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THE RESILIENCE OF SUBSTANTIVE RIGHTS AND THE FALSE HOPE OF PROCEDURAL RIGHTS: THE CASE OF THE SECOND AMENDMENT AND THE SEVENTH AMENDMENT

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ABSTRACT—At first glance, there seem to be strong affinities between the Second Amendment and the Seventh Amendment. Both the right to keep and bear arms and the right to civil jury trial potentially empower ordinary citizens. Both could check elites.

But there are crucial differences between these rights. I focus on two of them here. The first is relatively straightforward; it concerns individual accountability—or the lack thereof—and the ability to understand responsibilities. Gun owners and users generally have individual responsibility for their actions, and the ability to understand their responsibilities. In contrast, by design civil jurors lack individual responsibility. And they often have difficulty understanding judicial instructions and complicated scientific or mathematical evidence.

Second, and more broadly, there are important differences between substantive and procedural rights. Substantive rights such as the Second Amendment have a core that can be interpreted and protected, regardless of the type of legal system. But specific procedural rights such as the Seventh Amendment are wholly dependent on the surrounding procedural system for their significance. Changes in the rest of the procedural system can easily subvert a specific procedural right, as we have seen with both criminal jury trials and civil jury trials. Substantive rights are potentially resilient; specific procedural rights are inherently fragile. Unfortunately, procedural rights, even when they have become almost obsolete, can thwart efforts to develop a more accurate and efficient method of adjudication.

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INTRODUCTION

At first glance, there seem to be strong affinities between the Second Amendment and the Seventh Amendment. Both the right to keep and bear arms and the right to civil jury trial potentially empower ordinary citizens. Both could check elites.[1]

But there are crucial differences between these rights. I focus on two of them here. The first is relatively straightforward—it concerns individual accountability, or the lack thereof, and the ability to understand responsibilities.[2] Gun owners and users have direct individual liability for their actions. This individual liability seems to encourage decent behavior; holders of carry permits, in particular, are remarkably law-abiding. They

[1] *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 46–59, 87–88 (1998); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 235–36 (2005) (explaining how constitutional rights to juries, including civil juries, empower ordinary citizens); *id.* at 322–26 (explaining how a right to keep and bear arms empowers ordinary citizens). In an elegant article, Professor Darrell Miller has recommended parallel interpretation of the two amendments. *See generally* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013) (suggesting the Seventh Amendment's historical test can inform courts in crafting a clearer test for the Second Amendment).

[2] *See infra* Part I.

may even be more law-abiding than police officers. Furthermore, their responsibilities are relatively easy for ordinary persons to understand. In contrast, civil jurors lack any individual accountability for their decisions and have a hard time understanding their job. The result is unpredictable and wayward verdicts. These drawbacks are why the right to a civil jury trial was so controversial at the time of the founding. I focus particularly on Alexander Hamilton's critique of the civil jury in *Federalist* No. 83.

The second difference is more complicated. It has to do with the distinction between a substantive right and a procedural right.[3] Substantive rights, I hope to show, are potentially more durable and effective than detailed procedural rights. There is a solid core to a substantive right that is amenable to meaningful interpretation, whereas specific procedural rights prove to be flimsy. The meaning of a particular procedure or legal institution depends on the surrounding legal system as a whole. When other parts of the legal system change, the significance of that procedure or legal institution can change dramatically—it can essentially be nullified, even though nominally, it still exists. Worse, procedural rights cause positive harm to the legal system by requiring clumsy work-arounds for problems and thwarting more direct solutions.

Why compare these two rights, as opposed to some other pair of substantive and procedural rights in the first eight Amendments to the U.S. Constitution? In the past few decades, the contrast between the Second and the Seventh Amendments has been particularly striking. The right to keep and bear arms has had a remarkable resurgence, at both the popular and the judicial levels. This revival is not guaranteed to last—especially at the judicial level—but at least it can be done.

Meanwhile, the Seventh Amendment by its terms requires an originalist interpretation ("shall be preserved"), and the federal courts have indeed tried to apply a historical test.[4] Even so, the attempt at preservation has been a failure. Courts have developed many mechanisms to avoid civil jury trial, and litigants have fled from it by settling. As of 2020, fewer than one percent of civil cases reaching disposition in federal court are decided by jury trial.[5] Our civil justice system today is vastly expensive to litigants, full of delays, and unpredictable. Persons of modest means are almost entirely shut out of

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[3] *See infra* Section II.B.

[4] *See* Miller, *supra* note 1, at 872–93; Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 813, 836–45 (2014).

[5] Of federal civil cases reaching disposition after court action, jury trial occurred in 0.59%. ADMIN. OFF. OF U.S. CTS., FEDERAL JUDICIAL CASELOAD STATISTICS 2020 TABLES tbl.C-4 (Mar. 31, 2020), https://www.uscourts.gov/federal-judicial-caseload-statistics-2020-tables [https://perma.cc/8UMP-VEYD] (reporting 1,443 civil jury trials out of 244,812 total dispositions after court action).

it, or suffer grievous disadvantages. This Essay shows how the civil justice system could be greatly improved if we were free from the constitutional constraint of the civil jury. The Seventh Amendment, as Hamilton warned, provides an especially apt illustration of the problems of constitutionalizing specific procedural rights.

Other legal scholars have pointed to some of the problems with procedural rights. In an essay about criminal sentencing, Professor James Whitman observed, "Procedural protections are comparatively weak, easily evaded, and difficult to generalize beyond their point of departure. Substantive protections, by contrast, are comparatively strong."[6] Legal writers have expressed concern about the constitutional rights revolution in criminal procedure that began in the 1960s.[7] Professor John Langbein pointed out that the Sixth Amendment right to a criminal jury trial has been a "spectacular failure."[8] Plea bargaining has almost swallowed it. Professor Langbein commented on the fragility of written constitutions in general and their susceptibility to being undermined by the legal profession.[9] I believe that insight is especially true of procedural rights, embedded as they are in a legal system dominated by the legal profession. Procedural rights are particularly easy for the legal profession to manipulate and to alter without anyone else noticing. For example, many members of the public may be unaware of the virtual disappearance of civil and criminal jury trials.[10]

My aim here is to deepen our understanding of the differences between substantive and procedural rights. I discuss how to distinguish between the two and the importance of the distinction to the rule of law. The Second Amendment and the Seventh Amendment provide telling examples of the resilience of substantive rights, and the fragility of procedural rights.

Part I of this Essay discusses individual responsibility and comprehension of this responsibility. It is divided into two Sections. The first addresses the responsibility and knowledge of gun owners and users. It

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[6] James Q. Whitman, *What Happened to Tocqueville's America?*, 74 SOC. RSCH. 251, 263 (2007).

[7] *See, e.g.*, WILLIAM T. PIZZI, THE SUPREME COURT'S ROLE IN MASS INCARCERATION 1 (2021) ("[T]he Supreme Court has contributed to the rise in our incarceration rate because the so-called 'criminal procedure revolution' made trials increasingly unworkable and indirectly led to a system in which plea bargaining dominates."); GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS 155–56 (2008) (discussing the Warren Court as "seek[ing] nothing short of a revolution in federal regulation of state criminal processes in the 1960s"). *See generally* F. Andrew Hessick & Elizabeth Fisher, *Structural Rights and Incorporation*, 71 ALA. L. REV. 163 (2019) (arguing that federal constitutional jury rights intrude deeply on state sovereignty and thus should not be incorporated against the states).

[8] John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 119 (1992).

[9] *Id.* at 126–27.

[10] *See id.* at 120–21.

provides data concerning crimes committed by legal gun owners to demonstrate that there is an incentive for gun owners and users to be law-abiding, and it discusses the easily comprehensible nature of this responsibility. The second Section focuses on the Seventh Amendment and the contrasting lack of responsibility and knowledge of civil jurors. I explain Hamilton's related critique of the civil jury in *Federalist* No. 83, and his warning that it would be unwise to put such a procedural right into the U.S. Constitution.

Part II analyzes the distinction between substantive and procedural rights in five Sections. The first defines "substantive" and "procedural" rights. The second explains the importance of the separation of procedure and substance for the rule of law. The third demonstrates that specific procedural rights are not compatible with all legal systems and discusses the U.S. Supreme Court's struggles over incorporation of procedural rights. The fourth describes the historical decay of the right to a civil jury trial and outlines the important reforms that could occur in the civil justice system if we were free of civil jury trial, or the threat thereof. The fifth examines some of the potential weaknesses of substantive rights, the rise of gun control laws in the wake of a massive increase in violent crime beginning in the 1960s, and the current burgeoning exercise of the right to keep and bear arms.

The Essay concludes by highlighting the distinction between the two Amendments. The substantive nature of the Second Amendment has made it revivable, while the procedural nature of the Seventh Amendment makes it unlikely, and undesirable, to resuscitate. The Conclusion offers thoughts about the wisdom of constitutionalizing specific procedural rights, and suggestions for courts that must interpret such rights.

I. INDIVIDUAL RESPONSIBILITY AND UNDERSTANDING RESPONSIBILITY

First, we take up the question of individual responsibility and comprehension of responsibilities. Successful public policy depends on paying close attention to the accountability principle. Who is accountable, and how is that accountability enforced? Incentives matter. Gun owners and users have considerable incentives to behave responsibly; civil jurors have very few.

A. The Incentives and Knowledge of Gun Owners and Users

Freedom should entail responsibility.[11] This is the case with gun owners and users. Gun owners and users have direct, individual responsibility for

[11] This point has tended to be ignored or downplayed recently. *See* NIGEL BIGGAR, WHAT'S WRONG WITH RIGHTS? 334 (2020).

their actions. They have an incentive to be careful because of concern for the safety of their families and friends. And if they do something foolish or malicious with a gun, they are individually liable—not just liable under civil law, but also criminal law. They may be sued or prosecuted for what they do. Such individual liability has a way of focusing the mind.

This individual responsibility seems to have an effect on behavior. Proponents of gun-carry bans predicted mayhem in the streets after Florida passed a permissive concealed-carry law in 1987.[12] But these dire predictions have not come to pass. Permissive concealed-carry laws appear to have had no adverse effect on public safety.[13] It is impossible to know the number of firearms legally in private hands in the United States, although most estimates put the number at over 300 million.[14] It is also hard to know how many legal gun owners commit crimes with their guns, as there are problems defining that category. For example, does it include someone unlawfully carrying or unlawfully storing a gun the person had legally purchased for a lawful purpose?

The most solid data available on crime rates for legal gun owners in the United States concern holders of concealed-carry licenses. States generally keep track of how many licenses are issued, and also the crimes that holders of these licenses commit. There may well be differences between the crime profiles of carry-license holders and those of other legal gun owners. But for now, the best data we have concerns carry-permit holders.

For some persons, holders of concealed-carry permits seem to raise special concerns. In a church in Texas in December 2019, a volunteer

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[12] *See, e.g.*, Stephen Koff, Bob Port, Margaret L. Usdansky & Charlotte Sutton, *Some Seek Repeal of Gun Law*, ST. PETERSBURG TIMES, Jan. 17, 1988, at 15A (quoting Hernando County Commissioner Len Tria as saying, "It scares me. I'll hate to see the death statistics that will come in before the Legislature wakes up and changes its mind"); Lisa Getter, *Accused Criminals Get Gun Permits*, MIAMI HERALD, May 15, 1988, at 1A, 14A (quoting Miami Police Chief Clarence Dickson calling the new law "needless and foolhardy," and Florida Attorney General Bob Butterworth as saying, "[t]his is the worst thing I can think of in my 20 years of public service"); Sam Howe Verhovek, *States Seek to Let Citizens Carry Concealed Weapons*, N.Y. TIMES, Mar. 6, 1995, at A1 ("Opponents of the bills . . . contend that more guns will only spur more violence, and some paint modern-day Dodge City scenarios in which routine fender-bender accidents could escalate into bloody duels among gun-toting motorists.").

