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The Constitutional Authority of Oregon Juries: Drawing the Line on Legislative Encroachment

INTRODUCTION

Since the founding era of this country, liberty has never included the freedom of one to pursue his or her own self-interest at the cost of causing harm to others. On the contrary, although individual citizens are free to pursue their own happiness and interests in accord with their own vision, that pursuit "must submit to reasonable and considerate

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restraints"[1] so that "no man . . . can have a right to infringe the natural rights, liberties or privileges of others."[2]

Protection from injury by another is the other side of liberty's coin.[3] The civil jury is the American institution that provides that protection. A civil jury's damages verdict not only provides a remedy to restore the losses suffered by a person wrongfully injured by another, but it also deters such injurious conduct in the future by holding the wrongful actor financially accountable for those losses. For that reason, the founders of this nation considered the civil jury the "very palladium" of a free society.[4] As James Madison described, "[t]rial by jury cannot be considered as a natural right, but a right resulting from a social compact, which regulates the action of the community, [and] is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[5]

Because the civil jury uniquely secures the liberty of each citizen from infringement by another, the civil jury trial has been guaranteed in the U.S. Constitution and the constitutions of the states.[6]

The authority of the civil jury is not limited by power or wealth and may be used to hold "the most powerful individual[s] in the state" accountable for "inva[ding] another's right."[7] However, its ability to

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1 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789−1800, at 308, 310 (Maeva Marcus et al. eds., 1988) (U.S. Supreme Court Justice James Iredell's statement to a grand jury (Oct. 12, 1792)).

2 Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 927 (1993) (quoting Peter Powers, Reverend, Jesus Christ the True King and Head of Government, A Sermon Preached Before the General Assembly of the State of Vermont, on the Day of Their First Election (Mar. 12, 1778)).

3 *See id.* at 927–28 (explaining that "the equality of liberty had implications for the extent of liberty; it suggested that there were some limits on an individual's freedom to do as he or she pleased and that these limits consisted of the equal rights of others. Put another way, the analysis of equal liberty implied a definition of injury . . . .").

4 THE FEDERALIST NO. 83 (Alexander Hamilton) (recognizing that the supporters of the constitutional protections for the civil jury trial saw it as the "very palladium of free government"). *See generally Palladium*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, http://websterdictionary1828.com/Dictionary/palladium (last visited Feb. 2, 2018) (defining "palladium" as "something that affords effectual defense, protection and safety; as when we say, the trial by jury is the palladium of our civil rights").

5 1 ANNALS OF CONG. 437 (1789) (Joseph Gales ed., 1834) (statement of James Madison).

6 U.S. CONST. amend. VII (providing federal constitutional protections for the civil jury trial); TAYLOR ASEN, STATE CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT DECISIONS ON TRIAL BY JURY (2011) (listing the state constitutional protections for the civil jury).

7 *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 380 (1768).

provide a check on the conduct of the powerful has made it the natural target of the powerful.[8] For the last forty years, "the civil justice system as a whole, and the civil jury particularly, have been the targets of a sustained attack by" powerful interest groups that seek to avoid paying the costs for the harms they cause others in the course of advancing their own interests.[9] Such groups have consistently lobbied state legislatures to pass statutes that limit the amount of jury-assessed damages that a court can impose against a person or corporation that wrongfully harms another, no matter how egregious the conduct or how profound the harm caused.[10]

For example, in 1991, the state of Oregon passed a damages cap that limited the liability of the state and its employees to $200,000 for any harms they may cause an Oregonian.[11] Under that law, if a state employee recklessly drove a government vehicle and caused a child to suffer paralysis, the maximum compensation that child could receive

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[8] Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1254 (2014).

[9] *See id.*

[10] *See id.* at 1254–55.

[11] *See* OR. REV. STAT. § 30.270(1)(b) (1991) (repealed 2009). A brief history of this statute, known as the Oregon Tort Claims Act, is worth noting. In most states, sovereign immunity was a common law doctrine only, and, accordingly, state supreme courts had authority to dispose of it. Because the doctrine of sovereign immunity was rooted in the archaic notion that a lord has the privilege to kill or maim his subjects without consequence, a notion that was irrational in a democratic society, most state courts abandoned it in the mid-twentieth century. *See generally* Ronald B. Lansing, *The King Can Do Wrong! The Oregon Tort Claims Act*, 47 OR. L. REV. 357, 358 (1968) (discussing the disfavor of the common law doctrine of sovereign immunity). However, in 1961, the Oregon Supreme Court interpreted article IV, section 24, of the Oregon Constitution as constitutionally preserving the common law doctrine of sovereign immunity and providing that only the legislature could waive that immunity. *See* Vendrell v. Sch. Dist. No. 26C Malheur Cty., 226 Or. 263, 278, 360 P.2d 282, 289 (1961) ("Our Constitution is framed on the premise that the state is immune from suit and that if immunity is lifted it shall be done so by the action of the legislature."); *see also* Borden v. City of Salem, 249 Or. 39, 49, 436 P.2d 734, 739 (1968) (Goodwin, J., concurring) ("Whether or not sovereign immunity is a disfavored policy in a majority of the states is irrelevant in this state." (citing *Vendrell*, 226 Or. at 263, 360 P.2d at 282)). The Oregon legislature thereafter passed the Oregon Tort Claims Act in 1967 and partially waived sovereign immunity for the state's tortious conduct. *See generally* Lansing, *supra*. Over the following fifty years, the statute was amended numerous times. OR. REV. STAT. § 30.260 (chronicling enactment and amendments from 1967−2009). The 1991 statute cited in the beginning of this footnote is one such version of the Act.

