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# COMPENSABLE LIBERTY: A HISTORICAL AND POLITICAL MODEL OF THE SEVENTH AMENDMENT PUBLIC LAW JURY

GEORGE E. BUTLER II\*

## INTRODUCTION

These reflections about the jury relate to the erosion of protection for economic liberties under the United States Constitution. In that regard the 1930's represented a critical and well-known watershed. Where one day such interests as the right to contract stood as all but inviolable under the Due Process Clause, the next they were treated as merely a part of the public domain.<sup>1</sup> As a result, legislatures received the nod to regulate all intangible economic expectations at will—even to the point of virtual destruction.<sup>2</sup>

What is less well known, and may indeed be fundamentally misunderstood, is the precise operation of this historic watershed. Understandably, the dramatic judicial about-face

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1. Cf. Epstein, *Taxation, Regulation, and Confiscation*, 20 Osgoode Hall L.J. 433, 433 (1982). This shift away from active judicial review of economic legislation is perhaps best captured by the trilogy of decisions in *Home Building and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (upholding Minnesota's mortgage moratorium law), *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding New York's milk price control regulations), and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding Washington State's minimum wage statute). In particular, *Parrish* appeared to represent a dramatic reversal of the position taken by the Court the previous year in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §8-5—8-7 (1978).

2. In relatively short order, the Supreme Court carried its new doctrine of deferential review to the point of willingly inferring the necessary "substantial" relationship between an economic regulation and legitimate legislative ends based on the presumed existence of any hypothetical state of facts, not demonstrably untrue, which would sustain the statute. Compare *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) with *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). See note 4 *infra*.

strikes some commentators as a wholesale *abdication* to the legislative branch.<sup>3</sup> In contrast this article contends that both descriptively and normatively the due process revolution of the '30's should be viewed as having contained the essential elements of a practicable and principled due process *compromise*, a compromise founded on a critical Taking Clause component. Between the extremes of inviolable and negligible general economic liberties lay the broad conceptual middle ground actually, and properly, chosen by the Court: that of "compensable" individual liberties.<sup>4</sup> As a result of that implicit choice, the citizen was forced to surrender the right to attack a statute as generally unconstitutional on its face. But in exchange he was to enjoy an even more vigorous right<sup>5</sup> to

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3. See, e.g., McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. Cf. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 43 (1972).

4. In a similar philosophical vein, Professor Nozick rejects as a false dichotomy the assertion that either the state has the right to regulate risk-creating conduct (however *de minimis* the risk) or it does not—and if it does, there is no need to compensate. Rather, he suggests, it may be the state has a right to regulate some such conduct only if it provides compensation. R. NOZICK, *ANARCHY, STATE AND UTOPIA* 83-87 (1974). In that way Nozick correctly focuses on the fundamental equal protection component of the principle of, "just compensation." Cf., e.g., Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 44-45 (1964); Sax, *Takings, Private Property and Public Right*, 81 YALE L.J. 149, 169-71 (1971). The failure of government to regulate *all* risk-creating conduct dictates that those forced to bear an *unfair share* of the actual regulatory burden receive compensation. Nozick, *supra*, at 86-87. Cf. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1201-02 n.77 (1967).

In that sense compensation may be viewed as a surrogate for the protection against discriminatory economic regulation once associated with the Equal Protection Clause but now lost as part of the modern due process revolution. Under current doctrine discriminatory legislative classifications are deemed constitutionally justified by the tautology that "if the means chosen burdens one group and benefits another, then the means perfectly fits the end of burdening just those whom the law disadvantages and benefiting just those whom it assists." Tribe, *supra* note 1, at §16-2, 995.

It is for purposes of deciding what constitutes unfair regulatory sacrifice that the public law jury, introduced in the title of the article, will be utilized.

5. The posited vigor of the new inverse condemnation remedy for *de facto* regulatory takings stems from the following, *inter alia*: (i) the fact that liability standards for damage actions are properly less demanding than those for injunctive relief, *see* text accompanying notes 79-82, *infra*, and (ii) the fact that the inverse condemnation action functions as surrogate protection for the loss of any active "public purpose" or substantive equal protection constraints on the frivolousness of legislative ends or the

sue the state or its agents for just compensation on the basis of any particularized unfairness and harm from its application.<sup>6</sup> The text for this pragmatic solution to the conflict between absolute economic liberties and political expediency was the Court's earlier assertion in *Pennsylvania Coal Co. v. Mahon* that "if regulation goes *too far* it will be recognized as a taking."<sup>7</sup>

Nonetheless, the current perception of abdication is correct, but not for the reasons generally credited. Economic liberties have suffered largely because the Court has effectively abandoned the compensation element of the posited compromise. Having wisely repudiated the substantive economic due process of *Lochner v. New York*,<sup>8</sup> it has incongruously failed to cast aside the procedural due process doctrine of *Murray's Lessee*<sup>9</sup> which permits non-judicial, bureaucratic fact-finding in the critical public law area. As a result, the legislature en-

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discriminatoriness of legislative means.

6. One key factor that has contributed to the inference of abdication actually supports the present thesis. It is tempting to rationalize the developments in the '30's as simply logical extensions to new areas of economic liberty of the rent control and zoning decisions of the '20's. See *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921) (rent control); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (rent control); *Village of Euclid v. Ambler Realty Co.*, 303 U.S. 365 (1926) (zoning). But those earlier cases do not embody the precise proto-deferential philosophy assumed. In terms of procedural posture, they were all *facial* attacks. Accordingly, they illustrate important aspects of the compromise. For example, in *Euclid* the Court justified its lax standard of review on the basis that the Appellee was seeking injunctive relief against the zoning ordinance "as a whole," *id.* at 397, on the "broad ground that the mere existence and threatened enforcement" of the statute constituted a "present and irreparable injury," *id.* at 396, having never sought a building permit or a variance. *Id.* Brief for Appellants (on Rehearing), at 3, *id.* (the basic argument on rehearing, being that Appellee had no "right, in the present case and procedure, to bring into issue any question of reasonableness or unreasonableness of the ordinance as it applies to its land," though it was free to attack "the basic and *per se* unconstitutionality of the ordinance"). At the same time, the Court affirmed its willingness to scrutinize with greater care any future complaints detailing "a particular injury" from the "concret[e application of the ordinance] to particular premises . . . or to particular circumstances." That promise was quickly made good in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). The next important step dictated by the compromise was for the Court to provide a federal forum for "as applied" monetary, rather than injunctive, relief.

7. 260 U.S. 393, 415 (1922) (Holmes, J.).

8. 198 U.S. 45 (1905).

9. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).



joys the best of both worlds. While its economic enactments receive a presumption of facial constitutionality, it is still free to turn around and confer fact-finding authority, carrying a similar presumption of "correctness," on whatever expert administrative agency or special court it handpicks to adjudicate fact-sensitive individual claims of *as applied* statutory unfairness. Not surprisingly, the accredited fact-finders, imbued with the sovereign immunity concerns that underlie *Murray's Lessee*, tend to defer to the legislature's presumptive view that no compensation is due.<sup>10</sup>

While Justice Rehnquist<sup>11</sup> and Professor Epstein<sup>12</sup> would

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10. After all, regulatory schemes seldom provide any mechanism for awarding individualized compensation. Nonetheless, the posited compromise requires courts to defer to the legislative judgment on the issue of the *facial* reasonableness (or allocative efficiency) of such regulations, while preserving as an independent judicial question their *as applied* reasonableness (or distributive equity). True separation-of-powers principles require no less:

It seems to have been contended that the legislature is competent to determine whether [a statute necessitated by the public interest] . . . will be injurious to other interests, and that it is to be presumed, after a legislative [enactment] . . . , "that there is no just claim for resulting damage that has not been provided for." See American Law Magazine, vol. 1, No. 1, April 1843, 58-60. This assumes both the *omniscience* and *omnipotence* of the legislature.

*Eaton v. Boston, C. & M.R.R.*, 51 N.H. 504, 517 (1872) (emphasis added). See note 45 *infra*.

But the legislature is not omniscient. Because it cannot anticipate in any detail the individual harms to be expected from its regulatory decrees, it cannot accurately weight in advance their second-order distributive justice effects. Yet even if it could, it is not omnipotent. Having already received judicial deference at the general policy level where "legislative facts" are at issue, the legislature cannot also demand to be trusted as an exclusive political right to respond fairly and accurately to any disproportionate individual impact based on the relevant "adjudicative facts." Cf. K. DAVIS, ADMINISTRATIVE LAW TREATISE § § 7.02-06 (1958). Rather it is the especial "province and duty of the judiciary to pass upon the [*as applied*] constitutionality of statutes." *Eaton*, 51 N.H. at 517. In keeping with the present thesis, Professor Davis has described "adjudicative facts" as "roughly the kind of facts that go to a jury in a jury case." Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 199 (1956).

11. In his dissent in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), Rehnquist, joined by Burger and Stevens, argued that the existence of a regulatory taking should turn on three inquiries. First, is the affected expectational interest of the claimant sufficiently reasonable to merit recognition as a "property" right. *Id.* at 14-43. If so, and assuming the injury to the claimant's interest is substantial, *id.* at 150, the question arises whether the regulation is designed to prevent a harm, in the sense of a "real and substantial" nuisance-like threat of injury to the health, morals, or safety of the public, or to confer a benefit. *Id.* at

rectify this situation through more stringent substantive rules for compensable takings, this article advances a complementary procedural diagnosis and cure. It argues as a matter of history and policy that the Seventh Amendment be interpreted to guarantee an ultimate right<sup>13</sup> to have a public law jury *both* determine the substantive issue of whether a *de facto* regulatory taking has occurred, based on the fairness of the law as applied to the individual, *and* liquidate the resulting harm, but only to the extent the subjective "too far" threshold has been crossed. (Despite the conceptual impossibility of bifurcating those two issues,<sup>14</sup> current federal practice in inverse condemnation cases allows for a jury, if at all,<sup>15</sup> only on

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144-46. Finally, if the regulation of a property interest is intended to confer a benefit, the issue becomes whether or not the claimant has received "an average reciprocity of advantage" from the imposition of the regulation on other similarly situated individuals. *Id.* at 147-50. Otherwise, compensation is due.

This article contends that Rehnquist's criteria are ideally suited for application by a jury. For instance, what regulatory injuries are to be deemed "substantial" enough to trigger taking clause protection and what economic activities are to be deemed sufficiently "unneighborly" or "harmful" to the public to warrant substantial uncompensated regulatory sacrifice are certain to be in part a function of contemporary community standards, like the definition of obscenity in the First Amendment area. *See Miller v. California*, 415 U.S. 15 (1973). Plus, the use of a jury allows for the necessary fluidity among categories. In practice, the degree of "harmfulness" threatened would be subjectively balanced against the degree of "disproportionate sacrifice" exacted. Professor Ellickson has suggested a somewhat analogous analytical structure for private nuisance actions, in which the jury discounts defendant's "unneighborliness" by plaintiff's degree of "hypersensitivity." Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 756-57 (1973).

12. Epstein, *Not Deference But Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351, 356.

13. Note that the contention is for an ultimate, not necessarily an automatic, right to such a jury. Thus, an administrative hearing could be provided in the first instance with a right to appeal from an unfavorable determination to a *de novo* jury trial; moreover, that appeal could even be conditioned on the claimant's willingness to pay the state's reasonable attorneys' fees and expenses if the jury verdict is no more favorable. Also, the limitation of liability to claims of "substantial" harm will reduce the potential volume of litigation.

14. That is, only the fact-finder which has determined under the individual circumstances of the case the "too far" point of unacceptable regulatory imposition is then in a position to quantify the specific harm caused by the "unreasonable part" of the regulation. *See, e.g., Developments in the Law — Zoning*, 91 HARV. L. REV. 1427, 1497-1501 (1978).

15. Never expressly holding that the Seventh Amendment is inapplicable to condemnation actions, the Court has repeatedly voiced that opinion in unequivocal dicta. *See, e.g., Kohl v. United States*, 91 U.S. 367,

the issue of damages.<sup>16</sup> ) It is conceded on all sides that in theory the taking question concerns whether by contemporary standards of "justice and fairness" the intangible harm visited upon an individual exceeds his "fair share" of the cost of the measure. And if so, the disproportionate element of his sacrifice must be underwritten by the general public or by those more directly benefitted. As a central premise, this piece maintains that whatever appellate standards or guidelines are formulated to help structure that inquiry, an irreducible element of subjectivity will necessarily and *appropriately* remain in applying the open-ended equitable principle of "disproportionate regulatory sacrifice."

Accordingly, the Seventh Amendment and our constitutional heritage of the rule of law, *properly conceived*,<sup>17</sup> dictate

376 (1875), *Crane v. Hahlo*, 258 U.S. 142, 147 (1922), and *United States v. Reynolds*, 397 U.S. 14 (1970). See generally 5 MOORE'S FEDERAL PRACTICE ¶38.02 (1985). This perception is codified in Federal Rule of Civil Procedure 71A(h), which makes juries optional with the judge in condemnation cases and reserves to the court all issues other than the amount of just compensation.

But the history of Rule 71A(h) is a checkered one, full discussion of which must be deferred to another time. Suffice it to say here that there is little in the history of the rule that inspires one with confidence as to the wisdom of the rule. See generally 7 MOORE'S FEDERAL PRACTICE ¶¶ 71A. 03-08 (1985).

16. The Supreme Court resolves the current conceptual paradox of using separate fact-finders for each inquiry by awarding the condemnee an all-or-nothing recovery based arbitrarily on *full* diminution in the objective fair market value of his property. See, e.g., *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979). Cf. Krier, *The Regulation Machine*, 1 SUP. CT. EC. REV. 1, 12-13 & n.74 (1982). But the generosity in this measure of recovery is more apparent than real. For one, it makes the court commensurately less willing to find a taking in the first instance. Secondly, it lets the court prevent compensation jurors from awarding a recovery for actual subjective harm, which might serve indirectly to curb frivolous public or private enterprises.

17. The two very different historical conceptions of the political ideal called the rule of law support two different theories of the adjudicative role of politico-ethical principles. See R. DWORKIN, *A MATTER OF PRINCIPLE* 17-18 (1985). Professor Dworkin has termed the competing ideals the "rule-book" and the "rights" approaches. In the former narrow sense, the rule of law, while requiring that state coercive force be used only in accordance with clearly promulgated rules, says nothing about the content of the rules that may occupy the public rule book. In the latter sense, the substantive justice of the rules themselves constitutes a part of the ideal of the rule of law, since citizens are deemed to have "political rights against the state as a whole":

It insists that these . . . political rights be recognized in positive law so that they may be enforced *upon the demand of individual*

that such a discretionary standard of public justice be entrusted to the free and putatively unbiased administration of a unanimous (or near unanimous) cross-sectional jury—rather than to a single trial judge or to a majority of a panel of unelected appellate judges or executive commissioners. Thus, the successful protection of economic liberties under the Constitution may properly have less to do with the Due Process Clause than with the interaction of two other critical parts of the Constitution: the Taking Clause of the Fifth Amendment and the jury trial guarantee of the Seventh Amendment.

Yet the Supreme Court still tolerates *Murray's Lessee*. And it does so because its members summarily dismiss the idea that mandatory Article III fact-finding in important public law actions can be preferred conceptually over fact-finding done by a panel of agency experts, especially since the former might entail a Seventh Amendment "lay" jury. This article explores the distinct and ironic possibility that the Seventh Amendment, in the eyes of its proponents, was designed to serve a use opposite that to which the modern Court so effectively puts it. In other words, the civil jury guarantee was intended to protect against the spectre of public law decision-making by what Blackstone had termed "new and arbitrary [bureaucratic] methods of trial"<sup>18</sup>—not to be a tacit argument in favor of such decisionmaking in view of the inefficient Article III alternative.<sup>19</sup> It also briefly examines the

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*citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable.

*Id.* at 11.

While the jury plays a self-evident historical role in implementing this "ideal of rule by an accurate public conception of individual rights," *id.* at 11-12, its very propensity to bring its politico-ethical sensibilities to bear on legal issues has made it anathema to partisans of the "rule-book" ideal.

18. IV BLACKSTONE, COMMENTARIES \*\*349-50. Blackstone dismissed as an irrelevancy the greater administrative costs associated with the decentralized jury system:

And however convenient these [new methods of trial] 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

. . . .

*Id.*

19. Based on considerations of efficiency, the Court has given Congress *carte blanche* to create administrative systems for adjudicating legal issues, which would include damages from a regulatory taking. For purposes of the Seventh Amendment, such legal issues are deemed equitable

more cynical possibility that behind this mix-up lies the Court's desire to preserve the Article III toehold graciously ceded by Congress in public law matters, which it might forfeit by the ungrateful act of putting a blank check against the fisc in the hands of an unpredictable lay jury.<sup>20</sup> And it argues that behind this immunity concern lies a false dilemma, since the justiciability of a claim against the fisc does not render its collectability similarly justiciable. Within limits the latter can and should remain a political question.<sup>21</sup> Hence, if necessary

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on the basis of the inadequacy of the legal remedy; and the legal remedy is deemed inadequate because of the blanket Seventh Amendment requirement of a costly jury. See, e.g., *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. 442 (1977). Cf. Note, *Congressional Provision for Nonjury Trial under the Seventh Amendment*, 83 YALE L.J. 401, 415 (1973). Such specious circularity is possible because *Murray's Lessee* has created the illusion that the civil jury trial guarantee had no public law implications.

20. As developed within, it is for the court to exercise control over the public law jury *via* motions for new trials and remittiturs.

21. James Wilson of the U.S. Supreme Court assumed in his celebrated Law Lectures that just compensation questions would ultimately have to be decided — at least in terms of the decision to fund any award—by the legislature or its agents. And he warned of the tyrannical implications:

When questions—especially pecuniary questions—arise between a state and a citizen—more especially still, when those questions are, as they generally must be, submitted to the decision of those who are not only parties and judges, but legislators also; the sacred impartiality of the second character, it must be owned, is too frequently lost in the sordid interestedness of the first, and in the arrogant power of the third. This, I repeat it, is tyranny: and tyranny, though it may be more formidable and more oppressive, is neither less odious nor less unjust—is neither less dishonorable to the character of one party, nor less hostile to the rights of the other, because it is proudly prefaced by the epithet—legislative. He who refuses the payment of an honest demand upon the public, because it is in his power to refuse it, would refuse the payment of his private debt, if he was equally protected in the refusal. He who robs as a legislator, *because* he dares, would rob as a highwayman—if he dared.

II J. WILSON, *THE WORKS OF JAMES WILSON* 285 (J. Andrews ed. 1896) (emphasis in original).

These sentiments help explain Wilson's later opinion in *Chisholm v. Georgia*, 2 U.S. (Dall). 419 (1793), upholding Article III jurisdiction over a suit in assumpsit by a South Carolina citizen against the State of Georgia. They also suggest why he doubtless would have subscribed (along with Chief Justice Marshall, see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821)) to the view that the Eleventh Amendment is addressed only to Article III jurisdiction based on party identity and that federal courts retain Article III subject matter jurisdiction over constitutional claims against the states and the federal government (not to mention party status jurisdiction

to effectuate the posited compromise, the Court should boldly assert irrevocable jurisdiction *via* 28 U.S.C. § 1331(a) over constitutional common law damage actions (in the nature of inverse condemnation) against both the federal and state governments—or at least against the officers who implement their allegedly confiscatory regulations.

Drawing on the history of the Seventh Amendment and the political theory of the founding period, therefore, the article seeks to establish a plausible pedigree and philosophy for the modern absurdity of an ultimate right to a jury in just compensation actions. This reconstructed Seventh Amendment public law jury is far from being a mere fact-finding lay adjunct of the court, which federal judges are free to patronize or manipulate, like the optional Rule 71A(h) jury employed in condemnation actions under the Tucker Act. Despite efforts by the Supreme Court to belittle the “lay” status of jurors, Article III judicial power does not reside in professional Article III judges alone; rather it is vested in Article III courts, which happen also to be comprised of Seventh Amendment jurors in appropriate cases.<sup>22</sup> Hence the Seventh Amendment public law jury, like its Sixth Amendment sib-

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over the latter), save perhaps for the right to *enforce* monetary judgments. That qualification is a product of the jealously guarded legislative prerogative over the appropriation of tax monies and the added problem of getting the executive branch to execute a judgment against itself in the case of the federal government. It furnishes all the more reason for the judiciary to encourage the legislature to provide “just compensation.” For recent articles advocating a return to a “party status” view of the Eleventh Amendment and a general retrenchment of the principle of sovereign immunity, *see*, Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

22. Precisely this point as to the compendious meaning of “court,” when used to refer to the designated repository of federal judicial power under Article III, was made by John Marshall in the Virginia ratifying convention, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 557-58 (J. Elliot ed. 1866) [hereinafter cited as ELLIOT, DEBATES] (“Does the word *court* only mean the judges? Does not the determination of a jury necessarily lead to the judgment of the court?”) and by Thomas Dawes in the Massachusetts convention, 2 *Id.* at 113 (emphasis added):

The word *court* does not, either by popular or technical construction, exclude the use of a jury to try facts. When people, in common language, talk of a trial at the *Court* of Common Pleas, or the Supreme Judicial *Court*, do they not include all the branches and members of such court—the *jurors* as well as the judges?

ling, will be depicted as deserving a vital share of that Article III power by virtue of its historic right to apply governing legal standards to the facts at hand—and even to make equitable departures from those standards *in favorem libertatis*. For example, long before First Amendment protection was essentially absolutized,<sup>23</sup> it was widely assumed that freedom of speech and the press, practically speaking, lay in the fact that an impartial jury made the crucial “common sense” value judgment about how to weight and weigh the various factors comprising what we now term the “clear and present danger” standard.<sup>24</sup>

But the descriptive analysis employed should not camouflage the advertently normative or philosophical arguments being interwoven with the historical plot line. They, too, support an expanded constitutional principle of individual equity and a complementary institutional role for the public law jury as ultimate arbiter of the *as applied* fairness or equity of regulatory measures. These normative arguments may well be more important than any historical data contained in the Article. For if the Supreme Court ever accepts the proffered pedigree of the public law jury, which is concededly a tentative effort and inconclusive as a matter of historical fact, presumably it will be on the considerable strength of the policies and principles underlying the historical model.

Of the sections that follow, the first develops the asser-

23. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

24. Justice Story was neither the first nor last to link the substantive definition of the necessarily non-absolute liberty of the press to the *ad hoc* discretionary powers of the jury:

The noblest patriots of England, and the most distinguished friends of liberty, both in parliament, and at the bar, have never contended for a total exemption from responsibility, but have asked only, that the guilt or innocence of the publication should be ascertained by a trial by jury . . . . . [T]he exercise of a right is essentially different from an abuse of it. Common sense here promulgates the broad doctrine, *sic utere tuo, ut non alienum laedas*; so exercise your own freedom, as not to infringe the rights of others, or the public peace and safety.

III J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1879, 737, and §1882, 741 (1833) [hereinafter cited as STORY, COMMENTARIES.] This article develops the general thesis that the *sic utere tuo* maxim enjoys a public law status as well as a private law status and that in both types of cases historic due process requires that the jury be the one to apply the maxim's open-ended principle of “neighborliness” or “reasonableness under the circumstances” to differentiate between protected and unprotected liberties. Specifically, it pursues the analogy between using the jury to protect economic liberties and speech.

tion that the due process revolution of the 30's can be profitably viewed as a compromise based on the idea of compensable liberties, but one which contained the seeds of its own destruction due to the modern absence of an independent-minded Seventh Amendment jury to implement it. The second musters historical evidence to support the thesis that the Seventh Amendment was intended to provide a jury in public law actions and explores the form such an action might take in the context of an *as applied* Taking Clause attack on a regulatory statute. The next section examines a broader aspect of the thesis, namely, the assertion that the Seventh Amendment public law jury, like its Sixth Amendment counterpart, should be viewed as a dispenser of equity in cases pitting an individual against the state. That section also explores in depth the complex nineteenth century process by which all such law-finding prerogatives of the jury were carefully stripped away by the courts.

The final section brings us full circle. It suggests why the demise of the law-finding jury may have been instrumental in giving rise to the discredited doctrine of substantive economic due process in the first place. Having dismantled the one judicial institution that stood as a bulwark against government encoachment on individual liberties, due to its ability to dispense equity, the Supreme Court felt compelled to step in and fill the void it had created—a task for which it proved institutionally ill-suited. As a result, the Court has since chosen the path of virtual judicial abdication, at least in the area of economic liberties, with no thought to surrendering the lead back to its Article III yokefellow, the Seventh Amendment jury. Pointing out the irony that the earliest American judicial review cases involved the appellate courts in preserving the prerogatives of the jury, the article attributes the democratic “deviancy” of the modern American institution of judicial review<sup>25</sup> to subsequent appellate success in alternately suppressing and supplanting the jury's historic equitable powers. Some hopeful signs of a change in appellate attitude towards the jury are noted, however.

The Conclusion summarizes why, as a matter of constitutional theory, the posited Seventh Amendment just compensation jury (with its discretion over damages) could provide especially important surrogate structural protection for individual economic liberties otherwise left exposed to disproportionate legislative sacrifice by modern doctrinal

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25. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 18 (1962).



changes—like the definitive demise of any true “public purpose” limitation on exercises of eminent domain.<sup>26</sup>

### I. COMPENSABLE LIBERTY: THE LOST COMPROMISE

This hypothetical lost compromise, whose rightful modern architect was Justice Holmes,<sup>27</sup> constituted an integral part of the Holmesian institutional philosophy which informed the anti-*Lochner* revolution.<sup>28</sup> Its implicit terms can

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26. Any notion that either general principles of eminent domain or the Fifth Amendment's specific guarantee of compensation for “private property . . . taken for *public use*” (in itself or as applied to the states *via* the Fourteenth Amendment) carries as a negative pregnant the right that condemned property be devoted to actual public *use* has been supplanted by the view that the scope of eminent domain is coterminous with the “conceivable public *purpose*” (or advantage) limitation on the general police power. *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. 2321, 2329 (1983). See generally 2A NICHOLS ON EMINENT DOMAIN §§7.01[3]-7.07 (1983). And of course the so-called “public purpose” limitation is no limitation at all, given the lax “mere rationality” standard of modern due process review. See *Midkiff*, 104 S.Ct. at 2330, citing *inter alia* *Western & Southern Life Inc. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981); and note 2 *supra*.

To lament the demise of “public use” as a substantive due process limitation on the power of eminent domain, see, e.g., Aranson, *Judicial Control of the Political Branches: Public Purpose and Public Law*, 4 CATO J. 719, 722-30 (1985), however, is to discount the potential efficacy of Professor Hayek's well-founded suggestion that this may be one political problem that contains its own creative solution:

The chief purpose of the requirement of full compensation is indeed to act as a curb on . . . [unnecessary] infringements of the private sphere and to provide a means of ascertaining whether the particular purpose is important enough to justify an exception to the principle on which the normal working of society rests. In view of the difficulty of estimating the often intangible advantages of public action and of the notorious tendency of the expert administrator to overestimate the importance of the particular goal of the moment, it would even seem desirable that the private owner should always have the benefit of the doubt and that compensation should be fixed *as high as possible* without opening the door to outright abuse. This means, after all, no more than that the public gain must clearly and substantially exceed the loss if an exception to the normal rule is to be allowed.

F. HAYEK, *THE CONSTITUTION OF LIBERTY* 217-18 (1960).

27. Perhaps the earliest suggestion that just compensation would cure a legislative action otherwise invalid under a substantive guarantee like the Due Process Clause came in Justice Story's dissent in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 638 (1837), regarding the Contract Clause. Story's view was borne out by *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 506 (1848).

28. See L. TRIBE, *supra* note 1, at §8-7, 452-54 (1978).

perhaps best be grasped by reference to the current economic theory of property rights.<sup>29</sup> To maximize efficiency and fairness, the Court may be said to have decided simply to switch remedies in safeguarding economic liberties or expectations, substituting a post-deprivation damage remedy under the Taking Clause for specific predeprivation relief under the Due Process Clause. This change of tact represented a straightforward, pragmatic solution to the Due Process/Contract Clause crisis of the 30's. For at bottom that crisis had to do with whether the legislature, in an effort to protect "the economic structure upon which the good of all depends,"<sup>30</sup> could regulate certain individual affairs *at all*. In that fact lay the ingredients of compromise.<sup>31</sup> On the one hand, Holmes championed the prerogative of the majoritarian legislature to experiment *freely* with the cure of social ills through general statutes, adopting the strong judicial presumption that economic measures were necessary and expedient for the general advantage of the public. Ever the pragmatist, he denied that the Court enjoyed any special institutional competence or charter, despite its own formalistic constructs like "affectation with a public interest" or "public purpose,"<sup>32</sup> to second-guess the quantum of *publicness* sufficient to justify regulatory inroads on personal economic liberties.<sup>33</sup> Given the profound efficiency implications of underprotecting widely-shared public interest, Holmes felt the legislature should be excused for erring on the side of overprotection, even to the point of making "life livable" for those of its citizens who may have concluded that "the superfluous is the necessary."<sup>34</sup>

Besides—and this arguably was Holmes' critical perception—, if a regulation does go "too far," it can always be harmlessly converted into a *pro tanto* exercise of the power of

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29. See, e.g., Calabresi and Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

30. Home Building and Loan Ass'n v. Blaisdell, 290 U.S. at 442.

31. The truth seems to me to be that, *subject to compensation when compensation is due*, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Tyson and Bro. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting) (emphasis added). Cf. *Blaisdell*, 290 U.S. at 435.

32. See, e.g., Hamilton, *Affectation with a Public Interest*, 39 YALE L. J. 1089 (1930); Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in *LAW IN AMERICAN HISTORY*, eds. D. Fleming and B. Bailyn 329 (1971).

33. See, e.g., Tyson and Bro. v. Banton, 273 U.S. 418, 445-46 (1927) (Holmes, J., dissenting).

34. *Id.* at 447.

eminent domain, since by hypothesis economic liberties and expectations are fungible in dollar terms.<sup>35</sup> In other words, certain intangible liberties are justly characterized as compensable, not inviolable, so far as the police power is concerned.<sup>36</sup> Writing for the majority in *Mahon*, therefore, Holmes had taken the complementary step of repudiating the formalistic "physical invasion" doctrine in order to create an individual cause of action for excessive regulation arising under the Taking Clause.<sup>37</sup> Of course, the Holmesian com-

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35. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415. Early examples of the compromise at work include *Block v. Hirsh*, 256 U.S. 135 (1921), a case involving that portion of a D.C. rent control statute which gave tenants the controversial right to hold-over. Writing for the Court, Holmes rejected the *facial* due process attack on that right, which focused on the "public purpose" problem. In doing so, he emphasized the fact that statutory "[m]achinery was provided to secure to the landlord a reasonable rent" during the hold-over period. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), involved an unsuccessful *facial* attack on the 1933 Minnesota Mortgage Moratorium Law as violative of the Contract Clause based on similar grounds. Chief Justice Hughes stressed the importance to the result in *Block* and the other rent control cases of the statutory provision of post-deprivation remedies assuring "fair and reasonable compensation." *Id.* at 440-42. Accordingly, he justified the regulatory impact of the moratorium on the basis that the statute provided both that interest would continue to accrue *and that the mortgagor had to pay a reasonable rental value as ascertained in judicial proceedings*—so that the mortgagee was "not left without compensation for the withholding of possession." *Id.* at 445. (emphasis added). That the claimants pursued *facial* attacks at all was doubtless attributable to the constitutional Catch 22 mentioned above.

36. *Cf.* note 4 *supra*. By way of contrast, Professor Michelman has suggested the possibility of a class of cases in which "the injury suffered by the aggrieved owner is one for which money cannot compensate, because the injury is to some interest of the owner's apart from net worth." Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1111-12 (1981). For a recent contention that certain specific property interests are so "personal" they should be deemed noncompensable and hence immune from taking absent a "compelling state interest," see Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1002-06 (1982). Professor Radin is presumably driven to her novel conclusion by the current unsatisfactory state of the compromise. In particular, the Supreme Court has sharply restricted the jury's ability to award damages for a condemnee's subjective, non-market harm.

37. Despite Holmes' assertion in *Mahon* that "if regulation goes too far it will be recognized as a taking," 260 U.S. at 415, the decision did not constitute an express endorsement of an inverse condemnation remedy in such cases due to its factual posture. Since the beneficiary of the regulation had successfully sought to mandate its enforcement, the Supreme Court was asked merely to overturn the injunction previously issued. Seeking to limit *Mahon* to its facts, a number of state courts have recently contended that the Court "did not attempt . . . to transmute the illegal governmental

promise did require that the individual claimant demonstrate the "cash value" of the liberty interest allegedly taken.<sup>38</sup> No longer would it suffice to claim an irreparable injury to an abstract, ideological interest in seeing one's economic liberty preserved inviolate.<sup>39</sup> (For instance, if our friend Mr. Nebbia wants to recover, he must at least begin by demonstrating material pecuniary harm from being forced to sell his milk at too *high* a price.<sup>40</sup>) But whether a regulation goes "too far" in the way of inflicting concrete individual sacrifice would now be *judicially* determined by weighing the "*extent of public interest*" involved against the "extent of [private harm]."<sup>41</sup> To compensate for the fact that the publicness of the legislative purpose was to be strictly off limits to judicial inquiry in the context of injunctive relief, Holmes was ready and willing to assess the relative "superfluosity" of legislative ends when it came to determining the overall justifiability and hence compensability of specific individual regulatory sacrifice. That was, after all, the essential trade-off. Seen as a whole, therefore, the Holmesian due process compromise required that federal courts defer to the legislative judgment on the broad issue of the *facial* reasonableness (or allocative efficiency) of economic regulations, even as they carefully preserved as a judicial question "of degree" a statute's *as applied*

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infringement into an exercise of eminent domain and the possibility of compensation was not even considered." *Agins v. City of Tiburon*, 24 Cal. 3d 266, 274, 598 P.2d 25, 29 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). *Accord*, *Fred F. French Investing Co. v. City of New York*, 39 N.Y.S. 2d 487, 594, 350 N.E.2d 381, 385, *cert. denied and appeal dismissed*, 429 U.S. 990 (1976). But a sitting majority of the Supreme Court—albeit through dissent and dicta, respectively—have apparently laid this controversy to rest. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 633-34 (Rehnquist, J., concurring) (1981); *id.* at 649 n.14, 650 n.17 (Brennan, J., joined by Stewart, Marshall, and Powell, dissenting). Speaking through Justice Brennan, they confirmed that the principle behind *Mahon* mandates that the victim of an excessive police power regulation be given the option of an "inverse condemnation" remedy. *Id.* at 646-50. This conclusion is not altered by *Williamson Co. Regional Planning Comm'n. v. Hamilton Bank*, \_\_\_ U.S. \_\_\_, 105 S.Ct. 3108 (1985).

38. See note 11 *supra*. *Cf. Carey v. Piphus*, 435 U.S. 247, 254, 258-59 (1978) (students suspended from school without procedural due process were only entitled to recover nominal damages absent proof of actual injury).

39. *Compare Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) with *PruneYard Shopping Center v. Robins*, 447 U.S. 255 (1980). See Note, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1455-56 (1978).

40. See *Nebbia v. New York*, 291 U.S. 502 (1934).

41. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413-14 (emphasis added).

reasonableness (or distributive equity).

### A. *Eminent Domain and Public Purpose.*

Before examining the obscure fate awaiting Holmes' idea, a few words are in order to support its conceptual claim on our attention. Not only did actual signs of the compromise at work appear in pivotal cases like *Home Building & Loan Association v. Blaisdell*,<sup>42</sup> its suggested terms are consistent with dominant strains of American eminent domain and due process theory. For instance, the compromise may be analyzed as a straightforward application of the pragmatic quasi-contractual approach to eminent domain popularized by natural law theorists like Grotius, Vattel, Puffendorf, Burlamaqui, and Hutcheson. Their theory of "fair share", which appears to have been read and embraced by our founding generation,<sup>43</sup> was designed to domesticate this potent public law doctrine by reference to the universal maritime law of general average and other traditional private law rules of necessity.<sup>44</sup> They concluded that in a sufficient emergency the state was free to take property belonging to another without advance judicial due process, in much the same way that any private individual would be. As a result, the owner may not resist the taking, nor is he entitled to claim either punitive damages for a tortious wrong or the monopoly rents created by the emergency need. Instead, the taking is viewed as a privileged tres-

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42. 290 U.S. 398 (1934).

43. See, e.g., Stoebeuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 583-88 (1972); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931); III STORY, COMMENTARIES §1784, 661 ("[The doctrine of just compensation] is founded in natural equity, and is laid down by jurists as a principle of universal law."). See also *Chicago, B. & Q. Ry. v. Chicago*, 166 U.S. 226, 236-37 (1897). Cf. McNulty, *Eminent Domain in Continental Europe*, 21 YALE L. J. 555 (1912).

44. See, e.g., MONTESQUIEU, *THE SPIRIT OF THE LAWS*, Bk.26, Chap. XV (1748):

Thus when the public has occasion for the estate of an individual, it ought never to act by the rigor of political law; it is here that the civil law ought to triumph, which, with the eyes of a mother, regards every individual as a whole community.

VATTEL, *LAW OF NATIONS* Bk I, Chap. XX (1773):

[J]ustice requires that . . . this individual be indemnified at the public charge . . . for the burden of the State ought to be supported equally or in a just proportion. The same rules are applicable to this case as to the loss of merchandise thrown overboard to save the vessel.

Cf. *Mouse's Case*, 12 Co. Rep. 63 (1608).

pass, which gives rise to a *post hoc* quasi-contractual (or implied in law) duty on the part of the actor to indemnify the owner, but only for actual losses in excess of his own fair share of the cost of the public measure.<sup>45</sup> So long as that post-deprivation obligation is met, due process is served. Applied to the context of a general regulatory statute, the analysis supports Holmes' inference that any interim harm to an individual's economic liberties constitutes at worst a privileged governmental nuisance (*i.e.*, a substantial, nontrespassory invasion of his intangible rights) for which after-the-fact compensation is a sufficient remedy.

More importantly, this early American eminent domain theory, derived from natural law thinkers, vindicates Holmes' conferral of a presumption of constitutionality—or, more specifically, of adequate "public use"—on all such implicit regulatory assertions of the power of eminent domain. For one clear distinction between the public and private rights of necessity was recognized. Unlike private assertions of the right, any sovereign assertion of a public necessity sufficient to invoke the right was not to be judicially second-guessed.<sup>46</sup>

45. See, e.g., F. HUTCHESON, A SHORT INTRODUCTION TO MORAL PHILOSOPHY 223-226 (Bk. II, Chap. XIV) (1746), where Hutcheson describes the private plea of necessity as giving rise to an "[o]bligation[n] resembling those from [c]ontracts" or "[o]bligation[e] quasi ex contractu." Later he equates this private right in principle to the "eminent right in the supreme powers." *Id.* at 246 (Bk. II, Chap. IX). See also *id.* at 289-90 (Bk. III, Chap. V).

46. See, e.g., H. GROTIUS, THE RIGHTS OF WAR AND PEACE 387-88 (Bk. II, Chap. XX, §VII) (A. Campbell tr. 1901) (emphasis added):

The property of subjects is so far under the eminent control of the state, that the state or the sovereign who represents it, can use that property, or destroy it, or alienate it, *not only in cases of extreme necessity*, which sometimes allow individuals the liberty of infringing upon the property of others, but on all occasions, where the public good is concerned, to which the original framers of society intended that private interest should give way. But when that is the case, it is to be observed, the state is bound to repair the losses of the individuals, at the public expense, in aid of which the sufferers have contributed their due proportion.

Cf. S. PUFFENDORF, DE JURE NATURAE ET GENTIUM 1285 (C. and W. Oldfather transls. 1934).

Hence Justice Patterson on circuit in 1795 willingly conceded that the legislature could take property from private citizen A. and give it to private citizen B., in the sense that the legislators "are the sole and exclusive judges of the [political] necessity of the case," provided only that compensation is paid. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 312 (C.C. Pa. 1795). Any implication to the contrary in Justice Chase's 1798 opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (declaring that

Being ideally representatives of the community as a whole and not selfish actors, legislators were entitled to a presumption of good faith; alternatively, in light of the extent of the collective public interest at stake, they could be forgiven as the responsible fiduciaries for choosing to err on the side of overcaution. Thus, Holmes was not the first to embrace *post hoc* compensation as the only pragmatic way to keep legislators honest about imposing no unnecessary sacrifice, direct or regulatory, upon the citizenry.<sup>47</sup>

Worse, unless the judiciary drew the separation-of-powers line squarely at the issue of compensation, "political question" logic<sup>48</sup> would steadily tend towards legislative omnipotence. Step by step, partisans of the legislature were certain

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"a law that takes *property* from A. and gives it to B." violates implied limitations on legislative authority) can be readily explained by the presumed failure of the legislature in such cases to provide compensation. In other words, Chase was invoking a situation in which the legislature might transfer property from A. to B., cynically concede the absence of any public purpose, and hence *disclaim* any concomitant taking clause duty to compensate. The same point was made by Justice Iredell, albeit the other way around. Justifying civil *ex post facto* laws that take away the vested property rights of citizens, Chase invoked the expansive maxim that "private rights must yield to public exigencies." But he made it clear that the principle of compensation was an implied constraint on legislative manipulation of its political right to decree the necessity for such sacrifice:

In such . . . cases, if the owners should refuse voluntarily to accommodate the public, they must be constrained, as far as the public necessities require; and justice is done, by allowing them a reasonable equivalent.

*Id.* at 400.

47. [Conceding *arguendo*] that the two branches of the Legislature, subject only to the qualified veto of the Executive, are the sole judges as to the expediency of making police regulations interfering with the natural rights of our citizens . . . [o]ne of the restraints upon bad legislation in this regard, is the price which the people have to pay, by taxation, for the private property which is taken for public use. It is not reasonable that the Legislature will abuse the power, when their constituents pay for the right.

Parham v. The Justices, etc. of Decatur County, 9 Ga. 341, 354 (1851). Notwithstanding such precedents, Professor Tribe has asserted that Holmes' use of the requirement of just compensation as "surrogate assurance of public purpose" would have been quite unthinkable in the nineteenth century. TRIBE, *supra* note 1, at §9-3, 458-59.

48. See e.g., Henkin, *Is There a "Political Question" Doctrine*, 85 YALE L.J. 597 (1976). Professor Henkin describes the "pure theory" of the doctrine, under which courts voluntarily forego their paramount function of review of constitutionality, as founded on the notion that "some constitutional requirements are entrusted exclusively and finally to the political branches of government for 'self-monitoring.'" *Id.* at 599.

to try to parlay its discretion over the necessity of the taking into comparable powers over, first, the manner and mode of compensation and, finally, over the necessity of making it at all.<sup>49</sup>

### B. *Pre- versus Post-Deprivation Due Process.*

The compromise can be readily parsed in not dissimilar contemporary due process terms, as well. The interim economic harm to an individual from being forced to submit to an excessively broad or burdensome regulatory statute, with no ability to seek injunctive relief, is justifiable on several grounds. They include the presumptively compensable, *i.e.*, non-irreparable, nature of the interest involved,<sup>50</sup> the potential urgency of clamping a regulatory lid on the general situation,<sup>51</sup> and the resultant impracticability of affording predeprivation process to the multitude potentially affected.<sup>52</sup> The latter consideration is especially germane since the effects of a generalized regulation on particular individuals may be unknowable in advance. For instance, there is the question of the diminution in market value to specific properties to be expected from a new zoning law.

Recent Supreme Court cases suggest additional ways to

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49. Justice Patterson made the point forcibly in 1795. Accepting the political right of the legislature to judge the necessity for the policy behind Pennsylvania's occupying-claimant law, which allowed homesteaders to purchase the fee from absentee owners, he denied that the judiciary, consistently with the concept of limited government, could allow the legislature to assert additional "state necessities" to justify the procedural provisions of the Act:

Did there also exist a state necessity, that the Legislature, or persons solely appointed by them, must admeasure the compensation, or value of the lands seized and taken, and the validity of title thereto? Did a third state necessity exist, that the proprietor must take land by way of equivalent for his land? And did a fourth state necessity exist, that the value of the land-equivalent must be adjudged by the board of property, without the consent of the party, or the interference of a Jury? Alas! how necessity begets necessity.

*Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 315 (C.C. Pa. 1795).

50. Compare *Mackey v. Montrym*, 443 U.S. 1 (1979) with *Ewing v. Myling & Casselberry, Inc.*, 339 U.S. 594 (1950). See *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931) (Brandeis, J.):

Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.

51. See, *e.g.*, *Phillips v. Commissioner*, 283 U.S. 589 (1931).

52. See, *e.g.*, *Parratt v. Taylor*, 451 U.S. 27 (1981).



flesh out the Holmesian compromise. Since the post-deprivation damage remedy would arise under the principle of eminent domain, which connotes a deliberate "singling out" for sacrifice as opposed to the imposition of purely accidental harm, the interim harm from a general regulation is unlikely to be recoverable unless and until brought to the attention of some responsible official.<sup>53</sup> Only thereafter in the event a "variance" is not forthcoming within a reasonable time could the harm be deemed constructively ratified by the state creating for the first time the quasi-contractual duty to compensate for any disproportionate sacrifice being inflicted. Also, the compromise would suggest that even after an award for disproportionate sacrifice is made, the responsible authorities should still be in a position to decide that the assessed price for statutory uniformity is too high and simply rescind the regulation *as applied* to the claimant.<sup>54</sup>

### C. *Governmental Immunity from Damage Actions.*

Finally, before the reader can be expected to take seriously the doctrinal compromise being reconstructed, a word or two will need to be said about sovereign and official immunity. Otherwise, the skeptic may retort that the thesis entails a glaring counter-factual supposition. It assumes the availability of an adequate post-deprivation *damage* remedy for excessive regulatory harm; whereas, at the time of *Mahon* both the state and federal governments appear to have enjoyed *federal* immunity against such actions. In addition, that immunity extended to their officials who might commit or ratify regulatory torts within the scope of their express or discretionary authority. To be sure, the skeptic may concede, the post-Reconstruction Supreme Court had taken steps to address this situation by curbing the dangerous amplitude of the doctrine of official immunity. But its efforts were confined to the very area of specific relief deemed judicially off limits by the compromise. The Court afforded such federal relief through the medium of nonstatutory actions based on the Article III subject matter jurisdiction over "all Cases . . . arising under

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53. See, e.g., *Williamson Co. Regional Planning Comm'n. v. Hamilton Bank*, \_\_\_ U.S. \_\_\_, 105 S.Ct. 3108, 3117-21 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, (1981) (Brennan, J., dissenting); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1200, *reh'g denied* (5th Cir. 1981). Cf. *Parratt v. Taylor*, 451 U.S. 527 (1981).

54. *Accord*, *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, (1981) (Brennan, J., dissenting).

th[e] Constitution."<sup>55</sup> The possibility of such actions first arose in 1875 by virtue of the original counterpart to the present 28 U.S.C. § 1331(a), granting general federal question jurisdiction to the district courts. In particular, the Court had invoked Taking Clause principles to support the allowance of a federal ejectment action in 1882 against federal officers in *United States v. Lee*,<sup>56</sup> and a similar suit in 1908 for injunctive relief against state officers in *Ex parte Young*.<sup>57</sup> Thus the skeptic rests his case. Sovereign immunity was intact, and the Court refused to go beyond specific relief in lowering the barrier of official immunity, being reluctant to impose personal pecuniary liability upon dutiful officials.

But what is overlooked is that the same year as *Mahon* Holmes set about to change that immunity situation in *Portsmouth Harbor Land & Hotel Co. v. United States*.<sup>58</sup> Anticipating *Larson v. Domestic & Foreign Commerce Corporation*,<sup>59</sup> Holmes reasoned that to the extent those immunity doctrines embodied political or jurisprudential logic, that logic applied in the context of specific relief only. After all, the official actions being enjoined were likely to have been sanctioned or ratified by the executive or legislative department; they were not what we know today as constitutional torts committed merely "under color of law." Therefore, as Holmes surmised and as the Court confirmed in *Larson*, enjoining the commission of a continuing tort which is authorized by the sovereign should be a juridical last resort not a first.<sup>60</sup> Instead, lest it "sto[p] the government in its tracks"<sup>61</sup> and risk the danger of usurping valid emergency prerogatives of the co-ordinate branches, the judiciary should first rummage about for a suitable post-deprivation damage remedy, such as an inverse condemnation action.

In *Portsmouth* Holmes did just that. He characterized the commission of a continuing, presumptively ratified, tort by federal officers, which consisted of regular artillery shellings over petitioner's land, as a privileged act giving rise to a quasi-contractual claim against their principal under the 1887

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55. Cf. *Bell v. Hood*, 327 U.S. 678, 681-83 (1946); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

56. 106 U.S. 191, 220 (1882).

57. 209 U.S. 123, 124 (1908).

58. 260 U.S. 327 (1922).

59. 337 U.S. 682 (1949).

60. *Id.* at 703-04.

61. *Id.* See also *Malone v. Bowdoin*, 369 U.S. 643, 646-47 (1962).

Tucker Act.<sup>62</sup> At that time, the Tucker Act's coverage of "claims founded upon the constitution" was still construed to be limited by the subsequent phrase "not sounding in tort." Moreover, the dissenting Brandeis insisted that the Tucker Act's coverage of claims founded "upon any express or implied contract with the United States" continue to be strictly construed to apply only to an actual "contract, express or implied *in fact*, to pay compensation."<sup>63</sup> Holmes' analysis, borrowing from classical eminent domain theory, neatly avoided those dilemmas:

If the acts amounted to a taking . . . a contract would be implied whether it was thought of or not.<sup>64</sup>

Given his view of the "self-executing," implied in law character of the constitutional guarantee of just compensation,<sup>65</sup> Holmes, if given the chance, might very well have decided eventually (*a la Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*) to allow a federal common law damage action against the states so as to effectuate the compromise.<sup>66</sup> Or, if truly prescient, he might have anticipated the use of § 1983 to impose the quasi-contractual burden of authorized or ratified torts committed by local state officials directly upon their principal.<sup>67</sup>

62. Stat 505, ch. 359 (1887). See 28 U.S.C. §1491 (1970).

63. *Portsmouth*, 260 U.S. at 331.

64. *Portsmouth*, 260 U.S. at 330. This principle was affirmed in *United States v. Causby*, 328 U.S. 256, 261-62 (1946) (frequent low altitude flights of Army and Navy aircraft over property); *United States v. Dickinson*, 331 U.S. 745 (1947) (a taking of land by flooding in connection with the building of a dam). See also *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) ("the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does"). For earlier unsuccessful attempts to adopt a quasi-contractual approach to the Taking Clause guarantee, see *Hill v. United States*, 149 U.S. 593, 601 (1893) (Shiras, J., dissenting); *Schillenger v. United States*, 155 U.S. 163, 177 (1894) (Harlan, J., dissenting).

65. *Accord*, *United States v. Clarke*, 445 U.S. 253, 257 (1980), quoting 6 J. SACKMAN, NICHOLS LAW OF EMINENT DOMAIN §25.41 (new 3d ed 1980).

66. Cf. *Bivens*, 403 U.S. 388, 398 (1971) (Harlan, J., concurring): I am of the opinion that federal courts do have the power to award damages for violation of "constitutionally protected interests" and . . . that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interest protected by the Fourth Amendment.

