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Expanding the Search for America's Missing Jury

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THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES. By *Suja A. Thomas*. New York: Cambridge University Press. 2016. Pp. ix, 251. Cloth, $99.99; paper, $34.99.

INTRODUCTION

It may come as a surprise to more than a few readers to learn that America's juries are disappearing. Whether it is the murder of Caylee Anthony, the libel of Hulk Hogan, or the shooting of Michael Brown, media outlets dedicate extensive coverage to criminal, civil, and grand juries alike.[1] But reports of the jury's life are greatly exaggerated. Juries today determine fewer cases than at any other point in the nation's history. For instance, in 1962, the year when most judicial statistics become available, federal juries decided 8.2% of criminal cases and 5.5% of civil cases.[2] Yet by 2015, these numbers dwindled to just 2.04% of criminal cases[3] and a paltry 0.76% of civil cases.[4] Every state court across the country has seen a commensurate decline.[5]

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1. *See* Lizette Alvarez, *Casey Anthony Not Guilty in Slaying of Daughter*, N.Y. TIMES (July 5, 2011), http://www.nytimes.com/2011/07/06/us/06casey.html (on file with the *Michigan Law Review*); Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html (on file with the *Michigan Law Review*); Nick Madigan & Ravi Somaiya, *Hulk Hogan Awarded $115 Million in Privacy Suit Against Gawker*, N.Y. TIMES (Mar. 18, 2016), https://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html (on file with the *Michigan Law Review*).

2. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462 tbl.1, 554 tbl.A-17 (2004).

3. *U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2015*, U.S. CTS., http://www.uscourts.gov/sites/default/files/data_tables/D04Sep15.pdf [https://perma.cc/ZMV8-9ZYQ].

4. P. 2; *U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2015*, U.S. CTS., http://www.uscourts.gov/sites/default/files/data_tables/C04Sep15.pdf [https://perma.cc/X9EU-RW3N].

5. *See* Galanter, *supra* note 2, at 510; *see also* CAROL J. DEFRANCES ET AL., NAT'L CTR. FOR STATE COURTS, 1992: CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 1 (1995), https://www.ncjrs.gov/pdffiles/cjcavilc.pdf [https://perma.cc/CS8L-5GL5] (demonstrating that,

This decline is alarming. Juries allow lay citizens to check judges' work for corruption, state aggrandizement, and application of grounded normative standards.[6] They have thus been described as the "lower judicial bench" in a bicameral judiciary[7] and as "the democratic branch of the judiciary power."[8] Moreover, jury service offers one of the few opportunities for citizens to be directly involved in the administration of law. As Alexis de Tocqueville described, it is "a free school" that "instill[s] some of the habits of the judicial mind into every citizen."[9] Perhaps unsurprisingly then, trial by jury is the only right to appear by name in all three of the nation's founding documents: the Declaration of Independence, the Constitution, and the Bill of Rights. The disappearance of America's juries should thus give us pause and command our scrutiny.

Many authors have attempted to explain the jury's decline. Some focus on the adoption of the Federal Rules of Civil Procedure and Federal Sentencing Guidelines, which, coupled with advancements in evidence preservation, have rendered the truth-finding role of jury trials mostly redundant.[10] Others emphasize the costs and unpredictability of jury trials, observing that the resources and risks attendant to jury trial make it an inefficient form of dispute resolution.[11] Finally, some point to the rise of managerial judges who view their role as to guide parties toward settlement rather than to preside over jury trials.[12]

Professor Suja Thomas[13] offers a novel approach in her new book, *The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries*. She begins by recognizing the jury as a constitutionally mandated institution possessing specific powers and limitations in relation to the executive, legislature, and judiciary. She then explains how these traditional government actors have gradually usurped the jury's unique powers for themselves and so diminished the jury's constitutional import. Juries are vanishing, then, because the other actors have emerged in

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because only 2% of state cases in 1992 went to jury trial, state jury decline has tracked federal jury decline).

6. *See, e.g.*, *Letters from the Federal Farmer*, *in* 2 THE COMPLETE ANTI-FEDERALIST 214, 249–50 (Herbet J. Storing ed., 1981).

7. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 95 (1998) (referencing JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (W. Stark ed., 1950) (1814)).

8. *See Essays by a Farmer No. IV*, *in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 6, at 36, 38.

9. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 274 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

10. *See, e.g.*, John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 569–72 (2012).

11. *See, e.g.*, Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 62 (1996).

12. *See, e.g.*, Steven Baicker-McKee, *Reconceptualizing Managerial Judges*, 65 AM. U. L. REV. 353, 355 (2015).

13. Peer and Sarah Pederson Professor of Law, University of Illinois College of Law.

their stead. As a solution, she proposes recognizing the jury as a "branch"—a coequal to and a significant check on the traditional branches (p. 5)—and offers a doctrinal approach she calls "relational originalism" to assure this position (p. 8).

While *The Missing American Jury* provides an encompassing look at the jury's decline, it is not complete. In the introduction, Professor Thomas explains her decision to omit arbitration and settlement from the discussion, choosing instead to focus only on "procedures imposed by the government to which parties do not consent or procedures such as plea bargaining to which a party may unwillingly consent" (p. 3). This omission is a rare misstep. The emergence of binding arbitration and private ordering of public adjudication has tracked and contributed to the decline in the civil jury's constitutional esteem. The legislature and the judiciary have removed power from the jury and vested it in private parties' hands. In so doing, they have allowed powerful social and economic actors to sideline the civil jury and have shielded their own behavior from public scrutiny. These developments in private civil procedure are a necessary part of the discussion.

