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The Constitutional Right to Jury Trial: A Historical Exception for Small Monetary Claims

by

Margreth Barrett*

The demand for inexpensive, efficient, legal redress for small monetary claims has troubled judicial and legislative authorities throughout American and English judicial history.¹ The expense and complexity of common-law litigation procedures often exceed the value of a small monetary claim, effectively closing the courtroom door to small monetary claimants.²

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² See, e.g., City and County of San Francisco v. Small Claims Court, 141 Cal. App. 3d 470, 474, 190 Cal. Rptr. 340, 342-43 (1983) ("Ordinary litigation 'fails to bring practical justice' when the disputed claim is small, because the time and expense required by the ordinary litigation process is so disproportionate to the amount involved that it discourages legal resolution of the dispute.") (emphasis omitted) (quoting Pace v. Hillcrest Motor Co., 101 Cal. App. 3d 476, 478, 161 Cal. Rptr. 662, 663 (1980)); Flour City Fuel & Transfer Co. v. Young, 150 Minn. 452, 455, 185 N.W. 934, 936 (1921) ("Litigation by the common-law method over small claims is wasteful, and fails to bring practical justice because of an expense out of propor-

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Parliament and American state legislatures, past and present, have responded to this problem by creating special small claims tribunals. These tribunals have dispensed with many of the features of common-law litigation procedure that have generated complexity, expense, and delay, such as formal pleading, discovery, and lawyers. Presently, over three-fourths of American states have such small claims tribunals, generally denominated "small claims courts." Small claims jurisdiction is narrowly prescribed by statute and generally is limited to monetary claims under a stated amount, which ranges from $200 to $5000.

Notwithstanding sincere legislative effort, it often is contended that the present small claims tribunals have failed to accomplish their goal of making legal resolution of small monetary claims financially feasible and efficient. One reason for this failure is that most modern small claims procedures still provide litigants with access to a jury, either initially in the small claims tribunal, through removal to another court, or on appeal. Access to a jury, however, is usually waived. When a jury is demanded it adds tremendously to the cost, time, and complexity of trial, and can easily boost litigation costs beyond the amount of the claim.

3. See, e.g., Crouchman v. Superior Court, 192 Cal. App. 3d 102, 108, 217 Cal. Rptr. 910, 913, petition for review granted, 708 P.2d 703, 220 Cal. Rptr. 124 (1985); J. RUHNKA, S. WELLER & J. MARTIN, NATIONAL CENTER FOR ST. CTNS., SMALL CLAIMS COURTS 1-3 (1978) [hereinafter SMALL CLAIMS COURTS]; King, supra note 1, at 45-50; Steele, supra note 1, at 330-37 (means of decreasing expense include eliminating complicated pleading and pretrial procedures, relaxing the rules of evidence, reducing court fees, eliminating or discouraging attorneys, granting procedural discretion to judges, and attempting to encourage conciliation between the litigants); see also infra notes 58-69, 84-90, 104-110 and accompanying text.

4. Some states still retain updated versions of the old justice of the peace courts, which were more popular in past centuries. See Joseph & Friedman, Consumer Redress through the Small Claims Court: A Proposed Model Consumer Justice Act. 18 B.C. INDUS. COM. L. REV. 839, 840 n.5 (1977); King, supra note 1, at 44 n.12; infra notes 104-26 and accompanying text.

5. For a comparison of the jurisdictional limits of the small claims courts of various states, see SMALL CLAIMS COURTS, supra note 3, app. A; Joseph & Friedman, supra note 4, app.

6. See, e.g., Burger, supra note 1, at 88, 93; Joseph & Friedman, supra note 4, at 839-41.

7. See infra notes 12, 163 and accompanying text.


9. When superimposed on a small claims procedure designed to expand the average citizen's access to the justice system, the cherished procedure of trial by jury can have a highly destructive impact. Often it takes longer to obtain a jury trial than a court trial, and more appearances are required. Jury instructions, formal rules of evidence, and voir dire become necessary, which makes it difficult or impossible for the small claims plaintiff to proceed pro se.
Wealthy defendants have learned that merely demanding a jury as a strategic measure may deter less wealthy small claims plaintiffs from proceeding with their claims. In economic terms, a jury trial for very small monetary claims can be wasteful and can lead to injustice by making legal redress for small claims too expensive and time consuming to be feasible for the average small monetary claimant.

Generally, lawyer fees along with jury fees and time away from work will exceed the small claim of $500 or $1000. When the added inconvenience, effort, and time are taken into account, few small monetary claimants will determine that even a larger amount-in-controversy justifies proceeding. The jury trial thus serves as a potential roadblock to the small monetary claimant's access to the courts. See Crouchman v. Superior Court, 192 Cal. App. 3d 102, 113, 217 Cal. Rptr. 910, 916 (1985) (Brauer, J., concurring) ("The goal sought to be achieved by the small claims scheme would, in my opinion, be severely impeded by the availability of juries."); petition for review granted, 708 P.2d 703, 220 Cal. Rptr. 124 (1985); County of Portage v. Steinpreis, 104 Wis. 2d 466, 481, 312 N.W.2d 731, 738 (1981); H. Zeisel, H. Kalven & B. Buchholz, Delay in the Court 78 (1959) (research indicates that jury trials take roughly 40% longer than bench trials); Special Project, Judicial Reform at the Lowest Level: A Model Statute for Small Claims Courts, 28 Vand. L. Rev. 711, 781 (1975) [hereinafter Special Project, Model Statute] (providing jury trials in small claims courts would frustrate goal of speedy and inexpensive adjudication of small claims); Small Claims Court: Reform Revisited, 5 Colum. J.L. & Soc. Pros. Aug. 1969, at 56 (jury trials, which bring delay and increase procedural and evidentiary requirements, are inappropriate for small claims).

The fact that many small claims parties waive the jury trial is not an answer to the problem, for it provides no consolation to the individual small claims plaintiff who has a meritorious claim and whose ability to vindicate it is effectively blocked by his opponent's strategic demand for a jury trial. There is little comfort in a justice system that confronts an individual claimant with the Hobson's choice between abandoning a meritorious claim or proceeding with litigation at a cost that is likely to exceed the amount-in-controversy.

A number of critics have argued that the civil jury should be dispensed with in all cases. See, e.g., Karlen, Can a State Abolish the Civil Jury?, 1965 Wis. L. Rev. 103, 104; Landis, Jury Trials and the Delay of Justice, 56 A.B.A. J. 950 (1970); New Constitution for U.S., Trial, Aug.-Sept. 1970, at 5; O'Connell, Jury Trials in Civil Cases, 58 Ill. B.J. 796, 796-97 (1970); G. Schramm, supra note 1, at 30-33, 118-19. This Article does not address this larger question, but confines itself to the question of juries for "small claims."

10. See, e.g., Crouchman, 192 Cal. App. 3d at 114, 217 Cal. Rptr. at 917 (Brauer, J., concurring) ("[One] should ponder which small claims litigant is likely to have counsel and insist on a jury: it will be the corporation or governmental agency with access to house counsel, the rare indigent for whom Legal Aid wishes to bring a test case, and the man to whom money is no object. It certainly will not be Everyman. And it should not take the favored ones long to recognize the potential for legal extortion inherent in a jury demand."); COMMISSION ON THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE, REPORT TO 1934 N.Y. ST. LEGISLATURE, at 728-32 (1934) [hereinafter COMMISSION REPORT]; Markwardt, The Nature and Operation of the New York Small Claims Courts, 38 Alb. L. Rev. 196, 203 & n.68 (1974) (discussing "statistically-proven fact that most jury trials are demanded by defendants merely for the purposes of delay"); Joseph & Friedman, supra note 4, at 870 n.87.

11. See supra note 9; see also Stoller, Small Claims Courts in Texas: Paradise Lost, 47 Tex. L. Rev. 448, 456-57 (1969); Joseph & Friedman, supra note 4, at 869-70 & n.84; Burger, supra note 1, at 92-93.

An opposing argument suggests itself in the literature of critics who see the small claims court as a tool for accomplishing the social and political goals of giving greater power to consumers and a voice to the indigent. See generally Steele, supra note 1. From this point of
Nonetheless, courts, legislators, and scholars alike have assumed that access to a jury is constitutionally mandated for small monetary claims at some point in the litigation process because claims for money damages are "legal" in nature, and would have been tried to a jury at common-law. Aside from a small handful of isolated court opinions, this assumption has not been questioned or probed. State legislatures thus have supposed they had no choice but to structure small claims tribunals to provide a jury upon demand, either in the small claims tribunal itself, by removal to a common-law court, or through a trial de novo on appeal from the small claims tribunal.

The proceedings of many modern American small claims tribunals have been structured so that claims are tried to the court initially, with one or both of the parties retaining a right to demand a jury in a trial de novo on appeal. See infra note 15. This practice of deferring access to a jury until appeal has been challenged many times as a denial of the constitutional right to jury trial. In resolving these cases courts repeatedly have assumed that a right to jury exists for small monetary claims, but have found that such a right is satisfied by access to a jury on appeal. See, e.g., Capital Traction Co. v. Hof, 174 U.S. 1, 37 (1898); Universal Motor Lines, Inc. v. Walker, 237 Ala. 413, 414-15, 187 So. 495, 496-97 (1939); Wilson v. Oldfield, 1 Del. Cas. 622, 628 (1818); Flour City Fuel & Transfer Co. v. Young, 150 Minn. 452, 457, 185 N.W. 934, 936 (1921); Norton v. McLeary, 8 Ohio St. 171, 174 (1858); In re Smith, 381 Pa. 223, 230, 112 A.2d 625, 629 (1955).

Courts rarely have found it necessary to focus directly on the question whether the right to jury exists for small monetary claims, particularly for those which exceed the ceiling amount-in-controversy for juryless proceedings in the historic precedents to modern small claims courts. See infra notes 77-80, 87-91, 108-26 and accompanying text. When they have, a small handful of courts have determined that an exception to the constitutional right to a jury exists for very small monetary claims. See, e.g., Crouchman v. Superior Court, 192 Cal. App. 3d 102, 217 Cal. Rptr. 910, petition for review granted, 708 P.2d 703, 220 Cal. Rptr. 124 (1985); Maldonado v. Superior Court, No. 16272 (San Francisco Super. Ct., Sept. 8, 1983), rev. on other grounds, 162 Cal. App. 3d 1259, 209 Cal. Rptr. 199 (1984) (withholding opinion on question of exception to jury trial right for small claims); Guile v. Brown, 38 Conn. 237, 241-42 (1871); Iowa Nat'l Mut. Ins. Co. v. Mitchell, 305 N.W.2d 724, 725-27 (Iowa 1981).

Though legislatures have created access to juries for small claims, it is interesting to observe the many devices they have simultaneously adopted to discourage parties from availing themselves of that access. See, e.g., CAL. CIV. PROC. CODE §§ 117.12, 117.14 (West Supp. 1986) (awarding additional fees to plaintiff if defendant loses de novo appeal); ILL. ANN. STAT. ch. 110A, para. 285 (Smith-Hurd 1985) (jury fees); WIS. STAT. ANN. §§ 799.21(3), 814.61(4) (West Supp. 1986) (jury fees); see also Small Claims Court: Reform Revisited, supra note 9, at 56 (the District of
This Article suggests that, at least in many states, provision for a jury is not constitutionally mandated for small monetary claims. State constitutional jury trial guarantees generally are construed to preserve only the right to jury as it existed in England or the American colony or territory as of a certain time in history—usually the date the state constitution was adopted—and not to extend that right. During the relevant historical periods, England and many American colonies and territories provided a procedure for adjudicating small monetary claims that afforded no access to a jury. Thus, this historic exception to the right to jury should be incorporated into the present constitutional guarantees.

Section I of this Article discusses the proper test for determining whether a state constitutional right to jury exists for small monetary claims. This section determines that a historical test, which looks to the practice in England or in the American colony or territory when the state constitution was adopted, generally is the proper test.

Turning to an application of the historical test, sections II and III will examine the availability of juries for small monetary claims in England and in the American colonies and territories during the seventeenth, eighteenth, and nineteenth centuries. The section shows that these jurisdictions provided small claims tribunals to adjudicate small monetary claims without access to a jury at any phase of the litigation.

Section IV concludes that, under the historical test for the right to jury, the early practice of adjudicating small claims without provision for a jury should be incorporated into the constitutional jury trial guarantee in many states, and should permit similar juryless procedures today. This is so even when the original juryless small claims tribunals had concurrent jurisdiction with common-law courts which did afford a jury.

States may not provide any juryless small claims procedure unless one was available during the relevant historical period, but when a juryless small claims procedure is authorized, it need not duplicate the earlier procedures. Section V examines the constitutional requirements for jury-

Columbia discourages jury trials by imposing a fixed fee and requiring a written demand for jury on short notice); see generally G. SCHRAMM, supra note 1, at 83, 118-19.