*Accord*, Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Facts in Bell v. Hood*, 117 U. PA. L. REV. 1 (1968).

67. See *Monell v. Department of Social Services*, 436 U.S. 658

#### D. Differential Liability Standards.

In either case, the result of such remedial fine-tuning to guarantee the availability of an adequate post-deprivation *damage* remedy at both the state and federal levels should be the same. That is to say, the Holmesian compromise should have been expected to take root and flower. For the ability to liquidate a constitutional claim rather than award specific relief, as Justice Harlan observed in *Glidden v. Zdanok*,<sup>68</sup> should afford a court "greater freedom . . . to inquire into the [*as applied*] legality of governmental action."<sup>69</sup> Relieved of concern over the untoward efficiency implications of tying governmental hands through injunctive relief, the court can concentrate instead on achieving individual equity through damages. That is the posited analysis of *Mahon*. And at this point an instructive parallel may be drawn to the private law of nuisance. There a perceived remedial handicap, *i.e.*, the inability of courts to award damages rather than all-or-nothing injunctive relief, profoundly shaped the development of applicable substantive law. In short, the castastrophic efficiency implications of a finding of nuisance in a particular case, given the remedial spectre of an injunction, tended to swamp the competing fairness concerns and convince judges not to recognize a claimant's entitlement to be free from the nuisance harm in the first place.<sup>70</sup> Hence Professor Rabin has cogently argued that an expansion of the doctrine allowing defendants to buy the right to conduct a nuisance, a doctrine synonymous with *Boomer v. Atlanta Cement Co.*,<sup>71</sup> will benefit plaintiffs as well:

[B]ecause damages rather than injunctions would be the customary remedy . . . , courts would be more willing than at present to recognize the entitlements of plaintiff.<sup>72</sup>

In that sense, with respect to governmental regulatory nuisances impacting intangible economic liberties, *Mahon* should be seen as the public law precursor of *Boomer*.<sup>73</sup>

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(1978); *Owen v. City of Independence*, 445 U.S. 662 (1980).

68. 370 U.S. 530 (1962).

69. *Id.* at 557.

70. See Ellickson, *supra* note 11, at 720.

71. 26 N.Y. 2d 219, 257 N.E. 2d 870, 309 N.Y.S. 2d 317 (1970).

72. Rabin, *Nuisance Law: Rethinking Fundamental Assumption*, 63 VA. L. REV. 1299, 1332 (1977).

73. The foregoing analysis, with its counter-intuitive twist, explains why this author prefers to build creatively on *Larson*, rather than mourn the loss of the pre-*Larson* remedial status quo, especially since the scope of

### E. *Promise and Reality.*

In sum, with *Mahon* the foundation of the compensation component of the compromise appeared secure, if only the federal courts would flex their jurisdictional muscles to provide would-be claimants the necessary inverse condemnation remedy. By constitutionalizing the concept of a *de facto* taking of an economic liberty, Holmes had taken a bold step towards realizing the full ethical potential envisioned for the principle of just compensation by the author of the Taking Clause.<sup>74</sup> Following Locke, James Madison rejected the view that the inviolability of property is limited to the "vulgar and untechnical sense of the physical thing."<sup>75</sup> Nor did he consider it to be confined only to the bundle of intangible rights associated with the ownership of a specific object.<sup>76</sup> Rather, to paraphrase his 1792 essay *Property*, he asserted that in "its larger and juster meaning" the principle behind the Taking Clause rule that no property "shall be taken *directly* even for public use without indemnification to the owner" requires that "the United States . . . equally respect . . . [a man's] property in [his] rights" and abstain from "*indirectly* violat[ing]" the same through "unequal taxes" or unfair regulations.<sup>77</sup>

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substantive protection afforded thereby was exiguous at best.

74. See, e.g., Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L. J. 694, 708-716 (1985).

75. *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945).

76. Cf. *id.* (emphasis added):

[The term "property" as used in the Taking Clause denotes] the group of rights inhering in the citizen's relation to the physical thing or object, as the right to possess, use and dispose if it. . . . The constitutional provision is addressed to *every sort of interest* the citizen may possess.

77. *Property*, Nat'l Gazette, Mar. 27, 1792, in 14 J. MADISON, THE PAPERS OF JAMES MADISON 266-68 (R. Rutland & J. Mason eds. 1983). This expansive reading of the taking clause, which itself refers only to loss of "property," reflects the obvious fact that property is a compendious term embracing many intangible rights or expectations—or "liberties." The reference to "property" in the Fifth Amendment, therefore, may be understood as a term of art referring to all *compensable* liberties—as opposed to certain *inviolable* liberties. After all, like Locke, the libertarian framers often used "property" as a generalized rubric for every interest of "Life, Liberty, and Estate" to which an individual may be said to have a legitimate claim, meaning "that Property which men have in their Persons as well as Goods." See J. LOCKE, TWO TREATIES OF GOVERNMENT §91, 123, 173 (P. Laslett ed. 1960). Inviolable liberties are vindicable civilly through ex-

As the modern Court allowed the permissive scope of the police power to expand essentially unchecked in the post-'37 era, one might logically and normatively have expected it to employ the *Mahon* principle of compensation to take up the slack, especially once it acknowledged its jurisdiction over inverse condemnation actions. Hence, the recognized failure of the Court to devise "ethically satisfying"<sup>78</sup> rules or procedures for differentiating compensable from noncompensable exercises of the police power probably ranks as the key factor behind its so-called abdication in the economic arena.

To be sure, the Court still pays lip service to *Mahon*. And in the process it has reaffirmed with Madisonian inflection the historic equitable principle that the power of eminent domain, as embodied in the Taking Clause, imposes a quasi-contractual duty<sup>79</sup> on the state to pay for all "disproportionate" publicly-inflicted sacrifice, direct or regulatory, where "justice and fairness" require.<sup>80</sup> But there things have stayed. In

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traordinary injunctive relief or, failing that, through civil disobedience triable before a criminal jury; compensable liberties, before a Seventh Amendment jury. Such compensable liberties would include expectations bearing no relation to physical objects, but arising as quasi-contractual rights based on reasonable, detrimental reliance on the implied terms of the social contract. The central issue of whether the individual's reliance on the previous apparent state of the law was sufficiently reasonable and detrimental to warrant compensation would ultimately rest with the jury.

As an example of an unjust regulation which was inconsistent with "property in the general sense of the word," as well as being destructive of "the means of acquiring property strictly so called," Madison impugned the "spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favour his neighbor who manufactures woolen cloth. . . ." *Id.* at 267. This is doubtless a conscious and critical echo of the apologetic Blackstone, who defended the statute of King Charles II, which prescribes . . . a dress for the dead, who are all ordered to be buried in woolen . . . [as] a law consistent with public liberty; for it encourages the staple trade, on which in great measure depends the universal good of the nation.

2 TUCKER'S BLACKSTONE 126 (1 Bl. \*126) (1803).

78. Michelman, *supra* note 4, at 1171.

79. See, e.g., *Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("[T]he right to recover just compensation . . . rest[s] upon the Fifth Amendment. Statutory recognition is not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment"), cited in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 654-55 (1981) (Brennan, J., dissenting).

80. See, e.g., *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("[T]he Fifth Amendment's guarantee [is] designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole"), cited in *PruneYard*

practice, the Court has abdicated any serious responsibility for applying and refining the principle over time.<sup>81</sup> Instead, with regard to what should be the judicial question of the *as applied* fairness of a regulation, involving "essentially ad hoc, factual inquiries"<sup>82</sup> into "the particular circumstances of each case,"<sup>83</sup> it has again "adopted as its watchword 'deference' to the legislative judgment."<sup>84</sup> This article advances a straightforward procedural diagnosis and cure for the Court's failure to carry through with the Holmesian compromise, a failure which is symbolized by the current ethical bankruptcy of federal Taking Clause doctrine.<sup>85</sup> To paraphrase Jefferson, the problem has been the refusal of the Supreme Court to place the ultimate administration of the equitable principle of unreasonably disproportionate or unfair regulatory sacrifice "within the pale of [Seventh Amendment] juries."<sup>86</sup>

#### F. *Moral and Institutional Burdens of Appellate Review.*

Without a jury to fall back on, the open-ended standard of inequitable or unreasonable sacrifice,<sup>87</sup> like the "reasonableness" standard in torts, requires great self-confidence on the part of a judge if he is to assert and stand by his own subjective, outcome-determinative views—especially where they would impose liability on the fisc.<sup>88</sup> Holmes was such a jurist. An arch-antiformalist, he embraced the juridical necessity for qualitative judgments; and he affirmatively did not want a jury drawing difficult moral lines for him. If need be, he was prepared personally to shoulder the *Mahon* responsi-

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Shopping Center v. Robins, 447 U.S. 74, 82-83 (1980).

81. See, e.g., Krier, *The Regulation Machine*, 1 SUP. CT. EC. REV. 1, 5-8 (1982).

82. See, e.g., Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Kaiser-Aetna v. United States, 444 U.S. 164, 175 (1979); PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980).

83. See, e.g., United States v. Caltex, Inc., 344 U.S. 149, 156 (1952); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

84. See Epstein, *supra* note 12, at 355.

85. Krier, *supra* note 81, at 4.

86. VI T. JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* 66 (Washington ed. 1861).

87. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, (1978) ("[T]his Court . . . has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons. See Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).")

88. Cf. Epstein, *supra* note 12, at 355.

bility of deciding what regulations went "too far," just as he insisted in the First Amendment area on treating the issue of "clear and present danger" as ultimately a question of law, turning on the totality of the individual circumstances.

The modern Court is perhaps commendably less sure of itself. Consequently, in the Taking Clause context, as Professor Epstein has noted, "if there are no *fixed rules* to guide inquiry, the upshot will be judicial deference, if not to the jury then to the legislature and its administrative offspring."<sup>89</sup> To avoid the fateful combination of judicial deference to "the legislature and its administrative offspring" at both the *facial* and *as applied* levels of inquiry, Epstein, giving no serious thought to the jury alternative, would inject "fixed rules" back into the equation to produce a more structured inquiry, one designed to give judges the intellectual tools and confidence to invalidate more regulations.<sup>90</sup> This article does not dispute Epstein's call for a more rigorous theory of the Taking Clause, one which develops Holmes' balancing formula in *Mahon* into a three-pronged inquiry<sup>91</sup> along the lines sug-

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89. See Epstein, *supra* note 12, at 355.

90. *Id.* at 356.

91. The author rejects for two reasons the omitted fourth part of Epstein's inquiry, which seeks to breathe new life into the "public purpose" doctrine. *Id.* at 365-369. First, he accepts the principled foundations of the compromise with its rejection of specific relief and correlative emphasis on breathing new life into the doctrine of "just compensation" instead. Therein lies the true opportunity for surrogate "public purpose" protection. If compensation rules were revised in accordance with the present thesis, a jury would be allowed to compute and compensate the claimant's reasonable subjective harm (over and above loss of market value) in being forced to give up his property or "liberties." Cf. Harris, Ogun, & Phillips, *Contract Remedies and the Consumer Surplus*, 95 L. Q. REV. 581, 601-04 (1979). In an analogous setting, Professor Ellickson has referred to this element of harm as the claimants' "common nonfungible consumer surplus." Ellickson, *supra* note 11, at 735-37. And for evidence that concern over the current noncompensability of consumer surplus actually motivates those few judges who still insist on a "public purpose" doctrine with teeth, see *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 682-83, 304 N.W.2d 455, 481 (1981) (Ryan, J., dissenting):

But more important, [eminent domain] can entail, as it did in this case, intangible losses, such as severance of personal attachments to one's domicile and neighborhood and the destruction of an organic community of a most unique and irreplaceable character.

Secondly, as the recent unanimous decision in *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. 2321 (1984), confirms, "public purpose" is simply no longer a subject for fruitful debate in a post-*Lochner* universe of discourse. But see Epstein, *Asleep at a Constitutional Switch*, WALL ST. J., Aug. 9, 1984, at 28, col. 3.



gested by Justice Rehnquist's dissent in *Penn Central Transportation Co. v. New York City*.<sup>92</sup> But Epstein's solution is impugned by his own earlier analysis. His three *concrete* tests—which translate roughly as (i) whether the claimant had a “legitimate” economic expectation under the pre-existing state of the law that has been injured, and if so, (ii) whether a “sufficient threat” to a general public interest exists to warrant the degree of individual sacrifice imposed, and if not, (iii) to what extent has the “unjustified portion” of the sacrifice been offset through implicit “in-kind benefits” from the operation of the statutory scheme—are each ideally suited to application by a jury.<sup>93</sup> From the standpoint of the Court itself however, they each barely conceal an irreducible and unacceptable core of unwelcome discretion.

### G. *The Demise of Equity.*

Given the moral and institutional burden of exercising such discretion on a case-by-case basis at the appellate level, the modern Court has already demonstrated that it does not consider itself bound by *Mahon's* high judicial duty of *ad hoc* inquiry. Nor is this institutional reluctance to balance the equities necessarily the reflection of traditional sovereign immunity concerns. For example, Justice Brennan has championed the provision of an inverse condemnation remedy against local governments under § 1983, a remedy he would likewise extend against the states themselves under either § 1983 (and its jurisdictional analogue) or § 1331(a).<sup>94</sup> Yet with Brennan in the lead, the Court has sought refuge from *Mahon's* bal-

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92. 438 U.S. 104, 138 (1978) (Rehnquist, J., dissenting). See note 11, *supra*.

93. Briefly canvassed, the first criterion arguably embodies a central element of estoppel. Did the prior state of the law reasonably induce the claimant to take or forgo actions, that in turn have generated expectational interests that should be deemed “property” for Taking Clause purposes. Cf. *Penn Central*, 438 U.S. at 125. Law courts have long since taken over the principle of estoppel from equity and consigned the ultimate mixed question to juries. (Despite precedent to the contrary in the area of express contractual dealing with the government, this article contends that estoppel should be a lively principle for governmental liability under the social contract.) The second criterion is similar to the nuisance law “neighborliness” principle of *sic utere tuo . . .*, also a formidable redoubt of jury equity.

The final criterion is based on computation of net damages, another historic preserve of the jury.

94. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 349 n.1 (1979) (Brennan, J., dissenting).

ancing test in the safety and convenience of wooden, formalistic rules.<sup>95</sup> And, as if to add insult to injury, Justice Brennan persists in misreading the facts of *Mahon* as involving a "complete destruction" of the reserved mineral estate,<sup>96</sup> rather than the actual one-third loss in value.<sup>97</sup> As a result, he is able to adduce *Mahon* itself as support for a thoroughly unsatisfying reading of the Taking Clause that says, short of a physical invasion, only a governmental regulation or activity which entails the "total destruction of value"<sup>98</sup> or "complete depriv[ation] . . . of all or most [of one's property]"<sup>99</sup> should be deemed sufficiently disproportionate to rank as an inequity of constitutional magnitude.<sup>100</sup> In a situation where a genuine constitutional need for *as applied* equity exists, the Court has incongruously replied in terms of "the ideal of an impersonal justice identical for all."<sup>101</sup> Facially neutral rules of law have their place, but it is hard to justify their use to implement the broad remedial principles of "justice and fairness" said to underlie the Taking Clause. Rather, as later sections will explore, the approach being taken by the Court may be said to be a natural outgrowth of nineteenth century formalism, a doctrine which has encouraged courts in the direction of the "final and complete emasculation of Equity as an independent source of legal standards."<sup>102</sup>

#### H. Efficiency Concerns.

Of course, more concrete reasons exist why the Supreme Court has rejected any serious role in taking disputes for judicial equity and embraced bureaucratic equity in-

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95. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

96. *Id.* at 121.

97. *See Mahon v. Pennsylvania Coal Co.*, 274 Pa. 489, 511 (1922) (Kephart, dissenting), *aff'd* 260 U.S. 393, 395 (1922).

98. *Penn Central Transportation Co.*, 438 U.S. at 127.

99. *San Diego Gas* 450 U.S. at 653 (Brennan, J., dissenting) (emphasis added).

100. *Cf. Note, Reexamining the Supreme Court's View of the Taking Clause*, 58 TEX. L. REV. 1447, (1980):

Since *Pennsylvania Coal*, the Court has perceived Holmes' test as consistent with fairness, but too burdensome on government. Thus, the Court has self-indulgently applied the *Pumpelly/Mugler* ["appropriation/physical invasion"] test without openly disavowing the Holmes approach.

101. Michelman, *supra* note 4, at 1170.

102. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, 265 (1977).

stead—reasons other than the general institutional burden of fatigue and moral diffidence, that is. A specific political burden tempts the Court to employ latitudinarian, bright line rules of appellate review, glossed over by the cavalier assumption that the fact-finder below has fully and fairly balanced the equities between the state and the citizen despite clear evidence of immoderate deference to the legislature or rote adoption of administrative findings.<sup>103</sup> In short, the modern Court has decided *sub silentio* that regulatory taking disputes, given the latent public policy issue of curbing widespread fiscal liability and runaway litigation expenses, are not justiciable after all—except within broad arbitrary limits involving the presence of a physical trespass or a total destruction of value. Rather, they are to be treated as quasi-legislative matters, involving a political trade-off between efficiency, fairness, and the government's ability to afford both.

But that concern seems definitively misplaced. After all, at this point we are only talking about the government's liability for continuing "torts" which it has in effect voluntarily assumed through ratification and it can always turn off like a spigot. Furthermore, though justice precedes generosity, Congress itself has gratuitously accepted liability for a truly unpredictable category of accidental harms under the Federal Tort Claims Act.<sup>104</sup>

In any case, the Court's conclusion is unwarranted in principle. A direct parallel exists between the problems of limiting governmental exposure for intangible regulatory

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103. In *Penn Central* the Court put great emphasis on the fact that in the instant case—as in past cases—"a state [appellate] tribunal reasonably concluded that 'the health, safety, morals, or general welfare' will be promoted by prohibiting particular contemplated uses of land" and that as a result any destruction of or adverse affect upon "recognized property interests" was justified. 438 U.S. at 125. But as the Supreme Court acknowledged, the New York Court of Appeals reached that conclusion by rejecting the fact findings of the trial court and employing the clearly erroneous rule of law that an intangible regulatory harm can never amount to a taking. *Id.* at 120-21.

104. See 28 U.S.C. §§2671-80 (1970). Of course, 28 U.S.C. §2680(a) (1970), the so-called "discretionary function" exception, excludes from coverage "any claim . . . based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion is abused." While this exception is assumed to apply to the continuing constitutional "torts" under discussion, as Justice Brennan has noted in a similar context, "[a governmental entity] has no 'discretion' to violate the Federal Constitution. . . ." *Owen v. City of Independence*, 445 U.S. 622, 649 (1980).

harm and containing the costs of government-sponsored airport and airplane noise and vibrations. And, not surprisingly, in the latter context the Supreme Court has taken an identical stand. Focusing on the issue of physical invasion, its doctrine renders precisely the same harm to two individuals on the ground actionable or not depending on a mere technicality like the angle of overflight.<sup>105</sup> Nonetheless, a dissentient view more in harmony with our constitutional principles has emerged out of this cacophonous setting. That view holds that inability to compensate the entire class of those non-trespassorily and incompletely injured is no sufficient constitutional reason why none should be.<sup>106</sup> Rather it asserts that the *as applied* fairness of governmental nuisances must remain emphatically a judicial question, just as suggested by the compromise. Accordingly, in the case of both real and regulatory nuisances perpetrated by the government, a *judicial* fact-finder should determine on a case-by-case basis whether the individual harm is sufficiently "direct and peculiar and substantial" to warrant compensation.<sup>107</sup>

To be sure, that equitable determination will involve many substantive factors, such as those suggested by Rehnquist and Epstein—including no doubt one based on the general inefficiency of compensating certain reasonably *de minimis* levels of harm given the disproportionately high (and "wasted") cost of identifying, adjudicating, and paying each individual claim.<sup>108</sup> Unfortunately, being unable or unwilling itself to make such *ad hoc* equitable differentiations among members of the class, the Supreme Court has denied as well any constitutional imperative to see that the task devolve on a

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105. See *United States v. Causby*, 328 U.S. 256 (1946); *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

106. See, e.g., *Batten v. United States*, 306 F.2d 580, (9th Cir. 1962) (Murray, C.J., dissenting) *cert. denied*, 371 U.S. 955 (1963); *Thornburg v. City of Portland*, 233 Ore. 178, 176 P.2d 100 (1962).

107. *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914). Cf. L. TRIBE, *supra* note 1, at §9-3, 460 n.2 (1978). This requirement of a showing of "substantial" harm, should automatically winnow out trivial claimants from among the class of those non-trespassorily and incompletely harmed; and the actual "substantial" threshold will ultimately be set by the jury at the point where the redistributive impact can no longer justly be ignored in the name of efficiency. See Ellickson, *supra* note 11, at 773.

108. The thesis of this article is consistent with use of streamlined administrative procedures. And conditioning any right to appeal to a jury on payment of the state's attorneys' fees in the event of a less favorable verdict, coupled with the general cost of litigation, should go a long way towards protecting the fisc against frivolous and "inefficient" litigation.

more suitable *judicial* institution. Of course, the central thesis of this article holds that in all difficult cases involving the *as applied* fairness of regulatory conduct, regardless of what judicial standard are devised to structure the inquiry, a claimant enjoys an ultimate right to have a disinterested public law jury decide the underlying mixed question of law and fact. Pursuit of that proposal requires a brief look at the technical excuses the Court has given for shirking its own ostensible *Mahon* duty.

### I. *Mixed Constitutional Questions.*

There was, it turns out, an unfortunate aspect to the suggested Holmesian compromise of throwing brer legislature into the briar patch—a dark side, so to speak. Since the *as applied* fairness of regulations is a mixed question of law and fact, the *Mahon* standard of constitutional review, if it was to stand up against potentially sycophantic or self-serving findings of fact by legislative agencies or commissions, required the Court to take one of two approaches. Either it could adopt a strict legal standard capable of mechanical application to the undisputed historical facts found below, or it could stick by its necessarily open-ended standard of unreasonable sacrifice and assert an Article III power of *de novo* fact-finding as to the mixed constitutional question. As of 1922 *Mahon* arguably did neither. For at least until the 1928 abolition of the Writ of Error procedure,<sup>109</sup> which had limited the Court's appellate jurisdiction strictly to matters of law, Holmes would have agreed with Brandeis that applications of the formula-less *Mahon* standard were essentially unreviewable.<sup>110</sup> Absent fraud or willful misconduct, the administrative fact-finder need only pay lip service to the vague standard. Since its actual application required "the exercise of a sound and reasonable judgment upon a proper consideration of all relevant facts,"<sup>111</sup> any result could be aptly characterized as a pure matter of fact for Writ of Error purposes.

Even with the institution in 1928 of federal "appeals" extending to the facts of cases, Holmes agreed with Brandeis'

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109. See, e.g., R. WOLFSON AND P. KURLAND, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §104 (1951).

110. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 293, 298-99 (1920) (Brandeis, J., dissenting, joined by Holmes, J.).

111. *Id.* (quoting *Ben Avon Boro v. Ohio Valley Water Co.*, 260 Pa. St. 289, 309 (1918)). See also *Kentucky Rd. Tax Cases*, 115 U.S. 321, 335 (1885).

minority position that individual *as applied* attacks, which of course do not really implicate the *facial* validity of statutes, *i.e.*, the power of state to enact them at all, should be deemed to fall within the Court's *certiorari* rather than its mandatory and overburdened appellate jurisdiction, the latter being properly reserved for cases of "general public importance."<sup>112</sup> The former, like the Writ of Error procedure, excluded all factual issues on review of administrative actions save those concerning "excess of jurisdiction." At bottom, Brandeis simply did not believe that the precious appellate time and mission of the Court should be frittered away "assuring individual rights" on an *ad hoc* basis.<sup>113</sup>

Nonetheless, after the abolition of the formalistic Writ of Error procedure, it is difficult to imagine that the self-confident Holmes would any longer have disputed the practical conclusion reached by Chief Justice Hughes (the author of *Blaisdell*) as to an appellate matter properly before the Court:

[T]he [Article III] judicial . . . power necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function [of constitutional review]. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact.<sup>114</sup>

So it fell to Brandeis alone to counter Hughes' logic with a practical anomaly. He invoked the historically dubious public right/private right dichotomy first articulated in 1856 in *Murray's Lessee*.<sup>115</sup> There Justice Curtis insisted that as of 1791, the year the Fifth Amendment was ratified, it was assumed that in certain urgent public law matters, such as tax collection, the legislative and executive branches could provide adequate predeprivation due process.<sup>116</sup> This much was unexceptionable, but in a critical dictum Curtis also asserted

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112. *John P. King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 109-13 (1928) (Brandeis, J., dissenting, joined by Holmes, J.). Cf. *Dahnke-Walker Milling Co. v. Bordurant*, 257 U.S. 282, 289 (1921) (Brandeis, J., dissenting).

113. See 16 WRIGHT, MILLER, COOPER AND GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE* §4015, 650 (1977). Cf. *Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947).

114. *Crowell v. Benson*, 285 U.S. 22, 60-61 (1932).

115. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. at 38, 78-81 (1936) (Brandeis, J., concurring).

116. See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

that after any such privileged deprivation the state could *both* refuse to furnish any postdeprivation judicial remedy against itself *and* immunize the officials involved against any private damage action, absent excess of authority. Thus, as a result of prior extensions of *Murray's Lessee*, Brandeis was in a position to refute Hughes' assertion of a judicial duty of independent fact-finding by simply noting that even in a straight taking case, where the constitutionality of the governmental action clearly depended on just compensation being paid, Congress has been permitted to commit conclusive ascertainment of the quantum of damages to administrative commissions or tribunals.<sup>117</sup>

### J. *Hoist By Its Own Petard.*

But what is most significant is that Brandeis, in his influential concurrence in *St. Joseph Stock Yards Co. v. United States*,<sup>118</sup> did not defend the continued finality of administrative fact-finding in public law matters on the basis of the historical arguments in *Murray's Lessee*, arguments from which the majority was so clearly backing away. For example, Hughes had impugned the historical soundness of Curtis' dictum since it would tend to

establish a government of bureaucratic character alien to our system, whenever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.<sup>119</sup>

Rather Brandeis defended administrative determinations of constitutional fact on two competing policy grounds.

First, there was the perennial argument that a requirement of *de novo* Article III fact-finding would intolerably burden the federal courts.<sup>120</sup> More especially, however, Brandeis repeatedly invoked the *reductio ad absurdum* of the Seventh Amendment to justify Curtis' conclusion.<sup>121</sup> After all, even if the majority were correct about the need for judicial fact-finding in public law disputes implicating constitutional rights, what was to keep Congress and the states from conferring such responsibility on "a jury of inexperienced layman,"

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117. See, e.g., *Kohl v. United States*, 91 U.S. 367, 376 (1875); *Bauman v. Ross*, 167 U.S. 548, 593 (1897).

118. *St. Joseph Stock Yards*, 298 U.S. at 78-81.

119. *Crowell v. Benson*, 285 U.S. at 57.

120. 298 U.S. at 81.

121. *Id.* at 73, 78-81.

whose findings would themselves be effectively sheltered from judicial review by the second clause of the Seventh Amendment?<sup>122</sup> Indeed, that was the basic lesson taught by *Chicago, Burlington & Quincy Ry. v. Chicago*<sup>123</sup> (though Brandeis did not mention it). There the bold fact that the Court at long last extended the Taking Clause guarantee against the states had arguably been eclipsed by the legislature's simple expedient of entrusting the ultimate issue of just compensation to a jury. Its essentially unreviewable verdict was for one dollar. And so Brandeis asserted that the Constitution itself erected the ultimate barrier against Hughes' ideal of "supremacy of the law" being anything more grandiose in practice than making sure the accredited local fact-finder pays lip service to the applicable federal rule or standard.<sup>124</sup> In conclusion, Brandeis asked why, if the Constitution was content to leave the finding of facts in judicial proceedings largely to mere laymen, Congress and the states should be debarred from according the same conclusive weight to findings of an "expert agency"?<sup>125</sup>

A deeply ironic element of historical *deja vu* surrounds Brandeis' rhetorical question. Well before writs of certiorari and other means of direct appellate review were utilized, judicial review of administrative actions in England took the form of collateral attack through common law actions of trespass, trover, and replevin against the officials involved.<sup>126</sup> For example, the historic *Dr. Bonham's Case* involved a trespass action for false imprisonment against the Royal College of Physicians and Surgeons. Most importantly, in such damage actions the underlying administrative findings of fact (such as the conclusion that Dr. Bonham was guilty of malpractice) were traversable before the jury, even though the officials had been expressly granted discretionary authority to decide such facts.<sup>127</sup> This libertarian procedure, designed to vindicate due process of law (*i.e.*, the supremacy of common law procedures) over the bureaucratic innovations of Bacon *et*

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122. *Id.* at 73.

123. 166 U.S. 226, 242 (1897).

124. Brandeis' point was more telling then than now, since today federal trial courts enjoy undisputed authority to direct civil verdicts.

125. *St. Joseph Stock Yards* 298 U.S. at 81.

126. See, e.g., Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 953-55 (1957).

127. See *Dr. Bonham's Case*, 8 Coke 114, 77 Eng. Rep. 646 (C.P. 1610). See also *Rooke's Case*, 5 Coke 99b, 77 Eng. Rep. 209 (C.P. 1598).



*al.*,<sup>128</sup> bore the apparent impress of Chief Justice Coke's affection for the jury.<sup>129</sup>

In the period 1680-1700, however, with the growing ascendancy of Parliament, English courts began to impose on such collateral attacks the doctrine of "jurisdictional fact," previously used to circumscribe the scope of direct appellate review of legislative courts.<sup>130</sup> As a result, so long as administrative judges stayed within the ambit of their statutory discretion, the common law jury lost its former right to second guess the accuracy and fairness of their findings at least technically speaking.<sup>131</sup> In short, King's Bench acquiesced in the power of Parliament to confer on legislative courts the right to make factual mistakes and perpetrate inequities, all in the name of equitable discretion.

In order to reach that conclusion in the classical 1700 case of *Groenvelt v. Burwell*,<sup>132</sup> however, Lord Chief Justice Holt first had to distinguish Coke's opinion in *Dr. Bonham's Case*. He did so on the basis that the censors of the Royal College, the administrators involved in both cases, had in fact been granted valid *judicial* powers by Parliament.<sup>133</sup> Then, anticipating Brandeis in *St. Joseph Stock Yards*, Holt constructed a perverse syllogism, taking as his major premise the conceded non-reviewability of mistaken findings — of fact by common law jurors.<sup>134</sup> From there it was a short, dubious step to the conclusion that mistaken findings by nontraditional *judicial* fact-finders should be deemed similarly

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128. See Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 403 (1958).

129. A more technical, less romantic, explanation for Coke's allowance of a retrial of administrative findings before a jury lies in the fact that until the availability of certiorari was established in 1700 no "appellate" review over agency decisions was available. See, e.g., Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 956 n.11 (1957).

130. *Id.* at 955-56. See, e.g., *Terry v. Huntington*, 145 Eng. Rep. 557 (Ex. 1680) (an action of trover for goods levied on to satisfy an excise on wine assessed by the Commissioners of Excise).

131. Subsequently, it would appear that jurors often stretched the concept of *ultra vires* to cover findings of general administrative unfairness, precipitating a nineteenth century appellate crackdown.

132. 91 Eng. Rep. 1202 (K.B. 1700) (Holt, L.C.J.).

133. *Id.* at 1211. Coke had maintained that the censors "are not made judges, nor a Court given them, but have an authority only. . . ." *Dr. Bonham's Case*, 77 Eng. Rep. 657.

134. 91 Eng. Rep. at 1212-13. The unreviewability of criminal verdicts by collateral contempt proceeding was formally established by *Bushel's Case* in 1670.

conclusive:

By this statute the original power of the jury at common law being vested in censors, [their verdict] is equally peremptory.<sup>135</sup>

The modern irony of course is that Holt's omnipotent Parliament labored under nothing comparable to the Article III or Seventh Amendment constraints of the U.S. Constitution, which proscribe the diversion of *judicial* power to non-Article III institutions, not to mention the shifting of discretionary common law fact-finding to non-jurors. Otherwise, *Groenvelt* could not so easily have been written. Nonetheless, Brandeis just as facilely converted the hard-won constitutional prerogative of Article III jurors to make essentially unreviewable findings of fact in favor of individual liberty into the concededly nonjudicial right of administrators to "fudge the facts"<sup>136</sup> in favor of the state. Besides the historical smoke and mirrors of *Murray's Lessee*, Brandeis achieved his feat of legal legerdemain by successfully insinuating that Seventh Amendment jurors are mere "lay" adjuncts in the Article III process, who do not share in *essential* Article III judicial powers.

The section that follows represents an argumentative response to Brandeis' rhetorical question in *St. Joseph Stock Yards*, asserting the constitutional transitivity of "lay" and "expert" fact-finders. It musters history and policy to support an antithetical reading of the Seventh Amendment as guaranteeing an independent-minded Article III jury *especially* in public law cases (and hence as justifying wholesale deference

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135. *Id.* at 1213. This argument was prefigured by counsel in *Terry v. Huntington*, 145 Eng. Rep. 557, 558 (Ex. 1680).

136. This is a paraphrase of Judge Frank's famous effort at debunking the "myth" of the jury as conscious dispensers of democratic equity, in which he denied that jurors possessed the requisite sophistication to tailor their findings of facts in order to reach the desired legal result—a sophistication rendered unnecessary by the general verdict. On the other hand, Frank would doubtless have had to concede both the logical need and capacity for such "serpentine wisdom" on the part of *expert* agencies:

It is said that juries often do not find the facts in accordance with the evidence, but distort—or "fudge"—the facts, and find them in such a manner that (by applying the legal rules laid down by the judge to the facts thus deliberately misfound) the jury is able to produce the result which it desires, in favor of one party or the other. "The facts," we are told, "are found in order to reach the result."

J. FRANK, *COURTS ON TRIAL* 110-11 (1949).

to findings of "constitutional fact" by state appellate courts only where they are adopting mixed findings made by a jury).

### K. *The Status Quo.*

In the meantime the Court has adopted Brandeis' argument in *St. Joseph Stock Yards*, halted its retreat from *Murray's Lessee*, and thereby eliminated the last vestige of the posited Holmesian compromise. Thus did Brandeis convert his solo dissent in *Mahon* into the *de facto* position of the Court by way of the procedural back door. The vague *Mahon* standard of unjust or unreasonable sacrifice was entrusted to the tender mercies of the accredited administrative or juryless judicial fact-finder, which now need only review the relevant circumstances, pay lip service to the correct "rule of law," and find the constitutional facts so as to reach the politically expedient result.<sup>137</sup>

Equally disturbing is the inference drawn by the accredited fact-finders from the Supreme Court's lax standard of review as to the diminutive constitutional status of individual equity, an inference that is not necessarily inaccurate.<sup>138</sup> The

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137. See *Federal Power Company v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (Douglas, J.), which made the standard for confiscation in rate-making cases whether "the total effect of the rate order [is] unjust or unreasonable," rather than compliance with any fixed standards of law. Since virtually any mixed finding will be fairly debatable, given the multiplicity of facts, the administrative process is essentially shielded from review.

138. See, e.g., *Bowles v. Willingham*, 321 U.S. 503, 516, 517, 528 (1944) (Douglas, J.) (an unsuccessful "facial attack" by a landlord on the Emergency Price Control Act of 1942 which required the Administrator to promulgate rates that were merely "generally fair and equitable"). Finding "considerations of feasibility and practicability . . . germane to the constitutional issue," the Court held that Congress could decide to authorize a general rate schedule, even though as applied to a particular landlord it might be unfair and inequitable, especially since in wartime the manpower for *ad hoc* determinations was limited. *Id.* at 517, 520-21. In addition, any individual harm to a landlord's "fair return" was balanced in equal protection terms by the widespread uncompensated losses, including lives, being exacted by government in wartime. *Id.* at 519. (On the "equal protection" dimensions of the Taking Clause, see note 4 *supra*. Again, however, these observations were strictly dicta insofar as they implied anything about Mrs. Willingham's future ability to contest the inequity of the imposed rates in a post-deprivation *as applied* attack.

Yet Justice Brennan, following the surface logic of *Bowles*, does apparently condone individual regulatory inequities short of the physical invasion/total destruction of value threshold, even in the context of an *as applied* attack, so long as they stem from changes in the "general law" adjusting the benefits and burdens of economic life to promote the com-

contrary inference, supported by this article, is that the Court's deferential physical invasion/total destruction of value standard represents merely an appellate rule, born of its own institutional position, which both presupposes *and requires* that lower courts in fact fully and fairly balance the equities. With the statutory Writ of Error eliminated, this policy of continued deference to non-jury factfinders (especially in the economic area) can only reflect some combination of (1) federalism principles concerning the line dividing matters of exclusively state and local concern and those federal rights of which the Supreme Court must be the ultimate arbiter or analogous separation-of-powers principles and (2) prudential institutional principles of "sound appellate practice." The latter pertain to the Court's need to conserve its energy in its hierarchial role as the promulgator of general federal standards, rather than fritter it away as a trier of fact;<sup>139</sup> hence they actually support a more *responsible* fact-finding role for lower courts (and by extension for juries). But it is easy for the two sets of principles to become confounded. As a result, the Court may conclude — or appear to those same lower courts to conclude — that U.S. Constitutional guarantees themselves are merely intended to restrict governmental action within broad, general parameters, so that less easily categorizable statutory wrongs, which turn on the particular facts of how a statute is applied, are (in Brandeis' phraseology) of "trifling [federal] significance."<sup>140</sup> Yet,

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mon good"—war or no war. *Penn Central*, 438 U.S. at 124. Cf. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). There is in all this, of course, a conscious echo of Holmes' opinion for the court in *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915), in which the property assessments in an entire county were raised by forty percent. Affirming the tax against a *facial* attack, given the impracticability of a predeprivation hearing, Holmes wrote:

General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

*Id.* at 445. But Holmes, unlike Brennan, is not disparaging the right of individualized redress. Rather he expressly presumes that each owner already possessed the truly important right under prior decisions to contest the assessed valuation of their individual parcels, against which the new uniform rate would be applied. *Id.* at 444.

139. See Note, *Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases*, 14 STAN L. REV. 328 (1962); 16 WRIGHT, MILLER, COOPER, & GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE* § 4033 (1977).

140. *John P. King Mfg. Co. v. City Council of Augusta*, 277 U.S.

as Brandeis himself later acknowledged,<sup>141</sup> the Fifth and Fourteenth Amendment do render the *as applied* fairness of governmental regulations a federal question of fundamental importance. And so, too, as a consequence is the identity of the all-important dispenser of federal constitutional equity.

## II. THE THESIS: A SEVENTH AMENDMENT PUBLIC LAW JURY

The Seventh Amendment to the federal Constitution, which provides that "the right of trial by jury shall be preserved"<sup>142</sup> in all common law actions involving more than \$20., appears to have been something of a popular ark of the covenant—one of the most sought-after provision in the Bill of Rights.<sup>143</sup> Indeed, first mention of the need for a Bill of Rights in the Philadelphia Convention centered on the lack of a civil jury guarantee.<sup>144</sup> And thereafter opponents of the Constitution continually railed against this deficiency, the situation having been gravely compounded in their view by the decision to confer appellate jurisdiction on the Supreme Court "both as to law *and facts*."<sup>145</sup> That jurisdictional grant, they feared, would enable the Court to nullify the essential virtue of the civil jury they were demanding, *i.e.*, its ability to render an unreviewable general verdict on all mixed questions of law and fact. Justice Story records that these objections, which were "pressed with . . . urgency and zeal,"<sup>146</sup>

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100, 115 (1928) (Brandeis, J. dissenting). Cf. *Telluride Power Transmission Co. v. Rio Grande Western Ry.*, 175 U.S. 639, 645-46, 647 (1880).

141. *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935).

142. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by 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.

143. See, e.g., Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 688-89 (1973).

144. *Id.* at 657-661. Guarantees of a civil jury and freedom of the press were the two principal "rights" emphasized by Antifederalists and Federalists alike in demanding a bill of rights. See, e.g., J. MAIN, *THE ANTI-FEDERALISTS* 160-62 (1961). As one commentator has noted, the absence of the former "was lamented by nearly everyone who commented in any detail on the Constitution." *Id.* at 160. And it is arguable that the latter was directly linked in many minds to the problem of safeguarding the prerogatives of the *criminal* jury.

145. *Id.* at 673 n.89. See, e.g., *THE FEDERALIST PAPERS*, No. 81, at 488-91 (C. Rossiter ed. 1961) (A. Hamilton) [hereinafter cited as *FEDERALIST PAPERS*].

146. III STORY, *COMMENTARIES*, *supra* note 24, at § 1757, 628.

had such "a vast influence on *popular opinion*"<sup>147</sup> that they "well nigh prevent[ed] . . . ratification [of the Constitution]." <sup>148</sup> Moreover, they remained "one of the strongest points of [continued] attack upon the [C]onstitution"<sup>149</sup> until the Seventh Amendment itself was ratified.

This section, drawing in part on those to follow, reconstructs a general conceptual model of the civil jury that would explain why it was pervasively viewed as the "bulwark of Liberty"—"the very palladium of free government."<sup>150</sup> The basic argument is that civil jury trials were prized by the populace chiefly for their public law implications, that is, for their utility in preventing possible oppression in tax suits, condemnation proceedings, and other administrative actions and, if necessary, in obtaining redress for consummated governmental wrongs through collateral suits for damages against officials.<sup>151</sup> In the latter regard, the important controversy over the jurisdiction of the vice-admiralty courts demonstrates that damage actions were used not merely to punish executive misconduct but more often to make a dutiful official the means of vicarious redress against his oppressive, but immune principal—the sovereign legislature.<sup>152</sup>

147. *Id.*, § 1762, at 632.

148. *Id.*, § 1757, at 628. Alexander Hamilton, having reached the same conclusion, used THE FEDERALIST, No. 83 to persuade his fellow New Yorkers that the lack of a civil jury guarantee in the proposed Constitution was not the serious defect alleged:

The objection to the plan of the convention, which has met with most success in this state, 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.*

FEDERALIST PAPERS, No. 83, *supra* note 145, at 495 (emphasis in original).

149. III STORY, COMMENTARIES, *supra* note 24, at § 1762, 633.

150. *Federalist Papers*, No. 83, at 562 (A. Hamilton). In the Virginia ratification convention, for example, Patrick Henry rang all the changes on this rhetorical theme, extolling variously the "transcendent excellency" and "essentiality to the preservation of liberty" of this mode of trial. 3 ELLIOT, DEBATES, *supra* note 22 at 314, 324, 462, 583, 544. *See also* Wolfram, *supra* note 143 at 670 and n. 85.

151. *See, e.g.*, M. TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC 109 (1978); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 204-22, 249 (1965); E. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW 30, 32-35, (1963); *Damsky v. Zavatt*, 289 F.2d 46, 49-50 (2d Cir. 1971) (Friendly, J.) (in 1791 an *in personam* action by the Crown to collect taxes through the Court of Exchequer was a suit at common law in which the right of jury trial existed). *Cf.* Wolfram, *supra* note 143 at 705-708; *The Federalist No. 83, passim* (A. Hamilton).

152. *See, e.g.*, J. REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE

During the period 1787-91 executive immunity under the common law, even for officials exercising a quasi-judicial or discretionary authority, turned on a finding of reasonableness.<sup>153</sup> This absence of any blanket immunity *a la Murray's Lessee* guaranteed the civil jury a *de facto* opportunity to engage in collateral review of the redistributive consequences of legislative policy.<sup>154</sup> Where an unjust statute was enforced, the jury's right to decide all mixed questions of law and fact would enable it effectively to ignore the judge's instruction that the governing rule of law conferred immunity on the official provided only certain facts were found to be true, *i.e.*, that the official acted reasonably under the circumstances and in good faith.<sup>155</sup> With this "higher" equitable power to find

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AMERICAN REVOLUTION (1977) [hereinafter cited as Reid]. The critical parallel argument is that the dutiful official may be said to have taken his job *cum onere* insofar as the citizen's common law right of action is concerned; nonetheless, he enjoys a presumptive right of indemnity against the legislature, which will make a policy of paying if it wants to attract and keep the best administrative personnel. See *Cary v. Curtis*, 44 U.S. (3 How.) 236, 255-56 (1845) (Story, J., dissenting). See also HART AND WESCHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 332-33 (2d ed. 1972).

153. See, e.g., Jaffe, *supra* note 151, at 240.

154. Professor Jaffe has criticized the modern doctrine of official immunity, which looks only to the presence and value of discretion in administration without regard to the question whether the damage is of a sort that should be compensated, on the basis of the critical historical insight that:

[i]t forgets that the purpose of allowing actions against officers is not primarily to assert the notion of official responsibility but to find a conduit to the treasury in cases where there should be compensation and where no other device is provided.

*Id.* at 249. Implicit in Jaffe's soft-pedaling the issue of executive discretion is his assumption that executive officers asked to carry out legislative policies can effectively bargain for indemnification against liability for good faith actions. See *id.* at 245, 249.

155. The more technical side of the vice-admiralty courts controversy involved the supposed conclusiveness of a decree of condemnation or forfeiture from such a court in establishing "probable cause" for the seizure and thus precluding subsequent legal action—and, more especially, the attempt by Parliament in the infamous Sugar and Stamp Acts to invest the vice-admiralty courts with the power to issue a special certificate of probable cause conferring immunity from retaliatory damage suits if it found the officers had acted in good faith, even though no decree of condemnation was forthcoming. See, e.g., C. UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 68 (1960). The use of such certificates (together with the trial of violations of the Acts of Trade in the vice-admiralty court in Halifax, Nova Scotia, safely beyond the reach of a colonial common law court's writ of prohibition, see E. AND H. MORGAN, *THE STAMP ACT CRISIS* 39-40 (1962), induced John Adams to opine in 1765 that the "most greivous innovation" wrought by the Stamp Act—even more

any such law, along with its associated immunity rule, fundamentally unfair *as applied* to the facts at hand (and hence void *pro tanto*), the quasi-civil or public law jury was instinctively embraced by the people as a redoubt of popular sovereignty—a local counterweight to the danger of centralized federal oppression, especially in the form of unreasonable excise taxes. But, as the infamous Sugar and Stamp Acts proved, novel statutory conferrals of official immunity<sup>156</sup> employing only the lesser standard of “good faith” and authorizing courts to certify its presence as a matter of law, could be used to keep a tax case out of the hands of a jury altogether—denying the citizen even his post-deprivation remedy at law against the revenue agent. After the Revolution some American legislatures mimicked Parliament by experimenting with juryless revenue procedures of their own, such as *qui tam* actions. Proponents of the Seventh Amendment, therefore, viewed it as reaffirming—in the face of such lapsed “English” practices, which had drawn even Blackstone’s fire<sup>157</sup>—an ideal constitutional model predicated upon

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dangerous than its threat to the “grand and fundamental principle” of no taxation without representation—was “the essential change in the constitution of juries.” J. ADAMS, *THE POLITICAL WRITINGS OF JOHN ADAMS* 23-24 (G. Peek, Jr. ed. 1954).

156. Even in the darkest hours of Stuart absolutism, the doctrine of the civil irresponsibility of the sovereign—captured in the aphorism “the King can do no wrong”—concededly entailed the corollary “neither can He authorize any wrong.” As a result, for every act of the King necessarily carried out through others some ministers or officer was always legally answerable. *See, e.g.*, 3 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 463-469 (5th Ed. 1942); 6 *Ibid.* 226-267. Cf. III W. BLACKSTONE, *COMMENTARIES* \*225 (1768):

But injuries to the rights of *property* can scarcely be committed by the crown without the intervention of it's [*sic*] officers; for whom the law in matters of right entertains no respect or delicacy, but furnishes various methods of detecting the errors or misconduct of the agents, by whom [it is piously assumed] the King has been deceived, and induced to do a temporary injustice.

157. [T]he liberties of England cannot but subsist as long as this palladium remains sacred and inviolate; not only from all open attacks (which none will be so hardly as to make), but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary method of trial; by justices of the peace, *commissioners of the revenue*, and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are most convenient), yet let it again be 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



a citizen's ultimate right to have a jury decide the facts *and review the basic fairness of the applicable law* in all cases directly or indirectly pitting him against the state.

Although the model revolves around the power of discrete nullification normally associated with the criminal jury,<sup>158</sup> compelling direct and circumstantial evidence exists that this power informed the tacit orthodoxy of the quasi-

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.

IV W. BLACKSTONE, COMMENTARIES \*\*349-50 (emphasis added). In his argument for the Crown in the famous Writs of Assistance Case, Mr. Gridley sought to justify general search warrants in customs cases on the basis that they were not as "inconsistent with Eng. Rts. & liberties" as juryless tax collection procedures; but both he argued were justified by necessity—

"the necessity of having public taxes effectively and speedily collected [being] of infinitely greater moment to the whole, than the Liberty of any Individual.

QUINCY'S REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF TURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772 469, 479-82 (1865). See M. SMITH, THE WRITS OF ASSISTANCE CASE 282-85 (1978), suggesting the possibility that Gridley's heart was not in his conclusion.

