amended as recently as 1984. The Delaware Supreme Court has always construed that provision in the Delaware Constitution as *"guaranteeing the right to trial by jury as it existed at common law."*[141]

XIII. CONCLUSION

In *Williams v. Florida,* when examining the federal Constitutional right to a jury trial, the United States Supreme Court stated:

> While "the intent of the Framers" is often an elusive quarry, the relevant constitutional history casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at

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139 DOCUMENTS OF THE CONSTITUTION REVISION COMMISSION, COMMENTARY ON THE PROPOSED CONSTITUTION, PROPOSED SECTION 1.02 (1969).

140 *See* 4 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF DELAWARE 2386 (1958 ed.).

141 *Fountain,* 275 A.2d at 251 (emphasis added); *see also* Thomas v. State, 331 A.2d 147 (Del. 1975); *In re* Markel, 254 A.2d 236 (Del. 1969); Nance v. Rees, 161 A.2d 795 (Del. 1960); *see, e.g.,* State v. Fossett, 134 A.2d 272 (Del. 1957); Hopkins v. J.P. Ct. No. 1, 342 A.2d 243 (Del. Super. Ct. 1975).

> common law in 1789, then it was necessarily preserved in the Constitution.[142]

After an extensive review of the history leading to the actual wording of the right to trial by jury in the federal Bill of Rights, the United States Supreme Court concluded, "there is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury."[143] Accordingly, the United States Supreme Court has turned to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the United States Constitution.[144]

Conversely, it is untenable to conclude that the right to trial by jury in the Delaware Constitution means exactly the same thing as that right in the United States Constitution.[145] The history of the right to trial by jury "as heretofore," which has remained unchanged in the Delaware Constitution since 1792, demonstrates an unambiguous intention to equate Delaware's constitutional right to trial by jury with the common law characteristics of that right. Consequently, *all* of the fundamental features of the jury system, as they existed at common law, have been preserved for Delaware's citizens.

Therefore, the proper focus of any analysis of the right to trial by jury, as it is guaranteed in the Delaware Constitution, requires an examination of the common law. The Supreme Courts of other states have reached similar conclusions about the common law's reception into their state's constitutions.[146] A number of states, for example, authorize juries less than the common law number of twelve.[147]

The goal of American federalism, in the words of the Preamble to the United States Constitution, was to form a "more perfect Union," by

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142 399 U.S. 78, 92-93 (1970).

143 *Id.* at 99.

144 *Id.*

145 Sanders v. State, 585 A.2d 117 (Del. 1990).

146 *See, e.g.*, Baker v. City of Fairbanks, 471 P.2d 386, 399-401 (Alaska 1970); State v. Sklar, 317 A.2d 160, 166-68 (Me. 1974); *In re* Advisory Opinion to Senate, 278 A.2d 852, 855-57 (R.I. 1971).

147 Maxwell v. Dow, 176 U.S. 581 (1900). Several states do not adhere to the common law requirement for unanimous verdict. *See* Fay v. New York, 332 U.S. 261, 296 (1947); Jordan v. Commonwealth, 225 U.S. 167, 176 (1912); *see, e.g., Williams*, 399 U.S. at 78; Note, *Trial by Jury in Criminal Cases*, 69 COLUM. L. REV. 419, 430 (1969).

providing for a decision of sovereign power at two levels.[148] The constitutions adopted by the original states and "the constitution of every State entering the Union thereafter in one form or another," have protected the right to trial by jury.[149] Nevertheless, federal and state constitutional traditions have been distinct. "The guarantees of jury trial in the Federal and State Constitutions reflect a *profound judgment* about the *way* in which law should be enforced and justice administered."[150]

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148 *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

149 Duncan v. Louisiana, 391 U.S. 145, 153 (1968).

150 *Id.* at 155.