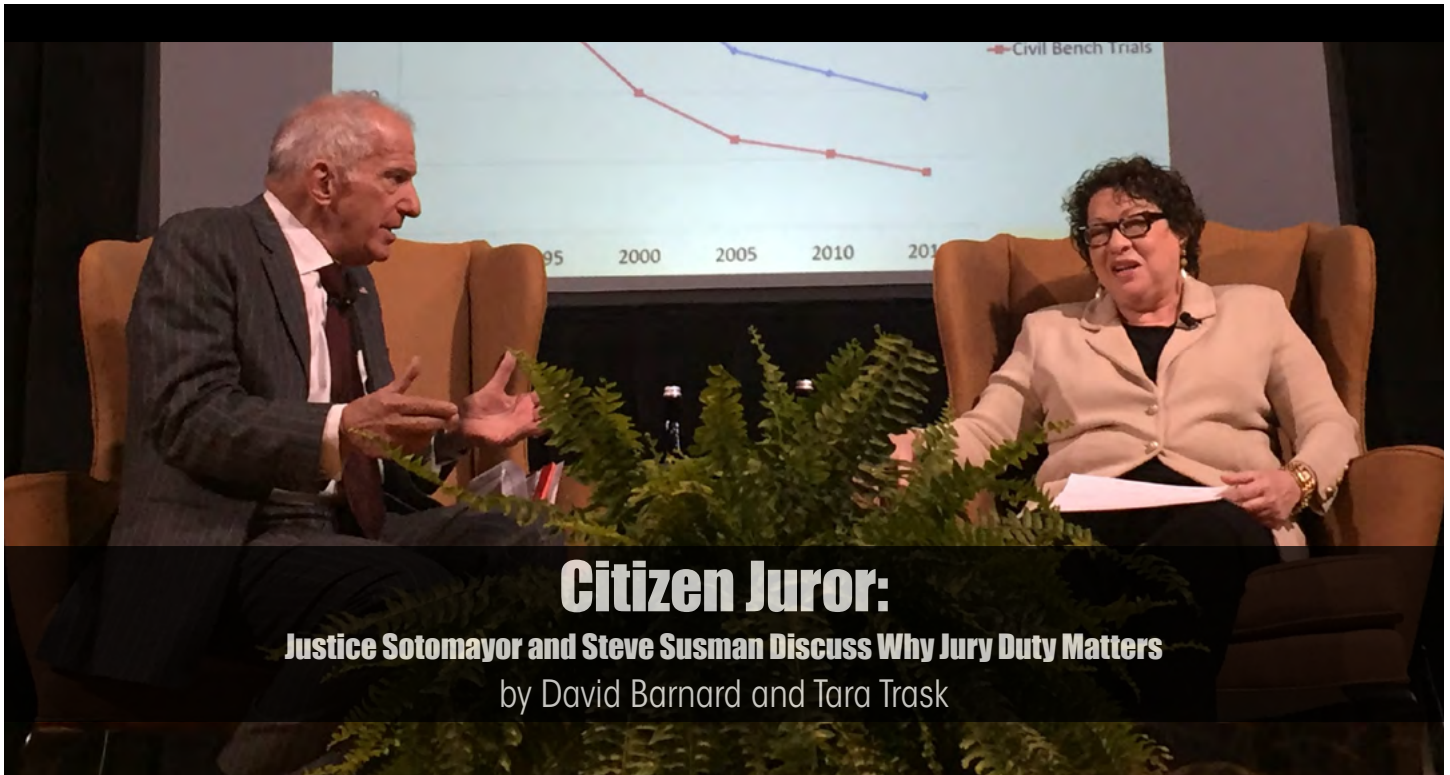


# THE JURY EXPERT

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## Citizen Juror:

Justice Sotomayor and Steve Susman Discuss Why Jury Duty Matters

by David Barnard and Tara Trask

**F**LIP ON THE TELEVISION, open the laptop or sit down around most dinner tables across the country these days, and it seems clear that we are experiencing interesting times. Americans are gravitating to grassroots, populist political movements on both sides of the traditional political divide. What the campaigns of both Donald Trump and Bernie Sanders share is a message that “the people” are not being heard and they are unhappy about it. Both campaigns have, albeit through different messages, attempted to appeal to a clear anti-establishment, anti-elite, anti-status quo sentiment, one in which many ordinary Americans seem to believe that they don’t have a voice in the direction of the United States. But we wonder, are Americans even aware of the opportunities they have to make their voices heard in their government? This is just one of many questions that Justice Sotomayor touched on when she visited NYU Law School this winter.