158. See, e.g., Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1930); Schefflin and Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW AND CONTEMP. PROB. 51 (1980) Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972); Van Kyke, *The Jury as a Political Institution*, 16 CATH. L. REV. 224 (1970) and 3 THE CENTER MAGAZINE 17 (No. 2, March-April 1970); Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L. J. 170 (1954); Kershen, *Vicinage*, 29 OKLA. L. REV. 801 (1976) (Pts. I and II), 30 OKLA. L. REV. 3 (1977) (Pts. III and IV); Note, *Jury Nullification: The Forgotten Right*, 7 NEW ENG. L. REV. 105 (1971); Sperlich, *Trial by Jury: It may Have a Future*, 1978 SUP. CT. REV. 191; Note, *Jury Nullification in Historical Perspective: Massachusetts as a Case Study*, 12 SUFFOLK U. L. REV. 968 (1978); Ingber, *A Dialectic, The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861, 932-37 (1975); Kuntsler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L. L. 71 (1969); Richardson, *Jury Nullification: Justice or Anarchy?*, 80 CASE & COM., Mar-Apr. 1975, at 30; Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE L. REV. 481 (1968); Kaufman, *The Right of Self-Representation and the Power of Jury Nullification*, 28 CAS. W. RES. L. REV. 269 (1978). Cf. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976); Christie, *Lawful Departures from Legal Rules: "Jury Nullification" and Legitimated Disobedience*, 62 CAL. L. REV. 1289 (1974); L. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY (1973); J. FRANK, COURTS ON TRIAL (1949); L. GREEN, JUDGE AND JURY (1930); P. DEVLIN, TRIAL BY JURY (1956); W.R. CORNISH, THE JURY (1968); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 252 (1973); W. FORSYTH, HISTORY OF TRIAL BY JURY (2D ED. 1971); C. CURTIS, IT'S YOUR LAW (1954); KADISH & KADISH, DISCRETION TO DISOBEY (1973); H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

civil or public law jury as well.<sup>159</sup> We have, for instance, Alexander Hamilton's arid<sup>160</sup> and unsuccessful, yet earnest, attempt in *The Federalist*, No. 83 to head off mounting demands for the Seventh Amendment. He did so by disputing the popular impression that such a jury could thwart the unfair application of a tax statute, either in a collection proceeding or in a collateral damage action. Hamilton embraced the "retrograde" English and local practice out of an instinctive fear that the Seventh Amendment concept was being hypocritically and cynically advanced by states'-rightists as a

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159. See, e.g., 5 THE COMPLETE ANTI-FEDERALIST 180-181 (H. Storing ed. 1981) [hereinafter cited as COMPLETE ANTI-FEDERALIST] ("Impartial Examiner") ("So different are many species of property, so various the productions, so unequal the profits arising, even from the same species of property, in different states, that no general mode of contribution [*via* excise taxes] can well be adopted in such a manner as at once to affect all in an equitable degree. . . . If this branch of revenue takes place, all the consequent rigors of excise laws will necessarily be introduced in order to enforce a due collection. On any charge or offense in this instance you will see yourselves deprived of your boasted trial by jury."); 6 *id.* 137 ("A Plebian"); 2 *id.* 417 ff. ("Brutus"); 2 *id.* 231-32, 249-50 ("Federal Farmer"); 3 *id.* 23-29 ("Old Whig") ("Are there not a thousand civil cases in which the government is a party?—In all actions for penalties, forfeitures and public debts, as well as many others, the government is a party and the whole weight of government is thrown into the scale of the prosecution[,] yet these are all of them civil causes."); 3 *id.* 204-05 ("Aristocratis"); 5 *id.* 37 ("[Maryland] Farmer"); 5 *id.* 113-15 (Richard Henry Lee); 6 *id.* 9, 11-15 ("Cincinnatus"); 6 *id.* 73-74 ("Countryman"). Like the *The Federalist*, No. 83, these passages suggest that the campaign of the Anti-federalist and democratic Federalists for the Seventh Amendment contemplated the right of jurors in public law cases to dispense with the enforcement of excise taxes which would be inequitable as applied. And, as Wolfram notes, since they "won" their views are entitled to at least respectful consideration. Wolfram, *supra* note 143 at 669 & n.84. See, also 4 C. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 140ff., 152ff., 222-27, 251ff. (1934); Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964); Schefflin and Van Dyke, *supra* note 158 at 69-71. But see Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 328 (1966); and Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486 (1975).

160. The adjective belongs to Professor Wolfram, who noted that Hamilton's attempt to deny the utility of civil jury trials in relieving a defendant from an unjust tax law, on the basis that the jury was theoretically obligated to take the law from the judge, see *FEDERALIST PAPERS*, *supra* note 145, at 500, foundered on his own practical admission that the jury's power to decide mixed questions of law and fact rendered judicial control over the law of the case "impracticable." *Id.* at 504. "[That fact], no doubt," as Wolfram notes, "was precisely the point of those who wished to have juries sit in taxation cases." Wolfram, *supra* note 143, at 705 n.183.

Trojan horse.<sup>161</sup> It was designed, he feared, for the systematic nullification *inter alia* of the Article I power of the proposed Congress to levy direct taxes on the people—a power Hamilton deemed absolutely critical to the survival of that one true bulwark of American Liberty, the federal Union.<sup>162</sup> Though Hamilton lost the battle, in that the Seventh Amendment was duly proposed and ratified, he won the war vicariously. While his views did not “satisfy the popular opinion” of his day, they were invoked by subsequent generations of federal judges to undermine the importance of what his political opponents had accomplished. They saw to it that potentially unsympathetic local juries would get little or no opportunity to sabotage the uniform administration of national policies.

#### A. *Levellers and the Scottish Enlightenment.*

While other historians have identified the significant role played by Revolutionary-era civil juries in vindicating the Whig view of law against the positivist Loyalist view,<sup>163</sup> the tendency has been to dismiss such nullification episodes as mere exercises in “creative institutionalism,” expedient manipulations of the available legal machinery to vindicate fixed constitutional principles.<sup>164</sup> This article, however, disputes the significance to the founders of *absolute* “natural law” enti-

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161. The hypocrisy lay in the fact that most states themselves levied taxes summarily. See *FEDERALIST PAPERS*, *supra* note 145, at 500. And in his own State of New York “more numerous encroachments ha[d] been made upon the trial by jury . . . since the Revolution, though provided for by a positive article of our Constitution, than has happened in the same time in . . . Great Britain.” *Id.* at 509. In his zeal to discredit this, the most politically popular position taken by strident advocates of a Bill of Rights (individuals whom he judged less committed to individual rights than to smothering the Constitution in its cradle), Hamilton overlooked or ignored the fact that state courts had already begun to purify their statute books of just such summary procedures. (By 1830 New York itself would provide (and later guarantee) a right of jury trial in excise tax proceedings.

162. For Hamilton’s views on the necessity of ending the system of supporting the central government through quotas and requisitions upon the states, a system that prevailed under the Articles of Confederation, by granting Congress the Article I, §8 “Power to lay and collect Taxes, Duties, Imports and Excises,” see *FEDERALIST PAPERS*, *supra* note 145, at 188-223.

163. See, e.g., Reid, *supra* note 152, at 71.

164. See Teachout, *Light in Ashes: The Problem of “Respect for the Rule of Law” in American Legal History*, in *LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION OF THE LAW* 167, 198-199, 224 (H. Hartog ed. 1981) (reprinting 53 N.Y.U.L. REV. 241 (1978)).

lements, such as freedom of speech, arguing instead that the American constitutional jury was intended to play a dynamic role in the definition and enforcement over time of the basic but essentially mutable constitutional principle of "natural equity" or fundamental fairness, a principle which underlies both the express substantive guarantees of the Bill of Rights, like "just compensation,"<sup>165</sup> and any which may be deemed implicit in the Ninth Amendment. It does so by attempting in the next section to relate the jury-centric nature of Whig law to contemporaneous intellectual and moral presuppositions about the nature of sovereignty, individual rights, and constitutionalism.<sup>166</sup>

First, that section suggests that a missing link in making this connection has been the political and legal philosophy of the Levellers, a radical party during the Puritan Revolution of the 1640's. The Levellers embraced Chief Justice Coke's revival of Magna Charta as a means of curbing the pretensions of a "democratic" Parliament to omnipotence, pretensions which it couched in terms of the ancient maxim *salus populi suprema lex*. Asserting the post-Reformation right to read canonical legal texts for themselves, the Levellers interpreted Chief Justice Coke's *First* and *Second Institutes* (with their celebration of both reason and the jury) creatively, al-

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165. See e.g., *Chicago, B. & Q.R.R. v. Chicago*, 166 U.S. 226, 233 (1897); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931).

166. Cf. Teachout, *supra* note 164, at 198-199. In his fine essay Professor Teachout tries to supplement the institutional focus of other scholars of the jury by expanding on Bernard Bailyn's suggestion that the colonial revolutionaries wound up emphasizing substantive principles above institutions, principles which they then carefully embodied into written constitutions. *Id.* at 198 n.86, citing 1 B. BAILYN, *PAMPHLETS OF THE AMERICA REVOLUTION 1750-1776*, 99-104 (1965). As an example, Teachout adduces James Otis' "creative" and "highly sophisticated interpretation of Lord Coke's celebrated Bonham's Case" in the 1761 Writs of Assistance case. Teachout emphasizes Otis' development of the public law implications of that case and especially his invocation of the inviolable "privilege of the house." In fact, the public law implications of Bonham's Case had been developed a century earlier by the Levellers, and Otis' use of the conclusionary maxim that "a man's home is his castle" should not overshadow the fact that he argued the case principally on the basis of the unreasonableness of the search practices under the local circumstances of the Colonies. Even Bailyn has noted Otis' opposition to the notion that the concept of fundamental rights could be catalogued. This article asserts that Otis would have been more likely to embrace a dynamic model of *institutional* liberty, with the jury (guided by judge and counsel) primarily responsible for overseeing the evolution of new standards of constitutional reasonableness, than Bailyn's model of fixed guarantees.

beit literally. They took Coke to mean that due process of law as guaranteed by Chapter 29 of Magna Charta is merely declaratory of the ancient, pre-Norman right—or “gothic liberty”—of jurors to square all positive laws (whether statutory or decisional) with the basic common law principles of reasonableness and fairness.<sup>167</sup> Despite the disappearance of

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167. Significantly, the Levellers' *locus classicus* for the historic dispensing power of the common law jury was Coke's authoritative citation of Littleton in his *First Institutes* to the effect “[t]hat if the jury will take upon them the knowledge of the law upon the matter, they may.” 1 Co. Inst. 228. While the text pertained to what we would now consider the private law governing the Assize of Novel Disseisin, the Assize was originally a criminal action; and Coke's text served as the lynchpin in John Lilburne's successful argument before his criminal jury in 1652. Lilburne, the leading Leveller theorist of the jury, deemed this substantive dimension of trial by jury explanatory of Coke's effusive celebration of the jury in the *Second Institutes* as synonymous with the ideal of due process of law enshrined in chapter 29 of Magna Carta. See V, HOWELL, STATE TRIALS, 417-444. See also T. PEASE, THE LEVELLER MOVEMENT. 326-46 (1916). Cf. STORY, III COMMENTARIES, *supra* note 24, § 1773, 652:

The right [to trial by jury] constitutes one of the fundamental articles of Magna Carta, in which it is declared . . . no man shall be arrested, nor imprisoned, nor banished, nor deprived of live; &c. but by the judgment of his peers, or by the law of the land. The judgment of his peers here alluded to, and commonly called in the quaint language of former times a trial *per pais*, or trial by the country, is the trial by a jury, who are called the peers of the party accused, being of the like condition and equality in the state.

On Coke's authority the “or” in the phrase “by the judgment of his peers, or by the law of the land” was to be read conjunctively in accordance with the medieval Latin *vel*. Indeed, it is by now well known that in the original context the reference to “peers” referred not to our familiar democratic institution but to a special dispensation from the normal course of the law, wrested from King John by his barons, entitling them to be tried “by no one lower in the social scale.” See, e.g., C. REMBAR, THE LAW OF THE LAND 168 (1980).

Ironically, the law courts administering Henry II's system of possessory assizes gave the “or” its normal disjunctive meaning from classical Latin, denying the barons the fruits of their victory by subjecting them to the verdict of the assizes' more democratic jury. *Id.* at 170. Universal democratic trial by jury in England, therefore, technically sprang from the “law of the land,” not the “judgment of . . . peers” language in Magna Carta. But once the dead letter feudal “judgment of . . . peers” passed from memory, it was natural economy of thought to reconcile the artifactual phrase with the existing scheme of things by reverting to the conjunctive “or”. Hence those like Felix Frankfurter, who condemned Sixth and Seventh Amendment juries on the basis that they derive from an ignorant, irrational attachment to a feudal phrase, “judgment of . . . peers,” found in Magna Carta, have almost willfully underestimated the sophistication of the 17th and 18th century devotees of the jury.

In point of fact the Levellers downplayed the importance of Magna

the movement by 1650, its populist view of the equitable power and constitutional duty of the jury to judge of the law as well as the facts doubtless contributed to the celebrated result in *Bushell's Case* in 1670.<sup>168</sup> There Chief Justice Vaughan vindicated the right of the juror to follow his conscience rather than the judge's charge, without fear of citation for contempt. The Leveller ideal of the independent-minded jury continued to influence political thought and literature through our founding period<sup>169</sup>—when once again claims of Parliamentary omnipotence filled the air. And in revolutionary America this received ideal of the jury was powerfully strengthened by the epistemology of the prevalent Scottish "moral sense" school of philosophy. The unanimous verdict of twelve randomly-chosen citizens enjoyed ready-made philosophic status in a climate of opinion favorable to moral empiricism and fundamentally at odds with the Hobbesian tradition of subjective relativism.<sup>170</sup>

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Carta to the constitutional status of the English jury, viewing that instrument as a painful reminder of the continued bondage of England's free customs beneath the Norman legal yoke. Instead, they took all references to the jury in Magna Carta as merely declaratory of the jury's ancient, prefeudal status under the English "law of the land." For the Levellers the jury gained nothing in status from its inclusion in Magna Carta. For evidence of the wide English belief in such a pre-Norman, Anglo-Saxon tradition of the jury, see, e.g., SIR MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 117-18 (2d ed. 1716):

So the Trial by Jury of Twelve Men was the usual Trial amount the Normans in most suits, especially in Assizes, & *Juris Utrums*, as appears by the *Contumier*, cap. 92, 93 & 94 and that Trial was in Use here in England before the Conquest, as appears in Brompton among the Laws of King Etheldred, cap. 3.

For a discussion of Jefferson's belief in this Leveller-inspired ideal of a simpler prefeudal law of the land presided over by the jury, see E. DUMBAULD, *THOMAS JEFFERSON AND THE LAW* 152-55 (1978).

168. Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670).

169. An example of a later Leveller-inspired pamphlet is Sir John Hawles' *THE ENGLISHMAN'S RIGHT/A DIALOGUE BETWEEN A BARRISTER AT LAW AND A JURY-MAN* (1680), in *CLASSICS OF ENGLISH HISTORY IN THE MODERN ERA* (1978). Professor Reid himself has written persuasively of the influence of the Levellers on the founding generation. See Reid, *In Legitimate Stirps: The Concept of "Arbitrary," the Supremacy of Parliament, and The Coming of the American Revolution*, 5 *HOFSTRA L. REV.* 459 (1977).

170. This article will document the corrosive effect of nineteenth century positivism on this popular ideal of the intuitive genius of the jury. Taking Bentham as a prime exemplar of positivist jurisprudence, we can anticipate much that follows by noting that he dismisses notions such as "natural equity" or "common sense" out of hand as transparent rationalizations for biased, subjective—as opposed to rational, objective—decisionmaking. J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF*

### B. "Preserving" An Ideal Not a Practice.

The Seventh Amendment speaks of "preserving" the right of jury trial. A failure to appreciate the importance of this popular ideal of the jury, with its basic tenet that Reason spoke directly even to self-taught Americans "without priestly or professional intermediaries,"<sup>171</sup> has led most modern commentators to interpret the Seventh Amendment as if principally designed to "preserve" in amber (as of 1791) a static set of historical English practices.<sup>172</sup> It would seem to be more in keeping with the constitutional context to construe the Amendment as "preserving" a dynamic popular ideal, embracing the substantive role of civil and criminal jurors in Article III adjudication under the Constitution,<sup>173</sup>

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MORALS AND LEGISLATION 136-43 (1948). Yet Bentham himself acknowledged that positivism was primarily a commercial or private law, not a constitutional or public law, credo. Where "English liberties" were being infringed, he readily embraced the jury's prerogative to nullify as a means of pressuring Parliament for reform:

. . . By a few successive exertions of such fortitude, not only momentary and partial relief against particular oppression would be afforded in each particular instance,—. . . But by a gentle and truly constitutional pressure, measures of complete and permanent relief might . . . be extorted from the legislature.

J. BENTHAM, *THE ELEMENTS OF THE ART OF PACKING AS APPLIED TO SPECIAL JURIES* 3 (1821) (emphasis added).

171. See G. WILLS, *THE INVENTING OF AMERICAN* 101 (1978).

172. For varying perspectives on the accepted "historical test" of the scope of the Seventh Amendment, see Wolfram, *supra* note 143, at 639-649; Henderson, *supra* note 159, at 289-91; and 5 MOORE'S, *FEDERAL PRACTICE* ¶38.08[5](4), at 79 (1971). It is ironic that the accepted source of this notion that actual English practice as of 1791 determines what are "Suits at common law" is Mr. Justice Story's opinion in *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750), since that case dealt with the separate question of what "rules of the common law" govern appellate reexamination of facts found by a jury for purposes of the second clause of the Seventh Amendment. See Wolfram, *supra* note 143, at 641 n.5. In fact, for purposes of the initial clause of the Seventh Amendment, Story, a Republican champion of the jury, rejected a static reference to "old and settled [English] proceedings" and instead treated Seventh Amendment common law "Suits" as a dynamic category extending to all new types of cases provided only that they determine "legal rights." See *Parsons v. Bedford*, 28 U.S.(3 Pet.) 433, 447 (1830). In short, for each clause he chose an interpretation which expanded the scope of what he acknowledged to be a very popular Amendment.

173. With little confidence in the reasoning ability of jurors, many modern scholars try to control the potential damage from the Sixth and Seventh Amendments by confining any "substantive" role for the jury to the simpler, cut-and-dried moral issues that reach criminal courts. See, e.g., Henderson, *supra* note 159, at 327-335; Simson, *supra* note 158, at 502;

from which contemporaneous English practice may well have strayed. Indeed, the American Revolution itself is commonly characterized as an attempt to vindicate an ideal English constitution against "its recent practice and its current workings."<sup>174</sup>

In this regard, Felix Frankfurter, like Alexander Hamilton before him, may have been misled by the coexistence at the state level during the period 1787-91 of constitutional analogues to the Sixth and Seventh Amendments alongside of summary juryless revenue procedures like the *qui tam* proceedings.<sup>175</sup> Frankfurter wrote an influential 1926 article that paved the way for juryless federal trials of "petty" offenses, despite the Sixth Amendment's express coverage of "all"

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Frank, *supra* note 158, at 179 (it is unlikely that "twelve men, summoned from all sorts of occupations, . . . unacquainted with their own mental workings . . . can . . . do as good a job . . . as an experienced judge"). By contrast, Jefferson, like Thomas Reid, used the "ploughman" to exemplify his critical belief that the "moral sense" is equal in all men:

State a moral case to a ploughman and a professor. The former will decide it as well and often better than the latter, because he has not been led astray by artificial rules.

6 THE PAPERS OF THOMAS JEFFERSON 258 (J. Boyd ed. 1957) [hereinafter cited as JEFFERSON PAPERS.] Ironically, therefore, Lord Devlin has recently supported a restrictive historical interpretation of our Seventh Amendment by citing a 1603 English case in which the Chancellor asserted that his court "was better able to judge than a jury of ploughmen," a case in which the conclusion would have "to be discerned by books and deeds." *Clench v. Tomley*, Cary 23, 21 Eng. Rep. 13 (Ch. 1603), *quoted in* Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 MICH. L. REV. 1571, 1577 (1983). The political forces behind the Seventh Amendment cast substantial doubt on the relevance of this bit of precedent, unless we can assume that equity has no role in the construction of written instruments.

William Walwin, one of the Levellers credited with inventing the belief that "trial by jury is a Bastion of English liberties," *see, e.g.,* VEALL, *THE POPULAR MOVEMENT FOR LAW REFORM 1640-1660*, 372 (1970), wrote in 1650 in opposition to the elitist notion that "understanding" in the sense of book learning was more important than "conscience" or common sense in a juror, noting that the slower members of the jury will not be unduly swayed by the few "nimble-pated men . . ., except they have reason and equity of their side." Walwyn, *Juries Justified*, in *CLASSICS OF ENGLISH LEGAL HISTORY IN THE MODERN ERA* (1978). (Of course, none of this is to say that the judge may not argue persuasively to the jury that it should not invoke principles of equity in deciding a particular issue because the parties have voluntarily agreed in advance to a particular black-and-white solution).

174. Wood, *The Intellectual Origins of the American Constitution*, NATIONAL FORUM 5, 7 (Fall 1984).

175. Frankfurter & Concoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917, 924 ff. (1926).



criminal prosecutions. In it he erroneously inferred that such juryless procedures were accepted as implicit, historical exceptions to the new constitutional guarantee.<sup>176</sup> What both Frankfurter and Hamilton failed to note was the clear evidence that state supreme courts had already begun to expunge such procedures from the statute books. In fact, two of the five American judicial review cases we know to have been available to the framers in Philadelphia involved the invalidation of statutory *qui tam* proceedings as violative of the "inestimable right of trial by jury."<sup>177</sup> And two of the other three also involved the preservation of jury trial against "new-fangled" summary jurisdictions.<sup>178</sup> In this context the epithet "new-fangled," like the Leveller's incessant and pejorative use of "innovative," was meant to signal not so much a change in actual recent practice, as a deviation from the historic ideal, an ideal which recent debates over the state bills of rights had brought into better focus.

But in his zeal to eliminate local juries as an impediment

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176. *Id.* Frankfurter, concerned about the unwillingness of federal juries to convict for minor violations of the widely unpopular Volstead (prohibition) Act, resolved to do something about it. Accordingly, his search for such implicit, historical exceptions to the right of trial by jury was conducted in the seemingly inhospitable context of the Sixth Amendment's guarantee of a jury in "all" criminal prosecutions. But that obstacle proved no more difficult to get around than had Justice Story's liberal construction of the Seventh Amendment (as extending to dynamic definition of "common law") for critics of the Seventh Amendment—and for some of the same reasons, as the text suggests. Frankfurter argued pragmatically for a summary federal criminal jurisdiction over misdemeanors involving the possibility of only a short prison term; his view soon prevailed. *See* *District of Columbia v. Clawans*, 300 U.S. 617 (1937).

177. *Trevett v. Weeden* (R.I. 1786) and *Holmes v. Walton* (N.J. 1779). For a discussion of these unreported cases and their possible relevance to the intended scope of judicial review under the U.S. Constitution, compare R. BERGER, *CONGRESS V. THE SUPREME COURT* 38-48, (1969) with W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 943-973 (1953). In his 1803 edition of Blackstone, St. George Tucker protested that the legislative tendency to extend summary debt collection procedures beyond the case of "public collectors" and other public officials, who might be deemed to have submitted to the rigors of such proceedings, to ordinary citizens was inconsistent with the spirit of the bill of rights—since it would "sap the foundation of the trial by jury, and finally subvert it." IV TUCKER'S BLACKSTONE COMMENTARIES APP. 58-59 (Editor's Appendix Note E) (1803). For informal reports of the cases, *see* B. SWARTZ ED., *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 404-08, 417-29 (1971).

178. *See* The New Hampshire "Ten Pound" Act Case (1786) and *Bayard v. Singleton*, 1 Martin 5 (N.C. 1787). *See* Berger and Crosskey, *supra* note 177.

to the implementation of national policies, like that of prohibition, Frankfurter joined the movement to debunk Magna Carta as "a lawyer's myth."<sup>179</sup> After all, "the most notable example" used by legal realists to demonstrate how the feudal origins of Magna Carta were misunderstood and romanticized by seventh century Englishmen and eighteenth century Americans was the conversion of "the *judicium parium* [into] trial by jury."<sup>180</sup> Thus Frankfurter freely impugned the political credentials of Chief Justice Coke,<sup>181</sup> called the inventor

179. R. POUND, *ADMINISTRATIVE LAW* 49 (1942).

180. C. MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 57 (1910).

181. Dismissing Coke as essentially a political hack, Frankfurter tentatively and inaccurately insisted that it was "the most reverend of legal fables" that Magna Charta (1215) had guaranteed trial by jury, *since trial by jury had not yet even taken shape*. Frankfurter & Corcoran, *supra* note 175 at 922. While it is true that no precise analogue to the criminal petit jury then existed as part of the King's centralized court system, modern historiography suggests that the "grand jury" assembled by the Assize at Clarendon (1166) was in many respects the functional equivalent of the modern petit jury, rather than a mere accusatory mechanism. For if the assize determined that guilt was sufficiently probable that trial by ordeal should occur, the defendant was in effect condemned. After 1166 even success in the ordeal required that the defendant promptly "abjure the realm," leaving family, possessions, and mother tongue behind. *See, e.g.,* C. REMBAR, *THE LAW OF THE LAND* 144-55 (1980).

Moreover, not only were jury trials an ancient fixture of English law as dispensed in local courts, they became the procedural centerpiece of the centralized common law practice that grew up around Henry II's Assize of Novel Disseisin (1166). The very word "assize" came to mean "the inquisition of twelve men." The jury of inquest had the right to view the site on its own and to decide both the law and the facts of the case. Obviously, such independence meant that Frankfurter would not consider it the functional equivalent of the Sixth or Seventh Amendment jury. It was not sufficiently under the thumb of the judge. By contrast, the Levellers cited Coke's *First Institutes* and a statute in the 13th year of Edward the First (both of which confirm the law-finding discretion of the assize) as declaratory of the ancient and enduring pre-Norman prerogatives of the local jury—which, they argued, carried over into Henry II's centralized system. Significantly, the Leveller view of the historical relevance of assize practice in determining the law-finding prerogatives of the modern jury was endorsed by James Wilson, a leading draftsman of the Constitution and early Supreme Court Justice. II *THE WORKS OF JAMES WILSON* 215-20 (J. Andrews ed. 1896). Frankfurter's out-of-hand dismissal of the relevance of the assize to constitutional theory parallels the treatment by 19th century American jurists of the *ad quod damnum* or sheriff's jury, a direct descendant of the assize, which had been widely used in England and the states in eminent domain actions during the period 1787-91.

Frankfurter's 1926 article was part of what Dean Pound labelled a concerted "movement" among pragmatic positivists to debunk Magna Carta as

of the myth of *Magna Carta*,<sup>182</sup> whose *Second Institutes*, reprinted by the Long Parliament, had first inspired the popular identification of trial by jury with *Magna Carta*'s guarantee of *due process of law*. What Frankfurter omitted to mention was the fact that the *Second Institutes* served as "hardly less than a legal political Bible to the framers of our polity," as well.<sup>183</sup> As Mark De Wolfe Howe wrote of the founding generation:

Building upon legend which Coke had dignified with spurious annotations and English Puritans had sanctified with pious pedantry, the Americans discovered that the rights that really mattered to them had their roots in common law.<sup>184</sup>

Chief among them was trial by jury. And as McIlwain has noted, echoing Vinogradoff, what is more important than the details of its origin is the history of the subsequent *influence* of *Magna Carta*, of what it came to mean to later generations.<sup>185</sup> Moreover, it is relatively clear that the American partisans of the jury were by no means overawed by the antiquity of *Magna Carta*, but were wedded to the political principles behind the institution.<sup>186</sup>

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"a lawyers' myth"—and, for good measure, to dismiss the notion of separation of powers as a product of Montesquieu's misreading of the British polity of his time. R. POUND, *ADMINISTRATIVE LAW* 49 (1942). Their purpose was to "give Bacon the last laugh over Coke" by denying the existence of any implied substantive or structural constitutional constraints on the sovereignty of the legislature. *Id.* at 14, 51. And, as noted in the text, their attempts to impugn *Magna Carta* turned on the "revelation" that it was a feudal document and that trial by one's "peers" had nothing to do with the democratic jury. See e.g., B. KENNEY, *JUDGMENT BY PEERS* 108 (1949). This would have come as no surprise to the Levellers and later opponents of the Norman feudal yoke like Jefferson. For a concurring view that Frankfurter's 1926 article, notwithstanding its later influence on the Supreme Court, was a discreditable performance, see Rembar, *supra*, at 390-95.

182. McIlwain, *supra* note 180, at 57-58 and n.2.

183. R. POUND, *ADMINISTRATIVE LAW* 14, 51 (1942); accord Berger, *supra* note 177, at 28, 371.

184. Howe, *The Migration of the Common Law: The United States of America*, 76 L.Q. REV. 49, 50 (1960).

185. McIlwain, *supra* note 180, at 58. Nor was the myth confined to these shores in the late eighteenth century. Holdsworth records that the final personal triumph of Lord Camden (a great friend of our Revolution) over his rival Mansfield was the declaratory form in which Fox's Libel Act (1792) was passed. "[Alth]ough historically of dubious correctness, "as Holdsworth asserts, *id.* at 305, 10 *id.* at 680-88, Fox's Libel Act vindicated Lord Camden's belief in the constitutional law-finding role of the jury, which was so professionally unpopular among his fellow judges.

186. McIlwain, *supra* note 180, at 57-58. Cf. J. POLE, *THE PURSUIT OF*

For true supporters of the Seventh Amendment, therefore, jurors represented the "intuitive side" of the law,<sup>187</sup> a common sense approach to what is fair and reasonable necessary to supplement "the professional or perhaps overconditioned . . . response of a judge."<sup>188</sup> Accordingly, alongside of separation of powers, the executive veto, and legislative bicameralism, the Sixth and Seventh Amendment guarantees may be viewed as implementing a sort of Article III judicial bicameralism—with the jury occupying the "principal place" in the administration of justice as "arbiter not only of fact but of law."<sup>189</sup> Whatever its ancient historical accuracy, therefore, the popular American mythology of the jury, which both fueled the demands for a Bill of Rights and thereafter definitively shaped the course of early state and federal practice, must influence our understanding of the proper scope of those Amendments.<sup>190</sup>

Thus, the Seventh Amendment was arguably designed to give juries a vital share in the Article III power of the federal courts. Specifically, the next section advances the unanimous cross-sectional jury (as distinct from a majority of a panel of appellate judges) as the intended dispenser of democratic equity under our constitutional system.<sup>191</sup> Under that view the jury has the final constitutional veto—the ultimate right to decide *against the state* the inevitably "mixed" or "intermingled" question of the fundamental fairness of particular application of its rules of positive law.<sup>192</sup> The proposed institu-

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EQUALITY IN AMERICAN HISTORY 16 n.6 (1976).

187. See Curtis, *supra* note 158, at 104.

188. See Taylor v. Louisiana, 419 U.S. 522, 529 (1975); Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968).

189. See Galloway v. United States, 319 U.S. 372, (1943) (Black, J., dissenting).

190. See Wolfram, *supra* note 143, at 669 & n.84. Justice Rehnquist, following Professor Wolfram's lead, has embraced the substantive role of the civil jury in reaching results that the judge "either *could not* or would not reach by disregarding applicable rules of law." *Id.* at 671. See Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting).

191. Cf. H. McCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 1 (2d ed. 1948) (defining equity as "the power to meet the moral standards of justice in a particular case by a tribunal having discretion to mitigate the rigidity of the application of strict rules of law so as to adopt the relief to the circumstances of the particular case.")

192. Despite the second clause of the Seventh Amendment and the statutory constraints formerly imposed by the Writ of Error procedure, the Supreme Court has asserted an independent duty in certain constitutional cases to review itself "mixed" bindings of law and fact—that is, "where a

tional model of the jury argues for a formal reinstatement of the jury into a cooperative role in pricking out a constitutional common law of protectible "liberty" and "property," a step the Supreme Court has tentatively taken in the obscenity area.<sup>193</sup> That approach would provide one theoretical solution to the modern Court's impasse, in the face of the silently reproachful Ninth Amendment, over the responsible generation of non-interpretive constitutional guarantees out of the open-textured language of the Due Process Clauses<sup>194</sup>—especially in the area of economic expectations.<sup>195</sup> More importantly, perhaps, it would relieve the institutional pressures that have led the Court to adopt an extremely narrow, literalistic approach to the "just compensation" guarantee of the Fifth and Fourteenth Amendments. The suggested model would allow appellate judges to continue to promulgate relatively fixed rules of law designed to govern a whole class of cases by providing a constitutional *floor* of protection, while the jury would act with a sort of ratchet effect to advance individual liberty in particular cases. Even if a judge finds that a statute is "facially" constitutional, since it satisfies constitutional minima, the claimant gets a second bite at the cherry by submitting to the jury the mixed question of its *as applied* fairness.

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conclusion of law . . . and a findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *See, e.g., Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927). But that has lately been a duty more honored in the breach in the area of economic liberties. In any case, such a duty is consistent with the proposed model of the Seventh Amendment since it has been asserted by the Court to advance the cause of individual liberty—not to relieve the state from a verdict that is not warranted by the facts. On the other hand, if the Court were to insist on assimilating the public law jury to the civil jury and assert a power to overturn a verdict unfavorable to the state, this article asserts that the public law jury is enough unlike the civil jury that a new trial—not a directed verdict—should be ordered.

193. *See Miller v. California*, 413 U.S. 15 (1973).

194. For some flavor of the controversy over the extent to which the Supreme Court should invoke the Due Process Clauses to constitutionalize values not readily inferable from the constitutional text, structure, or history, *see Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 44-45 (1975); Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693 (1976); and ELY, *DEMOCRACY AND DISTRUST* (1980).

195. This general model is congruent in many particulars with that proposed by Professor Bacigal for use in implementing the Fourth Amendment prohibition against "unreasonable" searches and seizures. *See Bacigal, A Case for Jury Determination of Search and Seizure Law*, 15 U. RICH. L. REV. 791 (1981).

### C. *The Hamiltonian Counter-Reformation.*

The next section, however, traces the 19th and 20th century forces behind the demise of the model—and the belated triumph of Hamilton's position in *The Federalist*, No. 83. It is simply not true, as some would suggest, that the equitable dispensing power of the civil jury fell of its own weight—left chronically “hung” by a breakdown in the “state[s] ethical unity.”<sup>196</sup> Rather the law-finding power of local juries, both civil and criminal, succumbed to the same systematic intellectual attack that Bacon and Hobbes waged earlier against Coke. The imperative administrative demands of a modern, centralized state, coupled with the Hobbesian conviction that ethical unity is a philosophic impossibility, dictated that no branch of the judiciary, judge or jury, could legitimately claim the right to engage in subjective “mutilation” of general statutory schemes.<sup>197</sup> The potential for frustrating their effective implementation was unacceptable, especially given the quixotic nature of any attempt at individualized equity. Hamilton helped “give Bacon th[is] last laugh over Coke.”<sup>198</sup> His unsuccessful attempt at a preemptive strike against the public law jury in *The Federalist*, No. 83, based on the assumption that this power of a local jury to “mutilate all law” ultimately translates at the federal level into a power to “dissolve the Union,” finally bore fruit in the mid-nineteenth century.

As a result of such Baconian reflections, appellate courts, both state and federal, “arrogantly”<sup>199</sup> and “speciously”<sup>200</sup>

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196. Compare W. NELSON, DISPUTE AND CONFLICT RESOLUTION IN PLYMOUTH COUNTY, MASSACHUSETTS, 1725-1825, at 150-51 (1981) with W. NELSON, AMERICANIZATION OF THE COMMON LAW 65-66 (1975).

197. Compare the statement by the judge in John Lilburne's trial to the effect that his “damnable heresy” concerning the lawfinding power of juries would be “enough to destroy all the law in the land.” II THE WORKS OF JAMES WILSON 217 (J. Andrews ed. 1896).

198. Pound, *supra* note 179, at 14.

199. The adopted characterization is Professor Howe's. See *supra* note 158, at 586.

200. Even Leonard Levy, otherwise an unstinting admirer, so describes the reasoning process by which Chief Justice Shaw of Massachusetts in the case of *Commonwealth v. Anthes*, 5 Gray 185 (1855) turned back an 1855 legislative attempt to override his earlier opinion in *Commonwealth v. Porter*, 10 Metc. 263 (1845), by codifying the “popular belief that the right to be judged by one's peers meant the right of one's peers to decide issues of law against the instructions of the trial judge.” See L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 290-91, 293 (1957). Levy seems to concede the historical accuracy of Judge Thomas' dissenting

undermined the basic ideal of a jury competent to decide both the law and the facts of a case, even though that ideal had been faithfully reflected in most early federal civil and criminal practice. They decreed the sacrifice of democratic equity after erecting twin altars to (i) a formalistic version of the Revolutionary idol of "the rule of law," and (ii) the Article VI supremacy of federal law. With regard to the former, appellate courts decided that under a *written* constitution an individual's right to appellate review of the law actually applied in his case was a more critical implied aspect of constitutional "due process of law" than any so-called law-finding function of juries. So jurors began to be sternly admonished as to their duty to apply the law just as it was given them, without equitable adjustments of any sort, so that appellate courts would have something definite to review.

Under this view the true constitutional common law jury by definition had to be a compliant jury, duty-bound to apply the rule of law given them, if judges were to carry out their "all-important" function of judicial review. This development was especially ironic since the prototypical American judicial review cases, which presumably had influenced the adoption of that principle in Philadelphia, involved appellate interposition to vindicate the prerogatives of the jury against statutory inroads. Later when the roles were reversed and legislatures sought to restore the popular ideal of the law-finding jury in the face of appellate repression, the courts refused to brook opposition to their competitive ideal of appellate-based due process. The statutes were declared unconstitutional. Likewise, the federal Supremacy Clause, which all judges in the nation were bound by oath to support, tended to confirm the appellate courts in their growing professional attachment to this ideal of the rule of uniform, centrally-administered law. With the jury progressively reduced in technical status to me-

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view:

[I]f this doctrine as to the right of the jury be an error, it is, in the country at least, an old one, the error of many of our wisest and most conservative judges and statesmen . . . I cannot but feel that, if I err in these views, I err with the fathers; that I am in the old and beaten path, standing *super antiquas vias*.

*Id.* at 302. Nonetheless, the fact that Shaw's result was ostensibly supported by the circuit opinion of Justice Story in *U.S. v. Battiste*, 25 Fed. Cas. 1042 (C.C.D. Mass. 1835), and that Shaw's opinion was in turn embraced by Justice Harlan on behalf of the Supreme Court in *Sparf and Hansen v. U.S.*, 156 U.S. 51, 80 (1894), emboldened Levy to accuse Thomas of numerous unnamed "egregious inconsistencies" in his defense of the popular model of the jury. Levy, *op cit.* at 302.

nial fact-finder, therefore, it is little wonder that modern judges profess puzzlement at the notion that denial of a jury in public law actions has political overtones.

D. Murray's Lessee, *Official Immunity*, and *Vicarious Redress Against the Sovereign*.

More importantly, however, the ultimate disappearance of the model can be traced to the collapse of the very concept of a "public law" legal action beneath the combined weight of the doctrines of sovereign and official immunity. As a result of Justice Curtis' opinion in the 1855 tax collection case of *Murray's Lessee*,<sup>201</sup> no citizen today can claim a Seventh Amendment right to a jury (with or without law-finding power) in contests against the government, whether involving a tax collection suit, an inverse condemnation action, or an administrative law proceeding.<sup>202</sup> Specifically, Curtis affirmed Congress' Article I power to authorize the conclusive extrajudicial distraint and sale of the property of a tax collector allegedly delinquent in his accounts with the Treasury. That result might be justified on the basis of an implicit contractual waiver of the ultimate right to a jury trial, but Curtis went further. He asserted in the influential but controversial dictum encountered in the Introduction, that Congress could effectively deny an Article III post-deprivation remedy in *all* tax distraint cases (even those involving ordinary citizens) simply by withholding its consent to suit.<sup>203</sup> This was so, Curtis argued, because the statutory precept itself was sufficient to immunize from personal liability an executive officer acting in good faith.<sup>204</sup>

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201. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

202. See generally 5 MOORE'S FEDERAL PRACTICE ¶138 (1985).

203. For the middle-ground modern view, see *Commissioner v. Shapiro*, 424 U.S. 614 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975).

204. Though a private person may take his property, or abate a nuisance, he is directly responsible for his acts to the proper judicial tribunals. His authority to do these acts depends not merely on the law, but upon the existence of such facts as are, in point of law, sufficient to constitute that authority; and he may be required, by an action at law to prove those facts; but a public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. He cannot be made responsible in a judicial tribunal for obeying the lawful command of the government, and the government itself, which gave the command, cannot be sued without its own consent.

*Murray's Lessee*, 59 U.S. (18 How.) at 283. This was *obiter dicta* insofar as



Curtis' freshly-minted federal doctrine of good faith immunity for legislative agents runs directly counter to the constitutional thesis being advanced here. That thesis holds that *common law* actions against officials were regarded by the proponents of the Seventh Amendment as a critical avenue of vicarious redress against the federal government, necessary to square its affirmative constitutional obligations (notably the duty to pay "just compensation" for property involuntarily taken) with the political reality of sovereign immunity. In light of those affirmative obligations, founders like Madison and Jefferson viewed with anathema any American analogy to the conceded power of the omnipotent post-1688 English Parliament to authorize private injury with impunity *and* to immunize its executive henchmen. Not even the absolutist Stuart Kings had the temerity to try to convert their personal immunity from process into a right to authorize third-party wrong.<sup>205</sup> Moreover, the Parliamentary attempt to introduce good faith executive immunity into American jurisprudence had begun inauspiciously with the Sugar and Stamp Acts. Juryless admiralty courts were given the right to award a certificate of good faith so as to insulate customs officers from common law accountability. In that regard the Acts were considered to represent yet another departure from the ideal English gothic constitution. Indeed, John Adams viewed the potential effects of this immunity doctrine on the public law role of the constitutional civil jury as the most insidious feature of the two Acts, even worse than their violation of the principle of "no taxation without representation." Before giving a brief account of the unlikely American success of the doctrine in the nineteenth century, it is important to note why proponents of official liability largely acquiesced in the doctrine of sovereign immunity, regarding it as making, not weakening, the constitutional case for the former.

It is not quite accurate, albeit tempting, to consider the survival of sovereign immunity under the U.S. Constitution as "one of the mysteries of legal evolution."<sup>206</sup> Having patterned their ideas on eminent domain after the quasi-contractual approach of the natural law theorists, the founders

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the statute in question specifically conferred on the taxpayer the right to a post-deprivation action in federal court.

205. See, e.g., L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 198-212 (1965); R. BERGER, *CONGRESS V. THE SUPREME COURT* 315-54; 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 435 (4th ed. 1936).

206. Borchard, *Governmental Liability in Tort*, 34 *YALE L.J.* 1, 4 (1924).

tended to accept two qualifications on the state's affirmative duty of compensation. Concededly, government incurs an obligation to pay when it involuntarily appropriates a citizen's property. But where the appropriation is part of an underlying consensual transaction, whose terms were agreed upon in advance, as was the case with the summary procedures employed for reckoning with tax collectors in *Murray's Lessee*, the equities are different. There the claimant may be said to have voluntarily taken his chances, relying in advance on the "good faith" of the legislature.<sup>207</sup> More importantly, even where the transaction is a classic case of forcible expropriation, the government's duty to pay is impliedly contingent on its practical ability to do so.<sup>208</sup> And of that the legislature must be the judge.<sup>209</sup> After all, the fisc may be empty or such funds as remain may be desperately needed to fight a war or meet some other emergency. In either case the legal obligation to pay would be temporarily dormant.<sup>210</sup> This pragmatic

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207. See *Lynch v. United States*, 292 U.S. 571, 580-81 (1934) ("[c]ontracts between a Nation and an individual . . . are only binding on the conscience of the sovereign and have no pretense to compulsive force . . ."). See also *Cohens v. Virginia*, 6 Wheat. 264, 407 (1821) (Marshall, C.J.). Cf., III STORY, COMMENTARIES, *supra* note 24, §1671, at 542, citing disapprovingly Lord Mansfield's opinion in *Macbeath v. Haldimand*, 1 Term Reports, 172, to the effect that "whoever advances money for the public service, trusts to the faith of parliament." Cf. note 646 *infra*.

208. See, e.g., H. GROTIUS, THE RIGHTS OF WAR AND PEACE 388 (A. Campbell tr. 1901):

Nor will the state, though unable to repair the losses for the present, be finally released from the debt, but whenever she possesses the means of repairing the damage, the dormant claim and obligation will be revived.

*Accord*, II THE WORKS OF JAMES WILSON 286-87 (J. Andrews ed. 1896).

209. Similarly, Anglo-American legislatures, jealously protective of their hard-won democratic prerogative over the levying and spending of taxes, convinced the judiciary not to allow unauthorized executive acts to force the legislature's hand in either respect by creating a finding claim against the fisc. Rather the legislature was to be given the right to decide which executive acts to ratify. This critical aspect of the overall historic phenomenon of democratic sovereign immunity is not developed here, since the article focuses on continuing harm from the implementation of legislative policies (not one-shot actions), so that *de facto* ratification should be apparent.

210. Cf. *Banker's Case*, 14 State Trials 1, 26 (1700) (Howell ed. 1812) (Treby, L.C.J.) (emphasis added):

Now who shall direct the payment of . . . debts, the barons [of the Court of Exchequer] or the treasurer? Who is the best judge of the state of the kingdom, and of its necessities? So that suppose there was only 4,000 *l.* in the exchequer, and we were threatened with a foreign invasion, how shall this money be disposed? . . .

political limitation on the principle of compensation was symbolized for many by Congress' Article I, § 8 power "to pay the Debts . . . of the United States." Similarly, the passage of the Eleventh Amendment vindicated Hamilton's assertion in *The Federalist*, No. 81 of the States' own "privilege of paying their . . . debts in their own ways."<sup>211</sup>

Correctly understood, however, that privilege furnishes no grounds for converting the juridical principle of compensation into a matter of pure legislative largesse. Justice Story, for one, agreed with those founders who viewed the petition of right as constitutionally obligatory upon the sovereign Crown.<sup>212</sup> Hence he supported St. George Tucker's analogous assertion in his 1803 "republican" edition of Blackstone that the sovereign American legislatures should consent in advance to legal proceedings in the nature of petitions of right and agree to appropriate funds to pay all judgments.<sup>213</sup> Still, any such agreement would necessarily be subject to the implicit proviso, "as the state of the fisc reasonably permits." To be sure, where no colorable claim of emergency executive prerogative was present, Lord Holt advocated the issuance of an *unconditional* judgment leviable against the fisc under a petition in the Court of Exchequer, based on the Crown's breach of an express contract in the *Banker's Case* in 1700.<sup>214</sup>

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And this I take to be the true reason why no action can be brought against the treasurer, because he acts as a *judge*, and not as a minister of the court. . . . So I take it, 'may be paid,' is enough for the barons to say; but 'must be paid,' is only for the treasurer to say.

*Accord, id.* at 103-105 (Sommers, L.K.).

211. FEDERALIST PAPERS, *supra* note 145, at 488.

212. STORY, COMMENTARIES, *supra* note 24, §1672 at 541.

213. *Id.* at 541-42 and n.1. See 1 TUCKER'S BLACKSTONE, App. 352 (1803).

214. 14 State Trials 1, 29-38 (1700) (Howell ed. 1812). The case involved a decision by the Court of Exchequer affirming the validity of letters patent issued under the great seal of the King, which commanded the commissioners of the Treasury to pay monies out of his hereditary excise to certain royal creditors. Moreover, Parliament had passed an appropriation statute directing the treasurer to make such payments to the King (and impliedly to his designee) on a regular basis. Hence there was no valid delegation of discretionary jurisdiction to the treasurer to withhold payment of these appropriated revenues upon a finding of supervening necessity. On the contrary, as Lord Holt emphasized, the ability of the King to alienate this branch of his revenues might itself be essential to prevent a national emergency:

[I]f the King could not raise money by alienating his revenue, the nation might perish; for he cannot otherwise raise money than by an act of parliament, for which there might not be time. . . .

But that result reflected the diminished constitutional status of the Crown and the fact that the funds in question had already been appropriated by Parliament for unrestricted royal purposes.

While the modern Supreme Court seems less confused than its predecessors<sup>215</sup> over the difference between the justiciability of the sovereign's duty to pay and the conceded non-justiciability of its ability to pay,<sup>216</sup> it has been no more willing to use that insight to develop substantive Taking Clause jurisdiction along principled lines—free from an implicit, inhibiting reference to Congress' own intent in waiving its immunity against the *recovery* of claims in the Tucker Act. Were it otherwise, the silent reproof of an affirmative judgment could serve to concentrate the sovereign's attention in weighing responsibly the political factors underlying its "payability." Nor would full payment be any less certain than it is when the citizen's only action was against a potentially insolvent official.

Thus, with no other mechanism to establish legislative accountability, we may safely assume that Madison, Jefferson, and Adams would all have dismissed out of hand, as did Marshall in *Osborn v. Bank of the United States*,<sup>217</sup> the "extravagant proposition" that a government official committing an *author-*

*Id.* at 30.

215. See, e.g., *District of Columbia v. Eslon*, 183 U.S. 62, 65-66 (1901); cf. *Draft Opinion in Gordon v. United States*, 117 U.S. 697, 702-03 (1865) (Taney, C.J.):

The award of execution is a part, and an essential part, of every judgment passed by a court exercising judicial powers. It is no judgment, in the legal sense of the term, without it. . . . It would be merely an opinion . . . unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this Court. . . .

216. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 570 (1962) (Harlan, J.), holding that "the capacity to enforce a judgment is [not] always indispensable for the exercise of judicial power"). In *Glidden* the Court upheld the status of the Court of Claims as an Article III court despite the fact that Congress had passed a general appropriations bill only for judgments of less than \$100,000 and that even the payment of those judgments was subject to later Congressional countermand. See *id.* at 568-571. See also *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 461-62 (1899) (upholding justiciability of a declaratory judgment action by the United States before the Court of Claims to determine the correctness of award by an international arbitral commission with whose enforcement the federal courts had no concern).

217. 22 U.S. (9 Wheat.) 738 (1824).

ized or *privileged* constitutional tort is shielded from "an action at law" by a theory of vicarious sovereign immunity. The fact of sovereign immunity cuts just the other way. What then is the explanation for Curtis' clear dictum to the contrary? Leaving aside the Sugar and Stamp Acts, it may be traced directly to a purported statutory conferral of immunity on U.S. tax collectors. Congress had sought to shield its revenue agents against quasi-contractual claims for monies allegedly had and received through the illegal exaction of custom duties. And the enactment was upheld in *Cary v. Curtis*<sup>218</sup> over the Seventh Amendment protests of Justice Story. While the majority noted that the statute left open the possibility of other common law actions like trover and replevin, Story found that the Seventh Amendment rights being "preserved" were illusory.<sup>219</sup> That was because greater tactical sophistication on the part of the taxpayer was required to maneuver into a position to bring the remaining actions.

But more to the present point, having skirted his procedural arguments, in dicta the *Cary* majority locked horns with Story over the substantive issue of the constitutional role of official liability. Focusing on the plight of the "innocent" tax collector, who was acting within his discretion and was statutorily prohibited from protecting himself through set-off or sequestration of contested collections,<sup>220</sup> they denied that a cause of action in quasi-contract could lie against such an officer. After all, the law never implied a contract where it would be unjust to do so. And under the circumstances "justice and fairness" imposed any implied duty to repay on the government, which both authorized the discretionary conduct and benefitted from the actual collections.<sup>221</sup>

Story recoiled in horror. This reasoning by implied analogy to the doctrine of judicial immunity was a perversion of our received constitutional principles. It made a "mockery of justice" to invoke *respondeat superior* where the principal was immune. Besides, notwithstanding Curtis' later assertion, it was Story's judgment that a common law remedy was historically available to the citizen for taxes illegally exacted (even if not to the collector against the state); and he asserted that such a public law action should in turn be available against all officials who commit wrongs under color of law, even or

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218. 44 U.S. (3 How.) 236 (1845).

219. Compare *id.* at 250 with *id.* at 255-56 (Story, J., dissenting).

220. Cf. *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137 (1836).

221. 44 U.S. (3 How.) at 250-52.

rather *especially* if authorized.<sup>222</sup> Story denied that the principle of quasi-contract was limited to routine private law cases of unjust enrichment, as suggested by the majority. Anglo-American constitutional history gave it "much broader and deeper foundations."<sup>223</sup> In particular, by virtue of our constitutional principles any executive officer who elects to work for the state should be deemed to take his job *cum onere*, i.e., subject to the citizen's historic right to sue him *at law* in order to obtain vicarious redress against his immune principal.<sup>224</sup> Hence concern for the "innocent" executive officer is definitively misplaced. And in any event equitable symmetry is introduced by the fact that the officer will enjoy a perfect right of indemnity against the state, a right which the legislature can be trusted to honor in his case, not just out of good faith, but in a pragmatic effort to attract and retain loyal administrators.

