The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment

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Slowly, the body of civil disputes that are guaranteed a right to a jury trial under the Seventh Amendment[1] is contracting. It is doubtful that the amendment will ever be repealed, but its content is being chipped away and there is increasingly little distance left between the current interpretation of the amendment and no amendment at all.

The agent of this erosion is the Supreme Court. If deeds speak louder than words, the message of the Supreme Court is that civil juries have, at best, a limited future. The Court writes frequently about the sanctity of the jury system,[2] and a Justice occasionally laments the erosion of the traditional sphere of jury cases,[3] but the Court nevertheless continues to exempt more and more cases from the scope of the Seventh Amendment.

This Article examines the exception that now threatens to swallow the rule: the public rights doctrine. Under this doctrine, a potentially huge body of civil disputes, including virtually all administrative law cases, are exempt from the Seventh Amendment. Although the philosophical basis for the public rights doctrine is as old as the Constitution, its lineage suggests nothing to justify this exception.

1. The Seventh Amendment reads: "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 re-examined in any court of the United States, than according to the rules of the Common Law."

2. Jacob v. New York, 315 U.S. 752 (1942). *See also*, Simler v. Conner, 372 U.S. 221, 222 (1963) ("The federal policy favoring jury trials is of historic and continuing strength."); Baylis v. Travellers' Ins. Co., 113 U.S. 316, 321 (1885) ("This constitutional right this court has always guarded with jealousy."); *see also* Chauffeurs Local No. 391 v. Terry, 494 U.S. 558, 564-66 (1990).

3. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322, 339 (1979) (Rehnquist, J., dissenting).

The development of the public rights doctrine is a consequence of the Constitution's brevity. The Constitution devotes about one page to the definition of the judiciary.[4] Due to the Constitution's brief and broad treatment of the number of courts and their respective jurisdictions, one of the first questions addressed by the judiciary was what set of disputes, if any, fell outside of the judicial system. One aspect of this question was whether, in a democracy, the government could claim a right to sovereign immunity. At least as to the federal government, this question was quickly answered in the affirmative.[5] This resulted in the conceptual segregation of those cases involving the government as a party into what were known as "public rights" cases.

The Supreme Court held that as a consequence of sovereign immunity, public rights cases fell outside some of the constitutional mandates governing other legal proceedings. According to this reasoning, if the government could only be sued with its consent, then the government could place whatever restrictions it wished on the suit. One of the primary applications of this principle was that the government did not have to consent to a jury trial.[6] In other words, public rights cases were excepted from the Seventh Amendment.

The Seventh Amendment, of course, pre-dated any of these public rights decisions, and without the Seventh Amendment, it is unlikely that there would have been any Constitution at all. At the time the Constitution was proposed, the people of the United States greatly distrusted government, and saw the absence of a guaranteed civil jury right as a reason, standing alone, to reject adoption of the Constitution; only by promising the Seventh Amendment did the Federalists secure adoption of the Constitution in several of the state ratification debates.[7] The Seventh Amendment captured the notion that centralized authority, wherever evident, should be checked by the oversight of the people.

In light of the history of the Seventh Amendment, the development of the public rights exception is misplaced. This is especially true as the Seventh Amendment is grounded on the concept of the citizens' right to check government power. Therefore, the most unlikely exception to the amendment would be in cases involving the government as a party. Strangely, however, the public rights cases did not address this philosophical tension. When the Court developed a

4. U.S. CONST. art. III.
5. Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 411-12 (1821).
6. Den v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284-85 (1856).
7. See *infra* text accompanying notes 15-25.

public rights exception to the Seventh Amendment, it neglected the philosophical underpinnings of the Seventh Amendment and instead focused on the consequences of recognizing sovereign immunity.

Moreover, in recent years, the Court has greatly expanded the scope of the public rights doctrine. This expansion, arguably tenuous in its own right, almost entirely divorces the public rights doctrine from its sovereign immunity roots. Now, a dispute is considered to involve "public rights" any time Congress creates "a seemingly (private) right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[8] Under this definition, Congress has near-dictatorial powers to withhold a broad spectrum of disputes from the judiciary and place them into legislative courts, such as tax courts, bankruptcy courts, or administrative law courts.

The justification for the expanded public rights doctrine is based on the almost sacrosanct doctrine of separation of powers. Under this reasoning, Article I defines spheres of responsibility and power reserved exclusively to the legislative branch, and the legislative branch may exercise these powers however it wishes, including the creation of dispute resolution bodies not subject to the Article III branch's check.

The redefinition of public rights exponentially expands the type and number of disputes enveloped by the doctrine, thereby expanding those disputes exempt from Seventh Amendment guarantees. Yet, as with the original development of the public rights doctrine, this broad expansion has occurred without reference to the underlying philosophy of the Seventh Amendment itself.

This Article addresses whether the Court's analysis of the public rights exception to the Seventh Amendment is sound when considered in light of the historical underpinnings of the Seventh Amendment. In other words, if the Court had considered the rationale behind the Seventh Amendment, would the Court have created a "public rights" exception?

This Article first asks if there should be a public rights exception to the Seventh Amendment under the traditional definition of "public rights." Next, this Article addresses whether there should be an exception to the Seventh Amendment for cases coming within the expanded definition of public rights. This Article answers both questions in the negative: there should not be a public rights exception to the Seventh Amendment.

8. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 594 (1985).

I. A Concise History of the Drafting and Adoption of the Seventh Amendment

The written record memorializing the emergence of the Seventh Amendment is not voluminous.[9] However, one theme that emerges relatively clearly is that eighteenth-century Americans viewed civil juries as a critical check on government power. The people wanted juries because they perceived the judiciary as an arm of the government, and the people distrusted government.

The comments of our nation's founders in the late eighteenth century provide repeated reference to the importance early Americans placed on the notion of the civil jury as a critical check on the power of government. Patrick Henry, speaking in the Virginia Constitutional Convention, called civil juries the "best appendage of freedom," one "which our ancestors secured [with] their lives and property."[10] Thomas Jefferson remarked, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[11] Thomas Paine felt civil juries were an extension of a natural right.[12] The Federalists opined that eliminating civil jury rights could lead to insurrection.[13] Indeed, when Alexander Hamilton defended the Constitution's omission of a civil jury trial guarantee, he did not contend that the right was unimportant, but rather that the silence of the Constitution did not impinge upon it.[14]

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9. The Author has published a previous Article on the Seventh Amendment, Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005 (1992). This Part of the present Article is largely drawn from that article. A comprehensive history of the Seventh Amendment is not necessary to understand the topics the present article covers. For thorough histories, see Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973). For a more concise, but still helpful, history of the origins in Western jurisprudence, see 5 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 38.02 (2d ed. 1993). *See also* Jack Pope, *The Jury*, 39 TEX. L. REV. 426 (1961).

10. 3 THE DEBATE IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 324, 544 (Jonathan Elliott ed., 1836)[hereinafter ELLIOTT'S DEBATES].

11. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in The Papers of Thomas Jefferson*, at 267 (Julian P. Boyd ed. 1958). Jefferson would later express surprise at his perception that the populace would give up the right without protest. *See* BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 609 (1971).

12. SCHWARTZ, *supra* note 11, at 316.

13. *Id.* at 455.

14. *See* THE FEDERALIST No. 83 (Alexander Hamilton).

The states did not share Hamilton's view. When the Constitution was sent to the states for ratification, it was met with immediate concern that it inadequately guarded individual liberties, and that "in civil causes it did not secure the trial of facts by a jury."[15] Thus, when Hamilton reflected on the entire range of stated objections to the Constitution, he surmised that the one which met with the most success in his state, "and perhaps in several of the other States, was *that relative to the want of a constitutional provision* for the trial by jury in civil cases."[16] As Hamilton indicated, the Anti-Federalists, who opposed ratification of the Constitution, rallied support by asserting that the Constitution would abolish civil juries altogether.[17]

One commentator illustrates the divisiveness created over retention of a constitutional right to jury trials:

> Within a month the whole country was divided into Federalist and Anti-Federalist parties. The almost complete lack of any bill of rights was a principal part of the Anti-Federalist argument; the lack of provision for civil juries was a prominent part of this argument, and the Supreme Court's appellate jurisdiction in law and in fact was treated by the Anti-Federalists as a virtual abolition of the civil jury.[18]

In Pennsylvania, the Anti-Federalists almost prevented the ratification convention from occurring, largely because they believed the Federalists were trying to abolish civil juries.[19] Similar sentiment was expressed in a variety of other states, most notably Massachusetts, New Hampshire, Virginia, New York, and Rhode Island.[20] Eighteenth century records uniformly emphasize the perceived importance of civil jury rights as a limitation on governmental power, and thus a guarantee of individual rights.[21]

In exchange for a promise by the first Congress to pass a declaration of individual rights as amendments to the Constitution, the Anti-

15. United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812)(No. 16,750).

16. THE FEDERALIST No. 83, at 495 (Alexander Hamilton) (Clinton Rossiter ed., Mentor ed. 1961).

17. *See* Henderson, *supra* note 9, at 292. "One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." Parsons v. Bedford, 26 U.S. (1 Pet.) 433, 446 (1830).

