

The Value of Jury Rights

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ABSTRACT

The right to a civil jury trial is often dismissed as an inefficient anachronism ill suited to the complexities of modern litigation, and these efficiency concerns have long overshadowed any serious defense of the Seventh Amendment. This Article argues that such skepticism profoundly misunderstands the constitutional function and enduring value of civil jury rights. The Article observes that the Seventh Amendment's jury right was adopted with the understanding that it would come with some inefficiencies and that contemporary concerns about its inefficiencies tend to be overstated. Ultimately, the Article finds that civil juries are essential for structural reasons such as preserving the fact-law distinction and limiting government.

The Article thus defends civil jury rights on historical and structural grounds. Its argument is particularly urgent in the wake of SEC v. Jarkesy, in which the Supreme Court limited the administrative state's evasion of jury rights. That case was only a first step toward restoring jury rights, and federal agencies are already trying to circumvent it. So, it is crucial to recognize not only the constitutional foundation of civil jury rights but also their value.

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INTRODUCTION

What is the value of the constitutional right to a jury in civil cases? Trial by jury in such cases dates back to the Middle Ages,¹ so is it even remotely plausible to think that the right to such a trial matters in the twenty-first century? And given that jury trials are time consuming and expensive,² why not ditch the right to a jury—at least in civil cases?

This Article argues that the right to a jury in civil cases has profound value. Scholarly literature has been skeptical of the right for more than a century, most prominently by complaining about the inefficiency of jury trials.³ This complaint, however, is overstated and in any case is not the only consideration.

Part I explains why it is so important in the wake of *SEC v. Jarkesy*⁴ to recognize the value of the Seventh Amendment right to a jury in civil cases. Part II argues that the inefficiency of *using* juries in civil cases is not dispositive as to the merits of having the *right* to a civil jury. Part III observes that the Founders anticipated the inefficiency of civil juries and, nonetheless, guaranteed the right to them. Part IV points out that the Seventh Amendment's twenty-dollar limitation, which is assumed to have inefficiently ignored inflation,⁵ is just the civil jury right's floor, not a measure of when the right is efficient. Part V explains that the alleged incompetence of jurors in complex cases is overstated. Part VI observes that the right to a jury preserves the democratic quality of law and the law-fact distinction. Part VII points to the right's political importance in limiting dangerous power and preserving liberty. Overall, this Article explains why the right to a jury trial is an essential protection in civil litigation, not just in criminal prosecutions.

¹ See, e.g., *Civil Trials and Common Law Juries in Medieval England*, CONST. RTS. FOUND. 1–2 (2012), <https://teachdemocracy.org/images/pdf/civiltrialsandcommonlawjuriesinmedievalengland.pdf> [<https://perma.cc/N2QN-3U8N>] (providing that “by the end of the 1100s, a defendant in a civil dispute (lawsuit) considered it his right to . . . [have] a common jury of freemen to decide the true facts”).

² See *infra* notes 27–33 and accompanying text.

³ See *id.*; Victoria A. Farrar-Myers & Jason B. Myers, *Echoes of the Founding: The Jury in Civil Cases as Conferrer of Legitimacy*, 54 SMU L. REV. 1857, 1880–82 (2001) (noting that juries are “inefficient and uncertain” and that “[o]ne way to reduce this . . . would be to restrict or eliminate the trial by jury in civil cases,” though ultimately concluding that the right to a jury in civil cases is fundamental); Charles E. Clark & Harry Shulman, *Jury Trial in Civil Cases—a Study in Judicial Administration*, 43 YALE L.J. 867, 884–85 (1934) (criticizing civil juries as inefficient and noting that reform may be advisable).

⁴ 603 U.S. 109 (2024).

⁵ See, e.g., Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665, 1672, 1686 (2005) (arguing that “[t]he Amenders were aware of inflation” so the lack of an inflation provision “should be respected as an informed decision,” but noting that this makes the Seventh Amendment “incapable of modern application that is true to its historical purpose of protecting liberty”).

There undoubtedly are other benefits. The points in this Article, however, should suffice to suggest that even if jury trials are inefficient, the right to a jury in civil cases has substantial value that cannot be quantified in hours and dollars.

I. THE ADMINISTRATIVE SIGNIFICANCE OF THE QUESTION

It is crucial to understand the value of juries, especially civil juries, because the Supreme Court has begun to reconsider the administrative assault on civil jury rights. For approximately a century, the Court had permitted administrative tribunals to proceed without juries.⁶ In *SEC v. Jarkesy*, however, the Court began to reconsider that stance.⁷ As that reconsideration proceeds, judges and scholars will need to recognize why civil jury rights matter.

Jury guarantees were once foundational. The Sixth Amendment declares that, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”⁸ The Seventh Amendment similarly 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”⁹

Such assurances were impediments to the development of administrative power. Administrative agencies enforce their own regulations, not just law.¹⁰ Agencies could not rely on the courts of law to carry out their policies, lest judges and juries hinder enforcement. Judges might have too much independence and attachment to law, and juries, being drawn from the people, might not defer to agency expertise.¹¹

⁶ See *Jarkesy*, 603 U.S. at 127–34 (compiling the history of cases in which the Court had so held).

