# JURIES FOR TAKINGS LIABILITY: TREATING LITIGANTS ALIKE

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## INTRODUCTION

The right to trial by jury has long been accepted as a foundational part of Anglo-American law. The Supreme Court has called it "the bulwark of American liberties"[2] and a cornerstone of our system of justice.[3] Blackstone praised it as "the glory of the English law."[4] John Adams called it "the heart and lungs" of liberty.[5] Thomas Jefferson concluded that trial by jury was "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[6] More recently, constitutional scholar Akhil Reed Amar concluded that "[n]o idea was more central to our Bill of Rights … than the idea of the jury."[7] And, lest we forget, one of the explicit charges in the Declaration of Independence justifying our split with England was "[f]or depriving us in many cases, of the benefits of Trial by Jury."[8] Take a poll of lawyers and the odds are strong that most will tell you they would prefer trying their cases to juries rather than judges.

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[9] the Supreme Court held that a regulatory takings plaintiff in a suit in federal court under

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[2] *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters, etc. v. Terry*, 494 U.S. 558, 565 (1990). See also William Blackstone, Commentaries on the Laws of England 342 (1769) (jury is the "grand bulwark" of English liberty).

[3] *See* United States v. Gaudin, 515 U.S. 506, 512-13 (1995); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976).

[4] BLACKSTONE, *supra* note 2 at 379.

[5] Letter from John Adams to the Earl of Clarendon, William Pym (Jan. 20, 1766), *quoted in* CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY 389 (1953).

[6] Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *quoted in* THE WRITINGS OF THOMAS JEFFERSON 408 (Memorial Edition, Andrew A. Lipscomb, ed. 1903).

[7] Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169 (1995).

[8] THE DECLARATION OF INDEPENDENCE, ¶15 (1776).

[9] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

42 U.S.C. §1983 had a right to have a jury decide the issue of liability (in addition to the issue of the amount of compensation). Gratuitously (as the issue of state court procedure was not before the Court), the opinion said flatly, "it is settled law that the Seventh Amendment does not apply [to] … suits brought in state court."[10] In fact, the case cited for this proposition shows no such "settled" law at all. It says only that "[t]he Court *has not held* that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment."[11] That is a far cry from the seemingly definitive assertion flatly made in *Del Monte Dunes*.

Knowing (as counsel for the property owner in *Del Monte Dunes*) that the issue was not part of that case, it has always grated on me that the Court saw fit to throw that statement into its opinion, thus injecting confusion (at least) into state court litigation of takings cases, as state courts accepted it as final.[12] At least part of the inspiration for this article was to try to figure out how that happened and whether it has any basis.

## I. THE BACKGROUND: BILL OF RIGHTS COVERAGE

Let's start with the application of the 7th Amendment against the federal government. The rules are clear. The right to trial by jury is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right" has always been and "should be scrutinized with the utmost care."[13] The 7th Amendment right to a jury trial applies to "all but" those cases involving solely equitable remedies.[14] When "legal" issues are presented, a jury is mandated upon request.[15]

The right to a jury trial in civil cases was a critically important issue at the time this country was founded. As the Supreme Court recently summarized:

> "In the Revolution's aftermath, perhaps the 'most success[ful]' critique leveled against the proposed Constitution was its 'want of a ... provision for the trial by jury in civil cases.' The Federalist No. 83. The Framers promptly adopted the Seventh Amendment to fix that flaw. In so doing, they embedded the right in the Constitution, securing it against the passing demands

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10 *Id*. at 719.

11 Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974) (emphasis added).

12 *See, e.g.,* Suppes v. Curators of Univ. of Mo., 613 S.W.3d 836, 857 (Mo. App. 2020); Buhman v. State, 201 P.3d 70, 83 (Mont. 2008); Spillers v. Third Judicial District Court, 456 P.3d 560, 568 (Mont. 2020) (dissenting opinion).