18. Henderson, *supra* note 9, at 295.

19. *See id.* at 296-97. Professor Wolfram suggests that this sentiment by the Anti-Federalists may not have been for the pure love of individual liberties, so much as a recognition of a populist issue that would serve their goals. Wolfram, *supra* note 9, at 667-68.

20. Henderson, *supra*, note 9 at 298-99.

21. *See* Luther Martin, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 221-22 (Max Farrand ed., 1911) ("*jury trials* . . . have . . . long been considered the *surest barrier* against *arbitrary power* . . .").

Federalists allowed nine states to approve the Constitution.[22] Of the seven states that proposed amendments, six proposed language protecting civil jury rights.[23] The proposed amendments evolved, of course, into the Bill of Rights.[24] The Federalists were committed to pass these amendments in the First Congress to avoid convening a second constitutional convention.[25]

James Madison was the first to introduce a draft of a bill of rights.[26] One of his proposed provisions was the clear predecessor language to the eventual final language of the Seventh Amendment: "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."[27] Madison's proposed language gives an interesting view of the type of suits that he considered appropriate for jury rights ("between man and man"). The implications of this language are perhaps more meaningful for their omission from the final ratified version, and provide an interesting presage to later debates over juries and sovereign immunity.

The key language in Madison's proposal is "In suits at common law." Even before the First Congress, Alexander Hamilton recognized the problem with language that defined the right to a jury trial by reference to "common law."[28] Hamilton's criticism was echoed in the First Congress. Federalist Samuel Livermore, former Chief Justice of New Hampshire, strongly opposed Madison's version of the Bill of Rights, and in particular the language used in the Seventh Amendment.[29] He enunciated the basic concern that not every case was best decided by a jury.[30] Implicit in this opposition was that he understood Madison's language as an absolute guarantee to a jury right in every civil case. The predicate, "In suits at common law," did not limit the set of civil jury rights in any manner whatsoever.

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22. Wolfram, *supra* note 9, at 725.

23. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE CONSTITUTION, H.R. DOC. NO. 398, 69th Cong., 1st Sess. 1019, 1026, 1029, 1036, 1046, 1054 (1925).

24. Wolfram, *supra* note 9, at 725.

25. *Id.*

26. *Id.* at 726-27. Although Madison, as the author of the original Constitution, was accused of opposing a bill of rights, he protested this characterization and claimed he supported amendments such as one protecting civil jury rights. *See* SCHWARTZ, *supra* note 11, at 996-97.

27. Wolfram, *supra* note 9, at 727-28 (quoting 1 ANNALS OF CONG. 435 (1789)).

28. *The Federalist No.* 83, 523-28 (Alexander Hamilton) (Hebry Cabot Lodge ed., 1808).

29. Wolfram, *supra* note 9, at 727-28.

30. *Id.* at 728-29, n.259.

The first case interpreting the Seventh Amendment arose less than twenty years after the passage of the Bill of Rights. In *United States v. Wonson*,[31] the defendant was prosecuted for failing to pay penalties in accordance with the Embargo Supplementary Act of 1808.[32] The defendant won at the trial court level, and the Government appealed. Justice Story was asked to decide "whether the facts are again to be submitted to a jury in this court, or the appeal submits questions of law only for the consideration of the court."[33] Justice Story found that the legislation creating appellate jurisdiction rejected the notion of a second jury.[34]

Justice Story then turned to the constitutional clauses regarding appeals. He reasoned that the Seventh Amendment was specifically crafted to restrict the higher courts from nullifying the jury verdicts of the lower courts.[35]

More importantly, he recognized "how deeply the subject [of civil jury rights] at th[e] time [of the drafting of the Seventh Amendment] interested the several states."[36] He concluded that this gave insight into the "scope and object of the amendment . . . ."[37] In other words, Justice Story recognized that the Americans of the time felt civil jury rights were of paramount importance, as reflected in the Seventh Amendment, and therefore, the Amendment must define those rights.

Next, Justice Story interpreted the Seventh Amendment in reference to "common law." Federalist 83, with which Justice Story was familiar,[38] made clear that if "common law" was read as a reference to American practice, then it provided no guideline at all. Each of the thirteen states had its own corpus of common law rules. Consequently, Justice Story was forced to conclude that "common law" referred to the law of England, the only other theoretically available solution:

> Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but it is the common law of England, the great reservoir of all our jurisprudence. It cannot be necessary for me to expound

31. 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

32. *Id.*

33. 28 F. Cas. at 745. Story recounts how at least some states did have the practice of second juries on appeal. *Id.* at 748.

34. *Id.* at 749-50.

35. *Id.* at 750 (relying on Hamilton's THE FEDERALIST No. 83).

36. *Id.*

37. *Id.*

38. He cited it within his opinion. *Id.*

> the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.[39]

No court since has questioned *Wonson*'s holding. As Professor Wolfram notes, "No federal case decided after *Wonson* seems to have challenged this sweeping proclamation; perhaps later judges have hesitated to appear to be the kind of intractable person that would require Mr. Justice Story to elaborate on the obvious."[40]

The *Wonson* interpretation of the Seventh Amendment became known as the "historical test."[41] Under the historical test, in order to determine whether a civil case carries a jury right, one must ask if the claimant would have a right to a jury trial according to eighteenth century common law principles. In 1898, the Supreme Court expressly recognized that the Sixth and Seventh Amendment's phrase "trial by jury" not only meant that a case should be compared to English practice, but also that the comparison was fixed in time to English practice in 1791.[42]

In the aftermath of the *Wonson* decision, the focus of most Seventh Amendment analyses has been to determine the applicability of the Seventh Amendment's jury trial provision in individualized cases. There have been a handful of instances, however, where judges or commentators have reaffirmed the underlying purpose of the Seventh Amendment. The most ringing reaffirmation is found in *Green v. United States*.[43] A dissenting opinion by Justices Black, Warren, and Douglas reaffirmed that primary among the precepts underlying the Constitution was that the people of the time

> deeply feared and bitterly abhorred the existence of arbitrary, unchecked power in the hands of any government official . . . . A great concern for protecting individual liberty from even the possibility of irresponsible official action was one of the momentous forces which led to the Bill of Rights. And the . . . Seventh

39. *Id.* If Justice Story had tried to explain the basis for his assertion that "common law" referred to England, he would have found the task nearly impossible. There is *no* recorded legislative history suggesting that the phrase "common law" referred to the common law of England. Nor is support found in the records of the state debates, the Federalist Papers, or the writings of commentators of the time. Indeed, Hamilton's concerns seem to suggest the opposite. THE FEDERALIST No. 83 (Alexander Hamilton). His assertion had no documentable basis. *See* David L. Shapiro and Daniel R. Coquillette *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 448-49 (1971).

40. Wolfram, *supra* note 9, at 641.

41. *See, e.g., id.* at 639.

42. Thompson v. Utah, 170 U.S. 343, 350 (1898). *See also*, Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

43. 356 U.S. 165 (1958) (Black, J., dissenting).

