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**THE CIVIL JURY: THE DISREGARDED  
CONSTITUTIONAL ACTOR**

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“The Civil Jury: The Disregarded Constitutional Actor”  
The Harold C. Schott Scholarship Award Lecture

University of Cincinnati College of Law  
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Professor Suja A. Thomas\*

Thanks, Lou. I want to thank the Harold Schott Foundation for its support of the award associated with this lecture. The Foundation has been incredibly gracious in its support of the law school through this award and other scholarship awards.

Before I embark on the topic for today I want to thank my former students who have helped me significantly with my scholarship over the years, including Tod Thompson, Ali Razzaghi, and Kim Breedon. I also want to thank my many colleagues who have read and commented on my drafts, including the Dean, and finally, I wanted to mention Jim Oldham of Georgetown Law School, a leading expert on English legal history of the late eighteenth century, who has generously taken time to comment on all of my work.

The title of this talk is “The Civil Jury: The Disregarded Constitutional Actor.” I thought a lot about the title of this talk. I didn’t like the word “disregarded” but it kept coming back to me. I tried “forgotten” but that is not true—the civil jury is not forgotten in our society. It really is that the civil jury is disregarded. Today I want to talk to you about why I think the civil jury is disregarded and why it should not be so disregarded and give you a call to action.

Much attention continues to be paid to the civil jury, including by a New York Times article this past spring by Adam Liptak which began “[t]rials are on the verge of extinction. They have been replaced by settlements, . . . , mediations and arbitrations and by decisions by judges based only on lawyers’ written submissions.” Liptak cites Professor Galanter’s work on the decline in the number of civil trials, both bench trials and jury trials. Galanter has written that “[i]n the fiscal year ending two months before the Federal Rules of Civil Procedure took effect in 1938, 19.9% of cases terminated by

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\* Professor, University of Cincinnati College of Law. Professor Thomas is the recipient of the Harold C. Schott Scholarship Award, which recognizes outstanding research and scholarly achievement by a member of the law school faculty. This lecture was delivered in conjunction with the Schott award. The material in this lecture is derived from the following articles: Suja A. Thomas, [Re-examining the Constitutionality of Remittitur Under the Seventh Amendment](#), 64 OHIO ST. L.J. 731 (2003); Suja A. Thomas, [The Seventh Amendment, Modern Procedure, and the English Common Law](#), 82 WASH. U. L.Q. 687 (2004); Suja A. Thomas, [Judicial Modesty and the Jury](#), 76 COLO. L. REV. 767 (2005); Suja A. Thomas, [Federal Tort Reform and the Seventh Amendment](#); Suja A. Thomas, [Why Summary Judgment Is Unconstitutional](#), 93 VA. L. REV. 139 (2007); Suja A. Thomas, [Why the Motion to Dismiss Is Now Unconstitutional](#), 92 MINN. L. REV. \_\_ (forthcoming 2008).

trial. In 1952, the trial rate for all civil cases [fell] to 12.1%. In 2003, only 1.7% of civil terminations occurred during or after trial.”

Many say this trend is all for the better and support arguments like ones of Professors Kozel and Rosenberg for the mandatory use of summary judgment. Others think the jury trial is very important particularly for the most factually intensive cases out there including civil rights cases. Professor Ruth Colker among other academics has argued that summary judgment has been overused in employment discrimination cases. Federal Judge Nancy Gertner of the District of Massachusetts has said that summary judgment is the procedure of choice when it should be just the opposite in employment discrimination cases.

I’m going to go back to the use of these procedures in civil rights cases after I tell you about my take on the use of these procedures. I have looked at this from the standpoint of examining the constitutionality of these procedures. I’m going to show you why I have concluded that several procedures, which affect the jury trial right, are unconstitutional.

Let me start with the Constitution as a whole. I think the Constitution is a beautifully written document. It gives the possibility of democracy and freedom. Those possibilities derive, I think, primarily from three inherent structures of the Constitution. First, the conception of the separation of powers between the judiciary, the legislature and the executive... Second, the conception of federalism, the division of powers between the federal government and the states...