On February 8<sup>th</sup>, 2016, in front of a packed auditorium at NYU Law School, Supreme Court Justice Sonia Sotomayor sat down with the Executive Director of the [NYU Civil Jury Project](#), Stephen Susman, to discuss the current state of civil jury trials in the United States. Justice Sotomayor is uniquely

positioned to comment. She is the only sitting Supreme Court Justice with direct jury experience—having presided over jury trials as a Federal Judge and previously participating in jury trials as a trial lawyer. In this article, we will offer a historical perspective of the jury system, current day scholars’ perspectives on the jury system, and Justice Sotomayor’s perspectives from her interview at NYU on the importance of the jury system today.

The NYU Civil Jury Project began last year with the goal of gaining a better understanding of why there has been a decline in the number of civil jury trials, as well as what the implications will be for the civil justice system if the trend continues. In 1962, 5.5% of federal civil cases were resolved by civil juries, and by 2005, that figure declined to below 1%. In 1997, in Texas State Courts, approximately 3,400 civil cases were decided by jury trials, and in 2012 that figure fell to 1,200 ([Civil Jury Project, 2015](#)).

The right to a civil jury trial is guaranteed by the 7<sup>th</sup> Amendment to the Constitution:

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 (*U.S. Const. amend. VII*).

The founding fathers considered the 7<sup>th</sup> Amendment to be sacrosanct for a self-governed democracy. The right of the people to be judged by their fellow citizens was, and remains today, a necessity for ensuring the stability of public sovereignty. In addition to protecting the people from the potential tyranny of government, juries allow the deliberative judgment of the people to play a central role in the administration of justice. Beyond the benefits to litigants, jury trials offer a rare opportunity for citizens to participate in their government. Unlike voting, where citizens choose representatives to make decisions on their behalf, serving on a jury affords a citizen the opportunity to decide issues directly that ultimately impact our democracy and our justice system.

Despite the importance of civil juries in our system, jury service is treated as an inconvenience or a nuisance, and the verdicts juries reach are often derided anecdotally and in the media. With a tiny fraction of cases reported in the media and coverage skewed and incomplete, many think that juries often “get it wrong”.

However, media rhetoric does not appear match reality. National polling shows that the public has a largely positive opinion of jury service, and confidence in the jury system. Additionally, a strong majority reported that if they were on trial, they would rather have their fate decided by a jury than a judge (American Bar Association, 2004).

## The Framers' Intent

When Justice Sotomayor sat down with Mr. Susman, one of the first questions he posed to her Honor was her response to a man wondering: “If civil jury trials are disappearing, why does it matter?”

*I would go tell him to read about the 7<sup>th</sup> Amendment, and read about what motivated our founding fathers to think that was an important protection of a sense of liberty. Their main reason was, remember, that the crown controlled justice in their time. The crown had judges, but those judges, because of the nature of the circumstances of that system, the judges hewed pretty closely to the desires of the King. You didn't keep your job if you didn't... I think that they [the founding fathers] understood, and I think that we should understand, that the jury is the front line of protecting*

*the society and its liberties and I think that's terribly important for us to continue and to uphold.*

Securing the people's right to a jury trial was a central issue in the ratification of the Bill of Rights. Charles Wolfram, (1973) examined the historical materials relating to the drafting the 7<sup>th</sup> Amendment, providing a historical context for how the Framers considered civil juries to be a check on governmental authority:

“A deeply divisive issue in the years just preceding the outbreak of hostilities between the colonies and England in 1774-1776 had been the extent to which colonial administrators were making use of judge-tried cases to circumvent the right of civil jury trial ... Legal writers and political theorists who were widely read by the colonists were firmly of the opinion that trial by jury in civil cases was an important right of freemen” (pp. 654).

The 7<sup>th</sup> Amendment was central to protecting the right of the people for self-governance and to guard against the tyranny of the government. Jury trials were considered by the Framers to be a check on judicial power stemming from English oppression. Judges, although better versed in the law than most citizens, represent a branch of the government, and their loyalties and situated position can influence their decisions. As Justice Sotomayor explained:

*And I think our founding fathers understand that no matter how you appoint your judges, whether they are elected or appointed, politics will always play a role in the appointment of judges. Sometimes in a big way, with a capital “P” as one of my judge friends once said who knows a Senator. Or a small “p” that you are involved in community affairs.*

The Framers' intent was not only for civil juries to be a safeguard against judicial bias. A jury is not empaneled because it is more likely to reach the same conclusion that a fair judge would reach, but because it is likely to reach a different one. Jurors bring more than a layperson's perspective; they bring the multiple unique perspectives of citizens that are engaged to settle a dispute. The decisions reached by the jury are the result of a dynamic deliberative process representing the views of a collaborative group of citizens. This process is unique to juries and would not be afforded by one judge returning a verdict.

