The Breakfast Club

Constitutional Minute for 4 Jul 2023

Right #22: The Right to a Jury in Common Law Cases

Before we plunge into the 7th Amendment, let's pause and contemplate the events of 247 years ago today. Would you have voted for independence? Would you have pledged to the other delegates of the Continental Congress your life, your fortune and your sacred honor? Think about it for a moment. What an awe-inspiring decision.

OK, back to the task at hand.

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

There's quite a bit to unpack here; let's begin with a primer on common law.

We all know statute law; this is law created by legislatures, written down in law books, and enforced when necessary by law enforcement agencies. Common law on the other hand is often, but inaccurately called "judge-made law." Common law is comprised of a collection of judicial decisions which don't deal directly with the interpretation of any particular statute, because no law existed which applied to the particular circumstances of the case when it came before the court. The term "judge-made law" is inaccurate because judges are not vested with legislative power, they can't make law, and they don't, legislatures make the law. The political entity which gives a judge's decision the status of law are the people. The people? Let's review: Acting in their sovereign capacity, the people share their inherent legislative power with elected representatives who then form a legislature. They vest this legislative body with legislative power through a constitution. That constitution provides the judiciary with no legislative power whatsoever.

If a judge's opinion in a case, whether common law or statute law is not perceived to be fair, the people should ignore it, making it null and of no effect. If the people decide the opinion is right, they give it the status of law by obeying the decision as law. Future judges may then use this earlier decision as precedent.

So a better term for Common law is "customary law." A judge's decision and those which follow using it as precedent, becomes the "custom" of the land. "That's just how we do it around these here parts," is a colloquial way of describing common law.

Here's an example.

Your cow wanders onto someone else's property and damages a farmer's crops. There is no statute law covering this situation, but the farmer naturally wants to be compensated for the

damage. You deny you are responsible for the actions of your cow and the farmer takes you to court. Not finding a law which applies to the situation, the judge rules in favor of the farmer and says you must pay for the damaged crops. The next year, someone's horse wanders off, is spooked by a snake, and runs into someone's car, denting it; the owner sues when the horse owner points out they had no control over the snake. The judge, again finding no statute law covering this situation, searches the common law and finds the previous year's precedent which seems to apply to these circumstances. He uses this common law case to guide his current decision, making a "law" which says you are responsible for damage caused by your animals.

Supreme Court opinions share some of the character of the common law in their attention to precedent. But the court itself warned in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) that "[t]here is no federal general common law."

Statue law can't possibly cover every possible hazard to life and property, and long ago, when statute laws were less comprehensive, suits at common law were more common; today, statutes have proliferated to cover many if not most situations, but common law precepts still exist.

As you might expect, American common law derived from English common law, which derived from Biblical law and centuries of custom.[1]

After securing jury trials in criminal cases in Article 3, the Constitutional Convention discussed but defeated a proposal for jury trial in civil cases. During ratification of the Constitution, several states urged Congress to provide this right as an amendment. In fact, this omission became the greatest source of opposition to ratification, as Alexander Hamilton admitted in Federalist 83. Five of the six ratifying conventions that proposed amendments to the Constitution urged securing the right to a civil jury.

Neither the Jury Trial Clause nor the Reexamination Clause has been incorporated using the 14th Amendment, thus states are free to establish or ignore this right at state level.

In *Baltimore & Carolina Line v. Redman* (1935), the Supreme Court stated that the amendment applies to the kinds of cases that "existed under the English common law when the amendment was adopted."

The right to a jury trial in federal civil proceedings is further annunciated in Rule 38 of the Federal Rules of Civil Procedure.

But wait, there are two clauses in the 7th Amendment; what about the Reexamination Clause?

Its origin is rooted in a fear that the newly established Supreme Court would destroy the jury system. Article 3, Section 2 Clause 2 of the Constitution ends with the words: "*In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law* ***and Fact****, with such Exceptions, and under such Regulations as the Congress shall make."*

If the Supreme Court could overrule civil juries in their determination of case facts (as differentiated from a determination of the law), why bother with civil juries? Every civil trial would end up at the Supreme Court. At the suggestion of the ratifying states, Madison was quick to add these words to what became the Seventh Amendment:

"[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States…" (Emphasis added)

The jury's word is final as to the facts of a case -- period.

For further reading:

The Common Law in Colonial America, Vol. 1: The Chesapeake and New England 1607-1660, by William E. Nelson, 2008.

Common Law and Natural Law in America (Law and Christianity) New Edition, by Andrew Forsyth, 2019.

Law, Liberty and the Constitution: A Brief History of the Common Law, by Harry Potter, 2020.

Next week: Right #23: Protection from excessive bail and fines. (8th Amendment).

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[1] "The Bible has always been regarded as part of the Common Law of England." Sir William Blackstone. "One of the beautiful boasts of our municipal jurisprudence is that Christianity is a part of the Common Law. . . There never has been a period in which the Common Law did not recognize Christianity as lying its foundations." Justice Joseph Story, 1833.