

# The English Fire Courts and the American Right to Civil Jury Trial

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*This Article uncovers the history of a long-forgotten English court system, the “fire courts,” which Parliament established to resolve disputes between landlords and tenants in urban areas destroyed in catastrophic fires. One of the fire courts’ remarkable features was the delegation of authority to judges to adjudicate disputes without juries. Because the Seventh Amendment’s right to a federal civil jury trial depends in part on the historical practice of English courts in 1791, this delegation bears directly on the present power of Congress to abrogate the use of juries in federal civil litigation.*

*Parliament enacted fire-courts legislation on eight occasions between the mid-seventeenth century and the nineteenth century. This Article particularly emphasizes the first and largest of these courts, established after the Great Fire of London in 1666. Archival research into 1,585 cases resolved by the London Fire Court reveals that the Fire Court never employed juries to resolve contested factual matters. This Article argues that the history of these courts provides a limited but clear power for Congress to strike the right to civil juries in federal court.*

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## INTRODUCTION

In constitutional adjudication, history matters.<sup>1</sup> Although agreement on this point is widespread, debates rage around two subsidiary questions: How much does history matter, and which history matters?<sup>2</sup> “How much does history matter” concerns the weight that historical evidence should receive in relation to other interpretive or constructive guides such as the Constitution’s text, purpose, and structure; precedent; moral norms; and present-day political, social, and economic realities.<sup>3</sup> Originalists, for instance, give history near-conclusive weight, at least for ambiguous constitutional texts;<sup>4</sup> but living constitutionalists are likely to value historical evidence less than modern realities in determining constitutional boundaries.<sup>5</sup> “Which history matters” encompasses issues of time frame (what is the relevant historical period?), scope (what evidence from this period is relevant?), and indeterminacy (what happens when the relevant evidence from the relevant

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<sup>1</sup> See, for example, *Alden v Maine*, 527 US 706, 713 (1999) (interpreting the Eleventh Amendment in accordance with “the Constitution’s structure, its history, and the authoritative interpretations by this Court”). See also Mitchell N. Berman, *Originalism Is Bunk*, 84 NYU L Rev 1, 21 (2009) (noting that the belief that “the original character of the U.S. Constitution . . . ‘matters’ or ‘is relevant’ to proper constitutional interpretation . . . [is] a trivial thesis without dissenters”); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 Georgetown L J 1765, 1766 (1997) (“[V]irtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation.”); H. Jefferson Powell, *Rules for Originalists*, 73 Va L Rev 659, 695 (1987) (“Responsible, intellectually respectable history in my opinion is an inextricable and essential element in our discussions of the Republic’s fundamental law.”).

<sup>2</sup> Professor Darrell A.H. Miller has posed similar questions, trained specifically on the interpretations of the Second and Seventh Amendments. See Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us about the Second*, 122 Yale L J 852, 876–86, 907–17 (2013) (positing three questions: “[w]hose history,” “[h]ow much history,” and “[w]hat [about] . . . conflicting or indeterminate history?”).

<sup>3</sup> See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 7–8 (Oxford 1982) (describing “historical, textual, structural, prudential, and doctrinal” typologies of constitutional interpretation and construction); Randy J. Kozel, *The Scope of Precedent*, 113 Mich L Rev 179, 212–22 (2014) (discussing common-law constitutionalism, originalism, pragmatism, conventionalism, and normativity as methods of constitutional interpretation). See also generally James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 Fordham L Rev 1335 (1997) (arguing for a “moral reading” of the Constitution).

<sup>4</sup> See Lawrence B. Solum, Book Review, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 Tex L Rev 147, 154 (2012) (stating that originalists agree that “the original meaning of each provision of the Constitution was fixed at the time of its framing and ratification” and that “original meaning should have binding or constraining force”).

<sup>5</sup> See David A. Strauss, *The Living Constitution* 1 (Oxford 2010) (“A ‘living constitution’ is one that evolves, changes over time, and adapts to new circumstances, without being formally amended.”).

period is conflicting or absent?). For example, all originalists agree that the relevant time frame is the point of a constitutional provision's ratification, but they diverge on the question of scope; "old originalists" limit the scope of historical inquiry to the evidence of the drafters' intent, while "new originalists" shift the inquiry to the evidence of the original public meaning.<sup>6</sup> For living constitutionalists, the time frame expands to include the nation's history subsequent to ratification, with the scope of the inquiry as broad as all past events that help to shape a constitutional provision for modern needs.<sup>7</sup>

Almost uniquely among constitutional provisions, the Seventh Amendment's guarantee of civil jury trial engenders few debates about weight, time frame, scope, or indeterminacy.<sup>8</sup> On the issue of weight, the Supreme Court has broken the Seventh Amendment's analysis into two principal components. The first is to determine whether the Amendment requires a jury to try a particular *claim*.<sup>9</sup> To answer this question, the Court turns to three factors: "first,

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<sup>6</sup> See Randy E. Barnett, *The Gravitational Force of Originalism*, 82 Fordham L Rev 411, 412–15 (2013) (comparing "old originalism" with "[n]ew [o]riginalism").

<sup>7</sup> Dorf, 85 Georgetown L J at 1811 (cited in note 1) (arguing that postenactment "historical events often inform constitutional interpretation more directly and in a way that reinforces" originalist modes of constitutional interpretation).

<sup>8</sup> The Seventh Amendment provides in full:

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

US Const Amend VII. The first clause guarantees the right to civil jury trial; the second clause, known as the Reexamination Clause, concerns matters beyond the scope of this Article.

The Seventh Amendment is one of the few guarantees in the Bill of Rights that has not—or at least not yet—been incorporated through the Fourteenth Amendment and made applicable to the states. See *González-Oyarzun v Caribbean City Builders, Inc*, 798 F3d 26, 29 (1st Cir 2015) (per curiam) ("The Supreme Court has consistently held that states are not constitutionally required to provide a jury trial in civil cases."). Incorporation of the Seventh Amendment has never been a burning issue, because forty-eight states (Louisiana and Wyoming being the exceptions) have comparable jury trial guarantees in their constitutions. See Robert Wilson, *Free Speech v. Trial by Jury: The Role of the Jury in the Application of the Pickering Test*, 18 Geo Mason U CR L J 389, 401 & n 116 (2008). This Article examines only the scope of the jury trial right under the Seventh Amendment—in other words, in federal court.

<sup>9</sup> See, for example, *Chauffeurs, Teamsters and Helpers Local No 391 v Terry*, 494 US 558, 561 (1990) (holding that the Seventh Amendment required a jury trial of a claim that a union violated its duty of fair representation); *Granfinanciera, SA v Nordberg*, 492 US 33, 36 (1989) (holding that a jury trial was required for a trustee's claim that a debtor had fraudulently transferred money to a defendant who had not submitted a claim against the bankruptcy estate).

the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries.”<sup>10</sup>

Today, the third factor is rarely in play.<sup>11</sup> The first factor (the custom before the merger of law and equity) requires a historical inquiry. The second factor (the remedy sought) is historically inspired, given that damages were generally awarded at common law, which used juries, and injunctions were generally awarded in equity, which did not.<sup>12</sup>

In weighing the pure historical inquiry of the first factor in relation to the rough-and-ready historical inquiry of the second factor, the Court has wobbled a bit over time. In 1990, in *Chauffeurs, Teamsters and Helpers Local No 391 v Terry*,<sup>13</sup> the Court identified the second factor as “more important in our analysis.”<sup>14</sup> More recent cases, however, suggest that the importance of the first factor’s pure historical inquiry is on the rise. In *Feltner v Columbia Pictures Television, Inc.*,<sup>15</sup> which involved a claim by a copyright holder seeking jury trial on the issue of statutory damages, the Court stated that it would “examine both the nature of

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<sup>10</sup> *Ross v Bernhard*, 396 US 531, 538 n 10 (1970).

<sup>11</sup> Before *Ross*, the Court had used only the first two factors to decide if a claim was jury triable. See, for example, *Parsons v Bedford*, 28 US (3 Pet) 433, 446–47 (1830). *Ross* introduced the third “practical abilities and limitations of juries” factor. *Ross*, 396 US at 538 n 10. See also *In re Japanese Electronic Products Antitrust Litigation*, 631 F2d 1069, 1079–80 (3d Cir 1980). Although this third factor sparked a twenty-year debate among courts and commentators about courts’ ability to strike a jury demand whenever a case was complex, see notes 32–33 and accompanying text, the Supreme Court ultimately confined the third factor to cases in which “Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and [in which] jury trials would impair the functioning of the legislative scheme.” *Granfinanciera*, 492 US at 42 n 4. See also note 34 and accompanying text.

<sup>12</sup> See *Chauffeurs*, 494 US at 570, quoting *Curtis v Loether*, 415 US 189, 196 (1974) (“Generally, an action for money damages was ‘the traditional form of relief offered in the courts of law.’”); *Tull v United States*, 481 US 412, 417 (1987) (“Prior to the Amendment’s adoption, a jury trial was customary in suits brought in the English law courts. In contrast, those actions that are analogous to 18th-century cases tried in courts of equity or admiralty do not require a jury trial.”); William Holdsworth, 1 *A History of English Law* 458, 466 (Methuen 7th ed 1956) (A.L. Goodhart and H.G. Hanbury, eds) (describing equity’s ability to issue injunctive relief that common-law courts could not).

<sup>13</sup> 494 US 558 (1990).

<sup>14</sup> *Id* at 565. See also *Curtis*, 415 US at 195–96 (noting that, although a claim’s analogy to “tort actions recognized at common law” was relevant, the “[m]ore important” consideration was that “the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law”).

<sup>15</sup> 523 US 340 (1998).

the statutory action and the remedy sought”<sup>16</sup>—without indicating, as it had eight years earlier in *Chauffeurs*, that the “remedy sought” factor was more important.<sup>17</sup> Likewise, *City of Monterey v Del Monte Dunes at Monterey, Ltd*<sup>18</sup> held that a jury was properly impaneled in a § 1983 action akin to an inverse-condemnation proceeding.<sup>19</sup> In examining whether a § 1983 claim was jury triable, the justices’ opinions focused almost exclusively on the proper historical analogue in English practice.<sup>20</sup>

The second step in the Seventh Amendment’s analysis asks whether a jury must determine specific *factual issues* within a jury-triable claim.<sup>21</sup> In answering this question, the Court has identified four factors: the “common-law practice at the time of

<sup>16</sup> Id at 342, 348.

<sup>17</sup> The bulk of the Court’s analysis in *Feltner* focused on historical English practice, see id at 347–52, although the Court buttressed that evidence with the argument that, as a general rule, “monetary relief is legal.” Id at 352.

<sup>18</sup> 526 US 687 (1999).

<sup>19</sup> Id at 694.

<sup>20</sup> See id at 715–18 (Kennedy) (plurality):

[A]s a matter of historical practice, when the government has taken property without providing an adequate means for obtaining redress, suits to recover just compensation have been framed as common-law tort actions. . . . [A]nd in these actions, as in other suits at common law, there was a right to trial by jury.

See also id at 724 (Scalia concurring in part and concurring in the judgment), citing *Feltner*, 523 US at 348 (“The Seventh Amendment inquiry looks first to the ‘nature of the statutory action.’ . . . The question before us, therefore, is . . . what common-law action is most analogous to a § 1983 claim.”); *City of Monterey*, 526 US at 734 (Souter concurring in part and dissenting in part) (“Like the Court, I am accordingly remitted to a search for any analogy that may exist and a consideration of any implication going to the substance of the jury right that the results of that enquiry may raise.”). The nature of the relief requested (damages) did not bear significantly on any of the opinions, although it entered briefly into the majority’s analysis. See id at 711 (“Because Del Monte Dunes’ statutory suit sounded in tort and sought legal relief, it was an action at law.”).

<sup>21</sup> See, for example, *Markman v Westview Instruments, Inc*, 517 US 370, 391 (1996) (holding that a judge, not a jury, should decide the proper construction of a patent, even when a jury would decide other issues regarding patent infringement).

Beyond these two analytical steps, the Amendment influences certain other issues relevant to the allocation of decisionmaking power between judges and juries. For instance, if a factual issue is relevant to both a claim that would be tried by a jury and a claim that would be tried by a judge, the Supreme Court has held that the jury should decide the overlapping facts. *Beacon Theatres, Inc v Westover*, 359 US 500, 510–11 (1959) (“[O]nly under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims.”). Likewise, in determining whether a disputed issue is a question of law (which a judge decides) or a question of fact (which a jury may decide), functional considerations about a jury’s capacity are often relevant. See *Hana Financial, Inc v Hana Bank*, 135 S Ct 907, 911 (2015) (“[W]e have long recognized across a variety of doctrinal contexts that, when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer.”).

the framing” of the Seventh Amendment, “precedent,” “the relative interpretive skills of judges and juries,” and “the statutory policies that ought to be furthered by the allocation” of the fact-finding function.<sup>22</sup> As with the first step, the weight given to the historical inquiry is considerable: “when possible, ‘ . . . the historical method’” should be used, and precedential or functional considerations should be employed “[w]here history does not provide a clear answer.”<sup>23</sup>

On issues of time frame and scope, there is no dispute: the Seventh Amendment preserves “[t]he right of trial by jury . . . which existed under the English common law when the Amendment was adopted.”<sup>24</sup> Thus, the relevant time frame is 1791, when the Seventh Amendment was ratified. The relevant scope of evidence from 1791 is the English common-law courts: English common-law courts employed juries, while equity did not.<sup>25</sup>

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<sup>22</sup> *Markman*, 517 US at 384. In its only case applying *Markman*’s jury trial analysis, the Court applied three of these factors: “history,” “precedent,” and “functional considerations.” *City of Monterey*, 526 US at 718.

<sup>23</sup> *City of Monterey*, 526 US at 718, quoting *Markman*, 517 US at 378, 384. Moreover, in *City of Monterey*, the majority’s treatment of functional considerations was to some extent a rehash of its historical and precedential arguments. See *City of Monterey*, 526 US at 720–21.

<sup>24</sup> *Baltimore & Carolina Line, Inc v Redman*, 295 US 654, 657 (1935). See also *Curtis*, 415 US at 193 (“[T]he thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791.”); *Dimick v Schiedt*, 293 US 474, 476 (1935) (“In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of adoption of that constitutional provision in 1791.”). The relevant scope (English practice) was established in *United States v Wonson*, 28 F Cases 745, 750 (CC D Mass 1812). Although *Wonson* was a circuit court opinion that concerned the Reexamination Clause, Justice Joseph Story’s opinion that the “common law” to which the Seventh Amendment refers was English common law effectively settled the question. See *id.* (“Beyond all question, the common law [ ] alluded to [in the Seventh Amendment] is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence.”). See also *Dimick*, 293 US at 477 (examining English precedents to determine the scope of the Seventh Amendment’s jury trial provision). *Wonson* did not, however, establish the proper time frame; *Dimick* and *Redman* established 1791 as the relevant date. See Margaret L. Moses, *What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence*, 68 *Geo Wash L Rev* 183, 187–92 (2000) (showing that the resort to England’s common law as of 1791 was “a twentieth-century development”). See also *Thompson v Utah*, 170 US 343, 349–50 (1898) (holding that the criminal jury trial provision in Article III should be interpreted “with reference to the meaning affixed to [the words ‘jury’ and ‘trial by jury’] in the law as it was in this country and in England at the time of the adoption of that instrument”).

<sup>25</sup> See Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 *Colum L Rev* 43, 44 (1980) (“[I]f the case could not be tried by jury, it could not in 1791 be tried at common law in any other way: until 1854 trial by jury was the only mode of trial known to the common law.”).

On the issue of indeterminacy, information about the English legal system in the late eighteenth century is plentiful, so that the problem of conflicting or absent evidence has tended to arise in only three limited, overlapping situations. First, because the boundary between common law and equity was ever shifting and the jurisdiction of the two systems sometimes extended over the same matters, an approach that picks an exact point in time (1791) and then sifts the evidence at that point for an exact answer (jury triable or not) sometimes fails to capture the fluidity of jury trial practices in eighteenth-century England.<sup>26</sup> Second, in rare instances, the historical evidence is so lacking that no conclusion about the proper analogue between a modern jury-triable question and eighteenth-century English practice can be drawn.<sup>27</sup>

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<sup>26</sup> See *Chauffeurs*, 494 US at 577 (Brennan concurring in part and concurring in the judgment), quoting Fleming James Jr, *Right to a Jury Trial in Civil Actions*, 72 Yale L J 655, 658 (1963) (“[T]he line between law and equity (and therefore between jury and non-jury trial) was not a fixed and static one.”) (brackets in original); Holdsworth, 1 *A History of English Law* at 445–76 (cited in note 12) (describing the evolution of equity jurisdiction from medieval to modern times and the “increase of [equity’s] business” over the course of the eighteenth century); F.W. Maitland, *Equity: Also the Forms of Action at Common Law; Two Courses of Lectures* 14 (Cambridge 1910) (A.H. Chaytor and W.J. Whittaker, eds) (“[I]n no general terms can we describe either the field of [English] equity or the distinctive character of equitable rules.”); David L. Shapiro and Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 Harv L Rev 442, 449 (1971) (noting that, during the late eighteenth century, “significant changes in the relationship between law and equity were in process” in the English system); *Galloway v United States*, 319 US 372, 392 (1943) (noting “the uncertainty and the variety of conclusion which follows from an effort at purely historical accuracy”).

