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The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial

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THE FAILURE OF ORIGINALISM IN PRESERVING CONSTITUTIONAL RIGHTS TO CIVIL JURY TRIAL

Renée Lettow Lerner*

ABSTRACT

The Federal Bill of Rights and state constitutions rely heavily on procedural protections, especially jury rights. Supporters of these rights at the founding praised the jury in extravagant terms, and many members of the legal profession continue to do so today. Yet civil and criminal jury trials are vanishing in the United States. The disappearance of the civil jury presents a puzzle because the Seventh Amendment and state constitutional rights require that civil jury trial be “preserved” or “remain inviolate.”

Scholarship on the history of constitutional rights to civil jury trial has tended to focus exclusively on the Seventh Amendment, particularly at the time of the founding or during the modern era. This Article examines both state and federal courts’ interpretations of constitutional rights from the late eighteenth through the early twentieth century. It demonstrates that courts during that time adopted originalist tests. These tests, however, proved so flexible that they allowed legislatures and courts great discretion in modifying civil jury trial. The civil jury was no longer valued as a law-nullifying institution, as it had been at the founding, but instead was considered a hindrance to the administration of justice. Courts were concerned to accommodate changed circumstances, such as growing docket pressure and expense of litigation and emphasized the impossibility of maintaining every detail of original practice. Once the anchor of original jury practice was abandoned, the jury right seemed tethered to no definite meaning. The one exception was the jurisprudence of the U.S. Supreme Court under the Re-examination Clause of the Seventh Amendment, but even that strict historical test proved able to be circumvented. This history suggests problems with maintaining procedural rights more generally.

INTRODUCTION	812
I. THE BACKGROUND OF CONSTITUTIONAL RIGHTS TO CIVIL JURY TRIAL:	
ORIGINS IN NULLIFICATION	817
A. <i>State Constitutional Rights</i>	817
B. <i>The Seventh Amendment and Nullification of a Different Sort</i>	824

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II. PROMINENT THEMES IN INTERPRETATION OF RIGHTS TO CIVIL JURY TRIAL AFTER THE FOUNDING THROUGH THE EARLY TWENTIETH CENTURY	828
A. <i>Praise of Trial by Jury, with Qualifications</i>	832
B. <i>Use of Flexible Originalist Tests</i>	836
1. Setting Out the Test: What Was the Time Referenced, and What Was the Law?	836
2. How Much Discretion for the Legislature and Courts?	840
C. <i>Avoiding or Controlling Jury Trial</i>	845
1. Changed Circumstances: Rising Caseloads, Greater Expense of Litigation, Inconvenience to Jurors (and, <i>Sotto Voce</i> , Juror Incompetence and Bias)	846
2. The Fiction of Consent to Non-Jury Procedures	850
3. Making a Jury Demand More Expensive: Jury Fees and Diversion to Non-Jury Proceedings with an Appeal to a Jury	855
4. Waiver of Jury Trial	860
5. Original Legal Categories: The Line Between Fact and Law	863
III. A CAUTIONARY TALE: AN ATTEMPT TO APPLY A STRICT ORIGINALIST TEST	870
CONCLUSION: IMPLICATIONS FOR THE PRESERVATION OF PROCEDURAL RIGHTS	878

The right of trial by jury shall remain inviolate.¹

Jury trials constituted 0.6% of all state court civil dispositions in 2002.²

INTRODUCTION

The U.S. Constitution³—and nearly every state constitution⁴—guarantees the right to civil jury trial. The right to civil jury trial has been historically, and continues to

¹ CONN. CONST. of 1818, art. XXI; ALA. CONST. of 1819, art. I, § 28; MO. CONST. of 1820, art. XIII, § 8; ARK. CONST. of 1836, art. II, § 6; R.I. CONST. of 1842, art. I, § 15; ILL. CONST. of 1848, art. XIII, § 6; IOWA CONST. of 1857, art. I, § 9; MINN. CONST. of 1857, art. I, § 4; NEB. CONST. of 1875, art. I, § 6; *see also* N.Y. CONST. of 1777, art. XLI (“[T]rial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever.”); CAL. CONST. of 1849, art. I, § 3 (“The right of trial by jury shall be secured to all, and remain inviolate forever”); MONT. CONST. of 1889, art. III, § 23 (“The right of trial by jury shall be secured to all, and remain inviolate”). Throughout this Article, sources are often listed in chronological order, to emphasize historical sequence.

² *See* Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 768 (2004).

³ U.S. CONST. amend. VII.

⁴ The exceptions are Louisiana and Colorado. Louisiana’s original Constitution of 1812 did not include a right to civil jury trial, although it did include a right to criminal jury trial.

be today, praised in extravagant terms. Several state constitutions called the right “sacred.”⁵ Lawyers and judges hailed the right as the “palladium of our rights”⁶ and “the most distinguishing badge of liberty,”⁷ among many other eulogiums. In a law review symposium in 2013, Senator Sheldon Whitehouse of Rhode Island called the civil jury “a bastion of individual rights” and “a structural element of our system of government.”⁸ And yet, this lavish praise has coexisted with elaborate efforts to curtail the power of the jury.⁹ Much-lauded in the rhetoric of the legal profession, the civil jury has been much derided in practice. Today, in both the federal and state courts, civil jury trials are vanishingly rare.¹⁰

How did we get here? The framers of the state and federal constitutions made every effort to prevent this outcome.¹¹ Nearly all the constitutional guarantees of civil jury trial refer to a historical baseline, either expressly or impliedly. Many of the provisions declare that jury trial shall “remain inviolate.”¹² The texts seem to demand a method of interpretation that today we would call originalist. As this Article demonstrates, originalism has indeed been the method most state courts have used to interpret these provisions, from the time they were ratified.¹³ The historical test used by the U.S. Supreme Court to interpret the Seventh Amendment is part of this trend. Under this test, the Court has declared that the Seventh Amendment preserves the practice of trial by jury as it existed at common law in England in 1791, the date of the Amendment’s ratification.¹⁴ Nevertheless, even an originalist method of interpretation has failed to protect the jury right in a form that would be recognizable to the original supporters of these provisions. This Article shows what happened and suggests why the aspiration to enshrine procedural rights in a constitution is ultimately quixotic.

See LA. CONST. of 1812, art. VI, § 18. Subsequent versions of the Louisiana Constitution maintained this distinction, as does the current Constitution. *See* LA. CONST. of 1845, art. CVII; LA. CONST. of 1852, art. CIII; LA. CONST. of 1864, art. CV; LA. CONST. of 1868, tit. 1, art. 6; LA. CONST. of 1879, art. VII; LA. CONST. of 1974, art. I, §§ 16 & 17 (as amended). On Colorado, see *infra* note 62 and accompanying text.

⁵ *See, e.g.*, VA. DECLARATION OF RIGHTS OF 1776, § 11; N.C. CONST. of 1776, art. XIV; MASS. CONST. of 1780, art. XV; N.H. CONST. of 1784, art. XX.

⁶ *Beers v. Beers*, 4 Conn. 535, 539 (1823).

⁷ *Bank of the State v. Cooper*, 10 Tenn. (2 Yer.) 599, 604 (1831).

⁸ Senator Sheldon Whitehouse, Opening Remarks at the William & Mary Law Review Symposium: The Civil Jury as a Political Institution (Feb. 22, 2013), *available at* <http://www.whitehouse.senate.gov/news/speeches/william-and-mary-law-review-symposium-the-civil-jury-as-a-political-institution>.

⁹ *See infra* Part II.

¹⁰ *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012) [hereinafter Langbein, *The Disappearance of Civil Trial*] (citing statistics showing that in 2002, 1.2% of federal civil filings terminated in jury trials, and jury trials constituted 0.6% of all state court dispositions).

¹¹ *See supra* notes 3–7 and accompanying text.

¹² *See infra* notes 53–54 and accompanying text; *infra* Part I.A.

¹³ *See infra* Part II.B.

¹⁴ *See, e.g.*, *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935).

The U.S. Supreme Court's originalist interpretation of the Seventh Amendment has prompted many questions. Should the jury practices of England in 1791 be followed in every detail? Could they be? Professor Suja Thomas, for example, has advocated a strict application of the historical test under the Seventh Amendment.¹⁵ She has argued, for instance, that no method of jury control should be used today that was unknown to the common law of England in 1791.¹⁶ (Certain recent U.S. Supreme Court cases concerning the criminal jury, and other features of criminal procedure, have suggested a similar position, strictly applying an originalist interpretation.¹⁷) Other scholars have pointed out some of the difficulties with that method of interpretation.¹⁸ The difficulties go deep, indeed. As this Article demonstrates, a strict originalist test would preclude many forms of court reorganization, changes to juror eligibility and selection, jury fees and waiver provisions, methods of bringing the trial record to an appellate court on appeal, and many other modifications to the civil justice system.

¹⁵ Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 144–45 (2007) [hereinafter Thomas, *Why Summary Judgment is Unconstitutional*].

¹⁶ *Id.* at 174–77; Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 754 (2003); Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 695–704 (2004) [hereinafter Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*].

¹⁷ *See, e.g.*, *United States v. Booker*, 543 U.S. 220, 238–39 (2005); *Blakely v. Washington*, 542 U.S. 296, 301–02, 313–14 (2004); *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 477–83, 490 (2000); *United States v. Gaudin*, 515 U.S. 506, 512–14 (1995).

¹⁸ *See, e.g.*, Brian T. Fitzpatrick, *Originalism and Summary Judgment*, 71 OHIO ST. L.J. 919, 925, 928–30 (2010) (arguing that not every change to jury practice rises to the level of constitutional significance and observing that many changes have occurred in federal practice that have expanded the types of cases juries can decide, including changes in pleading rules, ability to bring class actions, and judicial acceptance of contingency fees); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 877–84 (2013) (chronicling the U.S. Supreme Court's flexible interpretation of the Seventh Amendment). Fitzpatrick left off his list one of the most important changes expanding jury power, which is the curtailment of the judicial power to comment on evidence. *See* Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 241–57 (2000) [hereinafter Lerner, *The Silent Judge*]. Concerning the effort to apply a strict originalist test to the criminal jury, see Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 961–62 (2010) (observing that, in the late eighteenth century, juries consisted of twelve propertied men, almost always white, who generally had the right as well as the power to find law, had to decide unanimously and could be kept without food, fire, or drink until a verdict was reached). For an analysis of difficulties in applying a strict originalist test under the Confrontation Clause in a domestic violence case in which a witness was unavailable to testify at trial because the defendant had killed her, see Brief for the Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) et al. as Amici Curiae in Support of Respondent at 20–28, *Giles v. California*, 554 U.S. 353 (2008) (No. 07-6053).

This Article shows that state and federal courts almost uniformly rejected such an interpretation from the time the constitutions were ratified. One of the few exceptions was the federal courts' interpretation of the Seventh Amendment's Re-examination Clause, and even that proved able to be evaded by procedural mechanisms.¹⁹ This Article also shows that it has proved difficult for courts to settle on a standard or test for constitutional civil jury rights. Once the anchor of original practice is abandoned, as courts have all held it must be, the jury right seems tethered to no definite meaning. As this Article discusses, the normal methods of interpreting constitutional provisions to account for changed circumstances do not work for jury rights. Courts therefore have permitted legislatures to alter the jury right until it has become unrecognizable.

A potential problem in applying an originalist test is that it can be difficult to determine what the original practice or law was concerning a particular question. This was seldom a problem in cases involving jury rights, however. Judges often knew—and described minutely in their opinions—exactly what the laws or practices were at the time a constitution was ratified. This detailed knowledge of original practice included questions about jury selection, the jurisdiction of justices of the peace, jury fees, and nonsuit, directed verdict and other methods of jury control.²⁰ This level of knowledge is hardly surprising. In many cases, the judges were describing practices and laws that had pertained only a few decades previously, sometimes less. Despite this clear knowledge of original practice, judges did not hesitate to declare that the legislature could alter the law.²¹ Even though a significant difficulty of originalism did not apply, the method still proved unworkable respecting the right to civil jury trial.

This Article focuses as much on state constitutional provisions and decisions as on the Seventh Amendment and the decisions of federal courts. Most scholarly writing concerning the history of civil jury trial rights focuses exclusively on the Seventh Amendment. Almost none concerns the state rights.²² Even historical scholarship on the Seventh Amendment tends to address the time of the founding,²³ rarely the later

¹⁹ See *infra* Part III.

²⁰ See, e.g., *Emerick v. Harris*, 1 Binn. 416, 416 (Pa. 1808); *Keddie v. Moore*, 6 N.C. (2 Mur.) 41, 45 (1811); *United States v. Wonson*, 28 F. Cas. 745, 746–50 (C.C.D. Mass. 1812) (No. 16,750); *Head v. Hughes*, 8 Ky. (1 A.K. Marsh) 372, 373 (1818); *Beers v. Beers*, 4 Conn. 535, 536 (1823); *Curtis v. Gill*, 34 Conn. 49, 55 (1867).

²¹ See *infra* Part II.B.2.

²² The few works addressing the history of state constitutional rights to jury trial focus on particular states. See, e.g., Bruce D. Greenberg & Gary K. Wolinetz, *The Right to a Civil Jury Trial in New Jersey*, 47 RUTGERS L. REV. 1461 (1995).

²³ See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 81–92 (1998); Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145 (2001); Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407 (1999); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966).

history until the modern era.²⁴ Yet the history of these provisions did not stop with their ratification. The subsequent history of constitutional rights to civil jury trial reveals a steady decline in the importance of civil juries. That this happened in all jurisdictions, state and federal, suggests the difficulty of using originalist interpretations to preserve rights to civil jury trial.

This Article begins by describing, in Part I, the various constitutional rights to civil jury trial and the motivations behind them. At the time of the founding, the civil jury was regarded primarily as a political institution, not a judicial one. Supporters of state and federal constitutional rights praised the civil jury in extravagant terms, and valued the institution mainly for its ability to nullify unpopular laws—especially laws requiring repayment of debts. This use of procedural rights as a substitute for substantive protections is a longstanding theme in the history of the common law.

After the founding era, however, the civil jury's role as a political institution receded from view, and it received more attention as a judicial institution. In that respect, many courts and legal commentators believed, the civil jury fell short. State constitutional conventions modified rights to civil jury trial to permit waiver and other forms of flexibility. Part II examines prominent themes in interpretations of rights to civil jury trial from the founding through the early twentieth century. Courts continued to praise the civil jury, but they increasingly distinguished between civil and criminal juries in practice. Faced with the language of preservation in constitutional jury rights, courts adopted originalist tests. These tests, however, proved flexible and permitted many innovations in civil jury practice. Judicial opinions described at length the drawbacks of an alternative—a strict originalist test. Courts allowed legislatures considerable discretion. Indeed, there are few cases in which a court held that a statute violated a constitutional right to civil jury trial.

Part II.C explores the various rationales used for allowing innovations in jury practice.²⁵ Courts explained that circumstances had changed since their constitutions were ratified. In particular, judges expressed several concerns about the use of civil juries: growing docket pressure and delays, rising expense of litigation, inconvenience to jurors, and, in some cases, juror incompetence or bias. In addition to these arguments about changed circumstances, opinions relied on the fiction that certain persons had consented to non-jury proceedings by engaging in particular activities or assuming certain positions. This fiction was especially useful in holding that litigants could be

²⁴ Some work has addressed the later history of the Seventh Amendment, before the late twentieth century. *See* Miller, *supra* note 18, at 872–84; Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 592–624 (2003); Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 612–23 (2001).

²⁵ The Article does not address questions about the line between law and equity. This topic has particularly concerned judges and commentators interpreting the Preservation Clause of the Seventh Amendment. *See, e.g.*, JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 5–24 (2006). The complexity of this issue, however, requires a separate article to be properly treated.

subjected to new summary proceedings. Courts also upheld attempts by legislatures to limit jury demands by making jury trial more expensive. Typically, litigants would be forced into non-jury proceedings—such as those before justices of the peace or summary proceedings—and could only get a jury on appeal, after payment of appeal bonds and jury fees. To further reduce jury trials, courts, legislatures, and even constitutional conventions provided for waiver of civil jury trial.

In the late nineteenth and early twentieth centuries, civil jury trial once again became politically salient. Just as debt cases were an intense political issue at the founding of the nation, personal injury cases against railroads and other industrial corporations generated sharp political conflict in the late nineteenth and early twentieth centuries. Judges and legislatures permitted courts to assume more control over jury verdicts, partly to prevent the inefficiency of new trials and partly to counteract what they viewed as juror bias. Courts upheld these expanded judicial powers against constitutional challenge. Judges relied on the old common law distinction that the facts are for the jury and the law is for the judge, even though the line between fact and law had shifted dramatically since the founding.

Part III examines what happened when a court tried to adhere to a strict originalist test. An exception to the almost universal use of flexible tests was the U.S. Supreme Court's jurisprudence applying the Re-examination Clause of the Seventh Amendment. In the end, however, even that strict originalist test could not prevent greater judicial control over juries. A clever procedural mechanism permitted innovation in jury practice. This kind of innovation anticipated the Federal Rules of Civil Procedure of 1938. The flexibility respecting jury procedure described in this Article sets the stage for the changes made afterward by the Federal Rules. By emphasizing expensive pretrial discovery that encourages settlement, the Federal Rules have continued the process of killing civil jury trial.

The Conclusion suggests that this Article presents a warning about reliance on procedural rights. It offers some broader observations on the difficulty of maintaining procedural, as opposed to substantive, rights.

I. THE BACKGROUND OF CONSTITUTIONAL RIGHTS TO CIVIL JURY TRIAL: ORIGINS IN NULLIFICATION

A. State Constitutional Rights

At the founding, the jury was a political institution.²⁶ The American colonists' experience with civil juries in the struggle with Britain led many to value the institution

²⁶ Tocqueville famously treated the jury mainly as a political institution, rather than as a judicial institution. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270–76 (J.P. Mayer ed., George Lawrence trans., 1969).

as a means of nullifying the law.²⁷ In the 1761 case of *Erving v. Cradock*,²⁸ for example, a Massachusetts merchant sued a customs inspector for trespass and won a large verdict from a jury. The royal governor of Massachusetts, Francis Bernard, complained to a former governor that “[a] custom house officer has no chance with a jury, let his cause be what it will.”²⁹ Bernard warned his superiors in London that such verdicts effectively overturned judgments of the Court of Admiralty, which sat without juries, and nullified customs laws.³⁰ Another colonial governor of Massachusetts wrote that “a trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers.”³¹

Colonists viewed the jurisdiction of the juryless admiralty courts, which prevented nullification of customs laws, as a major grievance.³² In response to the Stamp Act of 1765,³³ delegates from nine of the thirteen colonies met in New York the same year, a meeting known as the Stamp Act Congress.³⁴ They adopted a Declaration of Rights and Grievances, which included the provisions “[t]hat Tryal [sic] by jury is the inherent and invaluable Right of every British Subject, in these Colonies,” and that The Stamp Act and several other Acts, “by extending the Jurisdiction of the Courts of Admiralty, beyond its Ancient limits, have a Manifest tendency to Subvert the Rights, and liberties of the Colonists.”³⁵ The Declaration of Independence listed as a reason for separation: “For depriving us, in many cases, of the benefits of trial by jury.”³⁶

²⁷ Many colonists also held the criminal jury in high esteem. Colonial criminal juries nullified unpopular laws such as those against seditious libel. *See, e.g.*, JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 100–01 (Stanley Nider Katz ed., 1963) (1736); JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO AMERICAN LEGAL INSTITUTIONS 475–80 (2009).

²⁸ *Erving v. Cradock* (1761), *reprinted in* Governor Francis Bernard to the Lords of Trade, 6 August 1761, 2 BERNARD PAPERS 46, 47, *reprinted in* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 553–56 (Boston 1865) [hereinafter BERNARD PAPERS].

²⁹ Governor Francis Bernard to Thomas Pownall, 28 August 1761, BERNARD PAPERS, *supra* note 28, at 557.

³⁰ Governor Francis Bernard to the Lords of Trade, 6 August 1761, BERNARD PAPERS, *supra* note 28, at 555 (“Your Lordships will perceive that these actions have an immediate tendency to destroy the Court of Admiralty and with it the Custom house, which cannot subsist without that Court.”).

³¹ STEPHEN BOTEIN, EARLY AMERICAN LAW AND SOCIETY 57 (1983) (quoting Governor William Shirley).

³² *See* C.A. WESLAGER, THE STAMP ACT CONGRESS: WITH AN EXACT COPY OF THE COMPLETE JOURNAL 12 (1976).

³³ Stamp Act, 1765, 5 Geo. 3, c. 12 (U.K.).

³⁴ WESLAGER, *supra* note 32, at 9, 107–08.

³⁵ Resolutions of the Stamp Act Congress (1765), *reprinted in* WESLAGER, *supra* note 32, at 201–02.

³⁶ THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

The weakness of the colonial bench encouraged the view that juries should decide law as well as fact.³⁷ Colonial judges lacked independence; they were usually dependent on the royal governor, who could appoint and dismiss them at will.³⁸ In addition, many colonial judges were untrained in the law.³⁹ As a result, jury instructions could be vague or non-existent.⁴⁰

The history of juries nullifying unpopular British laws, together with the weakness of the colonial bench, led important founders of the new republic to support the power of juries to decide the law. At various points, John Adams,⁴¹ Thomas Jefferson,⁴² and even John Jay as Chief Justice of the U.S. Supreme Court⁴³ declared that juries could decide the law, against the direction of the court.

With this background, the new states that wrote declarations of rights or constitutions almost invariably guaranteed the right to civil jury trial.⁴⁴ In June 1776, George

³⁷ See LANGBEIN, LERNER & SMITH, *supra* note 27, at 479.

³⁸ See *id.* at 478.

³⁹ See *id.* at 479.

⁴⁰ See *id.* In some colonies, particularly in New England, panels of judges presided over jury trials. The judges charged the jury seriatim, and sometimes gave contradictory instructions. Counsel sometimes argued law to the jury, strengthening the idea that the jury should decide the law. *Id.* at 480; see William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 911–12 (1978).

⁴¹ “It is not only [a juror’s] right but his Duty . . . to find the Verdict according to his own best Understanding, Judgment and Conscience, tho [sic] in Direct opposition to the Direction of the Court.” John Adams, *Diary Notes on the Rights of Juries*, in 1 LEGAL PAPERS OF JOHN ADAMS 229–30 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). For a discussion of the circumstances under which Adams wrote about the law-finding powers of juries, see 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 5 (L.H. Butterfield ed., 1961).

⁴² It is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one in which the judges may be suspected of bias, the jury undertake to decide both law and fact.

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 140 (J.W. Randolph ed., 1853) (1781–82).

⁴³ In 1794, Chief Justice Jay charged a civil jury that, although the jury usually decided the facts and the judge the law, the jurors had “a right to take upon [them]selves to judge of both, and to determine the law as well as the fact in controversy.” *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794). For a description of the Supreme Court’s jury procedure, see 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 84 n.70 (Maeva Marcus ed., 1998); Lochlan F. Shelfer, *Special Juries in the Supreme Court*, 123 YALE L.J. 208, 221–32 (2013). Shelfer has explained that the jury in *Brailsford* was a special jury of merchants, whose purpose as experts was to help the court to determine the law merchant. *Id.* at 212, 220, 227, 230–31.

⁴⁴ One exception was the New Hampshire Constitution of January 5, 1776, the earliest state constitution, which was very brief and framed in two weeks during a holiday period. See 4 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC

Mason wrote in the Virginia Declaration of Rights: “That, in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.”⁴⁵ North Carolina’s formulation in December of the same year closely followed Virginia’s, adding that trial by jury ought to remain “inviolable” as well as “sacred.”⁴⁶ The Pennsylvania Constitution of the same year simply declared: “Trials shall be by jury as heretofore.”⁴⁷ Other states adopted different formulations.⁴⁸ Several states borrowed the language from the Magna Carta, translated from Latin, concerning the “judgment of his peers” and the “law of the land.”⁴⁹ The New England states were slower to write constitutions than the others, but these later constitutions incorporated language on jury trial from other states.⁵⁰

LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2451 (Francis Newton Thorpe ed., 1909). The other exception was Delaware, whose Constitution of 1776 did not specifically mention juries but did incorporate “the common law of England.” DEL. CONST. of 1776, art. XXV. The Delaware Constitution of 1792 borrowed from Pennsylvania’s provision, *see infra* text accompanying note 47, and provided that “Trial by jury shall be as heretofore.” DEL. CONST. of 1792, art. I, § 4.

⁴⁵ VA. DECLARATION OF RIGHTS OF 1776, § 11.

⁴⁶ N.C. CONST. of 1776, Declaration of Rights, art. XIV (“That in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.”).

⁴⁷ PA. CONST. of 1776, § 25.

⁴⁸ The New Jersey Constitution of 1776 announced: “[T]he inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.” N.J. CONST. of 1776, art. XXII. South Carolina’s Constitution of 1776 confined the jurisdiction of the court of admiralty to maritime cases and provided for summoning juries. S.C. CONST. of 1776, arts. XVII & XVIII. The Georgia Constitution of 1777 contained elaborate jury procedures in civil cases, and declared: “The jury shall be judges of law, as well as of fact.” GA. CONST. of 1777, art. XL & XLI.

⁴⁹ *See* MD. CONST. of 1776, art. XXI; S.C. CONST. of 1778, art. XLI (“[N]o freeman of this State [shall] be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land.”).

⁵⁰ *See* MASS. CONST. of 1780, art. XV (“In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners’ wages, the legislature shall hereafter find it necessary to alter it.”); N.H. CONST. of 1784, art. I, § 20 (“In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless in causes arising on the high seas, and such as relate to mariners’ wages, the legislature shall think it necessary hereafter to alter it.”); CONN. CONST. of 1818, art. I, § 21 (“The right of trial by Jury shall remain inviolate.”); R.I. CONST. of 1842, art. I, § 15 (“The right of trial by jury shall remain inviolate.”).