[13] GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 411–14 (2005) [hereinafter KLECK, POINT BLANK]; GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 367–72 (1997) [hereinafter KLECK, TARGETING GUNS]. In 1995, *The New York Times* admitted that "Florida's experience has generally provided strong arguments for proponents of the right-to-carry bills . . . . Even those who opposed the measure said it had not led to the increase in violence they had feared. . . . [H]andgun-related homicides in Florida dropped by 29 percent from 1987 to 1992 . . . ." Verhovek, *supra* note 12, at A14.

[14] *See, e.g.*, AARON KARP, SMALL ARMS SURVEY, ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS 4 (2018), http://www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-BP-Civilian-Firearms-Numbers.pdf [https://perma.cc/6RP3-3M6M] (estimating that in 2017 there were 393,300,000 firearms in private hands in the United States).

security guard with a concealed-carry permit shot and killed a gunman who had just shot and killed two members of the church. The permit holder did this within six seconds of the gunman opening fire. Speaking about this incident at a campaign stop days later, Michael Bloomberg said:

> I wasn't there . . . . I don't know the facts—that somebody in the congregation had their own gun and killed the person who murdered two other people. But it's the job of law enforcement to have guns and to decide when to shoot. You just do not want the average citizen carrying a gun in a crowded place.[15]

The data should help to assuage Mr. Bloomberg's concerns. First, there are considerable benefits to gun ownership and carry. Defensive uses of firearms occur at least 67,000 times per year, according to a study by a pro-gun-control group using data compiled by the FBI.[16] And of course we do not know how many crimes are prevented because victims may be armed. Gun accidents are rare, and most of them occur at home, not during defensive use.[17]

Second, concealed-carry-permit holders are remarkably law-abiding. Not only do they commit far fewer crimes than the general population—they may commit fewer crimes than police officers. And there are a lot of them. According to statistics through April 30, 2021, Florida alone had 2,363,898

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[15] Editorial, *Bloomberg Misfires on Jack Wilson*, WALL ST. J. (Jan. 16, 2020), https://www.wsj.com/articles/bloomberg-misfires-on-jack-wilson-11579219312 [https://perma.cc/J8FA-VL79].

[16] VIOLENCE POL'Y CTR., FIREARM JUSTIFIABLE HOMICIDES AND NON-FATAL SELF-DEFENSE GUN USE: AN ANALYSIS OF FEDERAL BUREAU OF INVESTIGATION AND NATIONAL CRIME VICTIMIZATION SURVEY DATA 6 (2015), http://vpc.org/studies/justifiable15.pdf [https://perma.cc/9UKR-TWXP]. This is considered to be a low estimate. U.S. surveys that ask respondents directly whether they have used a gun defensively have produced estimates ranging from 760,000 annually to 3 million. NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 18 (2d ed. 2018). A 2013 study commissioned by the Centers for Disease Control and Prevention reported, "Almost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals, with estimates of annual uses ranging from about 500,000 to more than 3 million . . . ." INST. OF MED. & NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15 (Alan I. Leshner, Bruce M. Altevogt, Arlene F. Lee, Margaret A. McCoy & Patrick W. Kelley eds., 2013) (citation omitted). Violent crimes committed with firearms were estimated at 300,000 for 2008. *Id.*

[17] *See* KLECK, POINT BLANK, *supra* note 13, at 269–319; *id.* at 304 ("The risk of a gun accident is extremely low, even among defensive gun owners, except among a very small, identifiably high-risk subset of the population."); KLECK, TARGETING GUNS, *supra* note 13, at 293–324; *id.* at 321 ("Most gun accidents occur in the home . . . . [V]ery few accidents occur in connection with actual defensive uses of guns. Gun accidents are generally committed by unusually reckless people with records of heavy drinking, repeated involvement in automobile crashes, many traffic citations, and prior arrests for assault."). Accidental firearms deaths have been falling for the past four decades, including for children, and are today at an all-time low, despite widespread gun ownership. JOHNSON ET AL., *supra* note 16, at 22–25 (discussing the plunging fatal-gun-accident rates and some possible causes).

valid concealed-carry license holders.[18] For the period from July 1, 2019 to June 30, 2020, Florida revoked 1,546 concealed-carry permits.[19] Using these numbers, which are close in time, this is an annual revocation rate of just under 0.068%—hundredths of a percent. Florida requires revocation of these licenses for all felony convictions and certain misdemeanor convictions, and there is an option to revoke in certain instances such as mental or physical incapacitation.[20] To provide some comparison, in 2019 the rate of violent crime in Florida as a percentage of the population was 0.382%.[21]

In other states, rates of conviction for crimes committed by gun-permit holders are similarly low. In February 2020, a Texas official testified that 1.4 million persons in Texas had licenses to carry a handgun.[22] An official state report for 2020 shows that the total number of convictions that year for all crimes committed in Texas was 26,304. That year, the number of convictions for crimes committed by handgun-license holders was 114.[23] This indicates a conviction rate by handgun-license holders of about 0.0081%—a minuscule rate.

The crime rate of carry-permit holders may be lower than that of police officers. Large studies of the crime rates of police officers are scarce. One of the most prominent studies, for the period from 2005 to 2011, indicated that the arrest rate for state and local officers was about 0.072%.[24] (This is just

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[18] FLA. DEP'T OF AGRIC. & CONSUMER SERVS., DIV. OF LICENSING, CONCEALED WEAPON OR FIREARM LICENSE SUMMARY REPORT, OCTOBER 1, 1987 - APRIL 30, 2021 [hereinafter SUMMARY REPORT], https://www.fdacs.gov/content/download/7499/file/cw_monthly.pdf [https://perma.cc/VY55-RC2L].

[19] FLA. DEP'T OF AGRIC. & CONSUMER SERVS., DIV. OF LICENSING, CONCEALED WEAPON OR FIREARM LICENSE REPORTS, APPLICATIONS AND DISPOSITIONS BY COUNTY, JULY 01, 2019 - JUNE 30, 2020, https://www.fdacs.gov/content/download/84469/file/07012019_06302020_cw_annual.pdf [https://perma.cc/G8PM-588W].

[20] FLA. STAT. §§ 790.06, .23 (2020). Unfortunately, Florida no longer collects statistics on how many of these revocations were due to firearms violations, but the number is likely to be low. For all the years from 1987 through 2010, the total number of concealed-carry permits revoked because of a firearms violation was 168. SUMMARY REPORT, *supra* note 18.

[21] FLA. STAT. ANALYSIS CTR., FLORIDA STATEWIDE REPORTED VIOLENT CRIME, BY OFFENSE AND YEAR, 1971 - 2019., https://www.fdle.state.fl.us/FSAC/Documents/PDF/2019/Total_Violent_Crime.aspx [https://perma.cc/G59V-EP69]. I have not been able to find statistics showing the felony conviction rate per population in Florida.

[22] Wes Rapaport, *State Police in Texas Issued 1 Million Licenses to Carry Firearms in Last Decade*, KXAN (Feb. 26, 2020), https://www.kxan.com/news/texas-politics/state-police-in-texas-issued-1-million-licenses-to-carry-firearms-in-last-decade/ [https://perma.cc/J3DG-SDAW].

[23] TEX. DEP'T OF PUB. SAFETY, CONVICTION RATES FOR HANDGUN LICENSE HOLDERS, REPORTING PERIOD: 01/01/2020 - 12/31/2020, at 5 (2021), https://www.dps.texas.gov/sites/default/files/documents/rsd/ltc/reports/convictionratesreport2020.pdf [https://perma.cc/6GXC-EANW].

[24] PHILIP MATTHEW STINSON SR., JOHN LIEDERBACH, STEVEN P. LAB & STEVEN L. BREWER JR., POLICE INTEGRITY LOST: A STUDY OF LAW ENFORCEMENT OFFICERS ARRESTED 21 (2016),

over the revocation rate for Florida concealed-carry licenses.) The authors found that, during this period, officers were convicted in 2,846 cases,[25] an average of about 407 a year. The federal Bureau of Justice Statistics reports that, for the year 2011, there were 768,287 sworn law enforcement officers.[26] For a variety of reasons, it seems likely that the study undercounts the number of crimes committed by police officers. The study relied on collecting media accounts of officer crime, and so does not capture all instances of arrest or conviction. In addition, crimes by police are likely underreported compared with crimes by others. Therefore, not only does the rate of police crime found by the study seem to be higher than the rate for Texas handgun-license holders, it may actually be even higher than indicated.

The data therefore suggest that legal gun owners and users are careful to obey the law. Furthermore, the legal responsibilities that gun owners and users have are relatively simple and readily understood by ordinary persons. It doesn't require an advanced degree to understand the notion of reckless endangerment, or the possible consequences of a toddler getting hold of a loaded gun. To be sure, certain requirements that governments impose can be precise, such as storing guns in a locked container unless they are equipped with certain safety devices.[27] But again, these requirements are not difficult to understand.

B. Civil Jurors: Collective Decision-Making and Confusion

Unlike gun owners, civil jurors lack individual responsibility and have difficulty understanding the tasks that they are assigned. Indeed, this lack of accountability and confusion were why civil juries were controversial at the time of the Founding.

1. Civil Jurors' Lack of Individual Responsibility

Contrast the individual responsibility of gun owners and users—and their ability to understand their responsibility—with that of civil jurors. Juries are designed precisely to avoid individual responsibility. English high court judge and criminologist James Fitzjames Stephen pointed out that the

https://www.ojp.gov/pdffiles1/nij/grants/249850.pdf [https://perma.cc/LWK2-R9F6]. The study found that officers were arrested from 2005 to 2011 in 6,724 cases. *Id.* at 238 tbl.1. A total of 5,545 officers were arrested (some officers were arrested more than once). *Id.* at 21.

[25] *Id.* at 403 fig.1; *see also id.* at 244 tbl.5 (suggesting there have been 2,195 convictions).

[26] DUREN BANKS, JOSHUA HENDRIX, MATTHEW HICKMAN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUR. OF JUST. STATS., NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 2 tbl.1 (2016). https://www.bjs.gov/content/pub/pdf/nsleed.pdf [https://perma.cc/5M6Y-U9TX].

[27] MASS. GEN. LAWS ch. 140, § 131L(a) (2021).

traditional number of jurors—twelve—is enough to preclude any notion of individual responsibility.[28] The modern move to six jurors focuses responsibility somewhat more, but still leaves individual jurors with cover. The traditional requirement of unanimity further shields jurors from individual responsibility. Unless the parties agree otherwise, federal civil juries are still required to be unanimous.[29] And jury deliberations occur in secret. Jurors do not give reasons for what they do.

Not only do jurors engage in purely collective, secret decision-making, they are entirely shielded from the consequences of a faulty decision. If a jury completely misunderstands the evidence, or the instructions on the law, or is improperly swayed by the emotional arguments of counsel, or flagrantly disregards the law or the evidence, there is no consequence to the jurors whatsoever. They cannot be imprisoned, fined, or in any way punished. The English courts ended those practices in 1670 in *Bushell's Case*, thus tacitly approving jury nullification.[30] Today, the judge congratulates the jurors on reaching a verdict and thanks them profusely for their service, regardless of whether they have botched the decision.