This Review incorporates private procedure into Professor Thomas's explanation for the jury's disappearance. Part I analyzes Professor Thomas's central premise that the jury has fallen in constitutional esteem due to power grabs by the traditional actors. It also considers her proposal to fill the doctrinal void that has allowed this decline. Part II provides a historical overview of the emergence of private procedure and stresses that this development mirrors those power grabs reviewed in the book. Finally, Part III applies Professor Thomas's relational originalism doctrinal approach to private procedure.

I. The Missing American Jury

This Review considers Professor Thomas's contributions in the order in which she raises them in *The Missing American Jury*. First, she explains that the Framers empowered the jury with significant authority in order to check the traditional actors, making it an integral part of the federal structure—essentially a "branch." Next, she explains that the judiciary's failure to treat the jury with institutional respect, combined with the jury's unique characteristics, has allowed the traditional actors to free themselves from the jury's restraints. Finally, she proposes a doctrinal approach called "relational originalism" to help reestablish the balance of power.

A. *Juries as a "Branch"*

The Founders deeply valued juries. The Declaration of Independence is explicit that King George's acts "depriving [the colonists], in many Cases, of the Benefits of Trial by Jury" motivated the revolution.[14] And while the Constitution and Bill of Rights do not speak so plainly, the importance of guaranteed jury trials played an equally central role in shaping those

14. The Declaration of Independence para. 20 (U.S. 1776).

documents.[15] Fierce debate accompanied initial drafts of the Constitution, with several delegates refusing to sign because it lacked jury protections beyond those for crimes.[16] As William Nelson observed, "For Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights."[17]

Professor Thomas argues that the Founders so valued juries for the same reason they valued separate bodies exercising government authority: independent yet interrelated bodies most effectively balance and check power (pp. 58–62). The virtues of divided authority are extolled throughout the Founders' writings,[18] and the Constitution itself is framed as a delineation of relationships among departments and between federal and state governments. Professor Thomas contends that "[t]he Founders and the ratifiers . . . understood that the American jury had an independent role like the executive, the legislature, the judiciary, and the states—specifically to protect against actions by them" (p. 62). She then carefully explains the way the Founders viewed juries in relation to the traditional branches.

First, juries were considered a check on judicial power (p. 62). The Founders were wary of judges and particularly concerned with the potential for corruption and state bias (pp. 63–64). Thomas Jefferson emphasized this, privileging "the opinion of twelve honest jurymen" over permanent judges, who "are liable to be tempted by bribery [and] misled by favor, by relationship, by a spirit of party, [and] by a devotion to the executive or legislative power."[19] Alexander Hamilton went further to articulate the benefits of the two bodies' interrelation (p. 64). He called a judiciary made up of both judges and juries "a double security . . . [that] tends to preserve the purity of both institutions."[20] "By increasing the obstacles to success," he argued, "it discourages attempts to seduce the integrity of either."[21]

The Founders also used juries to cabin legislative power (p. 64). The writings of Hamilton and Monroe reveal that they viewed the constitutionally established jury trial as an abridgement of legislative prerogative (pp. 64–66). The Founders ensured that the legislature held no power over the jury beyond those expressly stated in the text of the Constitution, so the

15. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295 (1966) ("[The] lack of any bill of rights was a principal part of the Anti-Federalist argument [against ratification]; the lack of provision for civil juries was a prominent part of this argument.").

16. *See id.* Five of the six states that proposed amendments included two or more jury-related proposals. *See* AMAR, *supra* note 7, at 83.

17. WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 96 (Stanley N. Katz ed., 1975).

18. *See generally* THE FEDERALIST No. 32 (Alexander Hamilton), Nos. 45–48, 51 (James Madison).

19. *See* Letter from Thomas Jefferson to L'Abbe Arnoud (1789), *in* DEMOCRACY 95, 96 (Saul K. Padover ed., 1939) (Clinton Rossiter ed., 1961).

20. THE FEDERALIST, *supra* note 18, No. 83, at 501 (Alexander Hamilton).

21. *Id.*

legislature could not destroy or manipulate the institution.[22] Furthermore, the Founders celebrated the jury as a mechanism to repeal legislation through nullification, as had happened famously in the John Peter Zenger trial and frequently in the run up to the American Revolution (pp. 65–66). Indeed, juries ensured that no legislative act could be en-forced without a democratic body of laymen.

Finally, the Founders trusted juries to curtail executive authority (p. 66). Criminal juries accomplished this through their fact- and law-finding powers.[23] And civil juries ensured that those harmed by executive abuses might find relief.[24] But the most critical way that executive power is limited is through the promise of grand juries, which can halt the executive from bringing criminal charges.[25] James Wilson espoused the benefits of the grand jury, writing: "In the annals of the world, there cannot be found an institution so well fitted for avoiding abuses, which might otherwise arise from malice, from rigour, from negligence, or from partiality, in the prosecution of crimes."[26]

Professor Thomas concludes that "the constitutional text reveals that the executive, the legislature, the judiciary, the states, the criminal jury, the civil jury, and the grand jury all have powers and limitations as well as interdependences" (p. 56). She argues that because of this constitutional role, the jury is essentially a governmental branch: an institutional body retaining its own authority while balancing power between the others.[27] But despite the similarities between the jury and the traditional branches, the Supreme Court has not established an authoritative role for criminal, civil, or grand juries (p. 56).

B. *The Fall of Juries*

Professor Thomas draws upon this branch analogy to explain the jury's decline. She argues that while the Supreme Court has developed doctrines "acknowledg[ing] that the traditional actors possess significant authority and are restrained by important limitations," the jury has not received similar attention (p. 90). This failure to doctrinally cement the jury's constitutional authority has allowed the traditional actors to shift power to their benefit (p. 90). And because of the jury's unique institutional characteristics, it has been unable to combat these usurpations (pp. 91–93).

