RESOLVED, That the American Bar Association supports the application by state, territorial, and federal courts of the modern incorporation doctrine standards to the Seventh Amendment to the Constitution of the United States and make its formulation of the fundamental right to trial by jury in civil cases applicable to all states and territories of the Union.
Historical Background

When the States considered ratification of the Constitution of the United States, the most salient argument against replacement of the Articles of Confederation with the newly drafted Constitution was the absence of a bill of rights. The right to trial by jury was contained in each of the state declarations of rights that preceded the U.S. Constitution and was the right most urgently advocated for the Bill of Rights. The importance of juries, both generally and in civil cases in particular, is well recognized in the policies of the Association. Even so, the guarantee of the fundamental right to a civil jury trial currently depends on state constitutions. Three states, Colorado, Louisiana, and Wyoming, have no civil-jury trial guarantee in their state constitutions. All other state constitutions guarantee a civil-jury trial, but apply it unevenly and sometimes less rigorously than the federal courts apply the Seventh Amendment right to trial by jury in civil cases.

Originally, the provisions of the federal Bill of Rights applied only to the federal government and not the states. Under the organic acts, only those parts of the U.S. Constitution obligatory on the states apply as well to territories. For that reason, the resolution, if implemented, would also extend Seventh Amendment rights to territories. However, tribal courts, as the judicial branch of a separate sovereign are not subject to the Bill of Rights or the Fourteenth Amendment, and the resolution makes no change to those arrangements.

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1 *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636-37 (1943) (“Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification.”).
3 Eric J. Hamilton, Note, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 858-59 (2013). Louisiana follows a civil-law tradition, rather than the common law, unique among states. Because the Seventh Amendment preserves the jury-trial right as it existed at common law, federal law will determine eligibility for the application of the Seventh Amendment. *Parsons v. Bedford*, 28 (3 Pet.) U.S. 433, 447 (1830), established that the Seventh Amendment’s reference to suits under common law embraced cases in which “legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized.” In addition, the Supreme Court held that “the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). The federal district courts already have experience applying this principle to Louisiana statutory causes of action because the Seventh Amendment applies in federal courts sitting by diversity. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996).
5 See, e.g. *Newby v. Gov’t of Guam*, 2010 Guam 4, ¶ 45 (Guam Mar. 5, 2010), (“the Seventh Amendment’s guarantee of a civil jury trial has never been extended to the States, and because the Organic Act only extends the Seventh Amendment to Guam as it applies to the States, see 48 U.S.C. § 1421b(u) (2008)”).
Near the turn of the twentieth century, the Supreme Court began a project of selective incorporation, by which individual clauses or whole amendments of the Bill of Rights were determined to apply to the states. Relying on the Fourteenth Amendment,7 the Supreme Court began to apply the individual liberties recognized in the Bill of Rights to the States. After a period of dormancy in the project, the Supreme Court has once again undertaken the concept of incorporation, applying the Second Amendment’s right to bear arms8 and the Eighth Amendment’s Excessive Fines Clause9 to the states. This term, the Supreme Court will consider whether the Sixth Amendment’s unanimous jury-trial requirement in criminal cases applies to the states. The ABA filed an amicus curiae brief that urged the Supreme Court “to hold that the Fourteenth Amendment fully incorporates the Sixth Amendment’s requirement of jury unanimity.”10

The renewed interest among the justices of the Supreme Court in the Incorporation Doctrine makes this a ripe time to urge that the Seventh Amendment be applicable to the States as well. As with Timbs, in which the Supreme Court “incorporated” the Excessive Fines Clause, there is no current circuit split because of existing Supreme Court precedent, in this case of more than a century ago. Yet, the Supreme Court’s willingness to revisit the incorporation of the Second, Sixth, and Eighth Amendment suggests that it may be prepared to examine incorporation of the Seventh Amendment.