The consequences of civil jurors' lack of individual responsibility for their decisions are legion. One of the most salient has to do with giving away other peoples' money. Studies have consistently shown that the area of greatest disagreement between judges and jurors is damages.[31] Judges do have some individual responsibility for their decisions. Judges are named as the decision-makers, either alone or in a small group; must generally give reasons for their decisions; usually care about reversal by appellate courts; and often are concerned about their reputations among other judges and

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[28] JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 568 (London, MacMillan & Co. 1883) (the number twelve is enough "to destroy even the appearance of individual responsibility").

[29] FED. R. CIV. P. 48(b).

[30] *See* 124 Eng. Rep. 1006, 1011–12 (C.P. 1670).

[31] *See, e.g.*, Theodore Eisenberg & Michael Heise, *Judge-Jury Difference in Punitive Damages Awards: Who Listens to the Supreme Court?*, 8 J. EMPIRICAL LEGAL STUD. 325, 327–28 (2011) (discussing judge–jury differences with respect to punitive damage awards); Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. STATE U. L. REV. 469, 477–78, 481 (2005) (explaining that jury awards are, on average, twenty percent higher than judges would have awarded, and that half of the time, judges would have awarded less than the jury); R. Perry Sentell Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85, 102–06 (1991) (detailing more data about judge–jury differences in damages awards in Georgia); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the (Federal) Bench*, 27 GA. L. REV. 59, 74–77 (1992) (detailing similar findings in federal court); Harry Kalven Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065–66 (1964) (arguing that the "jury's sense of equity" is what accounts for the judge–jury discrepancy in damage awards, and not the jury's "relative competence" as compared to judges); HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY 64 n.13 (1966) (stating that juries award damages twenty percent higher than judges on average).

lawyers. Jurors lack almost all of these characteristics. As Montesquieu wrote, after their service, jurors melt back into the population, invisible.[32] There is therefore some constraint on judges in awarding damages that there is not on jurors. Jurors are prone to the typical effects on most humans of spending others' money on someone else, with no accountability.[33] The problem is well illustrated by the 2009 tweet of an Arkansas civil juror: "I just gave away TWELVE MILLION DOLLARS of somebody else's money!"[34]

Although after 1670 jurors could not be disciplined, their faults could at least be revealed. There was a practice of occasionally opening the black box of the jury's deliberations and of awarding new trials because of what was found. For a while, English and American judges spoke with jurors, or accepted juror affidavits, about misconduct during deliberations.[35] Sometimes that misconduct turned out to be flipping coins or drawing straws to decide cases.[36] Juries also used quotient verdicts, in which each juror came up with a number for damages and the jury averaged them.[37] There is no reason to think that quotient verdicts have disappeared.[38]

But in the late eighteenth and early nineteenth centuries, English and American judges put severe limits on accepting juror affidavits. They argued that accepting juror affidavits would open the door for the losing party to tamper with jurors after a verdict and would allow a single dissatisfied juror to destroy a verdict.[39] The finality of jury verdicts would be undermined. The difficulty was that the refusal to accept juror affidavits meant rejecting relevant evidence of juror misconduct. It came at a high cost.

For example, in 1987, the U.S. Supreme Court decided that a trial judge was correct to reject several juror affidavits stating that the jury in that case—a complicated fraud prosecution with a trial lasting six weeks—was "on one

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[32] CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 158 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans. & eds., 1989) (1748).

[33] *See* MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 116–19 (1980) (arguing that a person spending someone else's money on another person likely will not economize and will not seek the highest value).

[34] David Chartier, *Juror's Twitter Posts Cited in Motion for Mistrial*, ARS TECHNICA (Mar. 15, 2009, 9:15 PM), https://arstechnica.com/information-technology/2009/03/jurors-twitter-posts-cited-in-motion-for-mistrial/ [https://perma.cc/JSL6-EJL6].

[35] Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 527–36 (1996).

[36] Michael Tackeff, *Justice by Lot: The Taboo of Chance Verdicts in America*, 16 U. SAINT THOMAS L.J. 209, 212, 214–16 (2020) (defining and discussing the different types of "chance verdicts").

[37] *Id.* at 215–16, 236–39, 265–68.

[38] Although it is impossible to know how often quotient verdicts occur, they almost certainly still exist. I have been told of several by different former jurors in personal conversations.

[39] Lettow, *supra* note 35, at 533–40.

big party."[40] During breaks, the jurors allegedly consumed multiple mixed drinks and pitchers of beer, as well as marijuana and cocaine.[41] Justice Sandra Day O'Connor, writing for a unanimous Court, was concerned that allowing such affidavits would undermine "the community's trust in a system that relies on the decisions of laypeople."[42] Shining light into the jury room, she worried, would destroy the institution altogether. "It is not at all clear . . . that the jury system could survive such efforts to perfect it."[43] Not only were jurors not to be held accountable for such incidents, the incidents could not even be revealed.[44]

Justice O'Connor's predictions are being tested, however, by the 2017 case *Peña-Rodriguez v. Colorado*, in which the Court decided that juror affidavits should be accepted to show racial or ethnic bias on the part of a juror.[45] This has potential to be a significant change from the federal rule that juror affidavits regarding statements during deliberations will not be allowed. One thing that seems certain is that allowing such affidavits will diminish the finality of verdicts and further decrease prosecutors' already-low enthusiasm for jury trial.

Concerning juror incentives, many judges say that jurors try very hard to fulfill their responsibilities.[46] No doubt many do. Judges also report that they themselves have high levels of satisfaction with the jury system.[47] But, as I have explained in detail elsewhere, on this question judges cannot be unthinkingly trusted.[48] Concerning juries, judges are highly interested witnesses. Use of juries, or the threat of juries, absolves judges of a great deal of responsibility. Where juries are used, or threatened, judges do not have to decide cases on the merits, with all the attendant work of writing an opinion that will survive appeal. Not only that, but through use of juries, judges can present themselves as above the partisan fray in our adversarial

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[40] Tanner v. United States, 483 U.S. 107, 115, 125, 127 (1987); *see also* Warger v. Shauers, 574 U.S. 40, 44–45, 51–52 (2014) (refusing to accept juror affidavits indicating that the foreperson had lied on voir dire about experience with an issue central to the case).

[41] *Tanner*, 483 U.S. at 135–36.

[42] *Id.* at 121.

[43] *Id.* at 120.

[44] *Id.* at 120–21.

[45] 137 S. Ct. 855, 869 (2017).

[46] *See, e.g.*, Robbennolt, *supra* note 31, at 481–82 (summarizing previous surveys of judges on the jury system).

[47] *Id.*

[48] Renée Lettow Lerner, *The Surprising Views of Montesquieu and Tocqueville About Juries: Juries Empower Judges*, 81 LA. L. REV. 1, 16–18 (2020) ("Professional judges are often reluctant to admit that they are glad juries spare them the hard work and responsibility of judging.").

system, as referees making sure procedures are followed, not soiling their hands by asking questions and trying to understand the merits more deeply.[49]

Almost the only persons involved in the legal system who are willing to describe in detail the serious problems with juror incentives are trial consultants.[50] Their accounts are eye-opening. Trial consultants have a special need to understand jury decision-making accurately. So do trial lawyers, but lawyers fear to publicly criticize the jury, as they might appear as advocates in front of one. However, lawyers' concern about jury decision-making is revealed in their intense interest in jury selection and voir dire. There are a number of books about how to choose a jury that will be sympathetic to one's client before any evidence is heard.[51]

2. Civil Jurors' Lack of Understanding of Law and Facts

But even if a juror is soberly trying to do his or her level best, the task is daunting. Civil cases today are often complicated. Many studies have shown that jurors have trouble understanding the judge's instructions on the law, especially concerning damages.[52]

Jurors also can have difficulty understanding the facts. Much evidence today concerns complex transactions or advanced technology, and is in scientific or mathematical form. These topics and forms of evidence do not play to the strengths of ordinary jurors—particularly when one side has great incentive to remove anyone educated from the jury.[53] And dueling partisan

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[49] *See id.* at 16–17.

[50] *See, e.g.*, DAVID TUNNO, FIXING THE ENGINE OF JUSTICE: DIAGNOSIS AND REPAIR OF OUR JURY SYSTEM 35–44 (2012) (detailing many errors that jurors are prone to make because of bias). David Tunno is a trial consultant. *See id.* at xv–xvi.

[51] *See, e.g.*, JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION: GAIN AN EDGE IN QUESTIONING AND SELECTING YOUR JURY (4th ed. 2019); RONALD H. CLARK & THOMAS M. O'TOOLE, JURY SELECTION HANDBOOK: THE NUTS AND BOLTS OF EFFECTIVE JURY SELECTION (2018); ANGELA M. DODGE, WINNING AT JURY SELECTION: A HANDBOOK OF PRACTICAL JURY-FOCUSED TECHNIQUES & STRATEGIES (2010).

[52] *See, e.g.*, Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCH. PUB. POL'Y & L. 622, 666–68, 669–700 (2001) (summarizing studies over the previous forty-five years); Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1555–60, 1564–66, 1569–70, 1574–75 (2012) (detailing various types of errors jurors make, especially with respect to instructions and the law); Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 51–54 (1997) (asserting that "understanding the law is often the most difficult task for the juror"); Molly Armour, Comment, *Dazed and Confused: The Need for a Legislative Solution to the Constitutional Problem of Juror Incomprehension*, 17 TEMP. POL. & C.R.L. REV. 641, 652, 655 (2008) (arguing that studies have conclusively demonstrated that jury instructions are often incomprehensible to jurors).

[53] *See* TUNNO, *supra* note 50, at 23–34, 119–22 (detailing different types of cases in which one of the parties tried to remove anyone educated from the jury, or benefited from having incompetent persons on the jury).

expert witnesses can add to juror confusion. Jurors are often baffled.[54] As a result, litigators presenting a case to a jury go to great lengths to reduce the case to simple terms. In the process, the issues can be hopelessly distorted. For example, a litigant at trial in an intellectual property case might strongly emphasize a trade dress claim because that is easier for jurors to understand, and thus hope to win jurors' favor on a complicated patent infringement claim, which is really the most important issue in the case.

3. Controversy over the Civil Jury at the Founding: Hamilton's Critique

Jurors' lack of accountability and confusion were precisely why civil juries were controversial at the time of the American Founding. The Seventh Amendment right to civil jury trial was much more controversial than the Second Amendment right to keep and bear arms.[55] The Anti-Federalists were alarmed that the draft of the new Constitution coming from the convention in Philadelphia contained no right to a civil jury trial. This concerned them for two reasons. First, they viewed the power of the federal judiciary as excessive and unchecked. At least juries could provide some check.[56]

Second, and most importantly for our purposes here, the Anti-Federalists were especially eager to have juries decide debt cases. During the 1780s, state civil juries had shown bias in favor of debtors and against

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[54] *See* James R. Dillon, *Expertise on Trial*, 19 COLUM. SCI. & TECH. L. REV. 247, 276–79 (2018); Valerie P. Hans, David H. Kaye, B. Michael Dann, Erin J. Farley & Stephanie Albertson, *Science in the Jury Box: Jurors' Comprehension of Mitochondrial DNA Evidence*, 35 LAW & HUM. BEHAV. 60, 60–61 (2011); Strier, *supra* note 52, at 54–56; Eugene Morgulis, Note, *Juror Reactions to Scientific Testimony: Unique Challenges in Complex Mass Torts*, 15 B.U. J. SCI. & TECH. L. 252, 254, 266–69, 278 (2009) ("[T]echnical difficulty [in a case] makes other irrational factors, such as ideological biases and emotional reactions, all the more influential [on jurors]."). Occasionally, a thoughtful juror draws back the curtain and reveals misunderstandings among the jury. *See, e.g.*, NORMA THOMPSON, UNREASONABLE DOUBT: CIRCUMSTANTIAL EVIDENCE AND THE ART OF JUDGMENT 77, 103–05, 162–65 (2011) (describing fellow jurors' reluctance to judge, resulting in a hung jury in a murder trial).