Courts generally have tolerated such provisions. See, e.g., Capital Traction Co. v. Hof, 174 U.S. 1, 45 (1898) (upholding payment of a bond as a prerequisite to removal to a court where jury trial could be had); County of Portage v. Steinpreis, 104 Wis. 2d 466, 475-76, 312 N.W.2d 731, 739 (1981) (upholding additional fees when requested by jury). But cf. Flour City Fuel & Transfer Co., 150 Minn. at 458, 185 N.W. at 936 (holding a bond requirement for removal to a court where jury trial was available violative of state constitutional jury right).

When courts of general jurisdiction have concurrent jurisdiction with a small claims tribunal, the plaintiff often is deemed to have waived his right to jury by having chosen the small claims forum. See Legislation, supra, at 939-40.
less adjudication procedures. The Article suggests that a juryless procedure will satisfy constitutional requirements as long as the appropriate legislative body reasonably determines that a summary, juryless procedure is necessary in order to make relief available as a practical matter to persons with small monetary claims, fashions a procedure reasonably calculated to accomplish that end, and limits its availability to those claims whose amount-in-controversy and ramifications cannot justify the time and expense of a jury.

Finally, section VI suggests that modern legislative bodies, like their preconstitutional counterparts, should be able to determine and periodically adjust the amount-in-controversy that will be deemed a "small claim" for purposes of the juryless adjudication procedure. Amount-in-controversy requirements should take into account objective factors such as changes in the value of money and in the complexity and expense of litigation.

I. The Appropriate Test for Determining the Right to Jury

Ascertaining the appropriate test for determining whether a right to jury attaches to small monetary claims is a threshold consideration in this inquiry. In determining the extent of the seventh amendment guarantee of civil jury trial, federal courts apply a "historical test": The court looks to the practice in England in 1791, the year in which the states ratified the seventh amendment. If a jury would have been provided for the claim at that time, the Constitution requires that one be provided today. The seventh amendment is interpreted not to create

16. U.S. CONST. amend. VII. The seventh amendment states:
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.
18. The right to civil jury trial is not restricted to types of actions in existence in 1791 that were tried by jury. The right also attaches to subsequently created statutory causes of action that are analogous to actions that would have been tried by jury in 1791. J. FRIEDENTHAL, M.K. KANE & A. MILLER, supra note 13, at 481. However, if a statutory cause of action was unknown in 1791 then there is no right to jury. See, e.g., United States v. Sherwood, 312 U.S. 584 (1941) (no jury right in suit against United States in Court of Claims, since Tucker Act, not Constitution, created the cause of action against the government).
19. This historical test has been criticized as unduly rigid, arbitrary and unresponsive to modern needs. See, e.g., James, Right to a Jury Trial in Civil Actions, 72 YALE L.J. 655, 664 (1963); Wolfram, The Constitutional History of the Seventh Amendment, 57 MINN. L. REV. 639 (1973). Moreover, there is some evidence that the United States Supreme Court may be moving toward a more functional approach to determining the right to jury. See Kane, Civil Jury Trial: The Case for Reasoned Iconoclasm, 28 HASTINGS L.J. 1, 7-12 (1976). It is beyond
any new right to jury trial, but merely to preserve the right as it existed when the amendment was adopted.\textsuperscript{20}

The seventh amendment is inapplicable to the states,\textsuperscript{21} but virtually all the states have their own constitutional civil jury trial guarantees,\textsuperscript{22} and the federal courts' interpretation of the seventh amendment has been highly influential in the interpretation of these state provisions.\textsuperscript{23} The wording of the state provisions varies,\textsuperscript{24} but they, like their federal counterpart, routinely have been interpreted to preserve, not to extend or restrict, the right to a jury trial that existed as of a certain date.\textsuperscript{25} Some states have followed the federal practice of defining the right to jury as coextensive with the right as it existed in England.\textsuperscript{26} Many states, however, have looked to the practice in their own territory or colony prior to statehood, in addition to or instead of the practice in England.\textsuperscript{27} More-

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\textsuperscript{20} See United States v. Wonson, 28 F. Cas. 745, 750 (D. Mass. 1812) (No. 16,750); J. FRIEDENTHAL, M.K. KANE & A. MILLER, supra note 13, at 480, 483; Wolfram, supra note 19, at 640-42.


\textsuperscript{22} The only states without constitutional guarantees are Colorado (COLO. CONST. art. II, § 23 expressly guarantees a right to jury only in criminal cases) and Louisiana (LA. CONST. art. I, § 17 guarantees a right to jury only in criminal cases). Utah and Wyoming (UTAH CONST. art. I, § 10 and WYO. CONST. art. I, § 9) both lack an express provision, but courts have nonetheless assumed a constitutional right. See Kane, supra note 19, at 3 n.8.


\textsuperscript{24} E.g., ARiz. CONST. art. II, § 23 ("The right of trial by jury shall remain inviolate."); DEL. CONST. art. I, § 4 ("Trial by jury shall be as heretofore."); KY. CONST. Bill of Rights, § 7 ("The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate."); ME. CONST. art. I, § 20 ("In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced."); MICH. CONST. art. I, § 14 ("The right of trial by jury shall remain."); VT. CONST. ch. 1, art. XII ("[W]hen any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred.").

\textsuperscript{25} See J. FRIEDENTHAL, M.K. KANE & A. MILLER, supra note 13, at 503-04; J. PROFATTY, A TREATISE ON TRIAL. BY JURY § 84 at, 124-25 (1877); James, supra note 19, at 655.

A few states have extended the constitutional right to jury to cases that historically would have been tried in equity, without a jury. See GA. CONST. art. VI, § 16(1); TENN. CONST. art. I, § 6; TEX. CONST. art. I, § 15, art. V, § 10.

\textsuperscript{26} E.g., People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 286-87, 231 P.2d 832, 835 (1951); State v. Jutila, 34 Idaho 595, 597, 202 P. 566, 566 (1921); Miller's Nat'l Ins. Co. v. American State Bank, 206 Ind. 511, 515, 190 N.E. 433, 435 (1934).

\textsuperscript{27} See, eg., Bothwell v. Boston Elevated Ry. Co., 215 Mass. 467, 473, 102 N.E. 665, 668 (1913) (court looks to the right as it existed in the Colony of Massachusetts); Flour City Fuel & Transfer Co. v. Young, 150 Minn. 452, 454, 185 N.W. 934, 935 (1921) (court looks to
over, most state constitutional guarantees are interpreted to preserve the jury practice as it existed when the state constitutional guarantee was adopted. 28 This date, of course, varies from state to state.

Thus, in applying the historical test to determine whether, as a general matter, 29 states are required under their constitutions to provide a jury for small monetary claims, one must consider the jury practices for small claims in England and in the colonies and territories from the 1770s until the late 1800s. It generally does not matter whether the relevant jury practice was dictated by custom, case law, or statute. Many American courts have held that their state's constitution preserves the right to jury "as it existed at common law or by statute," 30 and statutes

practice in the Territory of Minnesota); El Paso Elec. Co. v. Real Estate Mart, Inc., 98 N.M. 490, 495, 650 P.2d 12, 17 (1982) (court looks to jury practice in the Territory of New Mexico); Baxter v. Putney, 37 How. Pr. 140, 143 (N.Y. County Ct. 1868) (court looks to the practice in the Colony of New York); Byers v. Commonwealth, 42 Pa. 89, 94-96 (1862) (court looks both to the practice in England and in the Province of Pennsylvania); State ex rel. Mullen v. Doherty, 16 Wash. 382, 384, 47 P. 958, 959 (1897) (court looks to the right to jury as it existed in the Territory).


There is some difference among the states regarding whether the constitutional right to jury is strictly the right as it existed when the first state constitutional jury guarantee was adopted, see, e.g., U.S. Fidelity & Guar. Co. v. Spring Brook Farm Dairy, Inc., 135 Conn. 294, 297, 64 A.2d 39, 41 (1949); Dudley v. Harrison, McCready & Co., 127 Fla. 687, 690, 173 So. 820, 825 (1937); North Carolina State Bar v. DuMont, 304 N.C. 627, 636, 286 S.E.2d 89, 98 (1982); Mason v. State ex rel. McCoy, 58 Ohio St. 30, 50 N.E. 6, 9 (1898), or whether it is the right as it existed when subsequent constitutional provisions were adopted, see, e.g., De Lamar v. Dollar, 128 Ga. 57, 58-59, 57 S.E. 85, 88 (1907); Liska v. Chicago Rys. Co., 318 Ill. 570, 583, 149 N.E. 469, 476 (1925); J. WEINSTEIN, H. KORN & A. MILLER, CPLR MANUAL § 23.03(a), at 23-11 (1980) (authored by O. Chase) (The New York Constitution was originally adopted in 1777 and interpreted to preserve the jury trial right existing at that time. New constitutions were adopted in 1821, 1846, and 1894 and each new constitution was held to expand the jury trial guarantee to all statutory jury trial rights that had been implemented since the prior constitution was adopted. Subsequent New York constitutions have been interpreted to freeze the constitutional right as of 1894.).

29. Of necessity, this Article will deal in some generalities. It will suggest appropriate general rules of law for determining the right to jury for small monetary claims and discuss the prevailing practices in England and certain sample American colonies and territories during the historical periods that are relevant to the determination of the right to jury in most states. The Article will seek to draw some conclusions based on these general rules and practices, but will not undertake an individualized analysis of the right to jury for small monetary claims in any particular state. Individual states may have varied the general rules of law discussed in this Article or may have unique historical jury practices that would lead to a different conclusion concerning the right to jury under the historical test than is reached in this Article.

which affirmatively granted a positive right to jury as well as those which expressly denied the right are both relevant.\textsuperscript{31}

II. The Right to Jury in England during the Seventeenth, Eighteenth, and Nineteenth Centuries

Between the seventeenth and late nineteenth centuries, the English judicial system was a veritable patchwork of diverse tribunals that had accumulated over the years to serve particular constituencies or to apply particular kinds of law.\textsuperscript{32} In addition to the three great common-law courts—\textsuperscript{33} the Court of Common Pleas, the Court of King's Bench and the Court of the Exchequer—there were equity courts, ecclesiastical courts, military courts, university courts, courts of commerce,\textsuperscript{34} and a

\begin{itemize}
  \item Mo. 1022, 1031, 62 S.W.2d 410, 414 (1933); Morton v. Morton Realty Co., 41 Idaho 729, 735-36, 241 P. 1014, 1015-16 (1925).
  \item In those states that look to the historic English practice to determine the constitutional right to jury, it might be argued that the state's policy concerning the incorporation of English statutes into the state common law would control the effect of English statutes governing the right to jury on the perimeters of the constitutional right. \textit{See generally} McKean, \textit{British Statutes in American Jurisdiction}, 78 U. PA. L. REV. 195 (1929). While this argument has some appeal, it ultimately should be rejected. Ascertainment of the English practice for purposes of constitutional jury trial guarantees is a separate constitutional inquiry, independent of a state's determination of which English statutes should be deemed incorporated into the state's substantive common law.
  \item For example, in Board of Supervisors v. Dunning, 20 Wis. 221, 227 (1866), the Wisconsin Supreme Court found that a territorial statute in effect when the state constitution was adopted authorized courts of law to refer long accounts to referees or auditors, thus depriving the parties of a jury determination. In light of this statute, the court concluded that there was no present constitutional right to jury for long accounts, for "[w]hen our state constitution was adopted, it did not take away this right of reference, but only provided that the right of trial by jury should remain as it was before." \textit{Id.} at 228; \textit{see also} Crouchman v. Superior Court, 192 Cal. App. 3d 102, 217 Cal. Rptr. 910 (English statute entrusting final resolution of cases involving less than 5 pounds to the judge of county court provides basis for denying right to jury in small claims courts today), \textit{petition for review granted}, 708 P.2d 703, 220 Cal. Rptr. 124 (1985); Lee v. Tillotson, 24 Wend. 337, 339 (N.Y. Sup. Ct. 1840) (upholding reference of entire cause as sanctioned by statute and practiced before adoption of the constitution); Willyard v. Hamilton, 7 Ohio 111, 116 (1836) (statute existing prior to state constitution provided for appointment of commissioners to resolve disputes in place of jury, and thus no right to jury was preserved in such cases by subsequent constitutional provision).
  \item \textit{See R. POUND, ORGANIZATION OF COURTS} 4-5 (1950).
  \item \textit{See generally} 3 W. BLACKSTONE, \textit{COMMENTS ON THE LAWS OF ENGLAND} *61-70 (describing ecclesiastical, military and maritime courts); \textit{id.} at *83-85 (describing the university courts); 1 W. HOLDSWORTH, \textit{supra} note 33, at 395-445 (describing the chancery court); \textit{id.} at 526-632 (describing courts of special jurisdiction including merchant, admiralty, military and ecclesiastical courts); R. POUND, \textit{supra} note 32, at 15-25 (giving a brief overview of the various English courts).
\end{itemize}
host of other more specialized tribunals.\textsuperscript{35} These courts varied not only in jurisdiction and substantive law applied, but also in procedure and means of determining questions of fact.\textsuperscript{36} The jury as we know it today, was the particular vehicle of the three common-law courts.\textsuperscript{37} At the bot-

\textsuperscript{35} For example, the Court of Marshalsea (jurisdiction over disputes involving members of the royal household), the Courts of Special Justices of Oyer and Terminus (jurisdiction to determine controversies over money collected for houses of correction or for the poor, and to hear complaints concerning colleges, hospitals and almshouses), and the Courts of the Stannaries (jurisdiction over disputes concerning tin mines and tin miners). \textit{See generally} 1 W. HOLDSWORTH, \textit{supra} note 33, 153-65, 208-09, 273-74; R. POUND, \textit{supra} note 32, at 4-22.

