

Symposium Paper Presentation

DEAN ERWIN CHEMERINSKY*

The Jury Trial and Remedy Clauses

Thank you so much for the kind introduction—that’s so kind of you. It’s really an honor and a great pleasure to be with you this morning. I believe that the Oregon Supreme Court’s decision in *Horton v. Oregon Health and Science University* reflects much greater ambivalence about the jury trial in civil cases.¹ And that’s what I’d like to talk about this morning, but I want to focus on maybe three points. First, at the time the Constitution was written, this thought that the right to jury trial in civil and criminal cases was regarded as equally important. Second, I want to talk about how that’s not been so, and certainly [not] in recent decades. And third, I want to

* Dean Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law, with a joint appointment in Political Science. Prior to assuming this position in 2008, he was the Alston and Bird Professor of Law and Political Science at Duke University from 2004 to 2008, and before that was a professor at the University of Southern California Law School from 1983 to 2004, including as the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. He also has taught at DePaul College of Law and UCLA Law School.

He is the author of ten books, including *The Case Against the Supreme Court*, published by Viking in 2014, and two books published by Yale University Press in 2017, *Closing the Courthouse Doors: How Your Constitutional Rights Became Unenforceable* and *Free Speech on Campus* (with Howard Gillman). He also is the author of more than 200 law review articles. He writes a weekly column for the *Orange County Register*, monthly columns for the *ABA Journal* and the *Daily Journal*, and frequent op-eds in newspapers across the country. He frequently argues appellate cases, including in the United States Supreme Court. In January 2017, *National Jurist* magazine again named Dean Chemerinsky as the most influential person in legal education in the United States.

Chemerinsky holds a law degree from Harvard Law School and a bachelor’s degree from Northwestern University.

¹ *Horton v. Or. Health & Sci. Univ.*, 359 Or. 168, 376 P.3d 998 (2016).

offer some thoughts as to why this has happened. But this, then, is the context the other panelists are going to talk about more generally: the right to jury trial in states across the country and then talk about how this all comes back to *Horton* and what it means here in Oregon.

So, let me then start by talking about the understanding of jury trials in civil and criminal cases from the earliest days of the country. It's interesting, if you even go back beyond American history, the right to jury trial in civil and criminal cases was treated much the same. You can trace the jury trial in civil and criminal cases back to Greek society, to Roman law. In the year 1215, King Henry II created a right to jury trial in land use cases, in the same year the Magna Carta was issued. And the Magna Carta very clearly provided for a right to jury trial in criminal and civil cases.² The way in which juries were thought of in England or in the Middle Ages is vastly different than it is today. But still it was described by Blackstone as one of the most important rights that existed.³ It's interesting that the Oregon Supreme Court in its decision in *Horton* quotes Blackstone and tries to talk about, well, what did Blackstone really mean when he spoke so glowingly of the crucial importance of the right to jury trial in civil cases?⁴

In the United States, you can find the first declaration of the right to jury trial in civil cases in Virginia in 1624. Virtually all of the colonies, in their charters and in their constitutions, had provisions that provided jury trials in civil and criminal cases. The drafting of the Constitution in Philadelphia in 1787 also had a focus on jury trials in criminal and civil cases. Article III of the Constitution specifically mentions the right to jury trial in criminal cases,⁵ but there was concern that there wasn't a comparable provision in the text of the Constitution with regard to civil juries. And so, on September 12, 1787, five days before the Constitutional Convention concluded, one of the delegates, Hugh Williamson, objected to the absence of a provision with regard to civil jury trials. This was truly the eleventh hour for the Constitutional Convention. Those who were present were tired; it was a long, hot summer in Philadelphia, [and] they didn't want to take up additional issues, so they felt that this could be dealt with later, especially by legislation. But one of the key arguments—perhaps the most prominently expressed objection to the ratification

² See *Horton*, 359 Or. at 175, 376 P.3d at 1004.

³ See *id.* at 236, 376 P.3d at 1036.

⁴ See *id.* at 236–43, 376 P.3d at 1036–40.

⁵ U.S. CONST. art. III.

of the Constitution—was the absence of an assurance of civil jury trials.