You might wonder what is the third. And that’s the point of this lecture. The third structure inherent to our Constitution’s promise of democracy and freedom is the division of power between the judiciary and the jury. Because we do not know of this division of power between the judiciary and jury like we know of the division of power between the branches and the division of power between the federal government and the states, I argue that this division of power has not been protected as it should be.

So formally we have never seen this recognition of the jury as a constitutional actor, like the judiciary, the legislature, the executive, and the states. The Founders however recognized the importance of this division of power. John Adams stated “[a]s the Constitution requires that the popular branch of the legislature should have an absolute check, so as to put a peremptory negative upon every act of the government, it requires that the common people, should have as complete a control, as decisive a negative, in every judgment of a court of judicature.” In the Federalist Papers, Alexander Hamilton discussed the role of the jury. He argued that the civil jury could be stated to be “a security against corruption” of judges. He stated that the judiciary and the civil jury were called “a double security; and it will readily be perceived, that this complicated agency tends to preserve the purity of both institutions.”

Although the Founders recognized the jury as a separate important constitutional actor, we have not seen this recognition in practice as the constitution is interpreted. In

practice, this lack of formal recognition of the division of power between the jury and the judiciary has resulted in the grant of power to the more powerful of these two actors, the judiciary, through procedures unknown under the English common law. These procedures include remittitur, summary judgment and the new motion to dismiss.

Let me give you a brief tutorial on the Seventh Amendment right to a jury trial in civil cases. The Seventh Amendment has been interpreted to apply to only the federal courts. Many states though, including Ohio, have themselves constitutionalized significant jury trial rights. Today I will talk only of the federal right to a jury trial which the Seventh Amendment addresses.

One of the least known facts about the Constitution is that the Seventh Amendment is the absolutely only part of the Constitution that explicitly includes the words “common law.” The significance of this fact is that this usage in the Seventh Amendment requires that the common law govern the right to a civil jury trial.

There is often talk of what role originalism should play in the interpretation of the Constitution. Originalism is defined as the original intent of the Founders or more recently defined as original public meaning. The Supreme Court has used originalism to inform the interpretation of various parts of the Constitution, using the English common law at the time of the founding.

The Seventh Amendment, however, is the only part of the Constitution that explicitly through the text requires this application of originalism. The Supreme Court has said that common law in the Seventh Amendment means the English common law in 1791 when the Seventh Amendment was adopted. While the Court has stated “the common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions, the Court has also stated that here we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791.” And the Court has stated that “[t]o effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution.”

So, in the first clause of the Amendment it says in suits at common law the right to trial by jury shall be preserved. The Court has interpreted this to mean that there is a jury trial right in cases with legal rights and remedies where there was a jury trial under the common law versus cases with equitable remedies and admiralty cases under which there was no jury trial under the common law. The Court has also emphasized that the substance of the common law, not the form should be satisfied. So, the Court in Curtis v. Loether said that there was a jury trial right for the congressional created cause of action of housing discrimination which gave a right to damages. This was so because this was a tort-like right and remedy tried to juries in England at the time that the Seventh Amendment was adopted.

Moving on to the second clause of the Amendment, it says that no fact tried by jury shall be otherwise re-examined by any court of the United States than according the

rules of the common law. The Court has stated that with respect to the second clause that any new procedure which permits the re-examination of facts must comport with the substance of the English common law jury trial.

Let me point out though that the Court's implementation of the substance of the common law has led the Court to constitutionally approve every new procedure that takes power from the jury before, during and after trial. I think this has been fundamentally the wrong result. I go back to my larger point that there must be a recognition of the division of power between the judiciary and the jury.