Sometimes constitutional provisions mentioned civil and criminal juries separately, but more often they referred to the two together, as “trial by jury.”⁵¹ These provisions almost always referred to the past, to preservation.⁵² The most widely copied of these early formulations turned out to be that of the New York Constitution of 1777, which declared: “[T]rial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever.”⁵³ Many states writing later constitutions adopted the “remain inviolate” language.⁵⁴

The constitutional provisions themselves, however, did not remain inviolate. Many states made changes over time to the text of their constitutional guarantees. These changes often made distinctions between rights to civil and criminal jury trial.⁵⁵ The vast majority of these modifications gave legislatures greater freedom to modify civil jury trial.⁵⁶ The provisions typically recited that jury trial “shall remain inviolate,” and then added a clause or sentence beginning “but.”⁵⁷ Changes included authorizing waiver of jury trial in civil cases;⁵⁸ providing that a jury could consist of fewer than

⁵¹ See, e.g., *supra* note 50.

⁵² See, e.g., *supra* note 50.

⁵³ N.Y. CONST. of 1777, art. XLI.

⁵⁴ See, e.g., GA. CONST. of 1789, art. IV, § 3 (“Freedom of the press and trial by jury shall remain inviolate.”); CONN. CONST. of 1818, art. I, § 21 (“The right of trial by Jury shall remain inviolable.”); ALA. CONST. of 1819, art. I, § 28 (“The right of trial by jury shall remain inviolate.”); MO. CONST. of 1820, art. XIII, § 8 (“That the right of trial by jury shall remain inviolate.”); ARK. CONST. of 1836, art. II, § 6 (“That the right of trial by jury shall remain inviolate.”); FLA. CONST. of 1838, art. I, § 3 (“That the right of trial by jury shall forever remain inviolate.”); R.I. CONST. of 1842, art. 1, § 15 (“The right of trial by jury shall remain inviolate.”); ILL. CONST. of 1848, art. XIII, § 6 (“That the right of trial by jury shall remain inviolate; and shall extend to all cases at law, without regard to the amount in controversy.”); CAL. CONST. of 1849, art. I, § 3 (“The right of trial by jury shall be secured to all, and remain inviolate forever”); IOWA CONST. of 1857, art. I, § 9 (“The right of trial by jury shall remain inviolate”); MINN. CONST. of 1857, art. I, § 4 (“The right of trial by jury shall remain inviolate”); NEB. CONST. of 1875, art. I, § 6 (“The right of trial by jury shall remain inviolate”); MONT. CONST. of 1889, art. III, § 23 (“The right of trial by jury shall be secured to all, and remain inviolate.”).

⁵⁵ See, e.g., N.Y. CONST. of 1846, art. I, § 2.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ New York was one of the first states to alter its jury trial right, in 1846. *Id.* The New York Constitution of that year added explicit permission for the legislature to provide for waiver of civil jury trial: “The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever. But a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law.” *Id.* Many other states followed. See, e.g., CAL. CONST. of 1849, art. I, § 3 (“The right of trial by jury shall be secured to all, and remain inviolate forever; but a trial by jury may be waived by the parties in all civil cases, in the manner to be prescribed by law.”); MINN. CONST. of 1857, art. I, § 4 (“The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy, but a jury trial may be waived by the parties in all cases in the manner prescribed by law.”);

twelve;⁵⁹ and permitting majority verdicts.⁶⁰ Few states maintained their constitutional

ARK. CONST. of 1868, art. I, § 6 (“The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases, in the manner prescribed by law.”); FLA. CONST. of 1868, Declaration of Rights, § 6 (“The right of trial by jury shall be secured to all and remain inviolate forever; but in all civil cases a jury trial may be waived by the parties in the manner to be prescribed by law.”); MONT. CONST. of 1889, art. III, § 23 (“The right of trial by jury shall be secured to all, and remain inviolate, but . . . upon default of appearance or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number provided by law.”).

⁵⁹ Some constitutions gave the parties the ability to agree to a number of jurors fewer than twelve, an arrangement that resembled waiver. *See, e.g.*, CAL. CONST. of 1879, art. I, § 7 (“In civil actions, and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open Court.”); MONT. CONST. of 1889, art. III, § 23 (“The right of trial by jury shall be secured to all, and remain inviolate, but . . . upon default of appearance or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number provided by law.”). Other constitutions gave to the legislature the power to reduce the number of jurors, at first only for inferior courts. *See, e.g.*, IOWA CONST. of 1857, art. I, § 9 (“The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by a jury of a less number than twelve men in inferior courts”); ILL. CONST. of 1870, art. II, § 5 (“The right of trial by jury, as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace, by a jury of less than twelve men, may be authorized by law.”); MO. CONST. of 1875, art. II, § 28 (“The right of trial by jury, as heretofore [sic] enjoyed, shall remain inviolate, but a jury for the trial of civil and criminal cases in courts not of record may consist of less than twelve men as may be prescribed by law.”); NEB. CONST. of 1875, art. I, § 6 (“The right of trial by jury shall remain inviolate, but the legislature may authorize trial by a jury of a less number than twelve men, in courts inferior to the district court”); GA. CONST. of 1877, art. VI, § 18, para. 1 (“The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial or traverse jury in courts other than the Superior and City Courts.”). The Constitutional Convention of Virginia of 1850, however, anticipated and tried to counter this trend by adding a phrase to George Mason’s words: “That in controversies respecting property, and in suits between man and man, the ancient trial by jury of *twelve men* is preferable to any other, and ought to be held sacred.” VA. CONST. of 1850, Bill of Rights, art. XI (emphasis added). Virginia removed this phrase from its constitution twenty years later, in 1870. *See* VA. CONST. of 1870, art. I, § 13 (“That in controversies respecting property, and in suits between man and man, the trial by jury is preferable to any other, and ought to be held sacred.”).

⁶⁰ ARK. CONST. of 1874, art. II, *amended by* ARK. CONST. of 1874, amend. XVI, § 7 (1927), and adopted at the general election on Nov. 6, 1928 (“[I]n all jury trials in civil cases, where as many as nine of the jurors agree upon a verdict, the verdict so agreed upon shall be returned as the verdict of such jury, provided, however, that where a verdict is returned by less than twelve jurors all the jurors consenting to such verdict shall sign the same.”); PA. CONST. of 1874, art. I, § 6; NEB. CONST. of 1875, art. I, § 6 (“The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases

provisions for civil jury trial unchanged through the nineteenth century.⁶¹ The Colorado Constitutional Convention of 1876 was bolder. The Colorado Constitution of that year pointedly refused to guarantee the right of civil jury trial at all.⁶² To this day, Colorado has no constitutional right to civil jury trial.⁶³ In debates about these changes in the state constitutional conventions, members emphasized the cost to the government—typically counties—of civil jury trials.⁶⁴ These costs included both the

in any court by not less than five-sixths of the jury.”); CAL. CONST. of 1879, art. I, § 7 (“The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three fourths of the jury may render a verdict.”); MONT. CONST. of 1889, art. III, § 23 (“In all civil actions . . . two-thirds in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all of such jury concurred therein.”).

⁶¹ Two rare exceptions were Delaware and Alabama. *See* DEL. CONST. of 1897, art. I, § 4 (“Trial by jury shall be as heretofore.”); DEL. CONST. of 1831, art. I, § 4 (same); DEL. CONST. of 1792, art. I, § 4 (same); ALA. CONST. of 1901, art. I, § 11 (“That the right of trial by jury shall remain inviolate.”); ALA. CONST. of 1875, art. I, § 12 (same); ALA. CONST. of 1867, art. I, § 13 (same); ALA. CONST. of 1865, art. I, § 12 (“The right of trial by jury shall remain inviolate.”); ALA. CONST. of 1819, art. I, § 28 (same).

⁶² COLO. CONST. of 1876, art. II, § 23 (“The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve men, as may be prescribed by law.”); *see* PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE STATE OF COLORADO 1875–1876, at 209–10 (1907) [hereinafter COLORADO CONSTITUTIONAL CONVENTION OF 1875–1876] (recording modifications made to the right to jury trial by the Committee of the Whole eliminating the right in civil cases and specifying that in all civil cases, a jury could consist of fewer than twelve).

⁶³ The jury trial provision is unchanged in the current version of the Colorado Constitution, except that “persons” has been substituted for “men.” *See* COLO. CONST. of 1876 (as amended), art. II, § 23. Colorado statutes have continuously provided for civil juries. *See* DALE A. OESTERLE & RICHARD B. COLLINS, THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE 58 (2002).

⁶⁴ *See, e.g.,* REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 545 (Albany, N.Y., William G. Bishop & William H. Attree, 1846) [hereinafter NEW YORK CONSTITUTIONAL CONVENTION OF 1846] (remarks of Mr. Bascom complaining of the costs of juror fees to counties); *id.* at 732 (remarks of Mr. Brown, explaining that he could not support the use of grand and petit juries in county courts because of the expense to the counties); 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS CONVENED 1869, at 307 (1870) [hereinafter ILLINOIS CONSTITUTIONAL CONVENTION OF 1869–1870] (minority report of the Committee on Counties, discussing expense of juror fees and mileage in large counties); COLORADO CONSTITUTIONAL CONVENTION OF 1875–1876, *supra* note 62, at 70–71 (remarks of E.T. Wells offering a resolution that “no jury be summoned to attend statedly in any court for the trial of issues in civil cases, and that the fees of jurors and the costs of summoning them shall not be made a public charge, but shall be taxed as other costs are”); NEW YORK CONSTITUTIONAL CONVENTION OF 1846, *supra*, at 724 (“Address to the People,” explaining that civil juries were permitted to consist of fewer than twelve, “thereby materially reducing the expenses of our courts.”).

fees of jurors and the costs of summoning them.⁶⁵ Members of the conventions also criticized the costs of jury trial to the jurors themselves. One member of the New York Constitutional Convention of 1846 explained:

I would respect the just rights of all litigants, but at the same time remember that men who are not litigants have rights also and ought not to be dragged from their own business by dozens to settle other people's quarrels, when half a dozen would answer all the ends of justice.⁶⁶

The importance of the civil jury as a political institution was fading. Most state constitutional conventions believed more flexibility was needed.

B. The Seventh Amendment and Nullification of a Different Sort

Although a right to criminal jury trial in federal courts was well-accepted among the framers of the U.S. Constitution,⁶⁷ a right to civil jury trial was controversial. When the question of requiring civil jury trial was raised late in the Convention in

⁶⁵ ILLINOIS CONSTITUTIONAL CONVENTION OF 1869–1870, *supra* note 64, at 307; COLORADO CONSTITUTIONAL CONVENTION OF 1875–1876, *supra* note 62, at 70–71.

⁶⁶ NEW YORK CONSTITUTIONAL CONVENTION OF 1846, *supra* note 64, at 111 (remarks of Mr. Hunt); *see also infra* Part II.C.1.

⁶⁷ The draft that the Philadelphia Convention of 1787 produced and sent to the states for ratification required criminal jury trial in the federal courts. U.S. CONST. art. III, § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .”). In *The Federalist No. 83*, Alexander Hamilton wrote of the agreement of the framers concerning criminal jury trial:

The friends and adversaries of the plan of the [federal constitutional] convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. . . . But I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases . . . seems therefore to be alone concerned in the question. And [criminal jury trial is] provided for in the most ample manner in the plan of the convention.

THE FEDERALIST NO. 83, 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Sixth Amendment reiterates the requirement of criminal jury trial. U.S. CONST. amend. VI.

Philadelphia in 1787,⁶⁸ several framers argued against it,⁶⁹ and their arguments persuaded most members.⁷⁰ In *The Federalist No. 83*, Alexander Hamilton undertook to justify why the Philadelphia Convention had not included a right to civil jury trial in the Federal Constitution.⁷¹ Hamilton observed that drafting such a right would be difficult.⁷² The federal courts had no existing practice, and therefore the formulations used by the states concerning preservation were useless.⁷³ The states varied considerably in their use of jury trial, forcing a hazardous choice among the different practices in drafting a federal right.⁷⁴ Such questions were best left to the legislature.⁷⁵ Even more important, in Hamilton's view, some civil cases were not appropriate for resolution by juries.⁷⁶ Cases involving the law of nations, such as prize cases, involved complicated questions of law unfamiliar to jurors and could spark wars with foreign powers if not decided correctly and consistently.⁷⁷ Equity cases required a large amount of discretion and were often too complicated and lengthy for trial by lay jurors.⁷⁸

Despite these arguments, ratifying conventions in several states viewed a right to civil jury trial in federal courts as so important that they recommended the inclusion of such a right in an amendment to the U.S. Constitution, and in some cases almost conditioned ratification on such a right.⁷⁹ Why? The Anti-Federalists were not simply paying ritual obeisance to the people or indulging showy rhetoric. They wanted results in civil cases that judges would not produce. The legislature might be captured by special interests of various kinds, and legislate against the good of the whole.⁸⁰

⁶⁸ George Mason raised the question of a bill of rights, including a right to civil jury trial, late in the proceedings, on September 12, five days before the convention was to adjourn. See James Madison, *Debates in the Federal Convention*, in 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587–88 (Max Farrand ed., 1911) [hereinafter Farrand, RECORDS].

⁶⁹ See *id.* (arguments of Nathaniel Gorham and Roger Sherman); *id.* at 628 (arguments of Nathaniel Gorham, Rufus King, and Charles Cotesworth Pinckney).

⁷⁰ *Id.* at 628.

⁷¹ THE FEDERALIST NO. 83, at 469–71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁷² *Id.* at 471.

⁷³ *Id.* at 471–72.

⁷⁴ *Id.* at 470–76.

⁷⁵ *Id.* at 471, 477.

⁷⁶ *Id.* at 472–73.

⁷⁷ *Id.* During the Revolutionary War, state admiralty courts used juries to determine prize cases, leading to inconsistent results that ignored established legal principles. See Harrington, *supra* note 23, at 176–79. Governor Edmund Randolph of Virginia also feared jury decisions in prize cases. “Would you have a jury to determine the case of a capture? . . . These depend on the law of nations, and no twelve men that could be picked up could be equal to the decision of such a matter.” 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 431 (Jonathan Elliot ed., 1836) [hereinafter Elliot, DEBATES].

⁷⁸ THE FEDERALIST NO. 83, at 473 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁷⁹ States that recommended an amendment to the Federal Constitution guaranteeing civil jury trial included Massachusetts, New Hampshire, Virginia, New York, and Rhode Island. See Henderson, *supra* note 23, at 298.

⁸⁰ See *id.*

The executive might use its power to reward friends or to punish political enemies.⁸¹ The civil jury, in both England and America, had proved useful in awarding damages in trespass suits against executive officials.⁸² The judiciary might be corrupt⁸³ or biased in favor of elites.⁸⁴ The jury could check all of these abuses.

Beside these general arguments, the Anti-Federalists had specific existing laws in mind for nullification. These were the laws of contract, which provided that debtors should pay their creditors.⁸⁵ During the Revolutionary War and its aftermath, rapid inflation and deflation, together with contract clauses requiring payment in hard currency, made it difficult for debtors to pay.⁸⁶ State legislatures passed various laws that made it easier for debtors to escape creditors' demands.⁸⁷ In addition, state juries were sympathetic to debtors.⁸⁸ By contrast, the new Federal Constitution contained

⁸¹ See *id.* at 185–86.

⁸² See, e.g., *Erving v. Cradock* (1761), reprinted in BERNARD PAPERS, *supra* note 28; *Wilkes v. Wood*, 19 How. St. Tr. 1153 (C.P. 1763), 98 Eng. Rep. 489; *Huckle v. Money*, 19 How. St. Tr. 1404 (C.P. 1763), 95 Eng. Rep. 768; *Beardmore v. Carrington*, 19 How. St. Tr. 1405 (C.P. 1764), 95 Eng. Rep. 790; *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765), 95 Eng. Rep. 807; *Money v. Leach*, 19 How. St. Tr. 1001 (K.B. 1765), 97 Eng. Rep. 1075; *Wilkes v. Halifax*, 19 How. St. Tr. 1406 (C.P. 1769); see also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 775–78 (1994); Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1905–06 (2010); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14, 19 (1972).

⁸³ See 2 FARRAND, RECORDS, *supra* note 68, at 587 (argument of Elbridge Gerry); Harrington, *supra* note 23, at 187 (quoting arguments of Anti-Federalists). Alexander Hamilton agreed that this was the strongest argument in favor of civil juries. THE FEDERALIST NO. 83, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961). He observed, however, that jurors could be corrupted as well as judges. *Id.* at 468–69.

⁸⁴ See Harrington, *supra* note 23, at 187 (quoting arguments of Anti-Federalists). This was Blackstone's principal argument in favor of the jury.

The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature, that *the few* should be always attentive to the interests and good of *the many*. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts.

3 WILLIAM BLACKSTONE, COMMENTARIES *379.

⁸⁵ Wolfram reviewed in detail the arguments linking debtors and the right to civil jury trial in the state ratifying conventions. Wolfram, *supra* note 23, at 673–703.

⁸⁶ *Id.* at 674.

⁸⁷ *Id.* at 674–75; Harrington, *supra* note 23, at 170–72.

⁸⁸ Harrington, *supra* note 23, at 173–74; Wolfram, *supra* note 23, at 675–76.

various provisions that favored creditors, including the Contracts Clause, which forbids the states to enact laws impairing the obligation of contracts.⁸⁹ (Federalists generally thought it imperative to repay debts, for the credit and prosperity of the new nation.⁹⁰) Debtors thus faced the prospect of being sued in federal court by their foreign and out-of-state creditors, under diversity jurisdiction, without a jury to nullify the debt. Furthermore, Article III gave the Supreme Court the power to exercise “appellate Jurisdiction, both as to Law and Fact.”⁹¹ Even if a federal court sat with a jury, therefore, the jury’s findings might be re-examined and overturned on appeal. Worse, a state jury verdict might be overturned by a federal court on appeal.⁹² Anti-Federalists alluded to these dangers many times in the ratification debates.⁹³ There were deep contradictions inherent in allowing juries to nullify law in a democratic republic. It would have been difficult to argue openly that a handful of citizens should be able to nullify the official acts of representatives elected by the entire voting population, and operating according to carefully designed procedures. Not surprisingly, in view of these contradictions, Anti-Federalists avoided openly praising juries for nullifying debts.⁹⁴ Nevertheless, the implication was clear. One of Patrick Henry’s speeches to the Virginia ratifying convention gives an example of how the connection between juries and debtors could be suggested without declaring it precisely:

Of what advantage is it to the American congress to take away this great and general security [of a bill of rights]? I ask of what advantage is it to the public or to congress, to drag an unhappy debtor, not for the sake of justice, but to gratify the malice of the plaintiff, with his witnesses to the federal court, from a great distance? What was the principle that actuated the convention in proposing to put such dangerous powers in the hands of any one? Why is the trial by jury taken away? All the learned arguments that have been used on this occasion do not prove that it is secured.⁹⁵

James Madison attempted to respond to these concerns in drafting the Seventh Amendment.⁹⁶ The first issue was the existence of civil juries in federal courts;⁹⁷ the

⁸⁹ U.S. CONST. art. I, § 10.

⁹⁰ See Harrington, *supra* note 23, at 173–76.

⁹¹ U.S. CONST. art. III, § 2.

⁹² See Harrington, *supra* note 23, at 220.

⁹³ See Wolfram, *supra* note 23, at 679–82.

⁹⁴ See *id.* at 679–80.

⁹⁵ 3 Elliot, DEBATES, *supra* note 77, at 302.

⁹⁶ Madison was anxious to avoid a second constitutional convention, which in his mind was a real possibility. See Harrington, *supra* note 23, at 222, 227. In addition, North Carolina and Rhode Island had not yet ratified the Constitution. *Id.* at 223.

⁹⁷ By the time Madison drafted the Seventh Amendment, Congress had already hammered out a compromise on civil juries in the Judiciary Act of 1789, specifying that federal courts

second was the re-examination of juries' verdicts by judges. Regarding the first issue, Madison had before him a number of different suggestions and models from the states.⁹⁸ Because the states' use of civil juries varied so greatly, and because Madison was unenthusiastic about the need for such a right,⁹⁹ he rejected all of the states' proposals. (Among the proposals that Madison rejected was New York's, which specified "the common law of England."¹⁰⁰) He instead came up with a vague formulation: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." ¹⁰¹ This became known as the Preservation Clause. Regarding the second issue, Madison drafted language to limit the scope of federal appeals of jury verdicts, which the Anti-Federalists feared. Congress approved the following language: "[A]nd no fact found by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."¹⁰² This became known as the Re-examination Clause. The Re-examination Clause has no counterpart in any state constitution. Its independent significance became clear in U.S. Supreme Court decisions, as discussed in Part III. It was the Re-examination Clause that prompted Joseph Story's test based on the English common law,¹⁰³ as well as the Supreme Court's strict historical interpretation of that test through the early twentieth century.¹⁰⁴

II. PROMINENT THEMES IN INTERPRETATION OF RIGHTS TO CIVIL JURY TRIAL AFTER THE FOUNDING THROUGH THE EARLY TWENTIETH CENTURY

The Anti-Federalists valued and sought to preserve the civil jury's law-nullifying function but that very characteristic soon came to be seen as a liability. The Anti-Federalists had wanted local juries to decide law based on local sentiment, so as to prevent a centralized tyranny. Increasingly, however, Americans in all areas were

would sit with juries in diversity cases, but not admiralty or revenue cases. *See* Judiciary Act of 1789, §§ 9, 12, 1 Stat. 73; Harrington, *supra* note 23, at 226–27. The Seventh Amendment therefore appeared as something of an anticlimax, not disturbing an arrangement already agreed to.

⁹⁸ *See* Harrington, *supra* note 23, at 217–22.

⁹⁹ Madison had argued strenuously against a need for a civil jury right in the Virginia ratifying convention. *See* 3 Elliot, DEBATES, *supra* note 77, at 487, 489.

¹⁰⁰ 1 *id.* at 362.

¹⁰¹ U.S. CONST. amend. VII. Akhil Amar has argued that the Seventh Amendment incorporates state jury practices. AMAR, *supra* note 23, at 88–93. In light of the work of Matthew Harrington and Stanton Krauss, this seems unlikely. Harrington, *supra* note 23, at 217–27; Krauss, *supra* note 23, at 445–47.

¹⁰² U.S. CONST. amend. VII. Stanton D. Krauss has proposed that the common law of England was intended to be the reference for the Re-examination Clause, but not for the Preservation Clause. *See* Krauss, *supra* note 23, at 447–51.

¹⁰³ *See* United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750).

¹⁰⁴ *See infra* Part III.

concerned with regional and national economic development.¹⁰⁵ Predictable, uniform legal rules helped promote that development.¹⁰⁶ Use of civil juries could lead to unlawful, unpredictable results that undermined the authority of legislatures and courts, and thwarted the ability to plan and carry out actions.

The desire for juries to protect debtors did not disappear, but it became less politically potent.¹⁰⁷ Some judges and delegates to constitutional conventions also stressed the jury's value in checking the judiciary generally.¹⁰⁸ John Reid's study of

¹⁰⁵ Acknowledging the danger of summing up "long periods and great movements in a sentence," Lawrence Friedman has written of American law in the nineteenth century:

[G]radually, a new set of attitudes developed, in which the primary function of law was . . . economic growth and service to its users. In this period, people came to see law, more and more, as a utilitarian tool: a way to protect property and the established order, of course, but beyond that, to further the interests of the middle class *mass*, to foster growth, to release and harness the energy latent in the commonwealth . . .

LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 114 (2d ed. 1985).

¹⁰⁶ In the North, judges such as James Kent, Joseph Story, Isaac Parker, and Jeremiah Smith worked to create uniform national private law that furthered commercial development and constrained juries. See DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 286–87 (2005); JOHN PHILLIP REID, *CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE* 107, 115–30 (2004); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 *COLUM. L. REV.* 547, 566–69 (1993); Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 *NOTRE DAME L. REV.* 505, 519–21 (1996) [hereinafter Lettow, *New Trial*]. In the South, judges such as Joseph Lumpkin of Georgia and Hamilton Gamble of Missouri wanted to encourage commercial and industrial development and predictable legal rules. See DENNIS K. BOMAN, *LINCOLN'S RESOLUTE UNIONIST: HAMILTON GAMBLE, DRED SCOTT DISSENTER AND MISSOURI'S CIVIL WAR GOVERNOR* 18–22 (2006); PAUL DEFOREST HICKS, *JOSEPH HENRY LUMPKIN: GEORGIA'S FIRST CHIEF JUSTICE* 63–72 (2002); TIMOTHY S. HUEBNER, *THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790–1890*, at 73–74, 81–86 (1999).

¹⁰⁷ At the New York Constitutional Convention of 1846, one delegate argued that even cases involving small amounts of money should go to jury trial. He immediately added that "[h]e was not sure but he would abolish all laws for the collection of debts, and leave the matter to the honesty and integrity of men." *NEW YORK CONSTITUTIONAL CONVENTION OF 1846*, *supra* note 64, at 549 (remarks of Mr. Swackhamer). Another delegate mocked this suggestion, stating that he, at least, "had not yet to learn . . . the great use in civilized society of laws for the collection of debts." *Id.* (remarks of Mr. Hoffman). So concerned were the framers of the Georgia Constitution of 1868 about juries nullifying debts that they inserted a provision to prevent it: "The court shall render judgment without the verdict of a jury in all civil cases founded on contract, where an issuable defence is not filed on oath." *GA. CONST.* of 1868, art. V, § 3, cl. 3.

¹⁰⁸ See, e.g., *Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382, 395–96 (S.C. 1794) (explaining that the purpose of the jury in America was to prevent judicial bias in favor of the rich and influential); *NEW YORK CONSTITUTIONAL CONVENTION OF 1846*, *supra* note 64,

New Hampshire during the early republic shows that the rationale favored by supporters of the jury shifted over time.¹⁰⁹ Instead of conceiving the jury mainly as a check on legislative or executive power, proponents of the autonomous jury in New Hampshire in the early nineteenth century praised it as a check on the judiciary.¹¹⁰ Interest in the jury as a check on judicial officers may have been a reason why some courts, legislatures, and constitutional conventions authorized justices of the peace and other inferior courts to sit with juries, ordinarily of six persons.¹¹¹ By the middle

at 545 (remarks of Mr. Porter) (arguing that the purpose of the jury in America was “to protect the rights of the people from the overshadowing encroachments and the tremendous power of the judiciary”).