The second reason most often advanced in support of Curtis' innovative common law of official immunity is implicit in the first. And it illustrates the tacit role played in the debate by the nineteenth century ideological clash over the proper role of the jury, a debate explored in the next section of the article. As a matter of separation of powers and respect for a co-equal branch, the judiciary did not want to subject executive officers to the danger of having their discretionary decisions second-guessed in legal actions—*especially by lay jurors*.<sup>225</sup> Besides the indignity of it all, potential liability might paralyze the exercise of vital executive discretion in cases where the officers had not been guaranteed a right of indemnity. But that concern—the product, as Professor Jaffe noted, of "unrealism in the name of realism!"<sup>226</sup>—is misplaced where the officers are carrying out legislative policy. If the legislature is concerned about such paralysis, it can always agree in advance to waive its own immunity or to indemnify officials against liability for their good faith, discretionary policy choices—assuming it is not enough to ask such officials (like citizens) to trust in the government's good faith or pragmatic good sense. (That is the recent solution to the executive paralysis dilemma imposed by the Supreme Court under

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222. *Id.* at 254.

223. *Id.* at 255.

224. *Id.* at 259-60.

225. See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 648 (1980); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610, 638, 642-43 (1955).

226. Jaffe, *supra* note 151, at 249.

§ 1983 in the case of local governments, where Eleventh Amendment sovereign immunity concerns are technically inapplicable.) In general sovereign immunity situations, this article contends, a competing constitutional postulate demands that the threat of executive paralysis in the implementation of legislative policies be maintained as a continuous source of pressure on the legislature to agree in advance to pay its quasi-contractual obligation for continuing harm from authorized executive policy choices.<sup>227</sup>

As noted earlier, official immunity against collateral common law attack developed when Lord Holt turned *Bushell's Case* on its head. After conceding *judicial* status to legislative courts and their officers, Holt concluded that they deserved to share in the jury's constitutional immunity from liability for erroneous fact-finding. Of course, Holt's motive was to assert an implied common law right of direct appellate superintendence over these judicial entities *via certiorari*.<sup>228</sup> And in that way the ideal of direct appellate judicial review, limited to matters of law or excess of jurisdiction, began to grow up at the expense of collateral judicial review by jurors, which had included an equitable inquiry into the underlying justification for administrative acts. Yet despite Holt's efforts active administrative review by damage action survived in England well into the nineteenth century. Although technically limited to issues of "jurisdictional facts," juries in such cases were apt to be guided by a broader sense of the equities, including the need to provide claimants with vicarious redress against the state. Hence English appellate courts in

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227. *Accord*, Jaffe, *supra* note 151, at 249. Cf. Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447 (1919); Jaffe, *Suite Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 215-18 (1963); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); James, *supra* note 225. Historically, official liability in common law damage actions for good faith acts, whether ministerial or discretionary, did lead as a matter of course to indemnification by the sovereign. Yet that fact and its implications have been lost on even the most perceptive critics who applaud the tacit value judgment made by modern courts in conferring blanket administrative immunity lest "courageous and independent official action" be inhibited. *Id.* at 643. As Professor James had said, "the benefits to be had from the personal liability of the officer (*especially since the prospect of actual compensation to the victim from that source is slight*) are outweighed by the evils that would flow from a wider rule of liability." *Id.* at 638-39 (emphasis added). On official immunity in general, *see* Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981).

228. *The Case of Cardiff Bridge*, 91 Eng. Rep. 135 (K.B. 1700); *Groenvelt v. Burwell*, 91 Eng. Rep. 1202, 1212 (K.B. 1699). *See* Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 414-17 (1958).

the last century had to define the concept of jurisdictional facts with narrower and narrower precision and direct more and more verdicts.<sup>229</sup>

In the United States, as *Murray's Lessee* attests, federal courts extended the fact-finding prerogatives and immunity of jurors to *quasi-judicial* administrative officers, notwithstanding Article III and the Seventh Amendment.<sup>230</sup> In the process, however, Justice Story was not the sole dissident to emerge. For example, in a case anticipating *Murray's Lessee* and recalling the obnoxious immunity provisions of the Sugar and Stamp Acts, Chief Justice Marshall dissented from the Court's holding that Congress could confer on administrative officers a "good faith" discretionary right to seize vessels that might appear *suspicious* to them.<sup>231</sup> Citing constitutional concerns, Marshall asserted that the jury in a collateral damage suit should be free to determine whether the officer exercised "reasonable care" in arriving at his subjective conclusion.<sup>232</sup>

Likewise, in his "much-maligned" opinion for the Massachusetts' Supreme Court in *Miller v. Horton*,<sup>233</sup> Justice Holmes upheld the liability of a health official for destroying a horse which the board of health found diseased, but which a jury later found not diseased. Although Holmes based the decision on a narrow reading of the statute, as authorizing destruction only of beasts *actually* diseased, in dicta he indicated grave doubts as to the widely-accepted right of the legislature to authorize the "good faith" destruction of animals merely *suspected* of being diseased,<sup>234</sup> so as to shield officials from judicial second-guessing. Anticipating *Mahon* and the posited Holmesian compromise, he conceded that such a statute would be valid as an emergency measure so far as actually authorizing good faith destruction was concerned—as well as presumably shielding the officer against punitive damages. But due process of law, he cautioned, might well entitle the claimant to "revision by a jury" in a post-deprivation damage action of any *unreasonable* administrative determination.<sup>235</sup> In

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229. Jaffe, *Judicial Review: Constitutional and Jurisdiction Fact*, 70 HARV. L. REV. 953, 959-61 (1957).

230. James, *supra* note 225, at 640-41. Compare *Bradley v. Fisher*, 80 U.S. 335 (1871) with *Kendall v. Stokes*, 44 U.S. (3 How.) 87 (1845).

231. *Otis v. Watkins*, 13 U.S. (9 Cranch) 339 (1815).

232. *Id.* at 358 (Marshall, C.J., dissenting).

233. 152 Mass. 540, 26 N.E. 100 (1891). See Jaffe, *supra* note 229, at, 967 n.48.

234. *Id.* at 101.

235. *Id.* at 102. And there, pragmatically speaking, the jury might



other words, the statute would not necessarily furnish an absolute shield of immunity, since to the extent the valid exercise of such broad discretion led to the infliction of unreasonably disproportionate harm it might constitute an unconstitutional taking.

Thus, the extension of the jury's fact-finding prerogatives to quasi-judicial officials may have been justified on a separation-of-powers or federalism basis, but only to the extent of precluding direct appellate interference to stop the discretionary governmental action in its tracks or to compel it to go forward. The possibility of collateral attack through a common law damage action, however, should have survived to permit a jury to establish whether a *de facto* taking occurred and, if so, to exert pressure on the legislature to compensate. Instead, not only were juries denied the *de facto* privilege of reviewing the redistributive impact of legislature policies in terms of the *reasonableness* of their implementation, federal courts even removed allegations of *bad faith* or maliciousness as a potential common law source of jury leverage over national policy.<sup>236</sup> As such unrealistic realism escalated, driven by a thinly-disguised juryphobia, blanket official immunity threatened to become a reality.

### E. Jury As Modern "Odd Man Out."

As noted in the Introduction, however, the modern Supreme Court has backed away from Curtis' dictum. Even so, demonstrating continued concern over paralyzing legislative policy, it held in *Larson*<sup>237</sup> that the legislature had impliedly and effectively abolished any constitutionally-based nonstatutory right to equitable relief against an officer for a continuing *authorized* tort. This was because Congress voluntarily provided a Tucker Act damage remedy. Only at that point does the more difficult conceptual question posed by this article arise.

Can this Tucker Act remedy or a similiar administrative

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return a verdict of "unreasonable" in the larger sense that, whether or not the officer's exercise of discretion or ministerial responsibility was mistaken or accurate, it led to unacceptably high redistributive consequences, for which no other means of compensation were provided.

236. Compare *Kendall v. Stokes*, 44 U.S. (3 How.) 87 (1845) with *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

237. *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949).

remedy, neither of which carries a right to a Seventh Amendment jury, be deemed to abrogate the citizen's federal and state *common law* right to litigate such as *applied* constitutional disputes in an action against the responsible officials? *Larson* specifically failed to reach the question.<sup>238</sup> In a case where that is found to be Congress' intent, this article suggests that the constitutional trade-off may have to be provision of a full-fledged Seventh Amendment jury as part of the statutory remedy.<sup>239</sup>

But that extravagant proposition is apt to be dismissed with a shrug, modern legal culture having long since drained the jury trial guarantee of all legitimate substantive content. Thus, while the modern Supreme Court apparently attributes Curtis' suspect doctrine of blanket official immunity to his misreading of *Cary* (in which the majority condoned Congress' removal of one common law remedy against a tax collector *but only* in view of the continued availability of other common law remedies),<sup>240</sup> it refuses to attach any special political significance to the fact that the alternative remedies in *Cary* involved a jury. Still laboring under Brandeis' influence, the Court sees no implicit Seventh Amendment obstacle to Congress' substitution of an exclusive administrative remedy for the citizen's historic common law right of action against

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238. *Id.* at 688 & n.8. This analytical use of *Larson* to support an expansion of the pecuniary liability of the government or its officers should make it clear why the author chooses not to join in the current round of hand-wringing over *Pennhurst State School & Hosp. v. Halderman*, 104 S. Ct. 900 (1984), a case which barred the use of a federal court injunction to force a state court official to comply with *state law*. See, e.g., Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 63 (1984). Indeed, the majority in *Pennhurst* is careful to note that damage actions against state officials for wrongful conduct are not affected. 104 S. Ct. at 913 n.19, 914 n.21.

239. Workmen's compensation statutes, initially invalidated on jury trial grounds or modified to provide an election to remain outside the system, do not constitute a telling counter-argument. The conclusory analysis used to support them holds that once a common law action is "merged" into a "statutory" action, the constitutional guarantee has "nothing on which to operate." See Jaffe, *supra* note 151, at 98 & n.48. For present purposes workmen's compensation claims may be adequately distinguished from taking claims on the basis that submission to the juryless system for adjudicating the former forms, part of a consensual contractual relationship.

240. See *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 n. 23 (1982), citing *Glidden v. Zdanok*, 370 U.S. 530, 549 n.21 (1962). *Glidden* in turn cited *Cary v. Curtis*, 3 How. 236, 250 (1834), for the proposition that the case turned on the availability of other legal remedies.

the administrator of an unjust law. On the contrary, it is more than likely the spectre of the public law jury that has prompted the modern Court to endorse mechanically the case law extending the flawed logic of *Murray's Lessee* (permitting *conclusive* administrative fact-finding) to taking or "just compensation" claims arising from acts of taxation, regulation, or confiscation.<sup>241</sup>

This tact would have been especially tempting to the Court insofar as it justly feared that the potential Article III baggage of a Seventh Amendment jury might dissuade Congress from extending to federal courts the coveted privilege of original jurisdiction or appellate review in public law cases, as through the Administrative Procedures Act and the Tucker Act. After all, a literal application of *Murray's Lessee* would justify having such claims determined *in full* by the legislative or executive branches themselves. So that today when the Court acknowledges that *Murray's Lessee* leads to the counter-intuitive result that an "independent [Article III] judicial tribunal" of any sort (not just a Seventh Amendment jury) is excluded from the very public law areas in which "political theory" suggests it is most needed,<sup>242</sup> but then purports

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241. *Kohl v. U.S.*, 91 U.S. 367, 375-76 (1875). Ironically, one reason why the Supreme Court allowed implicit immunity doctrines to gut the public law jury was its fearful misconception of the legitimate scope of Congress' express power *via* Article III, section 2 to curtail (and, the Court reasoned, place conditions upon) the original jurisdiction of the Supreme Court over "suits to which the United States is a party." Compare *Ex parte Bakelite Corp.*, 279 U.S. 438 (1928) with *Glidden v. Zdanok*, 370 U.S. 530, 549, and n.21 (1962). In fact, the "exceptions" power was designed to head off criticism by jury-philes of the Court's otherwise blanket Article III "appellate" jurisdiction over both "the law and the facts" of cases, by enabling Congress to prevent the retrial of facts found by a common law jury. R. BERGER, *CONGRESS V. THE SUPREME COURT* 303-14 (1969). This provision did not appease the critics, who did not want the jury's "inestimable privilege" to render an unimpeachable general verdict left to the tender mercies of Congress. See, e.g., 3 COMPLETE ANTI-FEDERALIST *supra* note 159, at 60-61 ("A Democratic Federalist"). So to be "doubly sure," they successfully agitated in the Ratification Conventions for what became the Seventh Amendment provision that "no fact tried by a jury shall be otherwise reexamined in any court of the United States"—thus (it would have seemed) effectively supplanting the "exceptions" clause. Instead, the clause would come back to haunt them. On the other hand, Professor Berger's well-reasoned analysis is that Congress's Article III "exceptions" power, like its Article I powers, is subject to the Fifth Amendment and cannot be manipulated so as to deny Article III jurisdiction over takings actions. Burger, *op. cit.* at 314. And along with obligatory Article III jurisdiction comes the obligatory Seventh Amendment jury—or so this article asserts.

242. See *Northern Pipeline*, 458 U.S. at 68 n.20. For recent reflections

to bow selflessly before the "historical fact" that as of 1791 such quasi-judicial matters could be *conclusively* determined by the other branches of government,<sup>243</sup> one is entitled to a healthy cynicism. Courtesy of Congress' voluntary conferral of jurisdiction on Article III courts in such matters, all Curtis' controversial assertion now means in practice is that public law actions constitute an implicit, historically-grounded exception to the Seventh Amendment. And so why should the Court go to bat historically for the jury, if the results could unsettle its own convenient *modus vivendi* with Congress?

#### F. The "Historical" Public Law Jury.

Nonetheless, there are at least four direct avenues for attacking Curtis' historical conclusions as applied to the jury, in addition to the indirect tact pursued in the next section; and for purposes of illuminating the general thesis, those alternative avenues, by now somewhat familiar to the reader, will be briefly summarized.

First, one might argue that once Congress has voluntarily conferred Article III jurisdiction over public law matters, as in the case of the Tucker Act, the Seventh Amendment, as an essential aspect of that jurisdiction, must apply if the subject matter itself constitutes a "Sui[t] at common law." And "just compensation" claims do clearly fall within Justice Story's dynamic definition of that phrase in *Parsons v. Bedford*.<sup>244</sup> Story, a believer in an expansive civil jury guarantee, asserted that by the phrase "common law" the framers of the Amendment intended

what the constitution denominates in the third article 'law;' not merely suits, which the common law recognized among its old and settled proceedings, but suits, in which legal rights were to be ascertained and determined. . . .<sup>245</sup>

Hence "just compensation" actions, as suits for damages, concededly satisfy Story's definition, *but for* certain alleged his-

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on the viability of the doctrine of sovereign immunity, *see, id.* at 67; Owen v. City of Independence, 445 U.S. 622, 645 & n.28 (1980).

243. *Id.*; *see also id.* at 67-69. For another view critical of the Northern Pipeline Court's continued "blind deference" to Curtis' suspect historical claims in *Murray's Lessee*, *see* Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Division*, 1983 DUKE L.J. 197, 205, 209 n.88.

244. 28 U.S. (3 Pet.) 433 (1830).

245. *Id.* at 446-49. *See also* STORY, COMMENTARIES, *supra* note 24, at § 1762.

torical exceptions having to do with the fact that as of 1791 Parliament did not inevitably require juries in English condemnation cases and when it did it often employed the highly independent *ad quod damnum* jury.<sup>246</sup>

Those exceptions appear irrelevant, however, once the federal statutory remedy is viewed as a surrogate for the common law damage action that would have been available against the administrative officer enforcing the unjust tax, regulation, or confiscation:

[T]he state is not suable except with its consent. . . . The State may also, when providing for its own needs under the right of eminent domain . . . , *give all necessary protection to its agents and relegate the owner to such remedy as it deems proper, provided it is adequate and accords to the citizen due process, and without reference to the Seventh Amendment.*<sup>247</sup>

So said the Sixth Circuit in upholding the original provision in the Tennessee Valley Authority Act empowering commissioners to assess just compensation for properties taken. But it is a *non sequitur* to assume that because the state need not consent to be sued, it can condition that consent on the destruction of a pre-existing legal remedy.

Secondly, the English exceptions may be irrelevant for another reason. Story considered that Article III divided federal jurisdiction into three inclusive categories, law, equity, and admiralty; and for him the addition of the Seventh Amendment meant that law should be viewed as the great residual category, after allowance for relatively static, particularized equity and admiralty exceptions.<sup>248</sup> He found confirmation for that view of the framers' intent in the fact that the day before Congress proposed the Seventh Amendment for ratification, it enacted §§ 9, 12, and 13 of the Judiciary Act of 1789 as a stopgap measure.<sup>249</sup> Those sections provided a residual right of jury trial in all non-equity and non-admiralty proceedings in the district and circuit courts, as well as in the Supreme Court. Hence the conclusion reached by the Supreme Court in *Kohl v. United States*<sup>250</sup> that the Seventh Amendment is inapplicable to condemnation suits because

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246. *Kohl v. United States*, 91 U.S. 367, 376 (1875).

247. *Welch v. TVA*, 108 F.2d 95, 98-99 (6th Cir. 1939), *cert. den.* 309 U.S. 688 (1940).

248. STORY, COMMENTARIES, *supra* note 24, at § 1762.

249. *Id.*

250. 91 U.S. 367, 376 (1875).

they were "common law" actions in which Parliament sometimes failed to provide a jury does not follow, unless we stand Story's analysis on its head. For it suffices for Seventh Amendment purposes that such suits were not part of the historic equity and admiralty exceptions. Yet Story's analysis has been inverted by those who incongruously cite his analysis of the second clause of the Seventh Amendment (which for different reasons he interpreted by reference to historical English practice as of 1791) as a basis for impugning his own dynamic analysis of the first clause.<sup>251</sup> Where Story insisted that the Amendment extended jury trials to "the fullest latitude of the common law," these critics would deny its operation unless "assessment by [common law] jury [was] *uniformly* resorted to" in English practice as of 1791.<sup>252</sup> And so it may be another *non sequitur* to assume with the modern Court that because the state need not consent to be sued, it can condition that consent on a modification of the intended residual scope of the Seventh Amendment.

Rather one suspects that in practice the jury has served as a judicial bargaining chip in securing Congress' waiver of sovereign immunity. That analysis is borne out by Justice McLean's contemporaneous dissent from Story's dynamic definition of the jury guarantee in *Parsons*. Since the Seventh Amendment does not bind the states, he noted, an unwanted federal/state procedural discrepancy would be introduced into diversity of citizenship actions by Story's expansive approach, despite Congress' Practice Act which sought to conform the procedures in such cases.<sup>253</sup> In particular, McLean indicated strong concern that otherwise valid state laws appointing commissioners to evaluate real property in the case of improvements erected by occupying claimants would be unenforceable in federal courts and, more importantly, that Congress itself would be powerless to adopt a commission system in condemnation cases. He concluded that this dichotomy did not make sense in terms of *realpolitik*, anticipating the latterday arguments of Justice White.<sup>254</sup> After all, given

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251. See 5 MOORE'S FEDERAL PRACTICE ¶ 38.08 [5.-4] n.2, citing *United States v. Wonson*, 28 Fed. Cas. 745, 750 (CCD Mass. 1812). (No. 16,750) (Story, J.).

252. Blair, *Federal Condemnation Proceedings and the Seventh Amendment*, 41 HARV. L. REV. 29, 32 (1927). See 5 MOORE'S FEDERAL PRACTICE ¶ 38.32[1] (1984).

253. 28 U.S. (3 Pet.) at 452.

254. *Id.* at 456; see *Northern Pipeline*, 458 U.S. at 116 (White, J., dissenting).

Congress' power to abolish or alter the jurisdiction of lower federal courts so as to leave the trial of all such cases to juryless state courts, little is gained and much is risked by insisting on technical limits to Congress' ability to shape a jurisdiction it need not confer at all. Little is gained by resisting McLean's unsavory bargain, that is, if one does not share Story's enthusiasm for the popular mythology of the jury. One who was familiar with that mythology first-hand and mirrored Story's enthusiasm was Justice Patterson. Indeed, in a 1795 diversity action<sup>255</sup> he charged a law-finding jury as to his conviction that a Pennsylvania statute, empowering commissioners to award compensation in just such occupying claimant cases, violated fundamental American principles of constitutional law implicit in the civil jury guarantee of Pennsylvania's own Constitution:

The interposition of a jury is, in such case, a constitutional guard upon property, and a necessary check to legislative authority. It is a barrier between the individual and the legislature, and ought never to be removed.<sup>256</sup>

Thirdly, the English historical exceptions may be irrelevant because they are a statutory, not a common law, phenomenon, emanating from an omnipotent Parliament unconstrained by either a Taking Clause or a Seventh Amendment:

A jury was dispensed with in such cases, not because at common law in similar cases a trial by jury could not be had, but because each statute of Parliament providing for an appropriation of property was a law unto itself.<sup>257</sup>

Given the presence of both guarantees in the U.S. Constitution, the Fourth Circuit concluded in 1913 that the status of an American taking claim under the Seventh Amendment should not be prejudiced by reference to lapsed English practice in 1791.<sup>258</sup> Employing Story's analysis, the court held that a taking claim is the equivalent of a suit at common law since "[t]he jury at common law was always the tribunal to assess damages."<sup>259</sup> Support for this view comes from Chief Justice Coke's response to one of the first parliamentary stat-

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255. *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C. Pa. 1795).

256. *Id.* at 315.

257. *United States v. Beatty*, 203 F. 620, 624-26 (4th Cir. 1913).

258. *Id.*

259. *Id. Accord*, *Badgett, Jury Trial in Condemnation Proceedings*, 13 TENN. L. REV. 181 (1935).

utes to authorize commissioners to take property at a "reasonable price" assessed by them, *viz.*, the Statute of Sewers involving the drainage of low lands. In the *Case of the Isle of Ely*<sup>260</sup> Coke narrowly construed this novel authority as limited to the maintenance of ancient sewers. He did so on the theory that such a procedure could only be justified by local custom and acquiescence. Coke insisted that the proper method for opening new sewers was through use of the ancient *ad quod damnum* or sheriff's jury, which would assess the damages. This decision prompted yet another skirmish between Privy Council and King's Bench, with the Privy Council committing plaintiffs for contempt who brought successful trespass and replevin actions against commissioners or their bailiffs for appropriating property for new sewers without a writ of *ad quod damnum*.<sup>261</sup>

Fourthly, the English historical exceptions themselves do not hold up under analysis. There *were* specific common law analogues to "inverse condemnation" actions;<sup>262</sup> and in the context of the important petition of right there existed an entitlement to a jury trial at King's Bench of all disputed legal issues,<sup>263</sup> not to mention the ubiquitous *ad quod damnum* jury to measure damages. To deny, as some would, that the petition of right can be deemed a true common law action, since relief was discretionary, is to elevate form over substance:

It is of no consequence that theoretically speaking the permission of the Crown is necessary to the filing of the petition, because it is the duty of the King to grant it, and the right of the subject to demand it.<sup>264</sup>

That leaves only the dubious claims that the petition of right was never part of the American common law<sup>265</sup> and that the

260. 10 Co. Rep. 141, 77 Eng. Rep. 1139 (1610). For general background, see Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 576-79 (1972).

261. See *Hetley v. Boyer*, 79 Eng. Rep. 287 (K.B. 1614). See Jaffe & Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L. Q. REV. 345 (1956).

262. See *Glidden v. Zdanok*, 370 U.S. at 563, citing *inter alia* 9 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 7-45 (1926).

263. See Holdsworth, *supra* note 262, at 17, 42 n.8.

264. *United States v. O'Keefe*, 78 U.S. (11 Wall.) 178, 183-84 (1870). Accord, JAFFEE, *supra* note 151, at 212. See also *R. BERGER, CONGRESS V. THE SUPREME COURT* 315-54 (1969).

265. Jaffe, *supra* note 151, at 213. But see *United States v. Lee*, 106 U.S. 196, 238-239 (1882) (dissenting opinion).



alleged Revolutionary shift from Crown to legislature rendered the precedent inapposite anyway.<sup>266</sup>

Just as importantly, however, there was in 1791 the near universal right in England and the states to an *ad quod damnum* jury on the issue of damages in straight condemnation actions, available (if not in the first instance) at least on appeal from an unfavorable administrative award.<sup>267</sup> But nineteenth century judges rejected the *ad quod damnum* jury as a precedent for application of the constitutional civil jury guarantee for a number of reasons. On the one hand, it was too independent of the common law court;<sup>268</sup> but under the model of a law-finding jury being proposed, the fact of its independence would be corroborative. Moreover, the *ad quod damnum* jury does enjoy a distinguished common law lineage. On the other hand, the Supreme Court has suggested that the use of an *ad quod damnum* jury merely to "establish a particular fact [i.e., value] as a preliminary to the taking" does not rise to the dignity of a full-fledged "Suit at common law" for Seventh Amendment purposes.<sup>269</sup> Of course, the historic *ad quod damnum* jury was capable of doing more than assessing damages,<sup>270</sup> and under the public law model being pro-

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266. Cf. Jaffe, *supra* note 151, at 213.

267. See, e.g., *id.* at 14-15; 1 NICHOLS ON EMINENT DOMAIN §§ 1.21-1.22 (3d ed. 1981).

268. In short, the common law *ad quod damnum* or sheriffs' jury was not regarded as historical precedent for determining the scope of the Seventh Amendment because it was not sufficiently under the thumb of the court. See, e.g., *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899), (holding that the constitutional trial by jury in its "primary and usual" sense connotes the "supervision of a judge empowered to instruct the jurors in the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence"). By contrast, the Anglo-Saxon jury-centric county courts that survived the Norman Conquest and inspired the Leveller tradition were judgeless courts held incident to the jurisdiction of the sheriff. See Lysander Spooner, *An Essay on the Trial By Jury* (1852) in LET'S ABOLISH GOVERNMENT 60-65 (M. Rothbard ed. 1972).

269. *United States v. Jones*, 109 U.S. 513, 519 (1883).

270. Indeed, the historic *ad quod damnum* jury possessed something very like the power to prohibit proposed local condemnations on the grounds of inadequate public purpose or necessity. And until the 1960's this historic prerogative was reflected in the constitutionally prescribed eminent domain procedures of both Michigan and Wisconsin. See MICH. CONST. art. XIII, §2 (1908); WISC. CONST. art. XI, §2 (1848). Generally, juries were designated to determine issue of the necessity for the taking, as well as damages, in all condemnations by governmental entities (other than the state itself) and by private entities. See, e.g., *In re Slum Clearance v. City of Detroit*, 331 Mich. 714, 50 N.W.2d 340 (1951).

posed the intention is that the jury *would* take an active role in assessing liability for regulatory takings.

Not coincidentally, Curtis' decision in support of Congress' disenfranchisement of the local jury in federal tax assessment cases paralleled in approach contemporaneous state court decisions acquiescing in the "increasing tendency of state legislatures [after 1830] to eliminate the role of the [county *ad quod damnum*] jury in assessing damages for the taking of land"<sup>271</sup>—and to supplant the compensation jury with appraisers or commissioners whose valuations were binding on the condemnee. Despite popular protests that the *ad quod damnum* jury enjoyed constitutional status,<sup>272</sup> legislatures acceded to the importunities of chartered railroads and canal companies lest juries from counties dissatisfied with the state's policy of internal improvements or juries mistakenly assuming the corporate condemnor to have unlimited resources continue empowered to frustrate important state policies. The courts obliquely manufactured the tenuous excuses just canvassed for impugning the common law credentials of that institution. Thus, the claim of individualized equity was advertently (and unnecessarily) subordinated to the need for an inexpensive method of adjudicating claims yielding uniform, *predictably low* judgments.<sup>273</sup>

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271. Horwitz, *supra* note 102, at 84-85. See also *id.* at 67-69. Representative state court decisions (cited in *id.* at 84 nn. 115-117) include Beekman v. Saratoga & R.R., 3 Paige 45 (N.Y. 1831); Willyard v. Hamilton, 7 Ohio 111 (pt. 2) (1836); and Raleigh & Gatson R.R. v. Davis, 2 D&B 451 (N.C. 1837). See also Bonaparte v. Camden & Amboy R.R., 3 Fed. Cas. 821 (1830). And in 1848 Daniel Webster lamented the untoward implications for personal liberty of the passing of the *ad quod damnum* jury, remarking that:

It is said, the citizen is safe, because, under the exercise of the eminent domain, he is to receive compensation . . . . That furnishes *no security*, for the mode and amount of compensation is fixed *ex parte* by the government and its agents.

West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 517 (1848) (emphasis added.) But Webster's position in the Fugitive Slave Act controversy prevented him from impugning the constitutionality of such a state of affairs.

272. See, e.g., L. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860*, 159 (1948).

273. In light of the off-setting benefits reaped by many, if not most, condemnees in such internal improvement cases and the fact that rural, unimproved land was likely to be involved, even before commissioners entered the picture net judgments rendered by juries might well be less than the condemnor's litigation expenses. So a clear impetus and perceived justification for the demise of the *ad quod damnum* jury was its large expense relative to the predictable size of the average claim. See, e.g., Horwitz, *supra* note 102, at 67. A more sensitive and historically sound approach, how-

### G. *Jury as Political Pawn.*

The foregoing factors render Curtis' original historical judgment, especially as applied to exclude juries from "just compensation" actions, profoundly suspect. In the final analysis, therefore, his dictum rests on the principle of sovereign immunity, the power of Congress to shape Article III jurisdiction, and the bogus corollary of official immunity—not on an accurate historical analysis of the Seventh Amendment. But this article leaves largely for another day the technical aspects of the debate over the constitutional status of the compensation jury.<sup>274</sup> Instead, it seeks in the next section to demonstrate that Curtis' hidden agenda in *Murray's Lessee* was to sabotage Story's dynamic definition of the Seventh Amendment and that he did so as a natural outgrowth of his own die-hard role in the Fugitive Slave Act Controversy. Echoing Hobbes, attorney Curtis in 1851 had upbraided those who championed the right of northern juries to dispense equity in favor of "the liberty of a mere black" when "the unity and security of a white man's country" were at stake.<sup>275</sup> Accordingly, Curtis' 1855 opinion may be seen as a

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ever, would have been to give the condemnee a suitably conditioned right to appeal from the commissioners' valuation for a trial *de novo* before a jury. See Henderson, *supra* note 159 at 17; Tachau, *supra* note 151, at 91. Cf. Capital Traction Co. v. Hof, 174 U.S. 1 (1899); Williams v. Taunton, 126 Mass. 287 (1879).

274. The author plans to explore the historical origins of the public law jury in greater depth in a subsequent article. The important thing to note at this point is that the state and federal judiciaries were in the convenient position of doing the bidding of the "democratically elected" legislature—and were certainly not disposed to stick out their own necks to save a so-called "popular" institution which they so distrusted professionally.

Two state courts, however, which did buck the legislative trend by according constitutional status to the compensation jury were those of Massachusetts and its legal twin, Maine. See Chadwick v. Proprietors of Haverhill Bridge, 2 Dane's Abr. 686; and Day v. Stetson, 8 Me. 365, 372 (1832). Not surprisingly, modern Massachusetts courts have narrowly construed the role of the constitutional compensation jury as limited to condemnations of tangible real property, not loss of good will, subjective harm, *etc.* See, e.g., Sawyer v. Commonwealth, 182 Mass. 245, 65 N.E. 52 (1902) (Holmes, C.J.). The idea has been repudiated altogether in Maine. Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893 (1904).

275. 1 B. CURTIS, JR., A MEMOIR OF BENJAMIN ROBBINS CURTIS 135-136 (1897), as paraphrased in R. COVER, JUSTICE ACCUSED 176 (1975). Curtis, appointed to the Supreme Court by Millard Fillmore, enjoyed the strong backing of Secretary of State Daniel Webster, who was principally attracted by the likelihood that Curtis, a staunch nationalist, would vigorously prosecute Fugitive Slave Act cases in his circuit duties as presiding

key component in the overall process referred to earlier by which the historic law-finding prerogative of local juries was deliberately sacrificed to a perception of the imperative demands of the Supremacy Clause. And unless that process can be reversed and the legitimate *political* function of the jury recognized and restored, vindication of the right to a jury in public law actions by itself will make little practical difference.

For instance, while the modern Court has finally (1) acknowledged that inverse condemnation actions may well be "inherently judicial" and are certainly "justiciable" for Article III purposes<sup>276</sup> and (2) asserted along with Chief Justice Hughes that Article III judicial power requires not only a presumptive right to review the law, but also a right to review the facts of cases decided administratively, since "fundamental rights [often] depend . . . upon the facts, and finality as to facts becomes in effect finality in law"<sup>277</sup>—it has still failed to put (1) and (2) together. The acknowledged constitutional justiciability of such actions alone, but especially in view of the acknowledged importance of what factfinder applies the law to the facts, dictates that they be tried by a Seventh Amendment jury.<sup>278</sup> Yet presumably today the Court refuses to take that logical step for an additional reason not present for the Brandeis court. By virtue of the 1943 decision in *Galloway v. United States*,<sup>279</sup> a divided Supreme Court definitively joined the nineteenth century movement by which judges leveraged an asserted power over the "legal sufficiency of the evidence" in civil cases into a constitutional right and

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judge over the First Circuit in eastern New England (Maine, N.H., Mass., and R.I.). Webster was not disappointed. See, e.g., Gillette, *Benjamin R. Curtis*, in II THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, 895-924 (L. Friedman & F. Israel, eds. 1969).

276. See *Glidden v. Zdanok*, 370 U.S. at 549 and n.21, 563-64.

277. See *Northern Pipeline*, 458 U.S. at 86 n. 39, quoting *Crowell v. Benson*, 285 U.S. 22, 57 (1932) (Hughes, C.J.).

278. This was the Justice Douglas' conclusion in *Glidden*, 370 U.S. at 602 (dissenting opinion); cf. *Kohl v. U.S.*, 91 U.S. 367, 378-79 (1875) (Field, J., dissenting). See *Beatty v. United States*, 203 F.620, 624-25 (4th Cir. 1913) (holding that the Seventh Amendment extends to just compensation actions). Cf. Hines, *Does the Seventh Amendment to the Constitution of the United States Require Jury Trials in all Constitution Proceedings?*, 11 VA. L. REV. 505 (1925); Blair, *Federal Condemnation Proceedings and the Seventh Amendment*, 41 HARV. L. REV. 29 (1927). Except for the fact that *Crowell v. Benson*, involved an admiralty case, the Article III right of *de novo* factual review vindicated therein by Hughes arguably would have included a Seventh Amendment component.

279. 319 U.S. 372 (1943).

duty to direct a verdict upon a proven set of facts, which could not be taken away. Proclaiming themselves to have been the "governor of the trial" at common law,<sup>280</sup> they boldly asserted this right as an integral part of the constitutional civil jury trial guarantee itself. (This should make it clear why the independent *ad quod damnum* jury was repudiated as a common law anomaly.)

Accordingly, if Article III means that the Seventh Amendment jury is definitively under the thumb of the trial and appellate judges—and can have no substantive role to play *even in public law actions*—then it is hardly worth the intellectual candle for the Court (or any one else for that matter) to champion their right to exist.<sup>281</sup> In other words, even if a jury were provided as a matter of right in public law actions, under the ethos of *Galloway* what possible political or libertarian significance could it have? For example, while the Supreme Court acceded in 1951 to the Advisory Committee's recommendation that Rule 71A(h) of the Federal Rules of Civil Procedure provide that federal courts *may* employ a jury in condemnation suits, it has since made clear that such a jury is to have no substantive role whatsoever in articulating and applying the constitutional standards for what constitutes a

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280. See, e.g., *Herron v. Southern Pac. Co.*, 283 U.S. 91, 93 (1931); *Keley v. Chicago, M. & St. P. Ry.*, 138 Wis. 215, 225, 119 N.W. 309, 314 (1909). Accordingly, the modern doctrine is that summary federal proceedings need only be followed by appellate review—not *de novo* jury trial. See *Phillips v. Comm'r*, 283 U.S. 589, 595, 597, 599 n.9 (1931). Cf. I K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 594, 595 (1958). So when the *Northern Pipeline* Court speaks of an Article III concern over how the facts are found, it is really only talking about what standard of deference to apply to the findings of a non-Article III adjunct. See *Northern Pipeline*, 458 U.S. at 86-87.

281. For instance, Redish shares this author's view that plenary Article III fact-finding jurisdiction should extend to all public law cases pitting an individual against the state and in which the individual asserts a constitutional claim. See Redish, *supra* note 159, at 224. (Non-constitutional claims, involving employment relationships, do not require plenary Article III jurisdiction. But by virtue of his own narrow, non-substantive view of the Seventh Amendment jury, see Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 Nw. U. L. REV. 486 (1975), he is willing to balance away the obligatory Article III status of the Seventh Amendment jury, at the same time that he emphatically rejects Justice White's attempt to balance Article III in its entirety against "competing constitutional values and legislative responsibilities." See Redish, *supra* note 159, at 221-24. Instead of endorsing a jury as his public law factfinder, Redish comes down predictably on the side of recommending a nondeferential standard of judicial review over administrative action. *Id.* at 227-28. One should question the workability of his suggestion given the crowded state of federal appellate dockets.

taking.<sup>282</sup> Rather the statutory jury is limited strictly to the issue of compensation, and even then its historic discretion over damages is strictly regulated. As epigrammatically summed up by one justice, "[t]here are powerful forces loose in this country that deprecate the use of juries . . . . [Yet if properly understood, juries through their control over damages] in condemnation cases [would be permitted to] perform . . . an historic restraint on executive and judicial power."<sup>283</sup>

#### H. *Proposals for Rehabilitation.*

Hence the balance of the article primarily attempts to flesh out a cogent model of the Seventh Amendment public law jury that assimilates its prerogatives to those of the historic law-finding criminal jury, at the same time that it distinguishes its function from that of the private law jury.<sup>284</sup> For example, since they occupy a conceptual middle ground, verdicts by public law juries *against* the state need not be treated as final, like acquittals, but should be subject at most to the limited right of courts in 1791 to set aside a civil verdict and order a new trial. In other words, *Galloway* need not be symmetrically applicable to Seventh Amendment public law and private law juries.

In that vein the next section explores why nineteenth

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282. This is even though the substantive taking standard articulated by the Court fairly cries out for the special competence of the jury, since it involves essentially an "ad hoc, factual inquiry." The Court itself, institutionally incapable of administering the fact-sensitive standard of disproportionate sacrifice, has transmuted it into essentially a mechanical rule involving the presence *vel non* of a physical invasion or total destruction of value.

283. *United States v. Reynolds*, 397 U.S. at 23-24. (Douglas, J., dissenting, with whom Black, J., joined) (emphasis added).

284. The basic argument being advanced here—that the Seventh Amendment guarantee was intended to be most nearly, if not absolutely, immune from judicial balancing in the area of public law litigation—simply avoids the basic thrust of Edith Henderson's central critique. She maintains it is illogical to extrapolate from the jury's uncontrollable power to acquit in criminal cases to "an equally unlimited right to give a verdict for either side in an *ordinary* civil case 'between party and party' . . . ." See Henderson, *supra* note 159 at 291 (emphasis added).

Hence, it is contended that federal directed verdicts are inappropriate in public law actions involving constitutional claims. Of course, as with English practice in 1791, a verdict may be set aside and a new trial ordered for a sufficient failure of proof. And while historically if the second jury brought in the same verdict, a third trial was rarely ordered, see Henderson *op cit.* at 311, this author would concede to federal judges the technical right to order repeated retrials in public law actions, if they and prepared to justify to the public such apparent moral arrogance.

century appellate judges may have been justified in departing from ancient practice by using the directed verdict to supplant the *private law* jury in certain cases. In the context of commercial contracts, for example, where evenly-matched parties have presumptively had an ample opportunity to reduce to writing the essential terms of their agreement, it might be inappropriate for a civil jury to rewrite the transaction on the basis of its communal sense of fairness. Both parties have exhibited a preference for commercial certainty over natural equity. But it would be a fallacy to apply the commercial "four corners" rule of contractual interpretation to the social contract which public law jurors are asked to expound, since that contract governs a relationship of such complexity as to defy any exhaustive *ex ante* attempt to reduce it to writing.<sup>285</sup> (Perhaps that is the essential lesson of the Ninth Amendment.) Moreover, unlike members of a commercial jury public law jurors would themselves be tax-paying parties on the other side of the social contract allegedly broken. As a result, a dilemma present in normal civil actions would be avoided. For even if public law jurors were to err on the side of generosity to the claimant, they could do so without necessarily being unjust to the other party. Nonetheless, by a parity of reasoning the modern Court could be expected to deny the proposed constitutional public law jury, just as in the case of its statutory counterpart, any historic prerogative of interpreting the implied terms of the social compact through the power of dispensing individuals from the operation of inequitable statutes.

Then, in order to reconcile the claimed dispensing power of the criminal law and public law juries with the true Revolutionary meaning of "the rule of law," the next section reinterprets that phrase as being exclusively neither the Hobbesian "rule of legislators" nor the Horwitzian "rule of rough, communal standards of justice"—but something in between.<sup>286</sup> The public law jury has the right to make "com-

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285. Cf. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1975). Professor Speidel suggests that the underlying assumption of the objective "bargain theory" of contract, i.e., that the "parties could or should presentiate, that is, express all of the material elements of the future exchange in the present agreement," is "hardly consistent with the dynamics of the long-term relationship between professor and university, husband and wife, . . ."—and citizen and state? *Id.* at 1173.

286. Professor Horwitz has asserted that the founding generation viewed the common law as "a known and determinate body of legal doc-

mon sense," not idiosyncratic, exceptions to the standing law in the direction of greater lenience towards the individual—a right the court can concededly oversee through the power to set aside a verdict. Conversely, the existence of standing laws was a necessary, not a sufficient, condition for their imposition. The article then seeks to square such equitable power on the part of local jurors with the legitimate structural imperatives of Article VI.

### I. *Implementing the Compromise.*

Finally, in light of encouraging recent developments in the law of § 1983 and elsewhere, providing federal damage and inverse condemnation actions against local governmental entities and officials<sup>287</sup> (replete with the possibility of a Seventh Amendment jury<sup>288</sup>), it is appropriate to focus briefly on the actual role a jury might play in drawing the difficult moral line which sets off governmental actions that go "too far" in the way of unfairly sacrificing individual liberties to the putative public good.<sup>289</sup> If the model Seventh Amendment public law jury were available in an inverse condemnation action, it could award compensation on the basis that governmental actions unfairly frustrated legitimate expectations formed in reasonable, detrimental reliance on the pre-existing state of the law. By recognizing a new category of *compensable* liberties, occupying a middle ground between today's "preferred" liberties that are essentially inviolable and "disparaged" economic liberties that are essentially negligible, practical protection could be afforded to a whole new spectrum of intangible expectations or privileges which are

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trine." Horwitz, *supra* note 102, at 4. For this proposition, as Professor Teachout has noted, Horwitz gives us an improbable cite to the Hobbesian views of Governor Hutchinson of Massachusetts. See Teachout, *supra* note 164, at 211. While Hutchinson's positivistic view is predicated on the absence of any ethical consensus in society, Horwitz is interested in assetting the opposite, that is, that the revolutionary rule of law embodied a pre-rational devotion to communal values. Cf. R. UNGER, *MODERN SOCIETY* 142-43 (1976). In his zeal to construct a precommercial, non-instrumentalist Eden, Horwitz consistently overlooks the dynamic and, yes, rational role that was to be played in republican America by Jefferson's ploughman/juror.

287. See, e.g., *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and *Owen v. City of Independence*, 445 U.S. 622 (1980).

288. See *Burt v. Abel*, 585 F.2d 613 (4th Cir. 1978).

289. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) Cf. Van Alstyne, *The Fate of Constitutional Ipse Dixits*, 33 J. OF LEG. ED. 712 (1983).



now considered neither fish nor fowl—that is, neither property nor liberty.<sup>290</sup>

Although the Supreme Court has recognized that the “just compensation” guarantee of the Fifth and Fourteenth Amendments embodies an ideal of “fairness,”<sup>291</sup> as noted earlier institutional constraints on the Court—with its crowded docket, concern for federalism, and hierarchial responsibility to decide cases of generalized importance—have convinced it to dispense constitutional equity largely at wholesale.<sup>292</sup> Without the time or perceived responsibility to

290. The Supreme Court has recently recovered from an obsessive bout with due process absolutism, *see, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970), during which it sought to prevent all deliberate governmental harm to individual interests absent the provision of prior adversarial hearings. *See Monaghan, Of “Liberty” and “Property,”* 61 CORNELL L. REV. 405, 430-31 (1977) With its new focus on the provision of adequate *post-deprivation* remedies as a means of squaring harmful governmental conduct with the demands of “due process,” the procedural and substantive implications of the Seventh Amendment provide all the more reason why the Court should leave it principally to state and federal *juries* to define over time the substantive dimensions of new categories of actionable constitutional torts. *Cf. id.* at 433-34. By contrast, Professor Monaghan suggests that federal judges should assume primary responsibility for defining the scope of compensable *liberties* under the Fifth and Fourteenth Amendments. This suggestion follows his judgment that *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (characterizing as “property” for federal “due process” purposes claims of entitlement against the state which are based on “rules or mutually explicit understandings”), makes the crucial issue of protectible or compensable entitlement under the due process clause “a question of law, rather than one of [mixed] constitutional fact.” Monaghan, *op cit.* at 437 n.209. While this may be true in the peculiar context of a governmental employment relationship, general principles of estoppel and implied-in-fact contract (as applied by juries) should govern reasonable subjective expectations induced in the general citizenry by the pre-existing state of the law.

291. *Armstrong v. United States*, 364 U.S. 49 (1960).

292. This phenomenon stems from a lingering tradition of deference to state court findings of fact, a deference originally compelled by the perceived limits of the statutory Writ of Error process—the only appellate process authorized by Congress for removal of state court cases to the Supreme Court until 1928. (The common law writ of error brought up for review only matters of law, in contradiction to an appeal in equity under which both law and fact were reviewed. *See King v. West Virginia*, 216 U.S. 92, 100 (1910).) The Judiciary Act of 1789, adopting the writ of error procedure, was enacted under Congress’ “exceptions” power just one day before the Seventh Amendment was submitted to the states for ratification; and like the second clause of that Amendment, it was designed to counter the popular fears that the Supreme Court’s Article III “appellate” jurisdiction would be employed to negate the historic prerogative of the jury to render an essentially non-reviewable verdict where law and fact were intermingled. Despite the historic association with maintaining the prerogatives

examine *ad hoc* the fairness of contested statutes or regulations, the Supreme Court tends to absolutize in all-or-nothing fashion its perceptions of fundamental constitutional fairness. Usually these constitutional common law rules, like the "*Miranda* warning" rule on the voluntariness of confessions or the "one man-one vote" decision, establish a precautionary national floor of protection. But while such preferred liberties as speech are absolutely protected or very nearly so, a citizen's claim for the "uncompensated" taking of intangible economic expectations ranks at the other end of the spectrum. The Court may speak of "fairness," but it dispenses its equity in the form of the wooden, all-or-nothing physical invasion/total destruction of value rule, which decidedly favors the state.<sup>293</sup> As Justice Black observed, this delusive form of appellate "balancing" of the equities—that takes a remarkably "deprecatory" view of those on the side of the citizen and a remarkably "sympathetic" view of those on the side of the state—is really no balancing at all.<sup>294</sup>

Moreover, because the Supreme Court chooses to act at a high level of generality, in order to validate a citizen's expectations it often must oust the state from all regulatory authority over a particular area of conduct. Given this stark institutional choice between upholding or invalidating *in toto* a statutory scheme authored by a democratically-elected legislature, the Supreme Court, afflicted as it is by anti-majoritarian *angst*,<sup>295</sup> tends to err decidedly on the side of upholding all economic legislation. This mandatory due process "death sentence" for oppressive statutes—like capital punishment for forgery of old—may be said to "endanger the property which it [was] intended to protect."<sup>296</sup>

More constitutional equity could be dispensed in the economic area if the Supreme Court were institutionally adapted—like the jury—to dispense it on a retail ("as ap-

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of the jury, the Writ of Error process was eventually used by the Supreme Court to sanctify fact finding by *all* state fact-finders, *including commissioners*.

293. See *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 124 (1978).

294. *El Paso v. Simmons*, 379 U.S. 497, 532 (1965) (Black, J., dissenting).

295. See BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 956 (1975); and Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 *STAN. L. REV.* 169, 185-87 (1968).

296. RADZINOWCIZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750* (1948).

plied") basis, rather than on a wholesale ("facial") basis. Since it is not, this article argues on the basis of both history and policy that the Court should formally enlist the cooperative help of local juries, a la *Miller v. California*,<sup>297</sup> to implement the Holmesian compromise posited in the Introduction. Not only can juries help particularize the federal standard of fairness to local facts, just as importantly they can at the same time liquidate a valid claim of unfairness so as to give the government an effective option either not to proceed further or to pay. Even Jefferson was content to see a citizen's substantive right to bodily liberty (and the attendant guarantee of habeas corpus) deliberately circumvented by repeated false arrests without probable cause, so long as the *truly essential* post-deprivation right to have a jury liquidate his subjective harm (*via* punitives) and award damages was preserved.<sup>298</sup> The modern Court is correct in moving in Jefferson's direction,<sup>299</sup> though its logical compass is unsteady. In fact, a unitary approach to remedying dignitary harms and indirect economic deprivations by the policymaking organs of the state is firmly within its conceptual grasp, an approach involving neither strict scrutiny nor extreme deference on the part of the judiciary.

Especially if all governments were liable for the good faith acts of their officials, as is now true of local governments under § 1983, the Supreme Court would be on solid ground in justifying under the Due Process Clause the interim infliction of virtually any economic harm and perhaps a wide range of dignitary harm proximately resulting from a statutory or regulatory policy, but not (as is currently the case with indirect economic harm) on the basis of the respect due to the policymaking branches alone. Rather in both types of cases due process immunity/judicial deference should be made to hinge on the correlative fact that a constitutionally-

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297. 413 U.S. 15 (1973).

298. Why suspend the Hab. corp. in insurrections and rebellions? The parties who may be arrested may be charged instantly with a well defined crime. Of course the judge will remand them. If the public safety requires that the government should have a man imprisoned on less probably testimony in those than in other emergencies; let him be taken and tried, retaken and retried, while the necessity continues, only giving him redress against the government for damages.

13 THE PAPERS OF THOMAS JEFFERSON 442 (J. Boyd ed. 1959).

299. See, e.g., *Ingraham v. Wright*, 430 U.S. 651-76 (1977) (the pre-determination deprivation involved corporal punishment of a student by a school official); See also *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

adequate factfinder stands ready and able to assess and liquidate an individual's damages. In that way the Due Process and Taking Clauses form a meaningful conceptual unit, along the lines of the so-called Holmesian compromise, furnishing the citizen graduated two-tiered protection, promoting efficiency and fairness. The former provides wholesale protection through specific relief against "facially" unreasonable governmental actions. And the lax "mere rationality" standard of review which characterizes that facial protection against generalized police power regulations relates, not only to the extraordinary nature of the relief, but also *ideally* to the fact that retail protection (in the form of an adequate legal remedy for *as applied* unfairness) exists under the Taking Clause. The availability and adequacy of such a postdeprivation damage remedy under the Taking Clause would demand nothing less than a thoroughgoing reconsideration of the ultimate judicial acceptability of certain due process deprivations.