for the harm to her life and liberty was $200,000, even if a civil jury assessed those harms to be far in excess of that amount.[12]

Similarly, in 1987, the Oregon legislature passed a damages cap that limited the liability of private actors, including corporations, to $500,000 for noneconomic harms they cause to any Oregonian.[13] Again, under that law, it does not matter if the harm permanently destroyed a person's liberty to freely live his or her life (such as in cases of permanent paralysis, debilitating brain injury, or death), or that a jury reasonably assessed that the profound harms caused far exceeded the capped amount. Under the statute, the wrongful actor would have no obligation to compensate the person injured for any harms that a jury valued above the $500,000 cap. Said differently, rather than protect the liberty of the injured person, the cap provides a privilege for wrongful actors to cause profound harms and violations of human liberty without an obligation to compensate for all the harms inflicted.

In *Lakin v. Senco Products Inc.*, the Oregon Supreme Court addressed whether the $500,000 statutory cap violated the right to a civil jury trial under article I, section 17, of the Oregon Constitution.[14] There, the defendant manufactured and sold a defective nail gun.[15] As a result of that defect, the gun shot a nail into the skull of John Lakin, causing him to suffer a life-changing brain injury and partial paralysis.[16] The jury found that Mr. Lakin suffered $2 million in damages for those harms to the quality of his life.[17] However, the trial court applied the statutory cap on noneconomic damages and reduced the manufacturer's liability for those damages to $500,000.[18]

On appeal to the Oregon Supreme Court, the manufacturer argued, among other things, that Oregon's Constitution was not violated because the statutory cap was applied after the jury made its determination of damages; therefore, Mr. Lakin had enjoyed his

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[12] *See* Clarke v. Or. Health Scis. Univ., 343 Or. 581, 610, 175 P.3d 418, 434 (2007) (holding that this cap on damages violated the injured party's right to a remedy under article I, section 10, of the Oregon Constitution).

[13] OR. REV. STAT. § 18.560(1) (1987), *amended by* OR. REV. STAT. § 31.710(1) (2017).

[14] Lakin v. Senco Prods., Inc., 329 Or. 62, 987 P.2d 463, *modified*, 329 Or. 369, 987 P.2d 476 (1999), *overruled by* Horton v. Or. Health & Sci. Univ., 359 Or. 168, 250, 376 P.3d 998, 1044 (2016); *see also* OR. CONST. art. I, § 17 ("In all civil cases the right of Trial by Jury shall remain inviolate.").

[15] *Lakin*, 329 Or. at 67, 987 P.2d at 467.

[16] *Id.* at 67–68, 987 P.2d at 467.

[17] *Id.* at 66, 987 P.2d at 466.

[18] *Id.* at 66–67, 987 P.2d at 466.

procedural right to a jury trial.[19] The court rejected the argument, explaining that it

> ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages. [To argue contra is to assert] that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment. Such an argument pays lip service to the form of the jury but robs the institution of its function.[20]

For that and other reasons, the *Lakin* court ultimately held that the statutory cap on damages "prevent[ed] the jury's award from having its full and intended effect," and, consequently, violated Mr. Lakin's right to a civil jury trial under the Oregon Constitution.[21]

But *Lakin* was not long for this world. Recently, in *Horton v. Oregon Health & Science University*, the Oregon Supreme Court overruled *Lakin*.[22] There, the jury found that a state employee caused an infant child to suffer over $6 million in economic losses and an additional $6 million in noneconomic losses.[23] The state pointed to a new statutory cap on damages for all cases involving state actors and argued that the statute required the trial court to order that the state should pay less than twenty-five percent of the costs of the harms it caused the child.[24]

The Oregon Supreme Court reviewed Oregon's constitutional protections for the civil jury and explained that the state constitution did not prevent Oregon's legislature from passing a statutory cap that effectively vetoed the jury's damages verdict.[25] The court held that whatever protections article I, section 17, may afford a litigant, it did not prevent the state legislature from requiring a judge to reduce the accountability of the defendant for the harms the litigant caused or to otherwise reduce the amount the jury deemed necessary to restore the liberty and quality of life that the defendant took from the injured person.[26] As a result, Oregon's constitutional guarantee of a civil jury for the protection of liberty yields to the power of the state legislature

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19 *See id.* at 79, 987 P.2d at 473.

20 *Id.* at 79–80, 987 P.2d at 473 (alteration in original) (quoting Sofie v. Fibreboard Corp., 771 P.2d 711, 721 (Wash. 1989) (holding that statutory caps on damages violate the right to a jury trial under Washington's Constitution)).

21 *Lakin*, 329 Or. at 79, 987 P.2d at 473.

22 Horton v. Or. Health & Sci. Univ., 359 Or. 168, 244, 376 P.3d 998, 1044 (2016).

23 *Id.* at 171, 376 P.3d at 1002.

24 *See id.* at 172–73, 376 P.3d at 1002.

25 *Id.* at 250, 376 P.3d at 1044.

26 *See id.* at 244, 376 P.3d at 1041.

to grant defendants the privilege to violate the liberty and freedom of others without accountability.