An excellent example of conflicting signals in the historical record is the intensive analysis done on two seventeenth-century Chancery suits, *Clench v Tomley*, 21 Eng Rep 13 (Ch 1603), and *Blad v Bamfield*, 36 Eng Rep 992 (Ch 1674), from which scholars drew opposing conclusions about the general willingness of the Chancery to remove a case from a common-law jury. Compare Devlin, 80 Colum L Rev at 74–76 (cited in note 25) (arguing that *Clench* and *Blad* were “clear example[s] of the Chancellor’s willingness and ability to intervene in a common law action when he felt a jury unfit to decide a case”), with Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U Pa L Rev 829, 840–46 (1980) (describing why these cases do not suggest a power to strike juries in complex cases), and James S. Campbell and Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U Pa L Rev 965, 974–85 (1980) (arguing in response to then-Professor Morris Arnold that the substantive issues in *Clench* “would [ ] have taxed the mind of a seventeenth-century juror” and therefore justified the chancellor’s intervention in the case).

<sup>27</sup> The classic example of absent evidence is *Markman*, in which the issue was the historical practice of juries construing patent claims. *Markman*, 517 US at 378–84. Because patent litigation was nascent at the end of the eighteenth century, no clear historical practice had emerged. *Id.* at 380 (describing the “absence of an established practice [on using juries for patent claim construction] . . . , given the primitive state of jury patent practice at the end of the 18th century, when juries were still new to the field”). One reason that historical evidence was lacking in *Markman* is that its analysis was entirely ahistorical; in 1791, when a case was tried to a jury, the jury determined all the facts. See *The*

Finally, the historical inquiry often requires reasoning by anachronism. When a present-day claim has a precise analogue to an action at common law, the jury trial question is easy.<sup>28</sup> But many modern American claims—especially those alleging statutory or regulatory violations—have no precise analogue in the common-law forms of action or in equity, thus requiring courts to ask whether a modern claim or factual issue, had it existed back in 1791, would have been tried to a jury or determined by the chancellor. The problem was already evident in 1830, when Justice Joseph Story argued that the Seventh Amendment’s right to civil jury trial extended to claims of statutory violations that neither existed at common law nor were available in 1791.<sup>29</sup> A modern example is *Chauffeurs*, in which the claimed violation—breach of a union’s duty of fair representation—was not cognizable at common law in 1791.<sup>30</sup> The plurality, one of the concurrences, and the dissent split over whether the best analogy to such a duty was a common-law action for legal malpractice or an equitable suit for breach of a trustee’s fiduciary duty.<sup>31</sup>

Perhaps the most vexing issue of indeterminacy arises from the technical nature or massive scope of some modern civil lawsuits. Such complexity in litigation was unknown at common law.

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*Supreme Court 1995 Term: Leading Cases*, 110 Harv L Rev 1, 272 (1996) (noting that *Markman* developed a “novel inquiry of its own design” and was an “extension of the historical method . . . [that] is not quite as consistent with precedent as the Court implied”). See also James Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries* 9–15 (NYU 2006) (stating that “[i]t was customary to send ‘the whole matter’ to the jury,” but describing devices through which a judge could overturn the jury’s finding on a particular fact after trial).

<sup>28</sup> For instance, a modern breach of contract claim seeking damages requires jury fact-finding because in 1791 the predecessors of a breach of contract claim—the writs of *assumpsit* and *debt*—were common-law actions. See J.H. Baker, *An Introduction to English Legal History* 282–90 (Butterworths 2d ed 1979) (describing the evolution from the common-law forms of action to modern contract law).

<sup>29</sup> *Parsons*, 28 US (3 Pet) at 446–47 (holding that the Seventh Amendment applied to “suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered”).

<sup>30</sup> *Chauffeurs*, 494 US at 565–66 (Marshall) (plurality) (“An action for breach of a union’s duty of fair representation was unknown in 18th-century England; in fact, collective bargaining was unlawful.”).

<sup>31</sup> Compare *id* at 569–70 (Marshall) (plurality) (finding “the malpractice analogy less convincing than the trust analogy” but ultimately stating that the historical inquiry “leaves us in equipoise”), with *id* at 582 (Stevens concurring in part and concurring in the judgment) (“I believe the duty of fair representation action resembles a common-law action against an attorney for malpractice more closely than it does any other form of action.”), and *id* at 586 (Kennedy dissenting) (“[T]he trust analogy is the controlling one here.”).



As a result, some courts<sup>32</sup> and many scholars<sup>33</sup> have explored whether the Seventh Amendment contains a “complexity exception” that allows courts to substitute judicial fact-finding for jury fact-finding in complex litigation.<sup>34</sup>

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<sup>32</sup> For federal decisions striking a jury trial, see *ILC Peripherals Leasing Corp v International Business Machines Corp*, 458 F Supp 423, 444–49 (ND Cal 1978); *Bernstein v Universal Pictures, Inc*, 79 FRD 59, 65–71 (SDNY 1978); *In re Boise Cascade Securities Litigation*, 420 F Supp 99, 101–05 (WD Wash 1976). See also *Towers v Titus*, 5 Bankr 786, 789–97 (ND Cal 1979) (applying the three *Ross* factors and finding that, under each factor, the issues were equitable, and noting on the third factor that “the size of the litigation and, more important[ly], the complexity of the relationships among the parties” made a rational jury decision impossible). Another district court struck a jury, but was reversed on appeal. *Cotten v Witco Chemical Corp*, 651 F2d 274, 276 (5th Cir 1981) (leaving open the possibility of a complexity exception on extraordinary facts). The Third Circuit refused to find a complexity exception in the Seventh Amendment, but held that a jury might be struck on Fifth Amendment due process grounds. See *Japanese Electronic Products*, 631 F2d at 1079–89. For federal cases refusing to strike a jury demand despite the complexity of the case, see *Brisk v City of Miami Beach, Florida*, 726 F Supp 1305, 1314–15 (SD Fla 1989); *Kian v Mirro Aluminum Co*, 88 FRD 351, 354–56 (ED Mich 1980); *Davis–Watkins Co v Service Merchandise Co*, 500 F Supp 1244, 1251–52 (MD Tenn 1980); *In re U.S. Financial Securities Litigation*, 609 F2d 411, 431 (9th Cir 1979). See also *Loral Corp v McDonnell Douglas Corp*, 558 F2d 1130, 1132–33 (2d Cir 1977) (affirming the striking of a jury demand when the case would have exposed a jury to classified information and the parties arguably waived the right to jury trial by contract).

Although not bound by the Seventh Amendment, see note 8, a few state courts have also examined the same issue under the comparable jury trial provisions in their state constitutions. See, for example, *Kenney v Scientific, Inc*, 512 A2d 1142, 1144–51 (NJ Super 1986) (striking the jury demand), revd, 517 A2d 484 (NJ App 1986) (reinstating the jury demand); *S.P.C.S., Inc v Lockheed Shipbuilding and Construction Co*, 631 P2d 999, 1002 (Wash App 1981) (giving discretion to the trial court to try some issues to the bench and some to the jury).

<sup>33</sup> During the 1970s and 1980s, the possibility of a “complexity exception” to the Seventh Amendment was one of the most hotly debated issues in American law reviews. For a sliver of the debate, see generally Arnold, 128 U Pa L Rev 829 (cited in note 26); Campbell and Le Poidevin, 128 U Pa L Rev 965 (cited in note 26); Devlin, 80 Colum L Rev 43 (cited in note 25); Roger W. Kirst, *The Jury’s Historic Domain in Complex Cases*, 58 Wash L Rev 1 (1982); Richard O. Lempert, *Civil Juries and Complex Cases: Let’s Not Rush to Judgment*, 80 Mich L Rev 68 (1981); Douglas King, Comment, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U Chi L Rev 581 (1984); Note, *The Case for Special Juries in Complex Civil Litigation*, 89 Yale L J 1155 (1980); Montgomery Kersten, Note, *Preserving the Right to Jury Trial in Complex Civil Cases*, 32 Stan L Rev 99 (1979); Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 Harv L Rev 898 (1979).

<sup>34</sup> Although the Court has never addressed the matter directly, its recent opinions provide little hope for a “complexity exception.” For instance, in *Tull*, the Court relied exclusively on the first two factors from *Ross* (historical practice and the nature of the relief requested) to determine the scope of a jury trial right; it noted that the third factor—the “practical abilities and limitations of juries” factor that had sparked the debate over the existence of a complexity exception—had been used only to justify the elimination of juries in administrative proceedings, and had never been used “as an independent basis for extending the right to a jury trial under the Seventh Amendment.” *Tull*, 481 US at 418 n 4. See also *Granfinanciera*, 492 US at 42 n 4. Despite this discouraging tone, some scholars continue to press for such an exception. See, for example, James Oldham, *On the Question*

When the historical record is indeterminate, all is not lost. In the face of conflicting or absent evidence of eighteenth-century English practice, the Court has tended to rely more heavily on the remaining factors that bear on the right to jury trial.<sup>35</sup> These occasional failings in the historical record have not led to general dissatisfaction with the Seventh Amendment's focus on Founding-era English practice.<sup>36</sup> On the contrary, the text of the Seventh Amendment (that the right to jury trial "shall be preserved") invites a historical analysis. And the relevant evidence (English legal practice) is bounded in scope, has been methodically analyzed by generations of historians, and avoids the value-laden inquiries into "intent" or "public meaning" that often plague historically grounded interpretive or constructive inquiries into other constitutional texts.

But history sometimes holds a surprise. Part I of this Article uncovers evidence that unsettles the traditional understanding of jury trials in seventeenth- and eighteenth-century English practice. Although their workings have since been lost to history, Parliament established special "courts of judicature" to resolve disputes arising out of fires that ravaged urban areas in England from the middle of the seventeenth century until the early nineteenth century. The most famous of the fires—the Great Fire of London in 1666—destroyed five-sixths of the City of London, including 13,200 homes and shops, 87 churches, and 44 guildhalls, along with wharves, warehouses, jails, and public buildings.<sup>37</sup> As devastating as the social dislocation resulting from the Great Fire

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*of a Complexity Exception to the Seventh Amendment Guarantee of Trial by Jury*, 71 Ohio St L J 1031, 1051–53 (2010) (advocating for a complexity exception in light of eighteenth-century procedural devices through which judges controlled juries in major commercial disputes).

<sup>35</sup> See notes 11, 17, and accompanying text.

<sup>36</sup> Justice William Brennan demonstrated the greatest disagreement with the historical test, ultimately concluding that the historical inquiry should be abandoned in favor of an analysis principally focused on whether the relief sought in the case was historically available from the common-law courts. See *Chauffeurs*, 494 US at 574–75 (Brennan concurring in part and concurring in the judgment) (arguing that the Court "has repeatedly discounted the significance of" English practice in 1791, so that it is "not equal in weight" to the "nature of the remedy" factor and should be "dispense[d] with [ ] altogether"). Even this approach, which no other justice adopted, is inspired by historical English practice.

<sup>37</sup> See Walter George Bell, *The Great Fire of London in 1666* 174, 210, 223–24 (John Lane 2d ed 1920); T.F. Reddaway, *The Rebuilding of London after the Great Fire* 26 (Jonathan Cape 1940). The fire also consumed considerable property beyond the walls of the City. See Bell, *The Great Fire of London in 1666* at 174 (cited in note 37).

was,<sup>38</sup> the threatened economic devastation was greater, for in a world of limited investment opportunities, a great deal of London's wealth was tied up in the leases and subleases of buildings turned to ash.<sup>39</sup> The "Fire Court" established in the wake of the Great Fire issued 1,585 decrees;<sup>40</sup> its mission was not only to resolve legal disputes over ownership, possession, and rents, but also to encourage London's expeditious rebuilding.<sup>41</sup> Later fire courts resolved fewer cases (because the damage was less extensive than it had been in London) but carried the same mission.<sup>42</sup>

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<sup>38</sup> Because the population of London was unknown, estimates about the number of people left homeless by the fire vary widely. John Evelyn, a contemporary diarist, thought that 200,000 had fled into Islington and Highgate, two of London's near suburbs. See 2 *The Diary of John Evelyn* 258 (MacMillan 1906) (entry for Sept 7, 1666). Given that the population of the City in 1666 was likely less than 100,000, a figure of 75,000 displaced residents is more reasonable. See Stephen Porter, *The Great Fire of London* 71 (Sutton 1998) (giving a range of 65,000 to 80,000 residents left homeless, with 76,500 being a likely estimate).

<sup>39</sup> See William C. Baer, *The Institution of Residential Investment in Seventeenth-Century London*, 76 *Bus Hist Rev* 515, 516–20 (2002). The cost of the fire in terms of destroyed real and personal property, lost rents, and the like was on the order of £10 million. See Bell, *The Great Fire of London in 1666* at 223–24 (cited in note 37); Porter, *The Great Fire of London* at 71–73 (cited in note 38). At the time, the median annual income in London was probably less than £60. See William C. Baer, *Stuart London's Standard of Living: Re-examining the Settlement of Tithes of 1638 for Rents, Income, and Poverty*, 63 *Econ Hist Rev* 612, 629 (2010).

<sup>40</sup> Of these decrees, eight were appeals from prior decisions of the Fire Court. See generally *Master List of Fire Court Decrees* (on file with author). The total of 1,585 decrees understates the Fire Court's work, for the Fire Court sometimes resolved between 2 and 4 petitions in a single decree. See generally *id.* A single decree might also cover multiple properties. See, for example, *Clerke v Chapman*, A 4, 4 (London Fire Ct Mar 7, 1667) (adjudicating claims to "severall peices of ground and Messuages [that is, houses]"). As in the example above, when referring to a specific decree, I provide the case name, followed by the volume, the first page of the decree, and the particular page referenced (for example, "A 4, 4"), and finally the name of the court and the date of the decree. The letters indicating the volumes in which the fire-court cases may be found correspond to the nine volumes of fire-court cases (A–I) housed in the London Metropolitan Archives.

<sup>41</sup> In the preamble to the act establishing the Fire Court, Parliament noted that the harshness of the common law both thwarted any attempt to justly spread "a proportionable share of the losse according to [the parties'] severall Interests" and threatened delays that "would much obstruct the rebuilding of the [ ] City." 18 & 19 Car II, ch 7, § 1 (1667), in 5 *Statutes of the Realm* 601, 601. On January 31, 1667, the House of Commons assented to this bill, which had passed in the House of Lords on January 23, 1667. See 12 HL J 87 (Jan 23, 1667); 8 HC J 687 (Jan 31, 1667). According to the calendar then in use, in which the new year began on Lady Day (March 25), the date of the statute's enactment was 1666. This Article follows modern dating conventions.

<sup>42</sup> In addition to the Fire Court established for London, Parliament constituted fire courts to handle the legal ramifications of urban fires in Northampton (1675), Southwark (1676), Warwick (1694), Tiverton (1731), Blandford (1731), Wareham (1762), and Chudleigh (1807). 27 Car II (1675), in 5 *Statutes of the Realm* 798, 798–801 (Northampton); 29 Car II, ch 4 (1677), in 5 *Statutes of the Realm* 842, 842–45 (Southwark); 6 & 7 Wm & Mary (1694) (private act) (Warwick) (on file with author); 5 Geo II, ch 14 (1731) (Tiverton) (on

For Seventh Amendment purposes, these courts contained one critical feature. In the act establishing London's Fire Court, Parliament gave the common-law judges who composed the court the discretion to employ—or not to employ—juries.<sup>43</sup> The records of the Fire Court reveal that in no case did the judges impanel a jury.<sup>44</sup> Later acts contained equivalent provisions regarding juries.<sup>45</sup>

Parliament's power to suspend the right to a civil jury trial in the fire cases was established well before 1791 and continued to be exercised into the nineteenth century. In light of this history, Part II argues that Congress enjoys the historical license to delegate to federal judges a comparable authority to resolve disputes without civil juries. While the history does not give Congress an all-purpose writ to suspend the right to jury trial in complex cases, the history of the fire courts permits Congress to delegate to federal judges the authority to dispense with civil juries when

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file with author); 5 Geo II, ch 16 (1731) (Blandford) (on file with author); 3 Geo III, ch 54 (1762) (Wareham) (on file with author); 48 Geo III, ch 89 (1808) (Chudleigh) (on file with author). See also Frank Sharman, *Fires and Fire Laws up to the Middle of the Eighteenth Century*, 22 *Cambrian L Rev* 42, 48–50 (1991) (describing the fire-court laws).

The Northampton Fire Court disposed of 85 property claims after a fire in 1675 destroyed approximately 700 out of 840 buildings in the town. See Frank A. Sharman, *The Northampton Fire Court*, in J.A. Guy and H.G. Beale, eds, *Law and Social Change in British History* 118, 119, 121 (Swift 1984). The Southwark Fire Court heard fifty-two cases after a fire in 1676 destroyed as many as six hundred homes. See generally *Court of Judicature Decrees, Fire of Southwark* (1677) (copy from the London Metropolitan Archives on file with author); 1098 *London Gazette* 2 (May 25–29, 1676) (estimating a loss of six hundred houses). The Warwick Fire Court heard at least 31 petitions arising from a fire that destroyed approximately 150 buildings. See Michael Farr, ed, *The Great Fire of Warwick 1694: The Records of the Commissioners Appointed under an Act of Parliament for Rebuilding the Town of Warwick* 369–407 (Dugdale Society 1992) (reporting two different estimates of the damage (144 or 156 buildings) and reproducing thirty-one draft decrees of the court).

<sup>43</sup> See 18 & 19 Car II, ch 7, § 1 (1667), in 5 *Statutes of the Realm* 601, 602 (stating that the court may reach its decision “upon the verdict or inquisition of Jurors testimony of witnesses upon oath, Examination of partyes interested, or by all or any of the said wayes or otherwise according to their Discretions proceede to the hearing and determining of the Demands or Differences betweene the said Partyes”).