When confronting questions of competing branch authority, courts start by recognizing that the traditional branches hold power either external

22. *Id.* (noting that by establishing criminal juries, the legislature's "discretion . . . [was] abridged"); 3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution 217–18 (Jonathan Elliot ed., J.B. Lippincott Co. 2d ed. 1937) (1836) (James Monroe making a similar point regarding civil juries).

23. *See* Amar, *supra* note 7, at 100–01.

24. *See id.* at 74.

25. *See* p. 66.

26. 2 James Wilson, Collected Works of James Wilson 992 (Kermit L. Hall & Mark David Hall eds., 2007).

27. *See* p. 68.

to (in the case of the states) or derived from the Constitution.[28] Judges developed the doctrines of federalism and separation of powers in order to maintain these spheres of authority (pp. 70–72). Likewise, the traditional actors may follow doctrines of self-restraint to maintain interbranch harmony; for instance, the political question doctrine and case and controversy requirements prevent the judiciary from addressing certain issues (p. 73). Despite these sophisticated approaches, the Court has not developed similar methods for addressing the jury's competing authority (p. 75). This failure, Professor Thomas argues, has resulted in a piecemeal methodology that has allowed the traditional actors to "subjugate[ ] the jury while recognizing significant power in each other" (pp. 69, 75–76).

Consider the fate of criminal juries: in the 1898 case of *Thompson v. Utah*, the Supreme Court determined that a judge could not try a criminal case without a jury.[29] The Court cited the Constitution's command that "[t]he trial of all crimes . . . shall be by jury," along with William Blackstone's common law recognition that "[t]he public has an interest in [the defendant's] life and liberty."[30] Note that while the ruling was textually and historically sound, it was unsupported by a specific doctrine of the jury's constitutional authority. Without that grounding, the Court easily switched course just thirty years later in *Patton v. United States*.[31] There, the Court determined that judges did have authority to try defendants because of Congress's creation of the district courts.[32]

As Professor Thomas elucidates, in deciding *Patton* the Court acted much differently from how it acts with respect to the traditional actors (p. 79). In this instance, although the Constitution explicitly delineates between which cases and responsibilities are reserved for the jury and which are reserved for the judge, the Court ignored this text (p. 79). Likewise, the Court failed to consider the way that judicial sentencing frustrates the jury's institutional responsibility to check the traditional branches for abuses of power and government overreach (p. 79). Instead, "the Court took power from the jury and placed it in its own hands" (p. 79).

Similar usurpations occurred to the civil and grand juries over the course of the twentieth century. With civil juries, the judiciary has claimed the power to reexamine unreasonable jury findings as well as dismiss cases that it alone determines lack sufficient evidence.[33] It has allowed the executive to establish agencies with jury-less tribunals[34] and the legislature to pass

28. P. 69. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404 (1819).

29. 170 U.S. 343 (1898).

30. *Thompson*, 170 U.S. at 346, 354 (quoting U.S. CONST. art. III, § 2).

31. 281 U.S. 276 (1930).

32. *Patton*, 281 U.S. at 299.

33. P. 82; *see* FED. R. CIV. P. 50 (judgment as a matter of law); FED. R. CIV. P. 56 (summary judgment).

34. *See* Suja A. Thomas, *A Limitation on Congress: "In Suits at Common Law"*, 71 OHIO ST. L.J. 1071, 1078–1108 (2010) (discussing the creation of new jury-less tribunals for the determination of fact).

laws limiting damages.[35] Likewise, the grand jury—which like the criminal jury was once a necessary barrier to curtail executive abuses of power—has been recategorized as a criminal defendant's waivable right.[36] Moreover, civil and grand jury rights are among the few liberties not incorporated by the Fourteenth Amendment.[37] Consequently, many of the exclusive powers that once defined the jury's authority have dispersed to the traditional actors.[38]

Professor Thomas argues that the jury's institutional traits make it vulnerable to these attacks (p. 91). Unlike the traditional actors who can unilaterally exercise power by enacting laws or commanding the military, "the jury cannot sit or otherwise perform without the action of the judiciary" (pp. 91–92). And because of the jury's position within the judiciary, judicial review of jury authority often involves judges reviewing their own competing authority (p. 92). This means that "if the judiciary resolves a question of jury authority favorably toward the jury, the judiciary denies itself power" (p. 92). Moreover, the jury cannot counter impingements on its authority like the traditional branches can (p. 92). By stressing their interrelationships, traditional actors can limit others' acts or their own acts in order to assert authority or ensure institutional harmony (pp. 92–93). These characteristics leave the jury at the whims of the other branches (p. 93).

C. *Restoring the Jury's Authority*

Professor Thomas asserts that "[i]f the jury was prescribed . . . a doctrine analogous to separation of powers or federalism, the divisions of authority between the jury and the traditional actors could be better assured" (p. 91). She proposes a method of interbranch deferment that she calls "relational originalism" (p. 136). This approach to institutional self-restraint would safeguard the jury's constitutional role by halting procedures that undermine its authority (p. 136).

"Relational originalism" uses common law as an interpretive frame for delineating the jury's authority in relation to the other branches (p. 136). Although the Seventh Amendment is the only jury clause to explicitly incorporate common law, Professor Thomas contends that it provides guidance for interpreting the authority of criminal and grand juries (pp. 133–36). She explains that the Founders' disparate references to common law in establishing juries relate to the ease or difficulty with which they could express the

35. For an in-depth discussion on legislatively imposed damage caps, see Shaakirrah R. Sanders, *Deconstructing Juryless Fact-Finding in Civil Cases*, 25 WM. & MARY BILL RTS. J. 235 (2016).