Some deprivations that were once deemed impermissible even if accompanied by a *post hoc* damage remedy might now be allowed, and some that have been permitted even without such a remedy might now be condoned only with one. For instance, historically the Court may have shown less disposition to tolerate a policy choice involving a deliberate pretermination infliction of mental suffering or dignitary harm since they were once deemed noncompensable (save under the guise of punitives predicated on maliciousness), not to mention nonrecoverable (if only a vicarious action against the potentially insolvent official was available)—and, in large measure for those reasons, "irreparable." Hence no postdeprivation damage remedy could be deemed adequate. Conversely, because early police power regulations tended to involve relatively trifling interferences with an individual's intangible expectations, the Court may have decided to resolve the matter of the perceived inadequacy of available postdeprivation remedies the other way—finding that individual harm from generalized police power regulations is presumptively *de minimis*. But as soon as one posits (a) the availability of a direct remedy against the state (b) before a factfinder with an increasingly accepted (because societally necessary) competence to quantify intangible losses,<sup>300</sup> such a

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300. Civil juries are increasingly being permitted to award tort damages for the intentional or negligent infliction of mental anguish, even in cases in which the emotional trauma stems from damage to physical prop-

historic due process compromise comes unstuck. No longer should the Court's inability to formulate an objective standard, like fair market value, for liquidating harm to intangible expectation reciprocally affect its willingness to recognize

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erty (such as a dream house) and results in no physical symptoms. *See, e.g., Rodriguez v. State*, 52 Hawaii 156, 472 P.2d 509 (1970). The problems of difficulty of proof and measurement of damages—and the concomitant danger of fraudulent claims—have been subordinated to an increased awareness of the reality of psychic and dignitary harm and of the formalistic hypocrisy of willingly entrusting the issue to juries where “mental anguish” happens to accompany a slight physical injury. W. PROSSER, TORTS § 12, 50 (4th ed. 1971). Indeed, even in the area of breach of contract, a defendant may now be assessed mental distress damages by a jury if he “had reason to know when the contract was made that the breach would cause mental suffering for reasons other than pecuniary loss.” RESTATEMENT (SECOND) CONTRACTS § 341. *See, e.g., Fletcher v. Aetna Cas. & Surety Co.*, 80 Mich. App. 439, 264 N.W. 2d 19 (1978).

Yet, the Supreme Court has recently reconfirmed that an objective standard (*i.e.*, fair market value) disregarding subjective values is particularly appropriate in the federal condemnation context precisely because of the presence of a jury:

[F]or juries should not be given sophistical and abstruse formulas as the basis for their findings nor be left to apply even sensible formulas to factors that are too elusive.

*United States v. 50 Acres of Land*, 105 S.Ct. 451, 458 (1984) (quoting Justice Frankfurter in *Kimball Laundry Co. v. United States*, 338 U.S. 1, 20 (1949)).

The thesis of this article is that such a conclusion stems from questionable premises, namely, that a condemnee enjoys a jury trial only through the grace of Rule 71A(h), and that a judge rather than a jury should dispense democratic equity since the latter is more apt to embody local bias and prejudice than commonly-shared notions of natural justice or equity. (On the positivist fetish for certainty and predictability in the law and associated animus towards the jury, *see Note, Towards Principles of Jury Equity*, 83 YALE L.J. 1023, 1026-28 (1974)).

Moreover, perhaps *lex non favet delicatorem votis* (“the law favors not the wishes of the dainty”) was good law in the rough and ready atmosphere of eighteenth century England with her open sewers in the streets, disease, *etc.*—where all might be expected to cultivate something of a thick skin. In twentieth century America, where private and public energies alike are openly devoted to the pursuit of “spiritual . . . [and] aesthetic” ends, *Berman v. Parker*, 348 U.S. 26, 33 (1954), a certain psychic “daintiness” (as the above state court decisions acknowledge) has become the modern social and legal norm. The Supreme Court should follow suit by allowing condemnees compensation for their “reasonable” subjective harm from being forced to surrender property to the state, as determined by a jury. Other western legal systems do allow consequential damages for the actual expenses of moving, as well as a premium for the consumer surplus lost by being an unwilling seller. *See, e.g., Bigham, “Fair Market Value,” “Just Compensation,” and the Constitution: A Critical View*, 24 VAND. L. REV. 63, 80-90 (1970).

such expectations as legal entitlements in the first place. That is especially so since the degree of intangible regulatory harm which government today routinely inflicts approaches the level of grand not "petty larceny," and its ability to raise revenue is essentially unlimited.<sup>301</sup>

In short, we do not require the modern insights of the economic theory of property rights to grasp the practical political significance of entrusting the ultimate substantive definition of "liberty" and "property" under the Due Process and Taking Clauses to a public law jury wielding a "liability rule" (and assessing damages), as opposed to an appellate court wielding a "property rule" (and either granting or withholding specific relief).<sup>302</sup> More interests can receive protected judicial status consistent with the legitimate prerogatives of the other branches of government.<sup>303</sup> Both efficiency and fairness can be maximized. Long ago Chancellor Kent, in equitable actions involving significant conflicting equities, refused the all-or-nothing ("*ex vigore*") relief of specific performance or rescission, preferring instead to remit plaintiffs to the good offices of a jury which through damages could "affor[d] relief . . . with a moderation agreeable to equity and good conscience."<sup>304</sup> Similarly, constitutional public law juries can help to decide as a matter of local understanding and evolving standards of fair play (which they in effect define), subject of course to applicable national minima, what constitute reasonable,<sup>305</sup> compensable<sup>306</sup> (versus merely "unilateral") expectations on the part of a fellow citizen vis-a-vis their government<sup>307</sup>—and to what extent any such reasona-

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301. The allusion is to Justice Holmes' "petty larceny of the police power" metaphor found in a draft opinion in *Jackman v. Rosenbaum Co.*, 260 U.S. 22 (1922). I HOLMES-LASKI LETTERS 457 (Howe ed. 1953).

302. Cf. Calabresi and Melamed, *supra* note 29.

303. Indeed, the Supreme Court has recently noted that where liability for damages for wrongs inflicted in the good faith implementation of governmental policies or other good faith exercise of executive discretion is formally placed on the government entity, *where it belongs*, legitimate separation of powers concerns over having a jury second-guess the reasonableness of the policy judgment of coordinate and coequal branches of government are all but eliminated. *Owens v. City of Independence*, 445 U.S. 622, 651-54 (1980). There is no threat of personal liability to induce policy-making paralysis on the part of executive officials.

304. *Seymour v. Delancey*, 6 Johns Ch. 222 (1822).

305. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

306. *See Penn Central*, 438 U.S. at 124-25 (1978).

307. The underlying thesis, that an individual's legitimate intangible expectations should be compensable if subjected to unreasonable, non-*de minimis* frustration by the exercise of any governmental power, whether in

ble expectations have been unfairly frustrated. With regard to the latter issue of assessing damages, the jury will implicitly establish what is the current socially-determined level of reasonably *de minimis*, noncompensable sacrifice which the government may randomly impose on its citizens as a sort of general in-kind tax, at the same time that it gives the government credit for all special in-kind benefits of the regulatory measure to the claimant.<sup>308</sup> The two questions of right and remedy are integrally related. In the public law setting all-or-nothing rules are certainly no more appropriate, if not demonstrably less so, than the harsh rule of "contributory negligence" in the field of tort law;<sup>309</sup> hence the "physical invasion" and "total destruction of value" rules should be scrapped in favor of the jury's "time-honored right . . . to

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the guise of taxation, regulation, or eminent domain, contingent only upon validation of those expectations by a public law jury, may be profitably compared to the similar thesis in Epstein, *Taxation, Regulation, and Confiscation*, 20 OSGOOD HALL L.J. 433 (1982). See also Epstein, *Not Deference But Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351.

308. Compare the role of the *ad quod damnum* jury in *Bauman v. Ross*, 167 U.S. 548 (1897), in netting against the harm to condemnee all implicit "special and direct" benefits from the project and that of the historic nuisance jury in determining what is the acceptable neighborhood level of "give and take" at or beneath which no intangible interference with a plaintiff is deemed sufficiently substantial to be actionable. See Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. OF LEGAL STUDIES 49, 82-87 (1979).

What Professor Epstein may have overlooked the possibility that Lord Bramwell, in articulating the principle of "give and take" in *Bamford v. Turnley*, 3 BH. & S. 66, 83-84, 122 Eng. Rep. 27, 32-33 (1862), was seeking to harmonize with the principles of corrective justice otherwise inexplicable jury verdicts—but not necessarily to provide judges with a constrained and calibrated rule of "reasonableness" (dealing with low-level reciprocal harm) as a benchmark for directing verdicts in favor of one party or the other. Ideally, in the public law context the rule of "give and take" would serve as the basis for charging the jury and would be consistent with wide discretion in that body. After all, as Epstein rightly notes, the socially-determined threshold level of compensable sacrifice of intangible expectations is a dynamic one, subject to continuous redefinition under changing circumstances; and one of those circumstances would be the contemporary reasonable of the claimant's expectations. And while in the public law setting one could plausibly champion an asymmetric arrangement that allows *both* judge and jury to invoke the strict rule on behalf of the individual claimant, this author feels that corrective justice—not to mention constitutional history—will be better served by acknowledging the jury as the principal expositor of this standard of "as applied" fairness.

309. Compare Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005 (1957) with Schefflin and Van Dyke, *supra* note 158, at 70-71.

reach a compromise verdict,"<sup>310</sup> i.e., to do equity between a citizen and his government.<sup>311</sup>

By way of contrast, one brief comparative law example should suffice to illustrate the reciprocal effect exerted by the Supreme Court's unwillingness to formulate flexible, open-ended standards for just compensation on its ability to recognize substantive entitlements. (And, as we might expect, the Court's inflexibility appears to stem from its determination to impose strict limits on the discretion of any compensation jury.) In 1964 in *Burmah Oil Co. v. Lord Advocate*<sup>312</sup> the British House of Lords decided that the precautionary wartime destruction of a petroleum facility to keep it out of the hands of an advancing enemy gave rise to a quasi-contractual claim, which in turn would support a petition of right. In so holding, the Law Lords relied in part on the Scots law of eminent domain, which is derived from the same natural law sources as our own. Accordingly, they adopted Vattel's influential distinction between private harm from governmental wartime acts done deliberately and by way of precaution (*librement et par precaution*), as where corn is destroyed out of fear it will fall to the enemy, and that resulting from acts done by inevitable or accidental necessity (*necessite inevitable*) in the heat of battle, as where the enemy forces the government's hand by occupying a certain house that is then shelled.<sup>313</sup> The latter category of unintentional harms, Vattel concluded, does not give rise to a quasi-contractual duty to compensate.<sup>314</sup>

310. *Karcesky v. Laria*, 382 Pa. 227, 114 A.2d 150 (1955). Of course, if the individual deems a particular expectation to be inalienable, he can always seek a declaratory judgment to that effect and, if unsuccessful, perhaps try his luck with a criminal jury.

311. Another official casualty of the nineteenth century was this notion that the historic prerogatives of the civil jury included an equitable discretion to award damages based on the open-ended notion of what is fair under the totality of the circumstances, subject to the limited power of the court set aside the verdict and order a new trial. Instead, the measure of damages became a pseudoscientific "question of law" for the courts—and equity was once more sacrificed to the nineteenth century idol of neutral, uniform rules of law. See, e.g., Horwitz, *supra* note 102, at 80-84. The clear social price paid for such capacious, sharply-drawn, seemingly egalitarian legal categories, which subsume much factual diversity under a single rule, was of course that inherent in any decision to treat unlikes alike. Whatever the justifications for these inroads on the historic prerogatives of the private law jury, the contention again is that they are not of symmetrical applicability to the Seventh Amendment public law jury.

312. [1964] 2 All E. R. (H.L.) 348.

313. *Id.* at 360-62.

314. E. VATTEL, *DROITS DES GENS* Bk. 3, ch. 15, ¶ 232 (1834).



Vattel's distinction was well-known to American law, as indicated by its use in the 1788 Pennsylvania case of *Republica v. Sparhawk*.<sup>315</sup> Yet the Law Lords noted the irony that in the nearly identical 1952 case of *United States v. Caltex*,<sup>316</sup> the Supreme Court ignored these equitable principles behind our written Taking Clause in favor of an unsatisfyingly literalistic approach. The Court had held that the property in question was not "taken" or appropriated, rather it was merely destroyed. Thus, notwithstanding the Ninth Amendment, perhaps Hamilton had been correct in warning Madison and others that a written Bill of Rights would create the inescapable implication of an exclusive list of reserved individual rights rather than an illustrative list embodying even more fundamental organic principles.<sup>317</sup>

Still, the *Caltex* case was admittedly a difficult one. The majority argued that at the time of demolition the facility had been tantamount to a public nuisance, "a potential weapon of great significance to the invader."<sup>318</sup> By contrast, the dissent argued that it clearly was not a "public nuisance" *per se*, subject to uncompensated executive abatement as a matter of law.<sup>319</sup> What the dissent failed to note was the clear procedural concern lurking just beneath the surface of this broad, almost cavalier, substantive ruling by the majority. They must have felt strongly that the claimant suffered little or no actual harm as a result of the destruction, since the facility would probably have been destroyed in due time by the enemy or as a result of noncompensable battle damage. But actually computing "just compensation" in the case would have been like valuing the prospects for life and health of the celebrated boy who fell off the bridge and in the midst of his plunge was electrocuted by defendant's negligently exposed wires.<sup>320</sup> With no trusted institution like the jury to turn to for the resolution of the complex of metaphysical "factual" questions surrounding a regulatory-type taking (*i.e.*, whether the facility was a sufficient threat or *nuisance* to war-

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315. 1 U.S. (Dall.) 357 (1788) (the claimant's stores of flour were removed to a governmental storehouse for safe keeping, where they fell into enemy hands).

316. 349 U.S. 149 (1952).

317. FEDERALIST PAPERS, *supra* note 145, at 512-14 (No. 84).

318. 349 U.S. at 155.

319. *Id.* at 156.

320. *Dillon v. Twin State Gas & Elec. Co.*, 85 N. H. 449, 456-57, 163 A. 111 (1932). See Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127 (1937).

rant the degree of *actual harm* inflicted, by implicit reference to the presumptively higher *acceptable level* of intentional uncompensated sacrifice government may impose during wartime), the Supreme Court took the formalistic way out, reversing the Court of Claims as a matter of law. The House of Lords allowed the action, leaving it up to the appropriate fact-finder to determine the "chances of [the facility's] survival and restoration, intact or damaged, to the appellants."<sup>321</sup>

### J. *Administrative Costs and Benefits.*

If the Supreme Court were to entrust an open-ended formulation of the liability/damages issue to the proposed public law jury in the area of regulatory takings, it bears repeating that its verdict could always be set aside and a new trial ordered, with or without a remittitur option. But a more important qualification on the suggested model is the fact that it guarantees an *ultimate*, not an automatic, right to a jury. In short, as the Court has previously held,<sup>322</sup> it would be consistent with the Seventh Amendment to give a public law claimant an administrative hearing in the first instance, with a right to appeal for a trial *de novo* before a jury. Moreover, that right to appeal could be suitably conditioned lest it become simply a reflex. For instance, the claimant could be required to pay costs, including the government's attorneys' fees, in the event the eventual jury verdict were no higher absolutely or by some fixed percentage than the commissioners' original valuation. Modern Supreme Court doctrine of course empowers Congress to create administrative exceptions to the Seventh Amendment at will, provided it is done in the name of efficiency<sup>323</sup> (read, the putative inefficiency of the jury<sup>324</sup>). Following suit, the Department of Justice and the Advisory Committee in their revised recommendations on Rule 71A (h) rejected the predominant state compensation model, consisting of commission plus *de novo* appeal to a jury, as a "wasteful 'double' system."<sup>325</sup> Yet such glib assumptions about the inefficiency of the jury system may reflect more unrealistic realism. Even courts which must follow the

321. 2 All. E. R. at 394. See also *id.* at 362, 395.

322. See *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899).

323. See, e.g., *Katchen v. Landy*, 382 U.S. 323, 328-29 (1966).

324. See *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970).

325. Fed. R. Civ. P. 71A, Notes of Advisory Committee on Rules (Supplementary Report).

Supreme Court's lead have been known to register a protest by endorsing the general utility of *de novo* jury trials in maximizing equity and efficiency. As the Third Circuit noted:

Experience demonstrates rather conclusively that in cases of this nature *de novo* review is seldom requested. It is the availability of the remedy, not its infrequent utilization, which is important to the cause of justice . . . .

. . . The necessity for an administrative agency on occasion to submit its determination to the scrutiny of a jury of citizens would be a healthful and disciplining experience.<sup>326</sup>

Not only has the *de novo* jury trial mechanism been widely used by the states from 1791 through the present,<sup>327</sup> it consists fully with the present thesis that the public law jury serve as a last resort for those who allege they have been treated with "fundamental unfairness" and demand individual equity. Admittedly, that is a serious and expensive claim to make, and one that cannot be costless. For those who sincerely feel they are being victimized by the government, the chance to make their case before a jury of their peers will be worth any reasonable incidental costs imposed. And in the area of economic liberties we are presumably talking about individuals who can afford the risk if it is worth taking.

Moreover, as should now be clear, the proposed model accords with the modern due process legacy of *Nebbia v. New York*.<sup>328</sup> Even police power regulations which occasion substantial individualized harm may be condoned as provisionally "privileged" deprivations. But as with certain privileged torts, the prerogative of policymakers to override the legitimate expectations of citizens entails an implied-in-law *post hoc* obligation to repair any disproportionate sacrifices actually inflicted.<sup>329</sup> And as the Supreme Court has only too recently

326. *Frank Irey, Jr., Inc. v. OSHA*, 519 F.2d 1200, 1205 n.11 (1975) (Weis, J.), *aff'd sub nom.*, *Atlas Roofing Co., Inc. v. OSHA*, 430 U.S. 442 (1977).

327. For instance, as of 1951 the Advisory Committee on Rules noted that the condemnation procedure of roughly one-half of the states could be classified as a commission system with a *de novo* jury trial right, while the balance employed juries exclusively—save for a handful (five states) employing only commissioners. Fed. R. Civ. P. 71A, Notes of Advisory Committee on Rules (Supplementary Report). For discussion of the wide use of the "double" system in 1791, see 1 NICHOLS ON EMINENT DOMAIN §1.22 (1981).

328. 291 U.S. 592 (1934).

329. See Hall and Wigmore, *Compensation for Property Destroyed to Stop*

acknowledged, this broad implied-in-law obligation is affirmed by the Taking Clause.<sup>330</sup> But thus far the Court, given the Eleventh Amendment, its chronically narrow view of the substantive extent of its own jurisdiction under the Tucker Act, and its reluctance to blaze new jurisdictional trails under 28 U.S.C. § 1331,<sup>331</sup> seems genuinely in doubt over its authority to award damages for consequential regulatory harm short of total destruction of value. Nor is it anxious to tackle the difficult linedrawing problem of which harm to compensate from among the innumerable class of persons non-trespassorily and incompletely harmed by governmental regulations. Thousands are affected, and the degree of regulatory harm fades by insensible gradations of degree from one to another. The Court has perceived its only practicable alternative as a Hobson's choice between upholding general police power regulations *in toto* or striking them down. The gradual abandonment of sovereign immunity (both in the context of § 1983 and through the recognition of federal constitutional common law claims against state and federal officers or their principals sounding in quasi-contract under either the Tucker Act or § 1331<sup>332</sup>) and the use of the public law jury

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*the Spread of a Conflagration*, 1 ILL. L. REV. 501, 514-20 (1907).

330. See, e.g., *Jacobs v. United States*, 290 U.S. 13, 16 (1933); *United States v. Clarke*, 445 U.S. 253, 257 (1980).

331. See, e.g., *United States v. Sherwood*, 312 U.S. 584, 590 (1941).

332. Preferably the Court will choose the §1331 route, allowing a public law jury action for regulatory harm against either the responsible officials or the responsible government. That may be true even in the case of an action against the United States, since the Court construes narrowly any waiver of sovereign immunity like the Tucker Act, which is backed up by a general appropriation for funding verdicts. It seems committed to the view that Congress impliedly waived its immunity from constitutional claims by reference to the highly formalistic physical invasion/total destruction of value interpretation of the Taking Clause. In short, the Court seems reluctant to rock ungratefully the Tucker Act boat. Under a §1331 nonstatutory jury action, as applied to both state and federal governments, a verdict would trigger no automatic appropriations of funds. Rather the Court could properly entrust the political issue of the feasibility of current payment to the respective legislature involved, leaving the verdict outstanding as a silent reproach. Of course, any such dormant verdict should accrue interest. But what happens if the Court's worst fears materialize and Congress responds to such a use of the jury and more open-ended, equitable standards by restricting §1331 jurisdiction over such claims through its Article III power to regulate the scope of federal jurisdiction? In that event, the Court could retort that all exercises of Congressional power are subject to the Fifth Amendment. See, e.g., *General Motors v. Battaglia*, 169 F.2d 254, 257 (2d Cir. 1948); R. BERGER, *CONGRESS V. THE SUPREME COURT* 303-14 (1969). As a result, at least as long as the district court system is not

can and should alter all that.

Furthermore, even if the Supreme Court itself were institutionally suited to make myriad *ad hoc* adjudications of the *as applied* fairness of governmental actions, there would remain the well-founded prejudice against the competence of five of nine unelected jurists to embody the contemporary moral sense of the people. Those of a "liberal" persuasion fear the court will subscribe to a "conservative" view of the equities—and *vice versa*. By contrast, the jury has always enjoyed majoritarian credibility.<sup>333</sup> And the use of a local jury, as in *Miller*, allows for a salutary regional diversity in the implementation of federal constitutional guarantees, especially as applied to state action, a diversity that promotes individual liberty at the same time that it advances the cause of federalism.<sup>334</sup> Consequently, jurists like Justice Rehnquist who are reluctant to see five fellow judges in Washington, D.C. mete out justice to a diverse nation on the basis of a vague standard like "fundamental fairness" may be perfectly content to see such a standard administered by a local jury,<sup>335</sup> subject to

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altogether abolished, its preexisting jurisdiction cannot be selectively and discriminatorily reduced to deny vindication of a constitutional claim to "just compensation." That would be especially so since Congress' legitimate sovereign immunity concerns will have been served by the recommended concession that the ultimate collectability of any such verdict be left in Congress' own hands.

333. Moreover, contemporary research indicates both that juries feel a positive need to be fair-minded and that they gravitate towards the equities of a case and not necessarily towards a sympathetic plaintiff. See Kalven & Zeisel, *supra* note 158, at 495; Note, *Towards Principles of Jury Equity*, 83 YALE L.J. 1023 (1974).

334. See Powell, *The Complete Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317 (1982).

335. Compare *Solem v. Helm*, 463 U.S. 277 (1983) with *Hamling v. United States*, 418 U.S. 87, 105 (1974). It is noteworthy that this institutional model of the jury might be susceptible of full implementation without the necessity of applying the jury trial guarantee of clause one of the Seventh Amendment to the states, because of the paradox that clause two of the Seventh Amendment has been held to protect all state jury findings from general federal appellate review. See, e.g., *Chicago B. & Q.R.R. Co. v. Chicago*, 116 U.S. 226, 242-46. Thus the Supreme Court may be in a position to induce states to adopt voluntarily the use of public law juries to resolve the mixed question of constitutional fairness through cessation of its own policy of according "excessive deference to [non-jury state] triers of fact." Griswold, *Of Time and Attitudes—Professor Hart and Judge Arnold*, 79 HARV. L. REV. 81, 86-91 (1960). See also 16 WRIGHT, MILLER, COOPER & GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE* 780-81 (1977). Deference would be accorded mixed findings of fact by a non-jury state factfinder in the economic area only if the claimant had available but declined a suitably

constitutional minima and the presiding judge's right to order a new trial.

The practical result of reenfranchising the historic public law jury in the area of economic expectations will be to force some members of the appellate branch of the Federal Judiciary to articulate for the benefit of jurors—and the rest of us as well—*persuasive*, non-institutional reasons for their apparent underlying conviction that no degree of continuous regulatory harm visited upon a citizen (short of “total destruction” of value) can rise to the dignity of an actionable constitutional inequity.<sup>336</sup> Not surprisingly, therefore, the persistent *leitmotif* of the balance of the article concerns what active role, if any, the concept of individualized equity should play in our majoritarian democracy.

### III. AN IMPRECISE CONSTITUTION

One cannot help coming away from a reading of the original United States Constitution, together with the Bill of Rights, with the disappointed sense of a rather meager and lackluster pantheon of basic substantive liberties. The framers and the members of the first Congress were not alone in their inattention to detail. Professor Bailyn has touched on the general political paradox that the American Revolutionary generation seemed strangely uninterested in reducing to parchment their luminous notions about the essential rights of man:

But what was the ideal? What *precisely* were the ideal rights of man? They were, everyone knew, in some sense Life, Liberty, and Property. But in what sense? Must they not be specified?<sup>337</sup>

Yet no truly comprehensive catalogue was forthcoming.

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conditioned right to a *de novo* jury trial.

336. There is also the possibility that the Fourteenth Amendment was intended to apply the civil jury guarantee to the States. Compare *Walker v. Sauvinet*, 92 U.S. 90 (1876) (the Seventh Amendment is not a “privilege or immunity” of national citizenship), with *Inman v. Baltimore & O. Ry.* 361 U.S. 138, 146 (1959) (Douglas, J., dissenting). And if the Seventh Amendment were extended to the States, it would mark an end to the hoary argument that non-jury Article III adjuncts look good beside the potential non-jury state court factfinder to whom original jurisdiction might be relegated consistently with Article III, § 1. Cf. Redish, *supra* note 159, at 225-26.

337. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 188-189* (1972).

Bailyn notes that James Otis, who introduced Coke's opinion in *Bonham's Case*<sup>338</sup> into colonial jurisprudence, positively "fulminated" at the impertinence of the idea of itemizing individual rights, remarking laconically the "[t]he common law is our birthright."<sup>339</sup> To be sure, we can find anecdotal assertions of such absolute liberties as the right to brew beer for home consumption,<sup>340</sup> but nothing on the state or federal level to rival the official affirmation of Article Four of the 1789 French Declaration of Rights of the Citizen that "liberty consists in the power to do anything that does not injure others."<sup>341</sup> For that matter, contemporary scholarship cogently suggests that what seemingly absolute guarantees there were in the Bill of Rights, such as "freedom of speech" under the First Amendment, are illusory. Even Jefferson gave the First Amendment an absolutist interpretation, if at all, only for relativistic reasons of federalism. He was happy to see *state* governments punish abuses of a citizen's necessarily

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338. 8 Coke 114a, 118a, 77 *Eng. Rep.* 647, 652 (1610). For a cogent exposition of the clear influence of *Dr. Bonham's Case* on the founding generation, see Berger, *supra* note 177, at 24-25, 371-393 (Appendix A). For a comprehensive view of the influence on the ideology of the American Revolution of Sir Edward Coke, judge, commentator, and treatise writer, see E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 1-57 (1948) and Bailyn, *supra* note 337.

339. See Bailyn, *supra* note 337, at 189.

340. See, e.g., C. ROSSITER, *SEEDTIME OF THE REPUBLIC* 57 (1955).

341. Nonetheless—and not surprisingly—there was a distinctly positivist cast to the French Declaration of the Rights of Man and of the Citizen (August 26, 1789), there being after all no judicial body designated to second-guess the legislative decrees of the popular National Assembly:

4. Liberty consists in the power to do anything that does not injure others; accordingly, the exercise of the natural rights of each man has for its only limits those that secure to the other members of society the enjoyment of the same rights. *These limits can be determined only by law.*

5. The law has the right to forbid only such actions as are injurious to society. Nothing can be forbidden that is not interdicted by law and no one can be constrained to do that which it does not order.

6. Law is the expression of this general will. All citizens have the right to take part personally or by their representatives in its formation. It must be the same for all whether it protects or punishes.

. . . . .

7. Property being a sacred and inviolable right, no one can be deprived of it unless a legally established public necessity evidently demands it, and on the condition of a just and prior indemnity.

J. BRISSAUD, *A HISTORY OF FRENCH PUBLIC LAW* 543-544 (1969) (emphasis added).

qualified freedom of political speech.<sup>342</sup> From this Professor Ely, among others, would deduce that the true constitutional protection accorded liberty consisted in the creation of a government electorally responsive to the people, who were themselves assumed to share a homogeneous moral view of the legitimate ends of government.<sup>343</sup> Beyond policing the constitutional division of powers, the federal judiciary had no charter to second-guess the fairness of legislative enactments.

By contrast, the most influential modern deduction from the limited number of substantive guarantees in the Constitution was based on the assumption of a necessarily heterogeneous moral universe within the fledgling Republic, given the different factions and the regional differences that had to be composed in Philadelphia. Under this view the framers were a sober, realistic group that appreciated the necessarily subjective nature of any good faith legislative attempt to draw a statutory line between conduct that is purely private (and hence part of an individual's residuum of natural liberty) and the conduct which arguably "harms" the public interest. As a result, they largely eschewed substantive protections in favor of procedural protections and guarantees—like the system of separation of powers, interdepartmental checks and balances, and a bicameralism. Furthermore, as Madison developed in *Federalist No. 10*, the very size of the nation and the division of the House of Representatives into districts would make tyranny difficult by increasing the transaction costs for a hypothetical majority to organize itself on principles narrower than "the public good, the real welfare of the great body of the people."<sup>344</sup> While Madison was interested in political purity and deathly afraid of majoritarian tyranny, this modern school of thought—as expounded by Justices Holmes and Frankfurter—stood *Federalist No. 10* on its head as a celebration of the rough and tumble of special interests politics. It remolded the framers in its own image as pragmatic positivists. Although the very structural "filters" Madison hoped would purify the majoritarian will lay in ruins, Olympian Washington, D.C. having become a political hothouse of lobbying and logrolling, *Federalist No. 10* was adduced by these positivists for the proposition that political truth is to be pro-

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342. Compare L. LEVY, *LEGACY OF SUPPRESSION 190-191* (1976) with W. Mayton, *Seditious Libel and the Lost Guarantee of the Freedom of Expression*, 84 COLUM. L. REV. 91 (1984).

343. See Ely, *supra* note 194.

344. FEDERALIST PAPERS, *supra* note 145, at 81-84.



cedurally defined as what emerges as statute out of the constitutional process.

In the best pragmatic fashion, political truth was emptied of any *a priori* normative content and subjected to the method of experimental verification—testing the power of an idea to get itself enacted as law in the political marketplace. Under this analysis, the one express Constitutional guarantee of “liberty,” contained in the Due Process Clause of the Fifth Amendment,<sup>345</sup> was interpreted as simply a right of summary judicial oversight to ensure the orderly imposition of the substantive rules of law generated according to the procedural master rule or *Grundnorm* or the Constitution. Beyond the inestimable “ordered liberty” of living under the rule of standing laws, the citizen’s only substantive liberty lay in those residual privileges of his as yet unregulated by positive law—or those few substantive liberties specifically guaranteed by the Constitution. The Due Process Clause—that emblem of the ancient English liberties confirmed in the Magna Carta—was emptied of all substantive content, except for an evolving number of *non-economic* “fundamental freedoms.”

Ironically, these two disparate views of the moral universe of the founders coalesced to support the due process revolution of the 30’s, at least insofar as it affected economic liberties. For instance, Professor Corwin, our most prolific modern student of the clause, approved the mid-twentieth-century reversion to a largely procedural notion of due process as recapturing the original understanding of the “law of the land” guarantee in Chapter 29 of Magna Carta (1225).<sup>346</sup> As definitively interpreted by Coke in his *Second Institutes*, due process was equated to the privilege of trial by jury.<sup>347</sup> To be sure, Coke waxed eloquent about the jury being the “undoubted Birth-right and the best Inheritance of every English man,”<sup>348</sup> but Corwin impliedly dismissed this as the peculiar ravings of an earlier time that for some reason at-

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345. “[No person shall] be deprived of life, liberty, or property, without due process of law . . .” U.S. Const. amend. V. The reference in the text is of course to the original Constitution and Bill of Rights; the Fourteenth Amendment provides similarly-worded protection against state governments. U.S. CONST. amend. XIV, § 1.

346. Corwin, *supra* note 338, at 41-42, 103; Chapter 29 provided that no free man shall be “deprived of his freehold or of his liberties or free customs . . . except by legal judgment of his peers or by the law of the land.” *Id.* at 23-24.

347. *Id.* at 41-42; 2 *Co. Inst.* 51-56.

348. 2 *Co. Inst.* 56.

tached almost mystical significance to the numerology and fact-finding abilities of the jury. His point is made by the fact that even for Coke essential due process was merely procedural. It did not involve the peculiar substantive notions of "right reason" and "natural equity" which Coke had invoked earlier in *Dr. Bonham's Case*; even though, according to John Adams,<sup>349</sup> James Otis had launched the American Revolution on the basis of those ideas, declaiming in 1761 in the Writs of Assistance Case that:

As to Acts of Parliament, an Act against the Constitution is void; an act against natural equity is void; and if an Act of Parliament should be made, in the very Words of this Petition, it would be void.<sup>350</sup>

More particularly, Corwin embraced a post-Murray's *Lessee* brand of due process that excluded juries or any other judicial fact-finder from the adjudication of public law matters.

#### A. *Natural Equity versus The Inflexible Rule of Law*

##### 1. Procedure as Substance

For Coke, however, the very nature of the judicial process entailed the power of the common law courts to interpret statutes equitably in particular cases to "round off their angles."<sup>351</sup> The classic Aristotelian theory of the inherent equitable powers of a court to contract the literal scope of statutory language is based on the inevitable over-inclusiveness of generalized statutory language. In other words, courts must dispense equity because the ideal of *isonomia*, equality of all before the laws, should constrain the legislature to embody its will in general terms. Rousseau, capturing the sense of this popular pre-Revolutionary ideal of impartial legislation, asserted that to be legitimate the general legislative will must be "general" or "universal" in its objects, promulgating laws that apply to all in a meaningful sense and do not lay a greater charge on one citizen than another.<sup>352</sup> Especially in view of this assumption about *isonomia*, it is easy to see the appeal of Aristotle's assertion that equity is better than strict

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349. 10 THE WORKS OF JOHN ADAMS 247-248 (C. Adams ed. 1856).

350. 2 *id.* at 522 (1850). Otis specifically cited *Dr. Bonham's Case* for this proposition.

351. McIlwain, *supra* note 180, at 309.

352. J. Rousseau, *The Social Contract*, in 38 GREAT BOOKS OF THE WESTERN WORLD 397 (R. Hutchins, ed. 1952). Cf. J. Madison, *Federalist No. 10*, *supra* note 145.

legal justice, though both are identical in *genus*:

What causes the problem is that the equitable is not just in the legal sense of "just" but as a corrective of what is legally just. The reason is that all law is universal, but there are some things about which it is not possible to speak correctly in universal terms.<sup>353</sup>

Coke enlarged the technical Aristotelian concept of equity, in which the judge selflessly attempts to implement true legislative intent as revealed by the general terms of the enactment. Borrowing from Plowden, he may well have reasoned that the true meaning of statutes is ambiguous for the additional reason that words are only the imperfect image of thought; and when multiple legislators ostensibly agree on the same statute, who but the courts are to say what the general legislative will behind the language of the statute truly is.<sup>354</sup> The final step for Coke, which he appeared to the American Revolutionaries and Framers to have taken in *Bonham's Case*, was to hold Parliamentary statutes up to a canon of judicial construction based on principles of "common right and reason" or "natural equity."<sup>355</sup> Coke appeared to be saying that there were certain immutable liberties enjoyed by the people, supposedly derived from Magna Carta, which constituted a fundamental law to which the general Parliamentary will *had* to conform—and would thus be equitably construed to do so. Ellesmere, Bacon, and Hobbes considered Coke's position a quaint, but irksome vestige of medieval scholasticism.

Using virtually the same arguments which Governor Hutchinson would later employ against James Otis, Bacon and Hobbes noted the paucity of actual substantive guarantees in Magna Carta and the lack of any "agreed-on, absolute and objective definition of morality"<sup>356</sup> on which to found a jurisprudence of "natural equity." By default, then, Bacon, Hobbes, Hutchinson, and later Holmes subscribed to the necessary "certainty of the [positive] law," as reflecting the best efforts of a presumptively well-intentioned centralized admin-

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353. ARISTOTLE, *NICOMACHEAN ETHICS*, 141 bk. V, § 10. (Bobbs-Merrill 1962). See also Chroust, *Aristotle's Conception of Equity*, 18 NOTRE DAME LAW. 119 (1942).

354. See McIlwain, *supra* note 180, at 268-269.

355. 8 Coke 114a, 118a, 77 Eng. Rep., 647, 652 (1610).

356. This is Professor Bailyn's paraphrase of Hutchinson's position in response to James Otis in *B. Bailyn, The Ordeal of Thomas Hutchinson* 70-77 (1974).

istration to promote the common good in a *relativistic* world.<sup>357</sup> These efforts should not be subject to second-guesswork by various and sundry common law judges, using the cognate claims of "natural law" and "common right and reason" to "mutilate the law"—often in favor of clamorous special interests. After all, the example of common law judges would encourage others to insist that laws comport with their own inescapably selfish moral calculus, which they dignified with the appellation, Right Reason. Therefore, Bacon and Hobbes favored placing all public law litigation into the hands of centralized "equity" courts, whose definition of equity (or distributive justice), as "the equal distribution to each man of that which in reason belongeth to him," would be drawn strictly from statutory law.<sup>358</sup> However laudable the ideal of equity or "perfect reason," in practice the very notion of an entitlement to individualized equity would foment discontent and dissent in society. People must respect and obey the written law.

Understandably, Bacon, and Hobbes thought they saw through Coke's paeans to "natural equity" as attempts to camouflage the assertion of a naked power on the part of common law judges to bend statutory enactments to their private will. For instance, Coke spoke of the fundamental English law being merely the reflection of "common reason." But when James I called his bluff by asserting the right to apply his own considerable intellect in the personal disposition of cases pending in his royal courts, Coke seemingly changed his tune. Now he insisted that:

Causes which govern the Life, or Inheritance, or Goods, or Fortunes of his subjects are not to be decided by natural Reason but by the *artificial Reason* and Judgement of the Law, which requires long Study and Experience before than a man can obtain to the cognizance of it . . . .<sup>359</sup>

Like Bacon, Hobbes interpreted Coke to mean that substantive individual rights, proof against Parliamentary invasions, were themselves the product of an "Artificial *perfection* of Reason."<sup>360</sup> In other words, they were the product of a legal scholasticism, whereby common law judges mysteriously de-

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357. See G. McDOWELL, *EQUITY AND THE CONSTITUTION* 27 (1981).

358. T. HOBBS, *LEVIATHAN* (1909).

359. 7 Coke Rep. 63-65 (1609).

360. Hobbes, *supra* note 358, at 207. Cf. Allen, *Learned and Unlearned Reason*, 36 JUR. REV. 254 (1924).

duced fundamental rights from the unlikely feudal text of Magna Carta and the musty, medieval Plea Rolls and Year Books. But an altogether different interpretation of Coke is possible.

Perhaps by "artificial Reason" he was simply defending the fundamental adjective law of the Kingdom, that is, the ancient jurisdictional prerogatives of the common law courts, with the jury as their procedural centerpiece. On that theory the Levellers chose to view Coke's persistent interventions on behalf of the common law, through writs of prohibition issued out of Common Pleas and King's Bench against *juryless* bureaucratic or prerogative courts, as intended principally to vindicate the right of jurors to apply the open-ended principles of "natural equity" in public law cases involving an individual's life, liberty, or property. After all, in most difficult public law cases, as the Levellers recognized long before Chief Justice Hughes, questions of how legal principles apply to the facts were more important than pure questions of law. In confirmation of that insight, Chief Justice Hale, a contemporary of the Leveller movement, wrote in his *De Portibus Maris* concerning the highly sensitive political issue of the Crown's right to license obstructions to public navigation:

In the case therefore of a building within the extent of a port in or near the water, whether it be a nuisance or not is *quaestio facti*, and to be determined by a jury upon evidence, and not *quaestio juris*.<sup>361</sup>

Thus, jurors were empowered to second guess the Crown's own utility calculations and to find in favor of collective public rights. Similarly, in the private law nuisance action known as *William Aldred's case*,<sup>362</sup> Coke rejected the plea by the defendant hog raiser that the social utility of his enterprise should be accepted as an adequate defense as a matter of law. Upholding the jury verdict of the Norfolk Assizes, Coke affirmed that the ancient "rule of law and reason, . . . *sic utere tuo ut alienum non laedas* [so use your own property as not to injure your neighbors] . . .," was for the jury to administer.<sup>363</sup> The open-ended common law standard of "neighborliness" was entrusted to the "common reason" of jurors by the "artificial Reason" of the English constitution.

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361. M. HALE, *De Portibus Maris*, in A COLLECTION OF TRACTS 85 (F. Hargrave ed. 1787).

362. 77 Eng. Rep. 816 (K. B. 1611).

363. *Id.* at 821.

Analogously, therefore, it can be argued that the Seventh Amendment impliedly entrusts the articulation of equitable standards, like that of "disproportionate sacrifice" under the Taking Clause, to the arbitration of a democratic or cross-sectional jury. In this way, law is not defined on the basis of one individual's reason, as in the Hobbesian caricature; rather it is a sort of ideal average empirically verified by the concurrence of twelve disinterested parties.

## 2. Law Without Equity: Excusable, Incidental Tyranny

The predictable response of modern *pragmatic* positivists to the inherent vagueness of the demands of natural equity has been to limit the operation of the principle to areas in which normal political processes cannot be presumed to operate efficiently. Professor Ely as a *principled* positivist, however, rejects this "double standard" of judicial review, under which natural equity is allowed to operate in the area of personal, but not economic, liberties. That is, he denies any role whatsoever for the undemocratic federal judiciary to pour moral content into the open-textured notion of "liberty" in the Due Process Clause. For Ely judicial efforts to prick out the limits of non-textual "preferred" liberties, as in the abortion cases, are a discreditable reminder of the era of substantive due process associated with *Lochner v. New York*—an attempt to resurrect Cokean "natural equity" in trendy attire.<sup>364</sup> After all, such judicial attempts to dispense equity may again turn "conservative."

Thus, the possibility of having a *democratic jury* dispense equity in both the areas of personal and economic liberties represents the "unexcluded middle." For that reason, Ely's strict constructionist approach to the Bill of Rights and Fourteenth Amendment draws only inconclusive support from Gordon Wood's conclusion that the decision in favor of a written Constitution and "codified" Bill of Rights was an implicit concession by the framers to the modern positivist definition of law as the command of the sovereign will.<sup>365</sup> According to Wood, despite the personal belief of many framers in the notion of "natural equity," in immutable maxims of reason and justice, they were unwilling to found a republic on such vague principles, especially if it meant they could be

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364. *Roe v. Wade*, 410 U.S. 113 (1977); see J. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973).

365. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 292-305 (1972).

applied only through judicial discretion. For example, Madison warned in 1788 that laws could not be subjected to equitable review without making the "Judicial Department paramount in fact to the Legislature, which was never intended and can never be proper."<sup>366</sup> Other commentators have agreed that the libertarian founders, like Jefferson, seemed to prefer to reduce judges to the status of "mere machines" and take the calculated risk of life under the inflexible rule of positive law. This they are said to have done in supposed confidence that, as "the great principles of right and wrong are legible to every reader,"<sup>367</sup> political pressure would promptly be brought to bear to correct obvious legislative abuses. This section will dispute the inference that either Jefferson, Madison, or Adams embraced the ideal of a positivist rule of law, leaving no room for the judicial operation of principles of natural equity unless clearly "codified" in the Constitution. To take the most challenging example: although Adams advocated "a government of laws, not of men" in his influential preamble to Chapter II of the Massachusetts Constitution of 1780, he clearly supported the tacit orthodoxy establishing the constitutional jury as the dispenser of democratic equity. Hence he can hardly be said to have contemplated the elimination of equity as an inherent public law principle.<sup>368</sup> But first a brief look at the modern face of constitutional positivism is in order.

Hobbes did totally banish individualized equity from his concept of public law, as both impossible to obtain and too costly to boot. On that basis he justified any incidental private harm or loss of liberty occasioned by a statute as a mere "inconvenience"—an inevitable part of the *ex ante* bargain com-

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366. *Id.* at 302.

367. *Id.* at 304.

368. See, e.g., III J. ADAMS, A DEFENSE OF THE CONSTITUTION OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA 56 (1788) (emphasis added):

The laws alone can be trusted with unlimited confidence; those laws, which alone can secure *equity* between all and everyone; which are the bond of that dignity which we enjoy in the commonwealth; the foundation of liberty, and the fountain of *equity*; the mind, the soul, the counsel, and judgment of the city; whose ministers are the magistrates, whose interpreters the judges, whose servants are all men who mean to be free. Those laws, which are *right reason*, derived from the Divinity, commanding honesty, and forbidding iniquity; which are silent magistrates, where the magistrates are only speaking laws; which, as they are founded on eternal morals, are emanations of the Divine mind.

pendiously known as the social compact.<sup>369</sup> All liberty was fair game for the incidental depredations of economic regulations, since practically speaking there was no institution qualified to second-guess the legislature's line-drawing efforts. So long as the harm was "incidental," in the sense that the act was not deliberately oppressive, the citizen had to content himself with the reflection that Leviathan needed much good faith elbow room in which to pursue the public good. Some jostling of the citizenry was inevitable.

This same spirit of tough-minded positivism animated the younger Holmes in *The Common Law*, where he argued that society was "justified in sacrificing individuals to public convenience," as when it marched conscripts "with bayonets in their rear, to death," or ran a highway through an "old family place" and paid only market value.<sup>370</sup> Likewise, Holmes firmly rejected the notion that punishment or regulatory restraint should be proportional to the offense or threatened harm. Positive law was purely an amoral matter of strict liability—of external conformity to rules. If the legislative punishment or regulatory restraint appeared to embody an element of disproportion, it was because the legislature wanted to be doubly sure to deter such acts or to adopt an extra margin of safety against the anticipated harm—or simply because the legislature found it too costly to tailor its law to meet individual situations.<sup>371</sup> The affected individual suffered not an inequity, but a mere inconvenience. Like taxes, it was part of the price he paid for civilization. Yet, as *Mahon* suggests, there was a healthy degree of deliberate iconoclasm or *realpolitik* in these original observations.<sup>372</sup>

369. Cf. F. COLEMAN, *HOBBS AND AMERICA* 75-99 (1979).

370. O. HOLMES, *THE COMMON LAW* 37ff., (M. Howe ed. 1963).

371. *Id.* at 40.

372. Holmes' realism was centered in his matter-of-fact acceptance of the inevitability of sovereign immunity:

Some doubts [ , he noted, ] have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (Leviathan, c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

*Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). That did not necessarily mean he liked the situation. Cf. M. HOWE, *JUSTICE HOLMES, THE PROVING YEARS* 72 (1963). But it did mean that compensation (*a la Mahon*) could not be the ultimate solvent for the unfair redistributive impact of legislative policies, since the legislature might refuse to go



Speaking for the modern Supreme Court, however, Justice Frankfurter added a Mansfieldian gloss to Holmes' earlier position, asserting that the *risk* of incidental inconvenience from uniform governmental rules could be assumed to be equally distributed, like taxes, across the entire population. Therefore, people should not view the materialization of the risk as an individualized inequity. Frankfurter was justifying the Court's own use of an inflexible rule of law, the same mechanical "fair market value" standard in just compensation cases to which Holmes adverted, as a "working rul[e] that will do substantial justice" in most cases, despite harsh inequities in others:

In view . . . of the liability of all property to condemnation for the common good, loss to the owners of nontransferable values deriving from his unique need for the property or idiosyncratic attachment to it, *like loss due to exercises of the police power* is properly treated as part of the burden of common citizenship.<sup>373</sup>

Of course, Frankfurter's analysis would apply to one's right to compensation for the property itself, save for the express provision of the Taking Clause. Accordingly, he supported a narrow construction of the Clause limiting its coverage to *physical* property, while excluding the intangible liberties and expectational interests that give it value. Thus, he turned the Aristotelian/Cokean theory of the relationship of judicial to legislative due process upside down. If *isonomia* constitutes sufficient justice in the legislative sphere, he reasoned, it should suffice in the judicial sphere as well. Unfortunately, Frankfurter's analysis breaks down in practice. There is currently no form of insurance available whereby citizens may effectively spread among themselves the risk of disproportionate loss from governmental regulation.<sup>374</sup> Hence the losers do lose.

Nonetheless, Professor Dworkin, among other modern scholars, has embraced this pragmatic positivist model of public law. The legislature, like the finely-balanced English Parliament so dear to the Whigs of 1689, will automatically generate the best "possible" solution to our social problems. Into the legislative hopper go all an individual's intangible

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along—precipitating anew the crisis between economic liberty and political expediency.

373. *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949).

374. Cf. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 41 n.1 (2d ed. 1977).

liberties—with a few “important” exceptions—to be reordered by the legislature according to its best cost-benefit calculations.<sup>375</sup> And so long as the legislature treats each citizen “as an equal” in its quest for the public good, with no attempt to punish or oppress a particular individual or group, then any economic “liberties” lost as a result of the process are nothing to which anyone had a right. Losers in the legislative process are, as it were, the victims of legislative accidents, whose cost is stipulated by the social contract to lie where it falls. But Dworkin’s argument glosses over a critical assumption. He employs a particular definition of “oppressive” which countenances the deliberate imposition of sacrifice even on a narrow group of citizens—such as “bondholders”—so long as the legislature has treated them “as equals.”<sup>376</sup> In today’s fractious world of pluralistic politics, it seems a peculiarly naive or therapeutic notion of due process to hold that one with a good deal more to lose than another is treated “as an equal” by having his interests advertently sacrificed to a majority, since those decreeing the sacrifice had nothing personal against the victim. They merely coveted what he possessed!

Professor Michelman has sought to justify this same result from the standpoints of both fairness and efficiency, reasoning that it would be fair and logical to suppose that the original social contract contemplated that an uncompensated sacrifice might be imposed on an individual where it could reasonably be predicted that the individual would be better off in the long run by submitting.<sup>377</sup> Refusal to submit would mean that others similarly situated could also refuse and demand compensation. The increased administrative costs to government due to the mechanics of identifying, evaluating, litigating, and paying all such claims could mean such an increase in individual taxes and the loss or abandonment of so many “efficient” projects that everyone would be worse off in the end. To prevent this particular “tragedy of the commons,”<sup>378</sup> everybody may be reasonably assumed as part of the implied terms of the social contract to have given up his right to sue for alleged incidental infringements of intangible rights or liberties. But the conclusion presumes that it is rea-

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375. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 323-324 (1978).

376. *Id.* at 270-273.