The Association has joined the many voices that have bemoaned the “disappearing jury trial.”11 In fact, the availability and use of juries in civil cases has been a constant concern of the Association, dating back to at least 1891 and continuing to today.12 With nearly all other provisions of the Bill of Rights now incorporated, the time to give full status to the Seventh Amendment is long overdue. This resolution would enable the Association to file an amicus curiae brief in support of a case that asks that the Seventh Amendment be applied to applicable common-law causes of action that originate in state courts.

The Meaning of the Seventh Amendment

The Seventh Amendment provides: “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 re-examined in any Court of the United States,

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7 The Supreme Court has uniformly held that the Fourteenth Amendment’s Due Process Clause provides the means by which incorporation takes place, *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019), although there is sentiment in both academia and among some justices that the Fourteen Amendment’s Privileges and Immunities Clause is a better vehicle for incorporation. See, e.g., Akhil Amar, The Bill of Rights: Creation and Reconstruction 163–214 (1998); *Timbs*, 139 S.Ct. at 691 (Gorsuch, J., concurring); 139 S.Ct. at 691-92 (Thomas, J. concurring).
9 *Timbs*, 139 S. Ct. 682.
12 See Note, *Meeting of the American Bar Association – Trial by Jury*, 5 Harv. L. Rev. 202 (1891); 2014 AM Res. 105a (opposing the “suspension or delay of the fundamental right to a civil jury trial, in the face of difficult fiscal circumstances.”); 2005 Principles for Juries and Jury Trials.
than according to the rules of the common law.” The Amendment is generally acknowledged to contain two complimentary provisions: the Preservation Clause and the Reexamination Clause. The Preservation Clause protects the right to trial by jury as it existed under the English common law when the Amendment was adopted. More broadly, the Preservation Clause protects a litigant’s rights to a jury trial and all the prerogatives that come with it. The Reexamination Clause, on the other hand, prevents substitution of judicial factfinding for the jury’s determinations.

The test for a Seventh Amendment violation is fundamentally historical in nature and consists of two questions: 1) “whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was;” and, 2) whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.

The Incorporation Doctrine

Under the Incorporation Doctrine, a federal right is applicable to the States “if it is ‘fundamental to our scheme of ordered liberty,’ or ‘deeply rooted in this Nation’s history and tradition.’” In 2019, the Supreme Court unanimously applied the Excessive Fines Clause of the Eighth Amendment to the States for the first time. Also, recently, the Second Amendment’s right to bear arms was incorporated.

Unquestionably, civil jury trials are a “fundamental” feature of our justice system. Moreover, it is essential to a fair trial. It thus qualifies under the first alternative test for incorporation. Still, it qualifies as well for incorporation under the second alternative test.

Like the Excessive Fines Clause incorporated in *Timbs*, the civil-jury right “traces its venerable lineage back to at least 1215” and Magna Carta. William Blackstone wrote that Magna Carta’s acknowledgement of trial by jury was “the principal bulwark of our

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16 *Markman*, 517 U.S. at 376 (citations omitted).
17 *Timbs*, 139 S. Ct. at 687.
18 *Id*.
22 Cf. *Timbs*, 139 S. Ct. at 687. See also *Magna Carta* ch. 39 (1215).
23 Sir William Blackstone’s commentaries on English common law, published on the eve of the American Revolution in 1765 had a profound impact on American legal thinking and were widely accepted as “the most satisfactory exposition of the common law of England .... [U]ndoubtedly, the framers of the Constitution were familiar with it.” *Schick v. United States*, 195 U.S. 65, 69 (1904).
British attempts to restrict the jury right in the American colonies, along with taxation without representation, was a primary complaint against British rule.\(^{25}\) As Justice Story wrote: “trial by jury in all cases, civil and criminal, was as firmly and universally established in the colonies as in the mother country.”\(^{26}\) As a result, trial by jury was the only right universally secured by all 13 original American state constitutions.\(^{27}\) Today, only Louisiana, (which adheres to a civil law tradition), Wyoming, and Colorado lack a constitutional civil-jury guarantee.\(^{28}\)