[55] The Anti-Federalists occasionally mentioned the right to bear arms. *See* The Address and Reasons of Dissent of the Minority of the Convention, of the State of Pennsylvania, to Their Constituents (Dec. 18, 1787), *in* PA. PACKET & DAILY ADVERTISER, *reprinted in* THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION 201, 207 (Herbert J. Strong ed., 1985) ("That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game, and no law shall be passed for disarming the people or any of them . . . ."). In the *Federalist Papers*, Hamilton, Madison, and Jay did not discuss the right to bear arms directly. The issue attracted so little controversy presumably because in the United States, the free population was already heavily armed. Recall that Americans had recently fought a war of independence with large participation by citizen militias and soldiers, that many persons ate game meat, and that in many areas firearms were needed to protect against attacks by persons and wild animals. On the other hand, the issues of a standing army and of the relationship between the state militias and the federal government were controversial. *See* THE FEDERALIST NO. 29, at 140–42 (Alexander Hamilton) (George W. Carey & James McClellan eds., Gideon ed. 2001).

[56] Lerner, *supra* note 48, at 23–25.

creditors, especially foreign creditors.[57] On the other hand, the Federalists worried that civil jurors' anti-foreign bias would discourage the investment that the new Republic so badly needed for economic development. And they were concerned that state civil juries' decisions in maritime and prize cases would upset the foreign relations of the new nation, and could even lead to war.[58] Anti-Federalist Patrick Henry and Federalist James Madison argued about these issues in the Virginia ratifying convention.[59]

In *Federalist* No. 83, Alexander Hamilton explained why a constitutional right to civil jury trial was a bad idea. Juries would often need radical simplification of disputes, and some disputes were simply too complicated to subject to this treatment.[60] Jurors were not learned in the law, and thus apt to make mistakes in delicate cases, especially ones involving foreigners.[61] And such a right would be difficult to draft. The federal courts had no existing jury practice, and the states all had different practices concerning when a jury was required.[62]

At the end of *Federalist* No. 83, Hamilton issued a strong warning against constitutionalizing a right to civil jury trial. Particularly concerning the civil jury, he explained, there was need for flexibility to accommodate "the changes which are continually happening in the affairs of society."[63] England, as well as the American states, had reduced the use of civil jury trial, which suggested that its previous extent had been "found inconvenient."[64] There was reason to suspect, he wrote, that this process of limiting the use of juries would continue. In fact, even states that had constitutional provisions guaranteeing jury trial had been busily limiting it. In the case of civil jury trial, Hamilton wrote, "I suspect it to be impossible in the nature of the thing, to fix the salutary point at which the operation of the institution ought to stop; and this is with me a strong argument for leaving the matter to the discretion of the legislature."[65] It was better to rely on the structure of government for permanent effects, rather than particular rights.

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[57] Lerner, *supra* note 4, at 826–27; Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 675–76 (1973); Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 172–74 (2001).

[58] ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION 121–24 (2017); Wolfram, *supra* note 57, at 678; Harrington, *supra* note 57, at 174–79; THE FEDERALIST NO. 83, at 437.

[59] Lerner, *supra* note 4, at 827–28 & n.99.

[60] *See* THE FEDERALIST NO. 83, at 438.

[61] *Id.* at 437.

[62] *Id.* at 435–36.

[63] *Id.* at 441.

[64] *Id.*

[65] *Id.*

"Particular provisions, though not altogether useless, have far less virtue and efficacy than are commonly ascribed to them . . . ."[66] Hamilton's warning proved to be correct. Civil jury trials are now exceedingly rare.

But the Anti-Federalists ignored Hamilton's warnings about piecemeal rights and insisted on a constitutional right to civil jury trial. To avoid what he saw as a real danger of a second constitutional convention, James Madison drafted a series of Amendments to the new Constitution that included a right to civil jury trial, in what became the Seventh Amendment.[67]

The very thing Hamilton warned about came to pass. The civil jury, with all its poor incentives and lack of comprehension, became embedded in the U.S. Constitution. As I explain in Section II.D, constitutionalizing such a procedure continues to distort the legal system.

II. SUBSTANTIVE RIGHTS VERSUS PROCEDURAL RIGHTS

The second major contrast between the Second Amendment and the Seventh concerns the difference between substantive and procedural rights. Substantive rights have a core that can be meaningfully interpreted and protected. They can exist independently of a particular government or a particular legal system. Procedural rights do not have such a core because they are necessarily embedded in a whole system of legal procedure and depend on that system for their meaning. I will explain this in more detail, but first, some definitions are in order.

A. Definitions of Substance and Procedure

For purposes of this argument, what is a substantive or a procedural right? The meaning of the terms "substance" and "procedure" are not always obvious. The line can be blurry. In the memorable words of Representative John Dingell of Michigan, who served several stints as chairman of the House Energy and Commerce Committee: "If I let you write the substance and you let me write the procedure, I'll screw you every time."[68] As Dingell's statement suggests, rules that seem to be procedural can have a dispositive effect on enforcing substantive rules. But this does not mean that there can be no line drawn between substance and procedure—or that such a line would not be useful.

Legal categories, like most other sorts of categories, are not absolute. But drawing lines is still helpful and necessary. There are two points worth

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[66] *Id.* at 442.

[67] Wolfram, *supra* note 57, at 725–26; Harrington, *supra* note 57, at 222, 227.

[68] Cristina Marcos, *Former Rep. John Dingell Dies at 92*, HILL (Feb. 7, 2019, 9:08 PM), https://thehill.com/homenews/house/428805-former-rep-john-dingell-dies-at-92 [https://perma.cc/2PLK-2VDB]. Thanks to Alice Ristroph for reminding me of the importance of Dingell's words.

keeping in mind about line-drawing between categories. First, there will always be some degree of arbitrariness in drawing the line. A helpful analogy is to the difference between a child and an adult.[69] At some point, a child becomes an adult. But where exactly that line is drawn will always be somewhat arbitrary. Still, the distinction is necessary and important.

Second, the line between categories may be drawn in different places for different purposes. For example, the line between a child and an adult is drawn in different places for purposes of marriage, validity of contracts, buying alcohol, voting, possessing criminal intent, and criminal procedure and sentencing. The words "child" and "adult" do not have the same meaning in all legal contexts.

Likewise, with respect to the line between substance and procedure, there will always be some degree of arbitrariness in hard cases. And the line may, and should, be drawn in different places depending on the purpose of the divide.

Conflict of laws, for example, asks courts to draw a line because a forum court applies its own procedural rules, but may apply the substantive law of another jurisdiction. In this case, a major goal of the line-drawing is to ensure uniformity of result across jurisdictions.[70] The idea is that the outcome of the case should be the same, no matter where the case is filed. This makes litigation more predictable. But it would be too burdensome to ask courts to apply every detail of another jurisdiction's practice. The test follows the goal. For conflict of laws, many courts use the test of the convenience of the forum.[71] Courts using this test ask: How hard is it to determine the law of another state, and is that law likely to affect the outcome of the case?

But here, we are not dealing with conflict of laws. The issue is about differences between constitutional provisions. The line between substance and procedure for this purpose need not be the same as the line used for other purposes.

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[69] This analogy comes from Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 356 (1933); *see also* Frederick Schauer, *Second-Order Vagueness in the Law*, *in* VAGUENESS AND LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES 177 (Geert Keil & Ralf Poscher eds., 2016) (discussing the second layer of vagueness often seen in legal interpretations where it is unclear which legal term is the operative and vague one).

[70] RESTATEMENT OF CONFLICT OF LAWS, at viii–ix (AM. L. INST. 1934) (citing, in the introduction, the purpose of the *Restatement* as "certainty and clarity"); *see also* William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1200 (1997) (describing predictability and forum neutrality as "vaunted virtues" of the first *Restatement*).

[71] *See* Cook, *supra* note 69, at 343–44; Janeen M. Carruthers, *Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages*, 53 INT'L & COMPAR. L.Q. 691, 692–93 (2004).

For purposes of the Constitution, the distinction between substance and procedure is important to the rule of law.[72] Substantive rules govern primary conduct outside litigation. That primary conduct may be either the citizen's or the government's. Clear substantive rules provide better guidance about what conduct is permitted and what is not. They improve knowledge of the law, and predictability of the system.

Procedural rules, by contrast, regulate the means by which government adjudicates certain disputes. Separate rules of procedure allow the procedural system to focus more precisely on efficiency and accuracy of adjudication. Again, this enhances knowledge of consequences and predictability.

For this purpose, an "outcome-determinative" test is not helpful to distinguish substantive rules from procedural rules. In many civil cases, the use of a jury—as opposed to adjudication by a judge—may indeed be outcome determinative, especially as to damages. Under such a test, the civil jury might therefore be considered substantive. But use of civil juries is a means of adjudication in litigation that should not affect primary conduct. Another way to put this distinction is that the civil jury trial is a right that only applies to litigants. The right to keep and bear arms is not. It directly concerns primary conduct outside the judicial system.

Not everything in the U.S. Constitution is a substantive or procedural right. In fact, most provisions of the Constitution are neither. Generally speaking, in a constitution there are three types of provisions: structural provisions, substantive rights, and procedural rights. The vast majority of the provisions of the U.S. Constitution are structural provisions; they set out the rules for establishing and running the federal government and its relations to the states and to foreign powers. In setting out the structure of the federal government, the Constitution creates an entire system, and carefully calibrates its various parts. These rules are what Professor Friedrich Hayek called "rules of organization" for a government.[73]

Substantive and procedural rights are not structural in this sense. Substantive rights may indeed express the main purpose of the government. In classical liberal thought, the main purpose of government is to secure liberty and property.[74] The structure and operation of the federal government were designed to further these goals. Some provisions of the first eight

[72] On this point, I am grateful for discussions with Darrell Miller.

[73] 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 124–25 (1973).

[74] John Locke declared that each person, and by extension government, "may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 198 (A. Millar et al. eds., London 1764) (1689). This is an expression of the idea of a natural right in life, liberty, and property that Jefferson changed to "life, liberty, and the pursuit of happiness" in the Declaration of Independence.

Amendments of the U.S. Constitution state these goals explicitly. But they are not in themselves part of the structure of government, which is why many Federalists thought that they were unnecessary.[75]

To elaborate further on the distinction between substantive and procedural rights, a "substantive" right does not purport to require a particular procedure in the legal system, and it is compatible with a variety of possible legal systems, including adversarial and inquisitorial systems. In contrast, a specific "procedural" right attempts to ensure the availability of a particular practice to an individual in a legal proceeding, or to require a government official in a legal proceeding to follow a particular practice. These provisions are not compatible with a wide variety of legal systems. They shape a legal system.

Applying this distinction between substance and procedure, here is a Table setting out the division among the provisions of the first eight Amendments to the U.S. Constitution:

[75] THE FEDERALIST NO. 84, at 445 (Alexander Hamilton) (George W. Carey & James McClellan eds., Gideon ed. 2001) (declaring that bills of rights "are not only unnecessary in the proposed constitution, but would even be dangerous").