¹⁰⁹ See REID, *supra* note 106, at 118–19.

¹¹⁰ See *id.* at 116–17.

¹¹¹ The six-person juries that sat with justices of the peace were discussed in some detail in the New York Constitutional Convention of 1846. See NEW YORK CONSTITUTIONAL CONVENTION OF 1846, *supra* note 64, at 545 (remarks of Charles O’Conor) (declaring that “the introduction of six men [in justices’ courts] amounted to nothing, as there was no necessity for them, according to the statute, and they formed no part of the old institution of trial by jury. They were an illegitimate jury.”). Several of the delegates expressed concern about the partiality of justices of the peace. See *id.* at 720 (remarks of Mr. Chatfield) (protesting the expansion of the exclusive and conclusive jurisdiction of justices of the peace, arguing that justices were ignorant and “often act under the influence of neighborhood excitement, catching the prevailing spirit, and being moved by its impulse”); *id.* at 721 (remarks of Mr. Crooker) (arguing that the justices “are too often controlled by some sectional power and influence”). One delegate, who claimed an extensive practice before justice courts, also denounced jurors in justice courts in strong terms.

The manner of selecting juries in justices’ courts was defective and opened the door for the most gross corruption. The constable if he was honest, summoned those who were nearest at hand and who were generally unfit to be trusted with the decision of causes. He could not for the pittance paid him for the service, select the jury with care from competent, safe and intelligent men. The idlers and vagabonds who had no business of their own, hanging around the court, like vultures around a carcass, formed the great mass of its juries. In very many causes the evil was of a stronger character. In strongly contested trials the people discussed the merits and took sides with the parties in the contest—A corrupt constable would summon a jury at the selection and dictation of the plaintiff, who always chooses his ground on which to prosecute, as well as the officer to serve his process.

Id. (remarks of Mr. Crooker). For constitutional provisions authorizing inferior courts to sit with fewer than twelve jurors, see, for example, IOWA CONST. of 1857, art. I, § 9 (“The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by a jury of a less number than twelve men in inferior courts . . .”); ILL. CONST. of 1870, art. II, § 5 (“The right of trial by jury, as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace by a jury of less than twelve men, may be authorized by law.”); MO. CONST. of 1875, art. II, § 28 (“The right of trial by jury, as heretofore enjoyed, shall remain inviolate; but a jury for the trial of criminal or civil cases, in courts not of record,

of the nineteenth century, however, those arguing that the jury served as a valuable check tended to be outnumbered by those concerned with the jury's inefficiencies.¹¹²

A pronounced shift occurred from considering the civil jury as a political institution to considering the civil jury as a judicial institution. And in the latter respect, many judges and commentators thought the civil jury fell short. We have already seen Hamilton's concerns about the capacity of civil juries.¹¹³ Tocqueville, although he thought the civil jury was a good device for educating the people in law and government, admitted that "its usefulness can be contested" if the question were how far the civil jury "facilitates the good administration of justice."¹¹⁴ The use of juries posed serious difficulties for the administration of civil justice, apart from any deliberate law nullifying. As judges commented in the cases discussed below, jury trial became increasingly time-consuming, expensive, and prone to delays.¹¹⁵ Juries sometimes lacked the technical expertise and understanding that might be necessary for decision-making in a complex society and economy.¹¹⁶ Judges emphasized jury control¹¹⁷ and avoidance. They allowed legislatures discretion in modifying civil jury trial.

This Part examines prominent themes found in court decisions, arguments of counsel, members of state constitutional conventions, and legal commentators concerning constitutional rights to civil jury trial. Although some regional and temporal variation did exist, these themes were remarkably uniform throughout the nation and over the course of the nineteenth century. Compared with other features of the legal systems—such as judicial comment on evidence,¹¹⁸ judicial elections,¹¹⁹ and formal mechanisms to control jury verdicts¹²⁰—the uniformity is striking.

may consist of less than twelve men, as may be prescribed by law."); NEB. CONST. of 1875, art. I, § 6 ("The right of trial by jury shall remain inviolate, but the legislature may authorize trial by a jury of a less number than twelve men in courts inferior to the district court."); GA. CONST. of 1877, art. VI, § 18 ("The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial or traverse jury in Courts other than the Superior and City Courts."). The six-person jury in justice courts is a phenomenon that would benefit from more study.

¹¹² See *infra* Part II.C.1.

¹¹³ See *supra* text accompanying notes 71–78.

¹¹⁴ TOCQUEVILLE, *supra* note 26, at 270–71.

¹¹⁵ See *infra* text accompanying notes 231–44.

¹¹⁶ See *infra* text accompanying notes 252–61.

¹¹⁷ See Lettow, *New Trial*, *supra* note 106, at 518–21, 524–26, 542–47; Renée Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 463–73 (2013) [hereinafter Lerner, *Directed Verdict*].

¹¹⁸ See Lerner, *The Silent Judge*, *supra* note 18, at 241–61 (describing variation among states in permitting or forbidding judicial comment on the evidence).

¹¹⁹ See JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA passim* (2012) (describing variation in adoption of judicial elections).

¹²⁰ See Lerner, *Directed Verdict*, *supra* note 117, at 463–518 (describing variation among states in use of mechanisms to control jury verdicts, including demurrer, nonsuit, directed verdict, and judgment notwithstanding the verdict).

A. Praise of Trial by Jury, with Qualifications

If one looked only at the rhetorical phrases used by lawyers and judges in the early nineteenth century to describe jury trial, one would never guess that such a momentous shift in attitudes toward the civil jury was going on. The words “palladium,” “sacred,” “bulwark,” “protection,” and “liberty” abound in the arguments of counsel and judicial opinions in connection with trial by jury.¹²¹ Members of state constitutional conventions also used these phrases, albeit more sparingly.¹²² The rhetoric used by revolutionaries and politicians of the early republic continued. Lawyers and judges stressed the great age of the custom, and extolled the provision of the Magna Carta concerning “the judgment of his peers” and “the law of the land.”¹²³

Reading the praise carefully, however, reveals important qualifications. Judges showed little consistency in giving reasons for the jury’s supposed benefits.¹²⁴ Courts also sharply distinguished the importance of criminal from civil juries.¹²⁵

One of the most influential early cases concerning the right to jury trial actually rejected the most common rationale for it, although the judge found another. In *Zylstra v. Corporation of Charleston*¹²⁶ in 1794, Judge Thomas Waties of South Carolina observed that, in England, the jury was valued as a barrier to prevent tyranny by the government.¹²⁷ He believed the problem of government usurpation of the people’s rights did not exist in democratic America.¹²⁸ He explained, however, that the jury was valuable for another reason: to help prevent judicial bias in favor of rich and influential

¹²¹ See, e.g., *Emerick v. Harris*, 1 Binn. 416, 424 (Pa. 1808) (Yeates, J.) (“sacred inherent right of every citizen”); *Keddie v. Moore*, 6 N.C. (2 Mur.) 41, 44 (1811) (“sacred right of every citizen”); *Beers v. Beers*, 4 Conn. 535, 539 (1823) (“palladium of our rights”); *Bank of the State v. Cooper*, 10 Tenn. (2 Yer.) 599, 604 (1831) (“the most distinguishing badge of liberty”); *Lewis v. Garrett’s Adm’rs*, 6 Miss. (5 Howard) 434, 457 (1841) (“one of the strongest bulwarks of human rights”); *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 206 (1848) (“palladium,” “blessed protection”); *Steuart v. Mayor of Baltimore*, 7 Md. 500, 514 (1855) (“highly valued privilege of trial by jury”).

¹²² See, e.g., NEW YORK CONSTITUTIONAL CONVENTION OF 1846, *supra* note 64, at 544 (remarks of Mr. Worden) (“palladium of individual rights” and “great safeguard of individual rights”); *id.* at 545 (remarks of Mr. O’Conor) (“ancient and sacred”); *id.* (remarks of Mr. Bascom) (“sacred right”); *id.* at 546 (remarks of Mr. Porter) (“too sacred a right to be interfered with”).

¹²³ See, e.g., *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235 (1819) (interpreting the Bill of Rights of Maryland, art. XXI, which incorporated that provision of the Magna Carta); *Tift v. Griffin*, 5 Ga. 185, 188–89 (1848) (Nisbet, J.); *Flint River*, 5 Ga. at 195 (Lumpkin, J.).

¹²⁴ See, e.g., *infra* text accompanying note 146.

¹²⁵ See *infra* text accompanying notes 126–47.

¹²⁶ 1 S.C.L. (1 Bay) 382 (S.C. 1794) (Waties, J.).

¹²⁷ *Id.* at 395.

¹²⁸ *Id.* at 395–96 (“[H]ere, it can be wanted for no such purpose; the government and the people have the same common interests, and the same common views . . .”).

private persons.¹²⁹ This was Blackstone's principal argument in favor of the jury.¹³⁰ Waties's concern was understandable in a society such as eighteenth-century South Carolina, in which the wealthy planters dominated society and made their influence felt in the courts.¹³¹ Even so, his praise was not extravagant: Use of the jury provided "a better chance, generally, that the poor [would] receive an equal measure of justice with the rich."¹³²

Other courts gave the traditional justification for the jury but emphasized its limited scope. Judge Trotter of the Mississippi High Court of Errors and Appeals declared in an opinion in 1841 that jury trial was "designed simply to guard the people against the arbitrary or capricious interference of the government."¹³³ After the obligatory praise of the Magna Carta,¹³⁴ Trotter explained:

[I]t is not regarded as any infringement of [the English people's] rights thus solemnly pledged, that in the arrangement and distribution of the powers in the several courts which have grown up under the common law in that country, modes of trial in many cases are allowed which dispense with the verdict of a jury.¹³⁵

In some cases, fulsome praise for the jury seemed a disguise for undermining it. The Chief Justice of the Georgia Supreme Court, Joseph Lumpkin, used this tactic in a case in 1848 concerning the right to civil jury trial.¹³⁶ Lumpkin was a Whig eager for economic expansion, a devout Presbyterian zealous in promoting educational and moral causes, and a legal reformer impatient with the crusty traditions of the common

¹²⁹ *Id.* at 396 ("In a country like ours, so thinly peopled, where, as in all societies, every man of any consideration has extensive private connexions, and often a secret interest in courting popular favour; if the power of proceeding to judgment, in all cases, was committed to a permanent body of men, it would sometimes happen that private affection or party views would intermingle in the trial of right, and prevent a fair and impartial decision. But when the rights of the citizens are to be determined on by 12 men, changed at every court, and indiscriminately drawn from every class of their fellow-citizens, there will be a better chance, generally, that the poor will receive an equal measure of justice with the rich, and that the decision of facts will be according to the truth of them.").

¹³⁰ *See supra* note 84.

¹³¹ *See* MICHAEL STEPHEN HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767–1878, at 1, 3, 5, 15 (1980).

¹³² *Zylstra*, 1 S.C.L. (1 Bay) at 396.

¹³³ *Lewis v. Garrett's Adm'rs*, 6 Miss. (5 Howard) 434, 454 (1841). The U.S. Supreme Court explained the provisions of the Magna Carta similarly: "[T]hey were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819).

¹³⁴ *Lewis*, 6 Miss. (5 Howard) at 455.

¹³⁵ *Id.*

¹³⁶ *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 195, 206 (1848).

law.¹³⁷ He wrote that he and his colleagues cordially concurred in the “glowing eulogium” on trial by jury in a recent number of the *Monthly Law Reporter*.¹³⁸ (The *Monthly Law Reporter* was a periodical published in Boston and edited at the time by Stephen H. Phillips.¹³⁹) Lumpkin tracked the argument of the “talented Editor” exactly, up to a point.¹⁴⁰ Trial by jury was, he declared with Phillips, “one of the great elements, the greatest characteristic of free government.”¹⁴¹ Notably, neither Phillips nor Lumpkin claimed that the jury was efficient or accurate.¹⁴² The ostensible virtues of the jury were different. Echoing Tocqueville,¹⁴³ Phillips and Lumpkin called the

¹³⁷ In 1849, a year after his opinion in *Flint River Steamboat Co. v. Foster*, Lumpkin wrote in another opinion:

I rejoice to see edifices built . . . “and covered with the moss of many generations,” swaying beneath the sturdy blows so unsparingly applied by the hand of reform. Why should the spirit of progress which is abroad in the world, and which is heaving and agitating the public mind in respect to the arts, sciences, politics and religion, halt upon the vestibule of our temples of justice?

Studstill v. State, 7 Ga. 2, 19 (1849). On Joseph Henry Lumpkin (1799–1867), see HICKS, *supra* note 106; HUEBNER, *supra* note 106, at 70–98; Timothy S. Huebner, *Joseph Henry Lumpkin and Evangelical Reform in Georgia: Temperance, Education, and Industrialization, 1830–1860*, 75 GA. HIST. Q. 254 (1991).

¹³⁸ *Flint River*, 5 Ga. at 205. The article that Lumpkin discussed was written by the *Monthly Law Reporter*’s editor, Stephen H. Phillips, and appeared, unsigned, in the July 1848 issue. Stephen H. Phillips, *The New York Code of Procedure*, 11 MONTHLY L. REP. (n.s. vol. 1) 97 (July 1848) [hereinafter Phillips, *The New York Code of Procedure*].

¹³⁹ Stephen Henry Phillips (1823–1897) was born in Salem, Massachusetts, graduated from Harvard College, and studied at Harvard Law School under Joseph Story. 1 DUANE HAMILTON HURD, *HISTORY OF ESSEX COUNTY, MASSACHUSETTS: WITH BIOGRAPHICAL SKETCHES OF MANY OF ITS PIONEERS AND PROMINENT MEN*, at xlvi–li (Philadelphia, J.W. Lewis & Co. 1888). Phillips was a delegate to the first Republican National Convention, in 1856 in Philadelphia, and Attorney General of Massachusetts from 1858 to 1861. *Id.* In 1866, King Kamehameha V invited Phillips to come to Honolulu. Phillips became Hawaii’s attorney general and was appointed to the House of Nobles in 1867. *Id.* Phillips’s fellow student at Harvard, William Little Lee, helped draft the 1852 Constitution of the Kingdom of Hawaii and served as its chief justice. See Christopher D. Hu, *Transplanting Servitude: The Strange History of Hawaii’s U.S.-Inspired Contract Labor Law*, 49 STAN. J. INT’L L. 274, 280 (2013).

¹⁴⁰ *Flint River*, 5 Ga. at 205–06.

¹⁴¹ *Id.* at 206 (quoting and paraphrasing Phillips, *The New York Code of Procedure*, *supra* note 138, at 109).

¹⁴² Lumpkin omitted Phillips’s qualification: “Whatever may be thought of [the jury], as a means of eliciting truth, and, without claiming for it any mystical virtue, we believe it is equal, or superior, to any other . . .” Phillips, *The New York Code of Procedure*, *supra* note 138, at 109.

¹⁴³ See TOCQUEVILLE, *supra* note 26, at 275 (“[The jury] should be regarded as a free school which is always open and in which each juror learns his rights, comes into daily contact with the best-educated and most-enlightened members of the upper classes, and is given practical lessons in the law, lessons which the advocate’s efforts, the judge’s advice, and also the very passions of the litigants bring within his mental grasp.”).

jury a “school,” in which a man learned “to weigh facts, to balance arguments . . . and [to] deliberat[e].”¹⁴⁴ This civic education improved his vote and turned a man into a citizen.¹⁴⁵ In addition, juries saved judges from “isolation from the people,” which was “the first step toward secret proceedings and arbitrary tribunals.”¹⁴⁶ This argument seemed to equate jury trial with the benefits of public trial. Both editor and judge praised the movement on the continent of Europe toward public trial by jury.¹⁴⁷

Judge Lumpkin parted company with Phillips, however, in an important respect. Phillips’s topic was the new *Field Code* in New York, governing civil procedure, and Phillips was concerned about preserving the jury specifically in civil cases.¹⁴⁸ Lumpkin did not mention this in his paraphrase. Rather, Lumpkin—who was deciding a case about the civil jury—confined his lengthy praise of the jury to *criminal cases*.¹⁴⁹ After effusions about the criminal jury frothy with moral rhetoric and exclamation points,¹⁵⁰ Lumpkin deflatingly observed, “We may, however, after all, *doubt the essentiality of trial by jury in civil cases.*”¹⁵¹ Although many states did not distinguish between the civil and criminal jury in their constitutions, judges often did.¹⁵² Like Alexander

¹⁴⁴ *Flint River*, 5 Ga. at 206; Phillips, *The New York Code of Procedure*, *supra* note 138, at 109.

¹⁴⁵ *Flint River*, 5 Ga. at 206; Phillips, *The New York Code of Procedure*, *supra* note 138, at 109.

¹⁴⁶ *Flint River*, 5 Ga. at 206; Phillips, *The New York Code of Procedure*, *supra* note 138, at 109.

¹⁴⁷ *Flint River*, 5 Ga. at 206; Phillips, *The New York Code of Procedure*, *supra* note 138, at 109.

¹⁴⁸ See Phillips, *The New York Code of Procedure*, *supra* note 138, at 106–11. Phillips doubted that the way that law and equity were merged in the *Field Code* would prove lasting. See *id.* at 106–09. He was concerned that flexible principles of equity pleading would not be compatible with the simplification of issues needed for jury trial. See *id.*

¹⁴⁹ See *Flint River*, 5 Ga. at 206–07.

¹⁵⁰ In *criminal* proceedings, trial by jury cannot be too highly appreciated or guarded with too much vigilance. So long as this palladium and *Habeas Corpus*, remain unimpaired, life and liberty are safe from passion, prejudice, or oppression, no matter from what quarter they emanate. What security to innocence and what a humane arrangement of the law, that punishment can only be inflicted by the unanimous decision of twelve of our honest and impartial neighbors! What are slight inconveniences in the mode of selecting a jury, compared with this blessed protection! Long may trial by jury, in criminal cases, the main pillar in the temple of justice, be continued to the country, and its results be characterized by wisdom and candor, patience and purity, firmness and independence.

Id. at 206.

¹⁵¹ *Id.*

¹⁵² *Id.* (“And while it is undoubtedly true, that the provisions, both of the National and State Constitutions, respecting this institution, apply to *civil cases*, still it cannot be denied, that they were mainly and primarily intended to protect inviolate, the trial by jury, in *criminal prosecutions*. And courts will watch with more jealousy, any departure from, or trespass upon trial by jury in the *latter* class of cases, than the *former*.”); see REID, *supra* note 106,

Hamilton, Lumpkin saw little use for the civil jury. Lumpkin observed that many types of civil cases were tried daily without a jury.¹⁵³ “Indeed, it is notorious, that modern law reform, both in England, and in this country, seeks, amongst other objects, to dispense, as much as possible with juries.”¹⁵⁴ He cited as evidence of this trend the provisions for waiver of jury trial in New York’s new *Field Code* (1848)¹⁵⁵ and the recent County Courts Act (1846)¹⁵⁶ in England. The summary proceeding established in the statute whose constitutionality was at issue in the case before the Georgia Supreme Court was a further example of that trend. As explained below in Part II.C.2, Lumpkin and his colleagues held that the proceedings did not violate constitutional rights to civil jury trial.¹⁵⁷ The rhetoric of judges extolling jury trial helped distract attention from the effect of their decisions, which was to limit it.

B. Use of Flexible Originalist Tests

In order for legislatures and judges to modify civil jury trial, courts had to construe constitutional provisions to allow them to do so. Constitutional rights to civil jury trial pose stark problems of interpretation. Nearly all of them refer to a historical baseline, as we have seen.¹⁵⁸ Courts faced the problem of how to give such procedural clauses meaning without prohibiting legislatures from making any change to any incident of jury trial.

1. Setting Out the Test: What Was the Time Referenced, and What Was the Law?

Courts, interpreting the unmistakable language of preservation of jury trial in their state constitutions, settled almost uniformly on an original baseline with respect to time: the time that their constitutions went into effect.¹⁵⁹

at 119 (explaining that Judge Jeremiah Smith of New Hampshire sought to control only the civil jury, to avoid greater opposition).

¹⁵³ *Flint River*, 5 Ga. at 206–07.

¹⁵⁴ *Id.* at 207.

¹⁵⁵ *Id.* (“[A]s a justification for this change, it is stated that in the city of New York, where the right of election existed as to the mode of trial, 1285 judgments were rendered by the Court in Marine causes *without*, against 67 upon the verdict of a jury.”); see 1848 N.Y. Laws 538, at § 221. On the jury waiver provisions of the *Field Code*, see *infra* note 345.

¹⁵⁶ *Flint River*, 5 Ga. at 207; see County Courts Act, 1846, 9 & 10 Vict., c. 95 (U.K.). On the provisions of the County Courts Act concerning jury trial, see Conor Hanly, *The Decline of Civil Jury Trial in Nineteenth-Century England*, 26 J. LEGAL HIST. 253, 275–78 (2005).

¹⁵⁷ *Flint River*, 5 Ga. at 194–95.

¹⁵⁸ See *supra* notes 45–54 and accompanying text.

¹⁵⁹ See, e.g., *Emerick v. Harris*, 1 Binn. 416, 424 (Pa. 1808); *Singleton v. Madison*, 4 Ky. (1 Bibb) 342, 343 (1809); *Keddie v. Moore*, 6 N.C. (2 Mur.) 41, 44–45 (1811); *Beers v. Beers*, 4 Conn. 535, 538–39 (1823); *Morford v. Barnes*, 16 Tenn. (8 Yer.) 444, 445–46 (1835); *Colt v. Eves*, 12 Conn. 243, 253 (1837); *Backus v. Lebanon*, 11 N.H. 19, 26–27 (1840); *Flint River*, 5 Ga. at 195, 205; *Ross v. Irving*, 14 Ill. 171, 179–81 (1852); *Lake Erie, Wabash & St. Louis R.R. v. Heath*, 9 Ind. 558, 559–60 (1857); *Gaston v. Babcock*, 6 Wis. 503, 506–07

The question of what law was preserved proved somewhat more difficult. The problem was especially acute in the federal courts, which had virtually no history when the Seventh Amendment was ratified together with the rest of the Bill of Rights in 1791.¹⁶⁰ We saw that in drafting the Seventh Amendment, James Madison had dodged the issue by simply referring to the “common law.”¹⁶¹ Which common law? As Justice Joseph Story remarked when he addressed the issue as a circuit judge in 1812 in *United States v. Wonson*,¹⁶² the common law differed among the states.¹⁶³ Therefore, he decided that the Seventh Amendment’s Re-examination Clause referred to “the common law of England, the grand reservoir of all our jurisprudence.”¹⁶⁴

Would the states also follow English practice? Occasionally, parties argued that states should, under state constitutional guaranties.¹⁶⁵ State courts generally rejected the idea that English practice controlled state rights to civil jury trial.¹⁶⁶ The Connecticut Supreme Court of Errors in 1837 observed that English jury practice had been constantly changing, and indeed had deviated from what the Court considered to be the

(1857); *Crandall v. James*, 6 R.I. 144, 148 (1859); *Shallon v. Bancroft*, 4 Minn. 109, 112–13 (1860); *Stilwell v. Kellogg*, 14 Wis. 499, 503–04 (1861); *Sands v. Kimbark*, 27 N.Y. 147, 149–53 (1863); *Tabor v. Cook*, 15 Mich. 322, 324–25 (1867); *McGear v. Woodruff*, 33 N.J.L. 213, 216 (1868); *Howe v. Treasurer of Plainfield*, 37 N.J.L. 145, 147–48 (1874); *Bothwell v. Bos. Elevated Ry.*, 102 N.E. 665, 668 (Mass. 1913) (“[T]he trial by jury known and practised in this State at the time the Constitution was framed and adopted [in 1780] was the one meant by article 15 of our Bill of Rights.”).

An exception was a line of cases beginning in 1794 in South Carolina, and influential in Georgia, which regarded the right to trial by jury as “originating in time immemorial,” almost a natural right. *See Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382, 395 (S.C. 1794) (“[T]he trial by jury is a common law right; not the creature of the constitution, but originating in time immemorial; it is the inheritance of every individual citizen, the title to which commenced long before the political existence of this society; and which has been held and used inviolate by our ancestors, in succession, from that period to our own time”); *see also State v. Allen*, 13 S.C.L. (2 McCord) 55, 60 (1822) (citing *Zylstra*, 1 S.C.L. (1 Bay) at 382); *Tift v. Griffin*, 5 Ga. 185, 190, 192 (1848).

¹⁶⁰ *See Harrington*, *supra* note 23, at 150 (“Although the [Seventh] Amendment was designed to reinforce the founders’ commitment to the principle of trial by jury in civil cases, it did not define the precise scope of the right.”).

¹⁶¹ *See supra* notes 96–104 and accompanying text.

¹⁶² 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

¹⁶³ *Id.* at 750.

¹⁶⁴ *Id.*

¹⁶⁵ *See, e.g., Colt v. Eves*, 12 Conn. 243, 250, 252 (1837) (argument of counsel that English civil jury selection practices should apply because of the right to jury trial in the Connecticut and U.S. constitutions).