The judiciary itself is in an odd position with respect to its decisions on its power versus the power of the jury. The jury itself has no power to protect its power, unlike for example, the legislature and the executive. Despite Court rulings, the Executive, the legislature, and the states can continue to do business. The jury can't do business if the Court strips it of its power. I assert that is the position that the jury is in today. But it shouldn't be. In "Judicial Modesty and the Jury," a paper published by the Colorado Law Review,<sup>1</sup> I argued that the judiciary should act modestly in its exercise of its power over the jury because of this dynamic. This dynamic is such that "any review of the power of the jury involves the review of the judiciary of its own power in comparison to the jury. As such, the judicial review of the power of other constitutional actors is unlike the judicial review of the power of the jury. If the jury is interpreted to have power under the Constitution, the judiciary generally has less power. Also, while the judiciary's review of the power of other constitutional actors often takes place after the branch or the states act in the first instance, the judiciary can prevent the jury from acting at all. Moreover, the jury, unlike other constitutional actors, does not have any power to counter impingement by the judiciary upon its authority and other constitutional actors also do not have power to counter fully any impingement on the jury's power." As a result, I argue in my Colorado paper that the judiciary should act modestly with respect to its interpretation of the power of the jury. I then state that the judiciary has not done so with respect to the civil jury.

Acting modestly would entail "a narrow construction of the judiciary's power in relationship to the other constitutional actor. Such an interpretation of the judiciary's power as a narrow construction of its own power in relationship to the other constitutional actor would, I argue, involve an examination of the text of the Constitution. Wherever the scope of the judiciary's constitutional power is possibly ambiguous, the judiciary would narrowly construe its own power in favor of power to the other actor." In the context of the Seventh Amendment, this would mean that the English common law at a set point in time – in 1791 when the Seventh Amendment was adopted – would apply. If the common law evolved – in other words, could be different than what it was in 1791 – judges could opt to give themselves more power effectively rendering the Seventh Amendment a nullity.

In contrast to the Seventh Amendment, in the context of the Sixth Amendment, we have seen the judiciary act modestly where the judiciary in a series of cases has given

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<sup>1</sup> Suja A. Thomas, *Judicial Modesty and the Jury*, 76 COLO. L. REV. 767 (2005).

the jury the power to decide facts that determine sentencing. Professor Barkow noted that “the Supreme Court has not allowed the kinds of limits on the criminal jury that it has condoned in the civil context.” I have argued that the “[t]he Court has interpreted the [Sixth] Amendment such that the criminal jury holds important powers including the power to decide every element of a crime with which the defendant is charged. Moreover, the jury has been held to have the power to decide both fact and law and thus to acquit without review by a court. Additionally, a judge may not direct a verdict for the government nor may a judge overturn an acquittal nor may a judge generally require a special verdict.”

So why has the power granted to the criminal jury contrasted so much with the power granted to the civil jury. It’s difficult to decipher. The Court has applied the English common law to give these significant powers to the criminal jury, even though unlike the Seventh Amendment, the common law does not explicitly govern the Sixth Amendment. The difference between the Court’s treatment of the Sixth and Seventh Amendments may have something to do with the fact that the Sixth Amendment concerns liberty and the Seventh Amendment concerns property. That we are more comfortable with a jury taking a person’s liberty, versus a judge.

Let me go back to talking more specifically about what I have found in my scholarship about the Seventh Amendment that demonstrates that the Court has not acted modestly in its interpretation of its power in relationship to the power of the jury. In my first article, “Re-examining the Constitutionality of Remittitur Under the Seventh Amendment,” published by the Ohio State Law Journal,<sup>2</sup> I examined whether a device like remittitur existed under the common law. Remittitur in the federal courts is the reduction of a jury verdict by a judge after a jury decides a case. To order a remittitur, the verdict should “shock the judicial conscience.” The judge decides the maximum amount a reasonable jury could find under the facts. The judge decides this by using other cases in which remittiturs were requested and comparing the facts in those cases to the case at hand. The court orders that the plaintiff take the remitted amount or a new trial. The new trial is generally on the particular damages award. A new jury hears the evidence and decides the amount to award. You cannot appeal the order of the new trial until after you have taken the new trial.

Let me give you a concrete real example. A jury awards \$219,000 in emotional distress damages to a plaintiff in a suit in which the plaintiff alleged he was retaliated against for complaining of race discrimination. The defendant moves for a remittitur of the award to \$20,000 or a new trial. The judge decides that \$20,000 is the maximum a reasonable jury could find and orders the plaintiff to take the \$20,000 or a new trial. The plaintiff is in a difficult position: take the remitted amount or take a new trial when the judge has already pronounced the maximum amount a reasonable jury could find on the facts. If the plaintiff takes the new trial and the jury awards more than the remitted amount the judge should remit again to the amount the judge has already decided was the maximum amount a reasonable jury could find.