\textsuperscript{36} One of the earlier commerce courts, the ancient piepoudre, or “piepowder” court, has been cited as a precedent for modern juryless small claims tribunals. \textit{See} Iowa Nat’l Mut. Ins. Co. v. Mitchell, 305 N.W.2d 724, 727 (Iowa 1981); G. SCHRAMM, \textit{supra} note 1, at 4-5.

In the middle ages much trade was transacted at fairs and markets. The King granted franchises to individuals or towns to hold such fairs and the right to hold a piepouder court was considered an incident of the franchise. \textit{See} 1 W. HOLDSWORTH, \textit{supra} note 33, at 535-36; L. CROSS & J. HAND, \textit{THE ENGLISH LEGAL SYSTEM} 240-42 (5th ed. 1971). The piepouder courts’ jurisdiction extended to both civil and criminal complaints that arose in the course of the fair. 3 W. BLACKSTONE, \textit{supra} note 34, at *32-33; W. GREENWOOD, \textit{BOYAEYTHPION OR A PRACTICAL DEMONSTRATION OF COUNTY JUDICATURES} 149 (5th ed. 1675).

The piepouder courts applied the law merchant, which was based on the accepted customs of merchants throughout Western Europe. The steward of the fair presided, and he was assisted in disposing of cases by the gathered merchants, who were familiar with the customs. \textit{See} Thompson, \textit{The Development of the Anglo-American Judicial System}, 17 CORNELL L.Q. 9, 33 (1931) (suggesting that the merchants were loose equivalents of the suitors in the county, hundred and manor courts); 1 W. HOLDSWORTH, \textit{supra} note 33, at 536; R. POUND, \textit{supra} note 32, at 14; W. GREENWOOD, \textit{supra}, at 151; \textit{Pie Powder Courts in Essex}, 222 THE LAW TIMES 317 (Dec. 14, 1956) (referring to the merchants as a “scratch jury”). Complaints typically were tried and resolved on the day the injury in order to accommodate the schedules of the itinerant traders. Thus the piepouder courts exercised a very summary procedure. 3 W. BLACKSTONE, \textit{supra} note 34, at *32; Thompson, \textit{supra}, at 33; 1 W. HOLDSWORTH, \textit{supra} note 33, at 536-37; L. CROSS & J. HAND, \textit{supra}, at 243.

While noted for their efficient, inexpensive administration of justice, the piepouder courts were not, strictly speaking, small claims courts, for jurisdiction was not limited to any dollar amount. 1 W. HOLDSWORTH, \textit{supra} note 33, at 536; R. POUND, \textit{supra} note 32, at 14; H. KIRALFY, \textit{THE ENGLISH LEGAL SYSTEM} 190 (2d ed. 1956). Moreover, while piepouder courts were prevalent in the thirteenth and fourteenth centuries, R. WALKER & M. WALKER, \textit{THE ENGLISH LEGAL SYSTEM} 47 (2d ed. 1970), they began to decline in the fifteenth century when the common-law courts began expanding their jurisdiction to include commercial transactions and provided for an appeal by writ of error from the piepouder courts. \textit{See} 1 W. HOLDSWORTH, \textit{supra} note 33, at 539; R. WALKER & M. WALKER, \textit{supra}, at 47. By the eighteenth century, the common law incorporated the piepouder courts’ substantive rules of law. Thompson \textit{supra}, at 33; R. GRAVESON, \textit{EXAMINATION NOTEBOOK OF THE ENGLISH SYSTEM} 83 (2d ed. 1951); R. WALKER & M. WALKER, \textit{supra}, at 47. Because the piepouder courts were so highly specialized and so uncommon by the late 1700s, they are of little relevance to the present inquiry.

\textsuperscript{37} \textit{See} 1 F. POLLOCK & F. MAITLAND, \textit{THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I}, 173 n.3 (2d ed. 1959); J. DAWSON, \textit{A HISTORY OF LAY JUDGES} 289-90 (1960). It appears that William the Conqueror introduced the concept of trial by jury into England to serve as an alternative to forms of factfinding, such as wager of law and trial by ordeal, which were used in the Anglo-Saxon courts. J. FRIEDENTHAL, M.K. KANE & A.
tom of the hierarchy of English courts was a series of local, inferior courts which focused primarily upon the resolution of small civil disputes. For present purposes, these courts can be divided into three categories: The ancient communal and feudal courts, the courts of request, and the new county courts. The courts of request and new county courts in particular provide historic precedent for modern juryless small claim procedures.

A. The Ancient Communal and Feudal Courts

The ancient county, hundred, and manorial courts enjoyed their greatest popularity in the middle ages, and had declined significantly by the seventeenth century. During the thirteenth century, judicial interpretations of the Statute of Gloucester had limited these courts' civil jurisdiction to personal actions involving less than forty shillings, although, at least in the county and manorial courts, actions involving larger sums or title to real property could be heard through means of a writ of justicies.

Most of the available records and studies of the county and hundred

Miller, supra note 13, at 472; see infra notes 38-53 and accompanying text. The early juries differed considerably from today's impartial finders of fact, but by the end of the fifteenth century the jury had essentially evolved to its present character. See J. Proffatt, supra note 25, at 51-52; W. Forsyth, History of Trial by Jury (1876); J. Friedenthal, M.K. Kane & A. Miller, supra note 13, at 472.

It was this "common-law jury" of twelve that most courts found to be preserved in the state constitutional jury trial guarantees. E.g., Hall v. Brown, 129 Kan. 859, 861, 284 P. 396, 396 (1930); Malinowski v. Moss, 196 Wis. 292, 295, 220 N.W. 197, 198 (1928).

38. These were not the only courts in existence that specialized in resolving small monetary claims. For example, some of the borough courts took the form of small debt courts. These courts used suitors or their equivalents and generally resembled the manorial courts. See 1 W. Holdsworth, supra note 33, at 149-51; 1 F. Pollock & F. Maitland, supra note 37, at 638-39, 643; Thompson, supra note 36, at 16; infra notes 39-53 and accompanying text. See generally Fourth Report to His Majesty by the Commissioners on Practice and Proceedings of the Superior Courts of Common Law app. I (1831-32) [hereinafter Fourth Report] (description of small debt courts existing in 1831).


40. 6 Edw., ch. 8 (1278).

41. J. Dawson, supra note 37, at 180; see 1 F. Pollock & F. Maitland, supra note 37, at 530-31 (real actions do not come to the hundred court, and actions are not transmitted to hundred court by the King's courts).

At least to the extent that these local courts exercised independent jurisdiction, they tended to apply local, customary law rather than common law. See H. Arthurs, Without the Law 19-21 (1985); M. Radin, supra note 39, at 178.

42. 1 W. Holdsworth, supra note 33, at 72; Fifth Report to His Majesty by the Commissioners on the Practice and Proceedings of the Superior Courts of Common Law 9 (1833) [hereinafter Fifth Report].
courts focus on their practices in the middle ages. They portray these communal courts as being presided over by the sheriff or his bailiff.43 Suitors, or doomsmen—local landowners who were required by law to attend court sessions44—determined and gave the judgment of the court.45 This judgment was not the equivalent of a jury's verdict; rather, it dealt primarily with the allotment of proof. After the parties had made their respective pleadings, the suitors would determine by which of several possible methods one of the litigants would have to prove his case: ordeal, compurgation, wager of law, or duel.46 Thus, the function of the suitors differed greatly from that of the jury, which developed independently in the King's common-law courts.47

The feudal or manorial courts—Courts Baron and Customary Courts—were in the private hands of manor lords and generally were presided over by the manor steward.48 Suitors served as the judges of these courts, as they did in the county and hundred courts.49

While little information exists concerning the practices of the relatively few county, hundred, and manorial courts that remained active in the seventeenth, eighteenth, and nineteenth centuries, it appears that these courts incorporated common-law type juries into their procedures, in addition to the suitors and other ancient procedures and traditions which they retained. Juries were used regularly in cases involving title to land or personal claims of more than forty shillings, which were authorized by writ of justicies.50 There is some evidence that juries were used at

43. 3 W. BLACKSTONE, supra note 34, at *35-36; 1 F. POLLOCK & F. MAITLAND, supra note 37, at 529. Some of the hundred courts were on private lands. In such cases, the steward of the manor typically presided over the court. Id. at 530; M. RADIN, supra note 39, at 177.

44. For a comprehensive discussion of the nature and duties of suitors, see R. PALMER, LAWYER AND DOOMSMAN IN THE OLD ENGLISH COUNTY COURT (1977); Maitland, The Suitors of the County Court, 11 ENG. HIST. REV. 417 (1888); see also M. RADIN, supra note 39, at 174.

45. 3 W. BLACKSTONE, supra note 34, at *36; 1 F. POLLOCK & F. MAITLAND, supra note 37, at 529-30. See generally R. PALMER, supra note 44.

46. See, e.g., W. MORRIS, THE EARLY ENGLISH COUNTY COURT 111-112 (1926); 2 F. POLLOCK & F. MAITLAND, supra note 37, at 598-603.

47. See 1 F. POLLOCK & F. MAITLAND, supra note 37, at 139-42, 550; 2 F. POLLOCK & F. MAITLAND, supra note 37, at 629.

48. 1 F. POLLOCK & F. MAITLAND, supra note 37, at 531, 550-51, 592-94. Courts baron were said to be held for the freeholders of the manor, while the customary courts were held for the copyholders. It appears, however, that in many cases the same body served both constituencies. Id. at 593; J. DAWSON, supra note 37, at 197.

49. J. DAWSON, supra note 37, at 196; 1 F. POLLOCK & F. MAITLAND, supra note 37, at 531, 551, 593. There is some authority suggesting that the steward was the sole judge in the customary courts. 1 W. HOLDSWORTH, supra note 33, at 181-82; 1 F. POLLOCK & F. MAITLAND, supra note 37, at 531, 593.

least occasionally in personal actions involving less than forty shillings, which were in the regular jurisdiction of these courts, but unfortunately little information exists to demonstrate the prevalence of this practice. It is clear that the earlier modes of proof—such as compurgation—were still available as alternative modes of determining questions of fact.

Though these ancient courts declined in importance, their official existence continued until well into the nineteenth century.

B. The Courts of Request

The decline in popularity of the county, hundred, and manorial courts was due to a number of perceived shortcomings, including their high litigation costs, obsolete, inconvenient methods of trial, slowness, limited ability to summon witnesses and enforce judgments, and sometimes, unfavorable rules of substantive law. By the seventeenth century, many small monetary claimants preferred to bring their suits in the common-law courts. While litigants wished to avoid the local courts, however, bringing or defending suits for small sums in the central common-law courts was also unsatisfactory. Such suits often entailed lengthy travel to and from the court and invariably involved high litigation costs that could not be justified. Indeed, as Sir William Holdsworth notes, the situation was “almost a denial of justice” for poor persons, for recovery of a small debt had become too inconvenient and

51. See C. KARRAKER, supra note 39, at 46-47 (Karraker speculates that by this time compurgation and other ancient modes of proof had been almost abandoned and that trial by jury had become the usual method of proof); 1 F. POLLOCK & F. MAITLAND, supra note 37, at 593-94; see also 1 F. POLLOCK & F. MAITLAND, supra note 37, at 139 n.1 (suggesting that suitors transformed into jurors in manorial courts); W. GREENWOOD, supra note 36, at 21-22. See generally Fifth Report, supra note 42, at 9 (incompetent jurors cited as a problem in hundred courts and courts baron in the 1800s); J. DAWSON, supra note 37, at 181 n.12, 207; M. MCINTOSH, AUTONOMY AND COMMUNITY 196-200 (1986).

52. See, e.g., J. DAWSON, supra note 37, at 181; 1 F. POLLOCK & F. MAITLAND, supra note 37, at 550 (“In the seventeenth century John Smyth could boast of the good justice done by the free suitors of the hundred of Berkeley where ‘there had not been in any age any trials by jury.’”).

