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Jury system: Constitution's invisible fourth branch of government

The book's cover features the proverbial milk carton with pictures of 12 people on the side. The title is "The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries" (Cambridge, 2016). It is a provocative new book by Suja A. Thomas, a professor at the University of Illinois College of Law.

The Bill of Rights guarantees not one, but three kinds of juries: the grand jury (Fifth Amendment), the criminal trial jury (Sixth Amendment) and the civil jury (Seventh Amendment). Of these rights, only one, the Sixth Amendment's criminal trial jury guarantee, has been selectively incorporated against the states by the 14th Amendment's due process clause.

As you probably know, the use of trial juries has gone from "occasional" to "rare." In 1962, juries tried 8.2 percent of criminal cases in federal court. By 2013, that declined to 3.6 percent. It is no better in state courts. In 2002, juries decided only 1.3 percent of criminal cases in the 22 most populous states.

It is even worse in the civil area. In 1962, juries decided 5.5 percent of federal civil cases; by 2013, that figure declined to 0.8 percent. And in 2002, juries decided only 0.6 percent of the civil cases in the 22 most populous states.

And we all know the reasons for the decline in juries: As Thomas puts it, they are "the inefficiency, cost, incompetence and inaccuracy of the jury."

Right?

Thomas emphatically says, "Wrong." And she offers an intriguing structural theory explaining and bemoaning the decline of the jury.

She starts with the three branches of government: the executive, legislative and judiciary. Thomas labels these as the "traditional constitutional actors."

She contends that these actors have marginalized the American jury by usurping functions that the jury had historically exercised.

For example, "The executive

[now in effect] charges, convicts and sentences despite juries indicting, convicting and sentencing in the past. The legislature can set damages, although only the jury historically had the power. The judiciary circumvents juries by dismissing cases via mechanisms such as the motion to dismiss, summary judgment, acquittal and judgment as a matter of law, procedures nonexistent at our Constitution's founding."

Thomas offers what she characterizes as a "unique view" of the jury. She argues that its centrality in the Bill of Rights shows that "the jury should be recognized as a co-equal of the (three) traditional actors and specifically as a significant check to balance their powers essentially as a (fourth) branch."

Thomas notes that the Constitution gives significant authority to the three traditional branches, and the Supreme Court has properly recognized this. But equally important, the Constitution established divisions between the three

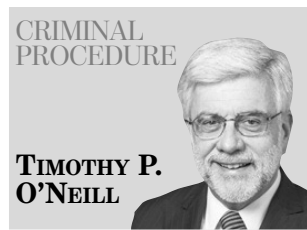
Unlike the other branches, the jury has a "unique inability to protect its own authority." The other three branches have both the ability and the desire to poach on the jury's power, but the jury lacks the constitutional tools to prevent it.

branches not only to protect but also to limit the power of each of them.

For example, a law generally cannot be approved unless there is agreement between both houses of Congress and the president; it takes a super majority in Congress to enact a law if the president vetoes it. The president can appoint members of the executive, but Congress has the power to "advise and consent."

And, although the Supreme Court can provide a check on usurpations of power by both Congress and the president, its justices must be appointed by the executive and approved by the Senate.

The jury has similar powers vis-a-vis the other branches. For ex-



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ample, although the executive branch may bring a criminal charge, the jury decides guilt. The legislature makes laws, but the jury decides facts and applies the facts to the law. If a jury acquits, the judiciary is absolutely barred from reversing that decision.

So why has the jury been on a downward spiral in the U.S.?

The problem that Thomas sees is that the doctrines of separation

of powers and federalism doctrines that both empower and limit the authority of the three traditional branches do not serve the same function for the jury.

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