⁷ See *id.* at 115, 140 (holding that when the Securities and Exchange Commission (“SEC”) seeks civil penalties for alleged securities fraud, the defendants “are entitled to a jury trial in an Article III court” which an adjudication before an administrative law judge does not fulfill).

⁸ U.S. CONST. amend. VI.

⁹ *Id.* amend. VII.

¹⁰ See, e.g., *Jarkesy*, 603 U.S. at 116–18 (noting the SEC brought an enforcement action against the defendants for violating SEC regulations).

¹¹ The standard defense of administrative tribunals is that they bring expertise to the complicated disputes engendered by agency regulations. See, e.g., Carl N. Pickerill, *Specialized Adjudication in an Administrative Forum: Bridging the Gap Between Public and Private Law*, 82 NOTRE DAME L. REV. 1605, 1627–30, 1646–47 (2007) (noting that the allure of administrative adjudications is “in their ability to apply expertise to the complexity of cases arising in the modern age”). In fact, it is far from clear that all or even most administrative law judges (“ALJs”) have any depth of expertise in the fields subject to the regulations they enforce. For example, most ALJs are brought into their agencies from the Social Security Administration. See, e.g., JACK M. BEERMANN & JENNIFER L. MASCOTT, ADMIN. CONF. OF THE U.S., RESEARCH REPORT ON FEDERAL AGENCY ALJ HIRING AFTER LUCIA AND EXECUTIVE ORDER 13843, at 1–2 (2019), <https://www.acus.gov/sites/default/files/documents/Submitted%20final%20draft%20JB.pdf> [<https://perma.cc/Z5B5-PHRB>] (also

Agencies therefore needed to bring their enforcement actions in their own tribunals, overseen by administrative law judges sitting without juries. Congress and the Supreme Court agreed. Throughout the twentieth century they systematically underwrote administrative tribunals, thereby denying Americans access to the courts and their juries.¹²

The underlying theory was that administrative proceedings, even when seeking regulatory enforcement, were civil—the implication being that the loss of jury rights in such proceedings was not too serious when compared to criminal cases.¹³ On top of this, the Supreme Court mobilized the term *public rights*. The phrase appears nowhere in the Constitution and even in the nineteenth century was understood very modestly.¹⁴ In the twentieth century, however, outside of the limited context of bankruptcy, the Court almost categorically allowed public rights to defeat the Seventh Amendment’s private right to a jury.¹⁵

noting that “many ALJs have viewed [the Social Security Administration] as a kind of training ground for an ALJ position at an[other] agency”).

¹² See, e.g., *supra* note 6 and accompanying text; 5 U.S.C. § 554 (providing standards for administrative adjudications).

¹³ See, e.g., *Helvering v. Mitchell*, 303 U.S. 391, 402 (1938) (contrasting civil and criminal penalties and finding that “civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply”); *Atlas Roofing Co. v. Occupational Safety and Health Rev. Comm’n*, 430 U.S. 442, 450, 458 (1977) (noting that the Court had upheld statutory schemes which provided civil penalties for violations “and committed exclusively to an administrative agency the function of deciding whether a violation ha[d] in fact occurred[.]” and that “factfinding, which is the essential function of the jury in civil cases, was never the exclusive province of the jury . . . at the time of the adoption of the Seventh Amendment” (citation omitted)).

¹⁴ See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855) (briefly discussing the concept without using the name *public rights*).

¹⁵ Compare *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 64 (1989) (finding that defendants in civil bankruptcy actions are entitled to a jury), with *Atlas Roofing Co.*, 430 U.S. at 460–61 (finding the opposite for workplace safety actions under the public rights exception); *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (finding that other public rights cases include those surrounding “interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans”). Another assault on jury rights focused on criminal prosecutions. Efficient criminal enforcement of the growing mass of federal regulation would be nearly impossible if prosecutors had to present their cases to juries. So, it seemed only efficient and reasonable to leave petty offenses for resolution in the administrative underbelly of the court system—that is, without juries and often with mere magistrate judges. See Fed. Magistrate Judges Ass’n, *United States Magistrate Judges: Their Function and Purpose in Our Federal Courts*, DIST. CT. FOR THE DIST. OF MD., <https://www.mad.uscourts.gov/human-resources/pdf/FMJA%20Brochure.pdf> [<https://perma.cc/JWW3-JW7X>] (explaining that the role of magistrate judges was expanded and that they now “dispose of all petty offense cases” to “help assure efficient disposition of the civil and criminal caseloads of the United States District Courts”). Although the Supreme Court did not mention these background considerations, it has held that petty offenses lay beyond the Constitution’s guarantee of jury rights for “all Crimes” and the Sixth Amendment’s promise of jury rights in all “criminal prosecutions.” U.S. CONST. amend. VI; see also *Duncan v. Louisiana*, 391

All of this began to change in 2024 with *SEC v. Jarkesy*.¹⁶ To be sure, the Court in that case did not recognize that most regulatory enforcement proceedings seek to correct or penalize and thus are criminal in nature.¹⁷ Nor did it admit that its decisions have long legitimized administrative proceedings without juries¹⁸—for example, by relying on the nonconstitutional term *public rights* and by giving it a dangerously broad meaning.¹⁹ But even while pretending that nothing had changed in its view of public rights, the Court retreated from its twentieth-century tolerance of the view that enforcement proceedings seeking civil penalties or fines fit within the public rights exception.²⁰ It restated the long-disrespected principle that “matters concerning private rights may not be removed from Article III courts”²¹ and held that the public rights exception did not “extend to . . . civil penalty suits for fraud.”²² The Court thus began to dismantle its longstanding use of the term *public rights* to defeat the private constitutional right to a jury.