This Article questions the Oregon Supreme Court's analysis and, ultimately, its holding in *Horton*. Specifically, the Article reviews the history of the civil jury trial, leading up to its inclusion in the Oregon Constitution. It compares that history to the historical conclusions emphasized by the *Horton* court to justify its decision. The comparison suggests that the court's reasoning in *Horton* is flawed by the omission of important historical context and events. The Article concludes that *Horton* was wrongly decided and that the court should revisit the matter at the earliest opportunity to restore the protections afforded to Oregon's citizens by the civil jury.

I
THE ENGLISH JURY AND THE *HORTON* COURT

In *Horton*, the court acknowledged the influence of the English understanding of the civil jury before the American Revolution on Oregon's constitutional protections of the institution:

> In considering [the scope of the right to a jury trial], we begin with Blackstone, whose writing on the civil jury trial was influential in shaping American thought on that issue . . . . In describing the attributes of the right, Blackstone focused solely on the procedures associated with jury trials . . . . In focusing on the procedural benefits of civil jury trials, Blackstone did not suggest that the right to a civil jury imposed a substantive limit on the ability of . . . parliament to define the legal principles that create and limit a person's liability.[27]

In other words, the *Horton* court suggests that the English understanding of the civil jury, which was eventually passed on to the American colonies, was merely a procedural institution and that Parliament was free to legislatively limit any liability suggested by a jury's findings.

That is not so. As shown in the historical review below, the jury was not an institution subjugated to government, but represented a unique allocation of governing power to the people. The English jury preserved in the hands of the people the authority to administer justice over the decisions of Parliament or any other government office.

During the medieval beginnings of the English common law, civil disputes, which largely involved controversies between tenants and

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[27] *Id.* at 236–38, 376 P.3d at 1036–37.

landowners, were resolved in favor of those with access to power. [28] England embraced the practice of trial by combat in which the opposing parties championed their own causes by fighting one another to submission or death.[29] The loser of the fight lost everything—land, dignity, and protections of law.[30] Moreover, trial was not a fair fight. By rule, a party could produce a hired champion in court, who was paid to fight in place of the disputing party,[31] but that privilege to substitute a hired fighter belonged to landowners only. A tenant could not "substitute another in Court for the purpose of undertaking the defence, unless it be his own lawful Son [sic]."[32] In the end, the facts and merits of the dispute did not matter, it was those with access to power and wealth that directed the course of justice.

That medieval institution of trial decided by power and wealth eventually gave way to procedures to ensure justice on the merits of the case through the Grand Assize.[33] Considered to be far more equitable than trial by battle, the Grand Assize marked the beginnings of the civil jury in which "twelve lawful Knights" would decide "which of the litigating parties, ha[d] the greater right" to prevail based on their weighing of "the testimony of many credible witnesses."[34] The practice of trials on the merits by indifferent men, not government officials, spread and eventually developed into the trial by jury enjoyed throughout England.[35]

Through the centuries, the civil jury trial came to be considered the "glory of the English Law" because it allocated governing authority to community members to hold powerful and wealthy individuals accountable for wrongs committed on those of lesser station.[36] In 1768, William Blackstone explained:

> [A] competent number of sensible and upright jurymen . . . will be found the best investigators of truth, and the surest guardians of

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28 HUNT JANIN, MEDIEVAL JUSTICE: CASES AND LAWS IN FRANCE, ENGLAND AND GERMANY, 500-1500, 86–87 (2004); JOHN BEAMES, A TRANSLATION OF GLANVILLE: A TREATISE ON THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND 46 (1812).

29 JANIN, *supra* note 28, at 86–87.

30 *Id.* at 87.

31 BEAMES, *supra* note 28, at 46.

32 *Id.*

33 *See id.* at 54.

34 *Id.* at 56, 58.

35 *See* Stephan Landsman, *The Civil Jury in America: Scenes from an Underappreciated History*, 44 HASTINGS L.J. 579, 591 (1993).

36 *See* BLACKSTONE, *supra* note 7, at 379–81.

> public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.[37]

Blackstone's description of the civil jury emphasized several fundamental and substantive values that the English saw in the institution. Indeed, far from the *Horton* court's suggestion to the contrary, Blackstone did not "focus[] solely on the procedures associated with jury trials" when describing the value of the institution.[38] Rather, Blackstone significantly focused on England's allocation of substantive decision-making authority in the jury and how that allocation provides a superior means to ensure justice on equitable terms and ultimately preserves liberty.

Blackstone emphasized that the civil jury assumed governing authority as the "guardians of public justice," whose authority reached to the "most powerful individual in the state."[39] He suggested that the mere threat of being held accountable by a jury would cause "the most powerful individual in the state [to] be cautious of committing any flagrant invasion of another's right."[40] Blackstone did not indicate, as the *Horton* court suggests, that Parliament could limit the liability of those before the jury. On the contrary, he suggested the opposite when he stated that there was no person in England beyond the reach of the civil jury's authority to administer justice.

Blackstone also emphasized that the institution "*preserves* [the administration of public justice] in the hands of the people," rather than the "powerful and wealthy."[41] That preservation in the hands of the people is directly at odds with the *Horton* court's suggestion that Blackstone indicated that the power was preserved in Parliament to limit the authority of the jury to impose liability. The *Horton* court's view, that the jury's decision-making authority necessarily yields to whatever limitations Parliament sees fit, preserves nothing in the hands of the people. Contrary to Blackstone, *Horton* ultimately determined

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37 *Id.* at 380.