¹⁶⁶ *See, e.g., id.* at 252 (“To preserve the trial by jury inviolate, cannot mean, that we must pursue the exact course taken in England to collect jurors.”); cases cited *infra* note 204. The Supreme Court of Vermont, however, interpreted its state’s unusual constitutional provision according to “the immemorial practice . . . in the common law courts of England and of this country.” *Plimpton v. Town of Somerset*, 33 Vt. 283, 291 (1860).

true common law rule with respect to jury selection.¹⁶⁷ In any case, the English rule regarding jury selection had developed in response to the needs of its own society and legal system, whereas the needs of Connecticut were different.¹⁶⁸ The Supreme Judicial Court of Massachusetts in 1913, responding to a decision of the U.S. Supreme Court the same year under the Re-examination Clause, declared firmly: “It is not to be thought that the framers of our Constitution in 1780, performing their labors in the midst of the War of the Revolution, had in mind the system of the mother country rather than that with which they were familiar by daily observation.”¹⁶⁹

California courts faced an interesting conundrum and solved it differently than had the federal courts. The California Constitution of 1849 declared that “[t]he right of trial by jury shall be secured to all, and remain inviolate forever.”¹⁷⁰ At the time of the adoption of that Constitution, the civil law was in force in California, and juries were not used in civil cases.¹⁷¹ In a case in 1860, *Koppikus v. State Capitol Commissioners*,¹⁷² Chief Justice Stephen Field got around this difficulty by holding that the right applied in cases “according to the course of the common law, as that law is understood in the several States of the Union.”¹⁷³ He observed that the framers of the California constitution were, with few exceptions, from states in which the common law prevailed, and that the vast majority of the people who voted on the constitution’s adoption were from common law countries.¹⁷⁴ In *Koppikus*, the plaintiff challenged the use of commissioners, rather than a jury, to assess compensation for condemnation of land.¹⁷⁵ Field briefly surveyed the law of other states and concluded that the use of commissioners rather than a jury was constitutional.¹⁷⁶

Parties sometimes argued, well into the nineteenth century, that the states were bound by the Seventh Amendment.¹⁷⁷ Early state and federal decisions held that the Seventh Amendment did not apply to the states, and that amendment remains unincorporated today.¹⁷⁸ State courts almost uniformly concluded that the laws of their

¹⁶⁷ *Colt*, 12 Conn. at 252 (asking, if Connecticut had to follow English jury practice, “what time is to be selected; for they have been constantly altering the qualifications, the exemptions and the mode of summoning jurors?”). The then-current English practice was to select jurors from the county, but Chief Justice Williams explained that the better common law rule was to select them from the vicinage. *Id.* at 251–52.

¹⁶⁸ Chief Justice Williams explained that it would be a great inconvenience to jurors in Connecticut to travel from all over the county to hear cases in the city of New Haven. *Id.* at 252.

¹⁶⁹ *Bothwell v. Bos. Elevated Ry.*, 102 N.E. 665, 668 (Mass. 1913).

¹⁷⁰ CAL. CONST. of 1849, art. I, § 3.

¹⁷¹ *See Koppikus v. State Capitol Comm’rs*, 16 Cal. 249, 253 (1860).

¹⁷² *Id.*

¹⁷³ *Id.* at 254.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 253.

¹⁷⁶ *Id.* at 255 (citing cases from New York and Ohio).

¹⁷⁷ *See, e.g., Colt v. Eves*, 12 Conn. 243, 250 (1837) (argument of counsel); *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 196, 200 (1848) (same).

¹⁷⁸ *See Jackson v. Wood*, 2 Cow. 819, 819–21 (N.Y. 1824) (holding that the Seventh Amendment of the Federal Constitution does not apply to the states); *Barron v. Mayor of*

state at the time the constitutional provision went into effect formed the relevant historical baseline.¹⁷⁹

Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) (stating that the limitations on government power in the Federal Bill of Rights apply only to the federal government); *Livingston's Lessee v. Moore*, 32 U.S. (7 Pet.) 469, 551–52 (1833) (stating that the Federal Bill of Rights, and specifically the Seventh Amendment, does not apply to the states); *Colt*, 12 Conn. at 251–52 (“So far as it regards the constitution of the United States, it is not necessary to examine what effect it could have upon this question [of civil jury trial]; because it has been well settled, that the amendments to that instrument were never intended to limit the power or to controul [sic] the proceedings of the state courts.”). Some courts, however, did not bother to reject the applicability of the Seventh Amendment in holding that a law was constitutional. *See, e.g., Flint River*, 5 Ga. at 194.

¹⁷⁹ *See, e.g., Emerick v. Harris*, 1 Binn. 416, 424 (Pa. 1808); *Singleton v. Madison*, 4 Ky. (1 Bibb) 342, 343 (1809); *Keddie v. Moore*, 6 N.C. (2 Mur.) 41, 44–45 (1811); *Morford v. Barnes*, 16 Tenn. (8 Yer.) 444, 445–46 (1835); *Colt*, 12 Conn. at 253; *Backus v. Lebanon*, 11 N.H. 19, 26–27 (1840); *Tift v. Griffin*, 5 Ga. 185, 189 (1848) (Nisbet, J.) (“The people of this State, then, are entitled to the trial by jury, as it was used in the State prior to the Constitution of ’98.”); *Ross v. Irving*, 14 Ill. 171, 179–81 (1852) (holding that a law allowing the appointment of seven commissioners to assess the value of improvements to land was unconstitutional under Illinois’s right to jury trial, in a case argued unsuccessfully by Abraham Lincoln before the Illinois Supreme Court); *Lake Erie, Wabash & St. Louis R.R. Co. v. Heath*, 9 Ind. 558, 559–60 (1857); *Gaston v. Babcock*, 6 Wis. 503, 506–07 (1857); *Crandall v. James*, 6 R.I. 144, 148 (1859); *Shallon v. Bancroft*, 4 Minn. 109, 113 (1860); *Stilwell v. Kellogg*, 14 Wis. 499, 503–04 (1861); *Sands v. Kimbark*, 27 N.Y. 147, 149–53 (1863); *Tabor v. Cook*, 15 Mich. 322, 324–25 (1867); *McGear v. Woodruff*, 33 N.J. L. 213, 216 (1868); *Howe v. Treasurer of Plainfield*, 37 N.J.L. 145, 147–48 (1874); *Bothwell v. Bos. Elevated Ry.*, 102 N.E. 665, 668 (Mass. 1913).

Treatise writers described this rule. *See* THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 547–48 (1857) (“[W]hen the constitution guarantees the right of trial by jury, it does not mean to secure that right in all possible instances, but only in those cases in which it existed when our constitutions were framed.”); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 410 n. 2 (Boston, Little, Brown & Co. 1868) (“Those cases which before the constitution were not triable by jury need not be made so now.”); JOHN PROFFATT, A TREATISE ON TRIAL BY JURY 127 (1877) (“For however the right may be defined or fixed, the inquiry must be made, as a purely historical fact, when and in what cases it is a matter of right; for the interpretation has been uniformly given to the operative clauses of the Constitution . . . that the right is to be confined to those classes of cases only in which it was used at the time of the adoption of the Constitution, unless it is expressly restricted or extended to others.” (footnote omitted)).

Few states concluded otherwise. For a time, South Carolina courts looked to a period before the ratification of that state’s constitution; South Carolina’s Constitution copied the Magna Carta. *See supra* note 48 and accompanying text. The Supreme Court of Kansas looked to an unspecified “common law,” rather than to the specific laws of Kansas at the time of the adoption of the constitution. *Kimball v. Connor*, 3 Kan. 410, 428 (1866) (interpreting Section 5 of the Kansas Bill of Rights: “The right of trial by jury shall be inviolate.”). Vermont had an unusual constitutional provision: “[W]hen any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held

2. How Much Discretion for the Legislature and Courts?

Once these preliminary questions about the originalist baseline had been decided, however, the task of interpretation was far from over. Did the originalist baseline mean that the legislature could alter no feature of jury trial? Were the laws at the time the constitutional provision went into effect thus made part of the Constitution?

Opinions in some early cases raising constitutional challenges to jury practices discussed at length the practical challenges of a strict originalist test. In the widely cited 1823 case *Beers v. Beers*,¹⁸⁰ the Connecticut Supreme Court of Errors considered the constitutionality of a statutory increase in the amount in controversy limit for justices of the peace, who sat without juries. The legislature had provided for an appeal to a court that sat with a jury.¹⁸¹ The defendant's counsel, David Daggett,¹⁸² observed that the law created various obstacles to the defendant trying to get a jury trial: Defendant had to move for an appeal, pay a duty, pay for copies, give bond, and prosecute the appeal.¹⁸³ Daggett gave a rhetorical flourish at the end of his argument:

Finally, in proportion to the importance of this right [of civil jury trial], will be the vigilance, not to say jealousy, with which this court will guard against any violation of it. It is a right which ought to be held *sacred*; and should its blessings be ultimately lost, it will be no reparation to learn from its history, that it has been frittered away, by *gradual encroachments and indirect means*.¹⁸⁴

Daggett's oratory failed to sway his fellow Federalist, Chief Justice Stephen Hosmer.¹⁸⁵ Chief Justice Hosmer's opinion, joined by all of his colleagues,¹⁸⁶

sacred." VT. CONST. of 1793, Bill of Rights, art. XII. The Vermont Supreme Court interpreted this provision according to "the immemorial practice . . . in the common law courts of England and of this country." *Plimpton v. Town of Somerset*, 33 Vt. 283, 290 (1860).

¹⁸⁰ 4 Day 535 (Conn. 1823).

¹⁸¹ *Id.* at 536; 1821 Conn. Pub. Acts 41.

¹⁸² Daggett was an active Federalist politician and held a variety of state offices. From 1833 to 1834, he was Chief Justice of the Connecticut Supreme Court. He is reckoned as one of the three founders of the Yale Law School. See John H. Langbein, *Blackstone, Litchfield, and Yale*, in *HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES* 33–35 (Anthony T. Kronman ed., 2004).

¹⁸³ *Beers*, 4 Conn. at 537.

¹⁸⁴ *Id.*

¹⁸⁵ On Hosmer, Daggett, and Peters, see Wesley W. Horton, *Hosmer to Peters to Daggett*, 73 CONN. B.J. 275 (1999). Horton wrote of Hosmer: "Like John Marshall in Washington, Hosmer had a first-rate legal mind and basically ran the court his way . . . while the other justices (including Republicans Chapman and Bristol) meekly went along with his views. Except for one person: John T. Peters." *Id.* at 277. Horton described Peters as a "Republican firebrand" who believed the other justices were betraying Republican principles and the Constitution of 1818 by going along with Hosmer's views. *Id.*

¹⁸⁶ *Beers*, 4 Conn. at 537 ("Chapman, Brainard, and Bristol, Js. were of the same opinion. Peters, J. at first dissented, but after more mature deliberation, acquiesced in the decision.").

rejected this challenge based on both the constitutional text and the drafters' intent.¹⁸⁷ Analyzing the text, Hosmer concluded that the right to trial by jury would be violated if it were taken away, prohibited, or subjected to "unreasonable and burdensome regulations" similar to a prohibition.¹⁸⁸ He continued by discussing the intent of the drafters: "It never could be the intention of the constitution to tie up the hands of the legislature, so that no change of jurisdiction could be made, and no regulation, even of the right of trial by jury, could be had."¹⁸⁹ Hosmer implied that the statutory change made jury trial in certain circumstances more expensive to the parties. Nevertheless, he held, jury trial "may be subjected to new modes, and even rendered more expensive, if the public interest demand such alteration."¹⁹⁰ He criticized a "morbid sensibility" concerning the right to jury trial that might hold unconstitutional a legal requirement of posting a bond, an increase in jurors' fees, and other "trivial changes," although these might be necessary to promote justice and general convenience.¹⁹¹ He underscored the importance of balancing various rights and of not treating one right as trumping all the rest. "As the interests of a state . . . do not essentially depend on the existence of one right only, but on many, it is proper to preserve them generally, and not to sacrifice one important consideration to another equally important."¹⁹² The right to trial by jury was not the only consideration in running a system of civil justice. Jury trial was enmeshed in a web of other procedures.

Hosmer's analysis in *Beers v. Beers* was influential.¹⁹³ In 1871, the Supreme Court of Errors of Connecticut elaborated on its earlier reasoning, remarking that a strict

¹⁸⁷ *Id.* at 539 ("[A] construction of this nature is equally unwarranted by the words, and by the intention, of the constitution.").

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* Other courts adopted similar arguments in the context of an appeal from an arbitration award. In a Pennsylvania case in 1820, a plaintiff who had lost in arbitration wanted to appeal to a court with a jury. *See McDonald v. Schell*, 6 Serg. & Rawle 240 (Pa. 1820). A statute provided such an appeal, on condition that the litigant demanding an appeal first pay the costs of the opposing party. *See id.* The plaintiff claimed that he was unable to pay these costs, "owing to misfortunes," and argued that this requirement violated Pennsylvania's constitutional guarantee of jury trial. *Id.* at 241. The Pennsylvania Supreme Court did not bother hearing the arguments of defendant's counsel, but briskly held that an appeal could not be entered without payment of costs. *Id.* at 241–42.

The law may undoubtedly, in certain cases, bear so hard on a poor man, as almost to deprive him of his appeal. But that will not justify the Court in deciding that the law is void. All general laws operate with severity in particular instances. The costs, although paid, are to be recovered again by the appellant, in case he succeeds in his appeal.

Id.

¹⁹¹ *Beers*, 4 Conn. at 539.

¹⁹² *Id.* at 539–40.

¹⁹³ Later cases repeatedly cited it. *See, e.g., Colt v. Eves*, 12 Conn. 243 (1837) (rejecting a challenge to a method of selecting jurors); *Curtis v. Gill*, 34 Conn. 49, 54–56 (1867) (rejecting a challenge to a change in the jurisdiction of justices of the peace). Theodore Sedgwick, in

historical test would result in constitutionalizing the statutes in effect in 1818.¹⁹⁴ The court acknowledged that such a rule was “precise and definite,” but for that very reason unsound.¹⁹⁵ Circumstances had changed. The expenses of litigation, both to the public and to the parties, had greatly increased.¹⁹⁶ The amount in controversy in this class of cases was small, certainly smaller than the cost of a jury trial.¹⁹⁷ If a party wanted to appeal to a court with a jury to annoy the adverse party, or to delay justice, it was well to deny him that opportunity.¹⁹⁸ It might happen, however, that a party might not receive a fair trial before a justice of the peace.¹⁹⁹ The court’s response was pragmatic: “To some extent at least the evil must be endured. Perfect justice in all cases is hardly attainable from human tribunals.”²⁰⁰ Not every case deserved full-blown jury trial, or elaborate procedures.²⁰¹ Efficiency was an important consideration in a legal system.

Other judges also emphasized the unworkable results of a strict originalist test. Courts observed that such a test would invalidate many important changes to jury practice, including use of fewer than twelve jurors²⁰² and extension of jury service to all who were eligible to vote in elections.²⁰³ Courts repeatedly emphasized that circumstances could change, and that the legislature had to have the power to adjust laws accordingly.²⁰⁴

If legislatures were permitted to innovate, however, at what point did laws violate the Constitution? Many courts declared that because the line was so difficult to draw, the legislature had great discretion.²⁰⁵ Some of the first courts to address questions

his treatise on constitutional interpretation, also emphasized the case. *See* SEDGWICK, *supra* note 179, at 547 (citing and paraphrasing *Beers v. Beers*).

¹⁹⁴ *Guile v. Brown*, 38 Conn. 237, 240–41 (1871).

¹⁹⁵ *Id.* at 241.

¹⁹⁶ *Id.* at 242.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Colt v. Eves*, 12 Conn. 243, 252–53 (citing *Beers v. Beers*, 4 Conn. 535 (1823)).

²⁰³ *Id.* at 253.

²⁰⁴ *See, e.g., Beers*, 4 Conn. at 539 (“[T]rial by jury . . . may be subjected to new modes, and even rendered more expensive, if the public interest demand such alteration.”); *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 208 (1848) (“New forums may be erected, and new remedies provided, accommodated to the ever shifting state of society.”); *Capital Traction Co. v. Hof*, 174 U.S. 1, 44–45 (1899) (declaring that the legislature, in designing a court system, had to have “considerable discretion” to adjust it “because of general increase in litigation, or other change of circumstances”).

²⁰⁵ *See, e.g., Emerick v. Harris*, 1 Binn. 416, 428 (Pa. 1808) (Brackenridge, J.) (“Yet this is but an indirect invasion; and the difficulty is to say where it may begin to be an invasion, unless it is assumed as a principle that it cannot be extended beyond what it was at the time of framing the constitution; and this, taking into view the history and progress of the jurisdiction,

of constitutional civil jury rights took this position. (Some of the cases addressing the civil jury right were so early that the opinions included substantial discussions—and decided affirmations—of the power of judicial review.²⁰⁶) In 1808, the Supreme Court of Pennsylvania declared:

If then we are not arrested at the precise point where the matter stood at the framing of the constitution, with respect to an enlargement of the jurisdiction of the justice of the peace, how far shall we go? Where shall we stop? Is it competent for the judiciary to fix this point? Is it not in the nature of it, a matter of discretion, a question of expediency? And must it not be left to the legislature?²⁰⁷

Later courts echoed this reasoning. The Supreme Court of Georgia in 1848 likewise permitted the legislature great discretion: “There is no invasion or infringement of the Constitution, so long as trial by jury is not directly nor indirectly, abolished.”²⁰⁸ Chief Justice Lumpkin wanted to make sure readers of the opinion understood the power of the legislature over jury trial. “I repeat, it is impossible to say at what point the Legislature ought to stop; and if undertaken to be said by the Courts, it must be at some point of great excess, that such a stand can be made.”²⁰⁹

Other courts tried to craft a test tailored to a particular issue. In 1871, the Connecticut Supreme Court of Errors proposed an alternative test to strict adherence to the statutes as of 1818.²¹⁰ “[T]he legislature may, in conformity to established usage, to a certain extent change from time to time, as the business interests of the state may require, the limit below which the state shall not be required to provide for a jury

would seem to be assuming more than is justifiable.”); *Beers*, 4 Conn. at 539 (“[E]very reasonable regulation . . . directed to the attainment of the public good, must not be deemed inhibited [by constitutional rights to civil jury trial], because it increases the burden or expense of the litigating parties.”); *Flint River*, 5 Ga. at 208 (following a strong assertion of the power of judicial review and stating that “[w]e cannot think the trial by jury, substantially defeated by these conditions, though the defendant may, and at times probably will, be subjected to some inconvenience, in complying. These terms may be onerous, but this is purely a question of expediency, and one which must, from its very nature, address itself exclusively to the law maker. And it is difficult to prescribe limits to the power of the Legislature, in this respect. Cases might arise which would authorize that body to go very far in disregarding the rules and regulations which are ordinarily observed in the enactment of a law for the assertion and defence of rights.”).

²⁰⁶ Two of the leading early cases on the subject, from Pennsylvania and North Carolina, both discussed and firmly declared the power of judicial review for courts of their states. See *Emerick*, 1 Binn. at 419–24 (Yeates, J.); *Keddie v. Moore*, 6 N.C. (2 Mur.) 41, 44 (1811).

²⁰⁷ *Emerick*, 1 Binn. at 428 (Brackenridge, J.).

²⁰⁸ *Flint River*, 5 Ga. at 208.

²⁰⁹ *Id.*

²¹⁰ *Guile v. Brown*, 38 Conn. 237 (1871).

trial.”²¹¹ The court emphasized that the changes had to be “reasonable.”²¹² The judges rejected the idea that the legislature could not be trusted with any flexible powers.²¹³

An example of a different type of test was that of the Supreme Judicial Court of Massachusetts in 1913, addressing the constitutionality of a statute providing for judgment notwithstanding the verdict.²¹⁴ After stating the standard historical baseline, the court went on to observe that many changes in Massachusetts jury practice had occurred since the constitution was ratified in 1780, without impairing the constitutional right.²¹⁵ For example, in 1780 litigants were entitled to a second jury trial on appeal from the first. This practice had fallen into disuse, but it was not required under the constitution.²¹⁶ The court looked to the “essential characteristics” of trial by jury in Massachusetts in 1780, not to “minor details or unessential formalities.”²¹⁷ The court declared: “The essence of trial by jury is that controverted facts shall be decided by a jury.”²¹⁸ The constitutional right was preserved “when each party has one fair opportunity to present to a jury the evidence on which he claims to raise an issue of fact.”²¹⁹

If there was no issue of fact, a judge could direct a verdict.²²⁰ (The court did not mention that the line between fact and law had changed greatly since 1780.) If a judge could direct a verdict, then judgment notwithstanding the verdict was constitutional also.²²¹ Therefore the court upheld the new procedure for jury control, even though it clearly would not have been permitted in Massachusetts in 1780.²²² The court announced with satisfaction that its interpretation of the Massachusetts constitutional right to jury trial allowed “slightly more flexibility in its adaptation of details to the changing needs of society without in any degree impairing its essential character” than the U.S. Supreme Court had allowed in a recent opinion addressing the same issue under the Seventh Amendment’s Re-examination Clause.²²³

²¹¹ *Id.* at 241–42; *see also* *Curtis v. Gill*, 34 Conn. 49, 55 (1867) (addressing a statute expanding the jurisdiction of justices of the peace and holding that “[s]o long as the legislature keeps substantially within the limits prescribed to itself by long usage, taking into consideration the relative depreciation in the value of money and the altered condition of the business interests of the state, we have no disposition to interfere by way of judicial veto”).

²¹² *Guile*, 38 Conn. at 242.

²¹³ *Id.*

²¹⁴ *Bothwell v. Bos. Elevated Ry.*, 102 N.E. 665 (Mass. 1913).

²¹⁵ *Id.* at 668–69.

²¹⁶ *Id.* at 668.

²¹⁷ *Id.*

²¹⁸ *Id.* at 669.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* (“The statute simply permits that to be done by this court which ought to have been done at the trial.”). This was a standard argument in judicial opinions at that time. *See infra* notes 450–52 and accompanying text.

²²² *Bothwell*, 102 N.E. at 669.

²²³ *Id.* The U.S. Supreme Court’s opinion was *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913). *See infra* notes 423–36 and accompanying text.

Indeed, as we will see in the next section, courts usually found changes to jury practice to be reasonable and permitted legislatures flexibility.²²⁴ Although almost every court purported to adopt an originalist test, almost no court applied it strictly. The exception was the U.S. Supreme Court in interpreting the Seventh Amendment's Re-examination Clause.²²⁵ We will see the outcome of that test in Part III.²²⁶

C. *Avoiding or Controlling Jury Trial*

The flexibility of the originalist tests that courts adopted gave legislatures power to curtail civil jury trial, at least to some extent. Hardly were the new republics founded, with their constitutional pledges to hold juries "sacred" and "inviolable," than legislatures began to chip away at civil jury trial. (The process of jury-avoidance actually dated far back into the colonial era, particularly with respect to arbitration.²²⁷) Even at the peak of Jacksonian democracy, legislatures throughout the nation enacted, and courts permitted, different kinds of jury-avoidance. Several scholars have remarked on the increasing distrust of juries among the legal profession and other elites in the late nineteenth century.²²⁸ A surprising revelation in cases about constitutional rights to civil jury trial is how often legislatures tried to avoid the civil jury in the *early* nineteenth century. Despite the variety of legislation limiting the civil jury, courts rarely found any of it unconstitutional.²²⁹ Legislatures, to be sure, were often careful in the

²²⁴ See *infra* Part II.C.

²²⁵ See, e.g., *Slocum*, 228 U.S. 364.

²²⁶ See *infra* Part III.

²²⁷ Arbitration seems to have been extensive in the colonies. See Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984) (finding evidence of extensive arbitration in Connecticut); Eben Moglen, *Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law*, 93 YALE L.J. 135 (1983) (finding similar evidence for New York). Colonial and early state legislatures enacted legislation promoting arbitration. See James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 LAW & HIST. REV. 241, 250 n.45 (2013). Some of these statutes allowed arbitration agreements to become court rules and provided that courts enforce arbitration awards with contempt power. See, e.g., *id.* at 259. Colonial and early state courts enforced these statutes. See *id.* at 251–66 (focusing particularly on Pennsylvania and Maryland). English assize courts in the seventeenth century delegated significant numbers of cases to arbitration. See J.S. COCKBURN, *A HISTORY OF ENGLISH ASSIZES 1558–1714*, at 137, 335 (1972).

²²⁸ See, e.g., Lerner, *Directed Verdict*, *supra* note 117, at 486–88; Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 190–92 (1964) [hereinafter Note, *The Changing Role of the Jury*]. Vast immigration and populist, anticorporate political movements contributed to this unease. Lerner, *Directed Verdict*, *supra* note 117, at 487.

²²⁹ A few cases exist in which a court held that a statute violated a constitutional right to civil jury trial. Some of these cases involved unusual statutes in which the legislature had flagrantly violated the spirit of the right. See *Bank of the State v. Cooper*, 10 Tenn. (2 Yer.) 599, 603–08, 610, 619–23 (1831) (holding unconstitutional a statute which provided for trial

means they chose to limit juries and the scope of that limitation. Government officials found it expedient to pay homage to the power of the people. That was the point of continuing the lavish rhetoric of jury praise. Few persons in the nineteenth century openly advocated complete abolition of the civil jury. It was expected that civil jury trial would continue in some form in many cases. Still, the trend toward limiting the civil jury was unmistakable.

1. Changed Circumstances: Rising Caseloads, Greater Expense of Litigation, Inconvenience to Jurors (and, *Sotto Voce*, Juror Incompetence and Bias)

In permitting these innovations, courts gave three practical reasons: growing docket pressure, rising expense of litigation, and inconvenience to jurors. In certain cases, judges sometimes added a fourth consideration: jury incompetence or bias.