53. Fourth Report, supra note 38, app. I; H. ARTHURS, supra note 41, at 18; J. DAWSON, supra note 37, at 232 (manorial courts); M. RADIN, supra note 39, at 177 (hundred court jurisdiction effectively abolished in 1867); Thompson, supra note 36, at 12-13; see R. POUND, supra note 32, at 6.

54. C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 289 (1949); 1 W. HOLDsworth, supra note 33, at 72-73, 150; C. KARRAKER, supra note 39, at 52; see Cross, Old English Local Courts and the Movement for their Reform, 30 Mich. L. Rev. 369, 372-73 (1932); Thompson, supra note 36, at 24. These problems only grew worse with time, as is demonstrated by the Fifth Report, supra note 42, at 6-9; see also T. SNAGGE, EVOLUTION OF THE COUNTY COURT 8 (1904).

55. 3 W. BLACKSTONE, supra note 34, at *36-37.

56. See L. CROSS & J. HAND, supra note 36, at 278-79.
expensive to pursue. An increasingly strong demand arose for courts to handle small claims—particularly small debts—efficiently and inexpensively.

This demand led to creation of the "Court of Requests," or Small Debtor's Court, in London in 1519. This court was created originally through an act of Common Council which provided that two aldermen and five commoners would hold court and determine, in a summary fashion and without a jury, cases of debt under forty shillings. Parliament confirmed this act of Common Council through statutes in 1604 and 1605.

This London court was extremely popular and heavily used. Later in the seventeenth century, and in the eighteenth and nineteenth centuries, similar courts of request were created in most principal cities through special private acts of Parliament. Though it is difficult to determine the precise number, it appears that at least twenty-six acts had been passed creating courts of request by 1791, and that these courts were handling large numbers of claims. By 1846, there were 106 acts in effect creating 400 courts of request, at which time the courts of request

57. 1 W. HOLDsworth, supra note 33, at 188.

In 1601, Parliament passed a statute attempting to preserve the jurisdiction of the existing local courts and to discourage "small and trifling suits" clogging the central common-law courts. An Act to Avoid Trifling or Frivolous Suits in her Majesty's Courts at Westminster, 1601, 43 Eliz., ch. 6. This statute provided that judges could deprive plaintiffs of costs when they recovered less than forty shillings, and authorized sanctions in some cases for bringing small claims in the common-law courts. Id.; see 1 W. Holdsworth, supra note 33, at 73-74. This statute, however, was ineffective: Litigants, who found the existing local courts unsatisfactory, found ways to circumvent it and judges were loath to enforce it. J. Dawson, supra note 37, at 284; 1 W. Holdsworth, supra note 33, at 74. Thus the problem continued to grow.

59. See 2 Jac., ch. 14 (1604); An Act for the Recovery of Small Debts, and for the Relieving of Poor Debtors in London, 1605, 3 Jac., ch. 15. These provisions were refined somewhat in An Act to Explain and Amend an Act Made in the Third Year of the Reign of King James the First, entitled, An Act for the Recovering of Small Debts, and for the Delivering of Poor Debtors in London, 1741, 14 Geo. 2, ch. 10. See H. Bliss, The History and Antiquities and Jurisdictions of All the Courts of Law 214-19 (1835); Winder, supra note 58, at 370-71.
60. H. ArthurS, supra note 41, at 25-26; Winder, supra note 58, at 369.
61. This number is derived from a list of court of request acts still in force in 1846, when the courts of request were formally abolished and replaced by the new county courts. See An Act for the more easy Recovery of Small Debts and Demands in England, 1846, 9 & 10 Vict., ch. 95, schedules A & B [hereinafter Chapter 95]. There may have been additional acts passed that were later repealed and thus are not listed.
62. See 1 W. Holdsworth, supra note 33, at 190; Winder, supra note 58, at 379.
were formally abolished and replaced by the new county courts.63

The structure and jurisdiction of the courts of request were not uniform. Most, however, consisted of several lay persons, called commissioners, who sat once or twice a week to decide cases without a jury, based on evidence offered by the parties. Procedures were extremely simple and expenses were trifling; the system was designed for informality and speed of decision.64

Generally, the court of request's jurisdiction was concurrent with that of the preexisting local communal and feudal courts.65 With regard to the common-law courts, some court of request acts provided that the court's jurisdiction would be exclusive within the territory covered by the act.66 In other acts, jurisdiction was concurrent with the common-law courts, but small claims plaintiffs initiating their suits in the common-law courts could be deprived of costs, or in some instances might be required to pay the defendant's costs.67 Cases brought in the courts of request generally could not be appealed68 or removed.69 Earlier court of request

63. H. ARTHURS, supra note 41, at 26; Winder, supra note 58, at 386-87.

These courts were extremely busy. In 1830, ten of the thirteen busiest local courts were courts of request, and one court of request in London alone handled almost 30,000 claims in a single year—nearly one-third of the entire caseload of all the superior courts. H. ARTHURS, supra note 41, at 26.

64. See H. ARTHURS, supra note 41, at 26; L. CROSS & J. HAND, supra note 36, at 280; Winder, supra note 58, at 370.

Unlike in other local courts, see R. PALMER, supra note 44, at 97-153; see supra notes 38-51 and accompanying text, few lawyers appeared in the courts of request because of the absence of a system of costs. Indeed, some statutes establishing courts of request actually forbade the appearance of lawyers. H. ARTHURS, supra note 41, at 43; see also Arthurs, 'Without the Law': Counts of Local and Special Jurisdiction in Nineteenth Century England, in CUSTOM, COURTS AND COUNSEL, SELECTED PAPERS OF THE SIXTH BRITISH LEGAL HISTORY CONFERENCE 130 (A. Kiralfy, M. Slatter & R. Virgule eds. 1983).

These courts of request should not be confused with the Court of Request created in the early Tudor period, which was a central court and an off-shoot of the Privy Council. This court of equity, sometimes known as the “poor man’s chancery,” was abolished in 1641. Cross, supra note 54, at 373.

65. Winder, supra note 58, at 374-75.

66. Id. at 375.


68. H. ARTHURS, supra note 41, at 45; H. BLISS, supra note 59, at 218; 1 W. HOLDSWORTH, supra note 33, at 190. One year before the courts of request were terminated and replaced by the new county courts, Parliament passed a statute permitting superior court review by certiorari in cases involving ten pounds or more. Small Debts Act, 1845, 8 & 9 Vict., ch. 127, § 21.

69. See, e.g., 4 Geo. 3, ch. 40, § 14 (1763); 17 Geo. 3, ch. 15, § 11 (1777); H. ARTHURS, supra note 41, at 45. After the jurisdiction of courts of request was enlarged, provision for
acts provided that the commissioners were to proceed according to "equity and good conscience," but later acts provided that the law should be followed. When the act provided for decisions in accordance with equity and good conscience, the commissioners proceeded according to their own ideas of natural justice; it appears that they were not intended to, and did not purport to apply Chancery equity. Rules of common law were respected to a certain extent, regardless of whether the applicable act called for good conscience or law, but since most commissioners were not lawyers, common sense was probably the most frequent touchstone. Later acts provided for experienced barristers to assist the commissioners, and it is likely that under their influence courts of request followed substantive common law more closely.

The scope of actions permitted in courts of request was narrow at first but expanded over time. The early parliamentary acts only authorized actions for debt under forty shillings. "Debt" was construed rather narrowly, and the acts expressly excluded actions for rent, actions based upon real contracts, and debts arising from a testament or matrimony or anything "properly belonging to the ecclesiastical courts." Beginning in 1805, however, Parliament began to broaden the jurisdiction of courts of request to include cases of assumpsit and insimul computasset, quantum meruit, trover and conversion, and trespass and detinue for goods or chattels taken or detained. Thereafter this broader jurisdiction became the rule.

Also, beginning in 1805, Parliament began to raise the jurisdictional removal was sometimes made for cases involving sums above a specified amount. See, e.g., 8 & 9 Vict., ch. 127, § 21 (1845) (authorizing removal for suits involving ten pounds or more). Winder, supra note 58, at 375; see, e.g., 4 & 5 Vict., ch. 77, § 24 (1841); 3 Vict., ch. 68, § 20 (1840).

71. One commentator concludes that courts of request "used their wide discretionary powers . . . to achieve a genuine blend of communal justice and situation equity." H. ARTHURS, supra note 41, at 29; see also W. HUTTON, COURTS OF REQUEST (1840); Arthurs, supra note 64, at 136-137, 140-141.

72. See H. ARTHURS, supra note 41, at 28-30; Winder, supra note 58, at 375-76, 389-91.

73. See, e.g., 1 & 2 Vict., ch. 90, § 4 (1838); 45 Geo. 3, ch. 67, § 3 (1805).

The fact that many courts of request were not strictly tied to substantive common law should not invalidate them as precedent for a juryless procedure in modern small claims tribunals. Indeed, while modern small claims courts apply the common law, some are directed in addition to do "substantial justice" between the parties, in much the same spirit as the old courts of request. See SMALL CLAIMS COURTS, supra note 3, at 1-2.

74. Winder, supra note 58, at 388-89. For example, "debt" was considered not to include special actions on the case for breach of agreement or for unliquidated damages. Id.

75. Slatter, supra note 67, at 102; Winder, supra note 58, at 374, 388.

76. 45 Geo. 3, ch. 67, § 16 (1805); Winder, supra note 58, at 389. See Arthurs, supra note 64, at 137-42, for a detailed description of the caseload of several courts of requests during the period between 1830-1840.
maximum amount-in-controversy, which routinely had been set at forty shillings. In that year, the court in Bath received jurisdiction to try cases up to ten pounds. 77 The following year, the Grimsby Act fixed the limit of its court at five pounds 78 and thereafter no more forty-shilling courts were created. Five pounds became the standard maximum amount-in-controversy until 1833, when it became customary for Parliament to authorize actions up to fifteen pounds. 79 When courts of request were created with jurisdiction over cases involving up to fifteen pounds, Parliament generally provided that the commissioners alone would determine cases under five pounds, but that a jury would be afforded for cases above five pounds. 80

The courts of request were controversial from their inception, partly because they were run by lay persons who often were perceived as inept or corrupt, and partly because they permitted parties to testify as witnesses on their own behalf, a previously unknown practice which was feared because it was expected to encourage perjury. 81 These and other

77. 45 Geo 3, ch. 67, § 16 (1805); see also Winder, supra note 58, at 388.
78. 46 Geo. 3, ch. 37, § 10 (1806). The Bath and Grimsby Acts both specified that three commissioners could hear claims under forty shillings, but five commissioners had to be present to hear claims above forty shillings. 46. Geo. 3, ch. 37, § 2 (1806); 45 Geo. 3, ch. 67, § 7 (1805); see also 1 & 2 Vict., ch. 90, § 3 (1838).
79. Winder, supra note 58, at 388. This increase in jurisdictional amount apparently was Parliament's response to pressure from litigants who found the courts of request vastly more efficient and cost-effective than the ancient local courts and the common-law courts. Id. Indeed, it was not uncommon for plaintiffs with claims above the jurisdictional limit to abandon prosecution of the excess in order to avoid having to bring suit in other courts. Id.
80. E.g., Blackburn Act, 1841, 4 & 5 Vict., ch. 77, § 32; Tavistock Act, 3 Vict., ch. 68, § 28 (1840); see also Winder, supra note 58, at 381.
81. See 1 W. HOLDSWORTH, supra note 33, at 190; Winder, supra note 58, at 372.
Courts of request were also criticized because of their "lack of judicial strength and their inability to enforce due execution of their own process, or compel the attendance of witnesses," T. SNAGGE, supra note 54, at 8, and because "persons of quality" were compelled "to submit for small debts to a company of shopkeepers." Winder, supra note 58, at 372. See generally Fifth Report, supra note 42, at 11-12 (summarizing perceived problems with the courts of request); Cross, supra note 54, at 375-85; Keane, The Small Debts Act, 36 LAW MAG. 189, 194-95 (1846).

Blackstone acknowledged the need for small claims courts to dispense quick, inexpensive justice, but did not feel that the courts of request were the answer.

The time and expense of obtaining this summary redress are very inconsiderable, which make it a great benefit to trade. . . . But it is to be feared, that the [courts of request may] be attended in time with very ill consequences: as the method of proceeding therein is entirely in derogation of the common law; as their large discretionary powers create a petty tyranny in a set of standing commissioners; and as the disuse of the trial by jury may tend to estrange the minds of the people from that valuable prerogative of Englishmen, which has already been more than sufficiently excluded in many instances. How much rather is it to be wished, that the proceedings in the county and hundred courts could again be revived, without burthening the freeholders with too frequent and tedious attendances; and at the same time re-
sources of dissatisfaction persisted despite the heavy use of these courts. Ultimately, in 1846, Parliament responded by repealing all the court of request acts and creating the new county courts.82

C. The New County Courts

The new county courts differed from the old courts83 in virtually every respect except name and purpose. Like the courts of request, the new county courts were especially designed to provide cheap and efficient justice.84

To ensure convenience, the act creating the new county courts called for an extensive network of courts across England. The Act further required that judges be experienced barristers.85 The Act directed that the new courts be conducted without formal pleadings, “in a summary way,”86 and that they continue the tradition of denying a jury in suits for very small amounts.87 When the amount-in-controversy was moving the delays that have insensibly crept into their proceedings, and the power that either party have of transferring at pleasure their suits to the courts at Westminster!