38 Horton v. Or. Health & Sci. Univ., 359 Or. 168, 236, 376 P.3d 998, 1037 (2016).

39 BLACKSTONE, *supra* note 7, at 380.

40 *Id.*

41 *Id.*

that once the fact is ascertained by the jury, the law *need not* redress it, but instead can ignore it.[42]

Blackstone's description also highlighted that the civil jury ensured that the administration of justice was not predetermined, but instead turned on the decision-making authority of "indifferent" persons appointed at the hour of trial. Justice was meted out on the merits and nothing else.[43] The *Horton* court suggests that Parliament was free to set a limitation on liability so low that the outcome of the jury's decision is, as a practical matter, predetermined and substantively meaningless. For example, in the *Horton* court's view, Parliament could freely pass legislation that all defendants that a jury finds liable for assault will pay no more than a penny's worth of damages, no matter the jury's finding of the actual damages caused. Such ability of Parliament to predetermine the substantive meaning of a civil jury trial is directly contrary to Blackstone's description of the jury's authority arising at the time of trial to indifferently administer justice based on the facts at hand.

Notwithstanding the analysis of the *Horton* court, Blackstone particularly warned the English against allowing any limitation on the authority of the jury to resolve civil disputes. He urged that

> the decision of facts, without the intervention of a jury, . . . is a step towards establishing aristocracy, the most oppressive of absolute governments . . . . It is therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to . . . guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretences [sic], may in time imperceptibly undermine this best preservative of English liberty.[44]

In sum, the *Horton* court incorrectly described the English jury as merely a preferred procedure for fact finding that yielded to parliamentary whims to take away the institution's authority to protect the liberty of the citizenry. On the contrary, the English believed that the necessary authority to protect against undue harms and guard against injustice was preserved in the civil jury and was not to be freely manipulated by Parliament.

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[42] *See Horton*, 359 Or. at 253–54, 376 P.3d at 1046. *Compare id. with* BLACKSTONE, *supra* note 7, at 380 ("[W]hen once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice . . . .").

[43] BLACKSTONE, *supra* note 7, at 380.

[44] *Id.* at 380–81.

II
THE CIVIL JURY IN THE FOUNDING ERA AND THE *HORTON* COURT

The *Horton* court also concluded that the history of the civil jury during the founding era of the United States indicates that the founders valued the institution solely because a jury provided a superior procedural mechanism to a judge for deciding facts.[45] The *Horton* court further suggested that the historical record does not indicate that the founders had any desire to limit the ability of the legislature to freely curtail the authority of the civil jury.

> [B]efore the revolution, one issue that divided the colonies from England was "the extent to which colonial administrators were making use of judge-tried cases to circumvent the right of civil jury trial." . . . The concern . . . was that decision-making authority was being improperly shifted from a jury composed of American citizens to a judge who was beholden to a British monarch. The perceived value of a civil jury trial lay in the jury's ability to provide a fair application of the law to the facts in an individual case, not in any substantive limitation that the civil jury trial placed on the legislature's lawmaking authority.
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> Despite the value that the colonists placed on having a jury rather than a colonial judge decide civil claims, the Constitutional Convention did not include a civil jury trial guarantee in the constitution, although the convention did guarantee a jury trial in criminal cases . . . .
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> When the states were deciding whether to ratify the constitution, one of the primary objections to the federal constitution was that it lacked a bill of rights, including a right to a civil jury trial in the federal courts. One argument was that by providing for jury trials in criminal but not civil cases, the constitution had, *sub silentio*, eliminated a right to civil jury trials in the federal courts. [In *Federalist No. 83*,] Hamilton explained, however, that the constitution did not prohibit the use of civil juries in federal court but instead had left it to Congress to decide in which class of civil cases jury trials should be available. In Hamilton's view, the strongest argument for guaranteeing a right to a civil jury trial was to check biased or corrupt judges . . . . Hamilton explained, the better course was the one that the Constitutional Convention had chosen—leaving it to Congress to define which class of civil cases should be tried to a jury and which should be tried to a judge . . . .
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> Despite Hamilton's arguments against including a civil jury trial right in the federal constitution, the anti-federalists' objections to the right's omission "struck a very responsive chord in the public" and ultimately carried the day . . . . [T]he anti-federalists' objections were not based solely on the ground that juries would be more accurate than judges. Rather . . . [they] intimated . . . that juries would provide

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[45] *Horton*, 359 Or. at 241–43, 376 P.3d at 1039–40.

> American debtors greater relief from British creditors than federal judges would. That intimation did not reflect a belief that the right to a civil jury trial would impose a substantive limitation on legislatures . . . .
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> After the states ratified the constitution and Congress took up the Bill of Rights, an 11-person committee proposed the essence of what became the [right to a civil jury trial under the] Seventh Amendment.[46]

In short, the *Horton* court concluded that the founders only constitutionally guaranteed that a civil jury, rather than a judge, must decide the facts in the case, but such constitutional protection did not prohibit the legislature from limiting liability that necessarily flows from those facts.

However, a more thorough review of the history yields a different conclusion. Three things in particular indicate that the founders wished to prevent legislative encroachment on the decision-making authority of civil juries: (1) how the colonists viewed the authority of the civil jury before the revolutionary era, (2) how the colonists viewed the role of the civil jury in relation to the legislation of Parliament and the crown during the revolutionary era, and (3) the civil jury authority demanded and won by constitutional delegates during the ratification of the Constitution.