I went back and found some of the quotes from the framers at the time. The anti-federalists, especially, were using this as a basis for trying to convince the state ratifying conventions not to approve of the drafted Constitution. Richard Henry Lee, in 1787, said, “Trial by jury in civil cases, and trial by jury in criminal cases, stand on the same footing. They are common rights of Americans.” Alexander Hamilton dedicated one of the Federalist Papers, we now know as *Federalist No. 83*, to explaining why the Constitution should be interpreted as being consistent with the right to jury trial in civil cases.⁶ The argument was that since the right to jury trial in criminal cases was mentioned in Article III, but the right to jury trial in civil cases wasn’t mentioned, this silence could be seen as disparaging, or even denying, the right. Hamilton denied that [argument].⁷ Hamilton said it was simply left to the legislatures to provide for jury trials in civil cases, and it can be expected that they would do so.⁸

As you know, many of the states approved the Constitution, but on the condition that a Bill of Rights be drafted. And it was clear from the outset that this Bill of Rights would include a provision with regard to civil jury trials. Let me quote James Madison from the time: “Trial by jury in civil cases is essential to secure the liberty of the people as any one of the preexistent rights of nature.”

The Constitution has the right to jury trial in criminal cases in the Sixth Amendment,⁹ and with regard to civil jury trials it’s in the Seventh Amendment,¹⁰ but you can find many statements from the late eighteenth, early nineteenth centuries saying that these were regarded as rights that were comparable in every way.

Joseph Story wrote his famous *Commentaries on the Constitution* in 1833.¹¹ They were both seen as a reflection on the understanding of the Constitution, but also they were tremendously influential for decades to come. Story was quite explicit that the right to jury trial in civil cases and the right to jury trial in criminal cases were equally

⁶ THE FEDERALIST NO. 83 (Alexander Hamilton).

⁷ *Id.*

⁸ *Id.*

⁹ U.S. CONST. amend. VI.

¹⁰ U.S. CONST. amend. VII.

¹¹ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE U.S. (Thomas Cooley ed., 4th ed. 1873) (1833).

important.¹² And again, let me quote Story. He said, “[T]he inestimable privilege of [a] trial by jury in civil cases . . . is conceded by all to be an essential political and civil liberty.”¹³ He wrote, “[It is] a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty.”¹⁴

If you go back to the time of the framing, [and] if you read Story’s *Commentaries*, you can see that the same concerns inspired the desire to protect civil juries and criminal juries. There was a desire to democratize decision making. There was a great fear of government, and it was seen that juries in civil and criminal cases were a key check on government power. There was also a thought that this was a way to educate people, to have them be involved in civic governance. Alexis de Tocqueville, in his famous work *Democracy in America* in the nineteenth century, spoke of juries in exactly this way.¹⁵

Well, this brings me to my second point. That’s not how the law has developed. There is no doubt that the right to jury trial in criminal cases is regarded as more important than the right to jury trial in civil cases. Indeed, the right to jury trial in criminal cases has been called a fundamental right, but that label isn’t used with regard to the right to jury trial in civil cases under the Seventh Amendment. You see this most clearly with regard to the fact that the Sixth Amendment right to jury trial in criminal cases has been applied to state and local governments through the process of incorporation, but the Seventh Amendment right to jury trial hasn’t been applied through the process of incorporation.

As you know, when the Constitution was written, it was thought that the Bill of Rights would apply only to the federal government. The Supreme Court in *Barron v. Mayor & City Council of Baltimore*, in 1833, said that it was understood by everyone that the Bill of Rights was meant as a limit on federal power, not as a limit on state and local power.¹⁶ And that made sense at the time, when it was thought that state constitutions would adequately protect people from state government abuses. The Bill of Rights was necessary to protect people from federal abuses. This all changes after the adoption of the Fourteenth Amendment in 1868, but it especially changes with regard

¹² See 2 *id.* at 523–44.

¹³ 2 *id.* at 526.

¹⁴ *Id.*

¹⁵ See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Daniel C. Gilman ed., 1898) (1835).