3 W. BLACKSTONE, supra note 34, at *81-83. Blackstone favored the emulation of a statute passed in 1749 to upgrade the County Court of Middlesex. This upgraded court had jurisdiction over cases under forty shillings and provided a trained barrister to administer the court and a jury of twelve freeholders, summoned by rotation. Id. at *82-83; see also L. CROSS & J. HAND, supra note 36, at 280; 1 W. HOLDsworth, supra note 33, at 191-92.

82. Chapter 95, supra note 61; see L. CROSS & J. HAND, supra note 36, at 280-82; Cross, supra note 54, at 375-85; Winder, supra note 58, at 383.

83. See supra notes 39-53 and accompanying text. In 1846, the new county court act replaced not only the courts of request but the old county courts as well. 9 & 10 Vict., ch. 95 (1846); Thompson, supra note 36, at 13.

84. The 1846 new county courts act stated:

[W]hereas the County Court is a Court of ancient Jurisdiction having Cognizance of all pleas of Personal Actions to any Amount by virtue of a Writ of Justicies issued in that Behalf: And whereas the Proceedings in the County Court are dilatory and expensive, and it is expedient to alter and regulate the Manner of proceeding in the said Courts for the Recovery of Small Debts and Demands [i.e., the Courts of Requests], and that the Courts established under the recited Acts of Parliament . . . should be holden after the passing of this Act as Branches of the County Court [it was enacted that certain county courts of the new model would be established]. . . .

Chapter 95, supra note 61, § 1; see also B. O'Donnell, Cavalcade of Justice 202 (1952).

85. Chapter 95, supra note 61, § 9; see B. O'Donnell, supra note 84, at 203.

86. Chapter 95, supra note 61, §§ 58, 74; see also L. Cross & J. Hand, supra note 36, at 282. For a brief description of the procedure in the new county courts, see Cautherley, The County Court System, 7 Law Q. Rev. 346 (1891).

87. The Act provided:

[T]he Judge of the County Court shall be the sole Judge in all Actions brought in the said Court, and shall determine all Questions as well of Fact as of Law, unless a Jury shall be summoned as herein-after mentioned. . . . [I]n all Actions where the Amount claimed shall exceed Five Pounds it shall be lawful for the Plaintiff or Defendant to require a Jury to be summoned to try the said Action; and in all Actions
less than five pounds, there was no right to a jury; the judge was directed to decide such cases by himself, although he could, at his discretion, order a jury for a particular case. A five-member jury was provided for cases involving more than five pounds. In a case involving less than five pounds, the defendant could not obtain a jury by removal to another court because removal was prohibited. Nor was there any right to a jury on appeal from the new county courts, since there was no appeal in any case involving less than twenty pounds.

The initial jurisdiction of the new county courts extended to all personal actions where the debt or damage did not exceed twenty pounds, except in actions for ejectment, will contests, slander, libel, and a few other exceptions. The new county courts proved very popular, and in

where the Amount claimed shall not exceed Five Pounds it shall be lawful for the Judge, in his Discretion, on the Application of either of the Parties, to order that such Action be tried by a Jury...

Chapter 95, supra note 61, §§ 69, 70; see also C. Pollock, The Practice of the County Courts 2, 48 (1851).

88. See supra note 87; Chapter 95, supra note 61, § 73:
[Whenever there are any Jury Trials Five Jurymen shall be impanelled and sworn, as Occasion shall require, to give their Verdicts in the Causes which shall be brought before them in the said Court ... and either of the Parties to any such Cause shall be entitled to his lawful Challenge against all or any of the said Jurors in like Manner as he would be entitled in any Superior Court; and the Jurymen so sworn shall be required to give an unanimous Verdict. Since many state jury trial guarantees have been construed to preserve the right to a “common-law” jury of twelve, see supra note 37, an interesting question arises regarding the ramifications of a jury of five in the new county courts. It might be argued that since the new county courts did not afford a common-law jury of twelve, all of their proceedings were “jury-less” for purposes of state constitutional jury trial guarantees. But see infra note 126.

89. Chapter 95, supra note 61, § 90. If the claim exceeded five pounds, removal was only possible by leave of a judge of a superior court “and upon such Terms as to Payment of Costs, giving Security for Debt or Costs, or such other Terms as he shall think fit.” Id.

While the plaintiff might initially choose to bring suit in one of the superior courts in order to obtain a jury, id. § 117, he could be denied costs if he recovered a verdict for less than twenty pounds in a contract action, or less than five pounds in a tort action. If he lost his action he might be compelled to pay the defendant’s attorney fees. Id. § 129.

90. Id. § 89; see also id. § 108 (“[N]o Judgment or Execution shall be stayed, delayed, or reversed upon or by any Writ of Error, or Supersedeas thereon, to be sued for the reversing of any Judgment given in any Court holden under the Provisions of this Act.”); C. Pollock, supra note 87, at 118.

91. Chapter 95, supra note 61, § 58:
[Al]l Pleas of Personal Actions, where the Debt or Damage claimed is not more than Twenty Pounds, whether on Balance of Account or otherwise, may be holden in the County Court, without Writ; ... Provided always, that the Court shall not have cognizance of any Action of Ejectment, or in which the Title to any corporeal or incorporeal Hereditaments, or to any Toll, Fair, Market, or Franchise, shall be in question, or in which the Validity of any Demise, Bequest, or Limitation under any Will or Settlement may be disputed, or for any malicious Prosecution, or for any
1850, only four years after the original act was passed, Parliament passed another act expanding the courts’ jurisdiction to debts or damages not exceeding fifty pounds. By 1867, Parliament had authorized certain contract and tort actions initiated in a superior court to be remitted to the county courts at the instance of the defendant. Moreover, once the 1846 Act was in place, Parliament regularly added new causes of action to the county court jurisdiction. The restrictions on access to jury remained, and the general trend in England since that time has been to further restrict the right to jury.

D. Summary

It appears that throughout the period relevant to our present inquiry, England had a system of small claims courts to resolve small monetary disputes without recourse to a jury at any point in the proceedings. This practice was grounded in the pragmatic realization that the jury process, notwithstanding its other merits, was too time consuming and expensive to be productive in resolving very small monetary claims. The amount at stake could not justify the personal expense to the parties, or the time of jurors and allocation of judicial resources.

Libel or Slander, or for Criminal Conversation or for Seduction, or Breach of Promise of Marriage. Cf. id. § 122 (clarifying that landlords could seek possession of small tenements when the value of the premises or the rent payable did not exceed fifty pounds per year).


93. An Act to Extend the Act for the More Easy Recovery of Small Debts and Demands in England, and to Amend the Same, 1850, 13 & 14 Vict., ch. 61. In increasing the jurisdiction of the county courts from twenty pounds to fifty pounds, the 1850 amendment provided that an appeal could be taken for claims involving more than twenty pounds. Id. § 14.

94. See 30 & 31 Vict., ch. 142, § 7 (1867); Cautherley, supra note 86, at 347.

95. E.g., 28 & 29 Vict., ch. 99 (1865) (equity jurisdiction); 30 & 31 Vict., ch. 142, § 11 (1867) (actions of ejectment and actions in which title to land was involved, when the annual value of the premises did not exceed 20 pounds); 31 & 32 Vict., ch. 71 (1868) ( admiralty jurisdiction).

96. See, e.g., R. WALKER & M. WALKER, supra note 36, at 188-90.

97. The English practice of resolving small civil claims without a jury is comparable to the English practice of convicting persons of petty criminal offenses in a summary fashion, reserving the jury for “grave and infamous” crimes. See Byers v. Commonwealth, 42 Pa. 89, 94-95 (1862); State v. Glenn, 54 Md. 572, 600 (1880); 4 W. BLACKSTONE, supra note 34, at *280; J. PROFFATT, supra note 25, § 95, at 135-36.

Summary prosecution for petty offenses was justified as being “for the greater ease of the subject, by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offence.” 4 W. BLACKSTONE, supra note 34, at *280-81; see also Glenn, 54 Md. at 605 (if petty offenders “could only be reached by formal indictment and trial by jury in the criminal Courts of the State, the formality and delay attending that mode of proceeding would either operate as an immunity to that class of offenders, or an oppression of them in many cases”); Katz v. Eldredge, 97 N.J.L. 123, 151, 117 A. 841, 852

I. The Right to Jury in the American Colonies and Territories during the Seventeenth, Eighteenth, and Nineteenth Centuries

A. Colonial and Territorial Practices

The earliest colonial settlers had a simple society and correspondingly unsophisticated courts which delivered justice of a "rude, popular, summary kind." Trial by jury appeared early in the colonies, but the settlers also were quick to establish special juryless tribunals for expeditious determination of small monetary claims, generally of forty shillings or less. (1922) ("[T]he theory, as I understand it, which gave rise to the distinction at common law and in subsequent statutes, is that the convenience and benefit to the public resulting from a prompt and inexpensive trial and punishment of violations of petty and trivial police power regulations are more important than the comparatively small prejudice to the individual resulting from his being deprived of the safeguard of indictment before having to answer and of trial by a jury when held to answer"); J. PROFATT, supra note 25, § 95, at 135. This practical reasoning accompanied English colonial settlers and established itself in the United States. See, e.g., Glenn, 54 Md. at 602: ("With us there has been no time since the earliest days of the colony that the summary jurisdiction by justices of the peace has not been exercised, in one form or another, over parties offending against the peace and good order of society. This jurisdiction has been exercised, sometimes under British statutes in force here, but more generally under statutes passed by the Colonial and State Legislatures."); Byers v. Commonwealth, 42 Pa. 89, 96 (1862). The distinction between grave and petty offenses for purposes of a right to jury was incorporated into the constitutional right to jury trial in criminal actions in many American jurisdictions. See, e.g., Codispoti v. Pa., 418 U.S. 506, 511-12 (1974); People v. Oppenheimer 42 Cal. App. 3d Supp. 4, 116 Cal. Rptr. 795 passim (1974); Reed v. State, 470 So. 2d 1382, 1383 (Fla. 1985). There seems little reason to adopt the practical English practice in petty criminal actions and reject it in petty civil cases.

98. Reinsch, English Common Law in the Early American Colonies, in 1 SELECT ESSAYS IN ANGLO-AMERICAN HISTORY 367 (1907), first published in II BULL. U. WIS. 7 (1899).

99. See, e.g., Reinsch, supra note 98; R. POUND, supra note 32, at 27-30; L. MOORE, THE JURY, TOOL OF KINGS, PALLADIUM OF LIBERTY 99-100 (1973). Unfortunately, relatively little has been discovered or published about jury practices in colonial American courts. See Wolfram, supra note 19, at 732 n.271. Of the few early court records which have survived, fewer still have been researched or published. Lacking the opportunity to engage in original research, this author must depend upon the few published reports that exist.

100. See, e.g., R. POUND, supra note 32, at 30-32 (juryless small claims tribunals in the colony of Massachusetts), 41-42 (juryless small claims tribunals in the colony of New York), 43-46 (juryless small claims tribunals in the colonies of New Jersey); J. PROFATT, supra note 25, § 99, at 142.

Several scholars have suggested that most early settlers patterned their colonial courts after the English local courts with which they were most familiar, rather than after the central common-law courts. See, e.g., Goebel, King's Law and Local Custom in Seventeenth Century New England, 31 COLUM. L. REV. 416 (1931); J. DAWSON, supra note 37, at 233. As noted above, the old county, hundred, and manor courts appear to have incorporated juries into their procedures by the sixteenth and seventeenth centuries. See supra notes 39-58 and accompanying text. It seems unlikely that the English courts of request had much influence on the development of the earliest American juryless small claims courts, since the courts of request, did
As the colonies progressed into the eighteenth century—a time more directly relevant to the present inquiry—colonial court systems became relatively sophisticated. While each colony’s court system was unique, each nevertheless followed the basic English pattern of maintaining separate tribunals to handle specified categories of disputes, including tribunals for expeditious handling of small monetary claims.

Civil jurisdiction over small debts, which had resided in the English courts of request, county, hundred, manor, and borough courts, usually was vested in justices of the peace in the colonies. Justice of the peace jurisdiction was statutorily prescribed and limited to relatively small amounts-in-controversy. In most jurisdictions, justice of the peace courts operated without a jury and without technical forms of pleading. Their purpose in civil matters, like that of the English courts of request and new county courts, was to give quick, convenient, inexpensive summary resolution of small monetary claims.

not become prevalent until the eighteenth and nineteenth centuries. See generally supra notes 57-61 and accompanying text. Accordingly, English precedent for early American juryless procedures is uncertain.