One might imagine that if *Jarkesy* protects the right to a jury in civil cases, then there is no need to defend the value of that right. *Jarkesy*, however, does not go far enough. The Court ought to have entirely renounced the term *public rights*.²³ The danger of continuing to rely on the term is evident from the Court’s decision in *Oil States Energy Services v. Greene’s Energy Group*,²⁴ which allowed patents, which are property rights, to be adjusted in an administrative tribunal without a jury.²⁵ Moreover, *Jarkesy* itself is already under siege. Federal

U.S. 145, 158 (1968) (holding that there are “no constitutional doubts about the practice[] . . . [of] prosecuting petty crimes without extending a right to jury trial”).

¹⁶ See *supra* notes 6–7 and accompanying text.

¹⁷ See generally *SEC v. Jarkesy*, 603 U.S. 109 (2024).

¹⁸ *Id.* at 178 (Sotomayor, J., dissenting) (“[I]n every case where the Government has acted in its sovereign capacity to enforce a new statutory obligation through the administrative imposition of civil penalties or fines, this Court, without exception, has sustained the statutory scheme authorizing that enforcement outside of Article III.”).

¹⁹ See *supra* note 15. One might add that the Court also took a perversely narrow view of “suits at common law.” See *Atlas Roofing Co.*, 430 U.S. at 449 (construing “[s]uits at common law” to mean “cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary”).

²⁰ Although the Court in *Jarkesy* said that the case was largely resolved by *Granfinanciera*, see *Jarkesy*, 603 U.S. at 134, the Court had continued to tolerate juryless administrative enforcement of civil penalties and fines until deciding *Jarkesy* in 2024. See *supra* note 6 and accompanying text.

²¹ *Jarkesy*, 603 U.S. at 127.

²² *Id.* at 136.

²³ The Constitution positively defines the scope of judicial power in Article III and the Due Process Clause and the right to a jury in Article III and the Sixth and Seventh Amendments. See U.S. CONST. art. I, § 2; *id.* amends. VI, VII. It is a mistake to define what is outside of that power and right by reference to the term *public rights*, which does not appear in the Constitution.

²⁴ 584 U.S. 325 (2018).

²⁵ *Id.* at 328–29, 345.

agencies have been trying to persuade lower courts to give *Jarkesy* a narrow reading.²⁶ So, the Seventh Amendment civil jury right remains vulnerable.

It is therefore important to understand why the right matters. Judicial protection for the right is apt to respond to confidence in its value. If the right seems vital, the Seventh Amendment and *Jarkesy* are likely to be respected; if the right seems less significant, however, the amendment and *Jarkesy* are likely to be narrowed.

II. INEFFICIENCY IS NOT DISPOSITIVE

It is easy to understand why jury trials are considered inefficient. They add to the personnel necessary to decide a case; they complicate proceedings and their procedures;²⁷ they are very time consuming;²⁸ they increase expenses for courts and litigants;²⁹ and they take jurors away from their often busy lives.³⁰ It therefore is tempting to believe that, at least in civil cases, the right to a jury is an expensive luxury best consigned to the rubbish heap of history.

But just because current jury trials are so long and expensive does not mean they have to be so burdensome. Professor Renée Lerner notes that extensive voir dire has made jury selection lengthy, expensive, and complicated.³¹ “Lawyers in England and elsewhere are amazed at the length and intrusiveness of questioning potential jurors in American courts”³² Indeed, “many academics and some judges have recommended abolishing peremptory challenges.”³³ Therefore, rather than assume juries are inefficient, it makes more sense to reconsider whether voir dire could be moderated to lessen the drawbacks.

The costs of jury trials, moreover, do not alone show they are inefficient. Although the varied costs in time and money are relevant, a

²⁶ See, e.g., United States of America’s Answer to Complaint at 1, *Norcave Properties, LLC v. United States*, No. 25-cv-00398 (W.D. La. June 6, 2025) (“There is no constitutional right to a jury trial in matters encompassed within the public rights exception to the Seventh Amendment.” (citing *Jarkesy*, 603 U.S. at 128)).

²⁷ See, e.g., RENÉE LETTOW LERNER, *THE JURY: A VERY SHORT INTRODUCTION* 65–68 (2023) (discussing voir dire, the necessary and complex process of jury selection).

²⁸ See, e.g., *id.* at 104 (explaining that “in Los Angeles, the average length of time for a felony [jury] trial was 78 trial days . . . [though] the time can stretch into months”).

²⁹ See Editorial, *The Costs of Juries*, 93 *JUDICATURE* 92, 128 (2009) (noting that “[t]here is no question that jury trials are the single most expensive event that takes place in a courtroom”).

³⁰ For some of the difficulties of relying on jurors, see LERNER, *supra* note 27, at 104–05 (length of trial and costs to jurors).

³¹ *Id.* at 65–68.

³² *Id.* at 65.