377. Michelman, *supra* note 4, at 1221-1223.

378. Cf. G. Hardin, *The Tragedy of the Commons* 162 *SCIENCE* 1243 (1968).

sonable to expect that one will in fact be better off in the long run by virtue of accepting sacrifices in such situations. For the answer to this critical politico-ethical question, Michelman retreated to the specious quantitative haven of complex cost-benefit formulae, whose results seemed to parallel in a general way the dictates of fairness. After all, administrative costs are less and the sense of injustice greater, the fewer who have been incidentally sacrificed as part of a statutory scheme. Basing his analysis on the welfare economics' principle of "hypothetical *ex post* compensation," Michelman readily conceded that, with no neutral or objective judicial standards of fairness to differentiate one incidental sacrifice of liberty from another, the problem perforce becomes a political line-drawing problem for the felicitic calculus of the legislature.<sup>379</sup>

Yet, Michelman's formulae defy practical application, and he has since renounced this failed attempt to tackle head-on the basic *moral* question of the fairness or acceptability of particular regulatory sacrifices.<sup>380</sup> Suffice it to say, neither scholar addressed the possibility that an institution other than the legislature or a bevy of unelected judges already exists to resolve such an intractable *quaestio facti*, an institution with a historic role in administering subjective moral standards like "substantial harm" or "unfairly disproportionate sacrifice"—an institution able to reduce to manageable size the class of those nontrespassorily and incompletely harmed by governmental regulations. But many will argue that such a legal solution is unavailable to us because it places too much discretion in the hands of a few—that, in short, our system of government embodies a critical historical choice of uniformity over equity in such public law matters.

### 3. A Rule of Law Tempered by Equity

If positivism has a credo, it is the "rule of law." And concededly the concept of the rule of law, in contradistinction to the discretionary "rule of men," was a central theme of the American constitutional period. But the rule of law is a two-

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379. See Michelman, *supra* note 4, at 1245-1258; this is so because it is difficult for judges to put themselves "in the position of the aggrieved yet rational person who must objectively view his status over the long run" as it will be affected by his submission (and that of others) to the species of sacrifice in question.

380. See Michelman, *Norms and Normatively in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1029 (1978).

edged sword. On the one hand, it suggests the philosophy of Hobbes and the younger Holmes, whereby a system of uniform, centrally-administered laws is venerated as "the structure of ordered liberty." To avoid the anarchical tyranny of the state of nature, man had surrendered his natural liberty to society; as a result, he owed implicit obedience to the positive rules of law as the small price paid for the compensatory accession of "ordered liberty" gotten in return. The catch, of course, is that the constituent liberties within that area of negative freedom are by and large reflexively defined: "The liberty of a subject," according to Hobbes, "lieth . . . only in those things which in regulating their actions, the sovereign hath praetermitted."<sup>381</sup> *Silentium legis, libertas civium*. Even though Hobbes had distinctive and "fairly generous" ideas about the limits of legitimate state regulatory concerns and acknowledged that bad laws were unnecessarily restrictive laws, the impossibility of *imperium in imperio* meant for him that positive law could not be unjust. The rule of law was the uniform rule of legislators.

But there is a decidedly different facet to the ideal of the "rule of law," one associated with Lord Kames. Some confusion arises because in his reflections on the impossibility of a jurisprudence of "natural equity," Hobbes anticipated many of Kames' ideas. Those influential ideas were set out in his *Principles of Equity* in 1766. In particular, Jefferson<sup>382</sup> and Adams embraced Kames' principle of the separation of law and morals, which resembled Hobbes' own position save for one fundamental qualification having to do with the critical institutional differences between judges and juries.<sup>383</sup> Drawing on Scottish moral sense philosophy, Kames warned that *individual* judges are not "angels" but are subject to error from unconscious bias, laziness, or negligence; therefore, the idea that they should have discretionary authority to "determine every particular case, according to what is just, equal, and salutary, *taking in all circumstances*" is a formula for injustice and

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381. Hobbes, *supra* note 358 at 149.

382. Jefferson owned three separate editions of Kames' work. See Wills, *supra* note 171, at 201.

383. Cf. *Duncan v. Louisiana*, 391 U.S. 145, 155-156 (1968) (In the opinion of the framers, "[i]f the [criminal] defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of a *single* judge, he was to have it." (emphasis added)); *Taylor v. Louisiana*, 419 U.S. 522, 529 (1975) ("the professional or perhaps overconditional or biased response of a judge.")

tyranny.<sup>384</sup> Concluding that the "idea of a court of equity in its perfection" is unworkable, Kames asserted "the necessity of establishing rules to preserve *uniformity* of judgment in matters of equity as well as common law."<sup>385</sup> He felt that a *single* equity judge should dispense only technical equity, *i.e.*, he should rule only according to a fixed body of substantive rules. Otherwise, the concept of natural equity would place "the whole rights and property of the community under the arbitrary will of the judge, acting . . . it may be, *ex aequo et bono*, according to his own notions and conscience; but still acting with a despotic and sovereign authority."<sup>386</sup> In short, individual magistrates should never possess the discretionary power to dispense equity in the true sense of natural equity. One thrust of Kames' observations pointed away from having specialized "equity" judges and toward a union of law and equity in common law proceedings. The idea of such a merger was embraced by Mansfield, Blackstone, and Jefferson.

By the time of the American Revolution, therefore, an apparent *Hobbesian* consensus had arisen even among libertarians like Jefferson that the power to dispense natural equity should be taken away from magistrates, even at the price of adhering strictly to the laws. But there was the critical distinction mentioned. As noted by Joseph Story, where a jury was present, as in negligence and nuisance actions governed by a reasonable man standard, then it *was* possible to administer justice fairly according to the "most enlarged and liberal

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384. H. HOMES, *PRINCIPLES OF EQUITY* 13 (1825) (emphasis added).

385. *Id.* Compare Hobbes' position:

[T]hat law can never be against Reason our Lawyers are agreed; and that not the Letter (that is, every construction of it) but that which is according to the intention of the Legislature, is the Lawe. And it is true: but the doubt is, of whose Reason it is, that shall be received for Lawe. It is not meant of any private Reason; for then there would be as much contradiction in Lawes as there is in the schools; nor yet (as Sir Edward Coke makes it) *an Artificial perfection of Reason*, gotten by long study, observation and experience, (as his). For it is possible long study may increase and confirm erroneous [Opinions] . . . and therefore it is not *Juris Prudential*, or wisdom of subordinate Judges, but Reason of his our Artificial Man the Commonwealth and his Command, that maketh, Lawe: and the Commonwealth being in their Representatives but one person, there cannot easily arise any contradiction in the Lawes; and when they doth, the same Reason is able by interpretation, or alteration, to take it away.

Hobbes, *supra* note 358, at 207.

386. J. STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* § 34 (1842).

principles of decision”:

[W]here the subject is such, as requires to be determined *secundum aequum et bonum*, as generally upon actions on the case, the judgment of Courts are guided by the most liberal equity.<sup>387</sup>

If twelve unrelated people unanimously agree on the application of a general principle of equity to a set of facts, they could hardly be accused of having fabricated the principle out of thin air or having simply shoehorned the facts to fit an accomodatingly vague standard so as to reach a preconceived conclusion.

For that reason Jefferson temporarily convinced his native Virginia to turn all equitable jurisdiction over to the jury-centric common law county courts (until presumably the expense or the need for summary interlocutory relief caused the Assembly to reconsider).<sup>388</sup> And modern historiography confirms that even the Puritans in Massachusetts, great proponents of the rule of law, affirmatively wanted county courts to act as courts of equity.<sup>389</sup> Chancery courts were virtually non-existent in seventeenth century America since colonial legal practice was largely borrowed from the non-centralized county courts in England, courts that exercised an ambidextrous jurisdiction in law and equity with the active participation of local juries.<sup>390</sup> As a result, Americans had grown attached to the notion that discretionary equitable powers could be responsibly exercised only through the mediation of a jury of one's peers. As a result, the apparent opposition to the concept of natural equity in eighteenth century America in fact concerned only the constitution of the courts that were to dispense the equity.<sup>391</sup> To paraphrase John Selden, equity without a jury was “a roguish thing.”<sup>392</sup>

On the other hand, Mansfield preferred to see the common law judge simply supplant the chancellor, by adding the

387. *Id.*

388. See Dumbauld, *supra* note 167, at 152 & n.103.

389. Compare Flaherty, *Law and the Enforcement of Morals in Early America*, and Haskins, *Legal Heritage of Plymouth Colony*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER*, eds. L. Friedmand and H. Scheiber 53-66, 38-45 (1978) with Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in *LAW IN AMERICAN HISTORY*, eds. D. Fleming and B. Bailyn 265-286 (1971).

390. Katz, *supra* note 389, at 263.

391. *Id.* at 286.

392. JOHN SELDEN, *TABLE TALK* 52 (1821).

flexible concept of equity to his quiver of principle for use in authoritatively expounding the law to the jury. In both the private and public law spheres, Mansfield rejected any role for the jury as dispenser of equity.<sup>393</sup> For him equity was simply part of the centralized, rationalistic construct known as the Common Law, which was to be definitely expounded by the hierarchical appellate courts.

On one level, Jefferson and others supported Mansfield's efforts to reform and rationalize the common law. This Mansfield accomplished, notably in the areas of commercial law, quasi-contract, and estoppel, by an infusion of "broad and equitable principles" drawn from the civil law.<sup>394</sup> Surprisingly, perhaps, Jefferson admitted the superiority of the civil law "as a system of perfect justice,"<sup>395</sup> with its articulation and development of principles, over the precedent-based common law. In particular, Jefferson rejected the common law rule of *stare decisis* as the keystone in a metaphysical structure of illiberal doctrines through which wily Norman lawyers and judges systematically entangled and undermined native Saxon liberties. Jefferson felt that the common law should consist of a body of principles accessible to everyday common sense and capable of being tailored to fit the facts of particular cases by a lay jury. Like the early American treatise writer DuPonceau, Jefferson favored distilling out of the common law "Republican and liberal principles" understandable to all.<sup>396</sup> By contrast, as things then stood, the ideal Saxon common law was too heavily encrusted with arbitrary rules which enabled "Norman" judges and lawyers to lord it over jurors.

Nonetheless, Jefferson opposed Mansfield's innovations since he had arrogated for the court full responsibility for the application and development of these new legal and equitable principles. In the commercial law area, for example, he hand-

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393. Cf. Dumbauld, *supra* note 167, at 17.

394. 7 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 44-45 (1926), quoted in T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 250 (1956).

395. VI T. JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 66 (Washington ed. 1861) (letter to Judge John Tyler in 1812).

396. Peter DuPonceau to James Madison, September 13, 1824, Madison Papers, Library of Congress, quoted in G. McDOWELL, EQUITY AND THE CONSTITUTION 65 (1982). For a discussion of the similar views of treatise writers James Kent, James Gould, John Milton Goodenow, and Francis Hilliard on the proper role of "common sense" principles in the common law, see *id.* at 62-69.

picked his jurors, socialized with them, and indoctrinated them with his views.<sup>397</sup> Proudly calling themselves "Lord Mansfield's jurymen," they willingly relinquished their historic law-applying prerogative, acceding to his repeated requests for "special verdicts" subject to a case for the opinion of the full court; or else they applied by rote Mansfield's preestablished rule.<sup>398</sup> More seriously in the seditious libel trial of John Wilkes, which so exercised the Colonies, Mansfield had held that the jury had no right to pass on anything but the facts of authorship and publication.<sup>399</sup> The seditious nature of the speech was *quaestio juris*. In response to such decisions, the English political radical "Junius" assailed Mansfield for "destroying Saxon rights and the Saxon spirit of liberty by his treatment of juries."<sup>400</sup>

As a result, Jefferson's attitude towards Mansfield and Blackstone, whom he accused of embodying "the honied Mansfieldism" of his patron,<sup>401</sup> was an ambivalent one. On the one hand, he admired their attempt to reduce the law to a set of understandable principles. But they were guilty in his estimation of having done too elegant and aristocratic job of rationalizing certain public law doctrines like Parliamentary omnipotence and the alleged residual power of common law courts to define *as a matter of law* new criminal offenses (including seditious libel) alleged to be *contra bonos mores*.<sup>402</sup> They made the common law out to be a self-regulating, rational mechanism like the Deists' clock-work universe that could be safely entrusted to judicial technicians. But Jefferson knew better. Anticipating the legal realists, he saw the irreducible role for discretion in the application of legal principles and wanted that responsibility placed squarely on the shoulders of jurors, especially in the public law area.

397. Plucknett, *supra* note 394, at 250-51.

398. BIRKENHEAD, *FOURTEEN ENGLISH JUDGES* 186.

399. Plucknett, *supra* note 394, at 248-49. *See* 19 State Trials 1075-1138 (Howell ed.).

400. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 NW. U.L. REV. 629, 644 & n. 89 (1933) (quoting in support I JUNIUS' LETTERS 308-09 (Wade ed. 1894)). Elsewhere Junius wrote:

The liberty of the press is the palladium of all the civil, political, and religious rights of an Englishman, and the rights of juries to return a general verdict *in all cases whatsoever*, is an essential part of our constitution.

*Quoted in* STORY, *COMMENTARIES*, *supra* note 24, at § 1879, 737 n.3.

401. XII T. JEFFERSON, *THE WORKS OF THOMAS JEFFERSON* 456 (Ford ed. 1895).

402. *See, e.g., Delaval*, 97 Eng. Rep. 913 (1763).



Thus, when Jefferson spoke of uncanonizing Blackstone and restoring the "uncouth" Coke, he may be understood in part to mean, as he wrote elsewhere, that when equitable principles of the public or private law have been rendered "pure and certain" "by repeated decisions and modifications, . . . they should be transferred by statute [if necessary] to the courts of common law, and *placed within the pale of juries*."<sup>403</sup> Jefferson had no sympathy for Mansfield's aristocratic departure from the more democratic, jury-centric notions of due process espoused by Coke. "Permanent judges" not only tended to develop a sense of professional elitism,<sup>404</sup> they were also apt to be misled in their deliberations by a sense of devotion to the legislative branch of government. Hence, Jefferson saw Mansfield as "a back-stairs courtier, intent on destroying political freedom."<sup>405</sup>—as being a daring legal reformer only in a sinister way. Presumably, therefore, Jefferson would applaud the nineteenth century American process by which the equitable doctrines of waste, estoppel in pais, and quasi-contract were incorporated into the common law and came to be regarded as "generally a jury question" based "upon the circumstances attending a particular case."<sup>406</sup> For that same reason, we may assume that Jefferson would look askance at half-hearted attempts by the modern Supreme Court to dispense *ad hoc* Article III equity in Taking Clause disputes, without giving any thought to a requirement that such principles be applied by a Seventh Amendment or Tucker Act jury.

#### 4. *Nulla Poena Sine Lege*

Especially in the public law area Jefferson and the other libertarian framers advocated democratic, not aristocratic, equity. Their insistence on the ideal of the rule of law must not be confused with the belief that all legal rules be rigidly enforced. Rather they felt that the existence of standing laws was a necessary, but not a sufficient, condition for their im-

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403. VI T. JEFFERSON, *THE WRITING OF THOMAS JEFFERSON* 66 (Washington ed. 1861).

404. See 15 JEFFERSON PAPERS, *supra* note 184, at 283 ("[e]spirit de corps").

405. Plucknett, *supra* note 394, at 287.

406. *Frost Motor Co. v. Pierce*, 72 Ga. App. 452, 453 (1945) (estoppel in pais). *Sherrill v. Connor*, 107 N.C. 630, 633 (1890) (waste). See also *Conway Nat. Bank v. Pease*, 76 N.H. 319, 82 A. 1068 (1912) (estoppel); *Cahill v. Hall*, 161 Mass. 512 (1894) (Holmes, J.) (quasi-contract).

sition. By contrast, the popular Aristotelian concept of equity also contemplated the need to correct for the under-inclusiveness of the general terms of a legislative enactment,<sup>407</sup> not just its over-inclusiveness. Thus it justified courts in *expanding* the scope of a statute to punish those outside its literal reach. The English King and his policies benefitted from many such equitable exceptions from the normal course of statutory and common law.<sup>408</sup> Hence, the libertarian principle of the non-discretionary rule of law which arose out of the Puritan Revolution responded to the specific reality that any exceptions by royal judges were likely to be in favor of the state—not the individual.<sup>409</sup> At bottom, therefore, the revolutionary ideal of “standing laws” in the Lockean sense translates as *nulla poena sine lege*.<sup>410</sup>

The experience of the Puritans in Massachusetts confirms that interpretation. Believers in a strict rule of law, but only insofar as limiting the discretion of the magistrate to punish was concerned, they favored the responsible exercise of equity to mitigate the harshness of the law. As Locke explained in the *Second Treatise*, although the standards of “the Law of Nature [which should guide our conduct] be plain and intelligible to all natural creatures,” they are unwritten and hence can easily be manipulated or misapplied *ex post facto* to the detriment of individual liberty.<sup>411</sup> Drawing on Hooker and Harrington, Locke concluded (i) that the law-making power should be placed in a “collective Bod[y] of Men,” so as to make it more likely that general, abstract concerns will prevail over particularistic, partisan concerns, and (ii) that they should govern by standing law, to prevent the temptation to enact abusive *ex post facto* laws or “extemporary Decrees.”<sup>412</sup> But even standing laws, he noted, had to conform to “the Law of Nature, *i.e.*, to the Will of God, of which this is a Declaration, and the fundamental law of nature being the preservation of Mankind, no Human Sanction can be

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407. ARISTOTLE, *Nicomachean Ethics*, bk. V, §10.

408. See McIlwain, *supra* note 180, at 302.

409. See Rousseau *supra* note 352, at 403 (“All that the citizen wants is the law and the obedience thereof. Every individual . . . knows very well that any exception will not be to his favor. This is why everyone fears exceptions; and those who fear exceptions love the law”).

410. Cf. Spencer, *Nulla Poena sine Lege in English Criminal Law*, in *THE CAMBRIDGE-TILBURG LAW LECTURES* 35 (3d Series 1980).

411. J. LOCKE, *TWO TREATISES OF GOVERNMENT*, §§ 123-126 (P. Laslett ed. 1960).

412. *Id.* at §§ 94, 131.

good, or valid against it."<sup>413</sup> Locke then quoted Hooker for the proposition that "[t]o constrain Man to any thing *inconvenient* doth seem unreasonable."<sup>414</sup> If government exercised "Power beyond Right," it was tyranny.<sup>415</sup> Government had no legitimate Power "to impoverish, harass, or subdue"<sup>416</sup> citizens beyond what was *necessary* for the common good.<sup>417</sup>

Like Locke the libertarian framers viewed the sphere of man's residual or negative liberty as his affirmative right—not as the gracious gift of the sovereign, whose decisions were not to be second-guessed. Just laws would not "unnecessarily" curtail that liberty or inconvenience the citizen.<sup>418</sup> Indeed, Locke asserted that man had no right to confer on government the power to curtail *unnecessarily* his natural intangible liberties—which made up his "unalienable" right to the pursuit of happiness.<sup>419</sup> And on the authority of Chief Justice Coke, the framers conceived of this as a fundamental proposition of the common law. Physical property, by contrast, is alienable—since no man is born with a natural right to a particular piece of property, but he does have an inviolable second-order natural right to just compensation. Government, therefore, may take such property so long as it is willing to pay "just compensation," even if its need for property is not demonstrably clear. No man, however, has the moral or political right to allow government to take more of his personal liberty than is necessary. English Whigs were fond of saying that the only thing the sovereign could *not* do—other than make a man a woman—was alienate its sovereign power, even if it expressly purported to contract it away. But in response American Revolutionaries asserted that the individual had no right to alienate in favor of the government excessive power over his or her natural liberties, and hence the social contract could not justly be construed to imply otherwise.

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413. *Id.* at § 135.

414. *Id.*

415. *Id.* at § 201.

416. *Id.*

417. A speculative argument that Locke viewed a right of jury trial—or something near it—as a necessary means of redress for a citizen who feels he is being individually oppressed can be fashioned out of his conviction that "the proper umpire" for an important controversy between the sovereign and "some of the people" should be "*the body of the people*." *Id.* at § 242 (emphasis added). Trial *per pais*, or "by the country," was the historic English synonym for jury trial.

418. *Id.* at § 242.

419. *Id.*

Thus, an irony dwells in the inner chamber of western democratic theory. The most essential individual rights are intangible and innominate. Liberty for liberty's sake. This should come as no surprise. The concept of free will dictated that the shape of man's destiny be left essentially within his own hands. But tangible property rights are easier to identify and to defend. When it comes to delimiting the inviolable sphere of individual autonomy—or free will—we have a fundamental boundary line problem. Abstract formulae, like John Stuart Mill's distinction in *On Liberty* between actions that affect only the actor and those that affect others, are seldom helpful since they are subject to both sincere and sophisticated manipulation.<sup>420</sup> By way of refinement, Professor Hayek has suggested that not all third-party effects are legally cognizable, only those which interfere with the rights—or “reasonable expectations”—of others.<sup>421</sup> The problem, however, of what collective expectations are sufficiently reasonable to justify cutting down an individual's residuum of natural liberty defies strictly logical resolution. Pragmatically recharacterizing certain liberties as alienable and hence compensable relieves a great deal of the analytical pressure. If the individual is content not to assert his technical Lockean right to revolt by disobeying the law, but seeks compensation instead, that fact confirms our recharacterization. Still, the all-important question, as both Hobbes and Locke clearly appreciated, remains: Who shall judge the legitimacy of particular laws and by what standard?

### B. *The Libertarian Model of the Jury*

#### 1. Jury as Dispenser of Democratic Equity

As noted, modern positivists argue that even Jefferson and the other so-called libertarian founders had yielded up out of moral uncertainty any natural law claims to substantive liberties which were proof against legislative interference. The counter-thesis of this article is that there was a pantheon of necessarily unspecified substantive liberties instinct in the Constitution, whose existence was expressly confirmed by the

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420. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 261-262 (1978).

421. Hayek, *supra* note 26, at 145. Hence Hayek endorsed the 1793 reformulation of Article VI in the French Declaration of Rights of 1789 to read: “La liberté est le pouvoir qui appartient à l'homme de faire tout ce que ne nuit pas aux droits d'autrui.” *Id.* at 145 n.17.

Ninth Amendment.<sup>422</sup> Furthermore, it is argued, the assumed mode of identifying and securing those liberties was through the document's procedural guarantees of Cokean due process, namely, the Sixth and Seventh Amendment jury guarantees.<sup>423</sup> Under the prevalent Scottish "moral sense" school of philosophy, which Jefferson imbibed at Williamsburg, it was assumed that the fundamental principles of liberty establishing the legitimate extent of state regulatory authority over the individual would be "self-evident" to the jury.<sup>424</sup> After hearing the facts of the case, having the relevant principles of law argued to them by counsel from both sides, and giving respectful attention to the judge's charge, the jury could be trusted to grasp intuitively whether or not the law was *so* unreasonable or unfair as applied to the individual in question as to warrant nullification. Obviously, all citizens have to expect to make certain sacrifices to the common good by putting up with laws they do not like. In that regard the jury can be trusted to heed the judgment of their elected representatives as to the general necessity for the law in question, but they still have the right to decide in the context of a particular case that the legislature has either intentionally or inadvertently gone "too far" in imposing sacrifice on an individual.

The "moral sense" necessary to make this qualitative judgment was thought to require only "a small stock of reason."<sup>425</sup> In this respect "moral sense" philosophy was much more egalitarian than even Locke's "intuitive rationalism," especially after the latter doctrine had been turned to conservative purposes in the eighteenth century.<sup>426</sup> Under the rubric of a rule utilitarian "common sense," Thomas Reid spoke of the need of most men to adopt their self-evident

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422. U.S. CONST. amend. ix ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.") See *Griswold v. Connecticut*, 318 U.S. 479, 486 (1965) (Goldberg, J., concurring); *Roe v. Wade*, 410 U.S. 113, 153 (1973); T. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 716 (1975). Cf. Rengold, *The History of the Enactment of the Ninth Amendment and its Recent Development*, 8 TULSA L.J. 1 (1972).

423. U.S. CONST. amend. vi ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ."); U.S. CONST. amend. vii ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .").

424. See Wills, *supra* note 171, at 167-255.

425. 12 JEFFERSON PAPERS, at 15.

426. See M. WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION*, 9-60 (1978).

truths second hand *via* custom, example, or rule of law. By contrast, "moral sense" jurors of whatever station in life were qualified to make what was in essence an aesthetic judgment about the inherent disproportion or unfairness in society's treatment of an individual. In short, the tacit libertarian orthodoxy of the founders regarded the jury as the anointed dispenser of democratic equity, in those cases in which the legislative process (for whatever reason) "lays an egg." After all, otherwise valid general laws may impinge too harshly on a single individual. Without invalidating the statute itself, the jury can silently and discretely except the individual from its operation. In that way the jury operationalized the founders' basic Lockean notion that the implied terms of the social compact did *not* require an individual to accept stoically as the price of ordered liberty all economic harm or "inconvenience" (to use the polite seventeenth-century term) he might suffer at the hands of the legislature. Rather than vainly petition Congress for individual redress or openly rebel, the dissident could take his case before a mini-plebiscite of the people and plead the natural equity or higher justice of his cause.

James Wilson, who was perhaps the most brilliant legal theorist at the Constitutional Convention and the leading draftsman next to Madison, as well as the first Supreme Court justice to take office, captured this libertarian orthodoxy in his 1793 law lectures:

[I]n a free state, the law should impose no restraint upon the will of the citizen, but such as will be productive of advantage, public or private, sufficient to overbalance the disadvantage of the restraint . . . . The proof of the advantage lies upon the legislature. If a law is even harmless, the very circumstance of its being a law, is itself a harm.<sup>427</sup>

This same principle that the social contract embodied a "mutual agreement [that government will] levy from any citizen the least possible amount of freedom" consistent with the public welfare had been derived from Locke by Cesare Beccaria in his influential *Dei Delitti e delle Pene* (1764), which Jefferson also studied at Williamsburg.<sup>428</sup> But this still left unanswered the question of who decides whether the principle of "least levying" had been violated. One response was Blackstone's Hobbesian assertion that Parliament in making laws

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427. II THE WORKS OF JAMES WILSON 287 (J. Andrews, ed. 1896).

428. See Wills, *supra* note 171, at 154.

possessed the "supreme, irresistible, absolute, uncontrolled authority" which must in all governments reside somewhere, since logically it was the only final appellate authority over the debatable reasonableness of a law.<sup>429</sup> Wilson retorted that the only such "supreme, arbitrary, absolute, uncontrollable" *discretionary* authority in the American democracy resided in the common law jury.<sup>430</sup>

In cases pitting an individual against the rest of society and involving an alleged breach of the social contract, Wilson noted, jurors stood in an unavoidable situation of potential conflict of interest, being both parties to (and representatives of) one side of the contract and judges of the breach. Nonetheless, their "moral sense" ability to empathize with the defendant or the claimant in such a situation, based partly on the fact that as the designated representatives of the people any injustice would properly rest on their conscience and not that of society at large, and partly on their sense of there-but-for-the-grace-of-God-go-I, constituted them "the palladium of liberty."<sup>431</sup> Finally, Wilson affirmed that the jury, as the sovereign democratic component of the judiciary, had the solemn right, acting unanimously, to "decide *the law* as well as the fact" according to their conscience.<sup>432</sup>

The English Whigs of 1689 accepted Parliamentary sovereignty out of a belief in the necessity for the strong centralized administration of law. For them, *imperium in imperio* was a political solecism. By contrast, the libertarian framers espoused the concept of the decentralization of political power as essential to liberty—and in particular they embraced the paradox of *imperium in imperio* in the form of the local common law jury. In this regard, John Adams averred that "the common people . . . should have as complete a control, as decisive a negative, in every judgment of a court of judicature" as in other decisions of government.<sup>433</sup> Likewise, in 1830 de Tocqueville could still observe that in America the jury was "above all, a political institution"—"as direct and extreme a consequence of the sovereignty of the people as universal suffrage."<sup>434</sup> In fine, like Otis before them, the lib-

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429. I W. BLACKSTONE, COMMENTARIES\* 160.

430. Wilson, *supra* note 427, at 167.

431. *Id.* at 169-171, 187.

432. *Id.* at 220.

433. 2 LIFE AND WORKS OF JOHN ADAMS 253-255 (C. Adams ed. 1856).

434. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 291-297 (P. Bradley ed. 1945).

ertarian framers saw no need for an exhaustive catalogue of American liberties. They agreed with the Coke of Leveller mythology that the true "birthright" of liberty inheres in the substantive dimensions of trial by jury.<sup>435</sup>

Besides, while the framers believed in immutable principles of fairness and reasonableness, which set bounds on the legitimate exertions of governmental power, they realized that those principles were mutable or varied in their application, depending on time, place, and circumstances. Rather than an "eternal immutable law of nature," the framers believed in what Roscoe Pound has termed "a creative natural law," with the jury serving as a "living instrument of justice."<sup>436</sup> As Jefferson observed, the reasonableness or "utility" of an act, and hence its viciousness or virtue, will vary from country to country.<sup>437</sup> And Francis Hutcheson, the father of "moral sense" philosophy, defended this ability of individuals to recognize when necessity justified an exception to the ordinary rules of natural equity. He refused to consider such exceptions to be violations of natural law, *i.e.*, purely unprincipled concessions to expedience, since "great utility" may be a legitimate overriding principle:

For the very question is, are not these cases . . . made known to us by the same use of reason by which the [ordinary rule of] law itself is made known. If we are no competent judges of future tendencies, we are no judges about the ordinary natural laws.<sup>438</sup>

As a qualification on these special laws of nature, however, Hutcheson noted society's sacred second-order duty to repair any special disproportionate sacrifice imposed on an individual.<sup>439</sup>

The upshot is that aside from trial by jury and just compensation, there were no other absolute, inviolable individual liberties for the libertarian framers, except perhaps *habeas corpus*. (And even there Jefferson suggested the simple expedient of repeated false arrests, paying whatever damages a jury might assess *under the circumstances*.) Rather, like our latterday pragmatic positivists, the framers espoused an experi-

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435. Cf. A. SCHLESINGER, *THE BIRTH OF THE NATION* 14-15 (1968).

436. R. POUND, *LAW AND MORALS* 86 (1924).

437. 14 *THE WRITINGS OF THOMAS JEFFERSON* 143 (A. Lipscomb and A. Bergh eds. 1903).

438. F. HUTCHESON, *A SHORT INTRODUCTION TO MORAL PHILOSOPHY* 242, (1747).

439. *Id.* at 245-246.



mental, process-based concept of fundamental liberties. But with the critical difference that for them liberty in the final analysis was what emerged from the operation of the jury—and not the legislature. The notion of when and under what circumstances a person had the moral right to be free from governmental interference, like other basic notions of right and wrong, would be perceived by the jury through a faculty of immediate and direct awareness. And the best evidence of the validity of that perception was the empirical data provided by the unanimous agreement of the twelve individuals that under contemporary moral standards a material breach of the social compact has occurred.

It is wrong to suggest that the libertarian framers may have shared Hobbes' underlying faith in the intelligence and good will of the sovereign—regarding either its original object or democratic legislatures. In the immediate post-Revolutionary period, majoritarian state legislatures perpetrated many abuses. In 1781 Jefferson specifically renounced the notion that "173 despots [could not be] as oppressive as one."<sup>440</sup> The legislature was not a magic black box. Aristotle had warned that the true rule of law did not equal rule by a numerical majority, since a majority's decrees tended to be too specific in their operation.<sup>441</sup> Likewise, Rousseau warned that the conscious will of all or of a majority did not equal the authentic "general will," since the former considered particular interests and was merely the sum of selfish desires.<sup>442</sup> Like Madison, he feared the legislative process because it was subject to manipulation by factions. To be legitimate the general legislative will had to be "general" or universal in its objects, promulgating laws that applied equally to all in a meaningful sense and did not lay a greater change on one citizen than another.<sup>443</sup> Because this ideal of *isonomia*,<sup>444</sup> the rule by laws of truly generalized applicability, was unobtainable in prac-

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440. THE WRITINGS OF THOMAS JEFFERSON 222 (P. Leicester ed. 1894).

441. ARISTOTLE, RHETORIC 1345 ab.

442. Rousseau, *supra* note 352, at 396-400; cf. FEDERALIST PAPERS, *supra* note 145, at 77-89 (No. 10).

443. See Rousseau, *supra* note 352, at 422.

444. See, e.g., Hayek, *supra* note 26, at 162-92, 234-49. For Hayek's discussion of *isonomia*, see *id.* at 164-179. For a discussion of the due process ideal of *isonomia* in nineteenth century American jurisprudence, see Corwin, *supra* note 338 at 90-115. Cf. Van Zant v. Waddell, 2 Yerg. 260 (Tenn. 1829) (construing the state's due process clause to mean "a general public law equally binding upon every member of the community . . . under similar circumstances"). *Id.* at 93-94 & n.49.

tice, Jefferson feared that even democratic legislatures would tend to pass increasingly partial laws, *if permitted to get away with it*.

As Professor Reid has noted, the American Whigs of the Revolutionary era were not so much heirs to the Glorious Revolution of 1688-1689, which substituted an arbitrary Parliament for a willful monarch,<sup>445</sup> as they were restorers of the democratic theories of the English Levellers of the Puritan Revolution of the 1640's.<sup>446</sup> The Levellers, who greatly influenced Jefferson, embraced the ideal of a pre-Norman system of English customary law in which artificial legal rules took a back-seat to the local jury. Having experienced before America the sting of arbitrary enactments by Parliament, the Levellers, building upon Coke, first gave blunt expression to the democratic constitutional theory that it was the ancient prerogative of the jury to reject as null and void "an act of Parliament contrary to the principles of reason."<sup>447</sup>

In 1788 Jefferson proclaimed from France that trial "by the people themselves," that is, by jury, as "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."<sup>448</sup> In a letter to Thomas Paine he despaired of success in his efforts through Lafayette and Gam to induce the unicameral "majority" of the National Assembly to adopt the jury, even as he put civil jury trial in all cases (if necessary) at the top of his list to Madison of protections to be included in the Bill of Rights.<sup>449</sup> As part of his campaign to induce the French *philosophes* to adopt the ancient English jury, he sent the Abbe Annoux in July, 1789, a list of Leveller or Leveller-inspired pamphlets, including Walwyn's *Juries Justified* and Hawle's *Englishman's Rights*. Discreetly suggesting that while juries had a right "to judge the law as well as the fact," they exercised the right only if they expected bias in the judge, he nevertheless concluded:

Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary Department, I

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445. See Reid, *supra* note 169.

446. See Dumbauld, *supra* note 167, at 144-156.

447. T. PEASE, THE LEVELLER MOVEMENT 326 (1916); see also S. PRALL, THE AGITATION FOR LAW REFORM DURING THE PURITAN REVOLUTION, 1640-1660, 54-60, 78, 136-137 (1966) and D. VEAL, THE POPULAR MOVEMENT FOR LAW REFORM 1640-1660, 158-159, 170 (1970).

448. 15 JEFFERSON PAPERS, 269.

449. *Id.* at 230-233; 14 *id.* at 442.

would say it is better to leave them out of the Legislative.<sup>450</sup>

Elsewhere Jefferson made it clear that, wholly apart from any suspicion of bias in the judge, "if the [legal] question relate to any point of public liberty . . . , the jury undertakes to decide both law and fact."<sup>451</sup>

Hence Jefferson doubtless would have endorsed the sardonic argument in favor of the law-finding jury by the Anti-Federalist Aristocrotis:

Another privilege which the people possess at present, and which the new congress will find it in their interest to deprive them of, is trial by jury—for of all the powers which the people have wrested from government, this is the most absurd; it is even a gross violation of common sense, and most destructive to energy. In the first place it is absurd, that twelve ignorant plebians, should be constituted judges of a law, which passed through so many learned hands;—first a learned legislature after many learned animadversions and criticism have enacted it—Second, learned writers have explained and commented on it.—Third, learned lawyers, twisted, turned, and new modeled it, and lastly, a learned judge opened up and explained it.<sup>452</sup>

And, indeed, this may have been the absurd populist ideal that the Sixth and Seventh Amendments were intended to "preserve."

## 2. Early Federal Practice

Accordingly, Professor Howe has documented the fact that well into the nineteenth century the near universal practice in federal courts was to charge juries in both civil and criminal cases as to their "right" to decide both the law and the facts of a case.<sup>453</sup> The Supreme Court, per Chief Justice Jay, did so in the exercise of its original jurisdiction over a *civil* action brought by the State of Georgia against a private individual in 1794.<sup>454</sup> This general role of the jury was ratified in the Sedition Act of 1789 with its provision that the

450. 15 *id.* at 283.

451. VIII THE WRITINGS OF THOMAS JEFFERSON 372 (H. Washington ed. 1853-54).

452. 3 COMPLETE ANTI-FEDERALIST, *supra* note 159, at 204-05.

453. See generally Howe, *supra* note 158.

454. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794). Justice James Wilson and James Iredell endorsed this proposition in *Bingham v. Cabot*, 3 U.S. (3 Dall.) 18, 33 (1795).

jury "have a *right* to determine the law and fact, under the direction of the court, as in other cases."<sup>455</sup> And despite assertions to the contrary, the debates over the Sedition Act furnish no evidence that the jury was not intended to function as a constitutional safety net. When concern was expressed that the Act might be construed to give the jury the right to pass on the admissibility of evidence or the constitutionality of the statute, it is true that Albert Gallatin of Pennsylvania—who proposed the language that was adopted—asserted that the jury would have the right to decide only "the criminality of the act."<sup>456</sup> Yet this characterization was fully consistent with, indeed descriptive of, the process by which a jury excepted a case from the operation of an oppressive statute.

Gallatin was merely pointing out that it was one thing for a jury to supplant the judge and make an articulate ruling on the admissibility of evidence or the general constitutionality of statutes, which would then be of precedential force in future cases. But it was quite another for a jury to conclude silently that a statute, at least as applied to particular set of facts, could not equitably mean what it said. In short, it is fully consistent with the thesis of "jury as dispenser of equity" to suppose that the jury could be bound by the judge's ruling as to the general *facial* constitutionality of a statute, but still be obliged to determine whether the statute *as applied* worked a special injustice. After all, as in the context of modern substantive due process review, the judge's ruling of facial validity merely meant that he had put on his "perfunctory judicial hypothesizing"<sup>457</sup> hat and conceived at least one non-arbitrary application or justification for the statute. The jury, tacitly accepting the judge's conclusion that the act was not facially invalid because it was susceptible of at least one constitutional application, under perhaps some as yet unspecified set of facts, merely concluded that the instant case was not within that set of valid applications. It had no charter to dispute the judge's characterization of the law as facially valid.

The jury's acquittal in *Henfield's Case*<sup>458</sup> in 1793 demon-

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455. Act of July 14, 1798, 1 Stat. 596.

456. See Howe, *supra* note 158, at 586-587.

457. See Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Never Equal Protection*, 86 HARV. L. REV. 1 (1972).

458. 11 Fed. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360). For a discussion of the case, see Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. L. REV. 26,

strated the significance of this distinction regarding the precedential value of jury verdicts. The issue before the jury, as charged by Justice Wilson, concerned the existence *vel non* of a federal common law of crimes. He argued that such crimes were punishable under that section of the Judiciary Act of 1789 which conferred jurisdiction on federal circuit courts over "crimes and offenses cognizable under the authority of the United States."<sup>459</sup> Like Mansfield, Wilson was attempting to get the jury to convict on the basis of the principles of an unwritten common law. But true to his "moral sense" philosophy, he asserted that the common law in question was of "Saxon" and not "Norman" derivation.<sup>460</sup> As a result, it was made up only of principles that should be intuitively accessible to all men. With no spirit of *ipse dixit*, therefore, he attempted to enter into a reasoned dialogue with the jury about why Mr. Henfield had no right to declare private war against England in light of principles behind Congress' exclusive power in that regard.<sup>461</sup> And unlike Mansfield he charged the jury as to its right to decide both the law and the facts of the case;<sup>462</sup> and the jury, under his mild tutelage, acquitted. At that point Phillip Freneau's *National Gazette* of Philadelphia, part of the growing anti-Federalist press, crowed uncharitably that:

By this verdict, which according to the charge of the court, indicates a decision on the law as well as the facts, it is now established that the citizen of the United States may by law enter on board a French Privateer and it is presumable that no other prosecution for this same cause can be sustained. . . .<sup>463</sup>

Of course, not only did the prediction about future prosecutions prove factually incorrect,<sup>464</sup> it was also incorrect as a matter of the theory of the functioning of the law-finding jury.

Thus, jury nullification was qualitatively different than judicial nullification, in that the law survived its encounter with the jury formally intact. It remained more than a scare-

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46-58 (1978).

459. An Act to Establish the Judicial Courts of the United States, ch. 20, § 11, 7 Stat. 73 (1789).

460. 11 Fed. Cas. at 1106-07 (charge to the grand jury).

461. *Id.* at 1108-09 (charge to the grand jury).

462. *Id.* at 1121 (charge to the petit jury).

463. *National Gazette of Philadelphia*, Aug. 3, 1793.

464. See Presser, *supra* note 458, at 57-58.

crow, since the judges apparently stood ready to exert their considerable influence to see that the next jury applied it to anyone foolhardy enough to follow the example of the first defendant.

Furthermore, in the context of the passage of the Sedition Act the particular issue of constitutionality that some legislators deemed it inappropriate for a jury to review did not concern the substantive fairness of the Act. Rather it dealt with a technical question of jurisdiction, concerning whether Congress or only the individual states had the power to pass such a statute. (Paradoxically, Albert Gallatin himself agreed that the states had exclusive power to regulate the subject matter; but if a federal law was to be passed, he wanted it to provide clearly for the libertarian jury.) And it *was* the one clearly appointed role of the Supreme Court under Article III to act as supreme umpire of the boundaries of federalism. Such technical questions were inappropriate for a local jury since they did not implicate matters of natural equity but of broad national policy. Ultimately, as we shall see, the jury was deposed as the dispenser of democratic equity largely because of such latent issues of federalism.

Leonard Levy has made much of the fact that Jefferson himself, as in his Kentucky Resolutions of 1798, opposed the Sedition Act because of the issue of federal encroachment on state's rights rather than out of concern for abstract liberty of the press, or freedom of speech.<sup>465</sup> Jefferson embraced the Blackstonian concept that freedom of the press meant merely freedom from prior restraint, *i.e.*, no advance censorship, but contemplated criminal liability for any abuse of the freedom to speak or publish "freely." Levy grudgingly acknowledged that Jefferson qualified Blackstone with the two "frail Zengerian principles" codified in the Sedition Act: *viz.*, (i) the truth of remarks was admissible in defense and (ii) the criminality of an individual's words were to be determined by a jury of his peers.<sup>466</sup> Levy, who elsewhere underestimated the

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465. Levy, *Liberty and the First Amendment: 1790-1800*, in L. FRIEDMAN AND H. SCHEIBER, ED., *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 99 (1978).

466. *Id.* at 100. Although libertarians could conceive "no greater liberty" than that assured by these provisions, Levy quickly dismissed the jury as "a court of public opinion, often synonymous with public prejudice":

Granted, a defendant representing a popular cause against the administration in power might be acquitted, but if his views were unpopular, God help him—for a jury would not, nor would his plea of truth as a defense.

libertarian role of the jury, failed to appreciate (as Jefferson clearly did) that unwarranted convictions under the Sedition Act had less to do with the failings of the institution of the jury than with the administration of the Act at the hands of fiery and highly-partisan Federalist judges like Samuel Chase, not to mention the packing of juries by partisan U.S. marshals.<sup>467</sup> These judges asserted a power to comment on the weight of the evidence and to browbeat juries into rendering prosecution verdicts by vehemently asserting that as a matter of law the speech in question was seditious.<sup>468</sup>

Chase himself was a committed Hobbesian. Asserting that "Liberty and rights, (and also property) . . . must be forever subject to the modification of particular governments," he believed in the necessity of a strong, centralized federal administration.<sup>469</sup> An opponent of universal suffrage, his analogous opposition to any "dispensing power" in a local jury led him to prevent John Fries of Fries' (tax) Rebellion fame from addressing the jury through counsel on the law in his treason case.<sup>470</sup> His Impeachment Articles recited that this was done "in open contempt of the rights of juries, on which, ultimately, rest the liberty and safety of the American people."<sup>471</sup> Significantly, Chase defended himself before the Senate by paying lip service to the "sacred . . . legal privileg[e]" of juries to render unreviewable general criminal verdicts in criminal cases. At the same time, he pointed out that while he had restricted counsel's use of what he in good faith deemed irrelevant authority, he "permitted [them] to argue before the petit jury, that the court w[as] *mistaken in the law*."<sup>472</sup>

Yet Chase would prove a key figure in the ultimate destruction of the Leveller ideal of the jury, even though it very nearly resulted in his conviction. To his credit, he was consistent positivist. His unlikely opposition to the idea of a federal common law of crimes was part of his apotheosis of a system

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*Id.*

467. See III A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 42 n.1 (1919); S. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federal Jurisdiction*, 73 NW. L. REV. 83 (1978).

468. See, e.g., *U.S. v. Cooper*, 25 Fed. Cas. 631 (C.C. Pa. 1800); *U.S. v. Callendar*, 25 Fed. Cas. 239 (C.C. Va. 1800).

469. See S. SMITH AND T. LLOYD EDS., II *TRIAL OF SAMUEL CHASE . . . BEFORE THE SENATE OF THE UNITED STATES*, Appendix v-viii (1805).

470. 1 *id.* at 5-8.

471. *Id.* at 25-103 (emphasis added).

472. *Id.*

of standing laws, impartially and invariably enforced, "whose certainty and precision . . . is its greatest glory."<sup>473</sup> Accordingly, in the 1800 case of *United States v. Callendar*<sup>474</sup> he repudiated the "Virginia syllogism" that the jury's has a right to decide the law of the case; the United States Constitution is the supreme law of the land; therefore, the jury has a right to pass on the constitutionality of the otherwise applicable statutory law. Chase retorted that the jury's conceded right to pass on the law of the case is limited to determining what positive law was intended to govern the situation, not whether a clearly applicable statute is binding law. To support his theory that a local Sixth or Seventh Amendment jury has no "dispensing power" over the applicable law, Chase relied on Hamilton's view in the *The Federalist*, No. 78 as to the function of judicial review by the Supreme Court.

Hamilton asserted that the power of judicial review under Article III over cases "arising under th[e] Constitution" springs from the clear need to have a single, binding national interpretation of the Constitution.<sup>475</sup> That ideal is frustrated if each local jury is entitled to arrive at its own independent view of the meaning of various constitutional provisions. Thus, Chase concluded that to the extent the Federal Practice Act could be interpreted to require a federal court sitting in Virginia to adopt the Virginia common law rule as to the division of responsibility between judge and jury, it would be unconstitutional as contravening the clear plan of Article III. So holding, he laid the foundation for much that is to follow. But two points bear current emphasis. First, Chase did not consider the effect on Hamilton's view of Article III of the embodiment of the jury trial guarantees in the Bill of Rights, which Hamilton unsuccessfully opposed due to the apparent assumptions of their proponents about the proper division of responsibility between federal judge and jury. Secondly, he ignored the possibility that the ideal of a uniform system of precedent binding on judges might be consistent with allowing equitable exceptions from the general rule to be made by juries. It is still important to have juries uniformly charged as to the guiding rules and principles of law. But it is clear that Chase, believing "the bulk of

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473. I S. SMITH AND T. LLOYD, TRIAL OF SAMUEL CHASE (1805) [hereinafter, CHASE TRIAL].

474. 25 Fed. Cas. 239 (C.C.D. Va. 1800) (14,709).

475. FEDERALIST PAPERS, *supra* note 145, at (No. 78).



mankind [to be] governed by a passion and not by reason,"<sup>476</sup> did not share the "moral sense" philosophy's sanguine view of the capabilities of a unanimous lay jury.

Initially, Chase was an aberration. More enlightened jurists, even those of a Federalist persuasion like James Wilson and Chancellor Kent, affirmed the substantive right of jurors to determine critical public law questions for themselves, like the "immoral or illegal tendency" of seditious libel. In that context, the people themselves would determine whether or not a sufficient "public right" was threatened to justify the *ex post* restraint on natural liberty—and only a unanimous verdict would convict. In an 1804 New York common law prosecution for seditious libel,<sup>477</sup> Kent, an acknowledged believer in principles of natural equity, championed the *right* of the jury to decide the law for itself. By the same token he noted that the jury would and should give the judge's opinion "due weight" and that in civil cases a verdict could be set aside and a new trial ordered. At the same time, he rejected out of hand the argument of Chase and Lord Mansfield—that a jury had a mere *de facto* power to ignore the judge's view of the law—as a perversion of basic American political principles, principles not confined to Jefferson's Virginia:

To deny to the jury the right of judging of the intent and tendency of the act, is to take away the substance and with it the value and security of this mode of trial.<sup>478</sup>

Who can doubt that implicit in Kent's view of the constitutional jury is the more clearly revolutionary principle that if the legislature itself (rather than the trial judge) should clearly declare certain specific words or phrases to be punishable as seditious libel *per se*, the jury would still have the right to second-guess the legislative line-drawing "as applied" to a case at hand on the basis that the words as uttered did not pose a sufficiently "clear and present danger" to justify penal sanction?

### 3. Dismantling the Model

The libertarian model of the jury was, however, systematically dismantled by "arrogant" state and federal appellate

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476. 1 CHASE TRIAL, App. v (Chase's 1803 charge to the Baltimore grand jury).

477. *People v. Croswell*, 3 Johns. Cas. 336 (N.Y. 1804).

478. *Id.* at 365.

judges during the middle part of the nineteenth century.<sup>479</sup> It was sacrificed by its undemocratic judicial yokefellow on the altar of the misunderstood Revolutionary idol of "a government of laws, and not of men." In denominating "the rule of law" the special ward of the hierarchial appellate court system, federal judges embraced three fallacies, which we shall examine in order. They were (1) a formalistic/positivistic conceit that all law, including constitutional law, should consist of clear general propositions that are either made by legislatures or discovered by judges according to certain authoritative techniques, (2) a fairness notion that a right of the jury to dispense equity cannot be limited either logically or practically to one-way exceptions in favor of the individual rather than the state, and (3) a nationalistic concern that the right of a local jury to review statutory law cannot be limited either logically or practically to its "as applied" fairness as opposed to its "facial" validity.

a. *Professional Formalism*. In the 1739 trial of John Peter Zenger, Andrew Hamilton, counsel for the defendant, argued to the jury that "by law [it was] at liberty (without affront to the judgment of the Court) to find both the law and the fact" in the case.<sup>480</sup> In line with "moral sense" epistemology, the rightness or wrongness of a rule of law was not a priestly or craft mystery. It was a moral phenomenon that each man had to judge for himself. Thus Hamilton observed that just as one man cannot see with "another's eye," he cannot conscientiously seek truth through "another's understanding or reasoning"—so that a judge should take no offense if the jury merely does its duty and finds the law according to its own lights.<sup>481</sup> Even Blackstone noted favorably that the jury brings the perspective of "the many" to the judicial branch to counterbalance the narrower views of "the few" likely to be held by appointed and life-tenured judges.<sup>482</sup>

As we will see, however, Lemuel Shaw, the influential Chief Justice of Massachusetts, did take umbrage at any sug-

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479. See Howe, *supra* note 158, at 586.

480. J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL, 95-96 (S. Katz ed. 1963).

481. *Id.* Hamilton borrowed his argument, language and all, from the opinion of Chief Justice Vaughan in the famous *Bushell's Case*, 6 Howell's 999, 1011 (1670), which established that a jury may not be punished for ignoring the judge's instructions on the applicable law.