103. See supra notes 32-97 and accompanying text.

104. Capital Traction Co. v. Hof, 174 U.S. 1, 17 (1898); Steele, supra note 1, at 326; R. POUND, supra note 32, at 86-88. While justices of the peace also existed in England, they exercised only administrative and criminal jurisdiction. The American colonies adopted the concept of the English justice of the peace but added jurisdiction over small civil claims. Special Project, Model Statute, supra note 9, at 717; Surrency, The Courts in the American Colonies, 11 AM. J. LEGAL HIS.T. 253 (1967).

For a description of other varieties of colonial and post revolution American small claims courts, see R. POUND, supra note 32, at 83-90, 150-56, 187-93, 245-46.

105. See, e.g., In re Thorne, 28 Del. (5 Boyce) 335, 337-38, 93 A. 557, 558 (1915) (provisional authority of justice of the peace to punish assaults and batteries by fines not to exceed $10); Herrell v. Simpson, 175 Tenn. 154, 156-57, 133 S.W.2d 463, 464 (1939) (power of justice of the peace is subject to the will of the legislature); Quenstedt v. Wilson, 173 Md. 11, 18-19, 194 A. 354, 357-58 (1937) (jurisdiction of the justice of the peace is subject to legislative control); 51 C.J.S. Justices of the Peace §§ 11, 26, 33 (1967).

106. See Capital Traction Co. v. Hof, 174 U.S. 1, 17 (1898); Norton v. McLeary, 8 Ohio St. 205, 208-09 (1858). A few state statutes provided for a jury of six or twelve in justice of the peace courts. See infra note 126. When an argument has been raised that a constitutional right to jury exists for a case brought in one of these justice of the peace courts, courts often have found that the justice of the peace jury did not satisfy that right, either because only six jurors were provided rather than the 12 jurors of the traditional “common-law” jury, or because the justice of the peace lacked adequate supervisory powers over the jury. See Capital Traction Co. v. Hof, 174 U.S. at 38-39; supra note 36.

The justices of the peace generally were persons untrained in the law. They had considerable discretion and were not closely supervised by higher authorities. The colonial, and later the state, legislative bodies routinely provided for appellate review through the superior courts. This appeal generally took the form of a trial de novo, complete with right to jury. Many states, however, conditioned this right to an appeal or trial de novo—and thus access to a jury—on a minimum threshold amount-in-controversy. For example, in 1795, Ohio territorial law provided that a single justice of the peace should hear debts and demands of under five dollars without jury and without appeal. In 1799 and 1800, the First General Assembly of the Northwest Territory passed statutes raising the justice of the peace jurisdiction to twenty dollars, and provided for an appeal to the Court of Common Pleas in the form of a trial de novo with jury, from judgments in excess of two dollars. This practice continued until after the adoption of the Ohio Constitution when, in 1804, the Second General Assembly of the new State of Ohio raised the justice of the peace jurisdiction to thirty-five dollars and raised the threshold amount required to obtain an appeal and access to a jury, to five dollars.

As early as 1642, Virginia statutes provided for summary adjudication. See Steele, supra note 1, at 326-28; Special Project, Model Statute, supra note 9, at 717-18.

A trial de novo was necessary at least in part because the justice of the peace generated no written transcript. See Steele, supra note 1, at 326-28, 332-33.

See R. Pound, supra note 32, at 150, 251; Steele, supra note 1, at 326, 332-33. Apart from any notions the colonists might have had concerning a natural right to jury, they apparently viewed a jury as necessary in such cases in order to counteract the perceived corruption and incompetence of justices of the peace. See R. Pound, supra note 32, at 251.

The statutes specifically provided that no other court would have cognizance of debts or demands under five dollars. A Law for the Easy and Speedy Recovery of Small Debt, 1795, ch. 40, §§ 1, 2, Ohio Stat. (1 Chase (1833)). Justice of the peace courts operated without a jury, see Norton v. McLeary, 8 Ohio St. 205, 208-09 (1858), so there was no access to a jury for such claims.

An Act Establishing Courts for the Trial of Small Causes, 1799, ch. 100, Ohio Stat. (1 Chase 233 (1833)); An Act Supplementary to the Act, Entitled, 'An Act Establishing Courts for the Trial of Small Causes,' 1800, ch. 162, § 3, Ohio Stat. (1 Chase 308 (1833)). Section 14 of the 1799 Act specified that defendants could appeal judgments exceeding two dollars. Plaintiffs could appeal judgments against them when their original demands exceeded two dollars. They could appeal judgments in their favor when their original demand exceeded their recovery by four dollars or more. Section 20 provided exceptions to the small claims jurisdiction of the justices of the peace, which included "debt on bonds for the performance of covenants, actions of covenant, actions of replevin, or upon any real contract," certain actions of trespass, and all actions in which the title to land was in question.

An Act Regulating the Duties of Justices of the Peace and Constables, in criminal and Civil Cases, 1804, ch. 47, §§ 5, 15, Ohio Stat. (1 Chase 429, 430 (1833)). Section 15 provided that a defendant could appeal a judgment exceeding five dollars. Plaintiff could ap-
tion of debts under twenty shillings, or two hundred pounds of tobacco, by a single magistrate, with no jury or appeal.\textsuperscript{114} Statutes in effect when Virginia adopted its first constitution preserved this jurisdiction in a single justice of the peace,\textsuperscript{115} and further provided that justices of the county court could determine all suits for "debt or demand due by judgment, or obligation or account" from twenty-five shillings, or two hundred pounds of tobacco, to five pounds, or one thousand pounds of tobacco, "without the solemnity of a jury."\textsuperscript{116} A similar provision existed for actions of detinue or trover under five pounds.\textsuperscript{117} Likewise, Kentucky justices of the peace made final determinations of claims up to five pounds with no right to jury in all cases of debt, trover, and conversion.\textsuperscript{118}

When the first state constitution was adopted in Pennsylvania, justices of the peace had jurisdiction to try debts of up to five pounds without a jury. Their determination was final for all actions involving less than forty shillings.\textsuperscript{119} A jury was made available on appeal when the action involved over forty shillings. Later, in 1794, a statute increased the justice of the peace jurisdiction to twenty pounds and made the justice's determination final for all cases involving less than five pounds,\textsuperscript{120} thus diminishing the right to jury as it existed when the state's constitution was adopted.

In 1644, the Colony of Connecticut provided that actions involving less than forty shillings would be tried by the court of magistrates with-
An appeal was later provided for in the county court, but the statute granting the appeal expressly withheld access to a jury.\textsuperscript{122} By 1769, after several variations in jurisdiction,\textsuperscript{123} justices of the peace were authorized to hear cases involving up to five pounds without a jury or a right to appeal.\textsuperscript{124} In 1795, the final jurisdiction of the justices of the peace was set at seven dollars, and this limitation on access to a jury was in effect when the Constitution was adopted, and for half a century thereafter.\textsuperscript{125}

Some colonies and territories apparently did provide a jury for every small debt claim, regardless of the amount involved.\textsuperscript{126} Nevertheless, it is clear that the practice of many colonies and territories at the time they adopted their constitutions was to provide juryless proceedings to ensure efficient resolution of claims involving less than a specified amount. In those jurisdictions which look, under the historical test, to their own colonial or territorial practice in order to define the constitutional right to a

123. See infra notes 174-77 and accompanying text.
125. Id.
126. Tennessee is an example. See, e.g., An Act to Amend 'an Act Establishing Courts of Law, and for Regulating Proceedings Therein,' 1794, ch. 1, §§ 52, 54, reprinted in Laws of the State of Tennessee (1803); Morford v. Barnes, 16 Tenn. (8 Yer.) 444, 446 (1835); see also Capital Traction Co. v. Hof, 174 U.S. 1, 26 (1898) (jury provided in county court for appeal from justice of the peace decision). A few states, like New York and Georgia, compromised by providing for a small jury in the justice of the peace court itself. See, e.g., De Lamar v. Dollar, 128 Ga. 57, 61, 57 S.E. 85, 87 (1907) ("All cases tried before a justice of the peace were subject to be appealed to a jury in that court consisting of five jurors, whose verdict was final and conclusive between the parties."); People ex rel. Metropolitan Board of Health v. Lane, 6 Abb. Pr. (n.s.) 105, 119-126 (1869) (jury of six in small claims court, with no further access to jury).

It is interesting to note that when the relevant New York constitutional jury trial guarantee was adopted, it provided a jury of six in the inferior court for all matters under $100 and no further jury through appeal. Later provisions raised the amount of the court's jurisdiction, but for claims exceeding the original $100 limit, parties had a right to remove the case to a court in which a jury of 12 was available. Since the constitutionally guaranteed right to jury was construed to be a right to a traditional common-law jury of twelve, People ex rel. Metropolitan Board of Health, 6 Abb. Pr. (n.s.) at 120; Baxter v. Putney, 37 How. Pr. 140, 143 (N.Y. County Ct. 1868), it appears that the New York courts did not view the provisions of a jury of six in the inferior court as satisfying the general constitutional right. See People ex rel. Metropolitan Board of Health, 6 Abb. Pr. (n.s.) at 125; Baxter, 37 How. Pr. at 143-44; supra note 103. Nonetheless, New York case law suggests that the right to a jury of six in the small claims court was preserved under the state's constitutional jury trial guarantee. Knight v. Campbell, 62 Barb. 16, 25-27 (N.Y. Ch. 1872); see De Lamar, 128 Ga. at 61-62, 57 S.E. at 87 (right to jury of five preserved on appeal in the justice court under 1798 constitution).
jury, such history would support the use of juryless small claims procedures today.

B. Special Constitutional Provisions

Most state constitutions merely require that the right to jury be "preserved" or "remain inviolate,"127 and thus give no guidance concerning their framers' specific understanding about the right to jury for small monetary claims. A few state guarantees, however, do make specific provision for small monetary claims. Of these states' constitutions, several parallel the seventh amendment to the United States Constitution and expressly limit the constitutional right to jury to cases involving more than a specified amount-in-controversy.128 While little legislative history of the framers' intent exists, one can infer from their inclusion of a minimum amount-in-controversy that the framers were aware of the impracticality of offering a jury for very small monetary claims and intended that such claims be resolved without a jury.129 Undoubtedly, the minimum amounts specified were deemed appropriate for that particular period in history—indeed, in some cases the constitutionally specified minimum may have exceeded the ceiling currently being imposed on juryless proceedings in the state.130

In contrast, three state constitutions expressly provide that the right

127. See supra note 24 and accompanying text.
128. See ALASKA CONST. art. I, § 16 ("In civil cases where the amount-in-controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law."); HAW. CONST. art. I, § 13 ("In suits at common law where the value in controversy shall exceed one thousand dollars, the right of trial by jury shall be preserved."); MD. CONST. Dec. of Rts., art. 23 ("The right of trial by Jury of all issues of fact in civil proceedings in the Several Courts of law in this State, where the amount-in-controversy exceeds the sum of five hundred dollars, shall be inviolably preserved."); N.H. CONST., pt. I, art. 20 ("In all controversies concerning property—and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, and except in cases in which the value in controversy does not exceed five hundred dollars, and title of real estate is not concerned, the parties have a right to a trial by jury."); OKLA. CONST. art. II, § 19 ("The right of trial by jury shall be and remain inviolate, except in civil cases wherein the amount-in-controversy does not exceed One Hundred Dollars ($100.00), or in criminal cases wherein punishment for the offense charged is by fine only, not exceeding One Hundred Dollars ($100.00).")); W. VA. CONST. art. III, § 13 ("In suits at common law, where the value in controversy exceeds $20 exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons.").
130. The problem, of course, is that by stating a specific minimum amount-in-controversy, the framers may have precluded the state legislature from adjusting the amount periodically to account for such things as changes in the value of money and changes in the cost of jury trial litigation. See infra notes 160-84 and accompanying text. Thus, the original minimum amount-in-controversy, while effective when enacted, may over time have served to defeat the
to jury will be preserved "in all cases at law, without regard to the amount-in-controversy." The wording of these provisions suggests that the framers were aware of the practice of providing juryless proceedings for small monetary claims and decided to prohibit it expressly.

Finally, some state constitutional guarantees provide that the right to jury will remain inviolate, but that the legislature may provide for juries of less than twelve in "inferior" courts or courts "not of record." Such provisions suggest that the framers were aware of the practical problems posed by juries in the kinds of small cases that often are relegated to "inferior courts" or courts "not of record," and wished to give the legislature flexibility to regulate jury trials in such tribunals to ensure efficiency. Since these provisions only purport to preserve the existing right to jury, they are not inconsistent with the outright denial of access to a jury for the smallest monetary claims.