¹⁶ *Barron v. Mayor & City Council of Balt.*, 32 U.S. 243, 248 (1833).

to the late nineteenth century, when the Supreme Court began to apply the Bill of Rights to the states through the process of incorporation. The Supreme Court, beginning in the 1890s, said that the word “liberty” in the Due Process Clause protects fundamental rights from state and local interference.¹⁷ The Supreme Court said among those rights protected as fundamental are those that can be deemed in the Bill of Rights to be fundamental.¹⁸ So, the Supreme Court said, included within “liberty” are rights not enumerated that are fundamental, but also included, incorporated in the liberty of the Fourteenth Amendment, are those provisions in the Bill of Rights that are deemed fundamental.¹⁹ It wasn’t until 1925, in *Gitlow v. New York*, that the Supreme Court first said that freedom of speech under the First Amendment was incorporated and applied to state and local governments.²⁰ It wasn’t until *Powell v. Alabama* in 1932, the infamous Scottsboro Trials, that the Supreme Court said that the Sixth Amendment right to counsel in criminal cases applied in capital cases.²¹ Of course, it wasn’t until 1963, in *Gideon v. Wainwright*, that the Supreme Court said that the right to counsel under the Sixth Amendment applies in any criminal case where there’s a potential prison sentence.²² It wasn’t until 1968, in *Duncan v. Louisiana*, that the Supreme Court said that the Sixth Amendment right to jury trial is fundamental and must be applied to state governments.²³ But, this has never happened with regard to the Seventh Amendment right to jury trial in civil cases. Never has the Supreme Court said that it’s to be regarded as fundamental as applied to state and local governments.

Actually, one of the very first cases about the application of the Bill of Rights to the states through the Fourteenth Amendment involved the Seventh Amendment right to jury trial in civil cases. In *Walker v. Sauvinet*, in 1875, the Supreme Court rejected the argument that the Seventh Amendment right to jury trial in civil cases applies to state courts.²⁴ In 1931, in *Hardware v. Glidden*, the Supreme Court reaffirmed that the Seventh Amendment right to jury trial doesn’t

¹⁷ See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

¹⁸ See *id.*

¹⁹ See *id.* at 590.

²⁰ *Gitlow v. New York*, 268 U.S. 652, 667 (1925).

²¹ *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

²² *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963).

²³ *Duncan v. Louisiana*, 391 U.S. 145, 148–49 (1968).

²⁴ *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875).

apply to state courts.²⁵ As recently as 2010, in *McDonald v. City of Chicago*, the Supreme Court repeated that the Seventh Amendment right to jury trial in civil cases has never been incorporated.²⁶ That case involved whether the Second Amendment right to bear arms applies to state and local governments.²⁷ From 1791, when the Second Amendment was ratified, until 2008, when the Supreme Court decided *District of Columbia v. Heller*,²⁸ the Court had never struck down any law—federal, state, or local—for violating the Second Amendment. In *Heller*, the Supreme Court said that the Second Amendment right to bear arms at least protects the right of individuals to have guns in their homes for the sake of security.²⁹ That case involved a part of the *federal* government—the District of Columbia.³⁰ There was no occasion for the Supreme Court to consider then whether it would apply to state and local governments.

Quickly, the Supreme Court took up that issue. Two years later in *McDonald*, the Supreme Court said the Second Amendment is incorporated and should be deemed fundamental.³¹ Justice Alito wrote for the Court. It's a plurality opinion, and in the opinion, Justice Alito said that there are four provisions of the Bill of Rights that have never been deemed to apply to state and local governments.³² One is the Third Amendment right to not have soldiers quartered in a person's home.³³ Now, I have no doubt that if a state government forced people to house soldiers the Third Amendment would be deemed incorporated, but there's never been such a case before the Supreme Court. The Fifth Amendment right to grand jury indictment in criminal cases—in fact, this goes back to a late nineteenth-century Supreme Court decision that said the Fifth Amendment right to grand jury indictment doesn't apply in states.³⁴ And I think here too this reflects an ambivalence about the role of the grand jury. The grand jury, which was thought of as a limit on state power, as a check on prosecutorial abuses, hasn't functioned that way. And so the Supreme Court has not found the occasion to apply the Fifth Amendment right

²⁵ *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 160 (1931).

²⁶ *McDonald v. City of Chicago*, 561 U.S. 742, 867 (2010).

²⁷ *See id.* at 742.

²⁸ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²⁹ *Id.* at 628.

³⁰ *See id.*

³¹ *McDonald*, 561 U.S. at 749.

³² *See id.* at 765.

³³ *Id.* at 765 n.13.