TABLE: DIVISION AMONG THE PROVISIONS OF THE FIRST EIGHT AMENDMENTS TO THE U.S. CONSTITUTION

	Substantive	**Procedural**
First Amendment	Prohibition on establishment of religion; free exercise of religion; freedoms of speech, the press, assembly, and petition	
Second Amendment	Right to keep and bear arms	
Third Amendment	Restriction on quartering of soldiers	
Fourth Amendment	Prohibition on unreasonable searches and seizures	Requirements for obtaining a warrant
Fifth Amendment	Compensation for takings of private property for public use	Grand jury; prohibition on double jeopardy; privilege against self-incrimination; due process
Sixth Amendment		Speedy and public trial; criminal jury trial; information about accusation; confrontation with adverse witnesses; compulsory process to obtain defense witnesses; defense counsel
Seventh Amendment		Civil jury trial; prohibition on reexamination of facts
Eighth Amendment	Prohibition on excessive fines, and cruel and unusual punishments	Prohibition on excessive bail

Some classifications in this Table may seem surprising. Therefore, three special notes are in order. First, the Eighth Amendment bans on excessive fines and cruel and unusual punishments are classified as substantive rights. The punishment that may be imposed for crime has traditionally, and rightly, been understood as part of substantive criminal law, not procedure. A sign of this is that specific punishments for crimes are not traditionally included in codes of criminal procedure. The punishment is typically specified at the same time the substantive offense is created. (In contrast, the method of sentencing is procedural.)

Second, freedom from unreasonable searches and seizures, the first clause of the Fourth Amendment, is a substantive right. It is compatible with

a variety of possible legal systems. But, to a large extent, the U.S. Supreme Court has transformed that substantive right into a procedural right. This happened in the decision to constitutionally require the exclusionary rule.[76] Instead of the focus being on the substantive right—was a search or seizure unreasonable?—the focus is on whether evidence will be excluded from a criminal trial. Justice John Marshall Harlan II pointed this out in his dissent in *Mapp v. Ohio*.[77] As commentators have observed, this judicially created procedural right has led to many problems.[78] Fortunately the Fourth Amendment, being fundamentally a substantive right, has a core that can be maintained. The U.S. Supreme Court has been slowly peeling away the procedural right of exclusion,[79] so there is hope for a more substantive emphasis.

Third, the Fifth Amendment right of due process is unusual among the procedural rights in that it is general and in theory compatible with a variety of legal systems. As I explain in the Conclusion, it is not subject to the same criticisms as the more specific procedural rights.

B. The Importance of the Distinction Between Substance and Procedure

As I discussed above, the distinction between substance and procedure is important to the rule of law. Clear substantive rules provide better guidance about what conduct is permitted and what is not. They improve knowledge of the law and predictability of the system. Separate rules of procedure allow the procedural system to focus more precisely on efficiency and accuracy of adjudication.

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[76] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[77] *Id.* at 683–85 (Harlan, J., dissenting). "In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement." *Id.* at 681.

[78] There are many alternatives to exclusion of evidence as a remedy for Fourth Amendment violations, including civil suits (the traditional common law remedy), internal discipline of police, and criminal prosecution of police. Professor Akhil Amar has given some of the most trenchant criticism of the exclusionary rule and creative exploration of the alternatives. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 797–99 (1994). As he and others have pointed out, the requirement of exclusion in a criminal case has narrowed the substantive scope of the Fourth Amendment. *See id.* at 769. Seeing a parade of guilty persons before them trying to exclude evidence has made courts reluctant to extend the substantive right. Courts have created endless exceptions to the exclusionary rule, making the law uncertain. *See id.* at 799. And exclusion provides no direct remedy for the innocent. But legislators sit back and relax, comfortable in the belief that the courts have taken care of remedies for Fourth Amendment violations. The procedural right has stifled innovation in remedies for search and seizure violations. Once again, a procedural right has arguably created more problems than it has solved.

[79] *See, e.g.*, Herring v. United States, 555 U.S. 135, 136–37 (2009) (holding that the exclusionary rule does not apply in situations in which illegal search or seizure is only the result of police negligence, as exclusion for negligence would not further the exclusionary rule's goal of deterring wrongful police conduct).

As legal systems grow in sophistication, they increasingly separate substance and procedure. They separate the rules of primary conduct from the machinery for enforcing those rules. Political entities adopting the civil law (Roman-canon) systems separated the two earlier than the common law. Examples were the early codes of procedure such as the Carolina, issued for the Holy Roman Empire in 1532.[80]

In the common law, the writ system made it difficult to separate substance from procedure. Each writ was a substantive cause of action, but contained its own mini-code of procedure—including method of summons, adjudication, and remedy.[81] It was only when the writ system was starting to decay—by the time of William Blackstone in the mid-eighteenth century—that a distinction between substance and procedure became more visible. Hence, Blackstone organized his *Commentaries* by the relatively modern categories of substantive law and procedure, rather than by writ, as most common law writers had done before him.[82]

But the word "procedure" was not generally used in the United States or England until the early nineteenth century.[83] Use of the word marked an increasing separation between substance and procedure. Courts recognized that procedure should be more flexible. Early-nineteenth-century courts were more willing to change procedural rules ("rules of practice") than substantive rules because substantive rules affected primary conduct. Courts tended to hold that procedural changes operated retroactively, whereas changes to substantive laws did not.[84] Increasingly, efficiency and accuracy of adjudication were thought of as the primary goals of a procedural system.[85]

Problems arise when a legal system tries to create a procedural fix for a substantive issue. This is exactly what Dingell's comment is about.[86] English

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[80] *See generally* CONSTITUTIO CRIMINALIS CAROLINA (1532). For further information about the Carolina, and an English translation, see JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 261–308 (1974). For a comparative account of the development of the distinction between substance and procedure, see Charles Donahue Jr., *"The Hypostasis of a Prophecy": Legal Realism and Legal History*, *in* LAW AND LEGAL PROCESS: SUBSTANTIVE LAW AND PROCEDURE IN ENGLISH LEGAL HISTORY 12–16 (Matthew Dyson & David Ibbetson eds., 2013).

[81] JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 87–97 (2009).

[82] *Id.* at 840–41.

[83] *See* AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877, at 10–12 (2017); Daniel J. Hulsebosch, *Writs to Rights: "Navigability" and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049, 1050–54 (2002).

[84] *See* Cook, *supra* note 69, at 341–43.

[85] *See* Lerner, *supra* note 4, at 828–31 ("Americans in all areas were concerned with regional and national economic development. Predictable, uniform legal rules helped promote that development.").

[86] *See supra* note 68 and accompanying text.

common law judges were well versed in creating procedural solutions for substantive problems. They were proto-Dingells. The best example is *Bushell's Case* in 1670, already referred to as eliminating jury accountability for verdicts.[87] At the time, there was a substantive problem with English law. There were no substantive rights to free speech or free exercise of religion. Parliament enacted laws restricting speech and religion, including the Conventicles Acts, making it a crime to participate in a Quaker meeting. Yet, a significant portion of the population favored some measure of these freedoms. What to do?

In *Bushell's Case*, matters came to a head when William Penn, the founder of Pennsylvania, and William Mead were caught participating in a Quaker meeting. There was no doubt whatsoever of their guilt; the pair openly preached Quakerism. A criminal jury acquitted them of violating the Conventicles Acts. A lack of substantive rights led to jury nullification. Faced with the question of whether to discipline the jurors by the usual means of fining or imprisoning, the English judges declined. By this decision, they tacitly permitted jury nullification. Instead of urging Parliament to declare a substantive right to free exercise of religion, or at least to repeal the Conventicles Acts, the judges preferred the procedural method of relying on juries to decide the question.

Many persons consider *Bushell's Case* to be a glorious triumph of liberty. The Fully Informed Jury Association has declared September fifth to be "Jury Rights Day" because it is the anniversary of William Penn's arrest for violating the Conventicles Acts.[88] But relying on a procedural fix for a substantive problem comes with a cost. It is by no means certain whether a jury will uphold a substantive liberty in a particular case by nullifying the law. It can also be hard to predict the results of other procedures, if they are being used to try to get certain substantive outcomes. The law becomes unpredictable. Persons cannot have reasonable certainty about the consequences of their actions.

Lack of jury accountability blurs the line between substance and procedure. In effect, jurors make law, and they are allowed to do so because they cannot be held accountable. The two major points of this Essay—about accountability and the difference between substance and procedure—are connected.

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[87] *See supra* note 30 and accompanying text. The following account of *Bushell's Case* is drawn from LANGBEIN, LERNER & SMITH, *supra* note 81, at 423–31.

[88] *Jury Rights Day*, FULLY INFORMED JURY ASS'N, https://fija.org/what-we-do/jury-rights-day/jury-rights-day-2020.html [https://perma.cc/48LM-JJLY].

C. Procedural Rights Not Compatible with All Legal Systems: The Problem of Incorporation

It's important to observe that, unlike substantive provisions, specific procedural provisions are not compatible with a wide variety of legal systems. Many are deeply incompatible. These provisions can put a straitjacket on procedure, preventing important reform. This was why Hamilton recommended leaving the scope of civil jury trial to legislatures. The problem of blocking reform provoked struggles on the U.S. Supreme Court over the issue of incorporating procedural rights against the states.

As an example of incompatibility with different systems, the independent jury has proven to be deeply incompatible with civil law, or inquisitorial, systems.[89] By independent jury, I mean groups composed purely of laypeople who deliberate and make adjudicatory decisions apart from professional judges. The independent jury is at odds with the goals of reasoned decision-making and full appeal that are so important to civil law systems. In particular, the use of civil juries is so alien to civil law systems that almost none of them have adopted it. Inquisitorial systems have tried to adopt the independent jury for criminal cases, and it has failed. Germany, Italy, and France, for example, abandoned the independent jury in favor of a mixed panel of professional judges and lay jurors.[90] In theory, Spain and Russia today have independent criminal juries for serious cases. But in practice, judges and lawyers in those countries have greatly diminished jury trial, by prosecutors undercharging and courts using abbreviated procedures.[91]

And we should not forget that, in practice, U.S. systems have also virtually eliminated jury trials in favor of settlements and plea bargains. I discuss this phenomenon respecting civil juries in Section II.D.1. In effect, the independent jury has also proven to be incompatible with our system as it has developed. For example, the scope and function of criminal jury trial changed hugely once prosecutors routinely started offering, and judges

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[89] The modern jury arose in the middle ages in England and did not exist in civil law systems until the French revolution—1792, to be precise. LANGBEIN, LERNER & SMITH, *supra* note 81, at 54–64; JAMES M. DONOVAN, JURIES AND THE TRANSFORMATION OF CRIMINAL JUSTICE IN FRANCE IN THE NINETEENTH & TWENTIETH CENTURIES 27, 34 (2010).

[90] *See* Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135, 135–43 (1972); Claudia Passarella, *From Scandalous Verdicts to "Suicidal Sentences": The Reform of the Courts of Assize Under the Fascist Regime*, 80 STUDIA IURIDICA 251, 254 (2019); DONOVAN, *supra* note 89, at 19–20.

[91] *See* Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, 62 LAW & CONTEMP. PROBS. 233, 245–46 (1999); Máximo Langer, *Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions*, 4 ANN. REV. CRIMINOLOGY 377, 397 (2021) (estimating a plea bargaining rate of eighty-three percent in Russia); *id.* at 43–44 (Supp.) (explaining that rates of plea bargaining, "conformidad," have been increasing in Spain in recent decades).

routinely accepted, deals with defendants for lesser charges or sentences in exchange for guilty pleas. In the late eighteenth century, judges strenuously discouraged felony defendants from pleading guilty and almost always succeeded.[92] The judges wanted to hear any evidence in mitigation of the sentence. Jury trial back then meant an extremely streamlined, almost summary proceeding.[93] But jury trials grew longer, more expensive, and more unpredictable. Today, in the federal system, over ninety-seven percent of criminal convictions are the result of a guilty plea, with no jury trial.[94] Criminal jury trial is vanishingly rare.