> [Amendment was] directly and purposefully designed to confine the power of courts and judges . . . .[44]

The Justices recognized that in the eighteenth century Americans considered trial by jury a "birth right of free men," and that their zealous determination to protect that birth right led to the passage of the Seventh Amendment.[45]

Similar reaffirmations appear in other cases. In *Edmonson v. Leesville Concrete Co.*,[46] Judges Rubin, Wisdom, Johnson, and Williams of the Fifth Circuit wrote, "The Seventh Amendment preserves the right of trial by jury, . . . thus, interposing the civil jury as an important constraint on the power of government."[47] In *Standard Oil Co. v. Arizona*,[48] the Ninth Circuit held that the Seventh Amendment arose as a consequence of "concern over the broad powers of federal government under the new constitution."[49] Similarly, in *Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission*,[50] a dissenting Judge Gibbons in the Third Circuit wrote that the people insisted upon the Seventh Amendment because they were "fearful of the aggrandizement of power in the national government."[51] Finally, Professor Wolfram, a noted scholar of the Seventh Amendment, alludes to the same notion behind the right to a jury trial: "It is familiar legend that juries in civil cases were intended to guard private litigants against the oppression of judges."[52] According to Wolfram, the Anti-Federalists, who were the driving force behind the amendment, wished to interpose juries between judges and the general populace.[53]

In summary, the focus of Seventh Amendment analysis largely has been to determine the Amendment's application to particular cases. In the instances where judges or commentators have had occasion to comment on the rationale of the Seventh Amendment, however, most have recognized the Amendment's purpose as a variant of populism. The Seventh Amendment essentially interposes a citizen check on governmental power, especially in the federal courtroom.[54]

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44. *Id.* at 209.
45. *Id.*
46. 895 F.2d 218 (5th Cir. 1990) (Rubins, J., dissenting).
47. *Id.* at 236.
48. 738 F.2d 1021 (9th Cir. 1984).
49. *Id.* at 1029.
50. 519 F.2d 1200 (3rd Cir. 1975) (Gibbons, J., dissenting).
51. *Id.* at 1208.
52. Wolfram, *supra* note 9, at 708.
53. *Id.* at 670-72.
54. See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1182-99 (1991). Professor Amar also discusses other rationales that he believes complemented

II. The Evolution of the Traditional Doctrine of Public Rights

A. Creation of the Public Rights Doctrine

Parallel to the development of the historical test of the Seventh Amendment, the Framers and the courts began to develop the notion of public rights. "Public rights" is defined by the courts as those disputes involving federal government action.[55] Contemporaneously, the courts considered whether so-called "public rights" cases were exempt from the constitutional constraints applicable to other cases.

In two places the Constitution explicitly speaks to the scope of the judiciary, and to specific rights attendant with civil trials. First, Article III creates the Judiciary, comprising the Supreme Court and such inferior courts as Congress creates. The power of the judicial branch extends to:

> all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[56]

Second, the Seventh Amendment provides: "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 re-examined in any Court of the United States, than according to the rules of the common law."[57]

On their face, these two provisions set forth a broad outline of an independent judiciary. The provisions, however, can be problematic when considered in context with other bodies of law. Two issues arise from these provisions that are pertinent to this Article. First, Articles I and II of the Constitution give broad, comprehensive grants of power to the executive and legislative branches. The exercise of executive or legislative power inevitably leads to conundrums, and thus

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the populism rationale. *Id. But see* Robert C. Palmer, *Akhil Amar: Elitist Populist and Anti-Textual Textualist*, 16 S. ILL. U. L.J. 397, 408-14 (1992).

55. *See infra* text accompanying notes 60-70.

56. U.S. CONST. art. III, § 2, cl. 1.

57. U.S. CONST. amend. VII.

necessitates dispute resolution forums. When, in the exercise of its power, the executive or legislative branches require such forums, do they then have the power to create their own courts, or are they required to rely on the judiciary? Second, because the "common law" of eighteenth century England arguably did not include a right to sue the sovereign, does the wording of Article III, referring to "[c]ontroversies to which the United States shall be a Party," constitute a waiver of sovereign immunity; or alternatively, do Article III and the Seventh Amendment simply not apply to suits to which the government is a party?[58]

Both of the issues go to the heart of sovereignty in a multi-branch democracy. Perhaps then, it was inevitable that what became the traditional definition of public rights emerged, initially, from the classical concept of sovereign immunity.[59]

B. The Sovereign Immunity Rationale

The idea was simple—if the sovereign could only be sued with its consent, then perhaps it could condition its consent to the institution of certain procedures in the action. The Supreme Court addressed this issue in *Den v. Hoboken Land & Improvement Co.*[60] In this case, often referred as the case of *Murray's Lessee*,[61] a dispute arose between two claimants to the same real estate - one who took under lineal title and the other who was a bona fide purchaser from the United States. The Government had obtained the land when the Treasury Department executed on a lien. The lineal title claimant challenged the validity of the Government's action because Congress had passed a statute requiring the Treasury Department to obtain certain findings in federal court before it could execute on a lien. According to the lineal title claimant, this Congressional act modified, and therefore violated, the Constitution's delineation of federal jurisdiction. The Court, however, held that, "there are matters, *involving public rights*, which may be presented in such form that the judicial power is capable of acting on them . . . which Congress may or not

58. Sovereign immunity, of course, presupposes that the government is a defendant. But, as became apparent in the federal courts, the doctrine also can arise when the government is a counter-claimant. *See* McElrath v. United States, 102 U.S. 426 (1880).

59. *See* Den v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 283-85 (1856); *see also* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co. 458 U.S. 50, 67 (1982) ("This doctrine may be explained in part by reference to the traditional principle of sovereign immunity . . . .").

60. 59 U.S. (18 How.) at 272.

61. *See, e.g.*, Atlas Roofing Co. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450-51 (1977).

bring within the cognizance of the courts . . . as it may deem proper."[62] By this holding, the Court coined the phrase "public rights" as a reference to those sets of cases in which the federal government was a party.

This classification of public rights cases had deep repercussions; the Court quickly held that public rights cases did *not* carry the same constitutional guarantees as other cases. By implication, this means that in public rights cases the government could provide as many or as little procedural safeguards as it chose. In particular, perhaps public rights cases were not subject to Article III and the Seventh Amendment.

The scope of the public rights exception immediately became an important question. The first drift in the direction of expansion emerged in 1929 in *Ex parte Bakelite Corp.*[63] In *Bakelite*, the Court faced the question of the constitutionality of "legislative courts."[64] The Tariff Act of 1922 allowed the President to impose tariffs to protect domestic industry and to set up a Tariff Commission to conduct hearings.[65] A party opposing imposition of a tariff could appeal adverse rulings of the Tariff Commission to the Court of Customs Appeals.[66] Bakelite had sought and obtained a tariff recommendation. Bakelite opposed the appeal on jurisdictional grounds, claiming that an inferior federal court could only hear cases or controversies, and that tariffs were executive actions, and therefore not judicially cognizable "cases and controversies."[67] The Supreme Court rejected this argument, holding that the Court of Customs Appeals was a legislative court, not a constitutional court.[68] In other words, as to matters which are purely within the purview of the legislative or executive branches, these branches may reserve to themselves the power either to create new forums for decision-making, or to delegate adjudicatory power to judicial tribunals.[69] For example, the Court referred to the Court of Claims, noting:

> It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States.

62. *Id.* at 284-85 (emphasis added).
63. 279 U.S. 438 (1929).
64. *Id.* at 451-52.
65. *Id.* at 446.
66. *Id.*
67. *Id.* at 447-48.
68. *Id.* at 448-61.
69. *Id.* at 451.

> But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.[70]

The *Bakelite* Court's characterization of the Court of Customs Appeals as a "legislative" court heralded potential expansion of the public rights doctrine. By definition, all proceedings in the Tariff Commission involved the government as a party. Therefore, *Bakelite* could have been decided simply by reference to the sovereign immunity basis of the public rights doctrine. The Court emphasized the legislative character of the Tariff Commission, however, foreshadowing a potential second, emerging rationale underlying the public rights doctrine—separation of powers.

C. The Emergence of the Separation of Powers Rationale

The Court would speak to the separation of powers rationale more explicitly three years later in *Crowell v. Benson*.[71] Crowell was a deputy commissioner of the United States Employees' Compensation Commission.[72] Crowell found Benson liable for injuries sustained by an employee of Benson's.[73] Benson challenged the award on several grounds, including that the Commission's award unconstitutionally violated the Seventh Amendment.[74] In the course of rejecting this contention, the Court held: "[T]he distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[75] Citing *Murray's Lessee* and *Bakelite*, the Court held that as to matters "which from their nature do not require judicial determination and yet are susceptible of it," Congress can reserve the power, delegate it to the executive, or commit it to judicial tribunals.[76]

D. The Two Rationales: Conjunctive or Disjunctive?

The two rationales for the public rights doctrine, sovereign immunity and separation of powers, carry the potential of greatly expanding the number of cases falling within the doctrine.[77] Sovereign immunity

70. *Id.* at 452.
71. 285 U.S. 22 (1932).
72. *Id.* at 36.
73. *Id.* at 36-37.
74. *Id.*
75. *Id.* at 50.
76. *Id.* at 50-51.
77. Later portions of this Article present an extended discussion of the parameters and validity of both sovereign immunity and separation of powers. *See infra* parts III, VI.B.1, VII.A. Presently, the classical definitions are sufficient. Sovereign immunity "precludes

only applies to cases where the government is a party. Separation of powers, on the other hand, applies to cases that arise under the broad grants of Article I or Article II. Thus, the breadth of the public rights doctrine turns on whether only one or both of the rationales must apply for a case to fall within its scope. If a dispute is a public rights case only when both rationales apply, then the number of cases covered by the doctrine is relatively small. One might refer to this as a "conjunctive" rationale requirement. On the other hand, if a dispute is a public rights case any time either of the rationales applies, then the number of cases covered by the public rights doctrine is quite large. This occurs where the rationales are "disjunctive." The express language of the *Crowell* decision indicates that the rationales are conjunctive.[78]

Not until fifty years after *Crowell* did the Court again give any serious focus to the scope of the public rights doctrine.[79] In 1980, Northern Pipeline filed a petition for reorganization. Pursuant to the Bankruptcy Act, it filed suit in bankruptcy court against Marathon Pipe Line alleging claims including fraud and breach of contract.[80] Marathon argued that the suit could not proceed except in an Article III court. Defending the constitutionality of the Bankruptcy Act, Northern asserted that bankruptcy was one of those pure legislative matters that, under the public rights doctrine, Congress could deal with however it wished.[81] This argument, of course, relied heavily on the "separation of powers" rationale for the public rights doctrine.