³⁴ *Id.*

to grand jury indictment to state courts. There is the Eighth Amendment right against excessive fines that the Supreme Court, in 1989 in *Browning Ferris Industries v. Kelco Disposal*,³⁵ said it never ruled whether this applied to the states. And finally, the court indicated that the Seventh Amendment right to jury trial in civil cases has never been deemed incorporated.³⁶

Now, this is one way of thinking of how the Supreme Court has treated the Seventh Amendment differently than the Sixth Amendment with regard to their provisions with regard to jury trial. The Sixth Amendment is explicitly deemed a fundamental right. The failure to incorporate the Seventh Amendment means it's explicitly deemed not to be a fundamental right. But it's more than that, too. Over recent years, you can find many Supreme Court cases expanding and enforcing the right to jury trial in criminal cases. You'll be hard-pressed to find comparable cases with regard to the Seventh Amendment right to jury trial in civil cases. I point, for example, to the Supreme Court's decision in *Apprendi v. New Jersey*³⁷ in 2000— from a practical perspective, one of the most important Supreme Court decisions in the last two decades. There, the Supreme Court said that any factor other than a prior conviction that leads to a sentence greater than the statutory maximum must be proven to a jury beyond a reasonable doubt.³⁸ It was on the basis of this that, five year later, in *United States v. Booker*, the Supreme Court held that the sentencing guidelines of the federal courts must only be advisory.³⁹ They can't be mandatory because it has to be that any factor other than a prior conviction that leads to sentence greater than the statutory maximum has to be proven to the jury. The Supreme Court's decision in *Apprendi*, and all the cases that have followed *Apprendi*, very much emphasize the role of the jury and the need to preserve and protect that role in criminal cases. Yet you don't find comparable decision with regard to the right to jury trial in civil cases. And so I do see the ambivalence which I described at the beginning with regard to jury trials in civil cases.

Well that then brings me to the final part of my remarks. Why? Why is there the exalting of the role of the jury in criminal cases and

³⁵ *Browning Ferris Indus. v. Kelco Disposal*, 492 U.S. 257 (1989); see *McDonald*, 561 U.S. at 765 n.13.

³⁶ *McDonald*, 561 U.S. at 765 n.13.

³⁷ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

³⁸ *Id.* at 466–67.

³⁹ *United States v. Booker*, 543 U.S. 220, 221 (2005).

the ambivalence of the role of the jury in civil cases? Because I do believe, as I said at the beginning, that the Oregon Supreme Court's decision in *Horton* reflects this ambivalence.⁴⁰ Well, let me offer some explanations, but as to each let me also suggest that it's not very persuasive.

One explanation is there is a significant limit with regard to jury trials in civil cases in the Seventh Amendment that doesn't exist with regard to the Sixth Amendment. The Seventh Amendment says that, as to matters at common law, there would be a right to a jury trial. Back in 1812, Justice Story, sitting as a Circuit Justice, said that what this means is there'd be a right to a jury trial in matters that would be seen as going to a court of law, but there wouldn't be a right to a jury trial in matters that'd be seen as going to a court of equity. And even then the court that was going to be originalist would say this is all decided on the basis of what would have gone to a court of law at the time the Constitution was written, as opposed to a court of equity at the time the Constitution was written. The Oregon Supreme Court in the *Horton* decision emphasizes the need to look to what was the law in terms of the right to jury trial at the time the Oregon Constitution, and specifically its provisions with regard to the right to jury trial, were adopted.⁴¹

This distinction between courts of law and courts of equity has long been repudiated. The United States government saw in the nineteenth century a merger of law and equity. No longer at the state court, in almost any jurisdiction, do you see a difference between courts of law and courts of equity. Federal courts don't have that, and the Federal Rules of Civil Procedure make clear that in civil cases in federal court there is one action.⁴² And yet the law persists to this day that whether a jury trial is available is based on whether it would have gone to a court of law (and essentially be a matter of money damages) or go to a court of equity (and be about injunctive relief). It's worth thinking about whether this distinction makes sense. Of course, seen as being written into the Seventh Amendment, it's been embedded in constitutional decisions since 1812. But why this distinction? Well, perhaps one argument is it's in the difference in the nature of remedies. Well, obviously both actions at law and actions at equity involve fact finding. Why couldn't the jury do the fact finding for

⁴⁰ See *Horton v. Or. Health & Sci. Univ.*, 359 Or. 168, 376 P.3d 998 (2016).