36. Pp. 84–85; *see* United States v. Cotton, 535 U.S. 625 (2002); *see also* Roger A. Fairfax, Jr., *Does Grand Jury Discretion Have a Legitimate (and Useful) Role to Play in Criminal Justice?*, *in* GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 57, 67–69 (Roger Anthony Fairfax, Jr. ed., 2011).

37. For a general discussion on nonincorporation of the jury trial rights, see Suja A. Thomas, *Nonincorporation: The Bill of Rights After* McDonald v. Chicago, 88 NOTRE DAME L. REV. 159 (2012).

38. *See* p. 106.

authority that the institution would exercise.[39] With the Seventh Amendment, the Founders relied on "common law" to instruct on the power that the judiciary and the civil jury held in relation to one another.[40] It provided an external source of context to define this power arrangement.[41]

Professor Thomas concludes that because the Founders employed common law as a restraint on the judiciary in relation to a competing actor—the jury in civil cases—it is justifiable to use common law to interpret authority in similar circumstances, such as competing authority among the traditional actors and the grand and criminal juries (pp. 135–36). She proposes that "[w]hen the constitutional text is ambiguous or the traditional actor grants itself power in circumstances in which the jury competes for authority, the common law could be used to limit the traditional actor's authority" (p. 136). Because juries are institutionally vulnerable to power grabs, applying this doctrinal approach would protect them from usurpations by the dominant actors—the executive, legislature, and judiciary (p. 136).

Through this lens, Professor Thomas documents four practices that would cease under her approach (p. 147): first, "a judge's power to free a person whom a jury has found guilty of a crime," which frustrates the jury's authority in sentencing (p. 147); second, the executive's authority to prosecute a crime without a grand jury decision, which halts the jury's authority to check prosecutions (p. 147); third, the legislature's capacity to create juryless tribunals, which usurps the jury's power to determine money damages and fines (p. 148); and finally, judges' ability to dismiss a civil case based on an evidentiary determination, which aggravates the jury's ability to check the judiciary.[42] None of these existed at common law.[43] Rather, they are key examples of how powers that were once exclusive to the jury have shifted in the absence of doctrinal rigor (pp. 182–85).

Professor Thomas acknowledges the difficulty with halting these practices (p. 183). The traditional actors consider them integral to securing interests like institutional efficiency and controlling juror bias (p. 183–84). She counters that these practices remain not merely for administrative ease or to ensure due process of law but because power-hungry actors "cling to authority they improperly hold" (p. 183). Without a cohesive doctrine of interbranch authority that acknowledges the jury's competing constitutional role,

39. P. 134; *see* THE FEDERALIST, *supra* note 18 No. 83, at 501 (Alexander Hamilton) (discussing the difficulties of drafting a right to trial by jury in civil cases).

40. *See, e.g.*, Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 991–92 (2010) (noting that since the jury was a well-established institution predating the Constitution, the Founders "could convey fairly precise meaning simply by using the words 'trial by jury'").

41. *Id.*

42. P. 148. Professor Thomas has written extensively on summary judgment as an unconstitutional practice. *See, e.g.*, Suja A. Thomas, *Why Summary Judgment Is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93 IOWA L. REV. 1667, 1680 (2008).

43. *See* chapter 5.

the traditional actors will continue their seizure.[44] Relational originalism provides a path toward balance (pp. 182–85).

II. Expanding the Search

The Missing American Jury offers a fantastic review of how the jury's constitutional authority has diminished in the face of executive, legislative, and judicial aggrandizement. Yet the discussion is incomplete. Professor Thomas chooses not to address issues attendant to private procedural ordering, such as arbitration and contract procedure, focusing instead on government-imposed procedures, or those to which the parties may not willingly consent (p. 3). In so doing, she discounts the way that private procedural arrangements have contributed to the civil jury's decline and how these procedural arrangements fit within her framework.

A. *The Rise of Private Procedure and the Fall of Civil Juries*

Nearly two and a half centuries ago, William Blackstone warned of "secret machinations, which may sap and undermine [the jury]," and cautioned that no matter how "convenient these may appear at first . . . delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty."[45] Although the traditional actors of early America heeded these words, Blackstone's wisdom seems to have been lost to those of the twentieth century. Citing dual concerns of economic efficiency and an expanded concept of contractual autonomy, twentieth-century traditional actors have ushered in a system of liberal and privatized civil procedure.[46] In so doing, they have granted powerful social and political actors a private bypass to the civil jury's public authority.

English common law going back to at least the seventeenth century refused to give effect to procedural contracts.[47] Most famously, Lord Coke declined to order a dispute between merchants to private adjudication in 1609, explaining that while a merchant was free to contract for private dispute resolution, "he might countermand it; for a man cannot by his act make such authority, power, or warrant not countermandable which is by the law or of its own nature countermandable."[48] The original rationale for this revocability is unclear,[49] but by the eighteenth century, English courts cited

44. *See* pp. 182–84.

45. 4 William Blackstone, Commentaries *343–44 (Univ. of Chi. Press 1979) (1769).

46. *See, e.g.*, Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 Va. L. Rev. 723, 737–38 (2011).

47. *See* H.R. Rep. No. 68-96, at 1–2 (1924) ("[T]he jealousy of the English courts for their own jurisdiction . . . survived for so lon [sic] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.").