482. III W. BLACKSTONE, COMMENTARIES\* 379.

gestion that juries might serve to protect a defendant against "biased" judges—dismissing it as an impertinent, if not irreverent, reflection on the wisdom of the framers of the Massachusetts Constitution, men who had taken careful steps to assure judicial independence through those same tenure and salary provisions.<sup>483</sup> Due to his assumption that the rules of public and private law could be scientifically discovered by professionally trained judges, Shaw missed the point entirely. If that assumption held, the only subjective qualities that might deflect a judge from the discovery of objective legal truth would be stupidity, dishonesty, or bias. Partisans of the jury demurred. Anticipating the legal realists' critique of formalism, they denied that the shape of common law rules can ever be dissociated from the moral sense of the judge, however objective he may be. Thus, it was not that Shaw's values or those of other appellate judges were corrupt, they were just different and aristocratic.

Among those values, as mentioned, was a professional belief in the desirability and feasibility of deductive legal certainty. Not coincidentally, therefore, it was Shaw who first introduced into American jurisprudence an inflexible version of the harsh English "fellow-servant" rule.<sup>484</sup> In so doing, he not only adopted a certain uniform rule of law based on the irrebutable legal presumption that employees (not employers) are the least-cost avoider with regard to accidents caused by their fellow servants and that their compensation had been originally adjusted to reflect this division of risk, he took especial pains to preserve his rule from tampering by the jury.<sup>485</sup> Following Shaw's lead an aristocratic *elegantia juris*, in the guise of nineteenth century legal formalism, was to triumph over the principle of individualized equity. As Jefferson pointedly observed:

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483. *Commonwealth v. Anthes*, 5 Gray 185, 230 (Mass. 1855); see L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 290-295 (1957).

484. *Farwell v. Boston and Worcester Rail Road Corp.*, 45 Mass. (4 Metc.) 49 (1842).

485. In particular, Shaw invokes general policy considerations to justify interpreting the specific employment relationship to contain *certain* implied in law features. Although one key consideration was the employee's ability to quit his post if he noticed his fellow servants were guilty of misconduct or negligence, Shaw refused to qualify his "practical rule" based on whether or not the plaintiff was actually in a position to observe or influence the conduct of the negligent fellow servant. *Id.* at 52. Such a qualification would have required entrusting the implementation of the rule to the impious hands of jurors. *Id.* at 55.

State a moral case to a ploughman and a professor. The former will decide it as well and often better than the latter, because he has not been led astray by artificial rules.<sup>486</sup>

And as Karl Llewellyn would later write, the failure of nineteenth-century legal formalists to see through their own rationalizations—to see that the legal “certainty” they achieved was “uncertainty for the non-law-tutored layman in his living and dealing”—blinded them to the inevitable and legitimate field of “free play” in the law for the operation of moral sense.<sup>487</sup>

Unhappily, although the legal realists were to realize that “*layman's* certainty through law” can only come through renewed emphasis on the “fairness” of particular outcomes, their devotion to centralized social experimentation meant no serious thought was given to reviving the moral authority of the decentralized jury. Instead, they ratified existing practice by formally entrusting the subjective job of balancing equities to the hierarchical elites of appellate courts and legislatures, “with the primary governing institution being administrative agencies, whose staffing and activities were not subject to popular check.”<sup>488</sup> In this way realism is said to have “paved the way” conceptually for political absolutism in America, at the direct expense of institutions of popular sovereignty like the jury.<sup>489</sup>

b. *Fairness and the Rule of Law.* Shaw, building upon Chase's foundation, was perhaps the key figure in the judicially-orchestrated demise of the jury. He insisted that trial judges instruct juries as to their “moral duty” to accept the law as given them. In so doing Shaw was misled by John Adams' ambiguous verbiage in the Massachusetts' Constitution of 1780 espousing the ideal of “a government of laws, not of men.” As already suggested, this ideal of the rule of standing laws actually had less to do with the citizen's duty to obey such laws than with the terms upon which he could be punished. Written laws were a necessary but not a sufficient con-

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486. 6 JEFFERSON PAPERS, at 258.

487. Llewellyn, *Some Realism About Realism Responding to Dean Pound*, 44 HARV. L. REV. 1222, (1931).

488. White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in early Twentieth Century America*, 59 VA. L. REV. 999, 1025 (1972).

489. Purcell, *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIS. REV. 428, 438 (1969). Accord R. POUND, CONTEMPORARY JURISTIC THEORY 9 (1940).

dition to punishment, given the time-honored principle of jury equity. A surprising number of modern scholars, however, reject the idea that juries should be allowed to make *one-way* exceptions from harsh statutory or decisional rules as founded on "an unprincipled distinction."<sup>490</sup> But the converse privilege to extend the scope of laws to punish activities not within its letter would take an inordinate toll of liberty, since no one could be certain what activities are lawful. The distinction is historical and is captured in the phrase *nulla poena sine lege*. One suspects that modern criticism of this self-evident distinction is linked to the apotheosis of "law-abiding" by pragmatic positivist/legal realist types, in order that social experimentation may be smoothly and scientifically carried out.<sup>491</sup>

Still, it is disturbing that the first federal judge identified by Professor Howe as having charged a jury on its "moral duty" to take the law from the judge should have been Mr. Justice Story, otherwise a champion of the jury. The case was the 1835 circuit court trial in *U.S. v. Battiste*,<sup>492</sup> a Slave Trade Act prosecution before a northern jury; and Story was arguing for *acquittal* of the defendant as a matter of law. So it turns out that Story's seminal argument is fully consistent with the libertarian model that "a government of laws not of men" properly translates as *nulla poena sine lege*.<sup>493</sup> In the case Story permitted Daniel Webster to argue to the jury that had a "moral right" to decide the correct interpretation of the law for themselves. Having allowed Webster his say, Story charged the jury that he disagreed with Webster as to the last point. Otherwise, if juries were truly entitled to decide cases *strictly* "according to their own notions or pleasure," he would "abstain from the responsibility of stating the law."<sup>494</sup> Continuing, Story asserted that his right to charge the jury as to the law would not in any case "operate injuriously" to the merits of the prisoner's case, since "an intelligent jury can

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490. See, e.g., Redish, *supra* note 159, at 508, and Simson, *supra* note 158, at 515.

491. See e.g., United States v. United Mine Workers of America 330 U.S. 258, 307 (1947) (Frankfurter, J., concurring), in which Frankfurter attempts to demonstrate how "the historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society."

492. See Howe, *supra* note 158, at 589. *U.S. v. Battiste*, 25 Fed. Cas. 1042 (C.C.D. Mass. 1835).

493. Accord, J. VAN DYKE, JURY SELECTION PROCEDURE 230-32 (1977).

494. 25 Fed. Cas. at 1043.

understand the principles of law applicable to the subject *as well as the court*; for they are the principles of common sense[!]"<sup>495</sup> In other words, like Justice Wilson in *Henfield's Case* he proposed to enter into a reasoned dialogue with the jury—not engage in *ipse dixit*. So he explained to the jury that balanced against their prerogatives was the "most sacred constitutional right" of the defendant to have the jury take the law from the judge and try him according to the "fixed law of the land." Otherwise, if the jury could simply remodel the law *ad libitum*, the defendant would be at the mercy of their prejudice or mistake:

[In] case of error, there would be no remedy for the injured party; for the court would not have any right to review the law as it had been settled by the jury.<sup>496</sup>

That said, Story went ahead to take careful issue with Webster's technical arguments, suggesting that they would place an impossible burden of proof on the government and would prescind from the operation of the statute a class of cases where the "public mischief" was as great, even though another "equally natural" interpretation of the statute would avoid these counterintuitive results. Then he delivered his true message to this northern jury. There was "no question of fact" concerning the defendant's role in the transaction. He merely transported the slave for hire. As a result, Story argued that the defendant should be acquitted as a matter of law, since it would confound all "moral distinctions" to treat the mere act of transportation as a crime of piracy punishable by death.

The problem of judicial review to which Story adverts seems to reflect the existence of genuine confusion in federal practice at the time as to the power of judges to order retrials to review convictions in capital cases. Despite some English precedent that the only relief for the prisoner in such a case was delay until a pardon could be obtained from the King,<sup>497</sup> the libertarian model (not to mention widespread state practice at the time) suggests the obvious solution that jury verdicts in criminal cases are final only if favorable to the defen-

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495. *Id.*

496. *Id.*

497. JOSIAH QUINCY ED., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772*, Appendix II ("Powers and Rights of Juries"), 564-565 (1865).

dant. The court should be free to order a new trial when it feels that an unfavorable verdict is contrary to the law or against the weight of the evidence. Modern rules of procedure have added the power to direct a verdict or set aside a conviction.<sup>498</sup> Appellate review as to errors of law would still be important, in the event of a conviction, to be sure that the defendant had received the equal protection of a uniformly favorable charge as to the law. That, however, was only his first level of protection. Then came the decision by the jury as to whether the law, as charged by the judge, could fairly be applied under the circumstances of the instant case. Story's opinion in *Battiste* was explicitly grounded in a libertarian concern for the defendant, based on the apprehension that a northern jury would turn the words of defense counsel against his client and righteously convict irrespective of the technical scope of the statute.

In 1771 John Adams himself, at a time when he was the first lawyer of the province, wrote that "[t]he great principles of the Constitution are intimately known; they are sensible felt by every Briton; it is scarcely extravagant to say they are imbibed with nurse's milk and first air."<sup>499</sup> As a result, if the judge should explain or interpret the law to a juror contrary to these principles, "it is not only his right, but his duty" in that case to find a verdict "according to his own best understanding, judgment, and *conscience*."<sup>500</sup> Obviously, for Adams, the "great principles of the Constitution," which are designed to constrain the operation of centralized government, would induce jurors to disregard instructions only in order to be more lenient than the law would otherwise dictate. Likewise, it was said of John Dickinson that he viewed it as the role of "veniremen" to "*mitigate* the inequity of the law and resist practices inconsistent with America's new republicanism."<sup>501</sup>

c. *Nationalism and Nullification.* Most of all, Shaw was misled as the proper role of the jury by the implications of the raging controversy over the federal Fugitive Slave Laws. Following in Hamilton's footsteps, Shaw concluded that the spectre of northern jury nullification threatened the entire structure of American "ordered liberty"—namely, the fed-

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498. See A. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 178 (1972).

499. Quincy, *supra* note 497, at 566.

500. *Id.* at 567 (emphasis added).

501. G. ROWE, THOMAS MCKEAN 216 (1978) (emphasis added).

eral Union. The Fugitive Slave Acts of 1793 and 1850 reflected Congress' belief that the fugitive slave clause of the Constitution entitled southern slaveowners to a summary extrajudicial method of retrieving runaways.<sup>502</sup> Although the clause itself was one of the fundamental compromises struck at Philadelphia, Abolitionists in the 1830's succeeded in getting many northern states to make writs of *homine replegiando* (personal replevin) available to alleged fugitives, in order to supplement the summary federal procedure.<sup>503</sup> The writ carried the right to a jury trial on the crucial factual question of whether the individual was in fact a fugitive slave. Shaw in the 1842 *Latimer Case* refused on federal supremacy clause grounds to recognize the Massachusetts' statute affirming the availability of the common law writ in such cases. Meanwhile, a symmetrical phenomenon was occurring in the South, where South Carolina States' Rightists and Anti-Unionists attempted to get local federal juries to nullify the 1828 Tariff of Abominations. In an unreported case Federal District Judge Thomas Lee, sitting in Charleston, refused to allow the question of the constitutionality of the tariff to be put to the jury—but on technical grounds.<sup>504</sup>

Other federal judges faced a similar dilemma. Forced to try criminal cases against alleged aiders and abettors of fugitive slaves before northern juries, they feared that the spectacle of sympathetic exonerations would further erode the stability of the Union. Jurors were repeatedly instructed that they were not to follow their conscience, but rather the "artificial morality" of the law as laid down by Congress.<sup>505</sup> These federal charges were by and large consistent with the libertarian model of the jury. They represented reasoned attempts, by judges to persuade juries that the fugitive slave clause of the Constitution embodied a specific, sacred pledge by "the People" of the northern states to protect the southern positive law institution of slavery.<sup>506</sup> It was therefore a *pro tanto*

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502. W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848*, at 80 (1977). R. COVER, *JUSTICE ACCUSED* (1975).

503. Cover, *supra* note 502, at 161, 171.

504. See D. MORGAN, *JUSTICE WILLIAM JOHNSON* 268-272 (1954).

505. *Van Metre v. Mitchell*, 28 *Fed. Cas.* 1036 (C.C.D. Pa. 1853) (No. 16,865) (Grier, J.); *Norris v. Newton*, 18 *Fed. Cas.* 322 (C.C.D. Ind. 1850) (No. 10,307) (McLean, J.); *Vaughn v. Williams*, 28 *Fed. Cas.* 1115 (C.C.D. Ind. 1845) (No. 16,903) (McLean, J.).

506. To be sure, convictions under the Fugitive Slave Laws were difficult to obtain, despite these "moral" promptings from the bench. See L. FRIEDMAN, *THE WISE MAJORITY* 2850 (1971); Sax, *Conscience and Anarchy*:



contractual waiver of the customary right of juries to serve as a mini-plebiscite on the fundamental fairness of criminalizing certain acts. In fugitive slave cases Northern juries had a *higher* moral duty, namely, upholding their side of the constitutional compact.

State and federal judges alike, under oath to support the supremacy of the national Constitution, opposed the political attempts by Nullifiers and Abolitionists to use local juries as a wedge to split the nation apart. For similar reasons Samuel Chase had rejected any inference that a jury's right to decide the law of the case extended to the validity of applicable statutes.<sup>507</sup> Employing the clearly erroneous assumption that such a *right* would have to extend to all statutes or to none, Chase dismissed the argument in the context of the Sedition Act on the basis that the general principle would have a "direct tendency to dissolve the Union."<sup>508</sup> He confidently predicted, for instance, that the principle of nullification would mean that federal laws "to impose taxes w[ould] be obeyed in one state and not in another, unless force be employed to compel submission"—and on its revenues the very existence of the national government depends. Here we have shades of *The Federalist*, No. 83.

Yet a broad middle ground was clearly open to Chase and the others, short of excluding juries from any participation in—read, "interference with"—what they viewed as the exclusive Article III structural role of federal appellate courts in assuring uniform, unbiased review of the constitutionality of federal laws. First, even if the Sixth Amendment were read to entitle juries to share in the Article III judicial power,<sup>509</sup> it would still be possible to reject any putative right to have juries entertain arguments that a federal statute was void *ab initio* due to a general, unreconstructed opposition to other specific provisions of the same Constitution, such as the fugitive slave clause or the critical Article I power of a distant

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*The Prosecution of War Resisters*, 57 YALE REVIEW 481 (1968).

507. *United States v. Callendar*, 25 Fed. Cas. 239, 256 (C.C. Va. 1800).

508. *Id.*

509. In fact Chase seems to have also been making the more subtle, but for our purposes irrelevant, technical observation that the Judiciary Act of 1789 made no allowance for a federal jury to play any role in the appellate Writ of Error process by which a uniform national interpretation of the Constitutional rule of law was guaranteed. *See, e.g., id.* at 255. That is consistent with the distinction as to "facial" versus "as applied" review being developed in the text.

Congress to tax the people of the states directly. The Constitution contained no such seeds of self destruction. More importantly, it would have been possible to reconcile the nationalism concerns that animated Chase *et al.* and the libertarian model of the Sixth Amendment through simple recognition of the jury's right to find a statute, not facially void for general reasons of policy, but rather "ineffective" as applied to the case at hand due to a showing of particularized unfairness.<sup>510</sup>

In other words, the libertarian model being articulated here concedes Chase's structural argument that Sixth Amendment juries have no charter to protect states' rights by deciding "what [jurisdictional] restrictions are expressly or impliedly imposed by [the Constitution] on the national legislature."<sup>511</sup> For the clear Article III role of the federal appellate courts, in policing the general boundaries of federalism, is to preserve the supremacy of national law against systematic local nullification. But that role can be vindicated, without unnecessary sacrifice of the historic substantive dimensions of trial by jury, through recognition of the ancient distinction between "facial" and "as applied" review of statutes—reserving the former only to the appellate courts.

Despite having adjured the U.S. Marshall "not to put any of those creatures called Democrats on the jury," Chase, on a self-described mission in *United States v. Callendar* to teach uppity Virginians a lesson in the difference between "liberty" and "licence,"<sup>512</sup> refused to acknowledge even the constrained *right* of the jury to review the equitable application of the law. He was not about to concede the jury a juridical inch, for the practical reason that once any *right* is granted it to nullify "no line can be drawn, no restriction imposed on the exercise of such *power*."<sup>513</sup> But Chase's argument proves too much. His ultimate quarrel is with the finality of a jury's general verdict of acquittal. Because of *that* power nothing a judge either says or fails to say in his instructions to the ju-

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510. The "void *ab initio*" / "merely ineffective" distinction, which parallels the facial/as applied dichotomy, lies at the heart of Professor Thorne's widely accepted analysis of Coke's opinion in *Dr. Bonham's Case*. THORNE ED., INTRODUCTION TO A DISCOURSE UPON THE EXPOSITION AND UNDERSTANDING OF STATUTES 77-88 (1942). *see* Bailyn, *supra* note 337, at 177. For a contrary view of Coke's meaning, *see* Berger, *supra* note 177, at 371-393.

511. *Callendar*, 25 Fed. Case at 255.

512. *Id.* at 258 (Editorial Note 1).

513. *Id.* at 256.

rors, or precludes counsel from saying, can completely control their ability to disrupt a national statutory scheme through acquittal.<sup>514</sup>

But it was left to Chief Justice Shaw to transpose the very different arguments in *Battiste* and the federal fugitive slave and tariff act prosecutions to the context of a locally-unpopular and state-imposed prohibition law. Massachusetts' juries were in effect to be instructed to *convict* a defendant on the basis of the supremacy of all statutory law. The only similarity to the other cases lay in Shaw's specious argument that Adams' paean to "a government of law, not of men," effectively emended by Shaw to read "a government of legislators, not of jurymen," conferred special sanctity on *all* legislative acts. He read the phrase in the Massachusetts' Constitution as if it were the fugitive slave clause writ large—a blanket agreement by the people to submit to the artificial morality of positive law in all matters and a renunciation of their customary right to impose their moral sense on the application of the law *via* participation on juries. It is perhaps not inapposite to note that one modern scholar of the period has characterized the temperance movement in Massachusetts as an attempt by a declining Federalist-Calvinist elite to "reestablish its prestige by 'lifting' the rude mass to a style of life enunciated by an aristocratic moral authority."<sup>515</sup>

Shaw concluded that jury discretion over the law in any case violated the fundamental republican notion of an appellate-based "rule of law." Shaw was not alone. Similar transpositions occurred elsewhere.<sup>516</sup> Despite prevalent early practice to the contrary, as well as popular protest, such appellate rea-

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514. On what principled basis, therefore, could Chase stop short of holding that the appellate mission of the federal courts to make the nation safe for national law required that the insufficiency of the evidence in a criminal case to convict be deemed *a matter of law* (backed up by the power to order a new trial), the "double jeopardy" clause of the Fifth Amendment notwithstanding? By the end of the nineteenth century Mr. Justice Brewer would cut this gordian knot in *in re Debs*. In that case the Court held that the Sixth Amendment did not preclude lower courts from employing criminal equity, *i.e.*, injunctions backed up by the contempt power, as an auxiliary method of federal law enforcement in communities where prosecutions "would be doomed in advance to failure," thereby eliminating the jury altogether. Otherwise, Brewer reasoned for the Court, "the whole interests of the nation . . . would be at the absolute mercy of a portion of the inhabitants of that single state." *In re Debs*, 158 U.S. 564, 582 (1895).

515. J. GUSFIELD, *SYMBOLIC CRUSADE* 42, (1963).

516. See Howe, *supra* note 158, at 590-616, and Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 *YALE L.J.* 70 (1964).

soning resulted in American juries being instructed increasingly during the mid-to-late nineteenth century that they had a "moral" duty to take the rule of law from the trial judge and mechanically apply it to the facts of the case, however grotesque the result. The jury was admonished to disengage its conscience and submit to the "artificial morality" of the legal system. Vociferous popular protests against such high-handed judicial power plays eventuated as in Massachusetts in statutes declaratory of the libertarian model of the jury, but most influential appellate courts, like Shaw's, ignored such sentiment and gutted the acts as contravening the constitutional primacy of a uniform rule of judicially-administered law. The Massachusetts' statute addressed the underlying problem in *Battiste* by confirming that judges could overturn convictions and order new trials.<sup>517</sup> Yet in a critical concession to popular mythology, even Shaw (as Chase before him) permitted defense counsel to argue the principles of law to the jury and to contest the judge's view of constitutionality in the teeth of an imminent instruction on the jury's duty to accept the opinion of the court.<sup>518</sup> This judicial effort at moral suasion proved no more successful in the area of state prohibition law prosecutions than it had in Fugitive Slave Law prosecutions. For that reason perhaps, judicial attitudes began to harden in mid-century.

Pursuing Shaw's own inexorable logic of the "rule of law," but conveniently rejecting his quaint procedural rule, American courts (including the Supreme Court in 1894 in *Sparf and Hansen*)<sup>519</sup> eventually denied defendants the right through counsel to argue to the jury the unconstitutionality of the statutory law, either on its face or as applied. The issue of constitutionality was to be left exclusively to the appellate courts, which thereby secured for themselves the right to have the final discretionary "say" in the American democracy.

Professor Horwitz has criticized the analogous private law process by which an "aristocratic" nineteenth century bench displaced the jury's simply communal notions of justice with a sort of class ideology.<sup>520</sup> In the area of contracts, for

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517. See *Commonwealth v. Anthes*, 5 Gray 185 (Mass. 1855). The provision may have been modeled after Fox's Libel Act, passed by Parliament in 1792.

518. *Id.*

519. *Sparf and Hansen v. United States*, 156 U.S. 51 (1885).

520. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977).

example, Horwitz traced how "procommercial forces" supplanted the eighteenth century theory of a "customary or fair price" with the objective "will" theory of contracts. Following Mansfield's lead, American judges looked only to the "four corners" of the contract for its meaning, the extrinsic circumstances of the parties being irrelevant. Any ambiguities or gaps would be resolved according to artificial, instrumental rules of law, so that by mid-century the interpretation of a contract was purely an objective question of law. Thus, as in the public law area, American civil courts created during the second quarter of the century

a great intellectual divide between a system of formal rules—which they managed to identify exclusively with 'the rule of law'—and those ancient precepts of morality and equity, which they were able to render suspect as subversive of the 'rule of law' itself.<sup>521</sup>

Whatever the justification for that process in the private law sphere, its public law manifestations are even more difficult to defend.

#### 4. Murray's Lessee Revisited

By the end of the nineteenth century the once noble jury had been effectively reduced to the status of a menial, fact-finding adjunct of the court. It is perhaps little wonder then that when the Supreme Court got around to taking the "due process" guarantee of the Fourteenth Amendment seriously, even so-called libertarian justices like Peckham and Field dismissed the idea that trial by jury was in any way essential to implementing the notion of fundamental fairness they associated with the phrase.<sup>522</sup> They would have rejected as ludicrous any suggestion that the jury was in fact constitutionally necessary to operationalize the meaning of "fundamental fairness." (Otherwise, they might have spared themselves their own later anti-majoritarian excesses.) By contrast, the key libertarian framers of the Fourteenth Amendment, which was ratified in 1867, clearly did consider trial by jury to be one of the principal guarantees of section 1. Representative Bingham, framer of that section, described to the House one aspect of the situation the Amendment was

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521. *Id.* at 188.

522. *See, e.g.,* Maxwell v. Dow, 176 U.S. 581, 603 (1900) (Peckham, J.): "Trial by jury has never been affirmed to be a necessary requisite of due process of law."

designed to redress as follows: "[The States] denied trial by jury, and [the citizen] had no remedy. They took property without compensation, and he had remedy."<sup>523</sup> Nor was this juxtaposition of the issues of juries and just compensation necessarily coincidental.

In contemporaneous debate the scholarly Radical Representative William Lawrence of Ohio, formerly a state judge and legal editor, adduced the authority of Coke for the proposition that even in some public law matters the Due Process Clauses of the Fifth and Fourteenth Amendments require "trial by a jury of twelve" and not simply "an act of the Legislature" purporting to establish some conclusive administrative process. In particular, Lawrence opposed a bill that authorized the federal condemnation of land through a procedure in which damages were assessed by "three disinterested and discreet . . . commissioners."<sup>524</sup> He argued that the right to jury trial, now guaranteed (as he assumed) at both the state and federal levels, properly extended to *all* just compensation actions:

But since the adoption of the fourteenth [amendment], it may well be maintained that a common law jury trial is secured. Its language is—

Nor shall any State deprive any person of . . . property without due process of law.

This is broad and comprehensive. It is not limited to ordinary law proceedings in courts, but it comprehends the cases where a State may exercise the power of eminent domain.

The condemnation of private property for public uses is not a subject of equity jurisdiction, or one which can be regulated by a statutory proceeding, so as to take it out of that "due process of law" which secures a common-law jury trial. . . .

Juries represent the impartial, honest judgment of enlightened people. Legislative or judicial commissioners may represent special interests or be manipulated for special

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523. See CONG. GLOBE, 42d Cong. 1st Sess., App. 85 (1871) (hereinafter *Globe App.*). This and other of Bingham's explications of his handiwork were recently adduced by the Supreme Court in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 685 n.45, for the proposition the Fourteenth Amendment "unequivocally prohibited uncompensated takings." *Id.* at 687. Cf. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1956 (T. Cooley ed. 1873).

524. See CONGR. GLOBE, 41st Cong., 3rd Sess., 1245 (1871).

purposes.<sup>525</sup>

A century later these arguments again rang through the House Chamber. In a successful effort to repeal the three-man commissioner system employed on TVA condemnations, Representative Quillen hailed the "traditional American right to trial by jury" in eminent domain as the "soundest and fairest manner so far devised for determining *equity* for all parties concerned."<sup>526</sup> Joined by Senators Baker (Tennessee) and Cooper (Kentucky), Quillen got the Congress to make Rule 71A(h), with its *optional* jury, applicable to the TVA.<sup>527</sup> There is a circular irony in this result that should not be overlooked.

In the beginning the key justification given by the Advisory Committee on Rules for making the Rule 71A(h) jury optional, rather than mandatory as demanded by the A.B.A.,<sup>528</sup> was the Congressionally-approved TVA system, together with glowing judicial endorsements of its effectiveness in producing uniform judgments.<sup>529</sup> The latter "cost containment" concerns were of course dressed up in rhetoric about the danger of "[d]isproportionate awards . . . creat[ing] dissatisfaction and ill will" among condemnees.<sup>530</sup> But in the TVA debates Senator Baker roundly asserted that in such actions juries and equity are "infinitely superior" to commissioners and uniformity.<sup>531</sup> Nonetheless, it was Senator Baker who introduced the successful substitute bill to place TVA condemnations under Rule 71A(h). Indicating his own preference for an "absolute right to trial by jury" in such cases, Baker in effect suggested that Congress bow to the Supreme Court's apparent view that *justice* sometimes requires the exclusion of a public law jury. Still, Senators Baker and Cooper and others made it clear that the Rule 71A(h) option *not* to employ a jury should be exercised only in "extraordinary, unique, and unusual circumstances," circumstances they

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525. *Id.*

526. 114 CONG. REC. 26,948-26,949 (1968) (remarks of Representative Quillen).

527. Act of September 28, 1968, Pub. L. No. 90-536, 80 Stat. 885, amending 16 U.S.C. § 831x (1964).

528. See ABA, *Report of the Committee on Amendment of Rule 71A of Federal Rules of Civil Procedure*, 81 A.B.A. REP. 463, 465 (1956).

529. *Fed. R. Civ. P.* 71A, Notes of Advisory Committee on Rules (Supplementary Report).

530. *Id.*

531. 113 CONG. REC. 36,980 (1968) (remarks of Senator Baker).

could not easily envision.<sup>532</sup> Thus today the Court, by treating the condemnation jury as optional and severely curtailing its equitable discretion over damages where employed, is acting the part of a self-appointed protector of the fisc from Congress' own sense that equity excels uniformity in such matters—an odd judicial mission, to say the least.

In Lawrence's case, the former Abolitionist was attempting to nip in the bud the untoward, and apparently calculated, jury implications of Justice Curtis' opinion in *Murray's Lessee*.<sup>533</sup> As noted earlier, Curtis, who was a protege of Chief Justice Shaw, championed through dicta the counter-intuitive proposition that the Seventh Amendment guarantee was inapplicable in the precise public law arena where it was most needed to mediate between citizen and state. Curtis grounded that conclusion on (1) the observation that since there was a Seventh Amendment guarantee of a civil trial by jury, the separate Fifth Amendment Due Process Clause was an implicit recognition of the permissibility of summary Article I legislative courts and (2) the equally suspect assertion of a doctrine of vicarious sovereign immunity for officials of the government. That use of the Due Process Clause to undermine the Seventh Amendment, however, studiously ignored the historical fact that the Seventh Amendment, with its express jury trial guarantee, was the more sought-after of the two provisions in the Bill of Rights precisely because its proponents (following Coke) identified due process of law with the common law procedure of trial by jury. The separate Due Process Clause of the Fifth Amendment was viewed as an afterthought, as innocuous window dressing.<sup>534</sup>

But Curtis' inattention to such inconvenient constitutional detail was not necessarily induced by the merits of the tax collection dispute before him. He had bigger fish to fry.

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532. See, e.g., *id.* at 36,980-36,981 (remarks of Senator Cooper).

533. *Murray's Lessee v. Hoboken Land Improvement Co.*, 59 U.S. (18 How.) 272 (1855).

534. After all, where the jury trial and due process language appeared *together*, as in Magna Carta and the Massachusetts' Constitution, in provisions proscribing any deprivation of rights "but by the judgment of his peers, *or* the law of the land," it was read on Coke's authority as implying a conjunctive "or" and meaning simply "a trial by jury in a regular course of *legal* and *judicial* proceedings." Chief Justice Shaw so held in *Fisher v. McGirr*, 1 Gray 1, 37 (1854), the first case to declare a Massachusetts' general statute unconstitutional. Shaw held that a summary statutory proceeding *in rem*, by which stores of liquor were to be sequestered, forfeited, and destroyed, was defective since it failed to guarantee a suitable postdeprivation remedy, including a jury trial.



A staunch nationalist, he was the Fillmore Administration's point man for the enforcement of the Fugitive Slave Act in Eastern New England. As a result, he was an ardent foe of those who claimed its summary procedure, which employed commissioners to issue *ex parte* certificates of removal for captured fugitives, violated the Seventh Amendment. Likewise, in a Fugitive Slave Act prosecution on circuit in 1851 he bent Story's opinion in *Battiste* to his nationalistic will, charging the jury that they had a duty under the Supremacy Clause to convict aiders and abettors of escape.<sup>535</sup> Where Story had reasoned with the jury as to the responsible exercise of its historic prerogative, Curtis—like Shaw before him—demanded that the local jury prostrate itself before the imperative demands of the centralized administration of federal law.<sup>536</sup> Fighting rhetorical fire with fire, he responded to the incendiary suggestion by counsel that the jury could find the Act unconstitutional on general principles<sup>537</sup> by pointing to the Article III role of the Supreme Court and denying that local jurors could possibly enjoy *any* law-finding privilege, however qualified.<sup>538</sup> As one biographer put it, "Curtis, who believed in the elitist duty of the educated to lead the people, became upset when the people talked back."<sup>539</sup>

Yet in 1854 the people had talked back to Curtis through the Wisconsin Supreme Court. With its decision in *In re Booth*, it became the first American court to declare the juryless removal procedures of the Fugitive Slave Act violative of the Seventh Amendment.<sup>540</sup> Anticipating the inevitable objection that the procedure to reclaim a fugitive did not correspond to any specific "Sui[t] at common law" in 1791, the Wisconsin court embraced Justice Story's position in *Parsons v. Bedford*<sup>541</sup> (and what would afterwards be Representative Lawrence's position before the House), namely, that jury actions were intended to be the great residual due process category for legal issues. As the court cogently reasoned: "Were it otherwise, Congress need only to change the common law form of procedure, to nullify the right of trial by

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535. *United States v. Morris*, 26 Fed. Cas. 1323 (C.C.D. Mass. 1851) [No. 15,815].

536. *Id.* at 1334.

537. *Id.* at 1331.

538. *Id.* at 1334.

539. See Gillette, *supra* note 332.

540. 3 Wis. 1 (1854).

541. 28 U.S. (3 Pet.) 434 (1830).

jury in all cases.”<sup>542</sup> To the counter-argument that the body of the Constitution itself specifically contemplated a “summary mode of proceeding,” the court responded that the *later* adoption of the Seventh Amendment countermanded any such inference. In an action originating in the federal system, Congress could not authorize any entity other than an Article III jury to render what was essentially a final judgment in a legal dispute involving whether or not “services or labor [was] due” from the alleged slave to the alleged master.

It was the very next year in *Murray's Lessee* that Curtis went out of his way in dictum to affirm that in summary “public right” actions involving the regulatory power of Congress, no ultimate post-deprivation remedy need be afforded, much less a jury. Still, it requires a moment's reflection to see why this was not an act of supererogation on Curtis' part. After all, the potent argument that the Seventh Amendment constitutes a *pro tanto* repealer of any summary procedures originally implicit in the Fugitive Slave Clause hinges on the assumption that free unnaturalized black persons, though born as slaves, have a constitutional right as citizens of the United States to sue in federal courts in diversity of citizenship cases.<sup>543</sup> But as the *Dred Scott* decision would demonstrate, Chief Justice Taney and other justices refused to buy the Abolitionists' critical premise.<sup>544</sup> On the other hand, because Curtis *did* agree that Article III jurisdiction extended to alleged free blacks, he must have deemed it a special challenge, given his role as Daniel Webster's cat's-paw, to defuse the enthusiasm generated by *In re Booth*. (Curtis found himself on the “right” side in *Dred Scott* because he characteristically affirmed the power of Congress to impose a centralized solution to the national problem of slavery on the territo-

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542. *In Re Booth*, 3 Wis. at 15.

543. For evidence that Abolitionists were well aware before *Dred Scott* of the centrality of this assumption, see, e.g., D. FEHRENBACHER, *SLAVERY, LAW, & POLITICS* 152 (1981).

544. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1951). Given that Taney's was the acknowledged opinion of the Court, the better assumption is that all the justices save McLean and Curtis, who dissented on the point, concurred in the basic alternative holding that no unnaturalized free blacks (whether or not born as a slave) or slave can be a U.S. citizen for Article III purposes. It is clear that Taney, Wayne, and Daniel excluded free blacks from the ranks of citizenship, while Campbell and Catron preferred to rest their jurisdictional vote on the substantive conclusion that Scott was still a slave. See Fehrenbacher, *supra* note 543, at 177-82.

ries—and presumably the existing states as well.<sup>545</sup>) He attacked *In re Booth* in *Murray's Lessee* by denying that the necessary condition of black citizenship would be sufficient to invoke Article III jurisdiction with its attendant Seventh Amendment guarantee. Instead, Curtis asserted that the separate Due Process Clause is, as it were, a monument to a whole set of possible extra-judicial procedures that constitute implicit, historically-grounded exceptions to Article III.

Ironically, the substantive holding in *In re Booth* was partially vindicated by Justice Brandeis' 1922 opinion for the Court in *Ng Fung Ho v. White*.<sup>546</sup> In a case involving the deportation of aliens (not slaves) who claimed to be citizens (not free), even Brandeis embraced for the occasion a concept of due process of law which mandated a more expansive, albeit appellate-administered, doctrine of "jurisdictional fact." In short, Congress was denied the right to confer discretionary authority to deport on the basis of a mere "suspicion" of alienage:

Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. . . . For where there is jurisdiction a finding of fact by the executive department is conclusive. . . . To deport one who so claims to be a citizen, obviously deprives him of liberty. . . . Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. *The difference in security of judicial over administrative action has been adverted to by this court.*<sup>547</sup>

Unfortunately, Brandeis refused to acknowledge any constitutionally-endorsed "difference in security" in factual review by juries over judges in public law matters. The next subsection focuses on the comparative advantages of the former in that setting, while the next section suggests how substantive due process grew up out of this procedural unwillingness of judges to turn public law fact-finding discretion back to the jury. But first a word should be said about why the public law

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545. It is noteworthy that Curtis' brother George T. Curtis, a conservative Massachusetts Whig, became at the last minute the second of only two attorneys to represent Scott before the Supreme Court. See Fehrenbacher, *supra* note 543, at 155.

546. 259 U.S. 276 (1922).

547. *Id.* at 284-85 (emphasis added).

fact-finding prerogatives of juries are not necessarily subject to the same balancing calculus used to curtail their discretion in private law matters.

### 5. Commercial versus Constitutional Equity: The Comparative Advantages of Juries

The libertarian model of the jury is not undermined by the well-known fact that increasing nineteenth century commercialization put effective pressure on the common law system to generate formal rules in the interest of certainty and predictability.<sup>548</sup> Those early judges can to some degree be excused for responding to such pressures by directing verdicts in cases in which the jury's unique moral perspective was simply irrelevant. Commerce is like checkers. Except to the extent new judicially-crafted rules are retrospective in operation (and they need not be), it is more important that such rules be uniform and understood than that they be ideally fair.<sup>549</sup> Once an individual has voluntarily submitted to the arbitrary rules of the game, it makes no moral sense to allow him to protest later on to a jury that one of the ground rules is unfair as applied to his situation. Under the "artificial morality" of the game, unfairness simply does not exist. Montesquieu, among others, recognized the need for special commercial rules of law of peculiar inflexibility.<sup>550</sup> The same basic logic would apply in certain public law areas, where, for

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548. See Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 705-709 (1913).

549. On the need for rigid rules to govern commercial transactions, see *Ralston v. Hamilton* (1862), 4 MACQ. 397, 405 (Lord Westbury) ("Their justice or injustice in the abstract is of less importance to the community than that the rules themselves shall be constant and invariable.") Compare the rationale of the Supreme Court in recently deciding that henceforth horizontal maximum-price agreements will be deemed *per se* violations of the Sherman Act:

The costs of judging business practices under the rule of reason . . . have been reduced by the recognition of *per se* rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. *As in every rule of general application, the match between the presumed and actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.*

*Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 343-44 (1982) (emphasis added).

550. C. MONTESQUIEU, *L'ESPIRIT DES LOIS*, liv., xx, chap. 18.

example, an employee has been hired with the express understanding that he may be fired at any time—with or without cause. He has submitted to a game in which his future success hinges, as it were, on nothing more logical or fair than the roll of the dice. That explains the result in the recent controversial Fourteenth Amendment due process case of *Bishop v. Wood*,<sup>551</sup> in which the Supreme Court upheld the application of a rule of law that ambiguous contracts with the state to be construed against the employee.

It is one thing to presume that a public employee walked into his contract with his eyes open, since word soon filters out that one must turn “square corners” in dealing with the state—and quite another to presume that each citizen at maturity walked into the social contract freely and with eyes open. The latter presumption, so dear to the hearts of pragmatic positivists and welfare economists of all stripes, rests on the theory that as part of the social contract each citizen received *ex ante* compensation for waiving the right to litigate the substantive fairness of any future governmental deprivations of his intangible expectations. Consequently, no one will be heard to complain that the government is estopped to frustrate individual expectations allegedly formed in reasonable detrimental reliance on the pre-existing state of law.

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551. 426 U.S. 341 (1976). The Supreme court noted that a local employee held office under a statute that could “fairly” be read to imply a promise of dismissal only for cause. Looking to local state law to test the substantive “sufficiency of the claim of entitlement,” to see in other words whether the employee had a “property” right which was subject to due process protection, the Court deferred to the decision of a lower court, *acting without jury*, that as a preliminary matter of law there had to be an express “guarantee” of continued employment, otherwise the individual’s employment was “at will.” *Id.* at 345. Here, again, perhaps we can excuse the court for standing the libertarian model of the jury on its head, *i.e.*, by putting the substantive cart before the procedural horse—to mix metaphors. Under that model it is the product of procedural due process, the jury’s verdict, that determines the ultimate substantive issue. In *Bishop* there was no right to have a jury arbitrate the issue of property *vel non* since (i) nothing passes by implication in a contract with the government and (ii) federalism dictates that the state (and local governments) retain important prerogatives over hiring and firing of their employees. With regard to principle (i), it is an accepted doctrine of federal employment law that employees’ entitlements derive only from the express provisions of applicable statutes and regulations, so that they are not entitled to rely on other officially-fostered expectations which would give rise to implied-in-fact contractual rights in a private setting. *See, e.g.*, *Kizas v. Webster* 707 F.2d 524 (D.C. Cir. 1983); *U.S. v. Larionoff*, 431 U.S. 864, 869 (1977); *Bell v. U.S.*, 366 U.S. 393, 401 (1961); and *Army Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728 (1982).

Surely in this context of the citizen on the street, Justice Brennan's protest in *Bishop* is more *a propos*: "the relevant inquiry is whether it was *objectively* reasonable for the [individual] to believe he could rely on [the continued benefit of the pre-existing entitlement]." <sup>552</sup> After all, the libertarian Lockean assumption is that individuals brought their property and talents into society with them and therefore would have been risk averse to giving government such broad powers. Brennan's suggestion that there should be a federal dimension to the definition of "property" for due process clause purposes partly coincides with the present argument—but with the twist that this article has advanced the Seventh Amendment jury, rather than the appellate Courts, as the principal fount of a new federal common law of "property" and "liberty." Juries can serve this role because the applicable rules of law are in fact generalized standards or principles of fairness that they are particularly suited to administer.

The use of juries for this purpose represents the choice of a particular kind of justice, for in jury trials the law "loosens its grip and allows the results to gravitate toward the *aequum et bonum*." <sup>553</sup> Whether the values of equity or of uniformity and predictability are more important must be evaluated, as Lord Devlin has noted, in relation to the type of case. As just suggested, cases involving the concepts of "liberty" and "property" under the necessarily implied terms of the social contract are *not* like cases involving commercial contracts. The statute of frauds and the parol evidence rule embody the concept that in discrete commercial transactions the parties have an opportunity to put everything clearly in writing—and if they fail to do so, they will not be heard to complain about the application to them of the artificial, but uniform rules of the commercial common law. <sup>554</sup> The concededly arbitrary "four corners" rule—associated with the objective "will" theory of contracts—is designed to encourage individuals to work out the details of their dealings in advance, so as not to tax the judicial system with the job of supplying their omissions.

As symbolized by the Ninth Amendment, however, no

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552. *Id.* at 353-354 (emphasis added).

553. P. DEVLIN, TRIAL BY JURY 155 (1966).

554. Cf. STAIR, INSTITUTIONS OF THE LAW OF SCOTLAND, Bk. 1, tit. x, § 4: "[N]ow when writing is ordinary, we allow no process for [oral] promises, as a penalty against those who observe not so easy a method."

parol evidence rule applies to the social contract. Because the social contract regulates a complex, ongoing contractual relationship, most of the important areas of future conflict must be left to arbitration according to certain prescribed practices or principles of justice. John Rawls has called the decision over what those practices or principles shall be "the 'solution' of [the] highest order 'game' of adopting . . . principles of agreement for all coming particular 'games' whose peculiarities one can in no way foresee."<sup>555</sup> Jefferson and the other libertarian framers rejected the Hobbesian notion that "justice [can be] founded in [the literal terms of] contract solely."<sup>556</sup> Instead, our collective moral sense had to be the basis for "man's politics and political rights;"<sup>557</sup> and what better institution to apply contemporary moral standards to the workings of government than the jury?

By comparison, judges are not suited to such moral line-drawing exercises, since there are no "neutral principles" for weighing competing notions of right.<sup>558</sup> As a result, judges tend to seek the refuge of mechanical rules of simple application, as we have seen in the Taking Clause area. There, for all its talk of "fairness and justice," the Supreme Court's bottom-line rule of thumb is a model of wooden simplicity: short of a physical invasion, an individual is not entitled to compensation for regulatory harm unless it renders his property vir-

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555. Rawls, *Justice as Fairness*, 67 THE PHILOSOPHICAL REVIEW 164, 170 (1958).

556. Wills, *supra* note 171, at 204, quoting L. CAPPON, THE ADAMS-JEFFERSON LETTERS 492 (1959). Compare Patrick Henry's assertion before the Virginia ratification convention of the need for a Seventh Amendment jury to "do equity" even in the context of private contract actions where changed circumstances militate against literal enforcement—

I admit that the American Union is dear to every man. I admit that every man, who has three grains of information, must know and think that union is the best of all things. But, as I said before, we must not mistake the end for the means. If . . . the rights of the Union are secure, we will consent. It has been sufficiently demonstrated that they are not secured. It sounds mighty prettily to gentlemen, to curse paper money and honestly pay debts. But apply to the situation of America, and you will find there are thousands and thousands of contracts, whereof equity forbids an exact literal performance. Pass that government, and you will be bound hand and foot.

3 ELLIOT, DEBATES, *supra* note 22, at 318-19, quoted in Wolfram, *supra* note 143, at 684-85.

557. Wills, *supra* note 171, at 213.

558. See Kadish, *Mythology and Criticism in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

tually worthless. With no jury feedback mechanism to indicate just how far out of sync with our contemporary moral sense the everyday results of the such mechanical rules are, little basis exists for their future refinement. As Holdsworth has written, judges in their hubris tend to build elaborate theories and rules, which all too often repress our fundamental intuitive notions of fairness and thereby "merely retard the attainment of a [just] conclusion without assisting in its formation."<sup>559</sup> By contrast, he noted, the jury has served for hundreds of years to keep legal rules in touch with everyday values as expressed through "contemporary common sense."<sup>560</sup>

The jury's task is to determine whether new statutory or decisional rules of law have the retrospective effect of impermissibly trenching upon individual expectations legitimately formed in reliance on the pre-existing state of the law. And, of course, what constitute reasonable expectations in the first place are a prophecy of what entitlements the ultimate factfinder will validate. Individual liberty is, therefore, effectively advanced to the degree that private actors are confident that they can intuit or otherwise predict the standards by which their actions are to be judged. Without such confidence individual enterprise (not to mention other forms of expression) may be chilled or paralyzed.<sup>561</sup> And certainly for the man on the street "the average man, applying contemporary community standards,"<sup>562</sup> is an easier factfinder to "handicap" than the professional jurist, whatever standards the latter may purport to apply.<sup>563</sup>

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559. 1 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 349 (1922). Cf. W. Shakespeare, *The Tragedy of Hamlet* (T. Brook and J. Crawford ed. 1947), III, i, 83-88 ("Thus conscience ['the ability to think' (ed.)] does make cowards of us all,/ And thus the native hue of resolution/ Is sicklied o'er with the pale cast of thought,/ And enterprises of great pitch and moment/ With this regard their currents turn awry . . .").

560. Cf. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609 (1908):

[I]t is the importance of the role of the jurors in tempering the administration of justice with common-sense and preserving a due connection of the rules governing relations with every-day needs of ordinary men that has atoned for the manifold and conspicuous defects of trial by jury and is keeping it alive.

561. Cf. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

562. *Miller v. California*, 413 U.S. 15, 24 (1972).

563. Cf. *People ex rel. Busch v. Projection Room Theater*, 546 P.2d 733, 745-753 (1980) (Tobriner, J., dissenting). In particular, Tobriner noted that

[c]entral to the *Miller v. California* test is whether "the average



In a similar vein the U.S. Supreme Court has decisively rejected any inference that there need be "uniform national standards" governing "precisely" how necessarily general constitutional standards are to be applied nationwide, community by community, since such application involves what are "essentially questions of fact."<sup>564</sup> Refusing to sacrifice regional diversity to "the [appellate] absolutism of imposed uniformity," by holding "the people of Maine" to the same effective obscenity test that governs "Las Vegas," the Court recently denied the necessary existence of a "provable 'national standard.' " In a tacit reappraisal of its own Article III role, the Court declined to establish a generalizable constitutional common law rule narrowly limiting regional diversity in the implementation of guarantees under our federal Constitution.<sup>565</sup> One implication of this allowance for regional diversity is that individuals can deliberately seek out communities where their expectations are more likely to be legitimated by their peers in the face of future exercises of the police power. Equally important, the possibility of regional diversity promotes inter-jurisdictional competition in providing a climate hospitable to the recognition of such intangible expectations against the competing claims of the government.<sup>566</sup>

Of course, as we have noted, the Supreme Court's rule-bound approach in the taking area can be explained by its policy of deference to by lower court determinations of the essentially factual question of the "as applied" fairness of particular measures. But as things now stand, the lower courts

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person, applying contemporary community standards" would find that the work appeals to the prurient interest. The jury, as a microcosm of the community, is the only vehicle fit to conduct that inquiry.

*Id.* at 746 n.1.

The fact that the public nuisance statutes relegate the decision [as to what is obscene] to a judge, rather than to a jury, exacerbates the chilling effect. A dealer in protected material who might have been confident that no group of 12 jurors would unanimously conclude that his material offended the community standards might find himself inhibited by the greater uncertainty of how a single member of the community—the judge—would react to it.

*Id.* at 752 n. 1. See also *Kingsley Books v. Brown*, 354 U.S. 436, 447-48 (1957) (Brennan, J., dissenting).

564. See *Miller*, 443 U.S. at 30.

565. *Id.* at 32-33.

566. Cf. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. OF POLITICAL ECONOMY 416 (1956).

themselves, not being required to have a jury apply the fairness standard to the case, must assume full "moral" responsibility for second-guessing the legislative determination. With no objective standard to guide them, they will usually recast the dilemma as a "political" question and openly defer to the legislative judgment by stretching the admittedly flexible standard of fairness in its favor. The presence of a jury would take much of this decisional pressure off judges and allow them to assume a truly disinterested role as the expositor of the various politico-ethical principles that should guide the jury. The jury can then deal with the subjective complexities of fact and the relative weights of competing constitutional norms without the awkward institutional self-consciousness of Justice Stewart's "I know it when I see it."

The vital intangible components of the notion of fairness defy formulation as part of a rule.<sup>567</sup> While a jury need not attempt to explain a moral decision which necessarily defies logical explanation, it is otherwise with judges. And the practical inability of the Supreme Court to spin out elaborate verbal formulae, which would logically substantiate its *ad hoc* perceptions of unfairness and which it would then be willing to see applied in subsequent cases, has caused it to reach out for mechanical props—like the mechanical Taking Clause rule. Further, where the institutional or positive law offends its collective sense of fairness, the jury need not tell the sort of discreet lie that even positivists acknowledge may be necessary to reconcile law and morals at the margins.<sup>568</sup> The general verdict cloaks in technical silence the basis for the jury's decision.<sup>569</sup> As a result, the jury's verdict sets no firm precedent. It can deal equitably with hard cases and still leave the general statutory rule of conduct formally unimpaired.

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567. See Pound, *supra* note 548, at 702.

568. See, e.g., Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958), and Dworkin, *supra* note 375, at 326-327.

569. See Wigmore, *A Program for the Trial of a Jury*, 12 AM. JUD. SOC. 166 (1929):

The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of an inflexible rule of law is avoided, and popular satisfaction is preserved . . . . It supplies that flexibility of legal rules which is essential to justice and popular contentment. And that flexibility could never be given by judge trial. The judge (as in a chancery case) must write out his opinion declaring the law and the findings of fact. He cannot in this public record deviate one jot from those requirements. The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.