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<sup>2</sup> Suja A. Thomas, *Re-examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003).

I did two studies to look at the constitutional issue of remittitur. Previously the Supreme Court had opined that the constitutionality of remittitur was “doubtful precedent.” This peaked my interest in looking at this issue. In one study, I looked at remittiturs in federal court to find out if plaintiffs took the new trial. I found that plaintiffs took the new trial in only 2% of the cases. They took the remittitur in 71% of the cases, not receiving one dime more than the judge ordered, and settled in 27% of the cases. I concluded that the new trial option was not a real option because the plaintiff did not have the real option of taking the new trial given what would happen after another trial with a similar verdict.

Beyond the elimination of the jury trial, we start to see a theme that judges are using these devices to eliminate or second guess the jury in fact-intensive cases and this often occurs in cases where the facts are uncertain. In the cases studied, 68% of the damages remitted were uncertain damages. Remittitur also significantly occurred in the context of civil rights cases. 63% of the verdicts remitted in the last 5 years of the study occurred in civil rights cases.

We start to see a pattern of judges’ involvement in civil rights cases, including employment discrimination cases, through these procedures that affect the jury trial right. We even see that Justices of the Supreme Court “have encouraged the use of remittitur as a way to control damages rendered by juries in civil rights cases.” These are so called liberal justices too – Justices Stevens, Souter, Ginsburg and Breyer. And we see another interesting theme in Seventh Amendment jurisprudence that being a liberal justice is often not in the camp of the jury—and we’re going to return to that theme later.

I did one additional study in the Ohio State paper. This study parallels the studies that I will tell you about from my summary judgment and motion to dismiss papers. In this study, I examined the English common law to see if remittitur as practiced in the federal courts existed under the English common law. In my study, I found that remittitur as practiced in the federal courts did not exist under the common law. Remittitur under the English common law simply corrected a pleading problem. For example, if the plaintiff pled \$20 of damages and the jury found \$30, the verdict was remitted to \$20. There were no substantive determinations of what the jury should have found. This was strictly prohibited. The only such determination that occurred at common law was upon a motion for a new trial. In that circumstance, the judge would decide if the verdict was not in line with the evidence. If so, the judge could order a new trial. The judge would do so only in cases in which damages were certain, as in a breach of contract case, but not a tort case. One of the findings I have found most interesting is this. That judges would not order new trials when damages were not certain. So putting this practice in today’s world, judges would not be permitted to order remittiturs nor for that matter would judges be permitted to order new trials for damages that are uncertain. At least one federal judge has paid attention to the remittitur findings in my article stating in an opinion that my “caution [regarding remittitur] merits evaluation by the federal courts.”

Let me tell you about the piece that has received the most attention because summary judgment is used more often than remittitur or the motion to dismiss. We'll come back to the motion to dismiss and the impending trend. I want to tell you about how I decided to write the summary judgment paper.

For years academics wrote about the large use of summary judgment in employment discrimination cases and I've mentioned Ruth Colker as an example. In practice I had seen first hand the use of this procedure in fact intensive cases. So after my remittitur article, having read a lot about the common law procedures, my hunch was that summary judgment was also improper. Some well-known academics had acknowledged possible Seventh Amendment problems—including Arthur Miller and Marty Redish and his co-author Ed Brunet, all of whom have been distinguished visitors at our law school.

Let me step back and briefly remind you of the standard for summary judgment. A court decides there are no genuine issues of material fact. This has been interpreted to mean that no reasonable jury could find for the non-moving party.

Similar to remittitur, summary judgment has never had a firm constitutional basis. The Court and scholars had cited *Fidelity & Deposit Co.* as the basis for the constitutionality of summary judgment when the rule there was comparable only to the motion to dismiss.