IV. The Effect of Concurrent Jurisdiction in Juryless Small Claims Tribunals and Common-Law Courts

The judicial procedures outlined in the preceding sections demonstrate that during the seventeenth, eighteenth, and nineteenth centuries an understanding existed both in England and in many of the American colonies and territories that special provisions could and should be made to resolve small monetary claims without the right to a jury at any stage of the proceedings. These provisions were needed to provide practical, useful remedies for persons with very small claims. Under the historical test \(^{133}\) for the extent of the state constitutional right to jury, this early practice of resolving small claims without a jury would justify comparable juryless procedures today.

original intent by mandating provision of a jury in cases in which it could not be justified in practical terms.

Some states have responded to the problem by amending their constitutions to set forth a larger minimum amount-in-controversy. Thus, Maryland originally provided for a minimum amount-in-controversy of five dollars (Md. Const. art. X, § 4 (1851, repealed 1864)), but subsequently raised the amount to $500. In its 1877 constitution, New Hampshire provided for a minimum amount-in-controversy of $100, which it raised to $500 in 1960. N.H. Const. pt. I, art. 20; see also Minutes of the Daily Proceedings, Alaska Constitutional Convention 1352-55, 1421-26 (Mar. 1965) (Delegates debate the propriety of naming a specific minimum amount-in-controversy, noting that any such sum will become outdated, but ultimately decide to include a specified sum with the understanding that it can be increased later through constitutional amendment.)


133. See supra notes 16-31 and accompanying text.
Nevertheless, certain circumstances complicate the determination of the right to a jury under the historical test. One complication concerns those states where juryless tribunals had concurrent jurisdiction over small claims with courts that afforded a jury. Certainly a case that could only have been tried through a juryless procedure during the applicable time period, due to its small amount-in-controversy, would not be constitutionally entitled to a jury today. Even where small claims courts had concurrent jurisdiction with courts providing a common-law jury of twelve, no absolute right to jury need be inferred. Rather, the right to jury will depend upon the circumstances under which the small claim is brought. Claims brought in the modern equivalent of the early small claims tribunal carry no constitutionally guaranteed right to jury simply because those same claims could be brought in courts that provided a jury during the applicable historic period.

While courts have had relatively few occasions to address this issue, they have reached similar conclusions in comparable contexts. For example, in *C.J. Hendry Co. v. Moore*, the Supreme Court noted that prior to the adoption of the seventh amendment and thereafter, both in England and in the colonies, the admiralty courts and the common-law courts had concurrent jurisdiction to give in rem judgments for forfeiture of property seized on the high seas. When actions for forfeiture were brought in the common-law courts they were determined by a jury, but when they were brought in the admiralty court there was no right to jury. This observation led the Court to conclude that the constitutional guarantee of the right to jury trial only preserved the right for those forfeiture actions brought pursuant to the common-law procedure. Similarly, common-law courts and equity courts historically had concurrent jurisdiction to try actions for an accounting, even though only a money judgment was sought. As a result, the constitutional right

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135. *See infra* notes 155-57 and accompanying text.
136. 318 U.S. 133 (1943).
137. *Id.* at 139-43.
138. *Id.* at 141, 152. Indeed, the King originally created jurisdiction in the admiralty courts in order “to have a forum not controlled by the obstinate resistance of American juries.” *Id.* at 141.
139. *Id.* at 153; *see also* Union Ins. Co. v. United States, 73 U.S. (6 Wall.) 759, 764 (1867) (right to jury trial in seizures on land; seizures on the high seas must be tried in admiralty); People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 301, 231 P.2d 832, 844 (1951) (no right to jury trial in admiralty).
to jury only extends to actions brought pursuant to common law.\textsuperscript{140}

It follows that where common-law courts had concurrent jurisdiction with summary procedure small claims courts to try small monetary disputes, the constitutional guarantee only preserves the status quo. Parties retain the right to jury if the claim was brought in a common-law court, but the constitutional guarantee creates no new jury trial right for cases brought in tribunals similar to the small claims court which historically afforded no right to jury.

One might question whether such reasoning would be consistent with recent United States Supreme Court rulings that have expanded the seventh amendment right to jury. In a trio of cases, \textit{Beacon Theatres, Inc.}\textit{ v.}\textit{ Westover,}\textsuperscript{141} \textit{Dairy Queen, Inc.}\textit{ v.}\textit{ Wood,}\textsuperscript{142} and \textit{Ross v. Bernhard,}\textsuperscript{143} the Supreme Court has taken an expansive approach for determining when common-law or equitable jury procedures should govern a case. The Court has held that courts must determine the legal or equitable nature of each issue to be tried, and provide a jury for all issues that are "legal" in nature and for all issues common to both a legal and equitable remedy. Federal courts may not, therefore, determine the right to jury based upon the overall nature or "gist" of the action; the equitable bench trial thus is limited to those issues historically within the exclusive substantive jurisdiction of equity.

Were this reasoning carried over to small monetary claims, a right to jury would almost always be found. There are several reasons, however, why the reasoning of the Supreme Court in \textit{Beacon Theatres, Dairy Queen, and Ross} is irrelevant to the question of a right to jury for issues brought pursuant to the summary procedures of a small claims court.

First, of course, these Supreme Court decisions concern the seventh amendment and do not control the states' interpretation of their own

\textsuperscript{140} See Board of Supervisors v. Dunning, 20 Wis. 210, 215-16 (1866); H.B. Zachry Co. v. Terry, 195 F.2d 185, 189 (5th Cir. 1952).

Indeed, the rule has arisen that if the accounts are sufficiently complex, the court should try the action as a suit in equity. The common-law remedy is deemed inadequate because it is impractical for a jury to attempt to sort out lengthy, detailed accounts. See \textit{H.B. Zachry Co.}, 195 F.2d at 189; Hewgley v. Trice, 51 Tenn. App. 452, 455-57, 369 S.W.2d. 741, 742-43 (1962). Cf. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962) (while an action for an accounting could be deemed equitable for purposes of the right to jury trial when the accounts are too complex for jurors to determine, the court's power to appoint special masters to assist the jury should render the legal remedy adequate in most cases and when adequate, the common-law procedure, with jury, should be used).

\textsuperscript{141} 359 U.S. 500 (1959).

\textsuperscript{142} 369 U.S. 469 (1962).

\textsuperscript{143} 396 U.S. 531 (1970).
constitutional provisions.\textsuperscript{144} Second, even if the states do adopt the
Supreme Court's reasoning in the equity or common law context,\textsuperscript{145} there is little justification for extending it to the common law small
claims court context. The decisions in \textit{Beacon Theatres}, \textit{Dairy Queen},
and \textit{Ross} were based on the understanding that courts of equity tradition-
ally have afforded no remedy when an adequate remedy exists at law.\textsuperscript{146} The Court reasoned that if an adequate legal remedy exists today, the
issues relevant to that remedy should be tried by a jury because a court of
equity in 1791 would have abandoned jurisdiction of those issues capable
of resolution at law.

This special relationship between common-law courts and courts of
equity never existed between common-law courts and juryless small
claims tribunals. Indeed, when remedies were available simultaneously
in both tribunals, the prevailing practice not only permitted summary
relief in the juryless small claims tribunals but strongly encouraged it: in
some jurisdictions there were laws expressly penalizing the litigant who
persisted in seeking the common-law procedure for a small monetary
claim.\textsuperscript{147} The very purpose of the small claims courts was to provide the
kind of relief the common-law courts provided—money judgments—
through a procedure simplified to accommodate the small amount-in-
controversy.

In two cases in which common-law courts and other specialized,
juryless tribunals have had concurrent jurisdiction, it appears that the
Supreme Court itself has recognized that the reasoning of \textit{Beacon Thea-
tres}, \textit{Dairy Queen}, and \textit{Ross} does not determine the right to jury trial

\textsuperscript{144}. \textit{See supra} note 21 and accompanying text.

\textsuperscript{145}. In fact, a substantial percentage of the states that have addressed the issue appear to
reject the Supreme Court's reasoning in \textit{Beacon Theatres}, \textit{Dairy Queen}, and \textit{Ross}. \textit{See, e.g.},
Rankin v. Frebank Co., 47 Cal. App. 3d 75, 91-92, 121 Cal. Rptr. 348, 358-59 (1975); State v.
Cahill, 443 A.2d 497, 500 (Del. 1982); First Nat'l Bank of Olathe v. Clark, 226 Kan. 619, 621-
23, 602 P.2d 1299, 1302-03 (1979); Linville v. Wilson, 628 S.W.2d 422, 425 (Mo. App. 1982);
Bank of Greer, 270 S.C. 691, 693-95, 244 S.E.2d 315, 316-17 (1978). Of course, a number of
state courts have opted to follow the United States Supreme Court's lead. \textit{See, e.g.}, Finance,
Inv. & Rediscount Co. v. Weis, 409 So. 2d 1341, 1344 (Ala. 1982); Shope v. Sims, 658 P.2d
1336, 1340 (Alaska 1983); Harada v. Burns, 50 Haw. 528, 534-36, 445 P.2d 376, 381-82
(1968); Temperance Ins. Exch. v. Carver, 83 Idaho 487, 493, 365 P.2d 824, 827-28 (1961);
Harvester Credit Corp. v. Pioneer Tractor and Implement, Inc., 626 P.2d 418, 421 n.2 (Utah

\textsuperscript{146}. \textit{See Beacon Theatres}, 359 U.S. at 507, 509; \textit{Dairy Queen}, 369 U.S. at 478; \textit{Ross}, 396
U.S. at 539-40.

\textsuperscript{147}. \textit{See supra} notes 67, 89 and accompanying text.
outside of the common law or equity context. In *Katchen v. Landy*, the Court found that though the bankruptcy court and common-law courts had concurrent jurisdiction to order surrender of voidable preferences at the behest of a trustee in bankruptcy, the existence of the right to jury in the common-law court did not mandate a jury when the same claim was brought in the bankruptcy court. According to the Court, practical considerations such as expediency, convenience, and efficiency should be taken into account in determining whether a "legal" claim can be brought in a special forum without the right to jury. In rejecting the petitioner's argument that *Dairy Queen* required that he be provided a jury for voidable preference issues, the Supreme Court noted:

> [P]etitioner's argument would require that in every case where a Section 57g objection is interposed and a jury trial is demanded the proceedings on allowance of claims must be suspended and a plenary suit initiated, with all the delay and expense that course would entail. Such a result is not consistent with the equitable purposes of the Bankruptcy Act nor with the rule of *Beacon Theatres* and *Dairy Queen*, which is itself an equitable doctrine. In neither *Beacon Theatres* nor *Dairy Queen* was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury.

Like the bankruptcy proceedings, summary small claims proceedings were created by statute to provide an inexpensive, speedy remedy without the intervention of a jury. Thus, the *Katchen* Court's reasoning suggests that *Dairy Queen* and *Beacon Theatres* do not require provision of a jury in small claims courts.

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149. Id. at 328-29, 339; see Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 455 (1977). Indeed, *Dairy Queen, Beacon Theatres*, and *Ross* addressed the continuing validity of doctrines permitting federal courts to resolve, without jury, legal issues that are incidental to or common to equitable claims before the court. *See J. FRIEDENTHAL, M.K. KANE & A. MILLER, supra* note 13, at 485-86. These doctrines had arisen primarily for the sake of efficiency and fairness, to avoid the necessity of two actions in separate courts. But as the Court noted in *Ross*, the joining of law and equity under the modern federal rules of civil procedure allows the same court to try legal issues before a jury and resolve equitable issues itself within one action. 396 U.S. at 539-40. *Cf Dairy Queen*, 369 U.S. at 471 (describing the inconvenience of filing separate actions for legal and equitable claims, which ultimately led to the consolidation of law and equity enabling legal and equitable claims to be joined in a single action). Convenience and fairness no longer dictated such an "all or nothing" rule allowing the court to resolve all issues—equitable and legal—without a jury.

Juryless small claims procedures likewise were created to try "legal" issues without a jury for the sake of efficiency and fairness. Nothing has occurred, however, to alleviate the hardship that would be caused by mandating a right to jury for small monetary claims—the expense of a jury will still render litigation of such claims impractical.

150. *Katchen*, 382 U.S. at 339 (citation omitted).
Likewise, in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, the Supreme Court found that when Congress passed statutes creating "public rights," it was free to assign the adjudication of enforcement proceedings to an administrative tribunal to be determined without a jury, even though the seventh amendment would require a jury if adjudication of the rights were assigned to a common-law court. According to the Court, "history and our cases support the proposition that the right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved."

Thus, in *Beacon Theatres, Dairy Queen, and Ross* the particular relationship between the common-law and general equity courts required the provision of a jury trial for all issues raised in equity that could now be tried at law. Cases such as *Katchen* and *Atlas Roofing* negate the contention that all issues capable of trial to a jury at common law are entitled to jury resolution, regardless of the forum. As long as a claim is properly brought in a juryless small claims tribunal that is comparable in that respect to one existing in England or the American colony or territory when the state constitutional jury trial guarantee was adopted, a right to jury should not attach, even if the jurisdiction of the precedent tribunal was not exclusive.