The Court rejected the argument, holding that a dispute between a debtor and a creditor involved only private rights, even if resolved in bankruptcy court.[82] Only a four-Justice plurality, however, could agree that the underpinnings of the public rights doctrine must conjoin for the public rights exception to apply. The plurality opined that the doctrine extends only to matters to which the government is a

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[a] litigant from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless [the] sovereign consents to suit." BLACK'S LAW DICTIONARY 1252 (5th ed. 1979). Separation of powers captures the notion that in a tripartite form of government, "[o]ne branch is not permitted to encroach on the domain of another." *Id.* at 1225.

78. 285 U.S. at 50 ("the distinction is at once apparent between cases of private rights and those which arise between the Government and persons . . . in connection with . . . constitutional functions . . . .").

79. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53, 67 (1982).

80. *Id.* at 56.

81. *Id.* at 63-64, 67-70.

82. *Id.* at 71-72.

party, and then only to matters that constitutionally can be determined exclusively by the executive or legislative departments.[83] The test for this separation of powers prong, as explained by the plurality, is a historical one: "[T]he Framers expected that Congress would be free to commit [certain] matters completely to nonjudicial executive determination, and that as a result, there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency."[84] The plurality offered a way to determine which matters were inherently judicial and which were inherently nonjudicial. They looked to the law of England and the states at the time the Constitution was adopted "in order to determine whether the issue presented was customarily cognizable in the courts."[85]

In addition to the four-Justice plurality opinion in *Northern Pipeline*, the five other justices filed a total of three other opinions.[86] Although none of these opinions directly challenged the plurality's conclusion that public rights cases must involve the government as a party, the opinions were all either silent on the issue or obliquely critical of the conclusion.[87] As a result, *Northern Pipeline* raised anew the controversy over the scope of the public rights doctrine.

III. The Public Rights Doctrine Emerges as a Restriction to the Scope of the Seventh Amendment

The renewed examination of the scope of the public rights doctrine threatened to impinge directly on the vitality of the Seventh Amendment. Throughout the 150 years of the public rights doctrine's evolution, the Court recognized the doctrine as a vehicle to exempt cases from otherwise pertinent provisions of the Constitution (Article III and the Seventh Amendment). Simply put, under the theory of sovereign immunity the government could not be held accountable for

83. *Id.* at 67-68.

84. *Id.* at 68.

85. *Id.* Interestingly, while the Court has never satisfactorily recognized the weaknesses of the historical test as a method of testing the meaning of "common law" in the Seventh Amendment, the Court immediately recognized the problem of such a test to define the public rights doctrine. Indeed, in *Northern Pipeline*, the Court explicitly commented that "[t]he distinction between public rights and private rights has not been definitively explained in precedents." *Id.* at 69. But, the plurality held it was not necessary to do so in *Northern Pipeline*, because "a matter of public rights must at a minimum arise 'between the Government and others,'" and in *Northern Pipeline*, the Government was not a party. *Id.* at 69-71.

86. *Id.* at 89-118.

87. *Id.*

its actions unless it expressly consented. Under the separation of powers doctrine, matters deemed legislative or executive in nature were wholly outside of the scope of judicial review. The cases recognizing a public rights exception to the Seventh Amendment also reflected a tension between the two rationales, because the number of cases susceptible to the doctrine could expand or contract depending on whether the cases required conjunctive or disjunctive rationales.

The first Supreme Court decision to address a public rights exception to the Seventh Amendment was *McElrath v. United States*.[88] In *McElrath*, a lieutenant in the Navy filed suit in the Court of Claims challenging his discharge.[89] The Government counterclaimed for amounts already paid him.[90] The Court of Claims found for the Government on its counterclaim and the lieutenant appealed, arguing that the statute empowering the Court of Claims to render judgment in favor of the United States violated the Seventh Amendment.[91] The Court rejected this claim, holding:

> Suits against the government in the Court of Claims . . . are not controlled by the Seventh Amendment. They are not suits at common law within its true meaning. The government cannot be sued, except with its own consent. It can declare in what court it can be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits.[92]

Essentially, the *McElrath* court relied upon the sovereign immunity branch of the public rights doctrine to hold that the Seventh Amendment's term "common law" did not encompass suits involving the sovereign.

The significance of *McElrath* as a sovereign immunity case became more apparent 30 years later when the Court decided *Hepner v. United States*.[93] *Hepner* involved a suit brought directly by the United States. Under a 1903 statute, the United States could sue private citizens for violations of certain immigration laws.[94] The United States brought such a suit against Hepner and won on directed verdict.[95] Because the case was decided on a directed verdict, the appeal addressed the jury rights of the parties. The Court ruled:

88. 102 U.S. 426 (1880).
89. *Id.* at 426-27.
90. *Id.*
91. *Id.* at 439.
92. *Id.* at 440.
93. 213 U.S. 103 (1909).
94. *Id.* at 104-05.
95. *Id.* at 105.

> [D]efendant was, of course, entitled to have a jury summoned in this case, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict according to the law if the evidence is uncontradicted and raises only a question of law.[96]

Thus, *Hepner* illustrates that the mere presence of the United States as a party did not, ipso facto, implicate the public rights doctrine and create an exception to the Seventh Amendment. Rather, the Government was required to be either a defendant or a counterclaimant. As with *McElrath*, the reasoning of *Hepner* clearly saw public rights as a sovereign immunity concept.

This point again was reinforced five years later in *United States v. Regan*.[97] There, the United States again sued to recover for violations of immigration laws.[98] One of the issues in the case was whether the action by the United States was fundamentally criminal or civil in nature. The Court decided that the action was civil in nature and, therefore, the defendant was entitled under the Seventh Amendment to have the issues tried before a jury.[99] *Regan* indicated that when Congress delegated a matter to the district courts, that delegation, at least as to civil matters, brought the case within the scope of the Seventh Amendment. Similarly, *Regan* continued to support the view of public rights as a sovereign immunity concept.

The first case to deviate from this view was *United States v. Pfitsch*.[100] *Pfitsch* involved the Lever Act, which allowed a citizen to challenge the amount of compensation the Government awarded after requisitioning war supplies.[101] The Court first addressed whether the Supreme Court had jurisdiction on direct writ of error, a question which turned on whether the Lever Act intended to confer trial court jurisdiction concurrently on the district court and the Court of Claims.[102] The answer to this question also "determine[d] incidentally whether plaintiffs who proceed under [the Act] are entitled to a trial by jury."[103] The Court interpreted the legislative history of the Lever Act to reflect Congress' intent to confer jurisdiction exclusively to the district court.[104] The Court then reasoned by extension that where a

96. *Id.* at 115.
97. 232 U.S. 37 (1914).
98. *Id.* at 40.
99. *Id.* at 46-48.
100. 256 U.S. 547 (1921).
101. *Id.* at 548.
102. *Id.* at 549.
103. *Id.*
104. *Id.* at 550-52.

statute "designates a jurisdiction in which the trial will be with a jury [an Article III court] instead of one where the trial will be by the court alone [an Article V court], it is our duty to give effect to its designation."[105] By deciding the case in this fashion, *Pfitsch* was the first decision to reference the separation of powers branch of the public rights doctrine. The thrust of *Pfitsch* is that if Congress delegated a power exclusively to the judiciary, then the normal constitutional guarantees controlling the judiciary would control the case.[106]

While *Pfitsch* foreshadowed analysis of Seventh Amendment issues under the separation of powers branch of the public rights doctrine, that shift did not occur quickly. Instead, in *Galloway v. United States*,[107] the Court returned to deciding Seventh Amendment issues under the sovereign immunity branch. The plaintiff, Galloway, sought benefits for total and permanent disability by reason of insanity.[108] The trial court granted a directed verdict for the Government.[109] Galloway claimed that the directed verdict deprived him of his right to trial by jury.[110] The Supreme Court rejected this claim, in part because "[i]t hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign."[111]

In *Galloway*, the Court implicitly suggested that the interplay between the Seventh Amendment and the public rights doctrine was *purely* a sovereign immunity question, and not subject to a separation of powers analysis. The Court explicitly took this position twenty years later in *Glidden Co. v. Zdanok*.[112]

Glidden involved two cases decided in legislative courts.[113] This raised the question of what constitutional protections, if any, applied to legislative courts. The Court, in a plurality opinion, stated:

> Despite dictum to the contrary in *United States v. Sherwood*, the legitimacy of [the] non-jury mode of trial [in the Court of Claims on a Government cross-complaint] does not depend upon the supposed [internal] "legislative" character of the court. It derives instead . . . from the fact that suits against the Government,

105. *Id.* at 553-54.