⁴¹ *Id.*

⁴² FED. R. CIV. P. 2.

both cases of law and cases of equity? It doesn't seem to be any different with regard to that.

So, the answer would have to be that there's something different in the nature of the remedies—that juries are particularly well suited with regard to damages, but they're not very well suited when it comes to equity. But why would that be? Equity, ultimately, as we've all learned, is about balancing competing considerations—that's where the phrase “balancing the equities” comes from. Why are juries ill suited to balancing the equities? Why are they less suited for that than anything else that we ask juries to do? We rely on juries to determine who or what is the reasonable person. Isn't that really, ultimately, a balancing of competing considerations? Well, perhaps it's the notion that an injunction often involves restraining liberty, whereas damages are about money. And maybe we care much more about liberty than we care about money and that would explain the difference. But that doesn't explain the distinction between the Sixth and the Seventh Amendments. The Sixth Amendment is all about taking away somebody's liberty, even taking away somebody's life. We entrust the jury with regard to this, so why wouldn't we want to entrust the jury with regard to matters of liberty under the Seventh Amendment? In fact, if we regard liberty as more important than money, wouldn't that argue for an even larger role for the jury? So does the distinction between law and equity really make any sense other than the fact that it was written in the Seventh Amendment and part of the law for so long?

I think there's another explanation for the ambivalence, and this has been the attack on the jury in civil cases. I think there has been an attack on the jury, and we find this in the form of criticism of large jury verdicts—the McDonald's hot coffee case is often pointed to as exemplary of this.⁴³ You find the argument by anecdote prominent in this regard. You hear the stories of the runaway jury. And you have a sense that what businesses would prefer, whether it's a suit by consumers or employees, is to take the case away from the jury and the passions of the jury.

Well, there's many problems with this. As I'm sure we'll talk about over the course of the day, study after study has shown that the runaway jury is a myth. Large damage judgments by juries rarely happen, and when they do they're quite explainable by the facts. Also,

⁴³ See *Liebeck v. McDonald's Rests. P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309, at *1 (D. N.M. Aug. 18, 1994).

there is a check that exists in every jurisdiction, and that's remittitur. It is the ability of the judge to be able to provide some kind of limit with regard [to] a jury verdict that seems inappropriate given the facts. Also, it seems strange to say because we don't like the perceived result, we're therefore going to limit the constitutional right. This isn't accepted in other areas of constitutional law. Why should it be here?

But I do believe that the ambivalence about the jury in civil cases reflects this attack on the jury that we've had over several decades. And I think the *Horton* decision reflects that as well.

Finally, I think, in terms of the ambivalence of the jury, there's the growth of alternative dispute resolution. An enormously important development in the law in the last several decades has been taking cases out of the courts in the civil arena and having them shifted to arbitration or other forms of alternative dispute resolution. Now, I don't object to this when it's two large companies that voluntarily agree they want to submit their dispute to arbitration. My concern is all of the places where arbitration clauses exist in form contracts and take people away from their ability to get to court and to have a jury trial. And you see this in so many places. I think one of the key cases was the Supreme Court's decision over a decade and a half ago in *Circuit City v. Adams*.⁴⁴ It involved a man by the name of Saint Clair Adams.⁴⁵ He had applied for a job at Circuit City.⁴⁶ (And now I have to explain to my students what Circuit City was. [Audience laughter.] Literally on the back of his employment application in quite small print is language that said that in any dispute that it would have to go to arbitration; he couldn't go to court.⁴⁷ After working at Circuit City for a couple years, he filed a suit in California state court, entirely under state law, for employment discrimination.⁴⁸ But Circuit City filed an action in federal court under the Federal Arbitration Act to have that contractual provision enforced.⁴⁹ Now, strangely, they called small print on the back of an employment application a contractual provision.⁵⁰ But the Supreme Court, in a five to four decision, split along ideological lines, said that the case had to go to

⁴⁴ *Circuit City v. Adams*, 532 U.S. 105 (2001).

⁴⁵ *Id.* at 109.

⁴⁶ *Id.*

⁴⁷ *Id.* at 109–10.

⁴⁸ *Id.* at 110.

⁴⁹ *Id.*

⁵⁰ *See id.* at 124.

arbitration—that Saint Clair Adams couldn't go to state court.⁵¹ He couldn't get a jury trial that otherwise would have been available to him in state court.⁵² And, in case after case, the Supreme Court has enforced arbitration clauses even as a form contract.