<sup>44</sup> In one case, described in notes 102–05 and accompanying text, the London Fire Court referred a matter regarding the value of land to a jury. The Fire Court had no jurisdiction to value land that was taken to widen streets during the rebuilding of London; by statute, Parliament gave that task to a jury impaneled by the lord mayor and Court of Aldermen of London. 18 & 19 Car II, ch 8, § 23 (1667), in 5 *Statutes of the Realm* 603, 608; 22 Car II, ch 11, § 32 (1670), in 5 *Statutes of the Realm* 665, 672.

<sup>45</sup> The seven statutes passed after the creation of the London Fire Court varied somewhat in the language in which they provided the courts with the discretion to dispense with juries. See note 101. Later legislation required the use of juries for one function that the London Fire Court had not been empowered to perform: valuing private land taken for rebuilding purposes. See note 121 and accompanying text.

suspension is a necessary and tailored component of legislation validly enacted to foster recovery from a national crisis.

This fact has important implications. Whether responding to an economic collapse like the mortgage crisis in the late 2000s or a catastrophe like September 11th, Congress has often turned to administrative solutions to award or limit damages arising from disaster.<sup>46</sup> The history of the fire courts shows that, under certain conditions, Congress has another streamlined option for distributing monetary relief that is integral to fostering national recovery: Article III courts, which can blend equitable (injunctive) and common-law (compensatory) powers without needing to impanel a jury.

The Conclusion explores a final question: whether this history should alter understandings about the Seventh Amendment's right to jury trial that became settled in the absence of such evidence. From a variety of interpretive standpoints, the answer is yes. History matters.

## I. THE FIRE COURTS

England was plagued by disastrous urban fires from the seventeenth through the nineteenth centuries. Speedy rebuilding of devastated communities was essential to their revitalization. In a world largely devoid of fire insurance, a common roadblock to the necessary rebuilding was the existence of disputes between landlords and tenants about their respective obligations to rebuild damaged homes and buildings. Establishing a structure to resolve these disputes was critical. Out of this felt need Parliament developed the fire courts. The first such court, the London Fire Court, created the template used for later courts. This template left the use of juries to each fire court's discretion, and the judges sitting on these fire courts routinely exercised their discretion by choosing not to impanel juries.

### A. The London Fire Court

The Great Fire of London began shortly after midnight on September 2, 1666, and burned uncontrolled for more than three days.<sup>47</sup> The summer had been hot and dry, and a strong wind was

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<sup>46</sup> See note 172 and accompanying text.

<sup>47</sup> For a day-by-day—indeed, street-by-street—description of the progress of the fire, see John Bedford, *London's Burning* 37–132 (Abelard-Schuman 1966). The fire was so intense that Samuel Pepys reported seeing cellars still smoldering from the fire the following

blowing.<sup>48</sup> Most of London's streets, lanes, and alleys were narrow. Its buildings were timber. The upper floors of houses were often cantilevered over the pathways below, so that the top floors on one side nearly touched those on the other.<sup>49</sup> It was a recipe for disaster—a recipe perfected when the fire started near, and quickly spread to, one of London's main waterworks, depriving the few willing to fight the fire of a ready source of water.<sup>50</sup>

Rebuilding London was a political and economic priority. At the time, England's prospects in the Second Dutch War were uncertain, and the spendthrift King Charles II was relying on loans from the City of London and its wealthiest citizens to finance the war and prepare defenses against an expected Dutch invasion.<sup>51</sup> The City's own finances were precarious even before the Fire; and with a considerable portion of its revenues tied up in leases of City property to tenants, the Fire and the royal demand for money pushed the City to the brink of bankruptcy.<sup>52</sup> Because Charles II

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March. See 8 *The Diary of Samuel Pepys* 114 (California 1974) (Robert Latham and William Matthews, eds) (entry for Mar 16, 1667). See also 7 *The Diary of Samuel Pepys* 393 (California 1972) (Robert Latham and William Matthews, eds) (entry for Dec 1, 1666) (describing a fire being rekindled in a cellar by strong winds).

<sup>48</sup> See Porter, *The Great Fire of London* at 33–34 (cited in note 38).

<sup>49</sup> See Bell, *The Great Fire of London in 1666* at 11 (cited in note 37); Porter, *The Great Fire of London* at 11–19 (cited in note 38).

<sup>50</sup> See Bell, *The Great Fire of London in 1666* at 28–30 (cited in note 37). Finding a way to encourage the rebuilding of the waterworks while satisfying the divergent interests of its beneficial and legal owners presented the Fire Court with one of its greatest challenges, and was one of its greatest accomplishments; by tackling and resolving the issue early in its existence, the court assured prospective builders of a reliable source of water. See generally *Morris v Morris*, A 199 (London Fire Ct Apr 27, 1667). See also Reddaway, *The Rebuilding of London* at 98–99 (cited in note 37).

<sup>51</sup> See 72 *Repertories Ct Aldermen* 9 (Nov 13, 1666) (appointing a committee to advise the lord chancellor of the exchequer of the “backwardness” of Charles II in his repayment of “the great sumes of money” lent by the City); *id.* at 117v (June 11, 1667) (providing Charles II with £105,000 to supply regiments that were to resist the attacks of the Dutch in the River Thames); Reddaway, *The Rebuilding of London* at 41 (cited in note 37) (noting that “London was almost indispensable to [England’s] chances of success” in the war). To allay fears that he would not repay his creditors, Charles II took the unusual step of assuring them that he would do so. *Declaration of Charles II on June 18, 1667*, reprinted in 166 *London Gazette* 2 (June 17–20, 1667). Less than five years later, he reneged on the promise, ruining some wealthy financiers. See J. Keith Horsefield, *The “Stop of the Exchequer” Revisited*, 35 *Econ Hist Rev* 511, 513–16 (1982).

Aside from war, Charles II needed money to fund an extravagant lifestyle. He was once described as a man “who liked his fun, thought Puritanism no religion for a gentleman, and acted accordingly.” M.M. Knappen, *Constitutional and Legal History of England* 443–44 (Harcourt Brace 1942).

<sup>52</sup> See Reddaway, *The Rebuilding of London* at 42, 68–71 (cited in note 37). See also *id.* at 74 (noting that the City was a considerable landlord, deriving one-quarter of its operating revenue from leases).

also obtained substantial money from customs and excise taxes and from a hearth tax (levied on fireplaces), the destruction of the customshouse, wharves, and more than thirteen thousand buildings caused another significant drop in royal revenue.<sup>53</sup> The catastrophe also had a great impact on charities, churches, civic groups, and private persons, including widows and children, many of whom relied on income from leased property for their operations or subsistence.<sup>54</sup> Others used leases as investment vehicles to raise capital;<sup>55</sup> they potentially faced ruin unless their interests were restored. In short, rebuilding London quickly was essential on numerous fronts, from the geopolitical to the financial to the familial.

But rebuilding posed enormous political obstacles (both local and national), as well as financial, social, aesthetic, and legal challenges.<sup>56</sup> Legal issues arose on two fronts. First, law was

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<sup>53</sup> See *id.* at 41–42 (noting that London’s “actual share of the total taxes [paid to the Crown] was large,” that money could not be obtained from creditors who lent on the security of the customs and excise duties that had been collected in London, and that “[c]himney money . . . stopped coming in”). “Chimney money” was another name for the hearth tax. It had first been imposed by Parliament in 1662 to supplement Charles II’s annual royal revenue. See 14 Car II, ch 10 (1662), in 5 Statutes of the Realm 390, 390–93; Paul F. Figley and Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich L Rev 1207, 1225 n 141 (2009) (describing the importance of the hearth tax to the century-long struggle over parliamentary sovereignty in matters of the purse).

<sup>54</sup> See Reddaway, *The Rebuilding of London* at 76 (cited in note 37). For instance, the widow of Peter Morris, whose grandfather had built the Thames waterworks, alleged that the £300 per year that she was granted under the terms of a trust established on her husband’s death were “her whole subsistence.” *Morris*, A at 200, 202. For a particularly complex familial arrangement, involving rents from the leases of “three mesuages or tenements,” distributed among two children and six grandchildren, see *Babington v Beake*, C 22v, 22v (London Fire Ct Nov 22, 1667).

<sup>55</sup> See Philip E. Jones, 1 *The Fire Court: Calendar to the Judgments and Decrees of the Court of Judicature Appointed to Determine Differences between Landlords and Tenants as to Rebuilding after the Great Fire*. v (Clowes 1966) (“The apparent frequency with which leases were assigned might suggest that at times it was a form of investment, a quick profit being taken through an increased fine [a lump-sum payment made on execution of the lease].”); Reddaway, *The Rebuilding of London* at 75 (cited in note 37) (noting that the Great Fire “had destroyed a substantial part of the accumulated savings of generations and had wiped out most of the security behind a highly complicated system of investment”); Baer, 76 Bus Hist Rev at 518–19 (cited in note 39) (describing the ways in which London property could be used as an investment). For instance, in *Clerke v Chapman*, A 4 (London Fire Ct Mar 7, 1667), a tenant had obtained from a third party an unspecified sum of money, and in return agreed to pay the third party an annuity of £40 per year for a term of years; £150 was still owing at the time of the Great Fire. The sense of the transaction was that the tenant had sublet the premises to others, using the rents to pay the annuity. *Clerke*, A at 13.

<sup>56</sup> The discussion in this paragraph derives from Professor T.F. Reddaway’s classic history of the rebuilding process, see Reddaway, *The Rebuilding of London* at 68–170

needed to impose a framework on the rebuilding process. It was necessary to establish building regulations that limited the risk of future catastrophic fire: buildings must be made of brick, they must not exceed a certain height, and they must not overhang the streets. Streets themselves would be widened, with private ground taken for the purpose. With these changes came others: a survey system to determine boundaries and settle disputes among neighbors; a mechanism to value property taken for public purposes or made worthless by widened streets; a tax on coal to finance both this eminent domain system and the reconstruction of public buildings; a sanction (escheat of the property to the City of London) if a property owner refused to rebuild within a reasonable time; provisions requiring owners to share rebuilding costs (such as party walls) that benefited multiple properties; regulations on the price and quality of raw materials used in rebuilding; and incentives to encourage skilled craftsmen to come to London, despite the sometimes onerous burdens of the City's creaking guild system.<sup>57</sup> With significant prodding from the City and Charles II, Parliament passed legislation in February 1667 that covered most of these matters;<sup>58</sup> the more mundane were left to London's Court of Common Council and Court of Aldermen.<sup>59</sup>

Law was also relevant in a second way that was less socially beneficial. The leases, mortgages, and annuities that defined the obligations of owners, landlords, tenants, and financiers were, of course, contracts. At the time of the Great Fire, the institution of

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(cited in note 37), as well as from my reading of the records of London's Court of Aldermen and its Court of Common Council.

<sup>57</sup> See *id.* at 79–85, 113–20, 150–67.

<sup>58</sup> 18 & 19 Car II, ch 8 (1667), in 5 Statutes of the Realm 603, 603–12. The Common Council worked to draft the rebuilding legislation. See 46 J Ct Common Council 132–34 (Nov 30, 1666). The Court of Aldermen drafted other proposals and sent delegates to lobby Charles II and influential figures in Parliament and at the royal court. See 72 Repertories Ct Aldermen 6v (Nov 8, 1666), 21–21v (Dec 4, 1666), 26v (Dec 8, 1666), 29v (Dec 16, 1666), 32–32v (Jan 8, 1667), 43v (Jan 22, 1667). The Court of Aldermen even provided gifts that today may be less charitably described as bribes: £100 to the Speaker of the House of Commons, Edward Turnor, as a “loving remembrance from this Court for his many kind offices,” *id.* at 21 (Dec 4, 1666) (rendering Turnor's name as “Turner”), and “halfe a ton” of the best claret to the attorney general as a similar “loving remembrance,” *id.* at 29v (Dec 21, 1666). In the end, Parliament passed legislation only after Charles II exerted “firm pressure,” refusing to end the Parliament until it passed rebuilding legislation. Reddaway, *The Rebuilding of London* at 86, 88 (cited in note 37). See also 8 HC J 684 (Jan 26, 1667) (reporting on a message from Charles II expressing his concern for “the Desolation of the City” and urging the House of Commons to “apply themselves to the Dispatch of those Bills which concerned the City”).

<sup>59</sup> See, for example, 72 Repertories Ct Aldermen 6v (Nov 7, 1666) (granting a City tenant the right to dig up five acres of leased land to make bricks).



fire insurance had not yet developed,<sup>60</sup> meaning that losses were allocable among the contracting parties. As a general rule, that fact spelled disaster for tenants. A covenant in most leases obligated the tenant to repair or rebuild the premises in case of fire—even if the tenant was without fault and even if the fire started elsewhere.<sup>61</sup> The tenant was also required to continue to pay rent during the time that the premises were damaged.<sup>62</sup>

The common-law courts were unlikely to relieve tenants of these agreements. In *Paradine v Jane*,<sup>63</sup> a tenant who had failed to pay rent for a period of three years defended himself by claiming that he had been forced from occupation by royalist forces during the English Civil War; because these forces allegedly included a foreign soldier fighting for King Charles I, the tenant argued that the willful act of a foreign enemy excused his payment.<sup>64</sup> *Paradine*

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<sup>60</sup> Jones, 1 *The Fire Court* at vi (cited in note 55) (“[The tenant] would have no insurance to soften the blow.”). The Great Fire “stimulated the development of fire insurance.” *Id.* at v. See also Porter, *The Great Fire of London* at 153–54 (cited in note 38) (describing the rise of the first fire insurance companies in the late seventeenth century).

<sup>61</sup> See Jones, 1 *The Fire Court* at vi (cited in note 55). The Fire Court decrees often recited the substance of the covenant. See, for example, *Franke v Deane and Chapter of the Collegiate Church of St. Peter of Westminster*, H 190, 190v (London Fire Ct July 2, 1672) (describing “a covenant on the Tenants part to repaire and uphold the premisses and soe to leave the same at the end of the said terme”). On rare occasions a lease omitted such a term. See, for example, *Sing v Woodcock*, E 60, 61 (London Fire Ct Dec 10, 1668).

<sup>62</sup> See Jones, 1 *The Fire Court* at vi (cited in note 55). Leases of twenty-one years were common, but many exceeded that length. Baer, 76 *Bus Hist Rev* at 538 (cited in note 39). A typical lease required a tenant to pay a combination of a “fine,” which was a lump sum due on execution of the lease, and rent in annual or quarterly installments. This system allowed a lessor to extract capital for immediate consumption or investment, albeit with a reduction in rental income in future years. Some leases, however, involved “rack rent[s],” in which no fine was due and the rent reflected full market value. See *id.* at 519 n 11, 538–39 (describing the frequency and purpose of fines). Three cases suffice to show the array of leasing arrangements. In *deCayne v Harding*, A 25 (London Fire Ct Mar 28, 1667), the tenant paid a fine of £30 and an annual rent of £22 for a thirteen-year lease on a messuage. *Id.* at 25. In *Bathurst v Wardens and Comonalty of the Mistery of Skinners London*, E 18v (London Fire Ct Nov 17, 1668), the tenant paid a fine of £300 and £6 per year (in quarterly payments) for a lease of twenty-three years on a messuage; two months later, the tenant subleased the property “without ffine” for £50 per year. *Id.* at 19. In *Rosewell v Thomas*, G 1 (London Fire Ct Jan 17, 1671), a tenant leased from the Cathedral of St. Paul’s, for an unstated duration and for a £200 fine, two messuages and some ground, and then sublet the premises for twenty-four years at a rent of £20 for the first three-and-one-half years and £60 thereafter. *Id.* at 1. Eleven years later the subtenant relet one of the messuages for most of the remaining lease term, receiving only a “competent ffine” and a yearly rent of £20 in view of the “great charges to bee layd out in reparatons” by the sub-subtenant. *Id.*

<sup>63</sup> 82 *Eng Rep* 897 (KB 1647).

<sup>64</sup> *Id.* at 897.

rejected the plea on three grounds,<sup>65</sup> the third and most extensively reasoned of which was that, while a court of law would excuse a tenant who was unable to act because of a foreign enemy from a “duty or charge” created by law, “the party [who] by his own contract creates a duty or charge upon himself [ ] is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.”<sup>66</sup> In language that anticipated the Great Fire, the court continued: “And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it.”<sup>67</sup>

But there was also contrary thinking that tenants would find relief in the courts. Albeit in a most unsatisfactory way, a hapless Frenchman, Robert Hubert, had confessed to starting the Great Fire; he was convicted with celerity and hanged for the crime on October 29, 1666.<sup>68</sup> Samuel Pepys reported on a dinner conversation with the noted lawyer Lord John Crew, in which Crew indicated that “the Judges ha[d] determined” that tenants were not required to bear the loss of fire when it was started by an enemy; and France, Hubert’s native land, was allied with the Dutch in the ongoing war.<sup>69</sup> Although *Paradine* seems decisively to support the opposite view,<sup>70</sup> Pepys thought that this argument was “an excellent Salvo for the Tenants.”<sup>71</sup>

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<sup>65</sup> The first ground held that the tenant had pleaded that the enemies held the leased premises for about two-and-three-quarters years, thus failing to plead an excuse for non-payment of the entire three years. *Id.* The second ground held that the tenant had failed to plead that the entire army was foreign. *Id.* The foreign soldier was alleged to be Prince Rupert, see *id.*, a German-born nephew of Charles I who had received titles of English nobility and was at the time leading the English forces fighting for Charles I. *Prince Rupert* (Encyclopædia Britannica, July 20, 2014), archived at <http://perma.cc/735G-G4N6>.

<sup>66</sup> *Paradine*, 82 Eng Rep at 897.