As Wolfram further explains, the antifederalists support for civil juries was not rooted in an efficiency analysis, such as we often hear leveled at civil juries today, (too time consuming, too costly, et cetera). The importance of the jury trial was viewed as so significant that it outweighed the fact that jury trials were costlier, time consuming, and labor intensive. The antifederal-

ists believed jury trials so necessary to ensure a free nation that the benefits outweighed the costs. Further, the Framers supported the institution of the civil jury with the awareness that the decisions juries reach can sometimes result in verdicts that are at odds with the “substantive rules that the judge instructs the jury to apply” (pp. 671).

“The inconveniences of jury trial were accepted precisely because in important instances, through its ability to disregard substantive rules of law, the jury would reach a result that the judge either could not or would not reach. Those who favored the civil jury were not misguided tinkerers with procedural devices; they were, for the day, libertarians who avowed that important areas of protection for litigants in general, and for debtors in particular, would be placed in grave danger unless it were required that juries sit in civil cases”(pp. 671-72).

In the modern era, we have to wonder if we’ve wandered too far afield of the original intention the Framers—where proving that juries can make decisions just as well as a judge could, or at least as *predictably*, is an argument for saving them. It is not predictability of decision-making that the framers were focused on, but rather they wanted to ensure a *diversity* of decision-making. In addition to bringing the perspective of the people to decide matters of law, civil juries grant the people ad hoc authority in the legislative process. As jury verdicts are upheld, are jurors, and their decisions, not inherently part of the common law system? As Wolfram explains, the Framers intent was that juries would allow the will of the people be interjected into the legislative process:

“Specifically, it is clear that the amendment was meant by its proponents to do more than protect an occasional civil litigant against an oppressive and corrupt federal judge-although it certainly was to perform this function as well. There was substantial sentiment to preserve a supposed functioning of the jury that would result in ad hoc “legislative” changes through the medium of the jury’s verdict. Juries were sought to be thrust into cases to affect a result different from that likely to be obtained by an honest judge sitting without a jury. The effort was quite clearly to require juries to sit in civil cases as a check on what the popular mind might regard as legislative as well as judicial excesses” (pp. 653).

Jury nullification, a form of ad hoc legislative change, is when a jury intentionally returns a verdict against the evidence, or otherwise chooses to take the law into their own hands. However, there has been debate as to whether juries should be in-

structed on the option of jury nullification. In *U.S. v Thomas (1997)* the Second Circuit Court of Appeals considered jury nullification to be “a violation of a juror’s sworn duty to follow the law as instructed by the court.” Justice Sotomayor commented on this position:

*You know the Second Circuit has an opinion that basically says that juries should never be instructed about jury nullification, and that any instruction that would suggest it, is wrong. And I leaned very closely to the Second Circuit warning for many, many years. As I have grown more in the system and watching it, I’m not so sure that’s right. Think about what juries did during the civil rights movement. If it weren’t for jury nullification, we would have many civil rights individuals who would be convicted felons for things that we think today are protected by the 1<sup>st</sup> Amendment. There is a place for jury nullification. Finding the balance of that and the role that a judge should and should not play in advising juries about that is important.*

This clearly presents an interesting Constitutional question regarding jury nullification. Many courts, in accordance with the Second Circuit, will not include jury nullification in its instructions to the jury; however, given the historical context of the Framers’ intent, could this be a restriction on the peoples’ right to self-governance, and importantly, knowledge of those rights?

### **Juror Benefits**

Beyond the benefits to litigants, the civil jury is a right, duty, and opportunity for those who are serving. The right to serve on a jury and to participate hands-on in the administration of justice is guaranteed to each citizen. It is the only compulsory service that is placed upon citizens, with the exception of a draft, which is not currently in effect. It is a rare opportunity for people to work together with a diverse group of their fellow citizens to reach a reasoned decision. Justice Sotomayor describes the experience of jury service:

*Such a fascinating experience, and it is the one responsibility of citizenship that no one else can actually do. And by that I mean everybody pays taxes whether you are citizens or not...the only other thing you can do is vote as a citizen. But this is the one activity where you’re asked to serve and to actually come to a decision on the behalf of the society that we represent, and I think that is a very, very important thing to remind people of.*