106. Since *Pfitsch* pre-dated both *Crowell* and *Bakelite*, it should not be surprising that *Pfitsch* did not make an explicit reference to separation of powers or legislative courts.

107. 319 U.S. 372 (1943).

108. *Id.* at 372.

109. *Id.* at 373.

110. *Id.*

111. *Id.* at 388.

112. 370 U.S. 530 (1962).

113. *Id.* at 531-33.

> requiring as they do a legislative waiver of immunity, are not "suits at common law" within the meaning of the Seventh Amendment.[114]

The Court made clear that the public rights doctrine exception to the Seventh Amendment was derived entirely from the notion of sovereign immunity.

Glidden clarified the parameters of the public rights exception to the Seventh Amendment. Public rights cases differed from other cases because, where the government was a defendant (and at times a cross-complainant), the government was a party only because it had chosen to allow itself to be sued. In such instances, the government could place whatever restrictions it wished on the litigation, including an exemption from Seventh Amendment guarantees.

In 1977, these parameters of the public rights exception to the Seventh Amendment changed in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*.[115] *Atlas Roofing* involved administrative proceedings against employers in violation of the Occupational Safety & Health Act of 1970. Under the Act, employers could challenge the results of the proceedings by judicial review in the federal courts. The employers contended that the Act violated the Seventh Amendment because the administrative procedures did not afford a right to a jury trial.[116] The Court rejected this claim, holding:

> At least in cases in which "public rights" are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.[117]

As this holding reflects, the Court rested its analysis of the public rights exception to the Seventh Amendment on the notion of separation of powers. The Court concluded that "the cases . . . stand clearly for the proposition that when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'"[118] Indeed, the Court even silently reaffirmed the holding in *Pfitsch* by noting that the Seventh Amendment re-

114. *Id.* at 572 (citations omitted).
115. 430 U.S. 442 (1977).
116. *Id.* at 450.
117. *Id.*
118. *Id.* at 455.

quired a jury where the adjudication was assigned to a federal court of law instead of an administrative agency.[119]

Atlas Roofing had the effect of both expanding and defining the parameters of the expanded rationale of the public rights exception to the Seventh Amendment. Prior to *Atlas Roofing*, the separation of powers aspect of the public rights doctrine was never interpreted to implicate jury rights. After *Atlas Roofing*, however, separation of powers considerations became crucial in evaluating Seventh Amendment rights.[120] As the *Atlas Roofing* decision made clear, Congress could not simply codify traditional rights and then assign adjudication of those rights to administrative courts. Rather, in order for the Seventh Amendment to be exempt from administrative proceedings, the statute had to create a new, previously unknown right, *and the government had to be a party to the dispute in adjudication of that right.*[121] Therefore, both aspects of the public rights doctrine had to conjoin to exempt a case from the Seventh Amendment.

IV. The Public Rights Doctrine Expands

The evolving definition and rationale of the public rights doctrine from *Murray's Lessee* to *Atlas Roofing* only subtly addressed the inherent tension between the two rationales. In the late 1980s, the Supreme Court confronted this tension and settled upon a new, expanded notion of the public rights doctrine. The issue arose in *Thomas v. Union Carbide Agricultural Products Co.*[122] *Thomas* involved a challenge to the constitutionality of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), a statute providing for information-sharing of scientific pesticide discoveries. Under FIFRA, if private parties did not reach agreement on data consideration and compensation schemes, the Environmental Protection Agency could force resolution of these issues through binding arbitration. The appellees contended that Article III barred Congress from requiring arbitration of disputes among registrants concerning compensation

119. *Id.*; *see also id.* at 457-58 (noting that juries always are available for adjudicating private rights in court, but can be restricted in other fora).

120. A few years later, in *Lehman v. Nakshian*, 453 U.S. 156 (1981), the Court made clear that while the focus of the public rights exception to the Seventh Amendment may have shifted to separation of powers, sovereign immunity was still a valid basis for the exception. *Id.* at 160-61.

121. *Atlas Roofing*, 430 U.S. at 449, 460.

122. 473 U.S. 568 (1985).

under FIFRA without also affording substantial review of the arbitrator's decision by tenured judges.[123]

One of the alternative bases supporting appellee's argument was their contention that FIFRA confers a "private right" to compensation, requiring either Article III adjudication or review by an Article III court.[124] This argument rested on the distinction between public and private rights as in the plurality opinion of *Northern Pipeline*.[125] Appellees urged that, under *Northern Pipeline*, *Crowell*, and *Murray's Lessee*, the public rights doctrine *only* applied when the federal government was a party of record.[126] In *Thomas* the Court rejected this argument.[127] The Court concluded that the public rights doctrine reflected a "pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced."[128] The Court then held that "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[129] The Court's holding embraced a vision of the public rights doctrine that focused almost exclusively on the separation of powers rationale and that ignored the sovereign immunity rationale. Thus, the Court embraced an undeniably expansive view of public rights.[130]

V. The Expansion of Public Rights Eviscerates the Historical Intent of the Seventh Amendment

Once the Court decided *Northern Pipeline* and *Thomas*, thus expanding the entire notion of public rights, it was inevitable that the

123. *Id.* at 582.

124. *Id.* at 585; *see also* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) (only public rights controversies may be removed from Article III courts).

125. *Thomas*, 473 U.S. at 585. *See also supra* notes 77-83 and accompanying text.

126. *Id.*

127. *Id.* at 586.

128. *Id.* at 589 (citing *Northern Pipeline*, 458 U.S. at 68 and Crowell v. Benson, 285 U.S. 22, 50 (1932)).

129. *Id.* at 593-94.

130. *See also* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (CFTC may entertain state law counterclaims without violating Article III).

public rights exception to the Seventh Amendment would expand. This inevitability was realized in *Granfinanciera, S.A. v. Nordberg.*[131]

Granfinanciera, like *Northern Pipeline*, was a bankruptcy decision. A trustee in bankruptcy filed a claim challenging an alleged fraudulent conveyance. One of the issues on appeal was the bankruptcy court's denial of the request for a jury trial. The Eleventh Circuit Court of Appeals affirmed the District Court's holding that the Seventh Amendment did not supply a right to a jury trial because fraudulent conveyances are equitable in nature and do not meet the Seventh Amendment's requirement of a case arising "under common law."[132] This issue came before the Supreme Court. In resolving the issue, the Court provided the contemporary form of Seventh Amendment rights analysis and its interplay with the public rights doctrine.

The Court began by defining a dual inquiry. First, applying the *Wonson* historical test, the Court had to determine whether the case fell within the Seventh Amendment's scope. Second, if the case was within the scope of the Seventh Amendment, the Court had to determine whether the public rights exception applied.[133]

The Court devoted several pages of historical analysis to support its conclusion that fraudulent conveyances were within the scope of "common law" under the Seventh Amendment. The Court concluded that "[u]nless Congress may and has permissibly withdrawn jurisdiction over that action by courts of law and assigned it exclusively to non-Article III tribunals sitting without juries, the Seventh Amendment guarantees petitioners a jury trial upon request."[134] This holding directly implicated the public rights exception to the Seventh Amendment.

Next, the Court turned to an analysis of the public rights doctrine, beginning by defining the range of cases where the doctrine would be invoked. The Court stated that wholly private tort, contract, and property cases would never be public rights cases.[135] On the other hand, Congress was free to devise novel causes of action involving public rights free from the strictures of the Seventh Amendment.[136] Thus, *Granfinanciera* foretold the inevitable expansive interpretation of the public rights exception to the Seventh Amendment.