A. The Authority of the Civil Jury in the Prerevolution Colonies

Blackstone's *Commentaries on the Laws of England*, and its elevation of the jury trial as the glory of the English law, was a best seller in the colonies.[47] During the time before the Revolution, the civil jury "sank deep roots into American soil" as an institution to redress individual grievances and preserve liberty.[48] That was particularly so because it was one of the only offices of colonial governance in which Parliament permitted the colonists to exercise substantial authority.[49]

The colonists particularly understood that civil jury authority extended to awarding large money damages against the government itself for violating a citizen's rights. For example, during the 1760s, the

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[46] *Id.* at 239–42, 376 P.3d at 1038–40 (internal citations omitted).

[47] Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195, 1200 (2014).

[48] Whitehouse, *supra* note 8, at 1246–47.

[49] *Id.*

colonists were keenly aware of the case of John Wilkes.[50] Wilkes accused the King of England of lying and was arrested and charged with seditious libel.[51] The case was dismissed, Wilkes sued for damages against the head of the English government, and the jury awarded him £1000, an extraordinary sum at the time.[52] The Lord Chief Justice of England declared that the jury held the authority to award such damages even if it was "for more than the injury received" because a jury's "[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as proof of the detestation of the jury to the action itself."[53]

Contrary to the court's statements in *Horton*, the prerevolutionary colonists understood that the civil jury was more than a procedural mechanism of fact finding; it was rather an institution that retained the authority necessary to hold even the head of the national government accountable for violating another's rights through damages verdicts.

B. The Authority of the Civil Jury in the Revolutionary Era

The colonists view that a fundamental purpose of the civil jury was to provide a substantive limit on government authority was further developed during the revolutionary era. For the colonist at that time, the jury was "linked to political power"[54] and provided a forum to challenge English authority.[55]

As antagonism grew between the colonies and England, Parliament passed oppressive legislation, such as the Stamp Act and the Navigation Act, which substantively limited the authority of the colonial jury in many civil cases.[56] George Mason, in his 1766 Letter To the Committee of Merchants in London, warned that such English threats to the trial by jury caused significant dispute between England and the colonies.[57] Ultimately, such limits placed by Parliament on the

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50 Landsman, *supra* note 35, at 591.

51 *Id.*

52 *Id.*

53 *Id.* (quoting MARK PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS 489–99 (1987)).

54 Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1118 (2014).

55 *See generally* Landsman, *supra* note 35, at 594–96; Whitehouse, *supra* note 8, at 1247.

56 Landsman, *supra* note 35, at 595−96.

57 1 THE PAPERS OF GEORGE MASON 67 (Robert A. Rutland ed., 1970).

authority of the jury served to help unite the thirteen colonies towards war against England.[58]

For example, in opposition to the Stamp Act legislation and its deprivation of the jury trial, colonists formed the Stamp Act Congress of 1765 and demanded that trial by jury was the inherent right of every British subject in the colonies.[59] Likewise, in the meeting of the First Continental Congress in 1774, the colonists took aim at other parliamentary legislation that removed certain cases to England for trial and at royal regulations that interfered with jury selection.[60] That Congress declared "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."[61]

In the Second Continental Congress, the colonists protested against further legislation of Parliament that deprived them "of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property."[62] Those repeated demands for trial by jury eventually culminated in the colonists listing the deprivation of the "Benefits of Trial by Jury" as an express grievance in the Declaration of Independence from England.[63]

In short, the colonists went to war rather than allow Parliament to legislatively limit the authority of the jury. The colonists did not view the jury as the *Horton* court suggests, a mere procedural factfinder whose authority may ebb and flow by legislative fiat. Indeed, it was such legislative fiat to limit the civil jury's authority that poked the bear of revolution.

C. The Authority of the Civil Jury Guaranteed by the Bill of Rights

Unlike the criminal jury trial, the Constitution did not initially guarantee the jury in civil cases. That caused a critical debate between the federalists and the anti-federalists[64] about whether the civil jury

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58 *See* Landsman, *supra* note 35, at 596.

59 *Id.* at 595.

60 *Id.* at 596.

61 *Id.*

62 *Id.*

63 THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

64 Charles Wolfram suggests:

> One of the earliest successes of the "federalists," the party that eventually won the battle over the adoption of the Constitution, was to foist upon their opponents

needed constitutional protection.[65] Alexander Hamilton, a federalist leader, advocated that the role of the civil jury was best decided by the legislature, and its absence from the Constitution distinctly gave the legislature the "liberty either to adopt that institution or to let it alone."[66] His lackluster defense of the institution is not surprising because, unlike the anti-federalists who saw the civil jury as "the very palladium of free government," Hamilton admitted that he could not "readily discern the . . . connection between the existence of liberty, and the trial by jury in civil cases."[67]

The anti-federalists agreed with Hamilton that the omission of the civil jury from the Constitution gave permission for the legislature to limit the jury's authority as it saw fit, but rather than seeing that as an advantage, they saw it "as portending a new form of tyranny."[68] That concern nearly prevented state ratification of the Constitution.[69]

The anti-federalists argued for a bill of rights that constitutionally guaranteed a civil jury.[70] "Historians of the period unanimously agree that the attack on the proposed Constitution by the antifederalists based on its omission of [such] a bill of rights struck a very responsive chord in the public."[71]

Certainly, as the *Horton* court described, the anti-federalists wanted constitutional protections for civil juries to protect citizens in the unique circumstances of debtor cases and to avoid undue influence from corrupt or biased judges.[72] However, the demand for a constitutional guarantee for the civil jury also was born of the anti-federalists' desire to substantively limit the ability of the legislature to curtail the jury and to ensure that government was subject to damages

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> the appellation "antifederalists." The connotations of opposition to a system of state-national governments and of sheer obstructionism were well appreciated by the "antifederalists" who vigorously argued that the name was better deserved by the supporters of the Constitution, who in fact should not be regarded as "federalists," but rather as "consolidationists" or "nationalists."

Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 667 n.77 (1973).

65 S*ee* Landsman, *supra* note 35, at 598–600.

66 THE FEDERALIST NO. 83 (Alexander Hamilton).

67 *Id.*

68 Ferguson, *supra* note 54, at 1117.

69 *Id.*

70 *See* Wolfram, *supra* note 64, at 667.

71 *Id.* at 668.

72 *See id.* at 679–81 (discussing concerns in debtor cases); *see also id.* at 708–10 (discussing concerns about corrupt judges).

verdicts for harming citizens. Charles Wolfram summarized the record of the debate as follows:

> [S]urviving materials demonstrate that the antifederalists advanced several distinct and specific arguments in favor of civil jury trial: the protection of debtor defendants; *the frustration of unwise legislation*; the overturning of the practices of courts of vice-admiralty; *the vindication of the interests of private citizens in litigation with the government*; and the protection of litigants against overbearing and oppressive judges.[73]

Indeed, the anti-federalists believed that civil jury authority was essential "to offset . . . overzealous legislatures."[74] Consequently, anti-federalists insisted on a constitutional guarantee of the civil jury, in particular "to guard against unwanted legislation passed by a misguided national legislature. Certainly the same potentially oppressive legislature that might pass obnoxious legislation could not be trusted to preserve a right of jury trial in cases arising under that legislation."[75]

George Mason, a prominent anti-federalist, advocated for "constitutional inclusion of the civil jury, because otherwise Congress could have as much influence as it desired on the decisions of the jury."[76] During the ratification debates he argued:

> [W]hat chance will poor men get, where Congress have the power of legislating in all cases whatever, and where judges and juries may be under their influence, and bound to support their operations? Even with juries the chance of justice may here be very small, as Congress have unlimited authority, legislative, executive, and judicial.[77]

Likewise, at the Virginia ratification debates, James Monroe argued that a constitutional guarantee was necessary to prevent Congress from abolishing the civil jury:

> [S]uppose [Congress] should be of opinion that the right of the trial by jury was not one of the requisites to carry it into effect; there is no check in this Constitution to prevent the formal abolition of it . . . . They are not restrained or controlled from making any law, however oppressive in its operation, which they may think necessary to carry

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[73] *Id.* at 670–71 (emphasis added).

[74] Stephan Landsman, *The Civil Jury in America*, 62 L. & CONTEMP. PROBS. 285, 289 (1999).

[75] Wolfram, *supra* note 64, at 664–65.

[76] Suja A. Thomas, *The Missing Branch of the Jury*, 77 OHIO ST. L.J. 1261, 1280 (2016).

[77] Wolfram, *supra* note 64, at 684 n.111 (alteration in original) (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 431 (Jonathan Elliot ed., 1891) [hereinafter Elliot DEBATES]).

> their powers into effect. By this general, unqualified power, they may infringe not only on the trial by jury, but the liberty of the press . . . . Our great unalienable rights ought to be secured from being destroyed by such unlimited powers, either by a bill of rights, or by an express provision in the body of the Constitution.[78]

The anti-federalists also highlighted the need for a constitutional guarantee for the civil jury to ensure that government infringement on citizen liberty could be deterred by large damage verdicts.[79] Reminiscent of the colonists' keen awareness of the jury's high damages verdict against the leader of the English government for violating a citizen's liberties in the Wilkes case, discussed *supra* Part II, Section A, the founders sought constitutional preservation of the jury's authority to render heavy damages verdicts to deter the government and its employees from harming the citizenry:

> Suppose, therefore, that the military officers of Congress, by a wanton abuse of power, imprison the free citizens of the United States of America; suppose . . . that a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift—suppose, I say, that they commit similar or greater indignities, in such cases a trial by jury would be our safest resource [to ensure that] heavy damages would at once punish the offender and deter others from committing the same.[80]

Simply put, the founders sought a constitutional guarantee for the civil jury to preserve the institution's ability to protect liberty and physical integrity from government intrusion, to substantively limit the ability of the legislature to impede the authority of the jury, and to ensure full and fair damages against state actors that caused harms to citizens.

The anti-federalists would not ratify the Constitution unless the jury, instead of any other government office, held the decision-making authority in all cases brought before the judiciary. As the Federal Farmer, another famous anti-federalist, described:

> [B]y holding the jury's right to return a general verdict in all [civil] cases sacred, we secure to the people at large, their just and rightful controul [sic] in the judicial department . . . . The body of the people, principally, bear the burdens of the community; they of right ought to have a controul [sic] in its important concerns, both in making and

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78 Wolfram, *supra* note 64, at 706 (quoting Elliot DEBATES, *supra* note 77, at 218).

79 Thomas, *supra* note 76, at 1281–82.

80 Wolfram, *supra* note 64, at 708 n.187 (quoting PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, at 154 (John Bach McMaster & Frederick Dawson Stone eds., 1888)).