Opinions often expressed concerns about docket pressure, or “the press of business,” as judges put it.²³⁰ Jury trial was viewed as prone to delays.²³¹ Courts also emphasized the expense of litigation to both parties and the public, a problem that grew over the course of the nineteenth century.²³² In an opinion in as early as 1794, Judge Thomas Waties of South Carolina praised the juryless courts of justices of the peace as

of actions for indebtedness to a particular bank before a special court of equity, consisting of named judges, from which there was no appeal); *Plimpton v. Town of Somerset*, 33 Vt. 283, 291–94 (1860) (holding unconstitutional a statute that allowed a judge to refer any civil case to one or more commissioners who were to try the case and report facts; the judge was to give judgment on the report unless one of the parties took issue with specific facts and wanted them tried to a jury; the report was to serve as prima facie evidence of the facts) (the statute was repealed in 1857, the year after it was enacted). State courts also occasionally held that the use of commissioners or judges instead of juries to assess the value of property condemned by the state or possessed by a bona fide occupant violated constitutional rights to civil jury trial. *See Stidger v. Rogers*, 2 Ky. 52, 52 (1801) (holding unconstitutional a statute authorizing a judge to assess the value of property condemned); *Armstrong v. Jackson*, 1 Blackf. 374, 375–76 (Ind. 1825) (holding unconstitutional a statute providing for assessment of the value of improvements to land by three commissioners). Courts sometimes construed legislation narrowly so as to avoid a constitutional difficulty under rights to civil jury trial. *See Dawson v. Shaver*, 1 Blackf. 204, 205–07 (Ind. 1822); *Tabor v. Cook*, 15 Mich. 322, 325–26 (1867).

²³⁰ *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 212 (1848). The U.S. Supreme Court often in the nineteenth century expressed concern about growing docket pressure. *See, e.g., Capital Traction Co. v. Hof*, 174 U.S. 1, 44–45 (1899) (holding that the legislature could expand the jurisdiction of justices of the peace because of the “general increase in litigation”).

²³¹ *See, e.g., Capital Traction Co.*, 174 U.S. at 44; REID, *supra* note 106, at 119 (discussing Jeremiah Smith’s belief that limiting jurors in civil suits would “lessen expense and delays” of the New Hampshire Superior Court).

²³² *See, e.g., Guile v. Brown*, 38 Conn. 237, 242 (1871) (explaining that the expense of litigation had greatly increased, both to parties and the public); *Capital Traction Co.*, 174 U.S. at 44–45 (permitting the expansion of jurisdiction of justices of the peace “to prevent unnecessary delay and unreasonable expense” of jury trial).

necessary for poor citizens to obtain justice.²³³ Poor citizens, he wrote, could not afford long absences from home, needed speedy recovery, and sued for small amounts that could not bear “the expense and delay” of a jury trial.²³⁴ Waties quoted Blackstone: “Even injustice is better than procrastination.”²³⁵ Some commentators complained about the length and expense of selecting a jury.²³⁶ The time consumed in voir dire in certain types of cases increased throughout the nineteenth century, as judges permitted more questioning of potential jurors and challenges on more grounds.²³⁷ The Supreme Court of Georgia in 1848, in upholding summary proceedings against constitutional challenge, remarked that those non-jury proceedings were “a vast saving of time, trouble, and expense, to suitors and the country.”²³⁸ Courts explained that a flourishing economy required efficient procedure.²³⁹ Members of constitutional conventions often discussed the costs to counties of summoning juries and of jury fees.²⁴⁰ Some

²³³ *Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382 (S.C. 1794) (Waties, J.).

²³⁴ *Id.* at 393; *see also Capital Traction Co.*, 174 U.S. at 44 (explaining that the legislature had “considerable discretion” to expand the jurisdiction of justices of the peace “to prevent unnecessary delay and unreasonable expense”).

²³⁵ *Zylstra*, 1 S.C.L. (1 Bay) at 393 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *442).

²³⁶ NEW YORK CONSTITUTIONAL CONVENTION OF 1846, *supra* note 64, at 544 (remarks of Arphaxed Loomis) (“[W]e have seen recently great abuses of this jury system; have seen large sums of money and a month of time consumed in getting a jury.”).

²³⁷ Timothy C. Doherty, Jr., *The Origins of Voir Dire Practice in the United States* 28–31 (2003) (unpublished manuscript) (on file with the Yale Law Library).

²³⁸ *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 207 (1848). Chief Justice Lumpkin added, “Whether these considerations should outweigh the advantages resulting from a personal participation, by every citizen, in the practical administration of public justice, it does not become me to say.” *Id.*

²³⁹ *See, e.g., id.* at 217 (“We submit, whether the interests both of agriculture and commerce, do not justify and require the present [summary] proceeding to be supported? We maintain that they do.”).

²⁴⁰ *See, e.g.,* NEW YORK CONSTITUTIONAL CONVENTION OF 1846, *supra* note 64, at 732 (remarks of Mr. Brown) (arguing that the convention should lessen expenses to the counties by reducing the number of jurors); ILLINOIS CONSTITUTIONAL CONVENTION OF 1869–1870, *supra* note 64, at 307 (minority report of the Committee on Counties, discussing expense of juror fees and mileage in large counties); COLORADO CONSTITUTIONAL CONVENTION OF 1875–1876, *supra* note 62, at 70–71 (remarks of J.H. Wells) (offering a resolution that “no jury be summoned to attend statedly in any court for the trial of issues in civil cases, and that the fees of jurors and the costs of summoning them shall not be made a public charge, but shall be taxed as other costs are”); *id.* at 724 (“Address to the People,” explaining that civil juries were permitted to consist of fewer than twelve, “thereby materially reducing the expenses of our courts.”). *Compare* NEW YORK CONSTITUTIONAL CONVENTION OF 1846, *supra* note 64, at 545 (remarks of Mr. Bascom) (“There was great expense involved in these trials by jury. In the county of Ontario during the past year, the amount paid out of the treasury for jury fees was greater than the entire amount of verdicts rendered by them in civil cases.”), *with id.* at 545 (remarks of Mr. Worden) (observing that some of those fees were for jurors in criminal cases).

delegates argued that despite the expense of civil jury trial, the institution served as a valuable check on the power of the judiciary.²⁴¹ These arguments, however, were few compared with complaints about expense and delay.

Courts in the late nineteenth century were especially concerned about growing docket pressure, delays, and litigation expense.²⁴² One cause of this greater docket pressure was the increasing number of industrial accident cases, which involved complicated questions of negligence and were much more expensive and time-consuming to try than the simple debt cases that had dominated dockets earlier.²⁴³ Judges therefore tried to limit the number of new trials; directed verdict was often the method of choice.²⁴⁴

Judges and commentators worried about inconvenience to citizens called to serve on juries.²⁴⁵ The time, expense, and discomfort of travel for jury service could be onerous.²⁴⁶ Judge Waties of South Carolina remarked that because of the frequency of sittings of justices of the peace, and the “thinness of our society,” it would be “an insupportable grievance to the citizens to serve as jurors in all” of these cases.²⁴⁷ The authors of New York’s *Field Code* of 1848 explained in their report that jury service was “[o]ne of the most burthensome duties of the citizen.”²⁴⁸ The authors went on to express their hope that providing for waiver of jury trial would lessen this burdensome duty.²⁴⁹ In curtailing the power of the jury, it was helpful to emphasize the benefit

²⁴¹ See, e.g., NEW YORK CONSTITUTIONAL CONVENTION OF 1846, *supra* note 64, at 545–46 (remarks of Mr. Porter); *id.* at 546 (remarks of Mr. Rhoades).

²⁴² Lerner, *Directed Verdict*, *supra* note 117, at 489–91.

²⁴³ See JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 58–63 (2004) (describing the rising numbers of industrial accident cases in the late nineteenth century); Lerner, *Directed Verdict*, *supra* note 117, at 489–91; Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 303–04 (1915) (noting that juries were hearing more complex cases than they were previously).

²⁴⁴ See, e.g., *Bowditch v. City of Boston*, 101 U.S. 16, 18 (1879) (stating that expansive use of directed verdict “is the constant practice, and it is a convenient one. It saves time and expense.”); *Meyer v. Houck*, 52 N.W. 235, 237 (Iowa 1892) (explaining that expanded use of directed verdict “will be of material advantage in the trial of cases in the saving of the time of the trial courts . . . and the saving of court expenses to the counties”).

²⁴⁵ See, e.g., *Colt v. Eves*, 12 Conn. 243, 252 (1837) (explaining that the rule of drawing jurors from the city of New Haven rather than the county avoided “a great inconvenience to our remote citizens” because of the expense and time of travel to perform jury service).

²⁴⁶ See Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 MICH. L. REV. 2673, 2679–84 (1996).

²⁴⁷ *Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382, 393 (S.C. 1794).

²⁴⁸ STATE OF NEW YORK, *FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS* 190 (1848).

²⁴⁹ *Id.* (“If that burthen can be lessened, by the plan proposed [of providing for waiver of civil jury trial], without in any way infringing upon the rights of parties, we shall regard it as a great benefit.”).

to jurors. Members of state constitutional conventions frequently mentioned the burden of jury service in arguing for permitting waiver of jury trial, reduction in the number of jurors, or majority verdicts.²⁵⁰ Even supporters of the traditional jury admitted that jury service was “an onerous duty,” that should be relieved.²⁵¹

Judges and commentators sometimes suggested—and on rare occasions, openly stated—another problem with juries: that they might lack the ability to decide complex cases or suffer from bias. One New York judge in 1862 was forthright: Jurors, he wrote, lack professional education and judicial experience, act in secret without individual responsibility, and are “far more liable to be swayed by passion and excitement, and other undue influences” than judges.²⁵² Jury verdicts are “notoriously many times founded upon mistakes, misconceptions, and other errors,” and therefore it was necessary for judges to review verdicts with “firmness.”²⁵³ Judges were typically more circumspect in hinting at the problem. Even the U.S. Supreme Court, however, could use strong language about the shortcomings of juries:

It is the duty of a court in its relation to the jury to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial.²⁵⁴

Juror ignorance and passion could upend the predictable legal rules needed in a complex commercial society. This view of the jury was far from that of the Anti-Federalists.²⁵⁵

²⁵⁰ NEW YORK CONSTITUTIONAL CONVENTION OF 1846, *supra* note 64, at 111 (remarks of Mr. Hunt) (complaining about “the present tax on jurymen’s time and patience” and arguing for a reduction in the number); *id.* at 538 (remarks of Mr. Tallmadge) (expressing his belief that “the system might be rendered less oppressive on jurors; by diminishing the number required in the trial for certain cases”); *id.* at 547 (remarks of Mr. Ruggles) (calling it an “abuse” that twelve men could be called from their work, including farmers during harvest, to decide cases worth trivial amounts); *id.* at 829 (remarks of Mr. Brown) (criticizing “a system that called a man for hours or days from his ordinary means of livelihood, to sit in the jury box and listen to the details of transactions into which the suitor entered of his own free will, and now from a defect of his own judgment, or misplaced confidence, sought to draw upon his neighbor’s time, and the state treasury, to restore to him compensation for the effects of the erroneous principles in relation to credit, upon which as contrasted perhaps with his innocent friends upon the jury panel, he conducted his business”).

²⁵¹ *Id.* at 545 (remarks of Mr. Worden) (arguing for preserving the traditional number of twelve but supporting the parties’ ability to waive civil jury trial).

²⁵² *Ernst v. Hudson River R.R.*, 24 How. Pr. 97, 105–07 (N.Y. 1862) (E. Darwin Smith, J.).

²⁵³ *Id.* at 106–07.

²⁵⁴ *Pleasants v. Fant*, 89 U.S. (22 Wall.) 116, 121 (1874).

²⁵⁵ See, e.g., Paul Finkelman, *Antifederalists: The Loyal Opposition and the American Constitution*, 70 CORNELL L. REV. 182, 201–02 (1984) (reviewing THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981)).

Members of state constitutional conventions also expressed doubts about the quality of jurors. In many areas, sheriffs had difficulty summoning enough jurors. “Talesmen,” or bystanders, were frequently enlisted.²⁵⁶ A member of the New York Constitutional Convention of 1846 commented on the quality of these jurors:

[V]ery many of our courts are haunted, day after day, by dissolute loungers, waiting a chance to obtain a shilling by getting on a jury, whose integrity and judgment no man can confide in, and who are utterly unfit to decide either the law or the facts of any case.²⁵⁷

Another member of that Convention argued that because jurors were “liable to prejudice,” the traditional number of twelve was needed.²⁵⁸ One out of twelve, hopefully, “would not be swayed by improper feelings.”²⁵⁹ He agreed that parties should be able to waive jury trial and thus avoid jury bias.²⁶⁰

Because of these circumstances, courts held, legislatures (and judges) should be allowed discretion to adjust the conditions of civil jury trial.²⁶¹ Legislatures and courts seized the opportunity.

2. The Fiction of Consent to Non-Jury Procedures

In addition to giving these practical reasons for curtailing jury trials, courts developed an important justification for why it was fair for litigants to be subject to another mode of proceeding. Particular litigants were on notice that they were so subject, and indeed had constructively consented to these alternative procedures by engaging in

²⁵⁶ King, *supra* note 246, at 2678. The use of talesmen was common in England in the seventeenth century, according to J.S. Cockburn. See COCKBURN, *supra* note 227, at 118, 141. J.M. Beattie found that in England in the eighteenth century, it was relatively easy to assemble “sufficient men of the solid middling groups” to serve on assize juries. J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660–1800, at 387 (1986). Finding qualified jurors for the quarter sessions, however, was more difficult. See *id.* at 391–92.

²⁵⁷ NEW YORK CONSTITUTIONAL CONVENTION OF 1846, *supra* note 64, at 111 (remarks of Mr. Hunt). On concerns about the integrity of talesmen in the early twentieth century, see King, *supra* note 246, at 2691–92.

²⁵⁸ NEW YORK CONSTITUTIONAL CONVENTION OF 1846, *supra* note 64, at 544 (remarks of Mr. Worden).

²⁵⁹ *Id.* at 544–45.

²⁶⁰ See *id.* at 545. Another delegate complained that expanded voir dire had weakened the quality of jurors. *Id.* at 547 (remarks of Mr. Stow) (“[A]t present, by recent decisions, none but knaves or fools can sit as jurors—knaves, who deny they have an opinion on the case; or fools, so profoundly ignorant they can form no opinion about a case.”). Echoing Hamilton, some delegates were concerned about the proposed merger of law and equity because jurors were not capable of deciding complex cases with multiple parties. See *id.* at 621–22 (remarks of Mr. Shepard); *id.* at 635 (remarks of Mr. Perkins); *id.* at 666.

²⁶¹ See *supra* Part II.C.1.

certain activities or assuming certain positions. These persons, courts declared, had voluntarily submitted themselves to procedures other than jury trial and therefore could not complain of its lack. (This argument was the opposite of the medieval fiction that a criminal defendant had “consented” to jury trial, and therefore could not complain about the procedure or the result.²⁶² In the middle ages, the legal system needed a fiction to establish jury trial; in the nineteenth century, the legal system needed a fiction to avoid it.²⁶³)

Some summary proceedings, without juries, had traditionally been permitted. Courts explained that summary proceedings without a jury had long been allowed for collection of rent and for collection of taxes.²⁶⁴ Judicial opinions—and Alexander Hamilton in *The Federalist No. 83*—explained the tax-collection exception to jury trial as a “necessity,” to avoid delay and uncertainty in collection of revenue.²⁶⁵ The government, the argument went, could not function if it had to submit the cases of defaulting tax payers to trial by jury. There was a similar exception to jury trial to recover government money from public officials or agents and their sureties. These actions, usually authorized by statute, were often said to be a form of contempt of court; the officials in question tended to be officers of the court such as sheriffs and

²⁶² See LANGBEIN, LERNER & SMITH, *supra* note 27, at 61–62.

²⁶³ *Id.*

²⁶⁴ These proceedings were called “distress for rent” and “distress for taxes.” See, e.g., *State v. Allen*, 13 S.C.L. (2 McCord) 55, 59–60 (1822).

²⁶⁵ See, e.g., THE FEDERALIST NO. 83, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“As to the mode of collection in this State [New York], under our own Constitution the trial by jury is in most cases out of use. The taxes are usually levied by the more summary proceeding of distress and sale, as in cases of rent. And it is acknowledged on all hands that this is essential to the efficacy of the revenue laws. The dilatory course of a trial at law to recover the taxes imposed on individuals would neither suit the exigencies of the public nor promote the convenience of the citizens.”); see also *Allen*, 13 S.C.L. (2 McCord) at 60 (“This [summary] method of collecting taxes is as well established by custom and usage as any principle of the common law. A similar practice prevailed in all the colonies from the first dawn of their existence; it has been continued by all the states since their independence, and had existed in England from time immemorial. Indeed, it is necessary to the existence of every government, and is based upon the principle of self preservation.”); *Tift v. Griffin*, 5 Ga. 185, 191 (1848) (“[T]he State may collect taxes immediately, out of the defaulting citizen; for that purpose the tax collector is authorized to issue execution. These powers of the government are founded in an imperious necessity. They are necessary to the preservation of the government, to the administration of the law, indeed, to a maintenance of all the rights of the people. If the government were forced to submit the case of every defaulting tax payer, and tax gatherer, and financial agent to a jury, with the delays and uncertainties attending a judicial investigation, it could not command its revenue, it could not be administered.”). Legislatures extended summary proceedings to subscribers for building public buildings who failed to pay their subscriptions. See, e.g., *Ewing v. Dirs. of the Penitentiary*, 3 Ky. (Hard.) 6, 7 (1805) (holding constitutional a summary proceeding, under statute, against a subscriber for building a penitentiary who failed to pay).

court clerks.²⁶⁶ Blackstone declared that such summary proceedings were “as ancient as the laws themselves” and important to prevent “among the people a disgust against the courts themselves.”²⁶⁷ These traditional summary proceedings, without juries, may have been a reason why a good deal of administrative power in the early republic was lodged with courts.²⁶⁸

If avoidance of trial by jury benefited the government in collecting its revenue, such avoidance might also benefit other litigants. Legislatures experimented with creating summary proceedings in different classes of cases. These typically gave to a plaintiff in a particular class of cases the ability to make an affidavit before a judge or justice of the peace, alleging that defendant owed him a sum of money.²⁶⁹ (There was a requirement of a prior demand and refusal to pay.²⁷⁰) Based on the affidavit alone, the plaintiff would obtain an order to enter judgment and to issue a writ of execution immediately.²⁷¹ The sheriff would then seize defendant’s property, and sell it.²⁷² (Some

²⁶⁶ See, e.g., *Wells v. Caldwell*, 8 Ky. (1 A.K. Marsh.) 441, 442 (1819) (observing that, according to “the ancient principles of the common law,” a court without a jury might order recovery from a sheriff who failed to return an execution according to the writ, and therefore holding that the Act of 1811 that allowed such proceedings did not violate the constitutional right to jury trial, and calling the sheriff’s failure a “contempt”); *Harrison v. Chiles*, 13 Ky. (3 Litt.) 195, 201–06 (1823) (citing *Wells*, 8 Ky. (1 A.K. Marsh.) at 441) (holding constitutional a summary proceeding against a court clerk for extortion in a fee bill); *Murry v. Askew*, 29 Ky. (6 J.J. Marsh.) 27, 27 (1831) (declaring that summary proceedings against a sheriff and his sureties were constitutional); *Lewis v. Garrett’s Adm’rs*, 6 Miss. (5 Howard) 434, 453, 456–57 (1841) (Trotter, J.) (holding constitutional summary proceedings against a sheriff and his sureties for the amount of an execution, but explaining: “And yet, I believe, the courts have seldom refused the sheriff or his sureties a jury trial when it has been formally demanded.”); *Tift*, 5 Ga. at 190, 192 (declaring that judges of the inferior courts may be subject to summary process for holding public money); 4 WILLIAM BLACKSTONE, COMMENTARIES *283 (stating that these proceedings are according to the common law and not dependent on statutes, and characterizing them as a civil execution for the benefit of the injured party). In 1848, the Supreme Court of Georgia construed this exception somewhat narrowly and required a jury trial for the executor of a deceased inferior court judge who allegedly possessed public money. *Tift*, 5 Ga. at 193.

²⁶⁷ 4 WILLIAM BLACKSTONE, COMMENTARIES *284, *286.

²⁶⁸ Early Congresses assigned a variety of administrative functions to federal and state courts. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 73–75 (2012).

²⁶⁹ See, e.g., Act of the Assembly of Maryland, 1793, ch. 30, § 14 (providing for summary proceedings for a bank to recover from its debtors); Tennessee Act of Nov. 15, 1821 (providing for summary proceedings for creditors of two banks to recover money owed); Georgia Pamphlet Laws of 1841, at 167–68 (providing for summary proceedings for employees on steamboats or watercraft on certain rivers against the owners of the vessel for wages and provisions owed).

²⁷⁰ See Act of the Assembly of Maryland, 1793, ch. 30, § 14; *Flint River*, 5 Ga. at 198.

²⁷¹ See Act of the Assembly of Maryland, 1793, ch. 30, § 14; *Flint River*, 5 Ga. at 198 (quoting 1841 Ga. Laws 167).

²⁷² Act of the Assembly of Maryland, 1793, ch. 30, § 14.

statutes required first advertising a sale.²⁷³) The defendant had the option of filing an affidavit denying the money was due, or some part of it.²⁷⁴ Some statutes specified that in order to get his property returned, and to obtain a jury trial, the defendant had to pay in full the amount admitted to be due.²⁷⁵ In addition, defendant had to give bond and security for the remaining amount alleged (and sometimes double the amount), together with any costs.²⁷⁶ These requirements were significant obstacles to jury trial.

Courts held that, despite the impossibility or difficulty of obtaining jury trials, litigants had in effect consented to the summary proceedings because of their actions by, for example, owning steamboats operating on certain rivers,²⁷⁷ or making a note payable at a particular bank.²⁷⁸ The U.S. Supreme Court in 1819 was one of the most emphatic on this point:

And it was with a view to the voluntary acquiescence of the individual, nay, the solicited submission to the law of the contract, that this remedy was given. By making the note negotiable at the Bank of Columbia, the debtor chose his own jurisdiction; in consideration of the credit given him, he voluntarily relinquished his claims to the ordinary administration of justice, and placed himself only in the situation of an hypothecator of goods, with power to sell on default, or a stipulator in the admiralty, whose voluntary submission to the jurisdiction of that Court subjects him to personal coercion.²⁷⁹

The Anti-Federalist nightmare about debtors was coming true, less than three decades after the ratification of the Seventh Amendment.

Legislatures tended to create such procedures for businesses invested with special public interest, and involving cases in which it was difficult for plaintiffs to sue, or defendants often resisted proper demands for payment, or prompt payment of debts was a necessity for carrying on business. For example, in 1841 the Georgia legislature created a summary process for employees on steamboats and watercraft on certain rivers for payment of wages and provisions against the owners of the vessels.²⁸⁰ The

²⁷³ See *Flint River*, 5 Ga. at 198.

²⁷⁴ See *id.* at 199.

²⁷⁵ See, e.g., *id.*

²⁷⁶ *Id.* (double the amount alleged to be due).

²⁷⁷ *Id.* at 216 (“So here it may be said, that every agreement made respecting service in the navigation of the particular streams named in the acts, in [sic] a voluntary submission by the owners of the steamboats or other water-craft to the law of the contract, and acquiescence in the remedy which it gives.”).

²⁷⁸ See *Bank of Columbia v. Ross*, 4 H. & McH. 456, 464 (Md. 1799) (“[H]e must have consented in writing that the same be made negotiable at the bank.”).

²⁷⁹ *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 243 (1819).

²⁸⁰ *Flint River*, 5 Ga. at 198 (citing Georgia Pamphlet Laws of 1841, at 167–68) (providing for summary proceedings of employees on steamboats or watercraft on certain rivers against

Supreme Court of Georgia, per Chief Justice Lumpkin, explained that steamboats on those rivers were “notoriously” owned by persons who lived abroad, and thus were not subject to ordinary process of law.²⁸¹ (The Court observed that, however, the owners’ agents were generally present and could defend against summary proceedings.²⁸²) Lumpkin displayed his interest in economic development by highlighting the importance of summary proceedings in these cases to the interests of both agriculture and commerce.²⁸³ He declared, rather dramatically, that “[w]ithout some such provision, our internal streams, the great arteries of trade and transportation, would be abandoned.”²⁸⁴ Presumably, he meant that persons would be reluctant to work on boats without a guaranty of wages being paid. Legislatures and courts demonstrated concern that contracts between employers and employees in such enterprises be enforced quickly and efficiently, thus smoothing relations and fostering development.

Another class of cases for which legislatures provided summary proceedings involved banks.²⁸⁵ The importance of maintaining a functioning credit system was evident to many; courts called banks institutions of “public utility.”²⁸⁶ Both legislatures and courts perceived jury trial as a hindrance to these public utilities.²⁸⁷ Legislatures provided summary proceedings for banks to use against their debtors,²⁸⁸ and for creditors to use against banks.²⁸⁹ The preamble of a 1793 Maryland statute creating a summary proceeding for a bank to use against its defaulting debtors explained: “[I]t is absolutely necessary that the debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them.”²⁹⁰ Courts repeated this point in upholding these provisions against attack on constitutional grounds.²⁹¹ The Supreme Court of the United

the owners of the vessel for wages and provisions owed). In 1845, the Georgia Legislature expanded the use of summary proceedings in the 1841 act. *See Flint River*, 5 Ga. at 199–200.

²⁸¹ *Flint River*, 5 Ga. at 212.

²⁸² *Id.*

²⁸³ *Id.* at 217.

²⁸⁴ *Id.*

²⁸⁵ On the use of summary proceedings in cases involving banks, particularly in the Southern states in the early nineteenth century, see Robert Wyness Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L.J. 193, 213–15 (1928) [hereinafter Millar, *Summary Civil Procedure*].

²⁸⁶ *Bank of Columbia v. Ross*, 4 H. & McH. 456, 464 (Md. 1799); *see also Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 259, 266 (1829) (calling two banks “public institutions” and observing that their charters were public laws).

²⁸⁷ *See, e.g., Act of the Assembly of Maryland*, 1793, ch. 30, § 14; *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 243 (1819); *Bank of Columbia v. Ross*, 4 H. & McH. 456, 464 (Md. 1799).

²⁸⁸ *Act of the Assembly of Maryland*, 1793, ch. 30, § 14; *see Okely*, 17 U.S. (4 Wheat.) at 241; *Ross*, 4 H. & McH. at 464.

²⁸⁹ Tennessee Act of Nov. 15, 1821; *see Vanzant*, 10 Tenn. (2 Yer.) at 263.

²⁹⁰ *Act of the Assembly of Maryland*, 1793, ch. 30, § 14.