³³ *Id.* at 68.

calculation of inefficiency would weigh them against the benefits of this mode of trial, and the literature on juries rarely does that.³⁴ The benefits are of a sort that are not easily reduced to numerical values, and for this reason, not to mention others, they are not obviously comparable to the costs.

For purposes of argument, however, assume jury trials are inefficient for civil cases. Even so, their inefficiency is not dispositive as to the merits of the right to a jury. The trial may be inefficient, but the right is merely the freedom to seek a jury. So, the inefficiency of *trial* by jury does not, by itself, show the inefficiency of having a *right* to a jury.

The efficiency objection to the right imagines a world in which courts hearing civil cases are frequently burdened by juries. From that perspective, the mere existence of the right means it will be commonly exercised. But the availability of the right to a jury does not necessarily mean that trials will regularly require a jury. On the contrary, even with jury rights most civil cases settle.³⁵ Therefore, it is mistaken to assume the mere existence of the right will impose the burden of jury trials in all or many cases.

It may be further objected that even the relatively few jury trials in civil cases are too much for the courts to handle. But that is not obviously true. Much of the burden of jury trials arises from judicial choices, not from the constitutional right to have a jury trial.³⁶ As already noted, the complexity and burden of voir dire are not required by the Seventh Amendment; rather, they result from judicial doctrine.³⁷ The federal judiciary, moreover, only has itself to blame for crowding its dockets with multidistrict litigation. When judges burden themselves in such ways, it is difficult to conclude that the right to a jury itself is the straw breaking the camel's back.

For such reasons, it should not be assumed that the allegations of inefficiency are true. The inefficiency of jury trials as currently conducted does not necessarily translate to the inefficiency of the right to a jury.

³⁴ *But see generally* Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987) (analyzing both the costs of litigation, including jury trials, and the benefits which juries bring).

³⁵ *See* Charlotte S. Alexander, Nathan Dahlberg & Anne M. Tucker, *Settlement as Construct: Defining and Counting Party Resolution in Federal District Court*, 119 NW. U. L. REV. 65, 65 (2024).

³⁶ *See* LERNER, *supra* note 27, at 65–68 (reviewing how attorney choices in voir dire create inefficiencies in jury trials).

³⁷ *See* Terry Fox, *Judicial Restrictions on Voir Dire: Have We Gone Too Far?*, 97 DENV. L. REV. 327, 336–46 (2020) (explaining that federal judges have wide latitude to control voir dire and reviewing the many common questions allowed).

III. INEFFICIENCY ANTICIPATED

Procedural rights, by their nature, are inefficient.³⁸ Their mere inefficiency is therefore not much of an argument against their value. And such concerns are particularly inapt for the Seventh Amendment right to a jury because, more than any other procedural right, it was adopted in the Constitution on the assumption that it would lead to inefficiencies and would be essential nonetheless.³⁹

A guarantee of jury rights in civil cases worried many Federalists. For example, Alexander Hamilton feared that “the changes which are continually happening in the affairs of society, may render a different mode of determining questions of property, preferable in many cases, in which that mode of trial now prevails.”⁴⁰ The English had already modified jury trials—for example, by using merchant juries in some commercial cases⁴¹—because “its former extent has been found inconvenient.”⁴² Accordingly, Hamilton supposed, “future experience may discover the propriety and utility of other exceptions.”⁴³ It seemed, however, “impossible in the nature of the thing, to fix the salutary point at which the operation of the institution ought to stop”⁴⁴ So, Hamilton and other Federalists thought this “a strong argument for leaving the matter to the discretion of the legislature”⁴⁵—to be “modified as the convenience of the public may require it.”⁴⁶

All the same, in response to Anti-Federalist concerns, James Madison led the move to guarantee the right to a jury in civil cases.⁴⁷ He had earlier joined Hamilton in arguing that such a right “must be . . . left to the

³⁸ See, e.g., Gross, *supra* note 34, at 748–57 (arguing that procedural legal systems are inherently inefficient, but that this may actually be a benefit).

³⁹ See Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 874 (2013); see also THE FEDERALIST NO. 83, at 573 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (describing trial by jury in civil cases as, in certain cases, “inconvenient”).

⁴⁰ THE FEDERALIST NO. 83, *supra* note 39, at 573 (Alexander Hamilton).

⁴¹ See William C. Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445, 458 (1958) (noting that “special juries composed of merchants were used by the common law courts in mercantile cases as late as 1806”).

⁴² See THE FEDERALIST NO. 83, *supra* note 39, at 573 (Alexander Hamilton).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 470 (Washington, Jonathan Elliot ed., 1836) (statement of Edmund Randolph, Governor of Virginia, on June 14, 1788). For the debate in Virginia over this issue, see Philip Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 241 (1989). For North Carolina, see *id.* at 295.

⁴⁷ See Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 302–03.

discretion of the Legislature to modify it according to circumstances,”⁴⁸ but in 1789 he introduced what became the Seventh Amendment.⁴⁹ This is not to say he had abandoned his concerns about a broad protection for civil juries.⁵⁰ It surely would be inconvenient, perhaps increasingly so. Yet it was necessary to “satisfy the public mind that their liberties will be perpetual”⁵¹ Convenience had to make way for an assurance of freedom.⁵²

The value of the Seventh Amendment—at least its political value, that is—was understood to rise above questions of efficiency.