Specifically, the activity of deliberating is a unique process that dynamically engages the people to reason and to apply the rule of law. As described by Mr. Susman, the act of deliberating is a rare opportunity in the lives of most citizens:

*For many people serving on a jury and going to lunch, and sitting in the jury room with the jury and deliberating is the one time that we have in our lives to work collaboratively with people who are totally different, both racially, religiously, totally different demographics, and they work together to produce a product that they are all proud of.*

In fact, in addition to experiential benefits, jury service has been shown to increase civic engagement. Gastil and Weiser (2006) argue that jury service has a *transformative effect* on citizens who participate in the deliberative process. People called for jury duty reported increased civic and political engagement (taking political action, discussing public affairs, group involvement, and staying informed) when they had a positive subjective experience participating in jury service:

“Although the criminal or civil juror does not make sweeping policy decisions, he or she does have the experience of sitting in the seat of government, deliberating with fellow citizens, and rendering decisions that have real consequences for plaintiffs, defendants, and the state...In other words, the jury is a sacred, institutionalized opportunity for citizens to experience the transformative power of public deliberation” (pp. 607).

Alexis de Tocqueville expresses similar sentiments in *Democracy in America* (2010). de Tocqueville states that while he cannot speak to the benefits of the jury system to the litigants, the benefit to the jurors is apparent:

“The institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society.... I look upon it as one of the most efficacious means for the education of the people which society can employ” (pp. 309-12).

## **Opinion of Jury Service**

Jury service is often portrayed in popular culture and water cooler conversation as a waste of time and something that is to be dreaded and avoided. Jurors themselves are said to be unintelligent. Axioms such as, “I am being judged by twelve people too stupid to get out of jury duty” are all too common. High profile cases are often held up as examples of how

the civil jury system is out of control. We haven’t participated in a single civil jury selection in the last 20 years without at least one juror mentioning the *McDonald’s Hot Coffee* case as an example of how the jury got it wrong.

Human beings tend to be critical of others but forgiving of themselves, which is likely the only explanation for the change of heart once a person actually serves as a juror. The empirical evidence shows that most adults have a highly positive view of jury service once they have served. Justice Sotomayor shared her experiences with jurors:

*In my experience, virtually every jury that served would tell me later that they were happy after they were picked, they were happy...I have to tell you that when you talk to jurors, many of them become friends maybe not the entire group of twelve or six or whatever, but they will always make a couple of friends that they will all keep for life. There is something about that experience. We don’t often make decisions like that and this is a way of forcing people to think about how useful that collaborative effort can be.*

In fact, the Justice’s experience is consistent with what the data show. In 2004, the [American Bar Association](#) commissioned a national opinion poll of adults to evaluate opinions of jury service. The results were more positive than one would anticipate given what is generally conveyed in the media.

Of those surveyed, 62% of adults had been called for jury service and 29% had actually served on a jury. Three-fourths of adults did not believe that jury duty is a burden to be avoided, and 84% agreed that jury duty is an important civic duty that should be fulfilled, even if it happens to be inconvenient.

Overall, a majority of jurors had a positive view of jury service, but those who had been called for jury service had a more positive view than those who had not. Eighty-seven percent of adults who had been called believed that jury duty is an important civic duty even if it’s inconvenient, whereas only 80% who had not been called believed so. Seventy-eight percent of adults who had been called disagreed that jury duty is a burden to avoid, whereas only 70% who have not been called disagreed.

Finally, 75% of adults, if they themselves were on trial, would want their case to be decided by a jury rather than a judge. This figure was the same for those who have and have not been called for jury service.

Although the above poll suggests a positive view of jury service, jury service can be subject to the influence of derisive narratives. For example, in 1995, near the end of the highly publicized O.J. Simpson trial in Los Angeles, an opinion poll of Californians (Holding, 1995) showed a more negative opinion

of the jury system. Only 13% of adults reported that they had a great deal of confidence in the jury system and 42% reported that they did not have confidence in the jury system. As discussed below, defenders of the 7<sup>th</sup> Amendment need to take action to educate the public about the importance of jury service.

## What Now?

The antifederalists believed that the rights afforded by the 7<sup>th</sup> Amendment were absolutely necessary to maintain a popular sovereignty and yet we hear very little about the 7<sup>th</sup> Amendment—or even the 6<sup>th</sup> Amendment for that matter. By contrast, the 2<sup>nd</sup> Amendment, with powerful corporate and commercial backup is one most Americans know very well. Can you imagine the outrage if a citizen could just “click away” his or her 2<sup>nd</sup> Amendment Rights every time an employment contract was signed? That happens every day when a citizen is forced to agree to terms that include an arbitration clause in lieu of resolving disputes through the court system.