131. 492 U.S. 33 (1989).
132. *Id.* at 37.
133. *Id.* at 42.
134. *Id.* at 49.
135. *Id.* at 51.
136. *Id.*

The Court, however, recognized that limitations on the expansive application of the doctrine were necessary. Without any limitations, the public rights doctrine posed the danger of eviscerating the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law.[137] On the other hand, limiting the scope of the public rights exception raised the issue of the potential of the Seventh Amendment to choke already crowded federal courts.[138] Based on this latter concern, the Court held that Congress had the right to fashion "closely analogous" causes of action to common law claims and place them beyond the ambit of the Seventh Amendment.[139]

This holding placed the entire emphasis of public rights analysis on the separation of powers rationale of the public rights doctrine. Indeed, the Court went on to state that "[t]he crucial question[ ] is whether 'Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.'"[140] Explaining further, the Court stated that "[t]hose cases in which Congress may decline to provide jury trials are ones involving statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency or a specialized court of equity."[141] The Court emphasized, however, that Congress could not take away a pre-existing, common law cause of action from the scope of the Seventh Amendment "merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or specialized court of equity."[142]

In *Granfinanciera*, Justice Scalia, in a concurring opinion, identified the threat that an expansive interpretation of the public rights exception poses to the Seventh Amendment. He noted that from 1856 until 1985, the public rights doctrine required that the government be a party to the litigation.[143] While the Court's decision in *Thomas* changed this notion, Justice Scalia argued that *Thomas* was

137. *Id.* at 52.
138. *Id.* at 51 n.9.
139. *Id.* at 52.
140. *Id.* at 54 (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593-94 (1985)).
141. *Id.* at 55 n.10.
142. *Id.* at 61.
143. *Id.* at 68 (Scalia, J., concurring).

"entirely inconsistent with the origins of the public rights doctrine."[144] Reviewing *Murray's Lessee*, the recognized source of the public rights doctrine, Justice Scalia noted that "[i]t is clear that what we meant by public rights were not rights important to the public, or rights created by the public, but rights *of the public*—that is, rights pertaining to claims brought by or against the United States."[145] The reason for this was simple—public rights turned on the doctrine of sovereign immunity and the waiver of sovereign immunity; these issues did not arise unless the government was a party to the case.[146] Thus, Justice Scalia accused the Court of both ignoring the origins of the public rights doctrine and expanding its definition "by sheer force of our office."[147] Finally, as Justice Scalia noted, this trend was based on reasons having little to do with the Constitution, but more to do with the pragmatic concerns of Congress and the courts.[148]

The potential consequences of the *Granfinanciera* decision are vast. The advent of administrative law, the preemptive effect of statutory regulation, the increasing frequency of procedural disposition of cases, and the financial pressures on Congress to get control of the federal budget, can work in concert with *Granfinanciera* to exempt ever-widening sets of cases from the Seventh Amendment. Now, even common law claims may have dubious Seventh Amendment protection in administrative courts.[149] Common law claims can arise in any variety of Article I courts beyond bankruptcy courts.[150] Yet once a common law claim is in an Article I court, its Seventh Amendment protection is virtually destroyed. Administrative law judges do not

144. *Id.* at 66.

145. *Id.* at 68 (emphasis added).

146. *Id.*

147. *Id.* at 69.

148. *Id.*

149. As one commentary observes, "almost any private, common-law sort of action may be converted by Congress to a matter of public right and thereby moved outside the zone of Article III courts." ALFRED AMAN & WILLIAM MAYTON, ADMINISTRATIVE LAW 126 (1993).

150. In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), which preceded *Granfinanciera*, the Supreme Court considered the argument that the Commodity Futures Trading Commission lacked authority to adjudicate common law claims. *Id.* at 835. The Supreme Court recognized that the traditional model of agency adjudications did not anticipate deciding common law claims, but that a legislative court nonetheless did have the legal right to do so. *Id.* at 851-52. While common law rights are the classical bailiwick of Article III courts, an Article I court deciding common law claims does not violate separation of powers. *Id.* at 851-57.

empanel juries (and might not have the power to do so).[151] Further, even if an administrative law judge could empanel a jury in disputes involving common law claims, Justice Scalia predicts that the judiciary will be inclined to simply relabel claims in order to strip them of common law protection in administrative courts. Simply put, if common law counts can and do arise in Article I courts, then claims the Supreme Court might characterize as not common law, but "closely analogous" to common law claims, will become the norm. Given the "amazing proliferation of twentieth-century administrative law cases,"[152] these claims, which fall within the public rights exception, could swallow the Seventh Amendment.

The remarkable aspect of this potential hole in Seventh Amendment protection is that it has come into existence without any reference to the Seventh Amendment. The expansion of the public rights doctrine has been purely a debate over whether sovereign immunity or separation of powers forms the more compelling rationale for the doctrine. Yet, if one of the primary consequences of any expansion of the doctrine is a contraction of Seventh Amendment guarantees, this factor should be weighed heavily in the evaluation of how to interpret the public rights doctrine. The remainder of this Article demonstrates that if the Court's analysis had proceeded along these lines, it might have come to a much different result.

VI. The Illogic of a Seventh Amendment Exception for Traditional Public Rights

If the Court had considered whether the public rights exception would fit within the overall structure and rationale of the Seventh Amendment, the Court would have addressed two questions: (1) whether a public rights exception could fit within the "historical test" that has come to define the scope of the Seventh Amendment, and (2) if so, whether the rationale for a public rights exception outweighs the principles underlying the Seventh Amendment. Undertaking this analysis, the Court would have concluded that the public rights exception cannot coexist with the historical Seventh Amendment test, and further, that the principles underlying the Seventh

151. Some commentators indeed postulate that the explanation of the public rights exception is the pragmatic realization that juries and agencies are incompatible. AMAN & MAYTON, *supra* note 149, at 145-46.

152. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 2 (1983).

Amendment far outweigh those supporting the public rights exception.

A. The Public Rights Exception to the Seventh Amendment Conflicts with the *Wonson* Historical Test for Interpreting the Amendment

As even *Granfinanciera* confirmed, interpretation of the Seventh Amendment is governed by the *Wonson* historical test. While one may cast doubt upon the validity of the historical test,[153] it is the standard rule of interpretation. Indeed, as the Court confirmed in *Granfinanciera*, a near identical analysis is required to determine whether a case is a public rights case.[154] Therefore, in determining whether traditional public rights cases (i.e., cases to which sovereign immunity applied) fit within the literal language of the Seventh Amendment, the Court should ask whether traditional public rights cases would be "common law" cases under the eighteenth century English justice system. In other words, at the time of the writing of the Constitution, could the sovereign be sued in the common law courts?

The simplistic formulation of the concept of sovereign immunity is that the King was afforded blanket protection from legal claims. Contemporary analysis has come to the conclusion that sovereign immunity was not grounded in the infallibility of the Crown, but rather in the pragmatic recognition that in a feudal hierarchy, there was no court above the King to correct his misdeeds.[155] According to this view, even in medieval England the King was at most pragmatically, not theoretically, absolutely immune from the law; and may not have even been pragmatically immune.[156]

Yet regardless of the breadth of immunity in medieval England, by the time of the eighteenth century, English common law certainly did not provide the crown with absolute immunity. The Seventh Amendment's "historical test" took into account the common law of England in 1791. It is indisputable that in 1791, the sovereign could be

153. *See* Klein, *supra* note 9.

154. *Granfinanciera*, 492 U.S. at 60-61; *see also* Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 460 (1977) (stating the Seventh Amendment "took the existing legal order as it found it").

155. *See* Nevada v. Hall, 440 U.S. 410, 415 (1979); J. W. EHRLICH, EHRLICH'S BLACKSTONE 66 (1959); 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 518 (1895).

156. *See generally*, Pawlett v. Attorney General, 145 Eng. Rep. Ex. 1668 (Hadres 465) 550, 551 (Ex 1668) (noting "... in natural justice redemption of a mortgage lies against the King").

sued in some circumstances in the common law courts of England.[157] Therefore, the Seventh Amendment guaranteed a right to a jury trial in some cases in which the government was a party. In other words, the literal language of the Seventh Amendment did not justify the creation of a *carte blanche* public rights exception.[158]

B. When Resolving the Conflict, the Public Rights Exception is Outweighed by the Principles Underlying the Seventh Amendment

While the literal language of the Seventh Amendment prohibits a *carte blanche* public rights exception, it does allow for jury trials to be curtailed in most claims involving the government. Thus, the next step is to determine whether the rationale for the public rights exception outweighs the fundamental principles of the Seventh Amendment.