<sup>67</sup> *Id.* In case the point were not already clear, the court further observed that even if the leased land had been “made barren by wildfire, yet the lessor shall have his whole rent.” *Id.* at 898.

<sup>68</sup> For a copy of Hubert’s indictment, see Bell, *The Great Fire of London in 1666* at 353–54 (cited in note 37). No one in authority, including the judge who sentenced him to hang, believed that Hubert had committed the crime. See *id.* at 191–95, 200–08.

<sup>69</sup> See 7 *The Diary of Samuel Pepys* at 357 (cited in note 47) (entry for Nov 5, 1666); *Anglo-Dutch Wars* (Encyclopædia Britannica, July 4, 2014), archived at <http://perma.cc/QC5G-DE75>.

<sup>70</sup> The language in *Paradine* was perhaps ambiguous enough to create room for the tenants’ argument, but Pepys likely misunderstood the import of Crew’s comments. Pepys’s desire to do so was understandable, given that his own father would have benefited from such a ruling. See 7 *The Diary of Samuel Pepys* at 357 (cited in note 47) (entry for Nov 5, 1666). It is also possible that Crew misunderstood *Paradine*, or thought it wrong (because it had been rendered by the King’s Bench after the arrest of Charles I and implicated the actions of forces loyal to the Crown). See note 65.

<sup>71</sup> See 7 *The Diary of Samuel Pepys* at 357 (cited in note 47) (entry for Nov 5, 1666).

Parliament had no similar illusions. The preamble to the act creating the Fire Court recited that “Many of the Tennants Under tennants or late Occupiers [ ] are lyeable unto Suites and Actions to compell them to repaire and rebuild [their houses] and to pay their Rents as if the same had not beene burned and are not releiveable therein in any ordinary course of Law.”<sup>72</sup> But neither was the situation entirely happy for landlords. Not only did they face the prospect of long delays and expense in bringing cases in the common-law courts,<sup>73</sup> but they were also liable at law to the tenants if they prematurely sought to reenter or relet the leased premises in order to facilitate reconstruction.<sup>74</sup> Moreover, even if they were successful in the law courts, landlords faced the prospect of tenants bringing suit in equity to obtain relief from the terms of their leases;<sup>75</sup> and regardless of the likelihood of success, equity’s process was notoriously long and expensive.<sup>76</sup>

These legal realities intersected with cultural realities in a way that was particularly unhelpful to efforts to rebuild. During the seventeenth century, London’s property owners almost invariably preferred not to put their own capital into building projects. Instead, they sought out developers for their properties, giving the developers sufficiently favorable and lengthy lease terms that the developers could recover the cost of construction (plus a profit) during the lease period. Owners took their profits on subsequent leases.<sup>77</sup> Thus, a tenant who had only a short time left on

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<sup>72</sup> 18 & 19 Car II, ch 7, § 1 (1667), in 5 Statutes of the Realm 601, 601.

<sup>73</sup> See 18 & 19 Car II, ch 7, § 1 (1667), in 5 Statutes of the Realm 601, 601 (noting that “great Differences are like to arise concerning the said Repaires and new Building of the said Houses and payment of Rents which if they should not be determined with all speede and without charge would much obstruct the rebuilding of the said City”).

<sup>74</sup> Depending on the circumstances, the tenant had a variety of potential actions against the landlord, including a writ of covenant, a writ of ejection, and a writ of trespass. See William Blackstone, 3 *Commentaries on the Laws of England* 156–57, 199–212 (Chicago 1979).

<sup>75</sup> For a contemporary case in which a tenant turned to equity to obtain relief from the payment of rent and to force the landlord to accept a surrender of a lease, see *Harrison v North*, 22 Eng Rep 706, 706 (Ch 1667). See also 2 *A General Abridgment of Cases in Equity, Argued and Adjudged in the High Court of Chancery, Etc.: Vol. II. [1667–1744]* 245 (undated), in 22 Eng Rep 1, 208 (discussing cases in which equity granted relief against a forfeiture for nonpayment of rent after the common-law courts had granted the landlord’s request for ejectment).

<sup>76</sup> For a scathing critique of the dilatoriness and extravagance of seventeenth-century equity practice, see Holdsworth, 1 *A History of English Law* at 423–42 (cited in note 12).

<sup>77</sup> See Lawrence Stone, *The Crisis of the Aristocracy: 1558–1641* 357–63 (Clarendon 1965) (describing seventeenth-century practices for developing the suburbs in the West End). Having been leveled to the ground, London was likely to require similar real estate investment practices if it were to rebuild successfully.

a lease had little incentive to rebuild a house, which (given the new building codes requiring construction in brick) would likely be an expensive and substantial improvement over the burned-down timber house. The tenant needed a sufficiently long lease, and favorable lease terms, to be induced to undertake the construction. The law, however, did not permit judges to calibrate the parties' legal rights to achieve the best incentives to rebuild.<sup>78</sup>

The solution that emerged was to establish a court with a specific charge and unique remedial powers. This court was composed of England's twelve common-law judges.<sup>79</sup> Its task was "to heare and to determine all Differences and Demands whatsoever which have arisen or may any way arise between Landlords Proprietors Tennants Lessees Under Tennants or late Occupiers of any the said Houses or Buildings."<sup>80</sup> This broad mandate included disputes concerning "the payment defalcation apportioning or abatement of any Rent or Rents" that arose after September 1, 1666; disputes "touching any Covenant Condition or Penalty"; and disputes "touching or concerning the prefixing or limiting of any time for such Repaires or new Building Rebuilding or any Rate or Contribution to be borne or paid thereunto by any person or persons Bodyes pollitique or corporate interested in the Premises."<sup>81</sup> Due to the variety of property arrangements, Parliament recognized that "noe certaine generall rule can be prescribed."<sup>82</sup> It did establish, however, a principle to govern the court's work: "it is just that every one concerned should beare a proportionable share of the losse according to their severall Interests."<sup>83</sup>

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<sup>78</sup> In light of the reality that many inhabitants had abandoned London and taken up long-term leases in its suburbs or elsewhere, property owners were also finding it difficult to induce new developers to take up the task of rebuilding. Indeed, in taking stock of the past year on the last day of 1666, Pepys wrote despairingly that "[t]he City [is] less and less likely to be built again, everybody settling elsewhere, and nobody encouraged to trade." 7 *The Diary of Samuel Pepys* at 426 (cited in note 47) (entry for Dec 31, 1666). The pace of rebuilding remained slow for the following two years. See Reddaway, *The Rebuilding of London* at 244–83 (cited in note 37) (describing the progress of reconstruction for houses, halls, and churches).

<sup>79</sup> At the time, there were three common-law courts—Common Pleas, Kings Bench, and the Exchequer—with four justices appointed to each court. See Holdsworth, 1 *A History of English Law* at 195 (cited in note 12); Blackstone, 3 *Commentaries* at 40 & nn 41, 44 (cited in note 74) (noting that there were generally four judges in each court, although a fifth was on occasion appointed).

<sup>80</sup> 18 & 19 Car II, ch 7, § 1 (1667), in 5 Statutes of the Realm 601, 601.

<sup>81</sup> 18 & 19 Car II, ch 7, § 1 (1667), in 5 Statutes of the Realm 601, 602.

<sup>82</sup> 18 & 19 Car II, ch 7, § 1 (1667), in 5 Statutes of the Realm 601, 601.

<sup>83</sup> 18 & 19 Car II, ch 7, § 1 (1667), in 5 Statutes of the Realm 601, 601.

To give this principle practical effect, Parliament granted the court the authority “where they shall thinke it convenient to order the surrendring, increasing abridgeing ceasing determining or charging of any Estates in the Premisses,” including the power “to order new or longer Leases or Estates not exceeding Forty yeares . . . at such Rents and Fines or without any Rent or Fine as they shall thinke fitt.”<sup>84</sup> The court’s decisions bound not only “all persons concerned” with the property but also their “Heirs Successors Executors Administrators and Assignes”; and if that preclusive effect were somehow unclear, Parliament further provided that even those under a legal disability (such as infancy or insanity), ecclesiastical persons and corporations, and “all other person or persons Bodyes Naturall and Politique their Heires and Successors and their respective Interests shall be bound and concluded by such respective Order or Orders.”<sup>85</sup> The primary limit on the court’s power was temporal: the legislation contained a sunset provision that terminated the court on December 31, 1668.<sup>86</sup>

The judges of the Fire Court had not, however, finished the backlog of cases by the end of 1668. Although it took two years for Parliament to pass legislation reconstituting the court, ultimately Parliament thrice revived or extended the court’s sunset date. With each of these enactments, Parliament expanded the power of the Fire Court over its existing caseload or extended its jurisdiction to hear cases arising from other fires.<sup>87</sup>

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<sup>84</sup> 18 & 19 Car II, ch 7, § 2 (1667), in 5 Statutes of the Realm 601, 602. Parliament placed one limit on this power: the court could not diminish “auntient [ancient] and accustomed Rents” when the “Lawes of this Realme doe forbid” such diminishment. 18 & 19 Car II, ch 7, § 2 (1667), in 5 Statutes of the Realm 601, 602. Numerous ecclesiastical, charitable, and educational entities, such as the Cathedral of St. Paul, St. Bartholomew Hospital, and Christchurch College in Oxford, held land in the City under ancient grants. See Jones, 1 *The Fire Court* at xviii–xix (cited in note 55).

<sup>85</sup> 18 & 19 Car II, ch 7, § 2 (1667), in 5 Statutes of the Realm 601, 602.

<sup>86</sup> 18 & 19 Car II, ch 7, § 5 (1667), in 5 Statutes of the Realm 601, 602.

<sup>87</sup> For instance, in the first reauthorization statute, Parliament expanded the Fire Court’s jurisdiction to determine disputes arising from other London fires that preceded the Great Fire. See 22 Car II, ch 11, § 31 (1670), in 5 Statutes of the Realm 665, 671. The same act expanded the Fire Court’s authority in other ways; for instance, the court could now extend leases by as many as sixty years (fifty-one years in certain cases in which an infant held title through an inheritance), see 22 Car II, ch 11, §§ 18, 25 (1670), in 5 Statutes of the Realm 665, 669–70, and it could transfer ownership when street widening rendered a parcel of land too small to be buildable, see 22 Car II, ch 11, § 32 (1670), in 5 Statutes of the Realm 665, 672. This act established a new sunset date of September 29, 1671. 22 Car II, ch 11, § 17 (1670), in 5 Statutes of the Realm 665, 669. Parliament subsequently extended the court’s sitting until September 29, 1672, adding to the court’s docket cases arising from fires in the borough of Southwark. 22 & 23 Car II, ch 14, §§ 1–2 (1671), in 5 Statutes of the Realm 724, 724. The court was again unable to conclude its work by

As the extensions and expansions of its jurisdiction show, the Fire Court came to be regarded as an indispensable institution in the rebuilding of London.<sup>88</sup> Case by case, over the course of nine years and nearly sixteen hundred decrees, it reconfigured parties' legal rights, either reducing rents and extending lease terms to give tenants willing to rebuild the financial incentive to do so or commanding tenants unwilling to rebuild to surrender their leases to willing landlords (sometimes on payment of money to help the landlord finance the rebuilding).<sup>89</sup> The court's influence

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the deadline; and Parliament revived the Fire Court in 1673 for a final time, in the process again extending the jurisdiction to encompass a recent fire that had burned houses left standing after the Great Fire. 25 Car II, ch 10 (1673), in 5 Statutes of the Realm 795, 795–96. The court's new sunset date was February 25, 1676. 25 Car II, ch 10, § 1 (1673), in 5 Statutes of the Realm 795, 796. The court heard its last case on February 18, 1676. See generally *Rookes v Maior of London*, I 171 (London Fire Ct Feb 18, 1676). Of the 1,585 decrees by the Fire Court, 16 involved fires other than the Great Fire.

<sup>88</sup> See Bell, *The Great Fire of London in 1666* at 248 (cited in note 37) (“The Fire Judges’ Court, by its practice and example, alone made the speedy restoration of London possible.”); Reddaway, *The Rebuilding of London* at 94 (cited in note 37) (“[The Fire Court] had the greatest possible success.”). Curiously, despite the Fire Court’s importance, none of the standard texts on English legal history mentions the court. See generally Baker, *An Introduction to English Legal History* (cited in note 28); Holdsworth, 1 *A History of English Law* (cited in note 12); Maitland, *Equity: Also the Forms of Action at Common Law* (cited in note 26); S.F.C. Milsom, *Historical Foundations of the Common Law* (Butterworths 2d ed 1981); Theodore F.T. Plucknett, *A Concise History of the Common Law* (Butterworth 5th ed 1956).

<sup>89</sup> For representative cases, see *Hickman v Gourney*, C 42v, 43–44 (London Fire Ct Jan 14, 1668) (forgiving the rental payments from the date of the fire until March 1669, extending the lease, originally for thirty-one years at an annual rent of £25, by thirty-five years at an annual rent of £12, and further noting the tenant’s argument that the combination of a widened street and the tenant’s inability to build a jetty over the street made it impossible to rebuild a house of the same rental value); *Thurlby v Dodsworth*, C 38, 38v–39 (London Fire Ct Jan 8, 1668) (forgiving the tenant’s rental payments from the date of the fire until August 1669, extending the lease, originally for twenty-one years at an annual rent of £50 and a fine of £120, by fifty-one years at an annual rent of £62, and further requiring the landlord to contribute £400 toward rebuilding); *Jears v Peake*, A 341, 341–42 (London Fire Ct July 18, 1667) (ordering a subtenant to surrender the lease upon the landlord’s payment of £30 to the subtenant and noting that, shortly before the fire, the subtenant had agreed to pay the prior tenant £300 for the remaining thirty-three years on the lease, of which the subtenant had already paid £90); *Coates v Withers*, A 1, 1 (London Fire Ct Feb 27, 1667) (ordering a subtenant to surrender a sublease for a messuage and warehouse on the condition that the owner pay £25 to the subtenant, who had recently paid £30 to the estate of a prior subtenant for the remaining three-plus years on the sublease). On some occasions, both parties wished to rebuild, and the court needed to determine which party’s rebuilding plan was more advantageous. The preference was to grant the tenant the right. See Jones, 1 *The Fire Court* at xv (cited in note 55) (noting that the Fire Court “gave preference to the person in occupation at the time of the Fire”); *Kemp v Mils*, E 127, 127v (London Fire Ct Dec 15, 1668) (holding that “it was not reasonable to turne out an old tenant for the benefit of a new contractor”). Sometimes, however, the court gave possession to the landlord or owner. See, for example, *Altham v Lenthall*, A 246, 247 (London Fire Ct Oct 28, 1667) (holding that, “although a Tenant who desires to build and

extended beyond the cases it decided; other cases settled in the shadow of the Fire Court's decrees.<sup>90</sup>

## B. Critical Features of the London Fire Court

For present purposes, two features of this remarkable court stand out. First, the Fire Court's procedure was so simple and efficient that it would be the envy even of modern times. There was certainly nothing like it in the seventeenth century. The common-law courts had become places in which pleading was rigid, draconian, and filled with unforgiving traps for the unwary; their justice was increasingly slow and expensive.<sup>91</sup> Equity was already laboriously slow and obscenely expensive, and it was developing the rigidity of doctrine associated with common law.<sup>92</sup> The Fire Court, in contrast, was to proceed "sine forma et figura iudicii and without the formalities of proceedings in Courts of Law or Equity."<sup>93</sup> The Fire Court could summon the parties to attend

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to returne to the place of his habitaton and trade if hee bee a shopkeeper who lives by his Customers resorting to his shopp ought to be preferred," the landlord should be given the right to rebuild under the unique circumstances of the case).

<sup>90</sup> See Jones, 1 *The Fire Court* at xix (cited in note 55) ("The decisions of the Court . . . influenced other owners of property in the City in dealing with their lessees."). For example, in one case, a tenant who ran a tavern had begun rebuilding pursuant to a prior order of the court; his new petition claimed that the landlord and thirteen tenants who ran shops beneath the tavern had not joined in the rebuilding or contributed to the cost. At the hearing the landlord informed the court that it had already negotiated new terms with several of the tenants; the court ordered that it provide like terms to the other tenants who wished to rebuild. *Sayer v Humble*, C 143v, 143v–44v (London Fire Ct Nov 13, 1667).

<sup>91</sup> See Baker, *An Introduction to English Legal History* at 74–77 (cited in note 28) (critiquing the technicalities that kept common-law courts from reaching the merits); Donald Veall, *The Popular Movement for Law Reform 1640–1660* 30–32, 184–93 (Clarendon 1970) (same; also discussing reform proposals to reduce delay and expense).

<sup>92</sup> See notes 75–76 and accompanying text; Baker, *An Introduction to English Legal History* at 95 (cited in note 28) (noting that, since the seventeenth century, "the word 'Chancery' had been synonymous with expense, delay and despair"); Plucknett, *A Concise History of the Common Law* at 692 (cited in note 88) (describing the increasing rigidity of equity doctrine).