So, I embarked on an article to decipher the substance of the common law and eventually to compare that to summary judgment. I was motivated to do this because I was bothered by the fact that the Supreme Court had said that the substance of the common law jury trial should be examined but the Court had never looked at what that was. Instead the Court had piecemeal looked at different procedures under the common law and compared them to the modern procedures and said this is close enough. Because the Court itself had not analyzed the substance of the common law, I wanted to see if there were any core principles that emerged from the common law.

I examined all of the major common law procedures by which the jury trial right was affected. The core principles or substance that emerged from my research first published in the *Washington University Law Quarterly*<sup>3</sup> and my subsequent *Virginia Law Review* article “*Why Summary Judgment Is Unconstitutional*”<sup>4</sup> were these: “One party could admit the allegations or the conclusions of the evidence of the other party, or the parties could leave the determination of the facts to the jury. A court itself never decided the case without a determination of the facts by the parties or the jury, however improbable the evidence might be. Second, only after the parties presented evidence at trial and only after a jury rendered a verdict, would a court ever determine whether the evidence was sufficient to support a jury verdict. Where the court decided that the evidence was insufficient to support the verdict, the court would order a new trial.

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<sup>3</sup> Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687 (2004).

<sup>4</sup> Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).



Another jury would determine the facts and decide which party won. The court itself would never determine who should win if it believed the evidence was insufficient. Third, a jury would decide a case with any evidence, however improbable the evidence was, unless the moving party admitted the facts and conclusions of the nonmoving party, including the improbable facts and conclusions.”

So in my Virginia piece, I compared summary judgment to individual procedures under the common law and also compared it to the core principles of the common law. There was no match. In order to eliminate the jury under the common law, the demurring party was required to admit the facts and conclusions of the moving party, including the improbable facts and conclusions. Circumstantial evidence must be admitted, etc. Thus, there was no procedure similar to summary judgment under the common law.

With that said, the Court is not moving in the direction to eliminate summary judgment or other problematic procedures. As I have said it’s quite the opposite, and this past term is no different. In my newest paper “Why the Motion to Dismiss Is Now Unconstitutional,” which the Minnesota Law Review will publish next year,<sup>5</sup> I discussed two cases decided by the Court. The Court considered two cases that concerned the appropriate standard for the motion to dismiss. In *Twombly* the Court retired the fifty year old standard for the motion to dismiss where the facts pled were taken as true and the case could not be dismissed unless there was no set of facts upon which relief could be granted. The Court decided that there should be a determination of whether the claim was plausible. The Court followed up with a decision in the *Tellabs* case where the Court stated that both inferences that favor the plaintiff and inferences that favor the defendant could be considered in deciding whether to dismiss the case. In that case, the Court made its most recent statement on the Seventh Amendment. In this decision, the Court failed to consider the common law and emphasized the concern that companies should not be subject to discovery and forced settlements in unmeritorious cases. So, it’s not looking too good for the Seventh Amendment after this term. In fact I venture to predict that the motion to dismiss is becoming the new summary judgment motion.

I want to say a few words about tort reform as it applies to the federal courts. Tort reform has been incorporated in federal legislation in various ways including by caps on damages in the 1991 Civil Rights Act and there are always other efforts to federalize tort reform. I did a talk a few years ago on this topic at the annual law professors meeting and the talk is published on law schools’ association website.<sup>6</sup> Unsurprisingly, when I looked at this issue, I found federal tort reform constitutionally problematic under the Seventh Amendment. Again this fundamentally goes back to the structure of the Constitution established by the Founders. The Founders established a constitutional structure whereby the jury in federal courts decided certain cases and damages were a fundamental component of such jury decision-making. If we permit the

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<sup>5</sup> Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. \_\_\_ (forthcoming 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1010062](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010062).

<sup>6</sup> Suja A. Thomas, *Federal Tort Reform and the Seventh Amendment*, available at <http://www.aals.org/am2006/program/papers/thurs/civilprocThomasspeech.pdf>.

legislature to alter jury verdicts in any case that goes before the jury, then we are effectively rendering at least part of the constitutional right to a jury trial a nullity. While juries can still decide liability in cases, juries may not be able to decide the damages, dependent on whether the legislature enacts a cap.