IV. THE TWENTY-DOLLAR LIMITATION WAS NOT INEFFICIENT

All the same, one may worry that, at least in one respect, the Founders made a gross error. Did they not realize inflation would eat away at the Seventh Amendment’s twenty-dollar limitation?⁵³ The very fact that the Founders relied on a fixed dollar limit suggests that whatever inconveniences they anticipated, they did not understand something as basic as the idea that inflation could render the right burdensome and obsolete.

But such skepticism about the twenty-dollar limit misconceives its function. In England, outside of equity and admiralty proceedings, the jury was traditionally a right in all civil proceedings with claims above forty shillings—this being the jurisdictional floor for common law courts.⁵⁴ In contrast, the county courts were undisturbed in their civil jurisdiction below that amount. Forty shillings was thus not a measure of convenience, but rather merely the jurisdictional floor for the right to a civil jury. Some American state statutes adjusted this floor to account for inflation, creating a range from forty shillings to twenty dollars or pounds. Lesser cases were heard by justices of the peace or other non-common law courts sitting without juries.⁵⁵

⁴⁸ *The Virginia Convention: Friday, 20 June 1788*, in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 1412, 1418 (John P. Kaminski et al. eds., 1993).

⁴⁹ CREATING THE BILL OF RIGHTS 79–80 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991).

⁵⁰ *See id.*

⁵¹ *Id.*

⁵² *See id.* at 296.

⁵³ U.S. CONST. amend. VII (preserving the right of trial by jury “where the value in controversy shall exceed twenty dollars”).

⁵⁴ PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 410, 425 (2008).

⁵⁵ At the time of the drafting and ratification of the U.S. Bill of Rights, twenty dollars or pounds seems to have been the maximum jurisdiction for justices of the peace or courts of conscience acting without juries—with one exception, which is discussed below. For the jurisdiction of justices of the peace in Rhode Island over debts or damages of not more than twenty dollars, see 1798 R.I. Pub. Laws 188. For a 1747 South Carolina law setting twenty pounds, see Act of June 13,

All of this is revealing about the Seventh Amendment. In speaking of suits at common law “where the value in controversy shall exceed twenty dollars,” the amendment was merely echoing the old assumption that the right to a jury could not run below the minimum for common law jurisdiction.⁵⁶ Thus, when saying that the right of trial by jury “shall be preserved,” it was preserving the right in all civil actions within the jurisdiction of the common law system.⁵⁷ Twenty dollars was a baseline measure of the right, not narrowly a question of efficiency.

Early Americans were familiar with the risk that the low jurisdictional floor for jury rights might become inefficient in some cases, especially civil cases for low amounts.⁵⁸ In 1785, New Hampshire’s legislature authorized juryless proceedings for claims up to ten pounds.⁵⁹ The next year, however, the state’s courts repeatedly held that the

1747, in *THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA* 213, 214 (Philadelphia, R. Aitken & Son 1790).

Most other states set much lower amounts. For a 1777 Maryland law setting five pounds, see 1787 Md. Laws 159. For a 1784 Massachusetts law establishing four pounds, see Act of Mar. 11, 1784, in *THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS* 107, 107 (Worcester, Isaiah Thomas ed., 1788). For a 1782 New Jersey law authorizing hearings without juries up to six pounds, see Act of June 5, 1782, in *ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY* 263, 263 (Trenton, Isaac Collins ed., 1783). For a 1782 law establishing ten pounds in New York, see 1782 N.Y. Laws 238. In 1786, New Hampshire attempted to raise the amount to ten pounds, but this deviation from the traditional forty shillings was held unconstitutional in the Ten Pound Cases by the Rockingham Inferior Court. See HAMBURGER, *supra* note 54, at 422–35. In Georgia, as noted by a 1782 law, courts of conscience traditionally heard cases between forty shillings and ten pounds. 1800 Ga. Laws 255. Recognizing this, the Georgia Constitution of 1777 set the jurisdiction of the court of conscience at not more than ten pounds. GA. CONST. OF 1777, art. XLVI. Later, however, the Georgia Constitution of 1798 authorized justices of the peace to hear civil cases in which the debt did not exceed thirty dollars. GA. CONST. OF 1798, art. III, § 5. For a 1792 Delaware law setting twelve pounds, see 2 Del. Laws 1041 (1797). Connecticut apparently did not have such a law.

The exception from the typical twenty dollar or pound maximum was Virginia. In 1780, the state enacted:

[W]hereas by the depreciation of the paper money, the power of a justice of the peace is in a measure done away, and creditors must be deprived of many of their just demands, or be compelled to institute suits in the courts of law, by which means the greater part of the debt will be expended in the prosecution for recovery thereof; . . . a single justice of the peace may have cognizance and finally determine any cause whatsoever, where the sum shall not exceed two hundred pounds of tobacco or the value thereof in paper money

Act of Oct. 1780, in 10 *THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA* 352, 352 (Richmond, William Waller Hening ed., 1822). The two hundred pounds referred to, of course, the tobacco’s weight, not its value.

⁵⁶ U.S. CONST. amend. VII.

⁵⁷ See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 247 (2014); Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 *HASTINGS CONST. L.Q.* 1013, 1019 (1994).

⁵⁸ See Klein, *supra* note 57, at 1019.