<sup>93</sup> 18 & 19 Car II, ch 7, § 1 (1667), in 5 Statutes of the Realm 601, 602. A literal translation of "sine forma et figura iudicii" is "without the form and shape of a judicial proceeding." A looser translation is "in a summary way" or "summarily." In separate rebuilding legislation for London enacted contemporaneously with the Fire Court legislation, Parliament authorized three common-law judges to determine the value of each person's interest in property once a jury had determined the overall value of property taken for a public purpose. In granting this power, Parliament eschewed the "sine forma et figura iudicii" language, instead instructing the judges to determine the interests "in a summary way of proceeding and without the formalities or ordinary course of proceedings used in" the common-law courts. See 18 & 19 Car II, ch 8, § 25 (1667), in 5 Statutes of the Realm 603, 608. Likewise, the fire-court legislation arising from the Northampton fire in 1675 and the Southwark fire in 1676 copied much of the language of the London Fire Court act,

through the simple expedient of a note or warrant served after the filing of a petition.<sup>94</sup> The next step was the hearing on the merits; there were no motions to derail the case on technical issues.<sup>95</sup> Three judges heard the case, which was almost always concluded on the same day that it commenced; the court typically decided three or four cases per day.<sup>96</sup> Litigants could, and often did, appear without counsel.<sup>97</sup> There was a right of appeal, but only to a larger body of seven or more judges of the same court;<sup>98</sup> as might

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but substituted the word “summarily” for the phrase “sine forma et figura iudicii.” 27 Car II, § 1 (1675), in 5 Statutes of the Realm 798, 798; 29 Car II, ch 4, § 1 (1677), in 5 Statutes of the Realm 842, 843.

<sup>94</sup> 18 & 19 Car II, ch 7, § 3 (1667), in 5 Statutes of the Realm 601, 602.

<sup>95</sup> On rare occasion, a party contested the court’s jurisdiction at the hearing on the merits. See Jones, 1 *The Fire Court* at xiii (cited in note 55). For instance, in *Vandermarsh v Godschall*, A 141 (London Fire Ct July 5, 1667), the defendant argued that the petitioner, who wished to obtain an extension of his lease in return for rebuilding, was a citizen of an enemy nation (Holland), and thus unable to hold a lease; he further argued that the damage done to the leased premises did not result from the Great Fire, thus putting the dispute beyond the jurisdiction of the court. *Id.* at 142–44. The court rejected both arguments, after which the defendant grudgingly consented to an extension of the lease. *Id.* at 145–46. See also *Fish v Maior of London*, I 27v, 28 (London Fire Ct Dec 5, 1673) (holding that the court had jurisdiction to hear a dispute involving a stairway, to be built on a public easement, that gave access to rebuilt premises).

<sup>96</sup> Jones, 1 *The Fire Court* at xi–xii (cited in note 55). Additional judges might attend the hearing. See, for example, *Coates*, A at 1 (four judges present, with all signing the decree); *Altham*, A at 246–47 (seven judges present, but with only three signing the decree). In the first year, the Fire Court sat on 120 days, and decided 374 cases, averaging slightly more than 3 cases per day. See Jones, 1 *The Fire Court* at xi (cited in note 55). See also *id.* at xii (“The majority of cases were completed on the day they were called.”). Sometimes the court could not determine the case at the first hearing, and would continue the matter. See, for example, *Blake v Boulton*, A 135, 136 (London Fire Ct May 30, 1667) (detailing two preliminary hearings before the final hearing on the merits).

<sup>97</sup> The record of each case noted appearances of counsel, if any. In the first case heard by the Fire Court, no lawyers were mentioned, see *Coates*, A at 1; the fifth case was the first to mention counsel, who appeared for each side. See *Taylor v Brewster*, A 8, 8 (London Fire Ct May 13, 1667). As might be expected, institutional property owners, such as the Cathedral of St. Paul, appeared through lawyers or other agents. See, for example, *Kelynge v Deane and Chapter of the Cathedrall Church of St. Paul*, A 479, 480 (London Fire Ct Apr 18, 1668) (noting appearances on behalf of both parties). The small cadre of lawyers who handled these cases performed a valuable function. See Philip E. Jones, 2 *The Fire Court: Calendar to the Judgments and Decrees of the Court of Judicature Appointed to Determine Differences between Landlords and Tenants as to Rebuilding after the Great Fire*. ii (Clowes 1970) (noting that the number of settlements increased as parties became “aware, or more likely were advised by counsel with long experience of the Court[']s procedure, of the terms that would be acceptable to the Court”).

<sup>98</sup> 18 & 19 Car II, ch 7, §§ 1, 6 (1667), in 5 Statutes of the Realm 601, 601–03. The lack of any right of appeal, and in particular of appeal to the House of Lords, was a significant sticking point that nearly scuttled passage of the Fire Court act. It passed the House of Lords after an attempt to include a right of appeal was defeated on a vote of 36–29. After passage, three lords specifically registered a formal protest against “the unlimited and unbounded Power given to the Judges in this Bill without any Appeal.” See 12 HL J



therefore be expected, appeals were rare and uniformly unsuccessful.<sup>99</sup> The judges were barred from accepting fees for their services, at a time when fees were a major source of judicial income.<sup>100</sup>

Second, Parliament generally left the decision to use juries to the discretion of the court.<sup>101</sup> Out of the 1,585 cases that the London Fire Court decided, the records reflect only 1 case in which the Fire Court referred a matter to a jury. *Drewry v FitzGerrald*<sup>102</sup> involved a dispute over the value of a scrap of land that was too small to build on and that a neighbor, John Drewry, had used to build a bigger house for himself.<sup>103</sup> While the court could adjust

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86–87 (Jan 23, 1667). The act had no comparable difficulty in the House of Commons, passing without significant debate. See 8 HC J 687 (Jan 31, 1667).

<sup>99</sup> Of the Fire Court's 1,585 decrees, 8 were appeals from prior decisions of the court. No appeal was successful. See generally *Master List of Fire Court Decrees* (cited in note 40). See also note 40.

<sup>100</sup> Compare 18 & 19 Car II, ch 7, § 4 (1667), in 5 Statutes of the Realm 601, 602 (“[N]one of the said Justices And Barons shall take any Fee or Reward whatsoever directly or indirectly for any thing to be done by them by vertue or colour of this present Act.”), with Holdsworth, 1 *A History of English Law* at 252–55 (cited in note 12) (discussing fees typically received by common-law judges).

<sup>101</sup> 18 & 19 Car II, ch 7, § 1 (1667), in 5 Statutes of the Realm 601, 602 (stating that the court “may upon the verdict or inquisition of Jurors testimony of witnesses upon oath, Examination of partyes interested, or by all or any of the said wayes or otherwise according to their Discretions proceede to the hearing and determining of the Demands or Differences betweene the said Partyes”). The lack of a comma after “Jurors” is either a drafting error or a drafting convention of the time. Legislation that created some of the other fire courts recited a comparable formula but included the comma. See 27 Car II, § 1 (1675), in 5 Statutes of the Realm 798, 798 (allowing the Northampton Fire Court to proceed “by Verdict, Testimony of Wittnesses upon Oath, Examination of Parties interested or by all or any of the said wayes or otherwise at their discretions”); 5 Geo II, ch 16 (1731) (on file with author) (allowing the Blandford Fire Court to proceed “either by Verdict or Inquisition of Jurors, Testimony of Witnesses upon Oath, Examination of Parties interested, or by all or any of the said Ways, or otherwise, at their Discretions”). The formulation for the Wareham Fire Court act was identical to that of the Blandford Fire Court act, see 3 Geo III, ch 54 (1762) (on file with author), and the Chudleigh Fire Court act was essentially identical, see 48 Geo III, ch 89 (1808) (on file with author). On the other hand, the Southwark Fire Court act had no comma after “Verdict” and did not mention “jurors” at all in the equivalent clause. See 29 Car II, ch 4, § 1 (1677), in 5 Statutes of the Realm 842, 843 (allowing the court to proceed “by Verdict Testimony of Wittnesses upon Oath Examination of partyes interested or by all or any of the said wayes or otherwise at their discretions”). The Tiverton Fire Court act followed the Southwark formula, but inserted a comma after “Verdict” and made other inconsequential changes. See 5 Geo II, ch 14 (1731) (on file with author). The Warwick statute followed the London Fire Court act formula, but it had no commas between any of its clauses and modernized the spelling of “Interested.” See 6 & 7 Wm & Mary (1694) (private act) (on file with author).

<sup>102</sup> I 76 (London Fire Ct May 12 and July 14, 1674).

<sup>103</sup> *Id* at 76–76v. Drewry held a fifty-year lease on property on Fleet Lane, while Richard FitzGerrald held the adjoining scrap of ground under a lease that lasted another twenty-seven years. Claiming a half-interest in Drewry's house, FitzGerrald brought an action of ejectment; in response Drewry petitioned the Fire Court to transfer possession of the land

lease terms, its enabling statute gave it no authority to determine the value of land taken in such circumstances; Parliament required that task to be performed by a jury impaneled by the lord mayor of London and the Court of Aldermen.<sup>104</sup> After the jury returned its verdict on the value of the land taken by Drewry, the case went back to the Fire Court, which confirmed the jury's verdict and ordered transfer of the neighbor's lease to Drewry on Drewry's payment of the jury's award.<sup>105</sup>

Even when a jury impaneled by the mayor and Court of Aldermen rendered a property valuation, the Fire Court was not required to accept its findings. In *Ford v Salter*,<sup>106</sup> a jury had previously valued land taken for an expansion of the Navy Office.<sup>107</sup> Different parties held interests in the property, and one party dissatisfied with the amount that the jury awarded for his share filed a petition in the Fire Court to increase his award. The court accepted the jury's finding on the value of the taken land (£3,023 13s).<sup>108</sup> On intricate facts, it then held that the value of the petitioner's interest was £400 rather than the £300 that the jury awarded.<sup>109</sup>

So far as the records show, in no case did the Fire Court impanel a jury to aid in its decisionmaking on matters within the Fire Court's jurisdiction. Of course, it is possible that juries were

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to Drewry for the remainder of his lease. The court referred two questions to a jury impaneled by the lord mayor of London and the Court of Aldermen: first, whether FitzGerrald's scrap of land was too small to build on; and second, if it was, what the value of the land was. The jury found that the land was too small to support a building, that the value of FitzGerrald's interest for the remainder of his twenty-seven-year lease was £33, and that the value of the interest of FitzGerrald's landlord (between the expiration of FitzGerrald's lease and the expiration of Drewry's lease) was £9. *Id.* at 76–78v.

<sup>104</sup> The power of the Fire Court to order these transfers of land, as well as the requirement that the value of transferred land be determined by a jury impaneled by the mayor and aldermen, were both added in the 1670 statute reauthorizing the Fire Court. 22 Car II, ch 11, § 32 (1670), in 5 Statutes of the Realm 665, 672. Before the 1670 reauthorization, Parliament had kept the function of the Fire Court in adjusting lease terms and the just compensation function more distinct; other rebuilding legislation allocated responsibility over the latter function exclusively to the lord mayor and the Court of Aldermen. See 18 & 19 Car II, ch 8, § 23 (1667), in 5 Statutes of the Realm 603, 608.

<sup>105</sup> *Drewry*, I at 78–79v.

<sup>106</sup> I 137 (London Fire Ct Feb 2, May 1, and Nov 13, 1675). In the statute for rebuilding London, which was a statute distinct from the legislation erecting the Fire Court, Parliament gave “three or more” of the common-law judges the power to resolve disputes over different interests in property taken for public use and to distribute a jury award among those interests. See 18 & 19 Car II, ch 8, § 25 (1667), in 5 Statutes of the Realm 603, 608. *Ford* was a rare case invoking this power. See generally *Ford*, I 137.

<sup>107</sup> *Ford*, I at 137v–38.

<sup>108</sup> *Id.* at 138.

<sup>109</sup> *Id.* at 140v.

employed in cases before the Fire Court without the fact being noted in the court's records. But this scenario is unlikely. The scribe recording the court's decrees spelled out in detail the procedural aspects of each case: the allegations in the petition, the service on the defendants, the appearances of counsel, prior hearings, the appearances of witnesses, the evidence adduced, and the orders that the court issued. Failing to mention a critical element like a jury verdict would not have been in keeping with this level of detail, especially given the scribe's painstaking, one-and-one-half-page rendering of the jury's verdict in *Drewry*.<sup>110</sup>

Certain realities temper the striking lack of juries. In most of the cases heard by the Fire Court, the parties came to a settlement, with the court either mediating the parties' dispute or approving the parties' prepackaged deal.<sup>111</sup> Most contested cases involved limited factual disputes: the terms of the leases and the ownership interests in the property were usually undisputed, and often the only issues were who would rebuild and on what terms. When factual disputes arose, they often occurred in cases that we would regard as equitable rather than legal: the Fire Court's principal task was not to award damages for past arrears of rent but to adjust the terms of the lease going forward.<sup>112</sup> Despite these limits, however, the court almost invariably excused past arrearages. Moreover, it sometimes made factual determinations in cases that would have been heard at common law—and performed the task without a jury. For instance, in *Lamot v Major of London*,<sup>113</sup> the parties negotiated a new lease for fifty-one years. The tenant believed that the new agreement absolved him from paying all arrears of rent; the City claimed that he had agreed to

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<sup>110</sup> See *Drewry*, I at 78–78v.

<sup>111</sup> See Jones, 1 *The Fire Court* at xvi (cited in note 55) (“The Court continually mediated between the parties to settle terms upon which one of them would rebuild.”); Jones, 2 *The Fire Court* at ii (cited in note 97) (“The principal difference between the cases recorded in the present Calendar and [earlier cases] is the frequency with which the parties reported that they had reached agreement prior to the hearing.”).

<sup>112</sup> For instance, *Vandermarsh* involved factual disputes about the citizenship of the petitioner and the extent of damage to his property, but the petitioner was seeking only an extension of his present lease. See *Vandermarsh*, A at 142 (praying that the Fire Court grant “[such] releife as should seeme meet and to stand with just right equity and good Conscience”). On occasion the court referred to the possibility that the parties might resort to common-law courts either to litigate issues not decided in the case or to enforce their legal rights if a party failed to abide by the terms of the court's decree. See, for example, *Altham*, A at 247 (permitting an owner to demand arrears “according to Law” from a tenant whose proposal to rebuild was rejected in favor of the owner's).

<sup>113</sup> H 241 (London Fire Ct Sept 26, 1672).

pay arrears. The Fire Court received evidence and heard the parties. The court credited the plaintiff, but still split the difference: it required the tenant to pay arrears up to the Great Fire, and discharged the tenant for postfire arrears.<sup>114</sup>

The Fire Court's failure to use juries is understandable. The court's powers to reduce rents and extend leases went far beyond the authority of common-law courts to order ejectment or to award damages for arrearages or breaches of the covenant of repair. The Fire Court was also not a court of equity: it operated not according to principles of equity, but according to Parliament's command to distribute losses proportionally and to craft leasing arrangements that financed the speedy rebuilding of London.<sup>115</sup> Although equity could relieve a tenant from the harshness of a legal remedy by canceling a lease and forgiving back rent,<sup>116</sup> it did not have the Fire Court's power to force the parties to accept a new lease of a different length and for a different rent. In modern parlance, we might say that the Fire Court operated in the spirit of equity, merging elements of law and equity; but this description would have meant little to judges operating in a world of distinct court systems and few enforceable statutory rights. One thing, however, was clear: the Fire Court was not a common-law court.<sup>117</sup> And jury trial was confined to common-law courts.<sup>118</sup>

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<sup>114</sup> Id at 242. See also 18 & 19 Car II, ch 7, § 1 (1667), in 5 Statutes of the Realm 601, 602 (limiting the Fire Court's power to apportion or abate arrearages in rents to those that arose after the Great Fire).

<sup>115</sup> See notes 87–89 and accompanying text; Bell, *The Great Fire of London in 1666* at 245 (cited in note 37) (describing the Fire Court act as “daringly conceived, undermining all those sacred rights with which lawyers during past centuries had invested property, accepted and passed by a Parliament in which property alone was represented”).

<sup>116</sup> See note 75 and accompanying text.

<sup>117</sup> See Jones, 1 *The Fire Court* at vi (cited in note 55) (stating that, although the judges came from the common-law courts, the Fire Court's “procedure and jurisdiction [were] akin to a court of Equity”). Walter George Bell may have put the matter best:

The Court sat in equity, but differed from all known courts in this, that in addition to the parties before it there was a third party, whose interests were confided to the safekeeping of the Judges themselves. This was the public, and in case after case the public interest in the speedy rebuilding of [ ] the City decided the issue.

Bell, *The Great Fire of London in 1666* at 246 (cited in note 37).

<sup>118</sup> In addition, juries were under attack in the mid-1660s due to concerns about bribery and delay. See William Holdsworth, 6 *A History of English Law* 408–09 (Methuen 2d ed 1977) (describing reforms to the jury system in the mid- to late seventeenth century to prevent corrupt and dilatory practices). The common-law justices serving on the Fire Court would have been intimately aware of the failings of jury trial.

### C. Subsequent Fire Courts

The London Fire Court was no flash in the pan. Large urban fires continued to plague England into the nineteenth century. Parliament established courts of judicature to deal with the Northampton fire in 1675, the Southwark fire in 1676, the Warwick fire in 1694, the Tiverton and Blandford fires in 1731, the Wareham fire in 1762, and the Chudleigh fire in 1807.<sup>119</sup> Although built on the London model, later fire legislation differed from the London legislation in important details. First, the later legislation tended to construct a single court with vaster powers: in some ways the latter fire courts took a mien of an administrative agency performing both rulemaking and adjudicatory functions. For instance, the later courts had the ability to establish regulations for new buildings, a power that Parliament had exercised for London.<sup>120</sup> Later courts also had the power both to determine landlord-tenant disputes and to impanel juries to determine proper compensation for landowners whose property was taken or reduced in value as a result of rebuilding—tasks that, as we have seen, Parliament had divided between the judges of the London Fire Court on the one hand and London's lord mayor and Court of Aldermen on the other.<sup>121</sup> Second, the common-law judges essentially dropped out

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<sup>119</sup> See note 42. Despite pressure to do so, Parliament failed to enact a statute to deal with a fire in Buckingham in 1724, much to the detriment of the town. See Sharman, *The Northampton Fire Court* at 125 (cited in note 42).