13 Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

14 Granfinanciera v. Nordberg, 492 U.S. 33, 43-44 (1989); *see* Chauffeurs, 494 U.S. at 564.

15 Dairy Queen v. Wood, 369 U.S. 469, 472-473 (1962); Curtis v. Loether, 415 U.S. 189, 193 (1974).

> of expediency or convenience. Since then, every encroachment upon it has been watched with great jealousy."[16]

So, 7th Amendment application against the federal government is clear. How about the states? Early on, the Supreme Court back-handedly dismissed any thought that the 7th Amendment applied to state court trials: "The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way."[17] Even to the point of eliminating juries altogether.[18] The Court repeated this generality, but never with any explanation.[19]

We have come a long way since 1833, when the Supreme Court concluded curtly that the Bill of Rights in general restrained the federal government but had no impact on the states.[20] Since then, the Justices have been split over which guarantees applied against the states, with Justice Black urging that all of them do.[21] Justice Black's words were forceful, and continue to ring true to at least some of us:

> "My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced."[22]

As Justice Black's view never secured a majority, the Court set about a process of examining each of the first eight guarantees in the Bill of Rights to determine which, if any, should apply against the states.[23] In the process,

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16 Securities & Exch. Comm. v. Jarkesy, 603 U.S. 109, 121 (2024) (cleaned up). *See also* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment,* 57 MINN. L. REV. 639, 745 (1973). JOHN P. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 4 (1986) ("No civil provision was more highly cherished in the European and American dominions of George III than jury trial").

17 Walker v. Sauvinet, 92 U.S. 90, 92 (1875).

18 Chicago, R.I. & P.R. Co. v. Cole, 251 U.S. 54, 56 (1919).

19 *E.g.,* Livingston's Lessee v. Moore, 32 U.S. 469, 552 (1833); Walker v. Sauvinet, 92 U.S. 90, 92 (1875); Missouri v. Lewis, 101 U. S. 22, 31 (1879); Twining v. New Jersey, 211 U.S. 78, 110, 111 (1908); Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916).

20 Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243, 251 (1833).

21 Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting); Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring); Malloy v. Hogan, 378 U.S. 1, 5 (1964) ("Ten Justices have supported this view [although never at the same time and] [t]he Court expressed itself as unpersuaded to this view ….").

22 Adamson v. California, 332 U.S. 46, 71-72 (1947), *abrogated by* Malloy v. Hogan, 378 U.S. 1 (1964); *cf.* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949).

23 There has been a dispute — both judicial and academic — about whether to accomplish incorporation through the Fourteenth Amendment's due process clause or its privileges and immunities clause.

the Court explained why it was doing some serious back-peddling on established law:

> "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme."[24]

During the last century or so,[25] the Supreme Court has methodically incorporated "almost all" features of the Bill of Rights into the due process clause of the Fourteenth Amendment, thus making them applicable to the states.[26] Only a handful of the Bill of Rights protections remain unincorporated.[27]

The Supreme Court has explained its incorporation doctrine thus:

> "With only a handful of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States. A Bill of Rights protection is incorporated, we have explained, if it is *fundamental* to our scheme of ordered liberty, or *deeply rooted* in this Nation's history and tradition."[28]

To date, virtually all of the guarantees in the Bill of Rights have been held to satisfy that requirement. Moreover, "[t]he Court … has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights …."[29]

So, if incorporation depends on the right being "fundamental to our scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition," why has the Seventh Amendment right to a civil jury trial not been incorporated? Why, indeed. Upon examination, the only answer that appears is something on the order of "because we said so." Not very satisfying. We will examine that more closely here.

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See, e.g., *Timbs v. Indiana*, 586 U.S. 146, 157 (Gorsuch, J., concurring), 157-59 (Thomas, J., concurring) (2019). For our purposes, it doesn't matter. The issue is whether the Bill of Rights applies against the states. The road to get there is less relevant than the conclusion of the journey.

24 Malloy v. Hogan, 378 U.S. 1, 5 (1964).

25 *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897) (the Court incorporated the 5th Amendment's just compensation guarantee.)

26 McDonald v. City of Chicago, 561 U.S. 742, 764-65 (2010).

27 *Id.*

28 Timbs v. Indiana, 586 U.S. 146, 150 (2019) (cleaned up); emphasis added.

29 *Malloy*, 378 U.S. at 10-11 (cleaned up).

## II. FUNDAMENTAL TO OUR SCHEME OF ORDERED LIBERTY" OR "DEEPLY ROOTED IN THIS NATION'S HISTORY AND TRADITION"

The Supreme Court repeats as a mantra that a Bill of Rights guarantee is incorporated into the Fourteenth Amendment's due process guarantee if it is "fundamental to our scheme of ordered liberty or deeply rooted in this nation's history and tradition." Sadly, it has not gone much beyond that. Its analysis generally consists of circular repetitions of the same generalities.