I. Rationale Redux: A More Detailed Analysis of Sovereign Immunity as a Justification for the Public Rights Exception

The classic rationale of the public rights exception is rooted in the concept of sovereign immunity. The vitality of the public rights doctrine depends upon the legitimacy of sovereign immunity as an American doctrine. Prior to the Revolutionary War, the colonists had adopted the concept of limited sovereign immunity.[159] Article III of the Constitution, however, gave federal courts jurisdiction in suits between citizens and state/federal governments in the newly formed United States.[160] Article III's grant of jurisdiction arguably was an implicit rejection of the entire concept of sovereign immunity. Recognizing this tension, the authors of the Constitution debated whether state sovereign immunity survived in the wake of Article III of the Constitution. Alexander Hamilton believed that the inherent nature of sovereignty meant that a state could not be sued without its consent.[161] He argued that suits against the government made no sense because awards were unenforceable.[162] John Marshall agreed,[163] ar-

157. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1-19 (1963).

158. "Historical . . . rationalizations . . . do not add up to a persuasive defense of the doctrine." C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 150 (1972).

159. *Id.* at 151.

160. U.S. CONST. art. III, § 2.

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

162. *Id.*

163. 3 ELLIOTT'S DEBATES, *supra* note 10, at 555-56.

guing that Article III simply allowed actions by states as plaintiffs. James Madison echoed similar thoughts.[164]

On the other hand, Patrick Henry read Article III as a recognition that states could be sued in federal court.[165] According to Henry, in the aftermath of the Revolutionary War, many citizens held continental paper money which only had value if the holder could sue a state to pay that state's proportion of the nominal value of the currency. Article III, therefore, was a specific recognition that such suits could be brought. Henry's reading of Article III was shared by delegates George Mason,[166] Edmond Randolph,[167] and James Wilson.[168]

One can draw three conclusions from these views. First, the Framers understood that the recognition of sovereign immunity was not a philosophical imperative, but, rather, a choice. Second, the language of Article III is open to interpretation, even the men who wrote and ratified it were not in agreement as to the meaning of the language. As Henry's comments reflect, there were practical, contemporaneous reasons why the founders had incentive to allow suits against the state. On the other hand, Madison's comments reveal the appeal of absolute sovereign immunity. Finally, the authors of the Constitution limited their debate to a discussion of whether state governments would enjoy the protection of sovereign immunity. None of the comments addressed the issue of the federal government's sovereign immunity. Yet it can be argued that Article III spoke to suits involving the federal government as well as the states. Further, it can be argued that a government by the people, for the people, and of the people cannot in concept be immune from a suit by a citizen.[169] Thus, if the language of Article III eliminated sovereign immunity for states, it might also do so for the federal government.

The Supreme Court shaped all future debate about federal sovereign immunity with its decision in *Chisholm v. Georgia*,[170] in which a private citizen sued a state. The question in *Chisholm* was whether Georgia had sovereign immunity. A majority of the Justices held that

164. *Id.* at 523.

165. *Id.* at 319.

166. *Id.* at 526-27.

167. *Id.* at 207.

168. 2 *id.* at 491 (2d ed. 1881).

169. JACOBS, *supra* note 158, at 152-53. For a tepid confirmation of the difference between king as sovereign and people as sovereign, see *United States v. Lee*, 106 U.S. 196, 208 (1882).

170. 2 U.S. (2 Dall.) 419 (1793).

Chisholm could sue Georgia. The various opinions, however, reveal the nature of sovereign immunity in a democracy.

Chisholm presented, in essence, three alternative avenues of decision. First, the Court might have held that the concept of sovereign immunity is incompatible with the inherent nature of democratic government. Therefore, any citizen can sue its democratic government, whether that be the federal or state government. The second possibility was for the Court to recognize an inherent distinction between the federal government and state governments that only permits the federal government to claim sovereign immunity. Finally, the Court might have decided that the Constitution, by its terms, precluded exercise of sovereign immunity.

Mr. Randolph, the Attorney General of the United States, presented Chisholm's case. He argued that in England—and, by extension, America—the preeminent power could only be sued with its permission.[171] He asserted that the United States could not be sued because "the head of a confederacy is not within the reach of the judicial authorities of its inferior members. It is exempted by its peculiar pre-eminencies."[172] But he also argued that the very text of the Constitution contemplated suits against a state.[173] Therefore, Randolph argued that sovereign immunity was not antithetical to democracy, but was antithetical to both the nature of state governments and the words of the Constitution.

None of the five Supreme Court justices accepted the entirety of Randolph's argument, each writing separate opinions. Justice Iredell recognized that, although the common law differed in each of the states, it fundamentally reflected the common law of England.[174] According to Justice Iredell, each state was a fully independent sovereign (except to the extent that it limited its sovereignty by agreement) and, because each state adopted English law, a state could only be sued with its permission, unless it agreed to otherwise limit its sovereignty.[175] Under Justice Iredell's theory, the Constitution did not reflect a waiver of sovereign immunity.[176]

171. *Id.* at 425. Mr. Randolph argued that petitions of right, *monstrans de droit*, and even process in the exchequer, all were permissible only with the indulgence of the Crown. *Id.*

172. *Id.*

173. *Id.* at 426-28.

174. *Id.* at 435-37.

175. *Id.* at 436.

176. *Id.* at 449-50.

Justice Blair based his discussion on constitutional construction. From his point of view, the language of Article III by its terms contemplated that a state could be sued. For him, this ended the inquiry. He did not address the larger philosophical or political questions regarding the nature of state sovereignty or the possibility of federal sovereign immunity.[177]

Justice Cushing's approach was somewhat similar to Justice Blair's. He believed that states could be sued under Article III of the Constitution. Unlike Justice Blair, however, Justice Cushing chose to address the larger question of whether a citizen could also sue the federal government. He noted that Article III referred to controversies between a state and citizens of a different state as distinct from "controversies to which the United States shall be a party."[178] Relying on this distinction, Justice Cushing concluded that Article III only eliminated sovereign immunity for states.

Justice Wilson drafted the lengthiest opinion. By his own characterization, he analyzed the case from three points of view: general jurisprudence, the laws and practice of historical states and kingdoms, and the history and language of the United States Constitution.[179] Justice Wilson held to two basic predicates: First, that the notion of sovereignty is not mentioned in the Constitution of the United States,[180] and second, that in a democracy the source of all power, and the apex of all power, is the individual citizen.[181] While Justice Wilson recognized that conceptually, in a feudal system, there could be no one who could exercise power over the king,[182] he also believed that as a matter of jurisprudence and justice, laws were derived and founded on the consent of those whose obedience they required.[183] Therefore, Justice Wilson ascribed sovereign immunity in England only to its pragmatic origins, and not to any valid philosophical underpinning. Indeed, he referred to notions of state independence, state sovereignty, and state supremacy as "haughty."[184] Justice Wilson concluded that the concept of sovereign immunity was philosophically antithetical to any form of government, pragmatically antithetical to a

177. *Id.* at 450-53.
178. *Id.* at 469.
179. *Id.* at 453.
180. *Id.* at 455.
181. *Id.* at 455-61.
182. *Id.* at 458.
183. *Id.*
184. *Id.* at 461.

democracy, and clearly not contemplated by the words of the Constitution.

The final opinion was that of Chief Justice Jay. He believed that the people of the United States were the heirs of the King's sovereign power.[185] Chief Justice Jay therefore concluded that, while in a feudal system the right to sue the sovereign is incompatible with the basic theory of sovereignty, in a democratic system there is no such problem.[186] Nonetheless, Chief Justice Jay recognized that from a political standpoint, no judgment against the United States could be enforced without the acquiescence of the United States. By this, Chief Justice Jay insinuated that, in America—much as in medieval England—sovereign immunity might be a pragmatic reality while lacking any legitimate philosophical basis.[187]

The *Chisholm* decision evoked serious concern and led to the immediate passage of the Eleventh Amendment.[188] As a result, Congress constitutionally reinstated sovereign immunity for state governments.[189]

Perhaps the anomalous consequence of the passage of the Eleventh Amendment (which by its terms addressed only the rights of state governments) was that it seemed to silence the interesting discussion begun in *Chisholm v. Georgia* regarding federal sovereign immunity. In *Chisholm*, only three of the five justices directly addressed the issue of sovereign immunity for the federal government. One of them, Justice Wilson, explicitly rejected sovereign immunity for the federal government. Another, Chief Justice Jay, believed the concept to be philosophically incongruous in a democratic government, but also recognized that the federal government could achieve that practical result if it chose to. Justice Cushing believed the Constitution explicitly rejected sovereign immunity for state governments but not the federal government, and voiced no opinion on the possibility of sovereign immunity for the federal government.

185. *Id.* at 470-71.

186. *Id.* at 471-73.