<sup>120</sup> See note 58 and accompanying text.

<sup>121</sup> See note 104 and accompanying text. For the rebuilding of London, Parliament had initially enacted two statutes: one to erect the Fire Court and another to establish regulations for rebuilding. See 18 & 19 Car II, ch 7 (1667), in 5 Statutes of the Realm 601, 601–03 (Fire Court legislation); 18 & 19 Car II, ch 8 (1667), in 5 Statutes of the Realm 603, 603–12 (rebuilding legislation). The rebuilding legislation required London's lord mayor and Court of Aldermen to impanel juries: (1) to determine the value of land that was seized because no one was willing to rebuild on it after a period of three years, see 18 & 19 Car II, ch 8, § 13 (1667), in 5 Statutes of the Realm 603, 605; (2) to determine the value of land taken for street widening if the owner would not agree to a price, 18 & 19 Car II, ch 8, § 23 (1667), in 5 Statutes of the Realm 603, 605; and (3) to determine the amounts that owners whose land was improved by rebuilding should pay to the City of London as a result of their new advantage, see 18 & 19 Car II, ch 8, § 24 (1667), in 5 Statutes of the Realm 603, 608. In the later fire legislation, Parliament combined all the tasks in one statute, and then concentrated all the regulatory and adjudicatory powers in one body: the fire court. When land valuation was in issue, Parliament required these courts to use juries. See, for example, 27 Car II, § 4 (1675), in 5 Statutes of the Realm 798, 799 (requiring a jury to assess the value of any land that the Northampton Fire Court ordered taken from a landowner for rebuilding purposes); 29 Car II, ch 4, § 4 (1677), in 5 Statutes of the Realm 842, 843–44 (requiring a jury to determine the value of land taken when the Southwark Fire Court ordered the confiscation of land due to a landowner's failure to rebuild); 48 Geo III, ch 89, §§ 7, 15 (1808) (on file with author) (requiring the Chudleigh Fire Court to impanel a jury to determine the value of land taken for street widening and further requiring a

of the picture with subsequent fire courts. The legislation for Northampton and Southwark included the common-law judges among those who could hear cases, but added local judges and dignitaries to the list of eligible court members.<sup>122</sup> The records of the Southwark Fire Court reflect that, while at least one justice sat on each of the fifty-two cases heard, only seven of the twelve common-law justices ever sat to hear a case, and only three of these sat with regularity.<sup>123</sup> By the time of the Chudleigh fire in 1807, local dignitaries constituted the court; no mention was made of the common-law judges.<sup>124</sup>

With these alterations in form, Parliament relied on the fire courts to resolve legal disputes arising from urban fires.<sup>125</sup> With

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jury to determine the value of the interest in land that was seized when a person was unwilling to pay an appropriate share of rebuilding expenses incurred by other parties).

<sup>122</sup> See 27 Car II, § 1 (1675), in 5 Statutes of the Realm 798, 798 (Northampton); 29 Car II, ch 4, § 1 (1677), in 5 Statutes of the Realm 842, 842–43 (Southwark).

<sup>123</sup> See generally *Court of Judicature Decrees, Fire of Southwark* (1677) (copy from the London Metropolitan Archives on file with author). See also Sharman, *The Northampton Fire Court* at 121 (cited in note 42) (noting that “[n]one of the judges of the royal courts ever sat” on the Northampton Fire Court).

<sup>124</sup> See 48 Geo III, ch 89, § 1 (1808) (on file with author) (noting also that the officials charged with resolving disputes in the Chudleigh fire were called “[c]ommissioners”).

<sup>125</sup> Sometimes Parliament required the later fire courts to resolve disputes under a proportional-share-of-the-loss standard equivalent to the London Fire Court’s standard, see note 87 and accompanying text; sometimes it did not. Compare 29 Car II, ch 4, § 1 (1677), in 5 Statutes of the Realm 842, 842 (specifying the London Fire Court’s standard of “proportionable share in the losse according to their severall Interests” for the Southwark fire), with 27 Car II (1675), in 5 Statutes of the Realm 798, 798–801 (not specifying a standard for the Northampton Fire Court), and 48 Geo III, ch 89, § 1 (1808) (on file with author) (not specifying a standard for the Chudleigh Fire Court). Nonetheless, every fire court received the powers to modify the length and terms of leases and to excuse covenants and postfire arrearages of rent—powers that were the means by which the courts achieved proportional sharing. Indeed, the Chudleigh court’s power to settle disputes concerning rents, covenants, or “any Rate or Contribution to be borne or paid for and towards the repairing and rebuilding of said Houses, by any Person or Persons,” 48 Geo III, ch 89, § 1 (1808) (on file with author), and to adjust the terms of leases was in some ways more open-ended than that of the London Fire Court: the Chudleigh court was unrestricted in the length of a new lease that it could establish. Compare Geo III, ch 89, § 3 (1808) (on file with author) (empowering the Chudleigh court to order “the granting, enlarging, charging, abridging, exchanging, surrendering, or determining of any Estates in the Premises”), with 18 & 19 Car II, ch 7, § 2 (1667), in 5 Statutes of the Realm 601, 602 (limiting the power of the London Fire Court to extend a lease to forty years), and 22 Car II, ch 11, § 18 (1670), in 5 Statutes of the Realm 665, 669 (increasing the London Fire Court’s power to extend leases to sixty years).

various formulations, each of the statutes gave the courts the discretion to use juries,<sup>126</sup> with mandatory impaneling of juries required only for issues of property valuation.<sup>127</sup> Not all of the records of these courts survive, but those that do suggest that the courts did not generally employ juries. The records of the Southwark Fire Court reveal that, like the London Fire Court, the Southwark court never relied on juries to determine disputed factual matters.<sup>128</sup> According to a historian who examined the records of the Northampton Fire Court, juries were impaneled only to value land taken from its owner in the rebuilding process<sup>129</sup>—exactly the same purpose for which they had been used in London.<sup>130</sup> The one and only counterexample that I have found occurred when the Warwick Fire Court impaneled a jury to determine who had pulled down a house to stop the progress of the fire (unnecessarily, as it turned out) and what the amount of the homeowner's damage was; but even in this case the court weighed the evidence and jury verdict before determining these facts for itself.<sup>131</sup> As a rule (to which land-valuation issues were the exception), Parliament and the fire-court judges saw juries as a dispensable feature in the resolution of legal problems arising from these urban catastrophes.

## II. INTERPRETING THE SEVENTH AMENDMENT IN LIGHT OF THE FIRE COURTS

As we have seen, the Seventh Amendment's jury trial right hinges substantially on the allocation of fact-finding between

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<sup>126</sup> See note 101.

<sup>127</sup> With later statutes, the juries were impaneled directly by the fire court, not by other officials such as the town's mayor or aldermen. See, for example, 27 Car II, § 4 (1675), in 5 Statutes of the Realm 798, 799 (Northampton); 6 & 7 Wm & Mary, 4 (1694) (private act) (Warwick) (on file with author).

<sup>128</sup> As with the London Fire Court, see note 112 and accompanying text, not every case before the Southwark Fire Court involved factual disputes. When such disputes arose, however, the court resolved them without the aid of a jury. See, for example, *Bankes v Wight* (Southwark Fire Ct June 8, 1677), in *Court of Judicature Decrees, Fire of Southwark* 6, 7–8 (1677) (copy from the London Metropolitan Archives on file with author) (describing testimony given under oath about the terms and covenants of a lease).

<sup>129</sup> See Sharman, *The Northampton Fire Court* at 123 (cited in note 42).

<sup>130</sup> See notes 104, 121, and accompanying text.

<sup>131</sup> See *Decree for Edward Heath* (Warwick Fire Ct), in Farr, ed, *The Great Fire of Warwick 1694* 374, 374–76 (cited in note 42). The court's judgment in *Heath* agreed with the jury's verdict. The Warwick court also impaneled a jury in a second case involving the valuation of a life interest when the court transferred possession of the land to a third party. See *Decree for Edward Clopton of Bridgetown, Esq* (Warwick Fire Ct), in Farr, ed, *The Great Fire of Warwick 1694* 396, 396–97 (cited in note 42).

judge and jury in late eighteenth-century England.<sup>132</sup> If the Parliament of that era could grant judges the discretion not to impanel juries, and if judges in the exercise of that discretion chose not to impanel juries, then federal judges today may enjoy some power under the Seventh Amendment not to impanel civil juries. Whether such a power exists, however, depends on two issues. The first is one of scope: Assuming that the history of the fire courts determines the question, how much license does this history give to federal judges to strike civil juries? The second issue is normative: Assuming that the history of the fire courts gives some license to strike juries, may judges employ this power given our settled understanding of the breadth of the Seventh Amendment's jury trial right? This Part addresses the first issue; the Conclusion addresses the second.

#### A. The Breadth of the Exception to the Right to Jury Trial

On the assumption that history determines (or at least strongly influences) the scope of the modern jury trial right, the history of the fire courts lends itself to three interpretations: a broad reading, in which judges can suspend jury trial whenever it is expedient to do so; a narrow reading, in which the history of the fire courts has no influence on the modern use of jury trials; and an intermediate reading, in which the power to strike civil juries is confined to circumstances of the kind that led Parliament to create the fire courts. The historical record best supports the intermediate position.

To begin, the broad interpretation of the fire-court history—that the existence of the fire courts provides a power for judges to suspend jury trial whenever in their discretion it seems proper to do so—is too extravagant a theory to maintain in view of the scope of the fire courts' operation. Unlike many lawsuits, the fire-court cases had a limited need for fact-finding, which is the grist of a jury's mill. Although the courts had factual findings to make (for instance, determining the terms of the lease(s) involved in the dispute), in most cases they had very few (if any) factual disputes to resolve. Relatedly, most of the fire-court cases for which records exist in accessible form (London, Southwark, and Warwick) were arbitrated or voluntarily settled. Even when these disputes were litigated and factual disputes resolved, the remedies were predominantly equitable in nature (or, perhaps more accurately,

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<sup>132</sup> See notes 8–36 and accompanying text.



were unavailable at common law): when the tenant was willing to rebuild, the London Fire Court usually forgave rent in arrears, excused the nonperformance of the covenant to rebuild, and extended and modified lease terms. None of these remedies was available at law, which would have enforced contracts and covenants according to their letter.<sup>133</sup> Moreover, the fire courts were ad hoc tribunals, legislatively constructed for a specific purpose and applying law tailored to the situation. Finally, fire courts constructed after the London Fire Court were not purely adjudicatory bodies, but also had administrative responsibilities of a kind to which a right to jury trial has never extended.<sup>134</sup> In short, to erect a broad theory of jury abrogation from the history of a unique, constrained, and occasional court would let a small tail wag a large dog.

The opposing theory—that the history of the fire courts should not influence the present interpretation of the Seventh Amendment at all—presents a more substantial hurdle. The argument runs along these lines. The right to a civil jury is determined principally by two factors: historical practice in 1791 and the nature of the relief sought.<sup>135</sup> In some cases, however, a third factor comes into play: “the practical abilities and limitations of juries.”<sup>136</sup> The Supreme Court has explained that this third factor applies to cases in which “Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and [in which] jury trials would impair the functioning of the legislative scheme.”<sup>137</sup> Congress’s power to abrogate jury trial for these disputes extends only to cases involving “public rights.”<sup>138</sup> “Public rights” are implicated in two narrow categories: claims against the government and claims in which

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<sup>133</sup> See notes 63–72 and accompanying text.

<sup>134</sup> See note 121 and accompanying text (describing the rulemaking responsibilities of the later fire courts). The Seventh Amendment does not apply to administrative rulemaking. See Thomas S. Ulen, *The Growing Pains of Behavioral Law and Economics*, 51 Vand L Rev 1747, 1756–57 (1998) (contrasting administrative rulemaking with jury trial as a means to determine liability).

<sup>135</sup> See notes 10–14 and accompanying text.

<sup>136</sup> *Ross v Bernhard*, 396 US 531, 538 n 10 (1970).

<sup>137</sup> *Granfinanciera, SA v Nordberg*, 492 US 33, 42 n 4 (1989).

<sup>138</sup> *Id.* at 51 (“Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders.”). See also *Atlas Roofing Co v Occupational Safety and Health Review Commission*, 430 US 442, 455 (1977) (“[W]hen Congress creates new statutory ‘public rights,’ it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment’s injunction that jury trial is to be ‘preserved’ in ‘suits at common law.’”).

“Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”<sup>139</sup> The fire courts fell into the latter bucket of “public rights”: they were closely integrated into public regulatory schemes for rebuilding burned cities. Thus, the argument concludes, the existing analytical structure for the Seventh Amendment already accounts for entities such as the fire courts, and no new exception or alteration in doctrine needs to be made.

But this argument fails. The fire courts were not courts of equity,<sup>140</sup> nor were they administrative agencies, when they adjudicated the rights of landlords and tenants. Even granting that later fire courts had regulatory as well as adjudicatory responsibilities and that these *courts* included local dignitaries in *addition* to judges,<sup>141</sup> the London Fire Court could in no way be seen as an administrative agency. The judges of the London Fire Court were the common-law judges—as close a parallel to Article III judges as could be found in seventeenth-century England. Moreover, insofar as they adjudicated the rights of private parties, none of the fire courts was an administrative agency: on the contrary, Parliament constituted the London Fire Court, and each later fire court, as “a Court of Record.”<sup>142</sup> Although some features of these later fire

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<sup>139</sup> *Granfinanciera*, 492 US at 54, quoting *Thomas v Union Carbide Agricultural Products Co.*, 473 US 568, 593–94 (1985) (brackets in original).

<sup>140</sup> See notes 115–17 and accompanying text.

<sup>141</sup> See notes 120–24 and accompanying text. The very last fire court took on the mien of an administrative agency in another way: the right of appeal. For the London Fire Court in 1666, Parliament had permitted an appeal from the court’s “Judgments and Determinations” only to a larger body of the same court. See 18 & 19 Car II, ch 7, § 4 (1667), in 5 Statutes of the Realm 601, 602. See also note 98 and accompanying text. For the Chudleigh Fire Court in 1808, Parliament provided a right of appeal to the court of assize for the County of Devon. See 48 Geo III, ch 89, § 26 (1808) (on file with author). The right to judicial review of agency action is a common feature of modern administrative law. See Administrative Procedure Act § 10, 60 Stat 237, 243 (1946), codified as amended at 5 USC § 702 (“Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”).

<sup>142</sup> See 18 & 19 Car II, ch 7, § 4 (1667), in 5 Statutes of the Realm 601, 602 (stating that “the said Justices and Barons or any three of them for the matters and according to the powers herein before mentioned shall be, and shall be taken to be a Court of Record”). The same language was used in later fire-court statutes. See, for example, 27 Car II, § 1 (1675), in 5 Statutes of the Realm 798, 798 (constituting the Northampton Fire Court as a “Court of Record”); 48 Geo III, ch 89, § 1 (1808) (on file with author) (constituting the Chudleigh Fire Court as a “Court of Record”). A “court of record is that where the acts and

courts, seen in retrospect, make them look like proto-administrative agencies,<sup>143</sup> a nonanachronistic view must acknowledge that they were—and were understood at the time to be—judicial bodies when they adjudicated the contractual rights of landlords and tenants. Any effort to cabin the fire courts within the “public rights” corner of Seventh Amendment doctrine fails to come to terms with the courts’ true nature.

Another reason that the fire courts cannot be swept into the “public rights” corner of Seventh Amendment jurisprudence is that the “practical abilities and limitations” factor limits jury trial only when the first two factors—the scope of jury trial in 1791 and the nature of the relief sought—point toward jury trial. As the history of the fire courts shows, Parliament’s ability to suspend jury trial for disputes arising from catastrophic harm was an established practice in 1791.<sup>144</sup> Because the fire courts’ influence on

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judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question.” Blackstone, 3 *Commentaries* at 24 (cited in note 74). See also *id.* (“All courts of record are the king’s courts, in right of his crown and royal dignity.”). There were numerous courts of record in seventeenth-century England, including the common-law courts and a number of minor courts, such as the Court of Oyer and Terminer, the Court of Gaol Delivery, and the Court of Sewers. See *Gregory’s Case*, 77 Eng Rep 282, 284 (KB 1595). Nineteenth-century reforms consolidated many of these courts into the High Court of Justice. See Holdsworth, 1 *A History of English Law* at 639 (cited in note 12).

<sup>143</sup> See, for example, Frank A. Sharman, *Planning Law after the Great Fire of London*, J Planning & Envir L 24, 26 (1982) (noting that the power given by Parliament to the City of London for rebuilding the City was “a very complete system of planning law containing forerunners of many modern planning law provisions”).

<sup>144</sup> It is unclear whether the fire courts were in Alexander Hamilton’s mind when he wrote Federalist 83, which defended the Constitution’s failure to include a right to civil jury trial. In the course of arguing that any attempt to delineate the scope of civil jury trial by constitutional provision would be unwise because of unforeseeable developments in the law, Hamilton observed:

It is conceded by all reasonable men, that [jury trial] ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these states as in Great-Britain, afford a strong presumption that its former extent has been found inconvenient; and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing, to fix the salutary point at which the operation of the institution ought to stop; and this is with me a strong argument for leaving the matter to the discretion of the legislature.

This is now clearly understood to be the case in Great-Britain, and it is equally so in the state of Connecticut.