In other common law countries as well, the civil jury has been virtually eliminated. Those legal systems developed independent and reasonably competent judiciaries, with strong powers to comment on the evidence presented to the jury. In the vast majority of civil cases, jury verdicts agreed with the opinion of the judge. Under the circumstances, the legal profession and members of the general public thought that the use of civil juries was an unnecessary expense and delay.[95] Hamilton was right. The trend in favor of limiting civil juries continued. The U.S. constitutional right has become hollow.

I could go on through the other procedural rights. Grand juries, and the requirement of indictment, have been abolished in England.[96] In the United States, about half the states do not require grand jury indictment.[97] Today, even in the federal system, grand jury indictment is being displaced by the growing practice of prosecutors to offer plea deals before indictment.[98]

Like the independent jury, double jeopardy, with jeopardy attaching early in the proceedings, is incompatible with the civil law systems. Those systems recognize that errors can be made by acquitting as well as by convicting, and that these errors should be corrected on appeal.[99] Civil law systems do not try to protect jury nullification, as our system does.

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[92] LANGBEIN, LERNER & SMITH, *supra* note 81, at 601–02.

[93] *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 16–20 (2003); LANGBEIN, LERNER, & SMITH, *supra* note 81, at 599–602.

[94] Of federal offenders sentenced in 2019, 97.6% pled guilty. CHARLES R. BREYER, DANNY C. REEVES, PATRICIA K. CUSHWA & DAVID RYBICKI, U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56 tbl.11 (2019).

[95] *See* Conor Hanly, *The Decline of Civil Jury Trial in Nineteenth-Century England*, 26 J. LEGAL HIST. 253, 259–60 (2005).

[96] PATRICK DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 10 (1960); LANGBEIN, LERNER & SMITH, *supra* note 81, at 707–08.

[97] LANGBEIN, LERNER & SMITH, *supra* note 81, at 750.

[98] For a jurisdictional criticism of this practice, see Roger A. Fairfax Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 400–01 (2006).

[99] John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. BAR FOUND. RSCH. J. 195, 200, 213–14 (1981).

The struggles over incorporation of federal constitutional provisions against the states reflect these difficulties with procedural rights. Early on, the federal courts shut down any notion of applying the first eight Amendments to the states, as explained in Chief Justice John Marshall's 1833 opinion in *Barron v. Mayor of Baltimore*.[100] After ratification of the Fourteenth Amendment in 1868, the question became more acute. The U.S. Supreme Court first incorporated substantive rights. Although initially the Court refused to apply the substantive provisions against the states,[101] later it did so. In 1897, the Court applied the Takings Clause against the states, and in 1925, the free speech and free press rights of the First Amendment.[102]

But the procedural provisions long resisted incorporation.[103] Some Justices, especially Benjamin Cardozo, Felix Frankfurter, and the younger John Harlan, understood that the states needed flexibility to develop effective systems of adjudication. In *Palko v. Connecticut* in 1937, for example, Justice Cardozo wrote for the Court refusing to incorporate the Double Jeopardy Clause against the states.[104] Connecticut allowed the prosecution to appeal an acquittal. Although he did not use the terms, Justice Cardozo drew a significant distinction between substantive rights and most procedural rights. Describing "freedom of thought, and speech," he wrote, "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."[105] Therefore it was properly applied against the states. On the other hand, the rights to jury trial and grand jury indictment, the prohibition against double jeopardy, and the privilege against self-incrimination "are not of the very essence of a scheme of ordered liberty. . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them."[106] Justice Cardozo took an informed comparative view, one that allowed the states flexibility.

Likewise, in *Wolf v. Colorado* in 1949, Justice Frankfurter wrote the Court's opinion incorporating the substantive Fourth Amendment right to be

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[100] 32 U.S. (7 Pet.) 243, 243 (1833).

[101] *See, e.g.*, United States v. Cruikshank, 92 U.S. 542, 542 (1875) (refusing to apply First and Second Amendment protections against the states).

[102] Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 226 (1897); Gitlow v. New York, 268 U.S. 652, 666 (1925).

[103] *See, e.g.*, Hurtado v. California, 110 U.S. 516 (1884) (declining to incorporate the Fifth Amendment requirement of grand jury indictment against the states); Twining v. New Jersey, 211 U.S. 78 (1908) (declining to incorporate the Fifth Amendment privilege against self-incrimination against the states).

[104] 302 U.S. 319, 319–20 (1937).

[105] *Id.* at 326–27.

[106] *Id.* at 325.

free from unreasonable governmental searches and seizures.[107] He declared that right to be "basic to a free society."[108] But he refused to incorporate the procedural exclusionary rule that the Court had developed for the federal courts. Applying Justice Cardozo's test of whether a right is "implicit in the concept of ordered liberty," Justice Frankfurter explained, "the ways of enforcing such a basic right raise questions of a different order."[109] The methods of checking violations, the remedies for violations, and the means of enforcing those remedies "are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment."[110] Again, flexibility was to be permitted to the states on matters of procedure.

And in *Duncan v. Louisiana* in 1968, Justice Harlan vigorously argued in dissent against incorporating the criminal jury right: "The States have always borne primary responsibility for operating the machinery of criminal justice within their borders, and adapting it to their particular circumstances."[111] Interfering with state procedure through incorporation of federal constitutional provisions was a mistake: "[N]either history, nor sense, supports using the Fourteenth Amendment to put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law."[112]

Unfortunately, Justice Harlan was fighting a losing battle. By 1968, the Court was launched on its procedural rights revolution. Justice Byron White wrote for the Court in *Duncan*, incorporating the right to criminal jury trial against the states. In the process, Justice White came up with a test for incorporation—whether a particular right is "necessary to an Anglo-American regime of ordered liberty"—which he buried in a footnote.[113] The test was disingenuous because it did not explain the cases at all, though Justice White claimed it did. Recently created procedural rights unknown in England were said to meet this test.[114] As this discussion shows, such a test would be unworkable in any event. The "Anglo-American" regimes of "ordered liberty"—that is, procedural systems—were constantly changing, in important ways.

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[107] 338 U.S. 25, 27–28 (1949).

[108] *Id.* at 27.

[109] *Id.* at 28.

[110] *Id.*

[111] 391 U.S. 145, 172 (1968) (Harlan, J., dissenting).

[112] *Id.* at 175–76.

[113] *Id.* at 149 n.14 (opinion for the Court).

[114] *Id.* (citing *Griffin v. California*, 380 U.S. 609 (1965), and *Mapp v. Ohio*, 367 U.S. 643 (1961), as two examples).

Most likely, what was really behind *Duncan* and many other 1960s cases was concern about the treatment of Black defendants.[115] The constitutional procedural rights revolution was essentially part of the Civil Rights Movement, and importantly linked to the Cold War.[116] The United States could hardly claim to be a beacon of liberty for the free world if it treated Black defendants badly.

But insisting on certain procedural rights turned out to be a terrible way to address that concern. The good intentions of the Justices backfired, because they ignored the law of unintended consequences. The result has been the denial of any form of adjudication.[117] Hundreds of thousands of Black men—and others—have gone to prison through plea bargains, without any adjudication at all.[118] Procedural rights have failed utterly. Not only have they failed to improve procedures for defendants; they have made things worse.

Despite its criminal procedure binge, even now, the U.S. Supreme Court is reluctant to incorporate all procedural rights against the states. The rights to grand jury indictment and to civil jury trial have not been incorporated.[119] Not coincidentally, those are the types of juries that have been virtually abolished in the rest of the common law world. At least to some extent, the federal courts seem to have understood that procedure needs to be flexible, to adjust.

The perceived need for legal institutions and procedures changes dramatically over time. And so does their function. On this central point, as well as the more specific point about the civil jury, Hamilton was right.[120]

D. The Terminal Decay of the Seventh Amendment

A particular legal procedure is necessarily one part of an entire legal system. The scope and function of any particular procedure can change dramatically depending on changes in the surrounding legal system. We have seen that with respect to criminal jury trial.[121] The same is true of civil jury trial.

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[115] Duncan was a Black nineteen-year-old accused of assaulting a white boy. *Id.* at 147.

[116] On the connection between the Civil Rights Movement and the Cold War, see MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 4–17 (2000).

[117] On the importance of adjudication in criminal cases, see Langbein, *supra* note 8.

[118] *See* PIZZI, *supra* note 7, at 24 (arguing that the Supreme Court's criminal procedure revolution has led to soaring rates of plea bargaining, and thus incarceration).

[119] Hurtado v. California, 110 U.S. 516, 534–35 (1884) (holding that the Fourteenth Amendment does not require indictment by a grand jury); Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 216, 223 (1916) (holding that civil jury trials are not required in state actions).

[120] *See supra* Section I.B.3.

[121] *See supra* notes 92–94 and accompanying text.

1. The Vanishing Civil Jury

The scope and function of civil jury trial has also changed tremendously over time, because of changes in the surrounding legal system. Elaborate pretrial discovery, rising cost of litigation, permissive joinder of claims and parties, consolidation of cases into class actions and multidistrict litigation, lengthy jury selection, ever more complicated claims, an explosion of scientific and statistical evidence, summary judgment procedure—all these and more have taken a toll on civil jury trial.[122] The greatest fear of counsel seems to be the unpredictability of civil jury verdicts, especially as to damages.[123] Currently, fewer than one percent of civil cases reaching disposition in federal court are decided by jury trial.[124] And yet, the Seventh Amendment states, "In Suits at common law . . . the right of trial by jury shall be preserved."[125]

It turns out that truly preserving a right to civil jury trial would require preserving much of a late-eighteenth-century legal system that is now superseded. Do we really want to go back? Do we want to eliminate summary judgment, as one proponent of civil juries has suggested?[126] And pretrial discovery, and a host of other features of the modern legal system?

The Seventh Amendment, by its language, "preserved," seems to demand a historical test—that is, an originalist method of interpretation. The U.S. Supreme Court has consistently purported to use a historical test in interpreting it. But even so, real preservation has proved impossible. The surrounding legal system has changed too much.[127]

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[122] *See generally* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012) (examining the movement away from civil jury trial).

[123] In a 2016 survey, 936 lawyers gave as their top three reasons why jury-eligible cases did not go to jury trial: (1) "Parties reached a mutually agreeable settlement"; (2) "Uncertainty of jury decision-making on damages"; and (3) "Uncertainty of jury decision-making on liability." AM. SOC'Y TRIAL CONSULTANTS & CIV. JURY PROJECT AT NYU SCH. L., SUMMARIZED RESULTS AND RECOMMENDATIONS, 2016 ATTORNEY SURVEY: DECLINING CIVIL JURY TRIALS 4, 16 (2016), https://civiljuryproject.law.nyu.edu/wp-content/uploads/2017/01/ASTC-CJP-Attorney-Survey-Report-2016.pdf [https://perma.cc/D26S-DR5L].

[124] Today, of federal civil cases reaching disposition after court action, jury trial occurred in 0.59%. U.S. CTS., TABLE C-4: U.S. DISTRICT COURTS—CIVIL CASES TERMINATED, BY NATURE OF SUIT AND ACTION TAKEN, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2020 (2020), https://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2020/03/31 [https://perma.cc/Q555-5R28] (reporting 1,443 civil jury trials out of 244,812 total dispositions after court action).

[125] U.S. CONST. amend. VII.

[126] *See* Suja A. Thomas, Essay, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 142 (2007).

[127] To take one example: In 1913, the U.S. Supreme Court refused to allow judgment notwithstanding the verdict in federal courts because of the Seventh Amendment's Re-Examination Clause. But in 1935, the Court permitted a work-around: federal trial courts were permitted to take a jury verdict subject to the court's later decision on the law. In effect, the Court was permitting judgment notwithstanding the verdict. *See* Lerner, *supra* note 4, at 870–78.