187. *Id.* at 478.

188. Hans v. Louisiana, 134 U.S. 1, 11 (1890).

189. Although, even here, some argue that the Eleventh Amendment intended to waive sovereign immunity to the extent it was waived in England. JACOBS, *supra* note 158, at 5, 20-21; Stewart A. Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 153-54 (1977). The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens of Subjects of any Foreign State."

Despite the debate captured in the five opinions of *Chisholm*, the Supreme Court has never meaningfully returned to the discussion of the philosophical underpinnings of sovereign immunity. Rather, the next mention of sovereign immunity is a single sentence in *Cohens v. Virginia*.[190] In *Cohens*, Chief Justice Marshall wrote, "The universally received opinion is that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits."[191] Chief Justice Marshall assumed—without analysis—that the federal government enjoys sovereign immunity, something that the justices in *Chisholm* saw as a far more murky issue. Chief Justice Marshall also assumed that sovereign immunity was absolute, although that view does not comport with English common law at the time of the formation of the American common law system. In any event, Chief Justice Marshall's opinion foreshadowed that later courts would address sovereign immunity as a closed issue.

II. Rationale Weighing: The Fundamental Principles of the Seventh Amendment Override the Logic of a "Sovereign Immunity" Exception

The principles underlying the Seventh Amendment, in contrast, are unambiguous. The early Americans deeply distrusted government, and were cynical and suspicious of any retention of power in a central governing authority.[192] Thus, if federal judges were to have lifetime tenure, then citizen juries were crucial to prevent kings in the courtroom.[193] The principle captured in the Amendment is that the specter of unchecked authority was unacceptable.[194]

The convoluted rationale behind the public rights exception, namely, the misguided application of sovereign immunity, does not outweigh the fundamental principles of the Seventh Amendment. As a theoretical matter, sovereign immunity had questionable validity as a means to shield a government of, by, and for the people. At most, it was a doctrine with limited appeal and vitality. Indeed, its weakness

190. 19 U.S. (6 Wheat.) 264, 411-12 (1821).

191. *Id.*

192. As one commentary states, "The grand function of the civil jury has to be that of rectifying and decentralizing government power according to community interests." AMAN & WILLIAM, *supra* note 149, at 141. This suggests that it is backwards to find a public rights exception (i.e. no jury) for agencies since agencies are the operation of government most subject to political pressure and least responsive to the community. *Id.* at 142; *see also* Colleen P. Murphy, *Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions*, 95 YALE L.J. 1459, 1465-66 (1986).

193. Wolfram, *supra* note 9, at 667-725.

194. *Id.*

was amply demonstrated by the subsequent frequency and breadth of legislative waivers such as the Federal Torts Claims Act, and of creative countermeasures, such as the tactic of suing a federal officer instead of the federal government. In contrast, the rationale of the Seventh Amendment was to prevent precisely the sort of unchecked government authority that the doctrine of sovereign immunity purported to preserve. Frankly, there is no doctrine that would be more offensive to the spirit of the Seventh Amendment than that of sovereign immunity.

VII. The Illogic of a Seventh Amendment Exception for the Present Day Notion of Public Rights

As noted in Part IV, under the expanded definition of public rights the doctrine is no longer grounded in sovereign immunity, but rather in separation of powers. This justification for the doctrine fares no better than sovereign immunity when measured against the principles underlying the Seventh Amendment.

A. Separation of Powers Is an Insufficient Philosophical Basis for an Expanded Public Rights Exception

As the history of the public rights doctrine reflects, the separation of powers branch of the public rights doctrine is an expansion of, and derivative of, the sovereign immunity branch of the doctrine. As demonstrated above, the sovereign immunity rationale of the public rights doctrine is insufficient to support a public rights exception to the Seventh Amendment. Therefore, if the expanded definition of public rights cases is purely derivative of the traditional definition, then the expanded exception also fails to justify a public rights exception.

Recent Supreme Court decisions, however, have interpreted the separation of powers rationale as an independent rationale. If separation of powers exists as an independent rationale for the public rights doctrine, then it is necessary to ask if separation of powers, as a jurisprudential concept, is itself a suspect doctrine.

One of the leading commentators on administrative law, Professor Kenneth Culp Davis, argues that separation of powers, at least as a philosophical basis for administrative courts, is an illusory doctrine.[195] As Professor Davis states, "[T]he theory of separation of powers . . . [does not provide] *any* affirmative support for the rise of

195. 1 KENNETH DAVIS, ADMINISTRATIVE LAW 63-91 (2d ed. 1978).

the administrative process."[196] In summary, Professor Davis concludes that there never has been true separation of powers.[197] Rather, the lines delineating the powers of the three branches of government have always overlapped and blurred.[198] He adds that, at best, we might now "mold" separation of powers into a useful doctrine, but it is philosophically incongruous to rest any jurisprudential concepts on separation of powers.[199] Indeed, James Madison recognized even before ratification of the Constitution that separation of powers could not be absolute.[200] Thus, one must recognize that some analysts view separation of powers as a weak doctrine.

In balancing the unsupported doctrine of separation of powers against the strong philosophical principles underlying the Seventh Amendment, one can only conclude that the public rights exception is a spurious doctrine. The fundamental principle of the Seventh Amendment was to reserve a portion of dispute resolution to the people, not abandon it to the government. The people did not trust the government. Therefore, it is again antithetical to the Seventh Amendment to read into it an exception for government-supervised dispute resolution.[201]

B. Separation of Powers is an Insufficient Jurisprudential Basis for an Expanded Public Rights Exception

Ultimately, the question of whether separation of powers justifies the creation of legislative courts and exempts certain disputes from the Seventh Amendment, is largely moot. This is because that entire analysis rests on the faulty premise that the Seventh Amendment only applies to Article III courts. If one recognizes that the Seventh

196. *Id.* at 62-63.

197. *Id.* at 63-65. "The United States government does not operate and never has operated under a theory that legislative, executive, and judicial powers must be kept separate and can never be mixed up together." *Id.* at 63.

198. *Id.* at 63-65. This was probably recognized as true even from the Constitution's inception. *See also*, Joseph S. Sano, Note, *A Literal Interpretation of Article III Ignores 150 Years of Article I Court History:* Northern Pipeline Constr. Co. v. Marathon Oil Pipe Line Co., 19 NEW ENG. L. REV. 207, 233 (1983).

199. DAVIS, *supra* note 195, at 59, 75-82. ("The administrative process has developed in spite of the dominant theoretical thinking, not in response to it. . . . [S]eparation of powers . . . [has] been [a barrier] to the development . . . .").

200. THE FEDERALIST NO. 47 (James Madison).

201. As one commentator notes, the early Americans' strong belief in limited government was itself one of the reasons for embracing separation of powers in the first place. Monaghan, *supra* note 152 at 32. Eighteenth century thinkers believed constitutional limits extended beyond protection of private rights. *Id.* at 32 n.188.

Amendment applies to the dispute resolutions of *all* claims sounding in common law, then separation of powers becomes irrelevant.

Furthermore, the Supreme Court has already resolved the question. The Supreme Court has held that, if a common law claim arises in an Article I court, that claim still carries a jury right.

In *Granfinanciera*, a common law claim arose in bankruptcy court. Bankruptcy courts are, of course, merely one variant of an Article I court.[202] The Supreme Court held that although the common law claim arose in an Article I court, the Seventh Amendment right to a jury trial still applied.[203] The *Granfinanciera* decision left open a variety of questions, however. For instance, could the legislative court impanel a jury, or did the case have to be transferred to an Article III court? Also, if the Article I court could impanel a jury, would the Article III court review of that decision require impanelling a second jury? These mechanical questions are still unanswered.[204]

Conclusion

We live in times when the pace of technological, sociological, and structural change is ever-increasing. The nature of society, our sense of morality and justice, and our views on jurisprudence, may only faintly resemble the notions of our predecessors 200 years ago. Our Founding Fathers, however, were far-sighted enough to anticipate that the unexpected might come to pass. Therefore, they did not saddle us with a rigid form of government, changeable only through revolution. Rather, the Constitution sets forth a variety of mechanisms for amendment. If the consensus of the people of the United States today is that judges can be trusted, Congress can be trusted, and juries are nettlesome, then the provisions of the Constitution can be changed to reflect this new concept of the relationship between government and the governed. Unless and until the Constitution is amended, our courts and legislators should adhere to it. There is no basis for a public rights exception to the Seventh Amendment, and our courts should abandon any position to the contrary.

202. *See, e.g., In re* Investment Bankers, Inc., 4 F.3d 1556, 1561 (10th Cir. 1993).
203. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 63-64 (1989).
204. *Id.*