A number of Circuits have opined on the constitutionality of state caps under the Seventh Amendment. The decisions are instructive as to the reasons that have been given by courts thus far for the constitutionality of caps under the Seventh Amendment. The Circuit decisions are based on one or more of the following: caps are constitutional because legislatures, not courts, are reviewing the facts found by the jury; caps are constitutional because the legislature can eliminate causes of action and thus also can limit damages; caps are simply the law that is being applied to a jury's finding of the facts; caps are constitutional because there may not be a right to a jury trial in the remedy phase of a civil jury trial.

Once again this goes back to my argument that the jury is a constitutional actor with specific powers. Nothing in the Constitution indicates that the legislature was to be a check on the jury. In fact the separation of power between the judiciary and the legislature and then, the subsequent power that the judiciary alone is given over the jury in the Seventh Amendment confirms that the legislature was not intended as a check on the jury. So part of my answer to the constitutionality of legislative caps is that the Constitution's text itself does not support such a role for the legislature nor does the discussion surrounding the adoption of the Constitution and the Seventh Amendment support such a role.

The next part of my answer to the arguments for the constitutionality of legislative caps looks to English legal history and my remittitur empirical study. Under the English common law, a judge could re-examine a verdict only by considering whether to order a new trial. The jury alone decided the damages and jury's findings almost invariably would stand. If the damages were excessive, a new trial was ordered. An English judge at the time stated "we cannot say what the damages ought to be, but can only send it for the investigation of another jury."

As to the relevance of the remittitur empirical study, I propose that caps would have a similar effect to remittitur on the right to a jury trial. Where there is a cap, a plaintiff with a significant claim has little reason to take the case to trial. The legislature has already decided what the case is worth. The cap possibly forces the plaintiff to take less than the case is worth because the defendant arguably should offer less than the cap because the cap is the most the plaintiff can obtain by going to trial.

With all that I have said about the current problems with the system, I want to address what can be done – how this tide can turn. The state of the summary judgment argument right now is that some lawyers are raising the argument in their briefs in responses to motions for summary judgment. No judges have rendered opinions on the matter that I have seen. I hope that the argument continues to get attention at a symposium at the University of Iowa at the end of February. They are focusing part of

the symposium on summary judgment and the Seventh Amendment and I along with two other academics will discuss and debate the issue with our moderator being an Eighth Circuit judge.

Another way I hope the civil jury is better recognized as a separate constitutional actor is interest groups taking an interest in the jury. Congress continues to consider expansion of civil rights protection including employment protection to groups including for example gay and lesbian groups. I think that is terrific. However, interest groups need to band together to lobby congress to protect the jury trial right. In other words, if you care about a civil rights issue, you should be very concerned about stepping up to protect the jury trial right which ultimately will help the more substantive civil rights issue.

I want to go back to the odd liberal – conservative dichotomy in the context of the jury. That the justices whom we label as conservative are the ones who are advocates of the jury trial right and those whom we label as liberals are not. Justice Scalia and Thomas are two of those jury advocates. Why is that—is some sense I cannot see any other reason than that liberals shy away from originalism. Originalism is seen as bad, antiquated, against rights. But that is not the case. There may be significant areas where originalism is particularly appropriate and indeed constitutionally required including under the Seventh Amendment. Hence the concept in a draft paper I wrote a few years ago arguing liberals should embrace originalism.

This is where members of the court could join together. The federal judiciary has the opportunity to take politics out of its decision-making and together support a symbol of democratic participation.

Let me step back. I am advocating a significant change to the system. You may be thinking doesn't that mean that the system will fall apart. I think not and I can talk more about this as I did in my summary judgment article and in an op ed that I wrote for the National Law Journal.

I want to end by again going back to my bigger point that what I am advocating is really a place for the jury at the table. There is – in fact – such a place for the jury and it's constitutionalized in the Seventh Amendment. It just continues to be ignored. To preserve one of the checks in the system that the Founders intended, we should recognize alongside the separation of powers and federalism, the importance of the separation of power between the judiciary and the civil jury.

Thank you.