Federalist 83 (Hamilton), in *The Federalist* 558, 573–74 (Wesleyan 1961) (Jacob E. Cooke, ed.). See also Bruce A. Ragsdale, ed, 1 *Debates on the Federal Judiciary: A Documentary*

the Seventh Amendment inquiry does not travel through the Amendment's "practical abilities and limitations" prong, the "public rights" analysis of that prong does not control the extent of the fire courts' influence on the right to jury trial.<sup>145</sup>

In steering between the Charybdis of "broad influence" and the Scylla of "no influence," however, the impact of the fire courts on the scope of the modern power to suspend civil juries in federal court remains an open question. Does this history allow Congress to suspend juries only for landlord-tenant disputes arising from catastrophic urban fires (which, given the dearth of such fires today, would effectively render the history irrelevant)? This stingy reading is unduly narrow. Cases interpreting the Seventh Amendment look to history not for a precise matching of factual and legal circumstances but for the best historical analogue; in the process, there is some abstraction from the particular setting under which jury trial did, or did not, occur in 1791.<sup>146</sup> On the other hand, abstracting too much from the particulars of the fire-court history—for example, by saying that because the fire courts resolved civil rather than criminal disputes, the fire-court history allows abrogation of jury trial in all civil cases—fails to respect the unique circumstances that led Parliament to create a limited discretion to abrogate jury trial.<sup>147</sup>

History, structure, and precedent are useful aids in finding the right level of abstraction.<sup>148</sup> With respect to history, the salient features of an exception to jury trial must account for Parliament's motivation in establishing the fire courts as well as the

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*History* 45 (Federal Judicial Center 2013) (suggesting the Hamilton was referring to "experiments in Great Britain and in some states that allowed other court procedures for settling property disputes").

<sup>145</sup> At the same time, this exception can help to shape the breadth of the limitation on jury trial. See notes 144, 172, 195, and accompanying text.

<sup>146</sup> For instance, in *Chauffeurs*, which involved whether a jury should hear a case involving a union's alleged breach of its duty of fair representation, the majority and dissenting opinions examined the best available analogues from 1791—an attorney malpractice action and a breach of fiduciary duty suit—in exploring the jury trial right, even though the factual and legal circumstances of a fair representation case varied from both analogues. See note 31. The Supreme Court also abstracts from historical practice in other constitutional contexts. See, for example, *District of Columbia v Heller*, 554 US 570, 582 (2008) (characterizing as "bordering on the frivolous" the argument that the only arms protected by the Second Amendment were those in existence at the time of the Amendment's ratification).

<sup>147</sup> See notes 133–34 and accompanying text.

<sup>148</sup> See, for example, *Alden v Maine*, 527 US 706, 713 (1999) (interpreting the Eleventh Amendment in accordance with "the Constitution's structure, its history, and the authoritative interpretations by this Court").

episodic nature of these courts in English practice. These features should be stated in a general enough fashion that they remain applicable in modern times<sup>149</sup> but are nonetheless fairly specific.<sup>150</sup> With respect to structural considerations, juries are a check against overreaching by government;<sup>151</sup> therefore, any limitations on the right should be narrow and necessary,<sup>152</sup> and ideally should require the assent of multiple branches of government.<sup>153</sup> With respect to precedent, the Court's Seventh Amendment jurisprudence is rich and stable; any exception to jury trial should fit generally within the Court's framework, which examines not only history but also "the remedy sought" and the narrow "public

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<sup>149</sup> See *Heller*, 554 US at 582, 627, quoting *United States v Miller*, 307 US 174, 179 (1939) (refusing to limit the Second Amendment's "right to keep and carry arms" to the exact weapons available at the time of the Amendment's ratification and holding instead that the right was limited to "the sorts of weapons . . . in common use at the time").

<sup>150</sup> The level-of-generality problem is common in constitutional analysis, and is often resolved by tailoring constitutional arguments at a more specific level. For example, in *Anderson v Creighton*, 483 US 635 (1987), the plaintiffs alleged that government officials violated their constitutional rights. To prevail, they needed to show that the constitutional right that the officials allegedly violated was a clearly established rule of constitutional law. *Id.* at 639. As the Court observed:

The operation of this standard [ ] depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. . . . [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

*Id.* at 639–40. See also *R.A.V. v City of St Paul, Minnesota*, 505 US 377, 383 (1992) (stating that the Court has adopted a "limited categorical approach" to exempt some speech from First Amendment protection, and noting that recent decisions "have narrowed the scope of the traditional categorical exceptions"); *id.* at 428 (Stevens concurring in the judgment) (stating that "we have consistently construed the 'fighting words' exception . . . narrowly").

<sup>151</sup> See Federalist 83 at 562 (cited in note 144) (describing two views held by supporters and opponents of the Constitution about jury trial, with "the former regard[ing] it as a valuable safeguard to liberty, the latter represent[ing] it as the very palladium of free government"). See also *Wellness International Network, Ltd v Sharif*, 135 S Ct 1932, 1961 n 1 (2015) (Thomas dissenting), quoting *Blakely v Washington*, 542 US 296, 306 (2004) ("There is some dispute whether the guarantee of a jury trial protects an individual right, a structural right, or both. . . . My view . . . leaves no doubt: It is a 'fundamental reservation of power in our constitutional structure.'").

<sup>152</sup> See *Granfinanciera*, 492 US at 42 n 4, 54 (noting that Congress may abrogate the right to jury trial in private cases by enacting legislation that establishes a regulatory regime, but only when jury trial would frustrate the objectives of this regime). See also *Heller*, 554 US at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.").

<sup>153</sup> See Bruce Ackerman, *The Emergency Constitution*, 113 Yale L J 1029, 1030, 1045–56 (2004) (arguing for "a more hard-headed doctrine—one that allows short-term emergency measures but draws the line against permanent restrictions" on civil liberties and further arguing that any emergency measures should contain political checks and balances).

rights” exception to jury trial.<sup>154</sup> These latter two factors can also help to identify features of the fire-court history out of which a fact-specific exception to jury trial can be built.

In light of these considerations, the history of the fire courts suggests that jury trial in federal court may be limited when four features are present: (1) a significant political, economic, or social crisis; (2) legal disputes arising out of this crisis that, if adjudicated under the legal system’s ordinary rules of substantive, procedural, and remedial law, impose an obstacle to a socially desirable activity necessary to resolve the crisis expeditiously; (3) an act of Congress that creates a tailored substantive, procedural, and remedial scheme that is intended to resolve disputes in a way that promotes the desired activity; and (4) statutory delegation to Article III judges of the power to strike juries when jury trial would thwart the effective administration of this scheme.<sup>155</sup>

The first factor—a significant crisis—acknowledges the national or regional catastrophes that urban fires once created. It also recognizes the episodic nature of the fire courts; abrogating jury trial should not be a permissible option under the Seventh Amendment for common or recurring types of legal disputes. The second factor—the unresponsiveness of ordinary legal rules to the crisis—also keys into the historical circumstances that gave rise to the fire courts. The common law of the period would have rigidly allocated the entire loss to one side or the other (likely the tenants); and, assuming that the chancellor was sympathetic to the plight of the losing tenants, all that equity could have done would have been to throw the entirety of the loss onto the landlords.<sup>156</sup> Neither result would have addressed the fundamental social need—to rebuild a city as quickly as possible. Given the way in which land development was financed (favorable lease terms to tenants to induce them to build),<sup>157</sup> the only way to spur the rebuilding of burned areas was to lower rents and extend lease terms to the point that tenants found it profitable to rebuild. But

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<sup>154</sup> See *Chauffeurs*, 494 US at 565 & n 4 (describing history, remedy, and the “public rights” exception as the three factors in the Seventh Amendment analysis); *Granfinanciera*, 492 US at 42 & n 4 (same).

<sup>155</sup> I assume that Congress has authority under Article I to enact such legislation and that Article III courts have subject-matter jurisdiction over the disputes and personal jurisdiction over the parties.

<sup>156</sup> See notes 60–75, 91–92, 116, and accompanying text.

<sup>157</sup> See notes 77–78 and accompanying text.

the rigid substantive and remedial law of the time could not accommodate this Solomonic solution; and in any event the procedural law would have kept the cases tied up in litigation for years.

The existence of legal obstacles in the wake of a crisis should not, however, be a sufficient reason to suspend jury trial; otherwise, jury trial rights would always be subject to suspension in times of emergency. Hence the third and fourth factors: Congress must craft a legal regime designed to foster activity that aids recovery from the crisis; and jury trial must be incompatible with this regulatory regime—an incompatibility that the legislation resolves by giving judges the discretion to suspend jury trial if necessary to implement the regime effectively.

Like the first two factors, the third and fourth factors draw substantially on the historical circumstances that gave rise to the fire courts. The legislation for London established a unique standard—available in neither law nor equity—that shared loss proportionally.<sup>158</sup> Every fire-court statute, after reciting the deficiencies of ordinary procedure in aiding expeditious rebuilding,<sup>159</sup> authorized the fire courts to adopt summary, streamlined procedures unlike anything available in traditional courts, then or since.<sup>160</sup> The remedies that Parliament authorized were also unavailable in ordinary litigation. Forgiving arrears and overlooking covenants to repair were not remedies within the ambit of the common-law courts; and while equity may have enjoyed the capacity to do both, neither equity nor common law could have taken the next step necessary to rebuild the towns: ordering the parties to accept longer leases on different terms from those originally negotiated.<sup>161</sup> Rather than tailoring the remedy to the parties' legal rights, which is the standard remedial approach in law

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<sup>158</sup> See note 87 and accompanying text. See also note 128 (discussing comparable grants to the Southwark Fire Court).

<sup>159</sup> See, for example, 18 & 19 Car II, c 7, § 1 (1667), in 5 Statutes of the Realm 601, 601 (stating that tenants affected by the London Fire would likely be “lyeable unto Suites and Actions to compell them to repaire and rebuild,” that the tenants “are not releiveable therein in any ordinary course of Law,” and that legal disputes “if they should not be determined with all speede and without charge would much obstruct the rebuilding of the said City”); 48 Geo III, ch 89, § 1 (1808) (on file with author) (stating that “divers Suits and Controversies are likely to arise between the Proprietors of and Persons interested in Houses and Lands [in Chudleigh], tending (if not prevented) to their great Vexation and Damage, and hindering the rebuilding of [Chudleigh]”).

<sup>160</sup> See notes 93–100 and accompanying text.

<sup>161</sup> See note 75 and accompanying text.

and equity,<sup>162</sup> Parliament ordered the fire courts to tailor their remedies to the social objective of rebuilding devastated communities.<sup>163</sup>

Finally, history shows that the fire-court judges did not have license on their own to suspend the use of juries: Parliament delegated to the judges the discretion to do so.<sup>164</sup> This discretion was confined to the adjudication of landlord-tenant disputes.<sup>165</sup> The judges obeyed the terms of this delegation precisely; when required by statute to refer certain matters for jury trial, they followed Parliament's command without hesitation.<sup>166</sup> We do not know the reason that they generally failed to employ juries, but it seems likely that they saw juries as an impediment to the operation of the fire-court scheme. Uniformity in outcome among similarly situated landlords and tenants was critical to speedy rebuilding;<sup>167</sup> in London many cases settled or were mediated against the backdrop of the Fire Court's decisions,<sup>168</sup> and the prospect of the jury trial might otherwise have led some optimistic parties to hold out. Impaneling juries in view of the mass dispersion of London residents after the Great Fire would also have presented significant logistical problems, and would have burdened returning citizens who were eligible for jury service with

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<sup>162</sup> See Douglas Laycock, *Modern American Remedies: Cases and Materials* 14–15, 265 (Aspen 4th ed 2010) (stating that the purpose of remedial law is to restore the plaintiff to the position she would have been in but for the wrong).

<sup>163</sup> In this sense, the fire courts adopted an approach to remedies that sometimes goes under the name of “do good” relief, which attempts to improve society according to a general notion of fairness rather than one of legal entitlement. See *id.* at 307. See also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv L Rev 1281, 1293, 1302 (1976) (describing how, in public law litigation, “right and remedy are pretty thoroughly disconnected,” so that “[r]elief is not conceived as compensation for past wrong in a form logically derived from the substantive liability . . . ; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons”).

<sup>164</sup> See note 101 and accompanying text.

<sup>165</sup> In particular, Parliament required the later fire courts to use juries to establish the value of property taken by the courts for public or rebuilding purposes. For the Great Fire, the Court of Aldermen, rather than the Fire Court, had responsibility for this task. See note 121 and accompanying text.

<sup>166</sup> See notes 104–05, 128–31, and accompanying text.

<sup>167</sup> Indeed, shortly after the London Fire Court was established, a lawyer wrote a text designed, in part, to help landlords and tenants determine the value of property and leases in the wake of the Great Fire. In his dedication of the book to the Fire Court judges, the author stated his hope that the book would help parties to adjust differences in valuation between themselves without resorting to the Fire Court, thus aiding “the Speedy Rebuilding” of London. See Stephen Primatt, *The City & Country: Purchaser & Builder* A2–A3 (London 1903) (originally published 1667).

<sup>168</sup> See note 90 and accompanying text.



public duties that would have distracted them from the task of rebuilding their own fortunes.

While the third and fourth factors remain close to the historical circumstances of the fire courts, they also rely on structural and precedential insights. Structurally, the requirement that Congress erect a unique statutory regime, one feature of which is the delegation of the power to suspend jury trial to judges, ensures that all three branches of government (Congress and the president through the requirements of bicameralism and presentment and the judiciary in its exercise of delegated discretion) agree on the necessity of suspending jury trial. In terms of precedent, the Supreme Court has acknowledged that “the remedy sought” is a critical determinant in the right to jury trial;<sup>169</sup> requiring that the statutory regime be constructed to induce socially beneficial behavior that existing law frustrates aligns such legislation with the historical range of equity, which tended to act only when existing legal remedies were inadequate and which tended to award injunctive relief that induced future lawful behavior.<sup>170</sup> The third and fourth factors also nod in the direction of the Court’s more recently developed “public rights” limitation on the right to jury trial, which authorizes delegation of fact-finding to nonjury tribunals as a component of a “public regulatory scheme,”<sup>171</sup> but only when “jury trials would impair the functioning of the legislative scheme.”<sup>172</sup>

## B. Applying the Abrogation Power in Modern Times

These four factors provide a narrow path to suspension of the right to civil jury trial in federal court. Although some courts and commentators have argued for a broad judicial power to strike

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<sup>169</sup> See *Chauffeurs*, 494 US at 565, quoting *Tull v United States*, 481 US 412, 417 (1987) (stating that “‘the remedy sought’ . . . is the more important [inquiry] in our analysis”).

<sup>170</sup> See *Aetna Health Inc v Davila*, 542 US 200, 222 (2004) (Ginsburg concurring), quoting *Mertens v Hewitt Associates*, 508 US 248, 256 (1993) (stating that “those categories of relief that were typically available in equity . . . [included] injunction, mandamus, and restitution, but not compensatory damages”); Laycock, *Modern American Remedies* at 380 (cited in note 162) (“It is hornbook law that equity will not act if there is an adequate remedy at law.”); id at 265 (“The injunction is a preventive remedy, because it seeks to prevent harm.”).

<sup>171</sup> *Thomas*, 473 US at 594.

<sup>172</sup> See *Granfinanciera*, 492 US at 42 n 4, 54; text accompanying note 139. Indeed, Congress could almost certainly authorize nonjury administrative adjudication in circumstances that meet the four factors outlined in the text. Thus, the principal effect of this narrow exception to the right to civil jury trial is to provide Congress with the option of investing federal judges, rather than agencies, with fact-finding authority.

juries in complex litigation,<sup>173</sup> fidelity to the historical record suggests greater caution. A multimillion dollar securities-fraud suit<sup>174</sup> stumbles on the first factor: in view of the size of our economy, a single company's alleged fraud does not present a national crisis. A massive antitrust dispute in a sensitive and economically vital industry<sup>175</sup> arguably might clear the first factor, but it would trip over the remaining factors: antitrust law and procedure do not themselves impose an obstacle to the activity necessary to overcome the crisis, nor has Congress established a unique regulatory scheme to spur activity necessary to overcome the arguable crisis or delegated to judges the decision whether jury trial would be incompatible with this scheme.

Nonetheless, it is possible to imagine cases that might fit within these four parameters. Recent disasters analogous to the Great Fire of London are the BP oil spill in the Gulf of Mexico in 2010, the destruction of sections of New Orleans in Hurricane Katrina in 2005, and al Qaeda's attack on the World Trade Center on September 11, 2001. A different example is the mortgage foreclosure crisis that exploded in 2008. Each event spurred substantial litigation.<sup>176</sup> Of course, for none of these disasters did Congress create a special court analogous to the London Fire Court,

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<sup>173</sup> See notes 32–33 and accompanying text.

<sup>174</sup> See, for example, *In re Boise Cascade Securities Litigation*, 420 F Supp 99, 103, 105 (WD Wash 1976) (striking a jury demand in a securities fraud case that had already resulted in \$50 million in settlements).

<sup>175</sup> See, for example, *In re Japanese Electronic Products Antitrust Litigation*, 631 F2d 1069, 1074, 1079–89 (3d Cir 1980) (affirming the district court's refusal to strike a jury under the Seventh Amendment in a case alleging a massive antitrust conspiracy among leading foreign manufacturers of electronics, but holding that the Due Process Clause may require a court to strike a jury "when a jury will not be able to perform its task of rational decisionmaking with a reasonable understanding of the evidence and the relevant legal standards").