The guarantee was also essential to approval of the U.S. Constitution; its absence the strongest objection to its ratification.\(^{29}\) The Seventh Amendment was added to ensure, among other things, that neither legislators nor judges interfered with the jury-trial right.\(^{30}\) The Seventh Amendment thus establishes that the “[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”\(^{31}\)

In evaluating a right’s deep roots in history and tradition, the Supreme Court has looked to whether state constitutions had adopted a similar right. In considering Second Amendment incorporation, the Supreme Court recognized that a majority of states, “22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms” when the Fourteenth Amendment was ratified.\(^{32}\) By comparison, at that time, “[t]hirty-six out of thirty-seven states . . . guaranteed the right to jury trials in all civil or common law cases.”\(^{33}\) In fact, “[f]ully 98% of all Americans in 1868 lived in jurisdictions where they had a fundamental state constitutional right to jury trial in all civil or common law cases.”\(^{34}\)

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\(^{25}\) See Declaration of Independence ¶ 20 (U.S. 1776) (charging England with “depriving us in many cases, of the benefit of trial by jury.”).
\(^{26}\) 1 Joseph Story, Commentaries on the Constitution of the United States, § 165 at 117 (Melville M. Bigelow, 5th ed. 1905) (1833).
\(^{28}\) Hamilton, 65 Stan. L. Rev. at 858-59.
\(^{29}\) Parsons, 28 U.S. at 445.
\(^{33}\) Calabresi & Agudo, 87 TEXAS L. REV. at 77.
\(^{34}\) Id.
Just as Timbs said of the excessive-fines prohibition, the jury-trial right “has been a constant shield throughout Anglo-American history.” Indeed, as with excessive fines, “the historical and logical case for concluding that the Fourteenth Amendment incorporates the [Amendment] is overwhelming.” Given the modern approach to the Incorporation Doctrine, arguments against application of the Seventh Amendment, as the Supreme Court recognized in incorporating the Second Amendment, are “nothing less than a plea to disregard 50 [now 60] years of incorporation precedent and return . . . to a bygone era.”

The precedents against incorporation long predate incorporation precedent. Seventh Amendment incorporation was only reviewed in Walker v. Sauvinet, 92 (2 Otto) U.S. 90 (1875) and Minneapolis & St. Louis R. Co. v. Bombolis, 241 U. S. 211 (1916). Both decisions precede the Supreme Court’s first articulation of what is now called the Incorporation Doctrine in Gitlow v. New York, 268 U.S. 652 (1925), which held that the Fourteenth Amendment’s Due Process Clause made the First Amendment’s free-speech guarantee applicable to the States. Today’s Supreme Court has criticized reliance on the cases from that earlier era, because they “did not engage in the sort of Fourteenth Amendment inquiry required by our later cases,” and has invited courts to undertake that analysis.

Although it may be anticipated that some states may oppose incorporation of a civil jury trial right because of the added expense that more jury trials may involve, however, as the Ninth Circuit has held, “the availability of constitutional rights does not vary with the rise and fall of account balances in the Treasury.” That statement reflects, as well, the ABA’s position adopted in 2014 AM Res. 105a, where the report favorably quoted the Ninth Circuit on this issue and opposed the “suspension or delay of the fundamental right to a civil jury trial, in the face of difficult fiscal circumstances.”

Conclusion

The resolution urges state, territorial, and federal courts to apply the modern incorporation doctrine standards to the Seventh Amendment to the Constitution of the United States and make its formulation of the fundamental right to trial by jury in civil cases applicable to all states and territories of the Union. It is an issue the Supreme Court has not revisited since 1916. In the time since then, the Supreme Court has applied the Incorporation Doctrine to nearly every other provision of the Bill of Rights. In 2019, it applied, for the first time, the Eighth Amendment’s Excessive Fines Clause and, this term, is considering incorporation of the Sixth Amendment’s unanimous criminal jury requirement, a position that the ABA urged the Supreme Court to adopt in an amicus brief. If the unanimous criminal jury requirement is incorporated, only the Seventh Amendment’s civil-jury guarantee and the Third Amendment’s quartering of troops provision will remain