48. Vynior's Case (1609) 77 Eng. Rep. 597, 598–99; 8 Co. Rep. 81 b, 82 a (footnotes omitted).

49. *See* Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 Law & Contemp. Probs. 207, 209 (2004) (reviewing potential rationales behind Lord Coke's order in *Vynior's Case*).

judicial envy.[50] Judges jealously guarded their privileged positions and rejected agreements they viewed as impermissibly "ousting courts of their jurisdiction."[51]

American judges inherited this aversion to private procedural contracts, and they justified their attitude in much the same way.[52] In 1874, the Supreme Court explained that while a party may choose to submit a dispute to arbitration or refuse to remove a suit to federal court, he cannot "bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented."[53] State courts agreed.[54] Some courts viewed arbitration clauses as a "trap for the unwary."[55] And the Massachusetts Supreme Court emphasized the public's interest, noting that "[t]he rules to determine in what courts . . . actions may be brought are fixed, upon considerations of general convenience and expediency, by general law," and may not be disturbed by "the agreement of parties."[56]

This common law approach changed during the twentieth century. The construction of extensive railroad networks during the early 1900s resulted in more commerce and subsequent disputes between distant merchants.[57] Calls for irrevocable arbitration agreements amplified as advocates sought a more certain and efficient method of dispute resolution.[58] Congress responded in 1925, passing what would later become the Federal Arbitration Act, providing that contracts to arbitrate disputes would be enforceable as a matter of federal law.[59] Nine years later, in an attempt to increase efficiency even further, Congress passed the Rules Enabling Act, delegating rulemaking authority to the Supreme Court and authorizing the creation of a single, transsubstantive procedural regime.[60] The judiciary quickly approved the Federal Rules of Civil Procedure in 1937, abolishing rigid pleading standards and fusing law and equity.[61] With these developments, judicial abhorrence to new procedural arrangement slackened during the midcentury.[62]

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50. *Id.* at 210.

51. Kill v. Hollister (1746) 95 Eng. Rep. 532, 532; 1 Wils. K.B. 129, 129 (noting that party agreements cannot oust courts of their jurisdiction).

52. *See* David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 995 (2008).

53. Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874).

54. *Cf.* Carrington & Castle, *supra* note 49, at 211–12.

55. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 340.

56. Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174, 184 (1856).

57. *See* Carrington & Castle, *supra* note 49, at 215.

58. *Id.*

59. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2012)).

60. *See* Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072(2012)).

61. Letter of Submittal, 308 U.S. 649 (1937).

62. *See* David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 445 (2011).

Courts rationalized their new boldness by emphasizing efficiency and litigants' freedom of contract.[63] The biggest statement came in 1972, when the Supreme Court held enforceable a forum selection clause in *The Bremen v. Zapata Off-Shore Co.*[64] The Court rejected the common law notion "that such clauses are improper because they tend to 'oust' a court of jurisdiction," explaining that this was "hardly more than a vestigial legal fiction."[65] Rather than being divested, "overloaded" courts were simply refraining from exercising their power in order to give effect to the parties' contract-backed expectations.[66] While *Bremen* dealt only with forum selection clauses between sophisticated businesses, it dawned a new era in which judges readily accepted most procedural contracts.[67] Indeed, "ancient concepts of freedom of contract" freed litigants to shape adjudication as they saw fit.[68]

Today, civil litigation proceeds through many diverse channels.[69] Notably, the Supreme Court's expansive reading of the Federal Arbitration Act has allowed parties to avoid public dispute resolution altogether.[70] Powerful economic actors have responded by creating a complex system of jury-less private adjudication.[71] Contracts, even between parties of disparate sophistication, so often contain arbitration clauses that some have called this private system the "new litigation."[72] These agreements are often enforceable even against typical contract defenses such as fraud,[73] illegality,[74] and unconscionability.[75] In such instances, civil juries adjudicate neither contract validity

63. *See, e.g.*, Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964) (acknowledging it had become settled law that parties may freely enter into an array of procedural agreements).

64. 407 U.S. 1 (1972).

65. *Bremen*, 407 U.S. at 12.

66. *Id.*

67. *See, e.g.*, Marcus, *supra* note 52, at 1042 ("The era of contract procedure arguably dawned with forum selection clauses.").

68. *See Bremen*, 407 U.S. at 11.

69. *See, e.g.*, Judith Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 593, 609 (2005).

70. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (noting that the FAA embodies a "liberal federal policy favoring arbitration"); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985) (holding that the FAA governs statutory claims); Southland Corp. v. Keating, 465 U.S. 1, 11 (1984) (holding that the FAA preempts state law).

71. *See* Horton, *supra* note 62, at 456.

72. *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. Ill. L. Rev. 1, 8.

73. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

74. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006).

75. *See* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 71 (2010).

nor the underlying dispute. Substantive issues of law are therefore determined and developed entirely without the jury's democratic input, and courthouses stagnate as places of communitarian law development.[76]

In addition, today's courts are routinely entertaining contracts that manipulate the procedural contours of *public* dispute resolution. This new form of organizing civil procedure according to private contracts has been called "contract procedure."[77] These agreements go far beyond those authorized by the Federal Rules of Civil Procedure, which already allow parties to undermine jury authority by consenting to trial by fewer than twelve people or judgment by non-unanimous verdict.[78] Instead, contract procedure sees private actors creating their own procedural rules in place of the government, "[such that] rather than marching in lockstep, cases follow their own 'mini-codes of civil procedure.'"[79] As a result, "[public] civil procedure has taken a backseat to contract,"[80] and an adjudicative framework based on party consent, rather than administrative due process, has become "the preferable modality for conflict resolution."[81]

There is little case law on contract procedure and no clear legislative or judicial direction on how to cabin litigants' procedural autonomy.[82] Procedures undermining the jury's authority therefore go unchecked. For instance, parties might consent to award-modification agreements in which the parties secretly agree on ways to alter the jury's award, such as cutting damages by a given percentage or setting damage caps and floors.[83] With these agreements in place, instead of determining the real value of the dispute, the jury acts merely to trigger a clause in the parties' contingent contract.[84] Procedural agreements like these slip past judges because they are

76. *See* Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 98 ("[W]e run the risk of finding ourselves without an institution that has the political legitimacy to make fact- and law-based decisions . . . .").