<sup>176</sup> The September 11th attack generated significant litigation among the airlines, the developer of the World Trade Center, victims of the attack, and those who suffered injuries in responding to the attack. See generally *In re September 11 Litigation*, 751 F3d 86 (2d Cir 2014); *In re September 11 Property Damage Litigation*, 650 F3d 145 (2d Cir 2011); *In re World Trade Center Lower Manhattan Disaster Site Litigation*, 66 F Supp 3d 477 (SDNY 2015); *In re September 11th Litigation*, 590 F Supp 2d 535 (SDNY 2008). For a small slice of the Hurricane Katrina litigation, see *In re FEMA Trailer Formaldehyde Products Liability Litigation (Louisiana Plaintiffs)*, 713 F3d 807, 810–11 (5th Cir 2013) (holding that the government was immune from damages resulting from temporary housing that it provided to victims); *In re Katrina Canal Breaches Litigation*, 696 F3d 436, 444–48 (5th Cir 2012) (finding that the United States was immune from suit when damage had resulted from waters released by flood-control activity); *In re Katrina Canal Breaches Litigation*, 628 F3d 185, 189 (5th Cir 2010) (reversing the certification of a class action for victims of Hurricane Katrina). On the BP oil spill, see, for example, *In re Deepwater Horizon*, 772 F3d 350, 353 (5th Cir 2014) (holding that entry of partial summary judgment against the

and it certainly never granted federal judges the discretion to strike a jury. But it is easy to imagine legislation that could have done so.

To use the September 11th attack as an example, Congress created exclusive jurisdiction and venue in one federal court (the United States District Court for the Southern District of New York) for all legal claims arising from the attack; it also created a compensation fund to induce victims not to sue.<sup>177</sup> This legislation applied ordinary rules of substantive, procedural, and remedial law to the claims filed in court,<sup>178</sup> and it did not give judges of the Southern District the discretion to strike juries. Assume, however, that Congress had given these judges the ability to order the airlines to compensate victims based not on the airlines' legal fault but rather "based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant."<sup>179</sup> Further assume that Congress authorized the judges of the Southern District to strike juries if they might interfere with the administration of this scheme. Such hypothetical legislation has many elements of the legislation creating the London Fire Court: a significant political, social, and economic catastrophe; changes in the substantive rules of liability; and procedural and remedial law uniquely crafted to resolve the consequences of the catastrophe.

Despite these similarities, this statute would not pass muster under a test derived from the history of the fire courts. Lacking is

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owners of a leaking well did not violate their Seventh Amendment rights); *In re Deepwater Horizon*, 744 F3d 370, 374–78 (5th Cir 2014) (affirming the district court's interpretation of the parties' settlement agreement, which permitted compensation on a broader basis than the defendant believed proper). The mortgage-crisis litigation was spread across the entire nation, and included both thousands upon thousands of individual foreclosure cases as well as litigation against major institutional players whose actions allegedly precipitated the crisis. See Lydia Nussbaum, *ADR's Place in Foreclosure: Remediating the Flaws of a Securitized Housing Market*, 34 *Cardozo L Rev* 1889, 1903–08 (2013) (describing the breadth of the foreclosure crisis); Matthew Goldstein, *Bank of America to Pay \$6.3 Billion to Settle Mortgage Securities Suit* (NY Times, Mar 26, 2014), archived at <http://perma.cc/F748-CGKT> (describing a \$6.3 billion settlement against Bank of America for its role in selling mortgage-backed securities).

<sup>177</sup> See Air Transportation Safety and System Stabilization Act, Pub L No 107-42, 115 Stat 230 (2001).

<sup>178</sup> Air Transportation Safety and System Stabilization Act § 408(b)(2), 115 Stat at 241:

The substantive law for decision in any such suit [seeking damages against airlines as a result of the September 11th crashes] shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law.

<sup>179</sup> This direction was given to the special master who ran the September 11th Compensation Fund. Air Transportation Safety and System Stabilization Act § 405(b)(1)(B)(ii), 115 Stat at 238.

the critical element that drove the establishment of the fire courts: the sense that existing law imposed obstacles that frustrated activities necessary to alleviate the crisis. True, after September 11th the financial health of the airline industry was threatened as a result of lost aircraft and declining passenger revenue.<sup>180</sup> But existing law was not itself the obstacle that kept passengers from flying. Nor was the portion of the statute providing compensation to victims designed to create incentives for passengers to fly (thereby reviving the industry); its sole purpose was compensation.<sup>181</sup> If we assume that liability from existing and potential lawsuits was itself threatening the financial health of the airline industry, then legislation permitting judges to decide September 11th lawsuits on a “loss apportioned among the parties” standard—under which judges could set damages with an eye toward avoiding crushing liability—would fit within the parameters of the fire-court legislation. There would be a *crisis* (the potential collapse of the airline industry), and existing law would impose an *obstacle* (massive liability) that made resolution of the crisis difficult. Creating tailored law that allocated losses between victims and the airlines would encourage *prospective activity* (keeping the airlines operational) to alleviate the crisis, and the *variability of jury trial* would frustrate awards of damages calibrated to ensure the airlines’ financial health.

A less far-fetched example arises from the recent mortgage foreclosure crisis, which parallels the problems of urban fires in many ways. The collapse of the housing market in 2008 created an economic *crisis*. Existing law, which required home owners to make agreed-on payments and gave lenders the right to foreclose for nonpayment, created an *obstacle* to the activity necessary to overcome the crisis: continued payment of mortgages on an extended and reduced basis that reflected income levels and property values. Legislation that would have given a “mortgage court” the ability to forgive arrears and adjust mortgage payments in light of income and value would have altered the traditional legal rights of home owners and lenders, and would have done so in a way that encouraged *prospective activity* (continuing payments on

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<sup>180</sup> See Air Transportation Safety and System Stabilization Act § 101(a)(2), 115 Stat at 230.

<sup>181</sup> Air Transportation Safety and System Stabilization Act § 403, 115 Stat at 237 (“It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.”).

loans and continued home occupation) that might overcome the crisis.<sup>182</sup> If Congress allowed this hypothetical “mortgage court” to suspend jury trial for the monetary claims of lenders whenever the prospective *variability of jury trial* might threaten the uniformity of result necessary to induce home owners and lenders to settle in the shadow of the court’s justice,<sup>183</sup> then the analogy to the fire courts would be complete.

In recent years, scholars have noted the trend toward agency or executive-branch settlement or adjudication of broad social disputes, many of which contain both backward-looking (compensatory) and forward-looking (injunctive) elements.<sup>184</sup> Although administrative or executive resolution of such disputes holds the promise of swift, inexpensive, and consistent justice, the practice also creates substantial concerns about capture, loyalty, and accuracy.<sup>185</sup> A common theme that has emerged in this literature is to import into these administrative or executive-branch solutions some of the protections that litigants receive in court; but doing so is not without problems—including sticky separation-of-powers issues that surround attempts by Congress or the judiciary to regulate the actions of the executive when it refuses to adopt these protections voluntarily.<sup>186</sup>

An evident solution is to return these disputes to the courts, which already have in place numerous protections for individuals

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<sup>182</sup> In the wake of the 2008 mortgage foreclosure crisis, Congress and the president responded with legislation and executive actions that made it easier for home owners to secure refinancing or modification of existing mortgages based on property values and income levels. See, for example, Mortgage Reform and Anti-Predatory Lending Act § 1482, Pub L No 111-203, 124 Stat 2136, 2203 (2010), codified at 12 USC § 5219a (authorizing the secretary of the treasury to enact Home Affordable Modification Program guidelines); Emergency Economic Stabilization Act of 2008 § 110, Pub L No 110-343, 122 Stat 3765, 3775, codified at 12 USC § 5220 (requiring federal agencies that hold mortgages to assist home owners); Nussbaum, 34 *Cardozo L Rev* at 1909–12 (cited in note 176) (discussing federal programs that permitted home owners to refinance or modify mortgages).

<sup>183</sup> Express congressional delegation of this power is required. Congress often fails to state whether jury trial is available, thus leaving courts to determine the question under the Seventh Amendment. See *Tull*, 481 US at 425 (noting that the statute in question “did not explicitly state whether juries or trial judges were to fix the civil penalties”); *Lehman v Nakshian*, 453 US 156, 162 (1981) (stating that Congress “failed explicitly to” provide for jury trial in the relevant statute). Congressional silence would be insufficient to trigger a federal court’s capacity to suspend jury trial.

<sup>184</sup> See, for example, Michael D. Sant’Ambrogio and Adam S. Zimmerman, *The Agency Class Action*, 112 *Colum L Rev* 1992, 2002–07 (2012); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 *Harv L Rev* 486, 492–510 (2012); Adam S. Zimmerman, *Presidential Settlements*, 163 *U Pa L Rev* 1393, 1403–07, 1421–35 (2015).

<sup>185</sup> See Zimmerman, 163 *U Pa L Rev* at 1442–52 (cited in note 184).

<sup>186</sup> *Id* at 1453–61; Lemos, 126 *Harv L Rev* at 542–46 (cited in note 184).

caught up in large-scale catastrophes. It is often thought that jury trial stands in the way of this solution: parties often balk at the notion that twelve people “good and true” should determine the fate of an industry, and juries make more difficult the use of novel techniques to bifurcate or segment cases.<sup>187</sup> Congress’s power to give judges the discretion to abrogate jury trial creates another option to resolve at least some of these large-scale disputes. Of course, many considerations will ultimately bear on the choice of forum, but the constraints imposed by jury trial do not always need to be among them.

### CONCLUSION

The history of the fire courts supports a narrow exception to the right to a civil jury in federal court. To be faithful to this history, the exception requires that Congress design a legal regime removing obstacles that existing legal rules place in the way of an activity necessary for recovery from a crisis; in addition, any valid suspension of jury trial also requires Congress to delegate the power to Article III judges to suspend jury trial only if jury trial would threaten the effectiveness of the regulatory regime. Not every disaster fits within these parameters, and Congress must thread the needle carefully for those disasters that do.

Even if history gives Congress the license to suspend the right to civil jury trial in unique circumstances, the issue remains whether history should change the settled interpretation of the Seventh Amendment. Knowledge of the fire courts has been lost to time,<sup>188</sup> and the modern understanding of the scope of jury trial

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<sup>187</sup> For a general discussion of these concerns in the context of a class action, see *In the Matter of Rhone-Poulenc Rorer Inc.*, 51 F3d 1293, 1298–304 (7th Cir 1995).

<sup>188</sup> There are only two substantive mentions of the fire courts in American law reviews—one in 1891 and one in 2012—and both were brief. See Marc L. Roark, *Disease, War, and Waste: A Consideration of External Factors on the Trade Fixtures Doctrine between 1324-1850*, 43 *Cumb L Rev* 1, 4 (2012) (mentioning the London Fire Court in the context of developing a thesis that “disruptive events” sometimes “have little to no impact on the ongoing legal regimes”); Ezra R. Thayer, Note, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 *Harv L Rev* 172, 180 & n 6 (1891) (citing the fire courts as an example of “judges sent out to decide controversies according to their own judgment in each particular case, the mere *abitrium boni viri*”). Ezra R. Thayer, the son of noted constitutional scholar and Harvard Law School Professor James Bradley Thayer, was a student when he wrote his note; he later became dean of Harvard Law School. See William H. Dunbar, *Ezra Ripley Thayer*, 29 *Harv L Rev* 1, 1–2 (1915). There was a passing, nonsubstantive reference to the London Fire Court in another note. See Erik Stock, Note, *“We Were All Born on It. And Some of Us Was Killed on It”: Adopting a Transformative Model in Eminent Domain Mediation*, 23 *Ohio St J Disp Res* 687, 692 n 36 (2008) (mentioning a surveyor, Robert Hooke, whose postfire surveys were used by

has formed in ignorance of the fire courts' existence. In this regard, the fire courts raise an issue of more general significance to constitutional interpretation and construction. Knowledge of history will always be imperfect. Albeit infrequently, unexpected historical revelations may fundamentally alter our understanding of the meaning of a constitutional text. The question is to determine the better course: stick with the settled meaning of a text or conform the Constitution more closely to the fuller understanding that the historical record provides.<sup>189</sup> The issue is most salient for those who adhere to originalist methodologies of constitutional interpretation and construction, but it matters for any methodology that gives credence to history—as virtually all methods do.<sup>190</sup>

Whatever the answer in other constitutional contexts, the answer under the Seventh Amendment is clear: the history of the fire courts must be incorporated into our understanding of the right to a civil jury. Unlike other constitutional texts, the Seventh Amendment bakes the importance of history into its very words (“the right of trial by jury shall be *preserved*”).<sup>191</sup> Unlike other constitutional texts, the Amendment has generated broad agreement across time and across ideological and methodological spectrums that history matters in the Amendment's interpretation and construction.<sup>192</sup> Unlike the use of history in other constitutional contexts, the historical issue in the Seventh Amendment context does not require a value-laden construction of the Framers' intent or the original public meaning of a text.<sup>193</sup> Uniquely among constitutional provisions, the Seventh Amendment requires an inquiry into objective historical fact—English practice in 1791—rather than subjective intent or meaning.

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the London Fire Court). While Hooke made rare appearances in the Fire Court, the note confuses the Fire Court with the Court of Aldermen and Court of Common Council, which routinely called on Hooke's services to determine property lines. See P.E. Jones and T.F. Reddaway, *Introduction*, in Peter Mills and John Oliver, 1 *The Survey of Building Sites in the City of London after the Great Fire of 1666* x, xiii–xxii (London Topographical Society 1967).

<sup>189</sup> See Randy J. Kozel, *Settled versus Right: Constitutional Method and the Path of Precedent*, 91 *Tex L Rev* 1843, 1896 (2013) (“[T]he doctrine of stare decisis is founded on the premise that the value of leaving the law settled must ultimately be weighed against the value of getting the law right. Negotiating that tension . . . requires the integration of interpretive methodology as informed by underlying normative premises.”) (citation omitted).

<sup>190</sup> See notes 1–7 and accompanying text.

<sup>191</sup> US Const Amend VII (emphasis added).

<sup>192</sup> See notes 8–36 and accompanying text.

<sup>193</sup> See text accompanying note 6; Jeffrey M. Shaman, *The End of Originalism*, 47 *San Diego L Rev* 83, 93 (2010) (arguing that judges who “engage in originalist interpretation [ ] recreate the past according to their own visions, including, it should be said, their own values”).

Therefore, the history of eighteenth-century English practice must bear on the shape of the modern right to civil jury trial in federal court. One aspect of English practice in 1791 was the system of fire courts—ad hoc tribunals created by Parliament to respond to urban crises and given discretion to resolve disputes without the aid of juries. In a comparable modern crisis, history tells us that Congress and federal judges should have comparable powers.

Of course, history is only one factor affecting the scope of the Seventh Amendment.<sup>194</sup> But a limited power to suspend the right to jury trial in crises comparable to those that gave rise to the fire courts is consistent not only with history but also with the non-historical factors—“the nature of the relief sought” and “public rights” litigation—that the Supreme Court uses to shape the Seventh Amendment.<sup>195</sup> Present-day situations equivalent to those that led to the fire courts—situations in which existing legal remedies are inadequate to spur the activity necessary to overcome a crisis—are equivalent to the circumstances in which equity traditionally intervened. Thus, suspending the right to a civil jury during certain crises fits nicely within the Amendment’s analytical framework.

This conclusion does not require acceptance of the broad claim that the Seventh Amendment contains a “complexity exception” under which federal courts may suspend civil jury trial when cases are too complicated for ordinary citizens to understand.<sup>196</sup> Debate over the existence of this “exception” has raged for years.<sup>197</sup> The exception is on shaky ground for a number of reasons,<sup>198</sup> not the least of which is the lack of clear historical antecedents. Although fire-court lawsuits contained one element of modern complex litigation—a mass number of claims<sup>199</sup>—a careful, cautious, and faithful reading of the fire-court history does not permit its extrapolation to all complex cases.

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<sup>194</sup> See notes 10, 22, and accompanying text.

<sup>195</sup> See notes 169–72 and accompanying text.

<sup>196</sup> See notes 32–33 and accompanying text.

<sup>197</sup> For a recent appraisal of the issue, see Oldham, 71 *Ohio St L J* at 1051–53 (cited in note 34).

<sup>198</sup> See note 34 and accompanying text.

<sup>199</sup> See *Complex Litigation: Statutory Recommendations and Analysis* 7 (American Law Institute 1994) (noting that, although “[c]omplex litigation’ has no fixed definition,” one meaning is “multiparty, multiforum litigation” involving “[r]epeated relitigation of the common issues . . . [that] unduly expends the resources of attorney and client, burdens already overcrowded dockets, . . . [and] results in disparate treatment for persons harmed by essentially identical or similar conduct”).



Nor does this conclusion require acceptance of the general claim that emergencies reshape the meaning of the Constitution.<sup>200</sup> The fire courts show that the right to a civil jury had been subject to suspension in a time of crisis long before the ratification of the Seventh Amendment. In the circumstances that this Article has described, suspension of civil jury trial during a crisis was built into the right from the beginning.

As limited as the power is, the idea that Congress has any power to suspend the right to civil jury trial in federal court nonetheless sounds novel and radical. One of the standard arguments made for originalism is the damper that its historical method places on novel (and presumably undesirable) constitutional interpretations and constructions.<sup>201</sup> This argument assumes that the history of every constitutional provision is fully known. Occasionally, however, history holds a surprise. That is perhaps the ultimate lesson of the fire courts. History can sometimes act as a destabilizing force in constitutional interpretation and construction.

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<sup>200</sup> See Ackerman, 113 Yale L J at 1030–32 (cited in note 153) (arguing that national crises may in some circumstances allow temporary alterations in constitutional liberties).

<sup>201</sup> See Solum, Book Review, 91 Tex L Rev at 154–56 (cited in note 4) (arguing that a common core of all originalist approaches is the claim that history binds or constrains judges in constitutional interpretation).