36 Timbs, 139 S.Ct. at 689.
37 McDonald, 561 U.S. at 780.
39 Armster v. United States District Court for the District of Alaska, 792 F.2d 1423, 1429 (9th Cir. 1986).
unincorporated. Because the Third Amendment has not figured in litigation, the decision will effectively treat the civil jury as an orphan from the rest of the Bill of Rights, even though its claim for importance and its place in our history and traditions is second to none. This resolution seeks to remedy that and help restore the civil jury trial right to its proper place in the pantheon of rights guaranteed by the Bill of Rights. The Tort Trial and Insurance Practice Section urges the adoption of this resolution seeking support for the incorporation of the Seventh Amendment right to trial by jury in civil cases.

Respectfully submitted,

Dorothea M. Capone
Chair, Tort Trial and Insurance Practice Section
February 2020
GENERAL INFORMATION FORM

Submitting Entity: Tort Trial and Insurance Practice Section

Submitted By: Thea M. Capone, Chair, Tort Trial and Insurance Practice Section

1. Summary of the Resolution(s).

   This resolution urges state and federal courts to apply the modern incorporation doctrine standards to the Seventh Amendment to the Constitution of the United States and make its formulation of the fundamental right to trial by jury in civil cases applicable to all states of the Union.

2. Approval by Submitting Entity.

   Approved by the Tort Trial and Insurance Practice Section on November 13, 2019.

3. Has this or a similar resolution been submitted to the House or Board previously?

   No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

   Not applicable.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

   Not applicable.

6. Status of Legislation. (If applicable)

   Not applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

   The resolution would enable the Association to file an amicus curiae brief in support of a case that asks that the Seventh Amendment be applied to applicable common-law causes of action that originate in state courts.

8. Cost to the Association. (Both direct and indirect costs)

   None.
9. Disclosure of Interest. (If applicable)

TIPS Delegate Robert S. Peck has argued cases seeking incorporation of the Seventh Amendment. Currently, pending in the Colorado Court of Appeals is Smith v. Surgery Center, No. 2019CA186, in which Mr. Peck is counsel, which asks that the Seventh Amendment be incorporated.

10. Referrals.

This Report and Resolution is referred to the Chairs and Staff Directors of the Section of Litigation and Civil Rights and Social Justice.

11. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

Robert S. Peck
(202) 944-2874
robert.peck@cclfirm.com

12. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.

Robert S. Peck
(202) 277-6006
robert.peck@cclfirm.com
EXECUTIVE SUMMARY

1. Summary of the Recommendation

   This resolution urges state, territorial, and federal courts to apply the modern incorporation doctrine standards to the Seventh Amendment to the Constitution of the United States and make its formulation of the fundamental right to trial by jury in civil cases applicable to all states and territories of the Union.

2. Summary of the Issue that the Recommendation Addresses

   The Supreme Court has not revisited incorporation of the Seventh Amendment since 1916. In the time since then, the Supreme Court has applied the Incorporation Doctrine to nearly every provision of the Bill of Rights. In the past decade, it has incorporated the Second Amendment’s right to bear arms and the Eighth Amendment’s Excessive Fines Clause. This term, it is considering the Sixth Amendment’s unanimous criminal jury requirement. If the latter is incorporated, it leaves only the Seventh Amendment’s civil-jury guarantee and the Third Amendment’s quartering of troops provision as unincorporated. That Third Amendment has not figured in litigation, so that it effectively treats the civil jury as an orphan from the rest of the Bill of Rights, even though its claim for importance and its place in our history and traditions is second to none. This resolution seeks to remedy that and help restore the civil jury trial right to its proper place in the pantheon of rights guaranteed by the Bill of Rights.

3. Please Explain How the Proposed Policy Position Will Address the Issue

   This resolution will permit the Association to participate as amicus curiae on the incorporation question involving civil juries as it has, most recently, on the incorporation of the Excessive Fines Clause.

4. Summary of Minority Views or Opposition Which Have Been Identified

   At this time, the sponsors do not know of any opposition.