Civil jury trial still exists in federal court. It occurs in a tiny number of cases. Professor Darrell Miller has made a valiant effort to show that "the Court has developed a Seventh Amendment doctrine designed to preserve the right to a trial by jury at common law in its essential features."[128] But civil litigation today would be deeply alien to someone from the eighteenth century. The right to civil jury trial has not been preserved in any robust sense of the term, as the many empty courtrooms in any courthouse attest, even before the COVID-19 pandemic.

2. What a Juryless Civil Procedure Could Look Like

Despite the scarcity of civil jury trials today, constitutional rights to jury trial still have a large effect on the legal system. This is for two main reasons. First, settlement negotiations take place "in the shadow" of the jury.[129] That is, the result of negotiations depends partly on what the parties expect a jury will do.

Second, the constitutional right to a civil jury blocks the development of more efficient and accurate methods of adjudication. Because of federal and state constitutional rights to a civil jury trial, the United States cannot adopt the method of civil adjudication used in civil law countries such as Germany. Those systems depend on a reasonably competent, impartial bench. Therefore, they may not be suitable for all American states or localities. Here are a few advantages of those systems:

More Efficient Courtroom Proceedings

Without juries, court hearings would speed up considerably. There would be no need for voir dire and the rest of jury selection, instructing the jury, or rules of evidence. The law of evidence is the law of jury control. We fear that lay juries won't be able to handle properly certain kinds of evidence, and so we exclude it. (This is clear in England, which has abolished the hearsay rule in civil cases, because these are now decided by bench trial.[130] But England has retained the hearsay rule in criminal cases, which use juries.)

Judges could come into court having reviewed written evidence from the parties and prepared to ask questions of witnesses that can get directly to the point. No juries means a more active and efficient bench.

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[128] Miller, *supra* note 1, at 859.

[129] J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 127 (2016). Other important factors in settlement negotiations are the expected cost of litigation and the parties' tolerance of risk. *Id.* at 68–80.

[130] Civil Evidence Act 1995, c. 38 (U.K.); *see* ANDREW L-T CHOO, EVIDENCE 262–93 (6th ed. 2021).

Sequential Proceedings in Logical Order

Judges could focus on different points in separate hearings, and address threshold questions first. If a defendant is not liable, there is no need to hear evidence about damages.

Such discontinuous proceedings are not possible with lay juries. It's not fair to ask lay jurors to keep coming back to court at different times. The jury requires trial of all issues at once, with related confusion and waste of time.[131]

Focused, Effective Discovery

Such sequential proceedings should help judges control discovery. Judges can order and be more active in guiding discovery on each point as it arises.[132] Parties should no longer be able to inflict or threaten to inflict horrible costs on each other with little gain in knowledge of relevant facts.

Reasoned Decision-Making

One of the most important changes is that decisions on the merits would be accompanied by written opinions explaining facts found and application of law to facts.

Juries do not give official reasons. The requirement that judges explain their reasoning to the parties and to the public, besides being more satisfying to the litigants, acts as a safeguard in several ways. A biased or corrupt judge would have a harder time justifying a bad decision. In addition, the reasoning of the judge or judges in the first instance could be thoroughly reviewed on appeal.

Thorough Appeal

Lastly, thorough appeals are a vital safeguard in legal systems that rely on judges to make decisions. Appeals in these systems are often de novo, with no presumption of correctness attaching to the decision below, and of fact as well as law.[133]

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[131] Arthur Taylor von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, *in* 2 EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART: FESTSCHRIFT FÜR HELMUT COING 361, 361–65 (Norbert Horn, Klaus Luig & Alfred Söllner eds., 1982).

[132] *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 828, 830–31 (1985); James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 15 TUL. J. INT'L & COMP. L. 541, 586 (2007); Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States—Opportunity for Learning from 'Civilized' European Procedure Instead of Continued Isolation?*, 42 AM. J. COMPAR. L. 147, 158–62 (1994).

[133] Langbein, *supra* note 132, at 855–57.

These systems are thorough in guarding against error in decisions on the merits. Our limited appeals are a legacy of the jury system. We try to control inputs, such as what evidence the jury hears or the judge's instructions on law, but there is little control over outputs, that is, the correctness of the verdict. Judicial decisions leading to settlement, such as a decision in a dispute over discovery or the denial of a motion for summary judgment, are virtually unreviewable. The terms of settlement can almost never be reviewed on appeal.

These are the many advantages we are giving up because of constitutional rights to civil jury trial. The civil jury does have a role to play in those unfortunate places where much of the judiciary is corrupt or deeply biased. And there is evidence to suggest that some jurors, once their service is over, participate slightly more in voting.[134] But this second benefit is slim now that there are so few civil jury trials. In many places, the advantages of designing a juryless system seem to considerably outweigh the disadvantages.

E. The Resilience of the Right to Keep and Bear Arms

Evidence for the robustness of substantive rights, as opposed to the frailty of procedural rights, is that substantive rights can and have been resurrected. This happened with the Second Amendment, after a period of being moribund. But it is much less likely that a procedural right would be resurrected. Resuscitating a procedural right would require radical change in the legal system.

Substantive rights protect certain behaviors, or protect against certain actions, that can occur regardless of the particular legal system. There is core behavior that is protected, or prohibited. There are, of course, difficulties in determining exactly what that protected or prohibited behavior is. Questions of translation are inevitable. Changes in technology, in particular, raise important interpretive issues. Internet blogs and social media have joined the printing press; texts and emails have largely taken the place of letters; we now have semiautomatic rifles as well as flintlock muskets and rifles. The scholarly literature is full of descriptions of various possible methods of constitutional interpretation. My point is that a substantive right has some meaning to interpret, to translate—a meaning that exists apart from the particular type of legal system.

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[134] This effect is modest and limited to jurors who were not politically active before. For jurors with "a relatively spotty voting record," a nationwide study found an average voter turnout increase of four to seven percent. For jurors who were already active voters, there was no change in voting behavior. JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER & CINDY SIMMONS, THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 48 (2010).

1. Potential Weaknesses of Substantive Rights

This is not to say that substantive rights are always secure. Substantive rights are vulnerable too; they can be undermined. The undermining can happen in three main ways. One is by fundamental interpretation of the right. For example, if the Supreme Court had declared the Second Amendment to be a collective right only—that is, a right of the states—the constitutional right would be essentially dead.

Second, interpretations that undermine a right can happen in more subtle ways, by limiting the scope of the right. To give an example, the types of firearms permitted can be restricted, sometimes gradually, until the restrictions become severe. And the persons allowed to own or carry firearms can also be restricted, as in the places where issuing a carry permit is up to the discretion of local officials. In New York City, this discretion meant that the rich and well-connected were issued carry permits—including Arthur Ochs "Punch" Sulzberger, publisher of the antigun *New York Times*.[135] And in the past, some states and localities barred Black persons from owning or carrying firearms.[136]

Finally, great burdens can be put on the exercise of the right. States or localities might, for instance, require payment of a $5,000 fee for a carry permit, or 100 hours of firearms training with a certified instructor, or a delay of a year before issuing a permit. Of course, lesser restrictions could also deter exercising the right.

Despite these vulnerabilities, I still suggest that interpreting substantive rights is easier than interpreting procedural rights. Restrictions on a substantive right can usually be more readily identified, and their effects more easily understood. The effects are typically more direct. In a sense, a judge is investigating a narrower sphere. A judge does not have to cope with all the possible ramifications of rules in an entire legal system. The difficulty of this task in the case of procedural rights is shown by the fact that Congress and even judges have misunderstood the effects of their decisions. As we have seen, many members of the U.S. Supreme Court seemed blissfully unaware that with the criminal procedural rights revolution, they were encouraging the death of any adjudication. Likewise, the advisory committee for the Federal Rules of Civil Procedure succeeded in hiding from Congress

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[135] Clayton E. Cramer & David B. Kopel, *"*Shall *Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 684 (1995); *see* Kates, *infra* note 149, at 208.

[136] STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876, at 27, 146 (1998); Robert J. Cottrol & Raymond T. Diamond, *In the Civic Republic: Crime, the Inner City, and the Democracy of Arms—Being a Disquisition on the Revival of the Militia at Large*, 45 CONN. L. REV. 1605, 1617 (2013).

the nature and effects of their radically expanded discovery provisions.[137] Many members of Congress did not appear to realize that the Federal Rules would result in a precipitous slide in the number of civil jury trials.

The revival of the Second Amendment is therefore somewhat contingent, by no means assured of lasting. But at least it was possible.

2. The Fall and Rise of the Second Amendment

To understand the decline and revival of the right to keep and bear arms, some historical perspective is necessary. Of special importance is the history of crime rates and the relationship between crime rates and gun laws. Let me transport you back in time a little over five decades. In the late 1960s, rates of violent crime were skyrocketing. In large American cities, in the decade between 1960 and 1970, reports of robberies to the police rose over 400%.[138] Homicides nearly doubled.[139] American cities, which had before been safe for women and children to navigate freely, even alone and at night, became hazardous. American urban life was transformed; crime seemed to be spiraling out of control.

In an effort to stem the violence and fear, officials and legislators in cities and states hit upon the idea of prohibiting handguns. They got encouragement from former U.S. Attorney General Ramsey Clark's 1970 book *Crime in America*.[140] Clark had launched his antigun campaign while in office in 1967.[141] The assassinations of President John Kennedy in 1963, and of Martin Luther King Jr. and Robert Kennedy in 1968, were an added spur.[142] Handgun ownership, and especially carrying a gun in public, was forbidden for many law-abiding citizens.[143]

Courts acquiesced in the new gun restrictions. Courts were not blameless in the rise of violent crime. The criminal procedure revolution of

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[137] *See* Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 972, 996–1000 (1987).

[138] BARRY LATZER, THE RISE AND FALL OF VIOLENT CRIME IN AMERICA 123 (2016).

[139] *Id.*

[140] RAMSEY CLARK, CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION AND CONTROL 101–14 (1970).

[141] STATEMENT BY ATTORNEY GENERAL RAMSEY CLARK BEFORE SUBCOMMITTEE NO. 5 OF THE HOUSE JUDICIARY COMMITTEE 1 (1967), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/03-16-1967.pdf [https://perma.cc/2KTU-TECU].

[142] *See* CLARK, *supra* note 140, at 110; ROBERT J. COTTROL, GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT, xxix–xxx (1994).

[143] Apart from the Black Codes, the first major law restricting handgun ownership and carry in public was New York's Sullivan Law in 1911, which was aimed at the large immigrant populations in New York City. STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS: A CONSTITUTIONAL RIGHT OF THE PEOPLE OR A PRIVILEGE OF THE RULING CLASS? 303–09 (2021); COTTROL, *supra* note 142, at xxv. Other states and cities followed New York, with the trend accelerating in the 1970s and early 1980s. DAVID HARSANYI, FIRST FREEDOM: A RIDE THROUGH AMERICA'S ENDURING HISTORY WITH THE GUN 226, 230–31 (2018).

the 1960s increased the costs and uncertainties of accurately investigating crimes, arresting offenders, trying them, and punishing them.[144] The novel judicial requirements burdened criminal justice systems and lowered deterrence, just at the time those systems needed to be more efficient and deterring.[145] Crime clearance rates and conviction rates of defendants both fell, just as crime was soaring.[146] The evidence suggests that both the police and courts were overwhelmed.[147] Courts put up no resistance to gun restrictions.[148] Focusing on guns conveniently deflected attention from the effects of courts' decisions on criminal procedure. Meanwhile, legal scholars almost wholly ignored the Second Amendment right to keep and bear arms, except to dismiss it as a collective right, to be curtailed at the states' or the federal government's pleasure.[149]

The expectations of Clark and other proponents of gun restrictions were disappointed. Despite the gun laws, violent crime did not fall; it rose—substantially. From 1970 to 1980, homicide rates in the largest American cities rose from 18.4 per 100,000 population to 29.4.[150] As the Italian criminologist Cesare Beccaria explained two and a half centuries ago, gun prohibitions only disarm law-abiding persons. Someone who is willing to commit armed robbery or murder is not likely to obey laws prohibiting guns.[151] As a result of gun restrictions, criminals had an easier time wreaking

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[144] Among these decisions were *Mapp v. Ohio*, 367 U.S. 643 (1961) (finding that the exclusionary rule is binding on states); *Chimel v. California*, 395 U.S. 752 (1969) (holding that warrantless searches of a suspect are limited to the suspect and the area within the suspect's reach); *Griffin v. California*, 380 U.S. 609 (1965) (finding that a jury instruction inferring guilt from a defendant's invocation of the Fifth Amendment right against self-incrimination was unconstitutional); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding that the Sixth Amendment right to jury trial applies to the states); and *Miranda v. Arizona*, 384 U.S. 436 (1966) (finding that the Fifth Amendment requires that law enforcement officials advise suspects of their right to remain silent and to obtain an attorney during interrogations in police custody).