²⁹¹ *See, e.g., Ross*, 4 H. & McH. at 464 (Chase, C.J.). Similarly, Judge Peck of the Tennessee Supreme Court explained that the summary proceedings at issue for use by creditors against

States seemed quite certain of its decision to uphold summary proceedings by a bank; it stopped the arguments of one counsel against constitutionality before he began.²⁹² Calling the question “one of the deepest interest,”²⁹³ the Court issued its decision, holding that the right to jury trial had not been violated, five days after argument.²⁹⁴ So successful was this type of summary proceeding that the Virginia legislature, in its Code of 1849, provided for such summary proceedings in all actions for money damages based on a contract.²⁹⁵

In short, when efficiency was valued, the jury was limited. Anti-Federalists had agitated for the Seventh Amendment precisely to require juries in cases against debtors.²⁹⁶ In less than three decades the U.S. Supreme Court unhesitatingly held that certain debtors could get a jury only on appeal, with all of the attendant restrictions and expense. The Anti-Federalist vision of the civil jury as a law-nullifying institution was rapidly fading. The drafters of the Federal Rules of Civil Procedure of 1938 drastically expanded this type of summary proceeding, and the English version, to create the summary judgment provision of Rule 56(a).²⁹⁷ Rule 56(a) eliminated any possibility of getting a jury in certain cases.

3. Making a Jury Demand More Expensive: Jury Fees and Diversion to Non-Jury Proceedings with an Appeal to a Jury

Another way that legislatures might limit the availability of jury trials was to make a jury demand more expensive. This could be done directly, through increasing jury fees. A more subtle method, favored by legislatures, was to force a litigant into a non-jury proceeding—such as the court of a justice of the peace or a summary proceeding—and then to provide a jury on appeal, but at much greater cost than obtaining a jury

banks aimed to repair “such defects in the existing remedies as the bank had laid hold of to evade the payment of her notes.” *Vanzant*, 10 Tenn. (2 Yer.) at 265.

²⁹² *Okely*, 17 U.S. (4 Wheat.) at 240 (“Martin, contra, was stopped by the Court.”).

²⁹³ *Id.* (Johnson, J.).

²⁹⁴ Oral argument occurred on February 17, 1819, and the Court delivered its opinion on February 22. *Id.* at 238, 240.

²⁹⁵ VA. CODE ch. 167, § 5 (1849). The revisers who drafted the Code reported to the Virginia legislature:

Seeing that this mode of proceeding has worked well in the cases in which it has been heretofore allowed, it seems to use advisable to extend it to all cases in which a person is now entitled to recover money by action on a contract. We do not propose to take away the right of bringing an action from any person; we propose merely, when his claim to money is on a contract, to allow him to use, if he please, the more simple remedy by motion, instead of an action.

Wilson v. Dawson, 32 S.E. 461, 462 (1899) (quoting the Report of Revisers); *see also* Millar, *Summary Civil Procedure*, *supra* note 285, at 216–17.

²⁹⁶ *See supra* notes 85–104 and accompanying text.

²⁹⁷ FED R. CIV. P. 56(a); *see also* Langbein, *supra* note 10, at 566–67.

in the first instance. Courts readily approved of these schemes and rejected arguments that they were unconstitutional.

Jury fees were a burden on jury trial that courts routinely upheld. Jurisdictions usually required prepayment of jury fees in order for a party to have a civil jury.²⁹⁸ Courts strictly construed these requirements. Litigants' claims of indigence often made no difference.²⁹⁹ Failure to pay the jury fees would result in a bench trial and decision by the court.³⁰⁰ Some litigants claimed that the requirement of prepayment of jury fees violated constitutional rights to trial by jury.³⁰¹ Courts briskly rejected that argument.³⁰² In 1862, the Minnesota Supreme Court remarked that the prepayment of jury fees seemed no more liable to constitutional objection than the prepayment of many other fees, including those of the clerk, sheriff, and other officers of the court.³⁰³ To hold jury fees unconstitutional would be to require litigation "without price" and would mean "an end to all fees, from the issuing of the summons to the entry of satisfaction of the judgment."³⁰⁴ "Reasonable" fees were permitted.³⁰⁵

²⁹⁸ See, e.g., *Adams v. Corrison*, 7 Minn. 456, 457 (1862); *Randall v. Keilor*, 60 Me. 37, 38, 44 (1872).

²⁹⁹ See, e.g., *Randall*, 60 Me. at 38, 44 (defendant demanded a jury trial as a constitutional right without paying the seven-dollar jury fee required by statute, stating he had "no money"). For an argument that the Due Process Clause, and access-to-court provisions of state constitutions, require that court fees be waived for poor litigants, see John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 632–33 (1984).

³⁰⁰ See, e.g., *Adams*, 7 Minn. at 457. Normally the plaintiff paid the jury fees, but sometimes defendants had to pay to get a jury. *Id.*

³⁰¹ See, e.g., *Adams*, 7 Minn. at 457; *Randall*, 60 Me. at 40.

³⁰² See *Adams*, 7 Minn. at 461–62; *Randall*, 60 Me. at 44 ("[T]he prepayment of a jury fee by the plaintiff has never been deemed an infringement upon the right to a trial by jury. Nor can the prepayment by the defendant be so regarded, when it is made at his own option, and followed by the same consequences as when paid by the plaintiff."); *id.* at 45 ("Declining to make the required payment, the defendant must be held as waiving the right to a jury trial, when he refuses to do what is an essential and reasonable prerequisite to its enjoyment."). In Maine, jury fees were repealed in 1873. See Pub. Laws 1873, ch. 123.

³⁰³ *Adams*, 7 Minn. at 461 ("The objection to the jury fee, we do not think is well taken. It is altogether too broad. It is not that the fee is so unreasonably high as to impede the due administration of justice, but because a fee is charged at all. We can see no valid objection to a reasonable fee of this kind. The constitution does not guarantee to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy in the law, or impede the due administration of justice.").

³⁰⁴ *Id.* at 462.

³⁰⁵ *Id.* at 461. In rare circumstances, a court might hold that a jury fee was unreasonable. See *La Bowe v. Balthazor*, 193 N.W. 244, 245–46 (1923) (holding unreasonable a twenty-four dollar fee in municipal court with a jurisdiction not exceeding \$1,000). Courts almost always found jury fees to be reasonable. See Note, *Constitutionality of Statute Requiring Party Demanding Jury to Pay Jury Fees or Charges Incidental to Summoning or Impaneling of Jurors*, 32 A.L.R. 865 (1924), superseded by Michael R. Flaherty, *Validity of Law or Rule*

The issue of making jury trial more expensive arose often in the context of expanding the jurisdiction of justices of the peace. Because of the many advantages of avoiding jury trial, legislatures were eager to raise the amount in controversy limit for justices of the peace. In raising these limits, legislatures sometimes remarked that “the value of money hath greatly lessened,”³⁰⁶ but courts rarely mentioned inflation.³⁰⁷ Instead, courts focused on the question of appeal. In expanding the jurisdiction of justices of the peace, many legislatures in the late eighteenth and early nineteenth century took care to provide an appeal to a court that sat with a jury.³⁰⁸ If such an appeal was provided, courts universally approved the expansion of jurisdiction of justices of the peace.³⁰⁹

Requiring State Court Party Who Requests Jury Trial in Civil Case to Pay Costs Associated with Jury, 68 A.L.R. 4th 343 (1989).

³⁰⁶ See *Emerick v. Harris*, 1 Binn. 416, 427 (Pa. 1808) (Brackenridge, J.) (quoting Pennsylvania Act of Apr. 5, 1785, preamble).

³⁰⁷ A rare example is *Curtis v. Gill*, 34 Conn. 49, 55 (1867) (addressing a statute expanding the jurisdiction of justices of the peace) (“So long as the legislature keeps substantially within the limits prescribed to itself by long usage, taking into consideration the relative description in the value of money and the altered condition of the business interests of the state, we have no disposition to interfere by way of judicial veto.”).

³⁰⁸ See, e.g., *Emerick*, 1 Binn. 416 (addressing the constitutionality of Pennsylvania Act of Apr. 19, 1794, which increased the jurisdiction of justices of the peace from a limit of ten pounds to twenty pounds, and providing an appeal for litigants if the judgment exceeded five pounds to a court with a jury); *Beers v. Beers*, 4 Conn. 535 (1823) (addressing the constitutionality of Connecticut Act of May, 1821, codified at Revised Statutes tit. 2, § 23, which increased the jurisdiction of justices of the peace from a limit of fifteen dollars to thirty-five dollars, and providing an appeal for litigants if the alleged damages exceeded seven dollars to a court with a jury). Georgia had a tradition of specifying the amount in controversy limit for justices of the peace in its constitution. See GA. CONST. of 1798, art. III, § 5 (providing for election of justices of the peace and setting the limit of their jurisdiction at thirty dollars); GA. CONST. of 1868, art. V, § 6, cl. 2 (setting the limit of jurisdiction for justices of the peace at one hundred dollars). The Georgia Constitution of 1868 further provided that if the sum claimed before a justice of the peace was more than fifty dollars, a party could appeal to the superior court, which sat with a jury. *Id.* On the continuing importance of appeal to a common law court to politicians and trial lawyers in the administrative state of the early twentieth century, see DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: AMERICANS CONFRONT THE ADMINISTRATIVE STATE* 2, 6–7 (forthcoming Oxford University Press).

³⁰⁹ See *Capital Traction Co. v. Hof*, 174 U.S. 1, 43 (1899) (“For half a century and more . . . after the adoption of the earliest constitutions of the several States, their courts uniformly maintained the constitutionality of statutes more than doubling the pecuniary limit of the civil jurisdiction of justices of the peace as it stood before the adoption of constitutions declaring that trial by jury should be preserved inviolate, although those statutes made no provision for a trial by jury, except upon appeal from the judgment of the justice of the peace, and upon giving bond with surety to pay the judgment of the appellate court.”); *id.* at 23 (“A long line of judicial decisions in the several States, beginning early in this century, maintains the position that the constitutional right of trial by jury in civil actions is not infringed by a statute which sets the pecuniary limit of the jurisdiction of justices of the peace in actions at law higher than

Obtaining a jury on appeal, however, was often much more expensive than getting a jury in the first instance. The added expense could be a serious deterrent to use of the jury. Counsel in a North Carolina case in 1811 remarked that the jurisdiction of justices of the peace in that state had been steadily increased from 1774 to 1802. He argued that unless the judiciary imposed a strict limit on the legislature, the jurisdiction of the justices of the peace “may eventually swallow up the jurisdiction of our Courts of Justice.”³¹⁰ True, counsel observed, an appeal was provided, but the appeal was “so clogged with difficulties that few can enforce it,” because of the requirement of an appeal bond.³¹¹ Counsel complained that the justices of the peace were becoming “an aristocracy of the most odious kind,” and urged the court to protect the citizen from the legislature with “the shield of the Constitution.”³¹² His and similar arguments failed.³¹³ Despite the added barrier to jury trial—which typically included requirements to post an appeal bond as well as to pay jury fees—courts found no violation of constitutional rights.³¹⁴ Legislatures were to have discretion to design a court

it was when the particular constitution was adopted”); *id.* at 45–46 (holding that, under the Seventh Amendment, Congress may extend the limit of jurisdiction of justices of the peace, as long as an appeal to a court with a common law jury is provided if the amount in controversy exceeds twenty dollars); *see also Emerick*, 1 Binn. at 424 (Yeates, J.) (“[I]t must be admitted that the right of trial by jury is not taken away, though the party may be subjected to some inconvenience in making his election.”); *Keddie v. Moore*, 6 N.C. (2 Mur.) 41, 45 (1811) (“So long as the trial by Jury is preserved through an appeal, the preliminary mode of obtaining it may be varied at the will and pleasure of the Legislature.”); *Pollard v. Holeman*, 7 Ky. (4 Bibb.) 416, 417 (1816); *Wilson v. Simonton*, 8 N.C. (1 Hawks) 482 (1821) (following *Keddie v. Moore* and holding constitutional an expansion of the jurisdiction of justices of the peace to one hundred dollars); *Morford v. Barnes*, 16 Tenn. (8 Yer.) 444, 445–47 (1835) (following the unreported case of *Stephens v. Henderson*, holding constitutional an expansion of the jurisdiction of justices of the peace because an appeal was provided to a court that sat with a jury); *Hapgood v. Doherty*, 74 Mass. (8 Gray) 373, 374 (1857) (“It is a sufficient answer to the constitutional objection, that a trial by jury is secured to the defendant on appeal.”).

³¹⁰ *Keddie*, 6 N.C. (2 Mur.) at 42 (argument of Jocelyn for the defendant).

³¹¹ *Id.* at 43.

³¹² *Id.*

³¹³ *See id.* at 45 (“The Court . . . cannot view this as a case which will warrant the Judiciary to exercise an act of such paramount and delicate authority as to interfere with the act of the Legislature.”).

³¹⁴ *See, e.g., Emerick*, 1 Binn. at 416 (requirement of an appeal bond); *Keddie*, 6 N.C. (2 Mur.) at 45 (requirement of an appeal bond) (“The party wishing to appeal may be subjected to some inconvenience in getting security, but this inconvenience does not in this, nor in any other case where security is required, amount to a denial of right.”); *Morford*, 16 Tenn. (8 Yer.) at 446 (holding that the legislature could determine the security required for appeal, and the act was not unconstitutional because the security required for appeal was greater than in cases in which the party was brought into the court by original writ); *People v. Hoffman*, 3 Mich. 248, 251 (1854) (holding that in a civil action for debt, legislature could require payment of jury fees before appeal from a justice of the peace to a court that sat with a jury); *Adams v. Corrison*, 7 Minn. 456, 456, 461–62 (1862) (holding that the legislature could require payment of jury fees before appeal from a justice of the peace to a court that sat with a jury).

system,³¹⁵ assuming they nominally provided certain safeguards such as an appeal to a jury. (Courts also relied on this argument in expanding the subject matter jurisdiction of justices of the peace.³¹⁶) Providing an appeal to a jury from justices of the peace, however, sometimes proved to be a stage en route to expanding the final, unappealable, jurisdiction.³¹⁷ Courts acquiesced in each step along the way, gradually allowing the jury right to erode.

The framers of the Illinois Constitution of 1848 tried to halt the continuing growth of the jurisdiction of justices of the peace, so prevalent in other states. In a rare move, that Constitution expanded the reach of civil jury trial, and provided: “That the right of trial by jury shall remain inviolate; and shall extend to all cases at law, without regard to the amount in controversy.”³¹⁸ A few other states copied this provision.³¹⁹ The Illinois provision only lasted just over twenty years; Illinois removed the provision from its constitution in 1870.³²⁰

Legislatures also used this device of providing an expensive appeal to a jury in creating new summary proceedings. Just as in cases involving justices of the peace, defendants subject to these summary proceedings argued that the jury right was “so clogged by restrictions” that it amount to a denial.³²¹ Courts responded that although the

³¹⁵ See, e.g., *Keddie*, 6 N.C. (2 Mur.) at 44 (“When the Convention declared that the ancient mode of trial by Jury should be preserved, no restriction was thereby laid on the Legislature as to erecting or organizing judicial tribunals, in such manner as might be most conducive to the public convenience and interest, on a change of circumstances affected by a variety of causes.”); *id.* at 45 (“So long as the trial by Jury is preserved through an appeal, the preliminary mode of obtaining it may be varied at the will and pleasure of the Legislature.”); *Head v. Hughes*, 8 Ky. (1 A.K. Marsh) 372, 373 (1818) (“[T]he apportionment of [the judicial] power, and its regulation from time to time among those tribunals . . . is the mere subject of expediency, which belongs exclusively to the sphere of legislation.”).

³¹⁶ In assessing the value of private property taken for public use, states sometimes followed a procedure of having a justice of the peace convene a panel of assessors. So long as an appeal to a court that sat with a jury was permitted, this procedure was held to be constitutional. See *Steuart v. Mayor of Baltimore*, 7 Md. 500, 512 (1855) (“[W]here a law secures the trial by jury upon an appeal, it is no violation of a constitutional provision for guarding that right, although such law may provide for a primary trial without the intervention of a jury.”); *Norristown Turnpike Co. v. Burket*, 26 Ind. 53, 62–63 (1866). The Pennsylvania legislature in 1863 likewise expanded the subject matter jurisdiction of justices of the peace to landlord-tenant disputes and provided for an appeal to a court that sat with a jury. See *Haines v. Levin*, 51 Pa. 412, 414–16 (1866) (upholding the constitutionality of the act because it provided for an appeal to a court with a jury).

³¹⁷ See, e.g., *Guile v. Brown*, 38 Conn. 237, 240–41 (1871) (upholding against constitutional challenge an expansion of the final, unappealable jurisdiction of justices of the peace).

³¹⁸ ILL. CONST. of 1848, art. XIII, § 6.

³¹⁹ See, e.g., MINN. CONST. of 1857, art. I, § 4 (“The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy”); ARK. CONST. of 1868, art. I, § 6 (“The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy”).

³²⁰ See ILL. CONST. of 1870, art. II, § 5.

³²¹ *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 208 (1848).

burden on the defendant might be “onerous,” that was a question for the legislature.³²² Restrictions on jury trial were not an absolute denial.³²³ Jury trial was still possible for the litigants, at least theoretically.³²⁴

4. Waiver of Jury Trial

American courts, legislatures, and even constitutional conventions were aggressive in trying to avoid jury trial another way: by providing for waiver. In England, in the common law courts, jury trial could not be waived in favor of bench trial.³²⁵ This was true until the Common Law Procedure Act of 1854 provided for waiver.³²⁶ English judges so dominated jury verdicts in civil cases, through their power to comment on the evidence and the respect in which they were held, that this change hardly made a difference to the outcome of civil cases.³²⁷ Avoiding jury trial did, however, result in savings of time and money.³²⁸ In the nineteenth century in England, a complex commercial society, the civil jury had become simply a wasteful nuisance.³²⁹

In the United States, several jurisdictions provided for waiver of civil jury trial earlier than in England. Some states included in their constitutions express provisions permitting waiver of civil jury trial.³³⁰ New York was one of the first states to alter its jury trial right, in 1846.³³¹ The New York Constitution of that year added explicit permission for the legislature to provide for waiver of civil jury trial: “The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a

³²² *Id.*

³²³ *Id.* Chief Justice Lumpkin delicately suggested to the Georgia legislature that it might consider amending the act to waive the bond requirement in cases in which the defendant gave an affidavit of poverty. *Id.* That shortcoming, however, did not prevent him from declaring the act to be constitutional. *Id.* at 208–09; *see also* *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 243 (1819) (observing that the act in question did not produce “a total prostration of the trial by jury” and did not even involve “the defendant in circumstances which rendered that right unavailing for his protection”).

³²⁴ *See* *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 259, 264–65 (1829); *Bank of Columbia v. Ross*, 4 H. & McH. 456, 464 (Md. 1799); *Flint River*, 5 Ga. at 208; *Okely*, 17 U.S. (4 Wheat.) at 243.

³²⁵ At least, this was true for questions of liability. Questions of damages were somewhat different. *See* OLDHAM, *supra* note 25, at 45–56. The County Courts Act of 1846 provided for waiver of jury trial in the new county courts, and few litigants in those courts proved to want a jury. *See* PATRICK POLDEN, *A HISTORY OF THE COUNTY COURT, 1846–1971*, at 46–47 (1999); Hanly, *supra* note 156, at 261–62.

³²⁶ Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, § 1 (U.K.) (providing that a judge could decide issues of fact, if the parties consented in writing and if the court believed it was appropriate to do so); *see* Hanly, *supra* note 156, at 277.

³²⁷ *See* Hanly, *supra* note 156, at 275–78.

³²⁸ *See, e.g., id.* at 278.

³²⁹ *See id.* at 259–62 (discussing the increasing hostility toward the civil jury).

³³⁰ *See, e.g., supra* note 58.

³³¹ N.Y. CONST. of 1846, art. I, § 2.

jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.”³³² A delegate to the New York Constitutional Convention of 1846 commented that waiver of civil jury trial in certain cases was already permitted by statute.³³³ Other delegates repeatedly emphasized the costs of jury trial to the county treasuries and to the jurors themselves.³³⁴ A few also suggested the problem of juror bias.³³⁵ Many other states followed New York in modifying their constitutional provisions explicitly to permit the parties to waive civil jury trial.³³⁶

The Federal Constitution and some state constitutions, however, did not explicitly permit waiver of civil jury trial. American courts in the nineteenth century nevertheless held that civil jury trial was a right that could be waived.³³⁷ In a case in 1841 before the Mississippi High Court of Errors and Appeals, counsel “very forcibly urged” that under the state constitution civil jury trial could not be waived either expressly or impliedly.³³⁸ In a widely cited opinion, Judge James Trotter decisively rejected that argument.³³⁹ In so doing, the judge paid the ritual homage to the jury:

We cannot consent to this interpretation of the bill of rights [of Mississippi]. The right it secures to the citizen is one which is justly regarded as one of the strongest bulwarks of human rights,

³³² *Id.*

³³³ NEW YORK CONSTITUTIONAL CONVENTION OF 1846, *supra* note 64, at 544–45 (remarks of Mr. Worden). The delegate remarked, “Judicious counsel always advise this course [of waiver].” *Id.* at 544.

³³⁴ *See supra* text accompanying notes 64–66; *see also supra* Parts I.A & I.C.1.

³³⁵ *See supra* text accompanying notes 252–55; *see also* Part I.C.1.

³³⁶ *See, e.g.*, CAL. CONST. of 1849, art. I, § 3 (“The right of trial by jury shall be secured to all, and remain inviolate forever; but a trial by jury may be waived by the parties in all civil cases, in the manner to be prescribed by law.”); MINN. CONST. of 1857, art. I, § 4 (“The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy, but a jury trial may be waived by the parties in all cases in the manner prescribed by law.”) ARK. CONST. of 1868, art. I, § 6 (“The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases, in the manner prescribed by law.”); FLA. CONST. of 1868, art. I, § 4 (“The right of trial by jury shall be secured to all, and remain inviolate forever; but in all civil cases a jury-trial may be waived by the parties in the manner to be prescribed by law.”); MONT. CONST. of 1889, art. III, § 23 (“The right of trial by jury shall be secured to all, and shall remain inviolate, but in all civil cases and in all criminal cases not amounting to a felony, upon default of appearance or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number provided by law.”).

³³⁷ *See, e.g.*, *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 243–44 (1819); *Lewis v. Garrett’s Adm’rs*, 6 Miss. (5 Howard) 434, 457 (1841); *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 208 (1848).

³³⁸ *Lewis*, 6 Miss. (5 Howard) at 457.

³³⁹ *Id.*

and is held dear by the people of this country. Still it must be considered a privilege which he may waive in any case he may choose. To hold otherwise, would be to restrain the liberty and privileges of the citizen, and not to enlarge them.³⁴⁰

The right of civil jury trial was therefore a protection belonging to a party, and not a good in itself. For this proposition, Judge Trotter cited an influential 1819 opinion of the U.S. Supreme Court, interpreting the Seventh Amendment to permit waiver.³⁴¹

The contrast in the way courts treated waiver of civil jury trial and waiver of criminal jury trial is instructive. Courts, interpreting constitutional rights to criminal jury trial, typically refused to permit waiver of jury trial in favor of bench trial in serious criminal cases.³⁴² A treatise writer summarized the reason: “[I]t is deemed, in such cases, there are more than personal interests involved, that the rights and interests of the public are also concerned.”³⁴³ Criminal jury trial, allowing laypersons to decide serious criminal cases, was a public good, apart from any advantage to the defendant.³⁴⁴ Civil jury trial, in the view of the courts, was not a public good apart from the interests of the parties.

In civil cases, either the text of state constitutions or judicial decisions gave legislatures power to establish the requirements for waiver of jury trial. Legislatures adopted

³⁴⁰ *Id.* Judge Trotter went on to declare:

The bill of rights says, that the *right* of trial by jury shall remain inviolate. It was not designed by this, to force a jury trial upon the party whether he wished it or not. It is then not the trial, but the *right* of trial by jury which is rendered inviolate.

Id.

³⁴¹ *Id.* (citing *Okely*, 17 U.S. (4 Wheat.) at 243–44). In *Okely*, Justice William Johnson observed that

if the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim. That this view of the subject is giving full effect to the seventh amendment of the constitution, is not only deducible from the general intent, but from the express wording of the article referred to. Had the terms been, that “the *trial* by jury shall be preserved,” it might have been contended, that they were imperative, and could not be dispensed with. But the words are, that the *right* of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta*, and the benefit of it may therefore be relinquished.

Okely, 17 U.S. (4 Wheat.) at 243–44.

³⁴² See, e.g., *Cancemi v. People*, 18 N.Y. 128, 137 (1858); *Hill v. People*, 16 Mich. 351, 355–58 (1868).

³⁴³ PROFFATT, *supra* note 179, at 157.

³⁴⁴ See John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC’Y REV. 261, 269–70 (1979) (explaining that a criminal jury trial, as opposed to civil, was considered a public good).

various requirements, some providing that a party could have a civil jury unless the party affirmatively waived the right,³⁴⁵ others that a party had to affirmatively request a jury trial.³⁴⁶ Over the course of the nineteenth and early twentieth century, legislatures shifted the default, with more requiring that a party affirmatively demand a jury trial.³⁴⁷ Courts upheld all these statutes, as long as the conditions for waiver were “reasonable,” which courts routinely found.³⁴⁸ Jury trial became more difficult to get, and easier to bypass.

5. Original Legal Categories: The Line Between Fact and Law

Courts used a different rationale for developing and upholding expanded methods of jury control, such as directed verdict, compulsory nonsuit, and judgment notwithstanding the verdict. Courts relied on the old common law maxim, stated by Coke and others, that the facts were for the jury to decide, the law for the judge.³⁴⁹ Courts conveniently ignored the problem that judges had been busy expanding the realm of law at the expense of fact since the beginning of the republic. By invoking these original legal categories, courts claimed to be preserving the province of the jury. The content of those categories, however, had radically changed.