In fact, most jury-centric narratives go well beyond just neutralizing the issue. For example, many people consider the *McDonald's Hot Coffee* case to be the embodiment of the civil jury system run amuck. It is held up as the epitome of a frivolous and unjust lawsuit. A shallow knowledge of the case pervades cultural divides throughout the United States and beyond. Although many people are aware of the case, their knowledge is at a newspaper headline level and often inaccurate. Many people believe that a woman was awarded nearly three-million dollars because her coffee was too hot. Often, when people learn more about the case—such as the extent of the injuries and the jurors' rationale for awarding damages—they quickly realize the issues are more nuanced. But, despite the release of a documentary film, “*Hot Coffee*,” highlighting the details of the case, the exposure of the film is miniscule compared to the *McDonald's Hot Coffee Case* axiom. This inaccurate but pervasive narrative can aid in undermining the jury system. Other narratives are also pervasive, such as the *Patent Troll* narrative, which has been at least as successful in closing the courthouse doors for litigants and, ultimately limiting the authority of the jury. Although the jury system was intended to be a check on the power of the government, in the modern era, it clearly also should provide a check on the power of corporations.

One could argue that a large reason people are susceptible to

derisive narratives, is because they do not have any competing narrative to contradict what they are told. This history of the 7<sup>th</sup> Amendment and the importance in securing our liberties needs to be shared.

Judges have a prime opportunity to educate citizens who appear before them as prospective jurors about the value of jury service and its role in our democracy. Justice Sotomayor spoke in reference to inspiring jurors to serve:

*...most of it was in preliminary instructions, in explaining to jurors the importance of the process, their individual importance in being part of the process, in talking to them about the attempt that the trial is going to be efficient and not waste their time. A lot of that kind of preliminary discussion goes a long way towards convincing jurors to serve.*

Clearly many judges, but not all, take great pride in educating jurors about the unique opportunity they are afforded. We have heard many different styles, areas of emphasis and even tone used to great effect. And sometimes the effect those efforts yield becomes abundantly clear.



There is a judge in Las Vegas Superior Court, who in his opening instructions to the venire, always reads the Preamble of the Constitution:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do

ordain and establish this Constitution for the United States of America.

His staff had a large plaque with the Preamble printed on it made for him and it hangs over his jury box. He begins his instruction there, and tells a very remarkable story of the soldiers in the Revolutionary War, what they were fighting for, and why “Justice” is the first establishment of the newly formed U.S. Constitution. It’s very inspiring.

Several years ago, during a jury selection, a prospective juror at the back of the room sent the Judge a letter. The juror was a veteran of Desert Shield and Desert Storm. He thanked the Judge for reading the Preamble and he said some other very important things excerpted here:

*Dear Honorable Judge,*

*I am Juror Name (badge number). I want to thank you for educating the other jurors on the Preamble... For the last approximately two weeks, I had to listen and witness the complaining of the dreaded jury duty. These are the people for whom I laid my life down? It is. And would gladly do it again and twice on Sunday...*

*Not everyone understands what it is to sacrifice your time for justice. We are receiving pay to sit and give our opinion based on facts under a blanket of freedom, which is provided by my brothers, and sisters fulfilling their patriotic duty even till this day....*

*Your Honor, I see your summons as a direct order to fulfill my duty as a public member of This County. And so, I follow orders. It does me great pleasure to see a system work especially since I fought for this system.*

*I am used to “Hurry Up and Wait”.*

*I am glad I have the privilege to order Starbucks and go where I please.*

*I am glad I am judged by a Jury of my Peers.*

*I am glad I live under a blanket of Freedom.*

*I am glad to be a part of this Great Nation and The Preamble.*

*Many do not understand what it is to sacrifice a little time for the better of all.*

*With All Due Respect,*

*Espirit De Corps,*

*U.S. Army Veteran (Operation Desert Shield and Desert Storm)*

When the next group of jurors was brought in, the Judge read the prospective juror's letter, being careful to protect the juror's identity. At the completion of reading the letter, the judge dabbed tears from his eyes on the bench. He now reads it to every incoming panel.

Given the populist and grassroots political climate that exists on both sides of our political spectrum, there may be no time like the present to refocus on what rights we have as citizens to participate in our government in the most direct fashion. Proponents of the 7<sup>th</sup> Amendment have a unique opportunity to re-frame the narrative in a manner that represents the historical context, and the central role jury trials fill in a self-governed democracy. 🗳️

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