Finally, juries have majoritarian credibility.<sup>570</sup> For that reason judges who perceive that a state action is unfair will be more willing to say so and explain why, so long as their opinion must first find acceptance with twelve jurors before it can become the law of the case. The jurors, who then take ultimate responsibility for the verdict, fade invisibly back into society. As things now stand, highly visible and elective state judges (as well as federal judges) are understandably reluctant to take personal responsibility for a subjective moral determination, which has the potential of imposing considerable financial liability on an increasingly tax-conscious society. Deference to the legislature has become a convenient, "principled" way out of a self-inflicted moral dilemma—a dilemma created by the appellate sabotage of the democratic element of the judicial department.

As Dean Pound noted in the 1940's, the public law legacy of Brandeis and Frankfurter has been the notion that even in cases pitting the individual against the state, it is more important that "a rule of law be settled than that it be settled right."<sup>571</sup> With that presupposition, the commercial ideal of positive law invaded what was in truth the legitimate domain of "*justice without law*."<sup>572</sup> By way of explanation, Pound suggested that the pragmatic positivists preferred a mechanical public law jurisprudence, with no room for equity, because they assumed that a conservative bench, which had wrestled equitable authority away from the jury, would exercise any power left it to dispense justice without law in favor of property interests, *e.g.*, in labor disputes.<sup>573</sup> The apparent solution offered here of turning the power of equity back over to the democratic jury did not go unaddressed, however.

A counter-argument, advanced by Justice Harlan and Jerome Frank among others, was that the jury's *random* nullification of a harsh rule of law was not necessarily better, indeed probably worse, than its total "enforcement." For example, Frank speculated that the refusal by juries to apply the inequitable judge-made fellow servant doctrine in torts probably helped "perpetuate [the] unjust rule, [by delaying]

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570. See Pound, *supra* note 548, at 700-702.

571. R. POUND, ADMINISTRATIVE LAW 97 (1942) (quoting Justice Brandeis).

572. *Id.* at 89.

573. *Id.* at 100-101.

its eradication either by judges or legislators.”<sup>574</sup> In other words, the use of juries as an equitable escape valve takes salutary pressure off the legislative and judicial rule-making mechanisms. As a result, the unjust rule survives longer. Meanwhile, since nullification itself is apt to be a random hit-or-miss affair, it subverts our notions of the equality before the law.

Suffice it to say, the current unsystematic nature of jury nullification may be attributable to the modern judicial conspiracy of silence regarding the existence of this historic prerogative. In the trial of the so-called “D. C. Nine,” for instance, Judge Leventhal justified his refusal to charge the jury as to its right to nullify as the only way to preserve the needed balance between jury equity and caprice, since as a practical matter the jury knows through “informal communication” from our culture that it enjoys that prerogative in extraordinary cases.<sup>575</sup> Dissenting, Chief Judge Bazelon argued normatively that the responsible, informed exercise of jury equity in the public law context is more important to our system of government than the preservation of the inflexible rule of law. Moreover, he disputed Leventhal’s apparent assumption that irresponsible or capricious nullification would occur less often if left to spontaneity than if the product of a “jury carefully instructed as to its power and responsibility” by the judge—and counsel.<sup>576</sup>

## 6. Jury as Constitutional Half-Way House

The ideal of the moral authority of the “well-instructed” jury provides a tenable middle ground between pragmatic positivists like Holmes and principled positivists like Justice Rehnquist, on the one hand, and substantive due process absolutists on the other. Both Holmes and Rehnquist have rejected in their own way the Lockean/Beccarian notion that government punishment or regulatory restraint should be proportional to the offense or threatened harm: Holmes, because he believed positive law to be purely an amoral matter of “strict liability,” of external conformity to rules; Rehn-

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574. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Harlan, J., dissenting) and J. FRANK, *COURTS ON TRIAL* 110-111 (1949); see also *Skidmore v. Baltimore & Ohio R.R.*, 167 F.2d 54, 59, n.14 (2d Cir.) (separate opinion of Frank, J.), *cert. denied* 335 U.S. 816 (1948); G. WILLIAMS, *THE PROOF OF GUILT* 226 (2d ed. 1958).

575. *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. (1972)).

576. *Id.* (Bazelon, C.J., dissenting).

quist, because (like Professor Ely) he denies the authority and ability of a simple majority of five judges to draw principled distinctions on the basis of the vague notion of disproportionality. Ultimately, they will end up substituting their own potentially subjective moral values for those of the legislature.<sup>577</sup> By contrast, modern civil libertarians like Justice Marshall protest that there must be some *core* federal substance to the notions of property and liberty contained in the Fifth and Fourteenth Amendments that defies legislative encroachment.<sup>578</sup> Like Brennan in *Bishop v. Wood* and Mr. Justice Jackson in the much earlier case of *D'Oerch, Duhme & Co. v. Federal Deposit Insurance Co.*,<sup>579</sup> Marshall proposes a substantive federal common law of property. In other words, his call is for a rigid federal rule of law protecting certain core intangible interests, which would replace equally rigid state rules of law that now deny protection to virtually all such intangible interests.

There is a like tendency on the part of more traditional libertarians to want to reify the concepts of liberty and property by establishing relatively rigid boundary rules designed to protect them. Professor Epstein, for instance, believes that an individual should be at liberty (at least from a common law nuisance standpoint) to engage in any and all non-invasive conduct.<sup>580</sup> He rejects Professor Ellickson's notion that a physically self-contained activity can still constitute a *nuisance*, if it is perceived as sufficiently "*unneighborly*" under contemporary community standards.<sup>581</sup> He does so in part out of fear that such a vague rule would open the floodgates in a judge-centric system to "standardless and unprincipled litigation."<sup>582</sup> In addition, as Epstein keenly appreciates, should courts decree that vague standard to be part of the common law definition of private property, it would poison the stream of public law. Legislators would demand the right to determine for themselves potential sources of such non-invasive

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577. See *Rummel v. Estelle*, 445 U.S. 263, 274-275 (1980). See also *Solem v. Helm*, 463 U.S. 277, 314 (1983) (Burger, C.J., dissenting).

578. *PruneYard Shopping Center v. Robins*, 447 U.S. 492 (1980) (Marshall, J., concurring).

579. 315 U.S. 447, 470-472 (1942) (Jackson, J., concurring).

580. Epstein, *supra* note 308, at 62.

581. Ellickson, *supra* note 11, at 731-32.

582. Epstein, *supra* note 308, at 84. Elsewhere Epstein indicates his particular concern that if such manipulable standards are applied by judges it will foster "the corrosive anti-intellectualism of legal realism." Epstein, *supra* note 12, at 355.

"unneighborliness" and to regulate or proscribe them free of any possible Taking Clause implications. And, under current standards of review, judges would have to accord their application of the vague standard a presumption of correctness.

Professor Epstein pretermits the middle-ground possibility that a presumptively impartial, non-tyrannic constitutional institution exists in the public law arena which could responsibly administer the common law's moral standard of "neighborliness," captured in the Cokean *sic utere tuo maxim*. At the same time, however, Epstein may concede the inescapable need for such an institution, when he points out that non-invasive conduct may still violate some prior contractual obligation ("special covenant") of the actor. Transposed to the public law context, that means perhaps that the implied terms of the social contract trump an individual's otherwise valid claim to make such non-invasive use of his property as he sees fit. Significantly, Mr. Justice Rehnquist himself seems to have embraced the general ideal of the substantive dimensions of trial by jury<sup>583</sup> and the particular usefulness of the jury as interstitial constitutional lawmaker.<sup>584</sup>

Having suggested that a creditable constitutional common law of both property and liberty, sensitive to communal values, can come only through the mechanism of the jury, in the next section we will explore (1) how the nineteenth century removal of law-finding juries from all public law actions contributed to the discredited era of substantive due process and (2) how the modern Supreme Court has turned to the jury in the area of obscenity to draw the sort of "moral" line between protected and unprotected liberties for which we urge its general competence.

#### IV. THE ERA OF SUBSTANTIVE DUE PROCESS: FILLING THE JURIDICAL VACUUM

##### A. *Misunderstood Origins*

The phenomenon of substantive due process, commonly traced in origin to the 1856 case of *Wynnehamer v. State of New York*<sup>585</sup> on the authority of Professor Corwin,<sup>586</sup> may be seen

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583. See *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 340-344, (1979) (Rehnquist, J., dissenting).

584. See, e.g. *Hamling v. U.S.*, 418 U.S. 87, 105 (1974).

585. 13 N.Y. 378 (1856) (opinions printed *seriatim* covering two distinguishable cases).

586. See Corwin, *supra* note 338, at 101-115.

as a product of the dismantling of the jury as the dispenser of democratic equity. Into the juridical vacuum they themselves created stepped appellate judges ready to impose their own sense of equity, or "fundamental fairness," on the legislative Leviathan. Under that analysis, however, *Wynehamer* was not even part of the process. Rather, like Holmes' opinion in *Miller v. Horton*,<sup>587</sup> it was an attempt to turn back the clock and restore collateral review by jury over "constitutional facts."

Substantive due process, on the other hand, developed in the late nineteenth century when state appellate courts began to chafe under the constraints of the doctrine of jurisdictional facts. Paying lip service to the old doctrine, they manipulated it to obtain for themselves an equitable right to review all relevant facts in administrative proceedings. As a result, one commentator has noted, the jurisdictional fact doctrine became temporarily *functus officio*.<sup>588</sup> At the federal level this led in succession to the expansive view of jurisdictional facts in *Ng Fung Ho* and later to Chief Justice Hughes' doctrine of independently determinable constitutional facts in *Crowell*. The irony of course is that Lord Holt was ultimately right in *Groenvelt v. Burwell*.<sup>589</sup> There administrators had found Dr. Groenvelt guilty of malpractice. Lord Holt denied the competence of appellate judges to make the *as applied* factual determinations necessary to second-guess the administrative decision:

[The issue] must have been tried by a jury at last [until Parliament designated a constitutionally-adequate surrogate fact-finder]; for Judges do not understand medicine sufficiently to make a judgment, whether they were sound or not.<sup>590</sup>

Accordingly, in light of New York's constitutional guarantee of civil jury trial, the *Wynehamer* Court denied there could be an adequate fact-finding surrogate for the jury in determining the *as applied* fairness of certain governmental regulations—not even the legislature itself.

Professor Corwin was oblivious to this due process role of the jury. For that reason he was precisely wrong in con-

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587. 152 Mass. 540, 26 N.E. 100 (1891). See text accompanying notes 233-35 *supra*.

588. Jaffe, *supra* note 229, at 964-67.

589. 91 Eng. Rep. 1202 (K.B. 1700).

590. *Id.* at 1213-14.

cluding that the procedures in *Wynehamer* were “for the most part unexceptionable”<sup>591</sup> and hence that the holding amounted to a declaration that the legislature could not deprive an individual of his existing life, liberty, or property, period, *with or without due process*. A careful reading of this appeal of a prohibition act proceeding for the destruction of liquor suggests that the *Wynehamer* majority was in fact concerned with that procedural integrity of the jury process under the libertarian model.<sup>592</sup> To be sure, the defendant had received a jury trial, but the jury was instructed by the trial judge that under the statute the character of the substance as a public nuisance had been definitively determined by the legislature and that it had no right to decide otherwise; accordingly, the judge excluded as irrelevant evidence proffered by *Wynehamer* that he owned and possessed the liquor prior to the time the law took effect.

Corwin notwithstanding, the majority did not hold that the legislature could never criminalize the continued possession of existing property; rather, it insisted that when a legislative act has a substantial retrospective impact on an individual, the individual be allowed to introduce evidence as to its *as applied* unfairness and have a jury determine the acceptability of such a regulatory imposition under the flexible common law nuisance standard. Under the circumstances *sic utere tuo*, as applied by a jury, governed the extent of *Wynehamer*’s legitimate “property” expectations. If the jury decided that the *sic utere tuo* principle was not so clearly invoked as to justify the extent of the retrospective impact on the defendant, then the legislature will have to pay to accomplish its regulatory purpose. Like Story in the federal context, the New York court liberally interpreted its civil jury guarantee—that “trial by jury [be preserved] in all cases in which it has heretofore been used”—to extend generically not only to specific instances of past use, but also “to such new like cases as might afterwards arise.”<sup>593</sup> Analogizing this *in rem* proceeding to excise law procedures, the court noted that at least since 1830 defendants in such cases had been entitled to a jury trial. Because the statute did not provide a satisfactory jury trial, in which the defendant could mount a complete defense and contest the *as applied* fairness of its retrospective impact, the majority was compelled to find the

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591. Corwin, *supra* note 338, at 100.

592. *Wynehamer*, 13 N.Y. at 393-395 (opinion of Comstock, J.).

593. *Id.* at 426 (opinion of A. S. Johnson, J.).



statute facially unconstitutional. In doing so, however, they renounced any vague power on the part of the judges themselves to amend statutory law as being against natural right and equity.<sup>594</sup> The court was forced to strike down the statute *in toto* only because of (i) the procedural perversion of the due process role of the *jury* and (ii) the clear presence of a deprivation of property.

Overlooking the procedural infirmity under the libertarian model of the jury, Corwin focused exclusively on the finding of a deprivation of property. In that regard, the majority expressed an unwillingness to allow the legislature on the basis of "theories of public good or public necessity . . . so plausible, or even so truthful, as to command popular majorities"<sup>595</sup> simply to destroy an individual's property without making a full indemnity. In terms of what constituted a substantial enough deprivation of property to trigger the due process guarantee, three judges in the majority asserted that property was itself a complex or bundle of intangible rights and that a "deprivation" could occur if a sufficiently important right was legislatively excised, even though bare title and possession were left intact. Applied to the case at hand, this meant that an act of the legislature which retrospectively destroyed the intangible "right to sell" valuable pre-existing property could not itself qualify as adequate due process. Repulsed by this, Corwin embraced what he considered the prophetic dissent of Judge T.A. Johnson.<sup>596</sup> Johnson had wondered aloud why, if the "property" component of the due process guarantee could be anatomized into parts, could not "liberty" be treated in the same way:

[I]t might be argued with precisely the same pertinency and force, that a statute which prohibits certain vicious actions and declares them criminal deprives persons of their liberty and is therefore derogatory of the Constitution.<sup>597</sup>

As Corwin observed, Johnson's *reductio ad absurdum* set up an uncomfortable resonance with the earnest libertarian musings of certain framers of the United States Constitution. In particular, as previously noted, Madison had penned the following paean to the concept of "property":

In its larger and juster meaning, it embraces everything to

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594. *Id.* at 430-432 (opinion of Selden, J.).

595. *Id.* at 387 (opinion of Comstock, J.).

596. See Corwin, *supra* note 338, at 104.

597. *Wynehamer*, 13 N.Y. at 468.

which a man may attach value and have a right; *which leaves to every one else the like advantage* . . . . In [that] sense, a man has property in his opinions and a free communication in them . . . . He has an equal property in the free use of his faculties and *free choice of the object on which to employ them*. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.<sup>598</sup>

With that rhetorical assist from the past, Corwin ruefully concluded, *Wynehamer* led directly to the discredited federal doctrine of substantive due process. As a result, the Supreme Court began in 1897 to expand both the notion of protected "property" (beyond bare title and possession) and that of protected "liberty" (beyond mere freedom from personal restraint) to encompass their essential constituent elements. For instance, in *Allgeyer v. Louisiana* Justice Peckham wrote for the Court that protected liberty under the due process clause included "the right to be free in the enjoyment of all [one's] faculties, . . . to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to carrying out to a successful conclusion the purposes above mentioned."<sup>599</sup> And in *Smyth v. Ames* the court held that rate regulation, by depriving one of the essential right to earn a reasonable return on one's property, could amount to a deprivation of property.<sup>600</sup>

Yet Corwin was arguably wrong on two critical counts in concluding that the Supreme Court was simply federalizing the substantive notion, allegedly implicit in *Wynehamer* and Madison's essay, of an extensive, inviolable sphere of intangible property and liberty interests, which were to be proof against legislative tampering.

First, as mentioned, Corwin ignored the significance of the central focus in *Wynehamer* on trial by jury. Hence he did not grasp the possibility that substantive *due process* was in effect a reaction to the failure of *Wynehamer* to restore the active role of the common law jury in reviewing the administrative process. It is ironic that Corwin, called our "most prolific student of due process,"<sup>601</sup> should have openly confessed puzzlement at this very idea of a libertarian model of the jury.

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598. VI J. MADISON, WRITINGS 101-103 (Hunt ed.), quoted in Corwin, *supra* note 338, at 106-107.

599. 165 U.S. 578, 582 (1897).

600. 169 U.S. 466 (1898).

601. G. GUNTHER, CONSTITUTIONAL LAW 507 n.3 (1980).

He wondered aloud what Madison had had in mind in 1786 when he argued against a bill in the Virginia House of Delegates to emit paper money on the basis that it "affects property without a trial by Jury."<sup>602</sup> Instead, Corwin persisted in viewing the jury's historic role as that of pure factfinder, whose task it was to apply dutifully the positive law to the case at hand. What real substantive help could a jury be? Hence he saw no significant connection between the judge's exclusion of the defense's evidence in *Wynehamer* as irrelevant under the statute and the exclusion of Andrew Hamilton's proffer of "the truth" in defense of John Peter Zenger as irrelevant under the common law. Rather than view the exclusion as violating the defendant's fundamental right through counsel to contest the "as applied" fairness of the statute, Corwin, noting that a jury was physically present, blithely concluded that the procedure in *Wynehamer* was unexceptionable.

Well before 1897 and *Allgeyer* the precedent of *Murray's Lessee* had guided the Supreme Court to the symmetrical conclusion in *Munn v. Illinois*<sup>603</sup> that the due process clause of the Fourteenth Amendment did not require a state jury in any "public law" matter, such as rate regulation cases. State legislatures were authorized to define and redefine "public rights" (and in the process the appropriate residuum of individual natural liberty at any given time) free from unwanted second-guessing by the judicial department. In *Munn* a common law proceeding, in which the jury had determined the reasonableness of a carrier's rate, was supplanted by a statutory rate structure establishing *mala prohibita* in the form of maximum rates. The *facial* reasonableness of these positive rules codifying the *sic utere tuo* standard was not for the court, much less a jury, to determine. The ballot box had supplanted the jury box. "For protection against abuses by the legislature," the Court reasoned, "the people must resort to the polls."<sup>604</sup> The people? Effective resort to the polls required majority support. Thus the ballot was apt to be no solution for the key democratic political danger identified by Madison, *viz.*, majoritarian tyranny. Yet *Munn* is actually consistent with the present thesis because the claimant was simply not entitled to attack the *as applied* redistributive consequences of the rate structure. The Fourteenth Amendment

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602. See Corwin, *supra* note 338, at 90 n.43.

603. 94 U.S. 113 (1877).

604. *Id.* at 145.

had not yet been interpreted to incorporate the Taking Clause.<sup>605</sup> Gradually, by the 1890's the Court awakened to the fact that the Fourteenth Amendment had been drafted with wide libertarian support as a guarantee of individual civil rights against oppressive state legislation—and extended the right of “just compensation” against the states.

B. *Courts As Dispensers of Natural Equity: The Doctrine of Constitutional Fact*

By the time the Supreme Court acknowledged the general need to provide penumbral due process protection around the central (but hollow) core concepts of physical property and physical liberty, it had dismantled the one institution capable of drawing credible lines between permissible and abusive uses of government power. The Supreme Court drove the last nail in the coffin of the independent federal jury in *Sparf and Hansen v. United States*,<sup>606</sup> just three years before *Allgeyer*. To further complicate matters, it would be difficult for the Supreme Court *effectively* to broaden constitutional rules of law, rendering them more flexible and fact-sensitive, when *Murray's Lessee* permitted the rules *to be applied* at the local level by “expert” commissioners (not impartial juries), whose mixed findings of law and fact were then usually adopted by the state courts under a very permissive standard of review. At that point, as we have seen, the constraints of the federal Writ of Error procedure, designed primarily to implement the guarantee of the Seventh Amendment that findings of fact by a jury could not be revised on appeal, meant the Supreme Court could only review the mixed findings below to be certain that the commissioners had paid lip service to the new rule. Thanks to *Murray's Lessee*, the near sanctity of the jury's general verdict had been replaced by the sanctity of the administrative ruling.

To overcome these hurdles in the area of rate regulation, the Court attempted to obviate the need for *ad hoc* factual review of the “as applied” fairness of the rate making process by promulgating an elaborate, multi-factored legal rule, which purported to reduce the problem of the regulatory confiscation of property to a mechanical formula.<sup>607</sup> But no such specious formula for quantifying permissible regula-

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605. See *Davidson v. New Orleans*, 96 U.S. 97 (1877).

606. 156 U.S. 51, 80 (1894).

607. *Smythe v. Ames*, 109 U.S. 466 (1898).

tory inroads on personal liberty could be devised. Consequently, the Court creatively conceived the doctrine of "constitutional fact"—to serve as the practical foundation for its focus on more subtle intangible rights, whose deprivation would be a "mixed question" of law and fact, a question of degree, of the balance between private harm and public benefit. The Court advanced the doctrine as the logical corollary of its ultimate duty of judicial review over the constitutionality of legislation. To carry out that duty effectively, it had to have the right to make an independent determination of any facts found below, where those facts were decisive of a mixed question of constitutional law and fact.<sup>608</sup> Otherwise, constitutional rights could be denied through deft manipulation of facts. In any case, the Court left behind its protective quantitative coloration as it ventured into the controversial qualitative arena of "natural equity."

To return to Corwin's analysis of substantive due process, he also failed to note that in *Lochner v. New York*<sup>609</sup> (and its congeners) the Court was essentially acting the part of a jury. So-called libertarian justices, like Peckham and Field, having actively colluded in the elimination of the jury as "a necessary requisite of due process of law," voluntarily took up the slack and began to dispense "natural equity" on their own. In short, the *Lochner* Court did not, doctrinally speaking, embrace "freedom of contract" as a new absolute liberty. Rather it purported to evaluate whether or not legitimate public interests like public health and safety were sufficiently implicated by regulations to justify the resultant diminution in private liberty. In doing so it mimicked the jury in its application of Coke's flexible *sic utere tuo* maxim. In *Lochner*, which involved a ten-hour work day rule for bakers, the Court decided that there existed less restrictive means to achieve the health purpose and that the principle of paternalistically redressing economic inequalities was simply not valid under the nation's contemporary democratic standards.

The *Lochner* Court, in constitutionalizing what it perceived to be the democratic "conceptions of the average man"<sup>610</sup> as to the proper role of government, followed the apparent lead of Justice Holmes. In *The Common Law* he acknowledged the jury as the one true source of moral or equitable principles in the law, especially in tort cases where it

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608. See *Crowell v. Benson*, 285 U.S. 22 (1932).

609. 198 U.S. 45 (1905).

610. O. HOLMES, *THE COMMON LAW* 43 (M. Howe ed. 1963).

applied the pervasive "reasonable man" standard; nonetheless, he positively encouraged judges in the private law field to supplant jurors in all cases, through the application of ever more particularistic, uniform rules of law. He pointedly suggested that the submission of the general issue to a jury was tantamount to a confession by the judge that he lacked "sufficient practical experience" or "clear views of public policy" "to lay down the rule intelligently."<sup>611</sup> To those who reposed special confidence in the jury, Holmes retorted that after several years at *nisi prius* the typical judge acquired a sufficient fund of experience "to represent the common sense of the community in ordinary instances far better than the average jury."<sup>612</sup> This hubristic sense of the judge as Herculean interstitial legislator later led Holmes to adopt on behalf of the Supreme Court a ludicrous contributory negligence standard, which required that a man approaching a railroad crossing actually stop, get out of his car, and look both ways before continuing—a standard clearly "not in accord with the [contemporary] conduct of the prudent man."<sup>613</sup> In that respect, the *Lochner* Court did no worse than Holmes in gauging contemporary values—and some would argue, better.

Holmes in dissent, however, countered with the key tenet of pragmatic positivism—the flexible right of a *legislative* majority to embody its conception of "public rights" into law on an experimental basis. Having helped depose the democratic component of the federal judicial department, the *Lochner* majority was subject to being thus successfully hoisted by its own anti-majoritarian petard. Still, even Holmes made it clear that the Court did not owe the legislature absolute deference, that it still had an important role to play in preserving certain unspecified "fundamental principles" of natural equity against legislative encroachment:

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, *unless* it can be said that a rational and fair man necessarily would admit that the statute proposed would impinge fundamental principles as they have understood by the traditions of our people and our law.<sup>614</sup>

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611. *Id.* at 98.

612. *Id.* at 99.

613. See *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66, 69-70 (1913) and Pound, Book Review, 44 HARV. L. REV. 1303, 1304 (1931).

614. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

Hence, the doctrinal division between Holmes and the majority may have been less than met the eye. Both believed in appellate courts as the ultimate dispensers of equity. They differed only as to which subjective principles *they* perceived to merit judicial protection. Out of deference to the legislature Holmes had a shorter list. But neither placed any stock in the substantive role of the jury as the articulator of such democratic principles.

With the help of Brandeis, Frankfurter, Cardozo, and the Great Depression, Holmes' basic vision of the right of the majority to work its will in the *economic* arena prevailed. Otherwise, as Cardozo warned, "in the clash of jarring rivalries the pretending *absolutes* will destroy themselves and ordered freedom too."<sup>615</sup> Unfortunately, Holmes' successors refused to pursue his suggestion in *Mahon* that the fundamental principle of compensation be used as a means of "deabsolutizing" conflicts among economic liberties. Instead, they focused their efforts on enhancing the ability of individuals and groups to have their interests included in the legislature's experimental cost-benefit calculus. Hence freedom of thought and expression was deemed "the matrix, the indispensable condition, of nearly every other form of freedom,"<sup>616</sup> because without it there could be no "intelligent experimentation" in self-government. Social progress, like truth, was a "process of trial and error"—legislative trial and error.

And if the legislature chose, the process of trial and error in social rulemaking could be carried out administratively.<sup>617</sup> In that event, as noted earlier, Justice Brandeis asserted that "supremacy of the law" requires only that the administrative agency pay lip service to a vague statutory standard of "reasonableness". An Article III court had no warrant to review the fairness of the agency's application of the standard to the facts:

If it did, the power of the courts to set aside findings of fact by an administrative tribunal would be broader than their power to aside a jury's verdict.<sup>618</sup>

Thus pragmatic positivists in the post-1937 era succeeded in

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615. B. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 687-688 (1931).

616. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

617. See *Yakus v. United States*, 321 U.S. 414 (1944), and *Bowles v. Willingham*, 321 U.S. 503 (1944).

618. *St. Joseph's Stockyards Co. v. United States*, 298 U.S. 38 (1936).

setting up administrative agencies with the essentially unreviewable power of the gothic jury—a power to apply vague standards of “reasonableness” to important matters of economic concern to the citizenry. Indeed, they imputed to the decisions of these “expert” tribunals the same “moral sense” ability earlier have ascribed to the jury to “express an intuition of experience which outruns analysis and sums-up many unnamed and tangled impressions—impressions which may lie beneath consciousness without losing their worth.”<sup>619</sup> Hence the “mystic” tribunal of experts took its place as the annointed new dispenser of American equity.

### C. Courts As Quasi-Administrators.

To be sure, under the stewardship of Justices Frankfurter and Cardozo, the Supreme Court in the 1930's and 1940's continued to assert its own prerogative of dispensing “natural equity” in the area of civil liberties under the rubric of “due process.” But ironically, as we shall see, the majority regarded its task of squaring the operation of general statutes with the constitutional equities of an individual case as a delegated quasi-legislative rather than a judicial function. It was qualitatively different than the idealized role of a common law jury. The judges' first allegiance was to the faithful implementation of the legislative policy behind the act. The principal antagonist to this approach was Mr. Justice Black, whose “incorporationist” view of the due process clause of the Fourteenth Amendment the majority resisted in large measure so as to restrict the extension of the requirement of criminal and civil jury trials to the states. And to this day the Seventh Amendment—alone—remains unincorporated.

Frankfurter and Cardozo repeatedly cited the 1791 guarantees of trial by jury as Exhibit “A” for their claim that fundamental rights were historically determined. It would have been highly improbable for the same set of rights, perceived as essential to protect individual liberty in 1791, to have been included in a similar catalogue in 1867. As a result they concluded that the framers of the Fourteenth Amendment deliberately chose the open-ended notion of “due process,” with the intent that its flexible command be applied by *appellate* judges based on their “fund of experience” as to what was required by contemporary “canons of decency and fairness

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619. See *Chicago, B. & Q. Ry. v. Babcock*, 204 U.S. 580, 585 (1907) (Holmes, J.).



. . . [expressing] the notions of justice of English-speaking people."<sup>620</sup> In short, appellate judges—not jurors—were to be the exclusive conscience of democracy and to decide cases on the unavoidably subjective basis of what "shocks [their] conscience."<sup>621</sup> With the late nineteenth-century ideal of a compliant, fact-finding jury as a model, it is no wonder that Frankfurter and Cardozo met little resistance in their assertions that trial by jury was self-evidently an antiquated, inefficient process. By no stretch of the imagination could it be considered "of the essence of a scheme of ordered liberty," since it implicated no "principle of justice so rooted in the traditions and *conscience of our people* as to be ranked as fundamental."<sup>622</sup> And yet once upon a time the jury *had been* the very embodiment of the "conscience" of the people.

In their assumed role as balancer of constitutional equities, however, Frankfurter, Cardozo and the majority kept a thumb on the scale in favor of the legislature. In the *Palko* and *Adamson* cases,<sup>623</sup> for example, in which they locked horns with Justice Black over the right of judges to dispense natural equity, the majority dismissed the concepts of freedom from double jeopardy and freedom from self-incrimination as no longer absolutely essential to modern notions of a "fair trial." Having reduced these concepts to the status of non-absolutes, they were free to balance them against the myriad of other competing principles at play, assigning to each such weight as they "felt" appropriate. The Court refused to find the state action in either case so qualitatively unreasonable, so shocking to the conscience, as to warrant invalidation. Both decisions were later reversed.<sup>624</sup>

Even in the special area of speech, Frankfurter and the majority displayed a willingness to balance away the interests of individual liberty. *Dennis v. United States*<sup>625</sup> involved a prosecution under the Smith Act of 1940. In the Act Congress had determined to its own satisfaction that certain fairly spe-

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620. *Adamson v. California*, 332 U.S. 46 (1947) (Frankfurter, J., concurring).

621. *Rochin v. California*, 342 U.S. 165 (1952).

622. *Palko v. Connecticut*, 302 U.S. 325 (1937).

623. *Id.* (freedom from double jeopardy not guaranteed by Fourteenth Amendment due process clause); *Adamson v. California*, 332 U.S. 46 (1947) (freedom from self-incrimination not protected by the Fourteenth Amendment).

624. *Palko* was overruled by *Benton v. Maryland*, 395 U.S. 784 (1969), and *Adamson* by *Malloy v. Hogan*, 378 U.S. 1 (1964).

625. *Dennis v. United States*, 341 U.S. 494 (1951).

cific types of speech, such as "knowingly . . . advocat[ing] . . . the . . . desirability . . . of overthrowing . . . any government in the United States by force," sufficiently threatened the public to warrant criminal punishment. In *Dennis* the Court declined to second-guess the legislative judgment "as applied," despite its nominal adoption of "the clear and present danger" test propounded by Holmes in his dissent in *Gitlow v. New York* (1925).<sup>626</sup>

*Dennis* exemplifies the essential doctrinal process by which the modern federal judiciary allied itself with Congress to vindicate national interests against possible local interference. Both the Court of Appeals and the Supreme Court, in treating the "clear and present danger" issue as a question of law, simply took judicial notice of generalized *legislative* facts to support the application of the law to the case at hand—facts such as the "inflammable nature of world conditions." Beyond that there were no significant *adjudicative* facts of record to prove the imminence of any danger from the defendants' conduct.<sup>627</sup> Writing for the Second Circuit in *Dennis*, Learned Hand explained that the "clear and present danger" determination is really legal shorthand for a necessarily subjective *legislative* choice between conflicting, incommensurable interests. It is the choice of whether "the mischief of the repression is greater [in some indefinable sense] than the gravity of the evil, discounted by its improbability . . . ." <sup>628</sup> While Hand acknowledged that such *ad hoc* legislative choices as to the proper standard to be applied in resolving legal conflicts are sometimes left to the jury in private law matters like negligence, he denied that the practice embodied "a universal principle." Instead, he argued that when a necessarily generalized federal statute dealing with "momentous public interests" raises equitable questions as to its "as applied" constitutionality, as inevitably it will, the federal courts should treat the required *ad hoc* value judgment in resolving the dispute as "a question of law"—that is, the courts should treat the question as a quasi-legislative decision impliedly delegated to *them* by the legislature.<sup>629</sup>

Hand was championing the special institutional role of the federal appellate courts in keeping policy decisions con-

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626. 286 U.S. 652 (1925).

627. *Dennis*, 341 U.S. at 587-91.

628. *United States v. Dennis*, 183 F.2d 201, 215 (2d Cir. 1950) (Hand, J.).

629. *Id.* at 216.

cerning important pieces of national legislation out of the provincial hands of juries, by performing themselves any necessary tailoring of statutes to local conditions.<sup>630</sup> Conversely, ascribing a similar institutional role to state courts vis-a-vis state legislative policies illuminates some of the federalism considerations underlying the Supreme Court's deferential attitude towards non-jury state factfinders. In both cases, pragmatic positivists sought to recharacterize the equitable adjustment of statutes to fit individual cases as essentially legislative in character, despite the historic ideal of *isonomia* which suggests that application of the general law to specific facts is emphatically part of the judicial power. The familiar result is to sacrifice equity to uniformity.

One will recall that the libertarian model of freedom of speech in the area of seditious libel was predicated on the right of the jury to decide for itself the true tendency of certain speech to harm public interests; to balance that threat against the individual liberty interests at stake; and finally to determine the criminality of the act in question. Under the statute in *Gitlow*, the state legislature purported to have established conclusively the "bad tendency" of certain types of speech; and following the late nineteenth-century model of the jury, the trial judge admonished the jury of its moral duty to rubber-stamp the legislature's conclusion "as applied" to the facts at hand.<sup>631</sup> With no thought to reviving the libertarian jury, Holmes embraced in dissent the substantive due process doctrine of constitutional fact and asserted that the reviewing Court itself had to make an "as applied" determination in each case involving the so-called "preferred" liberty of speech. In lieu of the displaced jury, the Court was to decide whether the conduct in question really posed a sufficiently "clear and present danger" to public interests to justify its criminal suppression. As the *Dennis* case demonstrates, however, the difference between having judges and jurors performing this essential libertarian balancing function inheres in the generally greater institutional tendency of unelected judges to defer to majoritarian legislatures. In any

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630. To support his argument, Hand pointed weakly to the familiar alternatives—

Were it not so, there would be no chance for review, for the verdict would be final; moreover, different juries might give different verdicts, and any approach to uniformity, *short as that can be in any event in this field*, would be impossible.

*Id.* (emphasis added).

631. 268 U.S. at 672-73.

case, if both perform the task, the defendant gets his historic "two bites" at the cherry.

#### D. A Modern Reinstatement

The dissents in *Dennis* by Justices Black and Douglas, the two great modern protagonists of the jury, capture one aspect of the present thesis in a nutshell. First, they argued in effect that the role of judges was to promulgate relatively fixed rules of right, not to dispense equity on an *ad hoc* basis. Secondly, they argued—in partial vindication of Jefferson over Professor Levy—that if the Court chose not to confer on speech an absolute protection, the inevitable mixed question of constitutional fact in free speech cases, regarding the presence of "clear and present danger," should be left to the jury to decide—as in olden days.<sup>632</sup> After all, we have Chancellor Kent's matter-of-fact assertion that the "value and security" of the right of trial by jury in this context inheres in its substantive right to "judg[e] of the intent and tendency of the act."<sup>633</sup>

The two points in *Dennis* are not mutually exclusive, as evidenced by subsequent developments in the speech area itself. While the protection of political speech under the First and Fourteenth Amendments was being absolutized, the Court gradually turned the integrally-related but unprotected area of obscenity over to the local jury. Despite die-hard protests from Frankfurter that the determination of "contemporary community standards" was really a question for the reviewing court which defied reduction to a "generalized" formula, being "an individual constitutional problem,"<sup>634</sup> the majority realized that the jury, in applying certain generalized constitutional formulae to the facts, plays an important judicial role of its own in determining what the individualized rule of law should be in the case at hand.<sup>635</sup> In stark ideological contrast, Frankfurter, by loudly protesting the possible inequities a jury might conceal beneath a general verdict, sought to assert exclusive appellate sway over the articulation

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632. *Dennis*, 341 U.S. at 580, 587 (Douglas, J., dissenting) (citing *Pierce v. United States*, 252 U.S. 239, 244 (1920), which held that the question of the "clear and present danger" of speech was for the jury, as a statement of the law "as it has been and as it should be.")

633. See text accompanying note 478 *supra*.

634. See, e.g., *Yates v. United States*, 354 U.S. 298 (1957) and *Brandenburg v. Ohio*, 395 U.S. 44 (1969).

635. *Roth v. United States*, 254 U.S. 476, 497-498, 502-503 (1974).

of the applicable rule of constitutional law so as to ensure in effect substantial nationwide deference to the legislature's decision to prohibit certain forms of allegedly obscene speech, etc.

With *Miller v. California*<sup>636</sup> the Supreme Court returned to a libertarian model that allows the jury to apply its collective moral sense on an *ad hoc* basis to a determination of the "prurience" and "offensiveness" of the work in question under local contemporary community standards, as well as to the work's social "value" under national standards. A jury verdict on these issues which is favorable to the defendant would be conclusive. But where, as in certain other First Amendment areas, the ability of the jury to vindicate national constitutional norms or to serve as a sufficiently disinterested factfinder is in doubt, the Court might promulgate more particularized, prophylactic rules with the effect of "overprotect[ing]" free speech in order, as Professor Kalven has put it, "to assure that [it is] not underprotected."<sup>637</sup> For instance, before an obscenity case can reach the jury the material must have been found to meet minimal guidelines as to what constitutes hard-core pornography.<sup>638</sup> This exemplifies the ratchet effect. Moreover, despite the positivist ideal of a uniform national rule of law, the *Miller* court found no constitutional dilemma in the fact that different juries might reach different results.<sup>639</sup> Perhaps true liberty requires the possibility of such regional diversity, with freedom of exit for the individual.

This article has argued that the equitable dispensing power of local juries was intended to be a critical constitutional component of that regional diversity. To be sure, urgent nationalistic concerns, implicating the very survival of the Union, may have justified Mr. Justice Chase in strongly admonishing local juries against strangling the infant Republic through nullification of its hard-won power of direct taxation—and other federal judges during the sectional crisis in counseling juries, North and South, against inflammatory acts of nullification. But with omnipotence of the central government, not its impotence, the fundamental political issue of

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636. 413 U.S. 15 (1973).

637. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 213. Cf. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 526-32 (1970).

638. *Miller*, 413 U.S. at 28-29.

639. *Id.* at 26 n.9. Accord, *Roth v. United States*, 354 U.S. 476, 492 n.30 (1957).

our time, restoration of the intended status of the jury may be overdue. Yet not surprisingly the Supreme Court has recently justified denying a compensation jury the "open-ended" equitable power to depart from an objective market value standard in a "condemnation contest . . . between [a] local community [or presumably any other local condemnee] and a national government that may be thought to have unlimited resources."<sup>640</sup> Uniformity once again triumphs over equity—lest local juries imperil the Union by awarding "windfalls" against the fisc. Instead of employing change of venue, *remittitur*, or the power to order a new trial to hem in the legitimate equitable power of the jury over damages, lest it occasionally lead to overgenerous awards to individual condemnees, the Court affirmed a rule that is systematically biased in favor of the state.

### CONCLUSION

This article has suggested that under the stimulus of the Ninth Amendment the Due Process and Taking Clauses, together with the Seventh Amendment, be read as a conceptual unit, providing a legal action for compensatory damages whenever the government violates intangible economic liberties in which, as Madison asserted, we have a "property."

Behind the suggestion lies an analysis of individual liberty as contained within three concentric circles. The first inner circle, setting off centermost inviolable liberties from second-order compensable liberties, is drawn and policed by the appellate court system and by juries in *criminal cases*. Inviolable liberties are liberties in the strong anti-utilitarian sense that it is wrong for government to deny them even in the general interest. They are protected by an inalienability rule. Constitutional liberties of this sort, we have argued, were conceived by the libertarian framers as being principally procedural guarantees—and chief among them was the right to trial by jury. The institution of appellate judicial review was designed to preserve these guarantees against legislative encroachment; indeed, the earliest American examples of judicial review were in aid of the jurisdiction of the jury.

Drawing the second circle involves a more difficult equitable determination of when a regulation, assumptively fair in general, would be unfair "as applied." Ideally, this should be the constitutional task of the public law jury. Since the court

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640. *United States v. 50 Acres of Land*, 105 S.Ct. 451, 458 (1984).

presumably has already ruled that the intangible interest is not inviolable, a favorable jury verdict will mean that under the pre-existing state of the law the claimant had a reasonable expectation of being able to pursue certain activities without societal interference of the sort or degree in question unless it were accompanied by in-kind or cash compensation. These fungible liberties are protected by a damages rule. In such a case, the state has the choice of whether to except the claimant from the operation of the statute or condemn his liberty or expectation interest and pay for the *excessive* amount of his sacrifice. The superiority of this approach to *Lochner*-era substantive due process should be clear. Far from being totally ousted from regulatory jurisdiction over a particular area, the state simply must pay its way.<sup>641</sup>

In addition to arguments from history, a potent modern rationale exists for making the disproportionate regulatory sacrifice of "fungible" liberties compensable.<sup>642</sup> It is provided by the need for surrogate structural protection to replace the loss of the ideals of a police power of essentially limited scope and of *isonomia*. With respect to the expansive scope of today's police power and the consequent proliferation of economic regulation, both state and federal, even the conservative members of the founding generation acknowledged tacit

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641. Accordingly, this approach is consistent with the recent decision in *New Orleans v. Dukes*, 427 U.S. 297 (1976), in which the Supreme Court struck a final blow at the ideal of *isonomia* in the economic area by upholding a New Orleans ordinance excluding all pushcart food vendors from the French Quarter, while grandfathering in those who had operated there for eight years or more. *Dukes* overruled *Morey v. Doud*, 354 U.S. 457 (1957). The vendor in question was seeking a declaratory judgment as to the facial invalidity of the ordinance, as if she had an "inviolable" right to pursue her livelihood in the French Quarter. (Perhaps her litigation was being financed by other interested vendors.) Our model suggests that normatively she should have fared better by merely challenging the particularized unfairness of any application of the ordinance to her *without appropriate compensation*. She would have had to argue to the jury that she had a legitimate reliance interest in being able to continue to operate in the Quarter and that her loss of that interest constituted a greater involuntary sacrifice to the public good than the government should be able to exact under contemporary circumstances without compensation. (Under wartime draft conditions, for instance, the perception of the average level of permissible, noncompensable sacrifice might be raised.) At the same time she would have had to anticipate the counter-arguments of the city by demonstrating that her activity did not pose a sufficient "harm" to the reasonable expectations of others to warrant its uncompensated abatement and that she could not just as profitably pursue her livelihood elsewhere.

642. For a clear anticipation of this theory of compensable liberties, see Michelman, *supra* note 4, at 1201 n.77.

limit on the citizen's duty of cheerful submission. They spoke of the general duty to put up with the inconvenience of *mala prohibita* given the compensatory in-kind benefits from having others obey laws they could do without, but they invariably observed that such regulations seldom affected an individual except incidentally in "one or two particular points."<sup>643</sup> Today, with individuals and corporations subject to a plethora of bureaucratic obstacles and frustrations, the private/public accounting sheet can swing wildly out of balance. A system of administrative compensation, based on sensitive payment schedules for loss of business good will and other consumer surplus and backed up by a suitably-conditioned right of appeal to a jury, offers one promising solution. Furthermore, with its discretion over damages, such a jury would provide true surrogate "public purpose" protection, by increasing awards to regulatory "condemnees" who are perceived to be the victims of frivolous "public" projects or ones of dubious utility.

In the same vein, the liberalization by the Supreme Court of the implicit equal protection constraints on the rule of law in the economic area has allowed legislatures to tackle smaller and smaller aspects of a larger problem. Without the structural protection of *isonomia*, disproportionate inconvenience or sacrifice may be visited on one sector of the population, or even on one citizen, with no comparable sacrifice being exacted of others. Not only is such unequal sacrifice in itself a possible constitutional wrong, the focused nature of the sacrifice makes it easier for rent-seeking factions to work their will and harder for the sufferers to mobilize effective political opposition to the law.<sup>644</sup> Holmes, however, who

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643. I W. BLACKSTONE, COMMENTARIES 126. The entire quotation is as follows:

[I]f any public advantage can arise from observing such [regulatory] precepts, the control of our private inclinations, *in one or two particular points*, will conduce to preserve our general freedom in other of more importance[—]by supporting that state of society, which alone can secure our independence.

*Id.* (emphasis added).

644. Cf. *Railway Express Agency v. New York*, 336 U.S. 106, 112-113 (1949) (Jackson J., concurring) ("[t]he framers of the Constitution knew and we should not forget today, that there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principle of law which officials will impose on a minority must be imposed generally. Conversely, nothing opens the door to arbitrary actions so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political



termed the equal protection clause "the last refuge" of every constitutional argument, subordinated the ideal of *isonomia* to the need for the legislature to experiment with solutions to social problems. Pragmatically speaking, it was insanity to require that an experimental drug be administered to the whole population—or to no one at all. Others eventually agreed. For that reason *isonomia* as a structural protection for individual liberty gave away to the doctrine that the legislature is free to experiment with only part of a larger problem.<sup>645</sup> Underinclusiveness, therefore, is no longer perceived as a fault in general economic legislation—opening the door wide to legislative discrimination or heavy-handedness.

Not coincidentally perhaps, Holmes (and later even Brandeis) settled upon the ideal of compensation as a more appropriate surrogate structural protection for the individual liberties in twentieth century America than the all-or-nothing approaches to legislative competence embodied by the equal protection ideal of *isonomia* and the so-called *Lochnerian* ideal of inviolable substantive rights.<sup>646</sup> Holmes rejected the formalistic physical invasion test for takings, correctly perceiving that there is "no qualitative difference between traditional [physical] takings and traditional exercises of the police power, but only a continuum in which established property

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retribution which might be visited upon them if larger numbers were affected") and *Ervin's Appeal*, 16 Pa. 256, 268 (1851) (Coulter, J.) ([w]hen individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice, at the instigation of an interested party, who is to stand up for them thus isolated from the mass in injury and injustice, or where are they to seek relief from such acts of despotic power?").

Regarding the demise of *isonomia*, it is interesting to note that *Lochner* itself is perhaps most accurately read as an equal protection case, in which the majority defended the rights of bakers and their employees not to be singled out for a sacrifice of their share in "the general right to make a contract." *Lochner*, 198 U.S. at 60. Cf. Pound, *Liberty of Contract*, 18 YALE L. J. 455, 470 (1912) (suggesting the importance of an Illinois case, *Miller v. People*, 117 Ill. 294 (1886), as a way station on the road to *Adair* and *Lochner*—a case which clearly turned on the fact that the statute was restricted to a certain class of employers only). Had the sacrifice been more generalized or the special classification uniquely justified, the result might have been different. Accordingly, three years later in *Muller v. Oregon*, 208 U.S. 412 (1908), and twelve years later in *Bunting v. Ohio*, 243 U.S. 426 (1917), the Court upheld ten-hour laws for women and for *all* factory workers, respectively.

645. See, e.g., *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

646. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

interests [made up of intangible expectations] are asked to yield more or less to pressures of public demands."<sup>647</sup> Of course, Holmes would have given the appellate courts (not a jury) final discretionary say as to whether the state had exacted too great a sacrifice of an individual intangible liberties. In Brandeis' mind, this ideal of compensation became especially important in the case of the expanding, centralized federal police power.<sup>648</sup> Increasingly specialized laws from a distant federal capital have a greater tendency to be oppressive—and their trans-jurisdictional federal character makes them a greater threat to liberty than the former exercise of such powers by the several states.

In any case, both Holmes and Brandeis perceived that, as Justice Brennan has recently written, a requirement of compensation for oppressive regulations will cause the regulators to tend "to err on the constitutional side of [the] police power."<sup>649</sup> It will help forestall the overproduction of putative public goods at the expense of intangible liberties.<sup>650</sup>

Professor Hayek's self-sufficient ideal of *isonomia*,<sup>651</sup> founders on his own concession<sup>652</sup> of the inevitable need in a complex society for legislative rules for special classes—and hence of the correlative need for a responsible moral judgment by someone, first, that the majoritarian decision in favor of such specialized rules was not influenced by the identity of those who happen to constitute the affected group,<sup>653</sup> and, secondly, that the decision did not frustrate legitimate individual expectations formed in reliance on the pre-existing

647. Sax, *Takings and the Police Power* 74 YALE L.J. 36, 41 (1964).

648. *Louisville Joint Bank v. Radford*, 295 U.S. 555 (1935). See also *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935).

649. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 661 n. 26 (1981).

650. Cf. Johnson, *Planning Without Prices: A Discussion of Land Use Regulation without Compensation*, in B. SIEGAN ED., *PLANNING WITHOUT PRICES* 63-111 (1977) and J. BUCHANAN, *FISCAL THEORY AND POLITICAL ECONOMY* 105-124 (1960), reprinting *Positive Economics, Welfare Economics, and Political Economy*, 11 J. OF LAW AND ECONOMICS 124-138 (1959).

651. See F. HAYEK, *THE ROAD OF SERFDOM* 54 (1944):

Stripped of all technicalities [the ideal of a rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive power in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

652. See Hayek, *supra* note 26, at 153-154.

653. Cf. Raz, *The Rule of Law and Its Virtues*, in *LIBERTY AND THE RULE OF LAW* 3-21 (R. Cunningham ed. 1979).

state of the law. Short of unattainable society-wide unanimity on the desirability of a change in the law, *de novo* jury trial arguably provides the workable, historically-grounded, independent ratification device needed to ensure that majoritarian rule provides adequate compensation to minorities who are the victims of unfair statutory "changes in the law." The jury will be charged with distinguishing such *changes* from mere codifications of the reasonably implicit terms of the social contract.<sup>654</sup> It is a difficult moral line-drawing responsibility, for which there can be few *a priori* guideposts, but it should be a perennially necessary job for some disinterested party in all modern dynamic democratic societies.

The institution of an inverse condemnation remedy for the loss of intangible economic liberties would involve claimant, court, and counsel in a long-overdue dialogue with the jury—centering around the contemporary meaning of liberty under the evolving terms of the social compact. That way the state will be given the opportunity to put to a moral road test the refined "reasonable man" theories developed by judges and scholars to justify the noncompensability of serious intangible regulatory harms — on the theory that the affected citizen has already received "just compensation" in the form of hypothetical *ex ante* or *ex post* benefits.

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654. Cf. Buchanan, *supra* note 650, at 115-120.