> executing the laws, otherwise they may, in a short time, be ruined . . . . This, and the democratic branch in the legislature, as was formerly observed, are the means by which the people are let into the knowledge of public affairs–are enabled to stand as the guardians of each others [sic] rights, and to restrain, by regular and legal measures, those who otherwise might infringe upon them.[81]

Or as John Adams succinctly explained: "the common people, should have as complete a control . . . in every judgment of a court of judicature" as they do in the legislature.[82]

In the end, Hamilton and the federalists lost in their effort to allow the legislature to control, limit, or dismantle the civil jury as it saw fit by the omission of a constitutional guarantee for such juries.[83] The federalists needed nine ratifying states to approve the Constitution without a provision protecting the authority of the civil jury.[84] Due to the demands and efforts of the anti-federalists, by August 1788, "five of the thirteen ratifying conventions had already made clear, in a series of formal declarations, that Americans wanted more jury safeguards . . . ."[85] Ultimately, ratification of the Constitution would not happen until the two factions agreed that the provisions of the Bill of Rights, including the constitutional guarantee of the civil jury trial, also would be sent to the states for ratification. [86] And, once received, the states did indeed ratify the Bill of Rights.[87]

As a result, the founders placed the civil jury trial within the constitutional scheme of the separation of powers. Americans would not see the jury trial right as "mere procedural formality, but [rather] a fundamental reservation of power in . . . constitutional structure . . . [to] ensure[ ] the people's ultimate control . . . in the judiciary."[88] The jury would from then forward hold authority over decisions that affect the liberty and rights of individual citizens in civil trials, and no government official or body was entitled to intrude upon that decision making; the civil juror as a fact finder was elevated to "a constitutional

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[81] *Letter from the Federal Farmer, No. 15* (Jan. 18, 1788), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 397 (Philip B. Kurland & Ralph Lerner eds., 2000).

[82] JOHN ADAMS, 2 WORKS OF JOHN ADAMS 253 (Charles C. Little & James Brown eds., 1850).

[83] Whitehouse, *supra* note 8, at 1251–52.

[84] Wolfram, *supra* note 64, at 696.

[85] Whitehouse, *supra* note 8, at 1251 (quoting AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIBLIOGRAPHY 236 (2005)).

[86] Whitehouse, *supra* note 8, at 1252.

[87] *See* U.S. CONST. amends. I–X.

[88] *See* Blakely v. Washington, 542 U.S. 296, 306 (2004).

officer—the constitutional equal" to legislative, executive, and judicial officers.[89]

The above understanding of the U.S. constitutional history of the civil jury trial indicates several serious errors in the Oregon Supreme Court's historical conclusions in *Horton*. First, although the court extensively cites to Wolfram's scholarship, it appears that the court failed to appreciate essential findings by Wolfram. Indeed, the *Horton* court offered a myopic view of Wolfram's conclusions:

> Wolfram explains that the antifederalists' objections were not based solely on the ground that juries would be more accurate than judges. Rather, examining the speeches in the state ratifying conventions, Wolfram concluded that the speakers intimated, although they never expressly stated, that juries would provide American debtors greater relief from British creditors than federal judges would. *That intimation did not reflect a belief that the right to a civil jury trial would impose a substantive limitation on legislatures*. Rather, it reflected the belief that, in an individual case, a jury might adjudicate the facts in a way that would favor local interests over foreign ones.[90]

The *Horton* court's summary erroneously excludes Wolfram's recognition that the anti-federalists' demands for a constitutional guarantee for the civil jury trial were motivated by a desire to impose a substantive limitation on legislatures. Wolfram emphasized that the anti-federalists wished to secure civil jury authority from "frustration[s] of unwise legislation" and to ensure "the vindication of the interests of private citizens in litigation with the government."[91] He further explained that the anti-federalists sought a constitutional guarantee to specifically protect the civil jury authority from a "potentially oppressive legislature that might pass obnoxious legislation [to the] right of [a civil] jury trial."[92]

Of course, if the *Horton* court acknowledged those historical bases for the constitutional guarantee of the civil jury trial, it would have been far more difficult for the court to reach its holding that the constitutional protections for the civil jury trial *do not* prevent the legislature from passing statutes that frustrate the jury's authority to

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[89] William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 71 (2006).

[90] Horton v. Or. Health & Sci. Univ., 359 Or. 168, 242, 376 P.3d 998, 1039–40 (2016) (emphasis added) (citation omitted).

[91] Wolfram, *supra* note 64, at 670–71.

[92] *Id.* at 664–65.

"vindicat[e] the interest of private citizens in litigation with the government"[93] through damages verdicts.

The *Horton* court also inappropriately placed undue historical importance on Hamilton's opinions of the civil jury in its analysis. The court even cited Hamilton's opinions as authority to overturn *Lakin* (that the legislature could not substantively limit the liability found by the jury).[94] The court explained:

> Hamilton's discussion of a right to a civil jury trial in *The Federalist No. 83* bears on the issue that *Lakin* decided in two respects. First, the arguments for and against including a civil jury trial guarantee that Hamilton canvassed all addressed the jury's value as a procedural corrective to potentially biased or, worse, corrupt judges serving as the triers of fact. Those arguments do not suggest that the right was viewed as a substantive limit on Congress's lawmaking power. Second, Hamilton made that point expressly in responding to an argument "that trial by jury [serves as] a safeguard against an oppressive exercise of the power of taxation." In addressing that argument, Hamilton explained that the right to a civil jury placed no limit on the legislature's power to define the substantive law.[95]

Hamilton should not be guiding the *Horton* court on this issue. As discussed in detail above, Hamilton's opinions on the authority of the civil jury lost. His view that the legislature was free to limit the jury's authority not only nearly prevented the U.S. Constitution from being ratified, but also was necessarily left to the dustbin of history when the anti-federalists extracted the constitutional guarantee of the civil jury trial in exchange for ratification. It was constitutionally agreed long ago that the opinions of Hamilton *do not* define the authority of the civil jury in relation to the legislature, and, consequently, the *Horton* court should not have cited those opinions as a basis to overrule *Lakin*.