The Supreme Court has used this phrase to describe rights that it says are not only deeply rooted in the nation's history and tradition but are also essential to the nation's system of ordered liberty.[30]

Such rights are considered so fundamental that neither liberty nor justice would exist without them.[31] This idea is further elaborated as rights embedded in the traditions and conscience of the people, reflecting a profound national commitment to protecting these liberties as indispensable to the American conception of justice.

That may sound lofty and aspirational. But let me cut to the chase. Reading these cases leads to one conclusion: If a majority of the Court (at the time an issue is considered) supports the idea of incorporating a particular right, then it finds that right essential to our concept of ordered liberty. If not, then it is not. But don't just take my word for it. Here is the analysis of Justice Harlan in the criminal trial context:

> "Today's Court still remains unwilling to accept the total incorporationists' view of the history of the Fourteenth Amendment. This, if accepted, would afford a cogent reason for applying the Sixth Amendment to the States. The Court is also, apparently, unwilling to face the task of determining whether denial of trial by jury in the situation before us, or in other situations, is fundamentally unfair. Consequently, the Court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is 'in' rather than 'out.'"[32]

When I began this investigation, I intended to provide an analysis of the cases using the well-worn "essential to the concept of ordered liberty" meme to tease out the reasons why the Court chose to include specific items within the concept. Surely, the cases must show some analysis, I thought. Alas, as Justice Harlan noted with frustration, they simply assert the conclusion, apply the label, and move on.

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[30] Lawrence v. Texas, 539 U.S. 558, 588 (2003); Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 216 (2022).

[31] Obergefell v. Hodges, 576 U.S. 644, 681 (2015); Kerry v. Din, 576 U.S. 86, 93 (2015); McDonald v. City of Chicago, 561 U.S. 742, 872 (2010).

[32] Duncan v. Louisiana, 391 U.S. 145, 180-81 (1968) (Harlan, J. dissenting).

That leaves us to wonder why the Seventh Amendment right to jury trials in civil cases — generally agreed to have been of serious concern to our Founders — has not been incorporated. Yet.

It seems the Court secretly wishes it had straightforwardly adopted Justice Black's full incorporation model. It is getting there, but only by fits and starts. One guarantee painstakingly incorporated and applied after another. We now have "almost all" of the Bill of Rights guarantees incorporated and applied against the states. Almost, but not quite all. Yet.

To me, the kicker remains the right to a jury in civil trials. Of all the rights enumerated, how could this one not be considered either "fundamental to our scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition?" Remember, that is a disjunctive formula, and only one part need apply. Candidly, I fail to see how both do not apply, particularly considering the strong feelings shared by those who revolted against English rule.

## CONCLUSION

As the Second Circuit put it recently, "[t]he jury is sacrosanct in our legal system. . . ."[33] There is no reason to believe that concept applies only to the Sixth Amendment right to jury trials in criminal cases, but not to the Seventh Amendment right to juries in civil cases. In fact, the Second Circuit's comment came in the context of a civil case.

Risking *lèse-majesté*, may I suggest that the Court has the question backwards? The issue should not be whether a particular right *should* be applied against the states, but whether there is any reason that it should *not*. After all, the whole point underlying the Bill of Rights was to protect the people against government excesses.[34] That protection should apply regardless of the level of government involved. All levels of government are equally capable of improper impositions on citizens. It is time to stop the accretion of rights by the slow drip-by-drip method of individual addition. The Bill of Rights should apply across the board against states and localities, just as it does against the federal government.

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[33] Palin v. New York Times, 2024 WL 3957617 (2d Cir. 2024).

[34] See the routine way that incorporation opinions rely on Magna Carta, perhaps the foundational document protecting individuals from government abuse. *E.g.,* Timbs, 586 U.S. at 151; United States v. Bajakajian, 524 U.S. 321, 336 (1998); Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 268 (1989); Duncan v. Louisiana, 391 U.S. 145, 151 (1968); Solem v. Helm, 463 U.S. 277, 284 (1983); Klopfer v. State, 386 U.S. 213, 223-25 (1967); Horne v. Dep't. of Agric., 576 U.S. 350, 358 (2015); Tyler v. Hennepin Cnty., 598 U.S. 631, 639 (2023). *See also* Bond v. United States, 564 U.S. 211, 222 (2011) (Constitutional guarantees exist to "protect the individual.") Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991) ("the jury could thwart overreaching by powerful and ambitious government officials").