Before examining this argument in more detail, it is important to understand a change in attitudes toward juries. In the late nineteenth and early twentieth century in the United States, the political power of civil juries once again became salient.³⁵⁰ Just

³⁴⁵ The most important of these statutes was the provision concerning waiver of jury trial in New York’s *Field Code* of 1848, which was copied in other states. See 1848 N.Y. Laws 538. The *Field Code* provided for waiver of jury trial in the following circumstances: “(1) By written consent [of the parties] filed with the clerk of the court; (2) By oral consent in open court, entered in the minutes; or (3) By failure to appear at the trial.” *Id.* States that copied this provision included Indiana. 1852 Ind. 2 R.S. 115, § 340. Fleming James described the various practical difficulties that these requirements for waiver created. Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 665–66 (1963). An Indiana case illustrates some of the problems that could arise. A court referred a case to a referee for trial without any of the parties objecting. *Shaw v. Kent*, 11 Ind. 80 (1858). The referee then made findings and judgment was entered accordingly. *Id.* Nevertheless, because no written consent to waiver of jury trial appeared in the record, the Supreme Court of Indiana subsequently ordered the case to go to jury trial. *Id.* at 82.

³⁴⁶ See, e.g., IOWA CODE § 1772 (1851); Act of 1871, c. 57, § 38, 1871 Va. Acts 53; Act of 1879, §29, 1879 Conn. Spec. Acts 156; FED. R. CIV. P. 38(d), 39(b).

³⁴⁷ See ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 261 (1952). Compare *supra* note 345, with *supra* note 346.

³⁴⁸ See, e.g., *McKay v. Fair Haven & W.R. Co.*, 54 A. 923, 924 (Conn. 1903); *Bennett v. Hillman*, 174 P. 362 (Cal. Ct. App. 1918); see also Fleming James, Jr., *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L.J. 1022, 1024–25 (1936).

³⁴⁹ 3 SIR EDWARD COKE, FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON 460 (J.H. Thomas ed., 1818) (1628).

³⁵⁰ See Lerner, *Directed Verdict*, *supra* note 117, at 487–88, 498–99.

as debt cases were an intense political issue at the founding of the nation, personal injury cases against railroads and other industrial corporations generated sharp political conflict in the late nineteenth and early twentieth century.³⁵¹ Judges often viewed juries as biased against railroads and other corporations in personal injury cases, to the point that economic prosperity might be threatened.³⁵² As I have explained in detail in another article, these concerns helped drive judges to develop more powerful means of jury control.³⁵³ In contrast, popular sentiment arose to limit these methods of control and to allow juries to award damages to plaintiffs.³⁵⁴ (The political importance of juries began to recede again in the 1920s with the advent of administrative schemes for workers' compensation and the widespread use of the automobile.³⁵⁵ Automobile accident cases rapidly filled courts' dockets and generated much less political conflict than railroad or other industrial accident cases.³⁵⁶) Besides the perceived problem of jury bias, courts were concerned about the growing number of complicated negligence cases for personal injuries on their dockets.³⁵⁷ Docket pressure grew greater than ever, and the main traditional method of jury control—new trial—began to seem far too expensive.³⁵⁸

Federal and state courts in the nineteenth and early twentieth century therefore vigorously expanded the use of directed verdict and other means of taking a case from a jury.³⁵⁹ If there was no significant dispute over an issue of fact, courts held, a judge could require the jury to bring in a particular verdict.³⁶⁰ Many state courts, following the lead of the federal courts, held that a trial court could, and should, direct a verdict if it would award a new trial for insufficient evidence if the jury brought in the opposite verdict.³⁶¹ In addition, many state legislatures gave courts authority to enter judgment notwithstanding the verdict based on the evidence.³⁶² These procedures greatly extended courts' power over jury verdicts. This was particularly true because courts constantly converted issues which had been questions of fact for the jury into questions

³⁵¹ See *id.* at 478–84, 497–505.

³⁵² *Id.* at 478–89.

³⁵³ *Id.*

³⁵⁴ *Id.* at 505–06. The most dramatic examples of this backlash against directed verdict occurred in Oklahoma and Arizona, which both ratified constitutional provisions to prevent the procedure in negligence cases. See OKLA. CONST. of 1907, art. XXIII, § 6; ARIZ. CONST. art. XVIII, § 5 (“The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.”).

³⁵⁵ Lerner, *Directed Verdict*, *supra* note 117, at 522–23.

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 453, 474.

³⁵⁸ *Id.* at 489–90.

³⁵⁹ *Id.* at 473–75, 488–93.

³⁶⁰ *Id.* at 467–68.

³⁶¹ See, e.g., *id.* at 489–93.

³⁶² *Id.* at 516–17.

of law for the judge.³⁶³ Some examples of this trend include the development of the doctrines of contributory negligence and the fellow servant rule, as well as the general proposition that sufficiency of the evidence was a question of law.³⁶⁴

Given the significance of these changes, it is surprising to a modern lawyer how seldom courts addressed in depth the constitutional validity of the new procedures for jury control. In deciding questions about procedures for jury control, courts almost never engaged in extended discussions of the text and history of particular constitutional rights to jury trial. Indeed, in their opinions courts rarely even cited a particular constitutional provision or quoted the text. Instead, courts simply declared that “[t]he jury have nothing to do with the relevancy and materiality of evidence, or with inferences of law from facts fully established.”³⁶⁵ Courts then proceeded to tailor the procedure in question according to the legal traditions of the jurisdiction, the practices of other jurisdictions, and the circumstances of the time, such as docket pressure and jury bias.³⁶⁶ Judges seemed unconcerned with the shift in the line between law and fact; it was the existence of the categories that mattered. In the 1890s, as political tensions built concerning personal injury cases against railroads, a few constitutional challenges to procedures taking a case from a jury were more insistent and detailed.³⁶⁷ But in these cases, also, courts continued to adhere to the standard reasoning: “If there

³⁶³ Scholars who have addressed this change include WILLIAM E. NELSON, *THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 165–72 (2d ed. 1994); JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 183–89 (1898); Lerner, *Directed Verdict*, *supra* note 117, at 486–95; Lettow, *New Trial*, *supra* note 106, at 542–47; Sward, *supra* note 24, at 592–94, 631–32; and Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1868–71 (1966).

³⁶⁴ See Lerner, *Directed Verdict*, *supra* note 117, at 486–95.

³⁶⁵ *Naugatuck R.R. v. Waterbury Button Co.*, 24 Conn. 468, 470 (1856); see also *Wheeler v. Schroeder*, 4 R.I. 383, 392–93 (1856) (“The legal sufficiency of proof, and the moral weight of legally sufficient proof, are very distinct in legal idea. The first lies within the province of the court, the last within the province of the jury.”).

³⁶⁶ See, e.g., *Meyer v. Houck*, 52 N.W. 235, 236–37 (Iowa 1892).

³⁶⁷ See, e.g., *Catlett v. St. Louis, Iron Mountain & S. Ry.*, 21 S.W. 1062 (Ark. 1893) (regarding a suit for negligence against a railroad because a boy was injured by swinging on the ladder of a moving train while playing). The court upheld a directed verdict for the defendant in that case. *Id.* at 1063. *Hopkins v. Nashville, Chattanooga & St. Louis Railway*, 34 S.W. 1029 (Tenn. 1896), concerned the application of the fellow servant rule to the death of a fireman working on a train. The defendant railroad was so desperate to keep the case from a jury that it sought to revive the practice of demurrer to the evidence, a procedure last used in Tennessee, as far as the state Supreme Court could tell, in 1818. *Id.* at 1038. On appeal, the plaintiff challenged the use of demurrer as violating the Tennessee constitutional right to jury trial. *Id.* at 1031. The court upheld the procedure as constitutional and appropriately sustained in that case. *Id.* at 1039. The Court’s encyclopedic opinion was widely cited for its extraordinarily long and detailed analysis, aided by the diligent research of counsel for the railroad, see *id.* at 1033, of different states’ constitutional rights to civil jury trial and procedures for taking cases from juries; see *id.* at 1033–35.

is no evidence to sustain an issue of fact, the judge only declares the law when he tells the jury so.”³⁶⁸

In a few cases, courts referred to jury practices at the time of a constitution’s framing.³⁶⁹ This type of historical argument was decidedly secondary, made to back up the main argument, which was about the division of fact and law between jury and judge. The U.S. Supreme Court, in its many nineteenth-century decisions approving expanded use of directed verdict, never even referred to an originalist test under the Seventh Amendment or considered the procedure’s constitutionality in any detail.³⁷⁰

Courts used this style of constitutional interpretation for the issue of taking a case from a jury partly because courts believed they had particular authority over this question of procedure.³⁷¹ Courts were emphatic that the ability to decide on the legal sufficiency of the evidence was a necessary attribute of judicial power.³⁷² Indeed, the Wisconsin Supreme Court held that a statute prohibiting directed verdict was unconstitutional as an improper infringement of judicial power.³⁷³ Directed verdict was an entirely judicially developed procedure, and it was apparent that the courts would not readily declare their own creation to have been all along a constitutional violation.³⁷⁴

Through the end of the nineteenth century, most legal commentators tended to applaud courts’ increasing power over jury verdicts.³⁷⁵ In the early twentieth century, however, legal commentators started to question whether courts had not assumed too much control over juries to be desirable and consistent with constitutional rights. Although many legal writers supported ever-greater judicial control over juries,³⁷⁶ a strand of dissent was developing. The jury’s political role was once more gaining importance.

A Missouri case decided the year before prompted the author of a note in the *Harvard Law Review* in 1903 to complain that courts were too zealous in directing

³⁶⁸ See *Catlett*, 21 S.W. at 1062.

³⁶⁹ See, e.g., *Naugatuck R.R.*, 24 Conn. at 478 (“Besides, this mode of trying a question of law [nonsuit], had always been practised at the common law, and was familiarly known to the men who framed our constitution; and it is not to be believed, that they meant, by this clause in the constitution [‘the trial by jury shall remain inviolate’], to restrict the courts and the legislature itself, in relation to this ancient practice.”).

³⁷⁰ See, e.g., *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442 (1871); *Pleasants v. Fant*, 89 U.S. (22 Wall.) 116 (1874); *Bowditch v. City of Boston*, 101 U.S. 16 (1879).

³⁷¹ See Lerner, *Directed Verdict*, *supra* note 117, at 501.

³⁷² See, e.g., *Pleasants*, 89 U.S. (22 Wall.) at 122.

³⁷³ *Thoe v. Chi., Minneapolis & St. Paul Ry.*, 195 N.W. 407, 411 (Wis. 1923).

³⁷⁴ See Lerner, *Directed Verdict*, *supra* note 117, at 501.

³⁷⁵ See, e.g., 92 N. AM. REV. 297, 308–09 (1861) (reviewing WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY (London, John W. Parker & Son, West Strand 1752)); *Limited Sovereignty in the United States*, ATLANTIC MONTHLY, Feb. 1879, at 184, 185–89.

³⁷⁶ See generally, e.g., J. L. Thorndike, *Trial by Jury in United States Courts*, 26 HARV. L. REV. 732 (1913); Ezra Ripley Thayer, *Judicial Administration*, 63 U. PA. L. REV. 585 (1915); Robert L. Pierce, Comment, *Practice and Procedure—Reservation of Decision on Motion for Directed Verdict as Means of Avoiding Unnecessary New Trials*, 34 MICH. L. REV. 93 (1935) [hereinafter Pierce, *Practice and Procedure*].

verdicts.³⁷⁷ The author suggested that aggressive use of this procedure violated constitutional rights to jury trial: “This constitutional safeguard is of little substantial value if the jury is not to pass upon the weight of the evidence or the credibility of the witnesses.”³⁷⁸ The author specifically questioned the constitutionality of the widespread standard of directing a verdict if the court would order a new trial if the jury reached a contrary result.³⁷⁹ In 1910, a Virginia lawyer harshly criticized the attempt by certain trial judges to introduce directed verdict into that state and declared the procedure to be unconstitutional.³⁸⁰ The Virginian hinted at certain reasons behind his vehement disapproval: The errant trial judges had only indulged this innovation “in damage suits on motions made by defendant corporations.”³⁸¹ These judges were biased in favor of corporations, he suggested.³⁸² The jury was needed to correct judicial partiality. The jury still had a political role to play.

³⁷⁷ Note, *Limitations on Power of Court to Direct Verdict*, 16 HARV. L. REV. 515, 515 (1903) [hereinafter Note, *Limitations*]. The case was *Weltmer v. Bishop*, 71 S.W. 167 (Mo. 1902), a defamation case in which the Missouri Supreme Court held that a verdict should have been directed for the defendant, who had written that certain self-described “magnetic healers” were frauds. *Id.* at 169. At trial, the magnetic healers had produced numerous witnesses testifying to the efficacy of their cure, and a jury brought in a verdict for plaintiffs. *Id.* at 168. In reversing the judgment, the Missouri Supreme Court declared:

Courts are not such slaves to the forms of procedure as to surrender their own intelligence to an array of witnesses testifying to an impossibility.

They are not required to give credence to a statement that would falsify well-known laws of nature, though a cloud of witnesses swear to it.

Id. at 169. The U.S. Supreme Court also addressed the issue of whether these magnetic healers were frauds, but that court overruled a trial court’s sustaining a demurrer against them. *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902). The Supreme Court based its decision on the standard of proof, skepticism about whether the fact of inefficacy could be known in such a case, and probably confidence in the ultimate fact-finder (a federal judge sitting in equity as opposed to a jury). *Id.* at 96, 101, 111.

³⁷⁸ Note, *Limitations*, *supra* note 377, at 515.

³⁷⁹ When a new trial is granted, it may be said that there is no denial of this right, for there is another jury trial. The same, however, cannot be urged in favor of directing a verdict . . . Furthermore, though the practice of granting new trials may be supported on the ground that it existed at the time the constitutional provisions were adopted, the present practice of directing verdicts, having grown up in the last half-century, cannot be regarded as impliedly recognized by the constitutions.

Id.

³⁸⁰ M. J. Fulton, *Directing Verdicts*, 16 VA. L. REG. 241, 242 (1910). The practice of directing verdicts was “not only a dangerous departure from our well known rules of procedure,” and “unnecessary, unwise and inexpedient,” but also “an inexcusable and unwarranted usurpation of the functions of the jury by the judge, and a clear violation of our laws and constitution.” *Id.* at 251.

³⁸¹ *Id.* at 249.

³⁸² *Id.*

In 1914, Washington lawyer Frank W. Hackett³⁸³ in the *Yale Law Journal* made the first extended argument that directed verdict as used in the federal courts violated the Seventh Amendment.³⁸⁴ Hackett's article was based on a petition for certiorari he had filed in the U.S. Supreme Court the year before, in a case in which he represented an employee suing a car manufacturing company for negligence in causing injury.³⁸⁵ In that case, the federal district judge had directed a verdict for the defendant because of insufficiency of the evidence, which the Third Circuit had upheld.³⁸⁶ In his article and petition for certiorari, Hackett argued for use of a strict originalist test based on the common law of England in 1791.³⁸⁷ Under this standard, the only way a federal trial court could make a final determination on sufficiency of the evidence was on a demurrer to evidence, with all its common law rigor and risks to the demurring party.³⁸⁸ Otherwise, a federal trial court could only grant a new trial.³⁸⁹

The most interesting part of Hackett's argument was his extended discussion of modern appellate practice in the federal courts as violating the Re-examination Clause.³⁹⁰ Hackett raised important questions about the way that ancillary procedures affected the civil jury right.³⁹¹ He was virtually the only writer who perceived that changes in appellate practice had significant implications under the Re-examination Clause. Hackett emphasized the contemporary practice of certifying the whole evidence in the case to the appellate court for a decision on the sufficiency of the

³⁸³ Hackett was a Republican from New Hampshire who, after serving as private secretary to Caleb Cushing, senior counsel to the Geneva Arbitration Commission in 1872, opened a law practice in Washington, D.C. He served as Assistant Secretary of the Navy from 1900 to 1901 under William McKinley. HENRY HARRISON METCALF & FRANCES M. ABBOTT, ONE THOUSAND NEW HAMPSHIRE NOTABLES: BRIEF BIOGRAPHICAL SKETCHES OF NEW HAMPSHIRE MEN AND WOMEN, NATIVE OR RESIDENT, PROMINENT IN PUBLIC, PROFESSIONAL, BUSINESS, EDUCATIONAL, FRATERNAL OR BENEVOLENT WORK 451 (1919).

³⁸⁴ See generally Frank Warren Hackett, *Has a Trial Judge of a United States Court the Right to Direct a Verdict*, 24 YALE L.J. 127 (1914).

³⁸⁵ Brief for Petitioner for Writ of Certiorari, *Allegar v. Am. Car & Foundry Co.*, 231 U.S. 747 (1913) (No. 705) [hereinafter Brief for Petitioner for Writ of Certiorari]. The plaintiff alleged negligence against the company because his fellow employees had taken him to the company's emergency hospital and then to another, where he claimed to have been negligently treated by the company's doctor, rather than home to be treated by his own doctor as he had requested. *Id.* at 3–6.

³⁸⁶ *Allegar v. Am. Car & Foundry Co.*, 206 F. 437, 438–40 (3d Cir. 1913). Judge George Gray, a Democrat who had served as Delaware Attorney General and U.S. Senator from Delaware, dissented without opinion. *Id.* at 440.

³⁸⁷ See Brief for Petitioner for Writ of Certiorari, *supra* note 385, at 8–9, 12.

³⁸⁸ See Brief for Petitioner for Writ of Certiorari, *supra* note 385, at 13–16, 31–34; Hackett, *supra* note 384, at 134–35.

³⁸⁹ See Hackett, *supra* note 384, at 137; see also Note, *Limitations*, *supra* note 377, at 515.

³⁹⁰ See Brief for Petitioner for Writ of Certiorari, *supra* note 385, at 10–13; Hackett, *supra* note 384, at 133.

³⁹¹ See Hackett, *supra* note 384, at 130–33, 137.

evidence.³⁹² At the time Hackett wrote, the whole evidence could include an official trial transcript.³⁹³ In some jurisdictions, a system of official stenographers was in place.³⁹⁴ Hackett observed that the practice of certifying the whole evidence in the case to the full court was unknown to the common law in 1791.³⁹⁵ At common law, a bill of exceptions described a particular ruling by a trial judge and some related evidence, but not the whole evidence in the case.³⁹⁶ Hackett argued that examination of the whole evidence for its sufficiency “was just what the amendment was intended to forbid.”³⁹⁷ He believed that appellate review under the Seventh Amendment was limited to the precise mechanisms for relating the evidence that had been used in England in 1791.³⁹⁸ Federal appellate courts therefore had no power to review decisions by trial courts to direct verdicts based on sufficiency of the evidence.

Hackett admitted that his argument “appears to be a bold assumption,”³⁹⁹ and counsel for the respondent heartily agreed.⁴⁰⁰ Counsel for respondent cited the numerous Supreme Court opinions upholding and encouraging directed verdicts.⁴⁰¹ They declared that the Re-examination Clause was not applicable in directed verdict cases because the jury had found no fact.⁴⁰² Hackett’s argument was not, however, that of a lonely crank. At least one justice of the U.S. Supreme Court had earlier made an argument similar to Hackett’s. In a case before the U.S. Supreme Court in 1887, Justice Stanley Matthews, on a motion for new trial, questioned in dicta whether the practice of bringing up the whole evidence for appellate review of sufficiency was consistent with the Seventh Amendment.⁴⁰³ Predictably, however, the U.S. Supreme Court denied Hackett’s petition for certiorari.⁴⁰⁴ The Court apparently had no desire to demolish the elaborate edifice of jury control it had carefully built up over the preceding half-century.

³⁹² See Brief for Petitioner for Writ of Certiorari, *supra* note 385, at 10–13; Hackett, *supra* note 384, at 133.

³⁹³ See Lerner, *The Silent Judge*, *supra* note 18, at 263 & n.343.

³⁹⁴ See, e.g., Act of May 1, 1907, 1907 Pa. Laws 135 (providing for the appointment of official stenographers in Pennsylvania).

³⁹⁵ See Brief for Petitioner for Writ of Certiorari, *supra* note 385, at 10–12; Hackett, *supra* note 384, at 133.

³⁹⁶ See Brief for Petitioner for Writ of Certiorari, *supra* note 385, at 11–13; Hackett, *supra* note 384, at 132–34.

³⁹⁷ See Hackett, *supra* note 384, at 133.

³⁹⁸ Brief for Petitioner for Writ of Certiorari, *supra* note 385, at 12; Hackett, *supra* note 384, at 134.

³⁹⁹ See Brief for Petitioner for Writ of Certiorari, *supra* note 385, at 4.

⁴⁰⁰ Brief of Respondent on Petition for Writ of Certiorari at 2, *Allegar v. Am. Car & Foundry Co.*, 231 U.S. 747 (1913) (No. 705) [hereinafter Brief of Respondent on Petition for Writ of Certiorari].

⁴⁰¹ *Id.* at 2–4.

⁴⁰² *Id.* at 4–8.

⁴⁰³ *Metro. R. Co. v. Moore*, 121 U.S. 558, 573 (1887).

⁴⁰⁴ *Allegar v. Am. Car & Foundry Co.*, 206 F. 437 (3d Cir. 1913), *cert. denied*, 231 U.S. 747 (1913).

III. A CAUTIONARY TALE: AN ATTEMPT TO APPLY A STRICT ORIGINALIST TEST

Hackett's unusual argument—especially his reliance on a strict originalist test under the Re-examination Clause—bears signs of the powerful influence of the Supreme Court's decision in *Slocum v. New York Life Insurance Co.*,⁴⁰⁵ decided just months before.⁴⁰⁶ *Slocum* was part of a long line of cases by the U.S. Supreme Court attempting to apply a strict originalist test under the Re-examination Clause. This line of cases was a striking exception to the usual flexible interpretation of constitutional rights to civil jury trial.⁴⁰⁷ The eventual fate of this test is instructive concerning the durability of procedural rights.

Slocum concerned the constitutionality of judgment notwithstanding the verdict.⁴⁰⁸ This procedure presumably would have been more vulnerable to constitutional challenges than directed verdict. Judgment notwithstanding the verdict was a creature of statute, which the courts had not previously developed (for the most part), and was clearly contrary to the traditional common law practice.⁴⁰⁹ Nevertheless, there were very few constitutional challenges to the procedure of judgment notwithstanding the verdict based on the evidence. State courts briefly announced that the procedure was compatible with rights to jury trial.⁴¹⁰ Because directed verdict was constitutional, courts held, there was no reason why the legislature could not authorize a court to enter a judgment after a jury verdict when it should have directed one earlier.⁴¹¹ Courts

⁴⁰⁵ 228 U.S. 364 (1913).

⁴⁰⁶ Hackett extensively quoted from Justice Van Devanter's opinion in *Slocum* in his brief. See Brief for Petitioner for Writ of Certiorari, *supra* note 385, at 30–31. Counsel for respondent claimed: "It is apparent that the present position of Counsel for the petitioner grows out of his mis-construction of the decision of this Court in the case of *Slocum v. Life Insurance Co.*" Brief of Respondent on Petition for Writ of Certiorari, *supra* note 400, at 6.

⁴⁰⁷ See, e.g., *Emerick v. Harris*, 1 Binn. 416 (Pa. 1806); *Beers v. Beers*, 4 Conn. 535, 538–39; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194 (1848).

⁴⁰⁸ See *Slocum*, 228 U.S. at 365, 369.

⁴⁰⁹ See Lerner, *Directed Verdict*, *supra* note 117, at 516–17.

⁴¹⁰ Minnesota's pioneer statute, enacted in 1895, drew a challenge from a plaintiff in a personal injury suit against a railroad. *Kernan v. St. Paul City Ry.*, 67 N.W. 71, 72 (Minn. 1896) (citing Minnesota Laws of 1895, ch. 320, 1895 Minn. Laws 729). The plaintiff had won a verdict from a jury, but the trial court entered judgment for defendant notwithstanding the verdict. *Id.* at 71. In 1896, the Minnesota Supreme Court tersely rejected the constitutional challenge. *Id.* at 72. The court held that because the defendant had not properly made a motion for judgment notwithstanding the verdict before the trial court, the judgment in its favor had to be reversed and a new trial granted. *Id.*; see also *Dalmas v. Kemble*, 64 A. 559, 559 (Pa. 1906) (explicating Act of Apr. 22, 1905, 1905 Pa. Laws 286).

⁴¹¹ See *Kernan*, 67 N.W. at 72; *Dalmas*, 64 A. at 560 ("What the judge may do is still the same in substance, but the time when he may do it is enlarged so as to allow deliberate review and consideration of the facts and the law upon the whole evidence. . . . [T]here is no intent in the act to disturb the settled line of distinction between the provinces of the court and the jury.").

did not bother to discuss in detail the text or history of particular constitutional provisions or to look into the practice at the time these provisions were adopted.

The U.S. Supreme Court's decision in *Slocum v. New York Life Insurance Co.*, in 1913, was therefore a shock to many in the legal profession.⁴¹² Statutes authorizing judgment notwithstanding the verdict based on the evidence had been spreading steadily, without state constitutional impediment.⁴¹³ Judges and lawyers had applauded the development as a significant gain in efficiency without disturbing the line between judge and jury.⁴¹⁴ The U.S. Supreme Court had long approved of, and in fact had led the way in, enhanced judicial control over juries through directed verdict.⁴¹⁵ The Court had never suggested that this greater power over juries violated the Seventh Amendment. Then, in *Slocum*, the Court held that a federal court could not, consistent with the Re-examination Clause of the Seventh Amendment, enter judgment notwithstanding the verdict based on the evidence.⁴¹⁶

This result should not have been a surprise, considering the Court's Re-examination Clause decisions. Many state courts and commentators had forgotten about the independent significance of that Clause, however, and the unusual jurisprudence interpreting it. Language similar to the first clause of the Seventh Amendment, the Preservation Clause, was ubiquitous in state constitutions. The second clause, the Re-examination Clause, was unique to the Federal Constitution. Not only was the language of the Re-examination Clause unique, the Supreme Court, unlike any court interpreting a preservation clause, had consistently used a strict originalist test to interpret it. The Supreme Court had long looked to the common law of England to decide questions under the Re-examination Clause, following Justice Story.⁴¹⁷ In discussions of the Re-examination Clause, the U.S. Supreme Court throughout the nineteenth century consistently quoted and applied Story's analysis in *Parsons v. Bedford*:

The only modes known to the common law to re-examine such facts [found by a jury], are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo [new trial],

⁴¹² See, e.g., Pierce, *Practice and Procedure*, *supra* note 376, at 96 ("This decision [*Slocum*] came as a distinct surprise.").