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[93] *Cf. id.* at 664–65, 670–71 *with Horton*, 359 Or. at 250, 376 P.3d at 1044 ("[I]t is difficult to see how the jury trial right renders a damages cap unconstitutional. Neither the text nor the history of the jury trial right suggests that it was intended to place a substantive limitation on the legislature's authority to alter or adjust a party's rights and remedies.").

[94] *Horton*, 359 Or. at 240–43, 376 P.3d at 1039.

[95] *Id.* at 241, 376 P.3d at 1039 (alteration in original) (citation omitted).

III
THE *HORTON* COURT AND OREGON'S CONSTITUTIONAL CIVIL JURY GUARANTEES

In *Horton*, the court stated that "the relevant history of Article I, Section 17, comes primarily from the English practice reflected in Blackstone's *Commentaries* and the history leading up to and surrounding the adoption of the Seventh Amendment."[96] This Article agrees with the *Horton* court to that extent. There is no historical evidence identified by this author that the drafters of the Oregon Constitution wished to provide less protection to the civil jury trial than those argued for by anti-federalists when passing the Seventh Amendment.

On the contrary, Americans maintained a rigorous desire to preserve the authority of the civil jury up to the time the Oregon Constitution was adopted. For example, Alexis De Tocqueville indicated that the American people in the mid-nineteenth century regarded the jury as a separate institution of government and "a mode of the sovereignty of the people" distinctly fashioned to temper the tyranny of the majority.[97] There is nothing in the writing of De Tocqueville to suggest that the American people believed that their sovereign authority in the jury could be freely manipulated in any legislative session.[98]

Drafters of the Oregon Constitution may have even expanded the authority of their civil juries through Oregon's unique constitutional provisions. In their constitutional discussions and guarantees for the civil jury, the drafters distinctly identified the "right" or authority of the jury to decide not only the facts but also the "law." Article I, section 16, of the Oregon Constitution provides that "In all criminal cases whatever, *the jury shall have the right to determine the law*, and the facts under the direction of the Court as to the law, and the right of new trial, *as in civil cases*."[99]

Some members of the Constitutional Convention opposed recognizing that its plain terms prevented a court from having the "right to set aside a verdict where the jury were the judges of the law and facts" or that the uninformed jurors would need "magic" to "become

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96 *Id.* at 243, 376 P.3d at 1040.

97 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 261 (Harvey C. Mansfield & Delba Winthrop trans., 2012).

98 *See generally id.*

99 OR. CONST. art. I, § 16 (emphasis added).

acquainted with the rules of law."[100] But those arguments were insufficient to defeat the bill and gave way to another member's argument that the jury's right to determine the law was necessary to protect against odious legislation when deciding cases.[101] Soon after that explanation for the need of such a provision, another member of the convention moved to amend the provision to include the clause "as in civil cases," reflecting their perception, comfort, and endorsement of civil jury power.[102] And that constitutional provision passed as amended.[103]

Pursuant to Oregon state history and the "relevant history . . . from the English practice reflected in Blackstone's *Commentaries* and the history leading up to and surrounding the adoption of the Seventh Amendment,"[104] it is no great leap to conclude that article I, section 17, actually means what it says: "In all civil cases the right of Trial by Jury shall remain inviolate." That is, the authority of the jury to decide the case shall remain "inviolate" and thereby suffer no manipulation by the legislature or any other government actor.

CONCLUSION

Oregon's Constitution preserves the civil jury's authority to "regulate[] the action of the community" so that it may secure "the liberty of the people."[105] The Oregon Constitution also preserves the authority of the civil jury to do that by levying a damages verdict that may restore an injured person for the harms that he or she has wrongly suffered at the hands of another. Likewise, the Oregon Constitution preserves a jury's authority to render a civil defendant liable for compensatory damages to deter others from engaging in similar harmful conduct. In a free society, in which all citizens are entitled to live their lives as they see fit, the civil jury is the constitutional promise that secures the liberty of each citizen from infringement by another.

The Oregon Supreme Court in *Horton* missed a critical opportunity to reinforce the authority of the civil jury so it could continue to protect

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100 THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, 313–14 (Charles Henry Carey ed., 1926).

101 *Id.* at 314.

102 *Id.*

103 *Id.* at 314–15.

104 Horton v. Or. Health & Sci. Univ., 359 Or. 168, 243, 376 P.3d 998, 1040 (2016).

105 1 ANNALS OF CONG. 437 (1789) (Joseph Gales ed., 1834) (statement by James Madison).

the individual liberties of Oregonians from wrongful invasions by others. As a result, the power of the jury to hold wrongful actors accountable—the very purpose of the jury—in Oregon has been weakened.

The Oregon Supreme Court will have an opportunity to revisit the issue in future cases. It is the hope of the author that the court will take that opportunity to reimmerse itself in the history of the constitutional guarantees for a civil jury and reject the legislature's statutory caps on damages that grant wrongful actors the privilege to cause profound harms without accountability. It is the hope of the author that the Oregon Supreme Court will take the opportunity to reinvigorate the authority of the civil jury as the "guardian of public justice."