⁵⁹ HAMBURGER, *supra* note 57, at 243; Hamburger, *supra* note 54, at 422–35.

statute violated the state's constitution.⁶⁰ The constitution seemed to preserve the right to a jury enjoyed in England,⁶¹ and that meant there was a right to a jury for claims above forty shillings, regardless of the inconvenience.⁶²

Against this background, the Seventh Amendment's twenty-dollar limitation is not a measure of when the jury right would be efficient, but rather is just the floor for the jury right. Under the Constitution, Congress can flexibly respond to inflation by raising the jurisdictional floor of federal courts.⁶³ By contrast, the Constitution rigidly fixes a very low amount in the Seventh Amendment because the amendment aimed to preserve the right to a jury, and that meant protecting it in almost all civil cases.

In sum, although the Seventh Amendment was adopted with a recognition that jury trials could be inefficient, the twenty-dollar limit is not evidence of that inefficiency. The limit was merely the floor for the jury right, and any risk of burdensome dockets had a solution in the authority of Congress to raise the floor for the jurisdiction of federal courts.

V. THE INCOMPETENCE OF JURORS IN COMPLEX CASES IS OVERSTATED

Accompanying the inefficiency allegations are concerns about competence. Being drawn from the public, juries often lack the expertise necessary to understand complex cases, especially those that turn on questions of advanced scientific or commercial knowledge.⁶⁴ This problem, however, may not be as inherent or intractable as imagined.

The expertise problem was familiar to the Framers of the Constitution. As already noted, Hamilton objected to including a jury guarantee for civil cases because he was aware that the English had found it convenient to use merchant juries for some commercial cases.⁶⁵ Specialized knowledge might require a departure from traditional juries—if not their abolition, then at least the use of special juries populated by experts in the relevant field. Nonetheless, the Seventh Amendment protected the right to a jury without making any concession for complex cases.⁶⁶

⁶⁰ HAMBURGER, *supra* note 57, at 243; Hamburger, *supra* note 54, at 427–35.

⁶¹ See N.H. CONST. art. I, § XX (“In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, the parties have a right to a trial by jury . . .”).

⁶² Hamburger, *supra* note 54, at 427–35.

⁶³ U.S. CONST. art III, § 2 (providing Congress with the authority to make “Regulations” regarding federal court jurisdiction).

⁶⁴ For the complexity problem, see LERNER, *supra* note 27, at 89–93.

⁶⁵ See *supra* notes 40–46 and accompanying text.

⁶⁶ See U.S. CONST. amend. VII.

The Constitution's insistence on the right to jury even in the face of the need for expertise may seem obtuse. Nowadays, a defense of the right may seem blind to the reality that jurors often are not competent to sift through complex evidence.⁶⁷

It is true that when jurors in complex cases are unaided, they often have difficulty sorting out the truth.⁶⁸ But they do not necessarily have to work alone. Jurors traditionally were assisted by the judges who were free to comment on the evidence, but doctrinal objections to that assistance have substantially contributed to the current difficulties.⁶⁹ Quoting John Henry Wigmore, Professor Lerner explains that "the loss of judicial power to comment on evidence 'has done more than any other one thing to impair the general efficiency of jury trial as an instrument of justice.'"⁷⁰ It seems Wigmore was referring to the competence of juries, not just their efficiency narrowly understood in the sense of their speed. Certainly, judicial commentary on the evidence would go far in helping jurors navigate complex cases that depend on expert testimony.

So, before giving up on the right to a jury in civil cases, one might consider that judges could make the jury system work better. That might involve relaxing the rules of evidence. It would at least include loosening the restrictions on judicial commentary on evidence.

VI. ESSENTIAL FOR THE FACT-LAW DISTINCTION AND THE DEMOCRATIC QUALITY OF LAW

The right to a jury is valuable in ways that transcend mundane calculations of efficiency and overstated concerns about competence. Most basically, the right helps to preserve the law's democratic quality and the distinction between law and facts.

Professor J.H. Baker observes that when the English abandoned juries, they no longer had to state the law for the benefit of juries, and therefore they increasingly wrote opinions that blended law and fact together.⁷¹ Moreover, because the judges no longer needed to present the law in the concise and simple manner that might allow jurors to understand it, their opinions became long and complex.⁷² In short, the loss of juries in England undermined the fact-law distinction and diminished the law's legibility.

Put another way, the existence of the jury right shapes judicial incentives. Even when only some cases come before juries, judges must

⁶⁷ See LERNER, *supra* note 27, at 89–91.

⁶⁸ See *id.*

⁶⁹ See *id.* at 119–22.

⁷⁰ *Id.* at 122 (quoting 5 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 557 (1923)).

⁷¹ See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 81 (2d ed. 1979).

⁷² See *id.* at 81–82.

anticipate the need to instruct them. In a system with jury rights, the judges have reason to distinguish law from fact and to keep the law comprehensible enough for juries and the public from whom they are drawn.

The right to a jury thus regulates judicial opinions in ways that shape the character of the law. The jury right keeps the law distinct from facts and limits doctrinal complexity. Put in general terms, the right is crucial for the distinctly legal character of law and for preserving its democratic quality.