77. *See, e.g.*, Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1140 (2006).

78. FED. R. CIV. P. 48.

79. David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 607 (2010).

80. David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1113 (2002).

81. Resnik, *supra* note 77, at 1140.

82. *See, e.g.*, Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1337–38, 1351 (2012).

83. *See* J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 85 (2016) (reviewing examples of what the authors call "partial settlement agreements").

84. *See* Richard Lorren Jolly, Note, *Between the Ceiling and the Floor: Making the Case for Required Disclosure of High-Low Agreements to Juries*, 48 U. MICH. J.L. REFORM 813, 824 (2015) (arguing that secret agreements undermine the integrity of the jury).

considered partial settlements, which ordinarily do not require judicial review.[85] Without that backstop, the civil jury is at the whims of private parties.

B. *Private Procedure in the Broader Dialogue*

The emergence of binding arbitration and private procedural ordering mirrors those usurpations of jury authority outlined in *The Missing American Jury*. Just as criminal procedural modifications like the emergence of bench trials and plea deals have contributed to the decline of the criminal and grand jury (pp. 78–79), so too has the civil jury fallen to parties' new arrangements. Although private civil procedure does not mark a usurpation of jury authority by a competing traditional actor per se (p. 69), the traditional actors benefit from the resulting increased efficiency and decreased public scrutiny.[86] And perhaps most significantly, courts came to accept private procedural ordering at the same time that they were approving other usurpations of the jury's authority.

Professor Thomas excludes issues of private civil procedure because she claims that civil litigants freely agree to their modifications, whereas the executive coerces criminal defendants into foregoing their grand and criminal jury rights.[87] It is unclear, however, whether this supposed distinction in party autonomy and government imposition exists, or why it should be a noteworthy differentiator. To be sure, the literature on criminal settlement is far from unanimous in its condemnation of charge and sentence bargaining as an executive bypass to jury authority.[88] Many authors treat these agreements as freely bargained contracts in which criminal defendants and prosecutors exchange valuable resources.[89] Likewise, although courts generally accept it to be true, it is not widely agreed that civil litigants enter into procedural arrangements knowingly and freely.[90] Thus, a difference in the level of party autonomy or whether the practice is government imposed does not warrant overlooking private procedure.

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85. *Compare* Barton v. Dep't of Transp., 308 P.3d 597, 608 (Wash. 2013) (describing high-low agreements as a "partial settlement agreement"), *with* Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. Legal Stud. 55, 55 (1999) (noting that courts defer to parties' settlements except in limited circumstances).

86. *See* pp. 81–83.

87. *See* p. 3.

88. *See, e.g.*, Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Stud. 289, 289 (1983) (contending that plea bargaining is part of a "well-functioning market system"); Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. Crim. L. & Criminology 943, 947 (2007) (arguing that the current plea bargaining model creates a system "based upon self incrimination by the defendant").

89. *See* Thomas W. Church, Jr., *In Defense of "Bargain Justice"*, 13 Law & Soc'y Rev. 509, 516 (1979).

90. *See, e.g.*, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 675–80 (1996) (arguing that clauses are often slipped into contracts of adhesion).

Perhaps Professor Thomas excludes private procedure from her analysis because it does not involve the direct aggrandizement of a traditional actor over the jury, as she says occurs in criminal settlement (p. 79). This too is a flawed rationale. It is only partially true that allowing criminal defendants to quickly settle their disputes expands the executive's actual authority; more accurately, it acknowledges a new contractual right that defendants did not enjoy at common law.[91] As such, it is not dissimilar to the court's twentieth-century recognition of private parties' right to contract around public adjudication.[92] Critically, both criminal and civil settlement allow private actors to replace public institutions by agreement. The judiciary has hurried the grand, criminal, and civil jury's decline by privileging private autonomy over institutional supremacy.

The judiciary has abandoned claims of institutional supremacy not just out of an expanded notion of contractual autonomy but also for purported efficiency gains. As many have noted, private civil and criminal procedural modifications are part of an overall "efficiency norm" that informs the judiciary's approach to structuring litigation and procedure.[93] By allowing parties to channel their disputes to external forums in the case of arbitration and to use only those public resources they desire in the case of civil and criminal private procedural ordering, resource-starved courts are able to handle heavy caseloads. Courts have explicitly approved of these new procedures for their ability to help manage dockets.[94]

But it is not only the judiciary that privileges efficiency over the jury's competing authority. Just as the legislature has constructed a non-trial criminal justice system in order to extract efficiency gains—for instance, by passing harsh sentencing guidelines that anticipate heavy discounts attendant to plea deals—so too have they encouraged a non-trial civil justice system.[95] This is best evidenced by the Federal Arbitration Act, but also through public funding of court-sponsored arbitration programs.[96] More than four hundred federal employees work full-time on these arbitration programs with a dedicated annual budget of over $36,000,000.[97] In addition, the legislature

91. *See* 1 Blackstone, *supra* note 45, at *129 ("This natural life . . . cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.").

92. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (recognizing a "liberal federal policy favoring arbitration").

93. *See, e.g.*, Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 Va. L. Rev. 183, 207–10 (2014) (discussing criminal procedure); Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. Rev. 1777, 1779 (2015) (discussing civil procedure).

94. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

95. *See, e.g.*, Gross & Syverud, *supra* note 11, at 2–3 ("We prefer settlements and have designed a system of civil justice that embodies and expresses that preference . . . .").

96. *See* Resnik, *supra* note 69, at 609.

97. *Id.* (citing Jeffrey M. Senger, Federal Dispute Resolution: Using ADR with the United States Government 2 (2004)).

has also slipped pro-settlement policies into other bodies of law, including tax and bankruptcy.[98] Chasing efficiency, the legislature has built a civil justice system that not only permits but actively encourages parties to avoid juries.

Finally, it is noteworthy that the emergence of private procedure occurred in lockstep with those usurpations outlined in *The Missing American Jury*. As Professor Thomas documents, legislative acts and judicial decisions disempowering juries clustered in the 1930s, 1940s, and then the 1970s through today (pp. 94–95). During these periods, radical antijury sentiment ran high among elites, who successfully influenced the Supreme Court and shaped public opinion.[99] The shift toward enforceable private procedure hits each of these timeline beats, mirroring the traditional actors' overarching march toward disempowering juries and empowering themselves.[100] That the traditional actors do not actually expand their own authority by allowing private parties to bypass the jury matters not, as they directly benefit from the attendant efficiency gains and decreased public scrutiny.[101] Without the jury's watchful eye, the traditional actors are free to distort substantive law in favor of the powerful and preferred completely unchecked. Just as these actors cling to power they have unrightfully seized from the jury (pp. 136–37), they relish in consensual inconspicuity.

III. Restoring the Jury

The traditional actors have permitted private distortions of the civil jury because they lack a doctrinal approach for assessing the jury's competing constitutional authority. Professor Thomas's proposal of "relational originalism" can fill this gap. It would prohibit private procedural agreements that manipulate the role of the civil jury as it existed at common law and thus halt certain practices that currently undermine the civil jury's constitutional position.

A. *Private Procedure Through "Relational Originalism"*

The Seventh Amendment seems to command an originalist interpretation.[102] By requiring that, "[i]n [s]uits at common law . . . the right of trial by jury shall be *preserved*," it sets a historical reference point carrying some fixed content.[103] Although scholars debate which aspects of the jury must

98. *Id.*

99. For instance, in 1928 former United States Supreme Court Justice Charles Evans Hughes urged "[getting] rid of jury trials as much as possible" and called "the judge, the best servant in our democracy." *Fewer Jury Trials Urged by Hughes*, N.Y. Times, Dec. 7, 1928, at 3.

100. *Compare supra* Section I.B, *with supra* Section II.A.

101. *See supra* note 86 and accompanying text.

102. *See* pp. 111–12.

103. *See* pp. 111–12 (emphasis added) (quoting U.S. Const. amend. VII). *But see* Amar, *supra* note 7, at 89–90 (arguing that "common law" was meant to evolve according to developments in state and federal common and statutory law).

remain, most agree that the Seventh Amendment demands some structural form and function that the Founders called "trial by jury."[104] Moreover, unlike Article III, Section 2's criminal jury or the Fifth Amendment's grand jury, the Seventh Amendment's civil jury is framed as an individual "right," such that litigants can waive the liberty. Considering these structural- and rights-based readings together complicates the Seventh Amendment's dictates on private civil procedure. It is simultaneously unclear which aspects the traditional actors are unable to disturb and which are open to private manipulation.

Currently, there is little judicial guidance on how to balance these competing readings when they are in tension.[105] As a result, it remains unclear the extent to which courts will or should "permit [civil] parties to commandeer judicial officers."[106] It is axiomatic, of course, that parties may not agree to procedures that expand jurisdiction, such as waiving the amount in controversy.[107] Parties also may not adopt procedures that contradict the court's structural form, such as contracting for a three-judge district tribunal or a particular judge.[108] Outside of these Article III constraints, however, courts have provided little direction on how to limit litigants' procedural autonomy in the civil jury context.[109]

There is some suggestion that the judiciary is antagonistic to private agreements tasking judges with adjudicative tasks wholly outside of their institutional form and function.[110] Judge Alex Kozinski has colorfully stated that a party cannot by contract command a judge to rule "by flipping a coin or studying the entrails of a dead fowl."[111] Such provisions are contrary to the concept of ordered justice and depart from any construct of the judicial role. But whether this restriction on procedural contracts extends to those agreements distorting the form and function of the *jury* is less clear. Might civil litigants agree to trial by a single juror armed with nothing but a quarter and a dismembered bird? Why not?

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104. *See* Larsen, *supra* note 40, at 961–63 ("Not even the purest originalist would likely claim that *all* attributes of the jury trial were fixed in the last eighteenth century . . . .").

105. *See, e.g.*, Dodge, *supra* note 46, at 737–38; Taylor & Cliffe, *supra* note 80, at 1113–14 (2002).

106. *See* Dodge, *supra* note 46, at 737–38 (discussing judges, not jurors).

107. *See, e.g.*, U.S. Const. art. III, §§ 1–2; Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (stating that one cannot forfeit or waive subject-matter jurisdiction).

108. Dodge, *supra* note 46, at 765–66.

109. In the criminal context, the Supreme Court has noted that certain procedural interests might prevent contracts that have the potential to "irreparably 'discredit[ ] the federal courts.'" United States v. Mezzanatto, 513 U.S. 196, 204 (1995) (quoting 21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5039 (1997)) (discussing the potential procedural importance of some evidentiary provisions).

110. *See* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) ("The review to which the parties have agreed is no different from that performed by the district courts in appeals from [other tribunals].").