I think another case which is quite significant, and this is *AT&T Mobility v. Concepcion*.⁵³ Here, the Concepcions, a married couple, saw an ad from AT&T advertising free cell phones for those who signed up for its services.⁵⁴ They, like all of us, signed an agreement. They, probably like most of us, didn't read the agreement they were signing. They were surprised when they got their first monthly statement for \$32.88 that was for sales tax; they thought since AT&T was advertising free cell phones it would pay the sales tax.⁵⁵ They wanted to be part of a class action suit against AT&T.⁵⁶ But in the agreement they signed was a clause that said that any dispute with AT&T would have to go to arbitration, not go to court.⁵⁷ The California Supreme Court in the *Discover Bank* case had said that such arbitration clauses in routine consumer contracts are not enforceable.⁵⁸ It said they're contracts of adhesion.⁵⁹ But the United States Supreme Court, in a five to four decision, reversed the Ninth Circuit and said that the Concepcions would have to go to arbitration.⁶⁰ Justice Scalia's majority opinion (the Court was ideologically divided) talked about the ill-effects of class actions.⁶¹ It talked about the terrorizing effects of class actions on businesses, forcing them to settle nonmeritorious claims.⁶² And I think there is an implicit criticism of the jury there. As a result, arbitration clauses are increasingly ubiquitous. They're in employment contracts. They're in consumer contracts. They're even in medical contracts.

Not long ago I went to see a new eye doctor for the first time, and I was given a big stack of papers to fill out. In the middle was a form I

⁵¹ *See id.*

⁵² *See id.*

⁵³ *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

⁵⁴ *Id.* at 337.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 336–37.

⁵⁸ *Id.* at 340; *see also Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), *abrogated by Concepcion*, 563 U.S. at 340.

⁵⁹ *Concepcion*, 563 U.S. at 346–47.

⁶⁰ *Id.* at 352.

⁶¹ *See id.* at 350–52.

⁶² *Id.* at 350.

was asked to sign: that if I have any claims against the doctor arising out of the treatment, I agreed I would not be able to sue the doctor. I'd have to go to arbitration. I asked the receptionist if the doctor would still see me if I didn't sign. She said she didn't know; nobody had ever asked her that question before. I now know of many doctors who will not see patients unless they sign waivers of going to court—arbitration agreements—which means they will never get to go before a jury.

Around the same time, I bought a new Dell computer. As you know, in order to use a computer and an iPad, you have to click that you've read the terms and agree to it. For the iPad, they're forty-six single-spaced pages long. I usually just click "Agree" and use the machine. Well, I decided to read the terms on my new Dell computer. Sure enough, there was a clause that said if I had any disputes with Dell arising out of the computer, I agreed I could not sue them, but I'd have to go to arbitration. In other words, I was giving up my right to a jury trial. I wrote Dell a letter saying I did not agree to that clause, and by opening the envelope of my letter they agreed I could sue them in court if we had a dispute. [Audience laughter.] Dell did not write back.

But I do think that the great growth in arbitration, as I've described, has contributed to the ambivalence with regard to the civil jury. But now juxtapose that with regard to the Sixth Amendment. In federal court, about ninety-five percent of all cases are resolved by a guilty plea. If you look across the country, to the state courts, it's quite similar to that as well.⁶³ We don't value the right to jury trial in criminal cases less because almost all criminal cases are resolved through this form of alternative dispute resolution. Why should we do so with regard to civil cases?

So, if I've convinced you that the right to jury trial in civil cases should be as important as that in criminal cases, that we don't treat it the same, and have offered some thoughts as to why, I think that does set the stage for the discussion today. I think some of the discussion that needs to be thought of is: how do we persuade the Supreme Court to take the Seventh Amendment more seriously and consider incorporating the Seventh Amendment? But until that happens, the right to jury trial in state courts is entirely a function of state constitutions. And that's why *Horton* is so important. That's why it's crucial here in Oregon with regard to the right to jury trial in civil

⁶³ *Id.*

cases, but it's also why, as other courts around the country look at *Horton*, it's going to be important to explain why the Oregon Supreme Court was mistaken, and why it's not taking this basic fundamental constitutional right seriously enough.