[145] Professor William Pizzi describes the deleterious effects of several of the Supreme Court decisions comprising the criminal procedure revolution. *See* PIZZI, *supra* note 7, at 29–35 (*Miranda v. Arizona*); *id.* at 50–53 (*Duncan v. Louisiana*); *id.* at 87–93 (*Mapp v. Ohio*).

[146] *See* LATZER, *supra* note 138, at 159–64.

[147] JAMES Q. WILSON, THINKING ABOUT CRIME 24–25 (1983).

[148] Nelson Lund, *Outsider Voices on Guns and the Constitution*, 17 CONST. COMMENTARY 701, 703–04 (2000); HARSANYI, *supra* note 143, at 228–48; Don B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 250–51 (1983).

[149] For a summary of most academic attitudes toward the Second Amendment as of 1989, see Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639 (1989) ("To put it mildly, the Second Amendment is not at the forefront of constitutional discussion, at least as registered in what the academy regards as the venues for such discussion . . . ."); *see also* Kates, *supra* note 148, at 206–07 (summarizing the collective rights view of most academics).

[150] LATZER, *supra* note 138, at 122.

[151] CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 87–88 (Henry Paolucci trans., 1963) (1764).

havoc, intimidating, and making our cities even more unlivable.[152] Of course, there often are multiple reasons for an increase in violent crime, but gun prohibitions certainly did not coincide with a drop in crime, as had been expected. Police, the only persons in many cities who were legitimately armed, were overwhelmed.

By the early 1980s, scholars began to question both the effectiveness and the legality of gun prohibitions. One of the first signs of this awakening was Stephen Halbrook's 1981 article *The Jurisprudence of the Second and Fourteenth Amendments*.[153] Halbrook argued that the Second Amendment guarantees an individual right to arms, and that the Fourteenth Amendment was intended to make the Second Amendment enforceable against the states.[154] At the time, those arguments were outlandish in academic and legal circles.[155] But Halbrook's work, and the work of other scholars, steadily revealed a sure foundation for these positions.[156] Decades later, the U.S. Supreme Court confirmed both of those principles in *District of Columbia v. Heller* (2008)[157] and *McDonald v. City of Chicago* (2010).[158]

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[152] *See* Daniel D. Polsby, *The False Promise of Gun Control*, ATLANTIC (1994), https://www.theatlantic.com/magazine/archive/1994/03/the-false-promise-of-gun-control/306744/ [https://perma.cc/U6MU-D5NF] ("It is easy to count the bodies of those who have been killed or wounded with guns, but not easy to count the people who have avoided harm because they had access t[o] weapons. . . . [P]eople who are armed make comparatively unattractive victims. A criminal might not know if any one civilian is armed, but if it becomes known that a large number of civilians do carry weapons, criminals will become warier.").

[153] Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U. L. REV. 1 (1981).

[154] *Id.* at 68.

[155] *See* Kates, *supra* note 149, at 206–07.

[156] *See. e.g.*, JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 135–37, 159–64 (1994) (discussing the drafting, intent, and interpretation of the Second Amendment as an individual right, drawing on the English tradition); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 305–14 (1983) (arguing that the Second Amendment is an individual right to bear arms, drawing on the English tradition); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 10508 (1987) (explaining that the Second Amendment guarantees an individual right to bear arms); ROBERT J. COTTROL, GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT, at x–xviii (1994) (arguing that, from a historical perspective, the Second Amendment is better viewed as an individual right); Polsby, *supra* note 152 (declaring that "most modern scholarship affirms that so far as the drafters of the Bill of Rights were concerned, the right to bear arms was to be enjoyed by everyone, not just a militia"); Kates, *supra* note 149, at 211–43 (giving numerous detailed reasons why the Second Amendment is an individual right); JOHNSON ET AL., *supra* note 16, at 354–58 (describing the view of St. George Tucker, an influential Founding-era commentator on the federal Constitution, that the Second Amendment was an individual right); *id.* at 431–36 (describing the close links between the Civil Rights Act of 1866 and the Fourteenth Amendment).

[157] 554 U.S. 570 (holding that the Second Amendment protects an individual right to possess firearms).

[158] 561 U.S. 742.

Meanwhile, apart from this academic and judicial recovery, many Americans were rediscovering the importance of the right to keep and bear arms. They were noticing a fundamental principle. As Blackstone explained, this right is the "right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[159] The police cannot protect us twenty-four hours a day, seven days a week. And we have a right to protection.

Voters exerted pressure on their representatives in legislatures to expand the ability to carry a firearm outside the home. In 1987, Florida became the first state with major urban populations to ensure that almost all law-abiding adults could get a concealed-carry permit.[160] Other states swiftly followed Florida in becoming "shall issue" states. In the United States, there are currently estimated to be over 19 million concealed-carry-permit holders. And that number does not include persons who carry in the twenty so-called "constitutional carry" states.[161] In constitutional carry states, no permit is required to carry a firearm in public. On September 1, 2021, Texas will become a constitutional carry state, bringing the total to at least twenty-one.[162]

Americans by the millions, of all races and in all areas, are showing by their actions what they think about the right to keep and carry arms. They are doing it. Gun sales have been soaring, especially to first-time buyers. For 2020, the FBI's National Instant Criminal Background Check System (NICS) reported that it conducted 21 million background checks for the sale of a firearm.[163] That was a sixty-percent increase over 2019's figure of 13.2 million. In 2020, there were estimated to be 8.4 million first-time gun buyers.[164] Now forty percent of gun buyers are women.[165] And a survey of gun retailers reports that gun sales to Black Americans were up fifty-eight percent over the previous year, the largest increase for any demographic

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[159] 1 WILLIAM BLACKSTONE, COMMENTARIES *144.

[160] Joe Carlucci Uniform Firearms Act, ch. 87-23, 1987 Fla. Laws 133 (codified at FLA. STAT. § 790.33 (2020)).

[161] *Breaking: Constitutional Carry Passes in Iowa and Tennessee*, U.S. CONCEALED CARRY ASS'N (Apr. 8, 2021), https://www.usconcealedcarry.com/blog/constitutional-carry-passes-ia-tn/ [https://perma.cc/9CP4-S5AT].

[162] Sami Sparber, *Texans Can Carry Handguns Without a License or Training Starting Sept. 1, After Gov. Greg Abbott Signs Permitless Carry Bill into Law*, TEX. TRIB. (June 16, 2021, 5:00 PM), https://www.texastribune.org/2021/06/16/texas-constitutional-carry-greg-abbott/ [https://perma.cc/7WD9-97X4].

[163] Joe Bartozzi, *Taking Stock of Record-Setting 2020 Firearm Year*, NAT'L SHOOTING SPORTS FOUND. (Jan. 7, 2021), https://www.nssf.org/articles/taking-stock-of-record-setting-2020-firearm-year/ [https://perma.cc/2HZG-7W5K].

[164] *Id.*

[165] *Id.*

group.[166] The Second Amendment right to bear arms has seen a clear reemergence, in contrast to the Seventh Amendment right to a civil jury trial.

CONCLUSION

We have, on one hand, a substantive right, the Second Amendment, that entails individual responsibility and is readily understandable. On the other, a procedural right, the Seventh Amendment, involving deeply complicated decision-making with almost no accountability. These differences have consequences. Many persons seem eager to take advantage of their right to keep and bear arms. But, in practice, few exercise their right to civil jury trial. The Second Amendment right is vibrant and prominent for many citizens. The Seventh Amendment right has shriveled to a husk of its former self. Hamilton would not be surprised.

The problems with constitutional procedural rights described here should serve as a warning to other countries and international bodies. Specific procedural rights are likely to prove problematic over time, creating interpretive quagmires and blockages to reform.

General procedural rights can be helpful as long as they are not interpreted in detailed, confining ways. For example, the Due Process Clause generally has not put a straitjacket on civil procedure.[167] The European Convention on Human Rights contains in Article 6 a right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[168] That is a good general statement of a procedural system's goals. The European Court of Human Rights applies to this article and to others a doctrine, the "margin of appreciation," that helps to protect differences in national procedure and to allow for change.[169] U.S.

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[166] *Id.*

[167] *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972) (holding that due process generally requires notice and an opportunity to be heard before seizing a person's property); Sniadach v. Fam. Fin. Corp. of Bay View, 395 U.S. 337 (1969) (holding that prejudgment garnishment of wages without notice and prior hearing violates due process). For the point that the Due Process Clause does not regulate state civil procedure in detail, see John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 579–80 (1984). I thank Dayna Matthews for discussions about due process.

[168] *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, 213 U.N.T.S. 222, 228 (1950).

[169] *See generally* Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843 (1999) (discussing the proper scope of the margin of appreciation doctrine); Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625 (2001) (describing the application of the margin of appreciation doctrine and suggesting reforms); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907 (2005) (evaluating the status of the margin of appreciation

federal courts might study the margin of appreciation doctrine as an example of how to maintain procedural flexibility.

Courts that must interpret constitutional procedural rights—including all courts in the United States—are well advised to tread cautiously and to avoid imposing detailed requirements. Flexibility should be afforded to legislatures and rules committees to develop new solutions to problems in the legal system. Legal systems should be designed, and reformed, by keeping the whole in mind. Singling out particular procedures to try to preserve, or to instate, is a recipe for failure.

The procedural rights guaranteed in the Constitution are piecemeal. The Constitution does not set out a complete code of criminal procedure, or a code of civil procedure—nor should it. In a code of procedure, each part is, or ought to be, carefully calibrated with respect to all the others. The Constitution, on the other hand, attempts to preserve particular pieces of what was an entire common law system. That common law system itself was in continual flux.

No one has praised haphazard growth and development more cogently and eloquently than Professor Friedrich Hayek. But even he drew the line at the structure of government and at legal procedure. These, he said, should be designed deliberately, not left to haphazard growth.[170]

doctrine under international law); Jan Kratochvíl, *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, 29 NETH. Q. HUM. RTS. 324 (2011) (describing the margin of appreciation doctrine and providing a set of distinct tests that the European Court of Human Rights can apply when invoking it); ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012) (providing a comprehensive justification of the margin of appreciation doctrine and cataloguing the key cases concerning it). I am indebted to Sean Murphy for this point.

[170] HAYEK, *supra* note 73, at 124–25 (arguing that, unlike rules of just conduct, which do not need to be deliberately made, government "is a deliberate contrivance" which requires deliberately made rules, and so does procedure and the court system).