⁴¹³ See Lerner, *Directed Verdict*, *supra* note 117, at 517 & n.488.

⁴¹⁴ See, e.g., *Dalmas*, 64 A. at 560 ("[T]here is no intent in the act to disturb the settled line of distinction between the provinces of the court and the jury.").

⁴¹⁵ Lerner, *Directed Verdict*, *supra* note 117, at 488–89.

⁴¹⁶ See *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 398–400 (1913).

⁴¹⁷ See *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447–48 (1830); see also *supra* text accompanying notes 102–04. In nineteenth-century Supreme Court jurisprudence, *Parsons* was the case consistently cited in discussions of the Re-examination Clause; *Wonson* is hardly mentioned.

by an appellate court, for some error of law which intervened in the proceedings.⁴¹⁸

State judges and legal commentators should have remembered Joseph Story's words in *Parsons v. Bedford* concerning the Seventh Amendment: "But the other clause of the amendment [the Re-examination Clause] is still more important; and we read it as a substantial and independent clause."⁴¹⁹

Modern scholars have also viewed the result in *Slocum* as an aberration. Two scholars, in an otherwise excellent article, called *Slocum* a "diversion" from the U.S. Supreme Court's usual support for increased control over jury verdicts, and found the decision difficult to explain.⁴²⁰ As with earlier commentators, these scholars did not recognize the independent importance of the Re-examination Clause, or the consistency of the U.S. Supreme Court's applications of it. In general, modern scholarship on the Seventh Amendment has not focused on the history of the Supreme Court's interpretation of the Re-examination Clause, nor indeed much on the Clause at all.⁴²¹ And yet, the Re-examination Clause, not the Preservation Clause, gave rise to the strict originalist test that has provoked so many questions.

Lillian Slocum sued New York Life to recover on a life insurance policy for her husband, who had died four days after the grace period for the last payment on the premium had expired.⁴²² The case was tried in the federal district court in Pennsylvania, sitting in diversity jurisdiction and following Pennsylvania practice under the Conformity Act.⁴²³ The district court denied the defendant's motion for a directed verdict, and the jury brought in a verdict for Mrs. Slocum.⁴²⁴ The Third Circuit Court of Appeals held that the trial court should have directed a verdict for the defendant and applied the

⁴¹⁸ *Parsons*, 28 U.S. (3 Pet.) at 448. The Court quoted this language steadily in later cases. See *Barreda v. Silsbee*, 62 U.S. (21 How.) 146, 166 (1858); *Justices v. Murray*, 76 U.S. (9 Wall.) 274, 277–78 (1869); *Miller v. Brooklyn Life Ins. Co.*, 79 U.S. (12 Wall.) 285, 300 (1870); *Knickerbocker Ins. Co. v. Comstock*, 83 U.S. (16 Wall.) 258, 269 (1872); *Mercantile Mut. Ins. Co. v. Folsom*, 85 U.S. (18 Wall.) 237, 248–49 (1873); *City of Lincoln v. Power*, 151 U.S. 436, 438 (1894); *Chi., B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 246 (1897); *Capital Traction Co. v. Hof*, 174 U.S. 1, 9 (1899).

⁴¹⁹ *Parsons*, 28 U.S. (3 Pet.) at 447.

⁴²⁰ *Woolhandler & Collins*, *supra* note 24, at 643–45.

⁴²¹ Suja Thomas has applied the Court's traditional historical test under the Re-examination Clause to the procedure of remittitur. Thomas, *Why Summary Judgment is Unconstitutional*, *supra* note 15, at 164–65. For another consideration of the Clause, see Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499 (1998).

⁴²² *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 370 (1913). An insurance agent had apparently agreed to a partial payment and postponement of signing a new payment plan, but the Court held that the written insurance contract precluded such an agreement with the insurance agent. *Id.* at 370–71, 374–75.

⁴²³ See *id.* at 366; see also 1905 Pa. Laws 286.

⁴²⁴ *Slocum*, 228 U.S. at 369.

Pennsylvania statute in entering judgment notwithstanding the verdict.⁴²⁵ The U.S. Supreme Court, per Justice Van Devanter, agreed that the district court had clearly erred in denying the defendant's motion for directed verdict.⁴²⁶ Directing a verdict did not implicate the Re-examination Clause, as the jury had not found any fact.⁴²⁷ The Court in *Slocum* emphasized that the federal practice of directed verdict, although powerful, was fully consistent with the Seventh Amendment.⁴²⁸ Nevertheless, the Court held that the Re-examination Clause prevented application of the Pennsylvania statute.⁴²⁹ The jury necessarily had found facts in giving a verdict, and entering judgment notwithstanding the verdict meant a judicial re-examination of those facts.⁴³⁰ The Court in *Slocum* acknowledged the common-law procedures of judgment non obstante veredicto and motion to arrest judgment, but it explained that these were both based on the pleadings, not on the evidence at trial as in *Slocum*.⁴³¹ The only possible remedy for an erroneous jury verdict in federal courts was a new trial.⁴³² The insurance company would have to go through another jury trial, at the end of which presumably the judge would direct a verdict in its favor, unless Mrs. Slocum dropped or settled her claim.

Probably to try to mitigate the apparent wastefulness of this outcome, the Court suggested another possibility. The Court observed that, at common law, the procedure of requiring a new trial to correct error "was regarded as of real value" because, in addition to recognizing the right to a jury determination, it allowed a party an opportunity to produce more evidence to help rightly resolve the issue.⁴³³ Mrs. Slocum "is entitled to that opportunity."⁴³⁴ For all the Court could tell, she might be able to supply omissions in her evidence, or show inaccuracies in the defendant's, that would rightly entitle her to a verdict and judgment in her favor.⁴³⁵

Considering the strong principle and consistency of U.S. Supreme Court Re-examination Clause decisions, the surprise is not that the Court held as it did in *Slocum*, but that four justices dissented, and dissented so vigorously.⁴³⁶ Commentators praised the "trenchant and excellent"⁴³⁷ dissent of Charles Evans Hughes (then an Associate Justice), joined by Justices Holmes, Lurton, and Pitney. Hughes was no admirer of jury trial. In 1928, *The New York Times* quoted Hughes's speech to the

⁴²⁵ *See id.*

⁴²⁶ *See id.* at 375.

⁴²⁷ *See id.* at 376.

⁴²⁸ *Id.* at 369.

⁴²⁹ *See id.* at 376–78.

⁴³⁰ *Id.* at 368.

⁴³¹ *Id.* at 381–82.

⁴³² *Id.* at 398–99.

⁴³³ *Id.* at 380.

⁴³⁴ *Id.*

⁴³⁵ *Id.* at 380–81.

⁴³⁶ *See id.* at 400.

⁴³⁷ *See, e.g.,* Pierce, *Practice and Procedure*, *supra* note 376, at 95.

Federal Bar Association in New York: “Get rid of jury trials as much as possible. . . . The ideal of justice is incarnated in the judge.”⁴³⁸ According to Hughes in his dissent in *Slocum*, there was no re-examination of any fact tried to a jury: “But, wherein has any matter of fact tried by a jury been reexamined? Concededly, there was no fact to be tried by a jury; the case as made was barren of any such fact; and there being none, there has been no re-examination of it.”⁴³⁹ Hughes pointed out that the federal trial court in Pennsylvania had developed a practice of applying the Pennsylvania statute, a practice approved by the Third Circuit.⁴⁴⁰ He warned of the “serious and far-reaching consequences of this decision.”⁴⁴¹ Not only did the decision prevent federal trial courts from applying salutary state statutes like the Pennsylvania law, “but it erects an impassable barrier—unless the Constitution be amended—to action by Congress along the same line for the purpose of remedying the mischief of repeated trials and of thus diminishing in a highly important degree the delays and expense of litigation.”⁴⁴² At a time of great docket pressure, Justice Hughes was not impressed with the value of giving Mrs. Slocum or any other such litigant another “opportunity” at jury trial. In Hughes’s view, the practical needs of the legal system trumped adherence to a strict historical test, however longstanding or consistently applied.

Like Justice Hughes, the legal profession reacted strongly against the decision in *Slocum*.⁴⁴³ To some extent, state judges and legal commentators simply failed to

⁴³⁸ *Fewer Jury Trials Urged by Hughes: More Power for the Federal Judges Would Improve System, He Says*, N.Y. TIMES, Dec. 7, 1928, at 3 (internal quotation marks omitted).

⁴³⁹ *Slocum*, 228 U.S. at 401 (Hughes, J., dissenting).

⁴⁴⁰ *See, e.g., Fries-Breslin Co. v. Bergen*, 176 F. 76 (3d Cir. 1909); *Smith v. Jones*, 181 F. 819 (3d Cir. 1910). For a later opinion in which Chief Justice Hughes disapproved of a federal court applying a state law concerning judge-jury relations under the Conformity Act, see *Herron v. S. Pac. Co.*, 283 U.S. 91, 94 (1931).

⁴⁴¹ *Slocum*, 228 U.S. at 400.

⁴⁴² *Id.*

⁴⁴³ *See, e.g., Constitutional Law—Practice in the Federal Courts—Motion Non Obstante Verdicto*, 13 COLUM. L. REV. 544, 545 (1913) (“The decision, certainly, is to be regretted in the face of the present movement for fewer trials and less expensive litigation.”); *Jury Trial—Re-examination of Facts Tried by Jury—The Slocum Case*, 47 AM. L. REV. 906, 907 (1913) [hereinafter *Re-examination of Facts Tried by Jury*] (“It is certainly to be regretted that the majority of the Supreme Court should have felt constrained to construe this amendment with strictness.”); Thorndike, *supra* note 376, at 737 (“The decision of the majority of the court is a public misfortune.”); Arthur W. Spencer, *Superfluous New Trials and the Seventh Amendment*, 26 GREEN BAG 106, 106 (1914) (“The decision in [*Slocum*] has provoked much adverse comment in the legal press.”); Thayer, *supra* note 376, at 587.

The decision in *Slocum* caused consternation at the American Bar Association’s annual meeting in September 1913. A special committee of the ABA had proposed a statute to reduce new trials that might be construed as unconstitutional following *Slocum*. *See Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws*, in REPORT OF THE THIRTY-SIXTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION HELD AT MONTREAL, CANADA 561, 562–68 (1913); *id.* at 565–66 (“There is no divine right to have the rules of evidence, or of procedure, always remain the same.”).

understand the independent significance of the Re-examination Clause and the jurisprudence under it. An example of such a failure—and of the difference the absence of the Re-examination Clause made in state cases—was an opinion of the Supreme Judicial Court of Massachusetts a few months after *Slocum. Bothwell v. Boston Elevated Railway Co.*⁴⁴⁴ was a case of wrongful death brought by the family of a boy who had been run over by a street car, with an unusual twist.⁴⁴⁵ In *Bothwell*, the trial court denied the defendant’s motion for a directed verdict. The jury gave a verdict for the plaintiff.⁴⁴⁶ The Supreme Judicial Court, in an opinion by Chief Justice Arthur Rugg, held that a verdict should have been directed for the defendant.⁴⁴⁷ As the case was “fully and fairly tried,”⁴⁴⁸ the Court decided to exercise its power under a Massachusetts statute of 1909 to enter judgment for the defendant, notwithstanding the verdict.⁴⁴⁹ The Supreme Judicial Court stated that it would have done so without discussion, were it not for the U.S. Supreme Court’s decision in *Slocum*.⁴⁵⁰ Massachusetts courts had entered judgment notwithstanding the verdict under the statute “in numerous instances without question of its validity.”⁴⁵¹ The Supreme Judicial Court observed that *Slocum* was not a binding authority for it, and that the Seventh Amendment did not apply to the states.⁴⁵² Even so, “deference” was due to the reasoning of a decision by

An exception to this almost universal criticism was a long article, spread out over several issues of the *Illinois Law Review*, by Henry Schofield of Northwestern University Law School, arguing that the decision was correct. See Henry Schofield, *New Trials and the Seventh Amendment: Slocum v. New York Life Insurance Co.*, 8 ILL. L. REV. 287 (1913); *id.* at 381; *id.* at 365.

⁴⁴⁴ 102 N.E. 665 (Mass. 1913).

⁴⁴⁵ In *Bothwell*, the plaintiff’s nine-year-old son was with a group of other boys standing on a sidewalk looking at a Chinese man who was fixing something on the floor of a shop with a hatchet. “The boys were ‘teasing’ or ‘mocking’ [the court was quoting the record] the Chinaman, who, after a few minutes, ‘got up with the hatchet in the air and walked toward the door.’” *Bothwell*, 102 N.E. at 666 (citation omitted). The boys then scattered in different directions, and the plaintiff’s son ran into the street in front of a street car and was killed. *Id.* A Massachusetts statute authorized a wrongful death action against a street car company if the decedent was “in the exercise of due care.” MASS. GEN. LAWS ch. 392, § 1 (1907). The plaintiff argued that the boy was excused from the requirement of acting with due care because he was afraid of the Chinese man. *Bothwell*, 102 N.E. at 666.

⁴⁴⁶ *Bothwell*, 102 N.E. at 666.

⁴⁴⁷ *Id.* The Supreme Judicial Court explained that fear could indeed excuse a person from acting with due care, as long as the person was free from blame in the event which caused the fright. *Id.* In this case, the court stated, the boy was blameworthy in teasing the Chinese man and therefore was not excused from the requirement of due care. *Id.* (“The plaintiff’s intestate was engaged with his companions in the wrongful project of ‘teasing’ and ‘mocking’ a Chinaman at work on his own premises. It might reasonably have been anticipated that in some way he would attempt to be rid of his tormentors.”).

⁴⁴⁸ *Id.*

⁴⁴⁹ MASS. GEN. LAWS ch. 236, § 1 (1909).

⁴⁵⁰ *Bothwell*, 102 N.E. at 667.

⁴⁵¹ *Id.*

⁴⁵² *Id.*

the nation's highest court.⁴⁵³ The Massachusetts court thought *Slocum's* reasoning called into question the validity of the Massachusetts statute, because the Massachusetts constitution, like the federal, contained a right to jury trial.⁴⁵⁴ The Massachusetts court failed to recognize the independent importance of the Seventh Amendment's Re-examination Clause. The Massachusetts court announced that it was following the usual originalist test,⁴⁵⁵ but upheld the new procedure with reasoning similar to that of the other state courts that had addressed the issue.⁴⁵⁶ The court emphasized that its interpretation of the right of civil jury trial allowed "slightly more flexibility in its adaptation of details to the changing needs of society without in any degree impairing its essential character" than the U.S. Supreme Court had allowed in *Slocum*.⁴⁵⁷ Legal commentators praised the decision in *Bothwell*.⁴⁵⁸

In the federal courts, thanks to the Re-examination Clause and the decision in *Slocum*, the issue was still alive. Commentators soon assailed the decision in *Slocum*.⁴⁵⁹ They also immediately suggested a way around it. A special committee of the American Bar Association drafted federal legislation that provided for a federal trial judge in a civil case to submit to a jury the general issue, and also specific issues of fact, and to reserve "any question of law arising in the case for subsequent argument and decision."⁴⁶⁰ Either the trial judge or an appellate court could direct judgment to be entered based on the court's decision on the law.⁴⁶¹ In May 1913, less than two weeks after the *Slocum* decision, Elihu Root introduced the bill in the U.S. Senate.⁴⁶² Several legal commentators suggested that this procedure of the trial judge reserving a question of law, and taking a verdict from a jury subject to the later decision of the trial or appellate court, would solve the constitutional problem posed by *Slocum*.⁴⁶³ This procedure, commentators explained, resembled the English case reserved, which was clearly a feature of common law practice in 1791.⁴⁶⁴

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at 669.

⁴⁵⁶ *Id.* ("The statute simply permits that to be done by this court which ought to have been done at the trial.")

⁴⁵⁷ *Id.*

⁴⁵⁸ See, e.g., *Latest Important Cases: Appellate Procedure—Trial by Jury—Massachusetts Constitution Does Not Guarantee Right to a Second Jury Trial of the Same Controversy*, 25 GREEN BAG 482, 482 (1913) (quoting Editorial, N.Y. L.J. (Oct. 7, 1913)).

⁴⁵⁹ See *supra* note 443.

⁴⁶⁰ *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws, in REPORT OF THE THIRTY-SIXTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION HELD AT MONTREAL, CANADA* 571 (1913).

⁴⁶¹ *Id.*

⁴⁶² *Id.* at 570.

⁴⁶³ See Thorndike, *supra* note 376, at 737; *Re-examination of Facts Tried by Jury*, *supra* note 443, at 907–10; Spencer, *supra* note 443, at 112–13; Thayer, *supra* note 376, at 600–01.

⁴⁶⁴ See Thorndike, *supra* note 376, at 737; *Re-examination of Facts Tried by Jury*, *supra* note 443, at 908; Spencer, *supra* note 443, at 112; Thayer, *supra* note 376, at 599.

Although the ABA bill that Root introduced in the U.S. Senate did not become law, some state legislatures enacted similar provisions allowing a state trial court to take a jury verdict subject to a later decision on the law. In 1935, the U.S. Supreme Court addressed the constitutionality of just such a statute. In *Baltimore & Carolina Line, Inc. v. Redman*,⁴⁶⁵ the plaintiff sued a railroad for personal injuries in federal court in New York. At the close of evidence, the defendant moved for a directed verdict for insufficient evidence.⁴⁶⁶ The trial court, applying a New York statute,⁴⁶⁷ reserved decision on the motion and submitted the case to the jury subject to the court's opinion on the question reserved.⁴⁶⁸ The jury brought in a verdict for the plaintiff.⁴⁶⁹ The trial court held the evidence was sufficient and entered judgment for the plaintiff.⁴⁷⁰ The Second Circuit Court of Appeals held that the evidence was insufficient and ordered a new trial.⁴⁷¹ The Court of Appeals decided it could not apply the New York statute and enter judgment for the defendant because of the *Slocum* decision.⁴⁷²

This time, Justice Van Devanter wrote for a unanimous court, and his opinion was considerably shorter. Van Devanter explained that the situation in *Redman* was "very different" from that in *Slocum*, because the trial court in *Redman* had taken a verdict from a jury that was expressly subject to the court's decision on a question of law.⁴⁷³ This practice, the Court stated, was in accord with the English common law practice of reserving questions of law, in use at the time the Seventh Amendment was adopted.⁴⁷⁴

⁴⁶⁵ 295 U.S. 654 (1935).

⁴⁶⁶ *Id.* at 656.

⁴⁶⁷ 1920 N.Y. Laws 165, §§ 459, 461.

⁴⁶⁸ *Redman*, 295 U.S. at 656.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ *Id.* at 658–59.

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At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments.

Fragmentary references to the origin and basis of the practice indicate that it came to be supported on the theory that it gave better opportunity for considered rulings, made new trials less frequent, and commanded such general approval that parties litigant assented to its application as a matter of course. But whatever may have been its origin or theoretical basis, it undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment.

Id. at 659–60.

(The practice in England was known as the “case stated,” and James Oldham has shown that Mansfield used it even in cases in which there were factual disputes.⁴⁷⁵) In addition, the U.S. Supreme Court had previously recognized that federal courts could take a verdict subject to the court’s opinion on a question of law.⁴⁷⁶ Application of the New York statute was therefore constitutional in a federal court.⁴⁷⁷ The Court ordered a judgment of dismissal on the merits, which was to be the equivalent of a judgment for the defendant on a directed verdict.⁴⁷⁸ Despite the rigorous requirements of the Re-examination Clause, the federal courts could, after all, order judgment notwithstanding the verdict if the proper procedure was followed. The decisions in *Slocum* and *Redman* could be viewed as wholly compatible. Commentators immediately hailed the result in *Redman* for permitting “a reduction in the number of costly and stultifying retrials of jury cases.”⁴⁷⁹

The result in *Redman* ought to give the supporters of a strict originalist test for jury rights pause. Even the strict originalist test the Supreme Court applied consistently under the Re-examination Clause did not prevent a significant change in practice. Through a clever procedural mechanism, the requirements of the Re-examination Clause could be evaded. The current provision of the Federal Rules of Civil Procedure on the subject, Rule 50(b), states: “If the court does not grant a motion for judgment as a matter of law made [before the case is submitted to the jury], the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion.”⁴⁸⁰ Reservation of the question has become automatic, a skillful solution to the problem posed by the Seventh Amendment’s Re-examination Clause.

CONCLUSION: IMPLICATIONS FOR THE PRESERVATION OF PROCEDURAL RIGHTS

John Langbein wrote that we are used to seeing the Bill of Rights as a success story.⁴⁸¹ He remarked, however, on a “spectacular failure”: criminal jury trial.⁴⁸²

⁴⁷⁵ OLDHAM, *supra* note 25, at 10–13.

⁴⁷⁶ In one such case, in 1830, the U.S. Supreme Court reversed a judgment entered for plaintiff on a jury verdict and entered judgment for the defendant. *Chinoweth v. Haskell’s Lessee*, 28 U.S. (3 Pet.) 92, 98 (1830). In 1927, the Court applied a Massachusetts statute permitting alternative jury verdicts, which a court could choose between depending on its decision on law. *N. Ry. Co. v. Page*, 274 U.S. 65, 67 (1927).

⁴⁷⁷ *See Redman*, 295 U.S. at 661.

⁴⁷⁸ *Id.*

⁴⁷⁹ Pierce, *Practice and Procedure*, *supra* note 376, at 97–98, 100. The article called the result in *Redman* “obviously commendable.” *Id.* at 97. *See also id.* at 97–98; Note, *Reversal Without Retrial Under the Seventh Amendment*, 21 IOWA L. REV. 117, 118, 123–25 (1935) (criticizing the *Slocum* decision for its “extreme rigidity” and praising *Redman*).

⁴⁸⁰ FED. R. CIV. P. 50(b).

⁴⁸¹ John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of the Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL’Y 119, 119 (1992).

⁴⁸² *Id.*

Attempts to mandate civil jury trial have failed even more spectacularly. Courts, faced with the language of preservation in constitutional jury trial rights, applied originalist tests. These proved so flexible, however, that legislatures and courts have modified civil jury trial almost out of existence. The alternative, a strict historical test, was considered not sufficiently adaptable to changing circumstances. As the U.S. Supreme Court's experience with the Re-examination Clause illustrates, even the adoption and consistent application of a strict originalist test is no guarantee that jury practice will remain unchanged.

Might there be a way of preserving some core or essence of a jury trial right? This Conclusion sketches some ideas. These ideas need to be developed in a separate work, fully engaging the large and sophisticated body of literature on originalism that is touched on here. The usual method of interpreting constitutional rights to account for changed circumstances is to search for functional equivalents, a process sometimes called "translation."⁴⁸³ With respect to substantive rights, we can find reasonable functional equivalents. Internet postings can be protected along with printing presses under the First Amendment, handguns along with muskets under the Second Amendment, telephone calls and emails along with letters under the Fourth Amendment. We can make sensible substitutions to account for technological change. To be sure, there are problems with deciding on the level of abstraction,⁴⁸⁴ and working out the precise details of what is protected. Still, a core can be protected.

Procedural rights are different.⁴⁸⁵ With procedural rights, the change in question is not simply technological, but legal. The whole legal system around a particular procedure may have changed, virtually nullifying it. Today, we hardly engage in any sort of adjudication—jury or otherwise—to resolve civil or criminal cases.⁴⁸⁶ Settlement or plea bargaining takes the place of adjudication.⁴⁸⁷ To truly return to a jury system like that of the founding era would mean, at a minimum, prohibiting most pretrial discovery and plea bargaining. Such a return would mean prohibiting many other changes, such as those on the civil side examined in this Article. It might also, by the way, mean restoring to trial judges a very vigorous power to comment on the evidence. Almost an entire procedural system must be preserved in order to preserve a single procedural right like jury trial.

⁴⁸³ See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171–73 (1993).

⁴⁸⁴ See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 300 (2009); Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 600 (2008).

⁴⁸⁵ James Whitman has criticized procedural rights compared with substantive rights. James Q. Whitman, *What Happened to Tocqueville's America?*, 74 SOC. RES. 251, 263 (2007) ("Procedural protections are comparatively weak, easily evaded, and difficult to generalize beyond their point of departure. Substantive protections, by contrast, are comparatively strong.").

⁴⁸⁶ See Langbein, *The Disappearance of Civil Trial*, *supra* note 10, at 569.

⁴⁸⁷ *Id.*

The fundamental difficulty is that a procedural system, in order to work effectively, requires two characteristics: it needs to be conceived as a whole, with each part carefully considered in relation to the others, and it needs to be adjustable to meet changed circumstances. Even Friedrich Hayek, a great champion of the spontaneous development of rules of just conduct, thought that rules of organization were different.⁴⁸⁸ He believed that rules of organization, including the procedure and organization of the courts, had to be designed and adjusted deliberately.⁴⁸⁹ Trying to pick out particular procedures for preservation as constitutional rights defeats both needs. Judges and legal commentators may continue to echo the praises heaped on the jury by their predecessors, but it is difficult to imagine a scenario of a revived civil jury remotely similar to that of the founding era. We would do better to search for more viable methods of adjudication.

⁴⁸⁸ 1 F. A. HAYEK, LAW, LEGISLATION, AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 124–25 (1973).

⁴⁸⁹ *Id.* at 125.