VII. CRUCIAL FOR LIMITING GOVERNMENT

Finally, the right to a jury in civil cases is politically important. It is essential for limiting government and preserving liberty.⁷³ At the very least, it is valuable for jurors. Although many do not appreciate it, their jury service can educate them about the law and inculcate their sense of public duty.⁷⁴ The more serious political benefits of the right, however, center on the parties, especially defendants.

Juries stand between the law and the parties, letting ordinary people be the ultimate decision makers. Not the government, not government experts, not even the judges, but a group of unspecialized individuals decides the outcome. In other words, the right to a jury assures parties that their fates can be decided by individuals who are apt to see their case very differently than a government official.⁷⁵ The jury right is therefore essential. Recognizing the importance of this distributed decision making, the Constitution guarantees juries in almost all cases, whether criminal or civil.⁷⁶

Although juries matter in criminal cases to protect against the government relying on its own adjudicators, juries are no less significant in civil cases. This may seem counterintuitive, because the government is not a party in most civil cases. Even in civil proceedings, however, the law is an instrument of government. Put another way, civil actions and remedies carry out government policy even when the cases are brought by private persons. So, defendants in civil actions generally have an

⁷³ See, e.g., THE FEDERALIST No. 83, *supra* note 39, at 562 (Alexander Hamilton) (noting that the right to a trial by jury is “a valuable safeguard to liberty . . . [and] the very palladium of free government”).

⁷⁴ See Mavis Duncan-Dyer, *Why Is Jury Service Important to Our Democracy? Does It Promote Civic Participation?*, HIST. SOC’Y OF THE N.Y. CTS. 1, 2–4 (July 2019), https://history.nycourts.gov/wp-content/uploads/2019/07/Academic_Garfinkel-2016_Mavis-Duncan-Dyer-Essay.pdf [<https://perma.cc/9S2L-RH26>].

⁷⁵ This difference in viewpoint has been put in terms of class bias. See LERNER, *supra* note 27, at 28, 31–32; GLENN HARLAN REYNOLDS, THE JUDICIARY’S CLASS WAR 19, 21 (2018).

⁷⁶ Incidentally, even judges benefit from juries as they can disperse their responsibility for difficult decisions. In the words of Professor Lerner, juries have the value of “[s]paring judges responsibility and criticism.” LERNER, *supra* note 27, at 40–42.

interest in nongovernment adjudicators. Although this interest is ordinarily less intense than that of defendants in criminal prosecutions, it is not entirely different.

This conclusion is especially important because the government increasingly has shifted its regulatory enforcement priorities from criminal toward civil proceedings.⁷⁷ Traditionally, a regulatory enforcement case under a statute was recognized—for example, by Chancellor James Kent—to be “in the nature of a public prosecution, instituted in behalf of the state, for the violation of a public law.”⁷⁸ Put another way, it “savours . . . of a criminal offence.”⁷⁹ Kent therefore held that the New York Attorney General could not obtain an injunction in equity in this sort of case.⁸⁰ As Kent explained, “such a prosecution is without precedent in this Court”⁸¹ “The charge is too much of the nature of a misdemeanor to belong to this Court.”⁸²

Nowadays, agencies frequently pursue regulatory enforcement proceedings as civil cases.⁸³ They evade juries by taking a broad view of what constitutes an equitable remedy. Indeed, they usually pursue regulatory enforcement in “civil” administrative proceedings, which allegedly meet civil standards but have allowed the government to circumvent not only the Seventh Amendment jury right but also many other of the Constitution’s procedural rights.⁸⁴ This reconfiguration of criminal proceedings into the civil or administrative sphere makes the role of juries and the recent *Jarkesy* decision all the more significant.

⁷⁷ See Debra Marie Ingraham, *Civil Money Sanctions Barred by Double Jeopardy: Should the Supreme Court Reject Healy?*, 54 WASH. & LEE L. REV. 1183, 1188 n.27 (1997) (compiling sources noting increases in civil administrative enforcement); Sarah Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS L.J. 989, 1011 (2007) (noting the “dramatic increase in civil enforcement actions and criminal prosecutions against corporations and their constituents that began in the late 1970s”).

⁷⁸ *Att’y Gen. v. Utica Ins. Co.*, 2 Johns. Ch. 371, 385 (N.Y. 1817).

⁷⁹ *Id.* at 378.

⁸⁰ *Id.* at 391.

⁸¹ *Id.* at 390.

⁸² *Id.* at 391. The defendants argued that, “being a violation of a statute, it was a *criminal* proceeding.” *Id.* at 375. Although the modern recharacterization of regulatory enforcement as equitable is important, it need not be pursued here.

⁸³ See, e.g., *SEC v. Jarkesy*, 603 U.S. 109, 115 (2024) (the SEC pursuing an action for securities fraud civilly).

⁸⁴ See Jean Eaglesham, *CFTC Turns Toward Administrative Judges*, WALL ST. J. (Nov. 9, 2014), <http://on.wsj.com/2oDxXIX> [<https://perma.cc/VH2K-GGH6>] (“We are going to use administrative proceedings more often,” [SEC Enforcement Director] Mr. [Andrew] Ceresney said. That will include [sic] some complicated cases, such as insider trading, that were once almost invariably tried in federal court, according to officials.”); Joseph Quincy Patterson, *Many Key Issues Still Left Unaddressed in the Securities and Exchange Commission’s Attempt To Modernize Its Rules of Practice*, 91 NOTRE DAME L. REV. 1675, 1690–99 (2016) (arguing that “defendants in administrative proceedings are denied their constitutional right to procedural due process, including right to a jury trial and equal protection of the law”).