111. *Id.*

Professor Thomas's relational originalism offers a fresh lens. Under her approach, the judiciary would refrain from enforcing private contracts that request procedures altering the jury's institutional authority in ways beyond those that existed at common law.[112] That is, if the Seventh Amendment prohibits the government from imposing upon the jury in certain ways, then the court should not permit private parties to do so either. A private agreement should not make the judiciary exercise its authority in a manner that undermines the coequal branch of the jury.[113] The Constitution entitles litigants to "trial by jury," not an orchestrated pretense by a public adjudicative body of their private liking.

Consider the applicability of this approach in a settled context. The Fourteenth Amendment prevents courts from enforcing private agreements for an all-white jury in civil cases.[114] A relational originalist approach to civil jury authority would command similarly. The court would review the contract in relation to the jury's competing institutional authority according to common law. It would employ an originalist lens to determine whether the discriminatory contract countermanded the requisite form and function of what constituted a jury in 1791. Racially discriminatory contracts undermine the jury's authority by altering its form as a democratic body in ways contrary to those that existed at common law.[115] Ultimately, the Court would hesitate to use its authority to enforce an agreement distorting the civil jury so.

There are other procedures that, while currently permitted, no less manipulate away the jury's authority. Consider Federal Rule of Civil Procedure 48, which specifically allows parties to consent to trial by fewer than twelve persons and judgment on a non-unanimous verdict.[116] Neither of these

112. *See supra* Section I.C.

113. *Cf.* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) ("Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints.").

114. *See id.* at 628.

115. *See* Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community.").

116. FED. R. CIV. P. 48(b).

practices existed at common law.[117] Empirical studies show that "progressively smaller juries are less likely to foster effective group deliberation"[118] and that non-unanimous verdicts allow majorities to quickly silence minorities.[119] A relational originalist approach would consider these effects, asking whether competing actors—in this case the Rules Committee and the parties—may alter the jury's form in a way that burdens its constitutional authority. Because the court would likely find that lack of full and democratic deliberation diminishes the jury's ability to check the traditional actors, it would not permit the practice.[120]

Relational originalism can address idiosyncratic forms of contract procedure, too. Consider again award-modification agreements that allow parties to request a damage award from the jury before altering it according to a contractual prearrangement.[121] Because parties often disclose these agreements to judges but do not need to disclose them to juries, the court is implicit in tasking the jury with performing a function alien to the institution: resolving a nonexistent dispute.[122] To be sure, the jury is asked to determine what the hypothetical value of the dispute would be if it were not in fact constrained by the parties' agreement.[123] The court, knowing that the verdict will remain unimplemented, allows the parties to secretly leverage the jury's constitutional authority. Aberrations like these would be rejected if courts considered the jury's competing constitutional authority to determine actual damages.[124] The jury is a principal judicial player with a limited and constitutionally codified authority; it is not an infinitely malleable institution.

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117. *See* Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899) (acknowledging that "trial by jury" meant "trial by a jury of twelve"); Am. Publ'g Co. v. Fisher, 166 U.S. 464, 468 (1897) (holding "unanimity was one of the peculiar and essential features of trial by jury at the common law" and that no authority was necessary for this holding). However, as part of a general trend disempowering juries during the 1970s, the Supreme Court reversed course on these issues, describing these holdings as dicta and concluding that the Seventh Amendment preserved "the substance of the common-law right of trial by jury." *See, e.g.*, Colgrove v. Battin, 413 U.S. 149, 157–58 (1973).

118. Ballew v. Georgia, 435 U.S. 223, 232 (1978) (prohibiting criminal juries of fewer than six people).

119. Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201, 205 (2006).

120. Imagine that the parties contract for a five-person jury. The Supreme Court has suggested that a civil jury of fewer than six does not comport with Constitution's commands of due process. *See Colgrove*, 413 U.S. at 159–60, 160 n.16. Would a rights-based reading of the Seventh Amendment authorize the court to empanel an otherwise too small of a jury? This new approach would answer "No."

121. Prescott & Spier, *supra* note 83, at 85.

122. Jolly, *supra* note 84, at 828.

123. *Id.* at 824–26.

124. *Cf.* Sherman J. Clark, *The Courage of Our Convictions*, 97 Mich. L. Rev. 2381, 2382, 2401 (1999) (stressing an understanding of the jury as a "responsibility-taking institution").

It is important to stress that application of Professor Thomas's doctrinal approach to private civil procedure would spell the end of neither arbitration nor contract procedure. It also would not alter the notion that the Federal Rules of Civil Procedure are defaults around which the parties may contract.[125] The Seventh Amendment did not freeze civil procedure or contract law in 1791, and relational originalism does not suggest otherwise. Private parties would remain free to enter into procedural arrangements to make trial by jury quicker, cheaper, and more accurate. What is prohibited under this approach, however, is the commandeering of the civil jury in ways that manipulate its form and function to undermine its competing constitutional authority.

Conclusion

Incorporating private procedural ordering into the framework Professor Thomas presents in *The Missing American Jury* would create an even more comprehensive work. Her contributions offer a structure for cogently addressing understudied questions regarding private distortions of the jury and the civil justice system generally. Yet shortcomings remain. This approach does little to retort the efficiency interests that the traditional actors claim are near supreme. Nor does it address the multitude of reasons why private parties have so readily jettisoned their right to a civil jury. But those problems are symptoms of a more serious ailment. Resuscitating the jury will require more than a doctrinal framework; it will require us to confront the collapse in esteem for the community's collective widsom.

125. Stephen C. Yeazell & Joanna C. Schwartz, Civil Procedure 159 (9th ed. 2016) (noting "the extent to which the rules of procedure are 'default' rules").