The government's ability to evade constitutional rights by shifting cases from criminal to civil and from the courts to administrative tribunals lets it choose when its defendants get criminal procedural rights, when they get civil procedural rights, and when they get only the watered-down administrative versions of procedural rights. The government can thus largely circumvent procedural rights. As the Author has argued elsewhere about the administrative version of the evasion:

The government once could engage in binding adjudication against Americans only through the courts and their judges. Now, it can choose administrative adjudication. In some instances, Congress alone makes this choice; in others, it authorizes an agency, such as the SEC, to make the selection. One way or another, the government can act ambidextrously—either through the courts and their judges, juries, and due process or through administrative adjudication and its faux process.

The evasion thereby changes the very nature of procedural rights. Such rights traditionally were assurances against the government. Now they are but one of the choices for government in its exercise of power. Though the government must respect these rights when it proceeds against Americans in court, it has the freedom to escape them by taking an administrative path. Procedural rights have thereby been transformed. No longer guarantees for the people, they now are merely options for the government.⁸⁵

Fortunately, *Jarkesy* recognizes both the right to be tried in an Article III court and the right to a jury.⁸⁶ It thereby promises to cut off at least the administrative evasion—if, that is, the courts adhere to it. But that remains to be seen. And *Jarkesy* does nothing to impede the evasion that occurs when regulatory enforcement methods shift away from criminal toward civil proceedings and equitable remedies are understood expansively.

Still, it is valuable that the Supreme Court has begun to acknowledge the Constitution's protection of jury rights across the civil-criminal division—except, alas, as to “petty offenses.”⁸⁷ The Constitution initially provided for juries only in the “Trial of all Crimes.”⁸⁸ This provoked a widespread outcry from Anti-Federalists, who viewed the civil jury as a crucial protection for liberty and vehemently objected to what

⁸⁵ PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* 39 (2017).

⁸⁶ *Jarkesy*, 603 U.S. at 140–41.

⁸⁷ See *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968); see also *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542–43 (1989) (regarding petty offenses).

⁸⁸ U.S. CONST. art. III, § 2.

they feared would be the “abolition of trial by jury in civil causes.”⁸⁹ In response, the Bill of Rights in 1791 both reinforced the original guarantee of criminal juries and added a provision for civil juries. The Sixth Amendment secures juries in “all criminal prosecutions,”⁹⁰ and the Seventh guarantees juries in “Suits at common law” — meaning all civil suits outside equity and admiralty.⁹¹

These two amendments—not to mention the Constitution’s initial jury provision—thus cover the waterfront. With only narrow jurisdictional exceptions for equity and admiralty, they secure juries in all cases. It is essential to have these similar jury requirements for all actions, criminal and civil, not to mention administrative. Only by having similar jury rights across the civil-criminal divide can the Constitution bar government from evading juries by switching from criminal to civil proceedings.

The larger point is that the law, whether civil or criminal, is an instrument of government. Americans need the protection of juries in both civil and criminal cases. Juries are essential.

CONCLUSION

Although all human institutions are imperfect, juries have a reputation for being especially imperfect. They are said to be inefficient and without the competence to handle complex cases. The failings of juries, however, have been overstated, and the deficiency of juries does not necessarily mean that we should defenestrate civil jury rights.

Jury rights are different from jury trials, and far more than the trials, the rights are valuable. They are crucial for preserving the legal and democratic character of our law and for limiting government.

⁸⁹ Elbridge Gerry, *Observations on the New Constitution, and on the Federal and State Conventions*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 1, 9 (Brooklyn, Paul Leicester Ford ed., 1888). For other such comments, see Klein, *supra* note 57, at 1018.

Kenneth Klein observes, “At the time the Constitution was proposed, the people of the United States greatly distrusted government, and saw the absence of a guaranteed civil jury right as a reason, standing alone, to reject adoption of the Constitution; only by promising the Seventh Amendment did the Federalists secure adoption of the Constitution in several of the state ratification debates.” *Id.* at 1015; *see also* Dissent of the Minority of the Pennsylvania Convention (December 18, 1787), in 1 THE DEBATE ON THE CONSTITUTION 544–45 (Bernard Bailyn ed., 1993) (complaints about the lack of the right to trial by jury in civil cases); Reply to the Pennsylvania Minority: “America” [Noah Webster] (December 31, 1787), in 1 THE DEBATE ON THE CONSTITUTION 555–57 (Bernard Bailyn ed., 1993) (responding to these complaints); THE FEDERALIST No. 83, *supra* note 39, at 558 (Alexander Hamilton) (“The objection to the plan of the convention, which has met with most success in [New York], and perhaps in several of the other states, is that relative to the want of a constitutional provision for the trial by jury in civil cases.”). These were cited by Judge Elrod in *Jarkesy v. SEC*, 34 F.4th 446, 451–52 (5th Cir. 2022), *aff’d*, 603 U.S. 109 (2024).

⁹⁰ U.S. CONST. amend. VI.

⁹¹ *Id.* amend. VII; *see also supra* note 54 and accompanying text (discussion on suits at common law).