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152. Id. at 455. The Court stated:

[I]t is apparent from the history of jury trial in civil matters that factfinding, which is the essential function of the jury in civil cases, was never the exclusive province of the jury under either the English or American legal systems at the time of the adoption of the Seventh Amendment; and the question whether a fact would be found by a jury turned to a considerable degree on the nature of the forum in which the litigant found himself. Critical factfinding was performed without juries in suits in equity, and there were no juries in admiralty; nor were there juries in the military justice system. . . .

The Seventh Amendment was declaratory of the existing law, for it required only that jury trial in suits at common law was to be 'preserved.' It thus did not purport to require a jury trial where none was required before. Moreover, it did not seek to change the factfinding mode in equity or admiralty.

Id. at 458-59 (citations omitted).
153. Id. at 460-61.
154. As the famous footnote 10 of the Ross opinion notes, in addition to historic custom and the remedy sought, "the practical abilities and limitations of juries" should be considered in determining whether a right to jury should attach. 396 U.S. at 538 n.10. Certainly in the small claims context this consideration would dictate finding no right to jury, as a jury cannot function efficiently as a fact-finding mechanism in this context. See supra note 9 and accompanying text; see also Wolfram, supra note 19, at 644 (analysis of Supreme Court's functional approach to determine the right to jury trial).

*Pernell v. Southall Realty*, 416 U.S. 363 (1974) does not suggest a different conclusion. In *Southall*, it was argued that the general jurisdiction courts in the District of Columbia could...
V. Necessary Characteristics of the Modern Juryless Small Claims Tribunal

State court systems have changed significantly since the states adopted their constitutions, and most preconstitution small claims tribunals no longer exist. Where state constitutions authorize the creation of juryless tribunals for the resolution of small monetary claims, questions arise concerning the essential characteristics of such tribunals. Modern juryless tribunals should not be required to mimic their historical precursors in technical details. Nor should it even be necessary that legisla-
deny a jury in suits in recovery of possession of property in order to expedite judicial disposition of landlord-tenant disputes. The Supreme Court rejected this argument because there was no precedent for such action in England in 1791. Such precedent does exist in the case of small monetary claims.

155. Since juryless proceedings for small claims often have been associated with courts officially designated “not of record,” it might be suggested that juryless proceedings may now only be offered in courts that are not of record. Aside from numerous references in cases linking juryless summary proceedings to courts not of record, see, e.g., Ex parte Thistleton, 52 Cal. 220, 225 (1877) (court of record equated with provision of jury), several state constitutional jury trial guarantees specifically limit the constitutional right to a common-law jury of 12 to those cases brought in courts of record, thus associating courts not of record with a lesser jury right. See WASH. CONST. art. I, § 21 (“The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record. . . .”); S.D. CONST. art. VI, § 6 (“The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount-in-controversy, but the Legislature may provide for a jury of less than twelve in any court not a court of record.”); S DAKOTA CONSTITUTIONAL CONVENTION 1885, 282-83, 286-88 (1907) (indicating that state constitution framers believed that the right to a common-law jury only existed in courts of record and that the constitutional provision should not extend the right to courts not of record).

Examination of the practices in England and the American colonies, however, reveals that while many of the juryless small claims proceedings were in courts not of record, this was not always the case. The English courts of request apparently were not regarded as courts of record, see H. ARTHURS, supra note 41, at 34; see generally notes 54-82 and accompanying text, but the new county courts which replaced them were. H. ARTHURS, supra note 41, at 232 n.219; Chapter 95, supra note 61, § 3; see generally supra notes 83-96 and accompanying text. In the American colonies, justice of the peace courts generally were not deemed courts of record. See, e.g., Capital Traction Co. v. Hof, 174 U.S. 1, 17 (1898); Ellis v. White, 25 Ala. 540, 542 (1854). There were, however, some exceptions to this rule. See, e.g., Hooker v. State, 7 Blackf. 272, 273 (Ind. 1844); Hinchman v. Cook, 20 N.J.L. 271, 272 (1844).

The distinction between court of record and not of record also is unsatisfactory because the concept has never attained a universal meaning, but appears to vary from one jurisdiction to the next and even within jurisdictions. See, e.g., Chrisman v. Metropolitan Life Ins. Co., 178 Tenn. 321, 325, 157 S.W.2d 831, 832 (1942); Seattle v. Filson, 98 Wash. 2d 66, 69, 653 P.2d 608, 610 (1982) (a court may be “of record” for some purposes and “not of record” for other purposes); NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, COURTS OF LIMITED JURISDICTION: A NATIONAL SURVEY xiii (1977) (“No uniformly applicable definition of courts ‘of record’ could be devised.”); Stone, The Constitutional Guaranty of Jury Trial, 3 ALB. L. REV. 293, 296-97 (1871); Alger, What is A Court of Record, 34 AM. L. REV. 70, 70-74 (1900); 20 AM. JUR. 2D Courts § 26, at 405 (1965).

However, if status as a court “not of record” were deemed necessary to justify juryless
tures create separate, freestanding tribunals to provide the juryless small claims procedure; a small claims division offering a summary, juryless procedure might be created within a general jurisdiction court.

The preconstitution juryless small claims tribunals had two key characteristics which constitutionally their modern counterparts should be required to emulate. First, these tribunals offered summary proceedings that were specifically fashioned by legislative bodies to provide a practical, inexpensive, speedy remedy for persons with small monetary claims. Many aspects of traditional common-law procedure were discarded because they were too costly and time consuming in relation to the amount-in-controversy. Second, jurisdiction of small claims tribunals was limited, both in terms of subject matter and amount-in-controversy, to those claims whose resolution could not justify the time and expense of traditional common-law procedure.

Today when legislatures set out to create juryless small claims procedures as authorized by their state constitutions, they must first determine that such procedures are necessary in order to make relief available as a practical matter to persons with small monetary claims, and they must fashion a procedure that is reasonably calculated to accomplish that end. They also must limit the availability of the procedure to those claims whose amount-in-controversy and ramifications cannot in objective terms justify the time and expense of traditional common-law procedures.

VI. Adjusting the Jurisdictional Amount-in-Controversy of Juryless Small Claims Tribunals

A final question that arises in applying the historical test for the
right to jury is whether the specific dollar amount-in-controversy limitations imposed on juryless proceedings when the states adopted their constitutions\textsuperscript{160} may be exceeded in juryless small claims proceedings today, at least in those states where no minimum amount-in-controversy is expressly stated in the constitution.\textsuperscript{161}

A number of early cases suggested that the amount-in-controversy limits for juryless proceedings in effect when the state's constitution was enacted could not thereafter be raised.\textsuperscript{162} The question arose indirectly in cases where state legislatures had increased the limits of justice of the peace jurisdiction and simultaneously provided for a trial de novo appeal, with jury, for actions exceeding the previous jurisdictional limits. The reviewing courts held that the constitutional right to jury had not been violated by raising the jurisdiction of justices of peace because the right could be satisfied either through provision for a jury in the original proceeding or on appeal, and here provision for jury had been made on appeal.\textsuperscript{163} In finding as they did, the courts implied that there was a constitutional right to jury in cases involving the increased jurisdictional amount.\textsuperscript{164} However, such a finding was not necessary to resolve the case and the courts did not purport to examine the merits of the issue in any depth.

Three appellate courts that have directly considered the constitutionality of raising the jurisdictional amount-in-controversy for juryless

\textsuperscript{160} A related question is whether today's juryless proceedings are limited to the precise types of claims triable in such proceedings when the constitutional guarantee was adopted. As indicated in sections II and III, the breadth of the subject matter jurisdiction of juryless small claims courts varied from court to court in England and from state to state in the United States, and changed over the course of time within each jurisdiction. This Article will not undertake a separate examination of the types of actions that can be brought in a juryless tribunal, though the underlying principles discussed in this section should be relevant to that determination. See generally Evergreen Corp. v. Brown, 35 Conn. Supp. 549, 554-55, 396 A.2d 146, 149 (1978) (court reasons that legislature is free to subject eviction action to juryless proceedings when only a month-to-month tenancy is involved, implying that this minor interest in land is analogous to a small monetary claim and thus falls within the spirit of the exception to the right to jury for small monetary claims). But see Emerick v. Harris, 1 Binn. 416, 429 (Pa. 1808) (separate opinion of Brackenridge, J., who finds expansion of jurisdiction of justices of peace through addition of new types of claims more objectionable than expansion through raising amount-in-controversy).

\textsuperscript{161} See supra note 131 and accompanying text.

\textsuperscript{162} See, e.g., White v. Kendrick, 1 S.C.L. (1 Brev.) 469, 472 (1805); People ex rel. Metropolitan Board of Health v. Lane, 6 Abb. Pr. (n.s.) 105 (1869).

\textsuperscript{163} See Capital Traction Co. v. Hof, 174 U.S. 1, 23 (1898) and cases discussed therein; J. PROFFATT, supra note 25, § 101, at 146.

\textsuperscript{164} It is possible that the state legislatures themselves also assumed that there was a right to jury, and provided for a jury on appeal for that reason. Other factors may have been at work as well, however, such as the public's desire to keep a check on untrained, sometimes corrupt justices of the peace. See supra notes 108-10 and accompanying text.
small claims courts procedures have upheld the practice. These decisions make sense in light of the purpose juryless small claims court procedures were created to serve. These procedures are grounded in the pragmatic realization that very small monetary disputes do not justify the individual and societal expense of a jury. In many cases, the added cost imposed through introduction of a jury would make litigation of a small claim economically impractical, leaving a plaintiff with no realistic means of obtaining legal redress. As the value of money decreases and the cost and complexity of jury trial litigation increases, the legislature must be free to adjust the monetary threshold below which juryless proceedings are available in order to ensure that these proceedings continue to serve the purpose of giving small claims plaintiffs access to the court. Freezing the monetary ceilings for juryless proceedings as of the date a constitution was enacted—at forty shillings, five pounds, or the equivalent in dollars—would serve only slavish literalism and undermine the original rationale for providing juryless procedures. Today an exception to the right to a jury for claims under forty shillings or five pounds would be virtually meaningless.

In other respects the constitutional right to jury has not been construed to require such literal adhesion to the practices in vogue when the constitution was adopted as to preclude adjustments which promote "the cause of justice and the general convenience," and do not thwart the purposes underlying the right to jury trial. Thus, courts have held that legislatures can subject the right to jury to reasonable conditions and regulations, such as requiring the posting of a bond to cover the increased costs of a jury trial. Likewise, courts have held that, contrary to com-

165. See Guile v. Brown, 38 Conn. 237, 240-41 (1871); Iowa Nat'l Mutual Ins. Co. v. Mitchell, 305 N.W.2d 724, 726-29 (Iowa 1981); Crouchman v. Superior Court, 192 Cal. App. 3d 102, 217 Cal. Rptr. 910, petition for review granted, 708 P.2d 703, 220 Cal. Rptr. 124 (1985). The court in Mitchell found that an exception to the right to jury existed for small monetary claims in English law, and then held that the legislature was empowered to raise the amount-in-controversy ceiling below which a jury need not be afforded. Though the court's conclusion is consistent with the thesis advanced in this Article, the court's reasoning differs from the line of reasoning emphasized by the author of this Article.

166. See supra notes 9-11 and accompanying text.

167. Even as late as 1830, forty shillings represented a substantial amount of money. According to one source, it represented more than the weekly wage of most manual and clerical workers in England. See H. Arthur, supra note 41, at 26, 224 n.94. Today it amounts to wages for approximately one hour of labor at minimum wage. See generally Fifth Report, supra note 42, at 12-15 (discussing the effect of the decrease in the value of money over time on the practical effectiveness of inferior courts, and describing the difference in buying power of 40 shillings in the fourteenth century and in the nineteenth century).


169. Capital Traction Co. v. Hof., 174 U.S. 1, 43-46 (1898); County of Portage v. Steinpreis, 104 Wis. 2d 466, 471-76, 312 N.W.2d 731, 733-35 (1981). In Steinpreis, a territorial
mon-law practice, the jury verdict need not be unanimous,\textsuperscript{170} and the jury may be comprised of fewer than twelve members,\textsuperscript{171} because neither of these adjustments interferes with the basic purpose of the jury trial guarantee. When constitutional jury trial guarantees were adopted, existing laws drew a line at a point where the cost of a jury could be justified in economic and societal terms. Readjusting that line to accommodate changes in the value of money and the cost of juries would perpetuate, rather than undermine, the original purpose of the amount-in-controversy threshold.

It is likely that constitutional framers contemplated that the amount-in-controversy limits for juryless proceedings would be adjusted from time to time to accommodate changing social needs, as they had been adjusted in the past, both in England\textsuperscript{172} and in the colonies and territories.\textsuperscript{173} In Connecticut, for example, in 1717, the justice of the peace tried actions for amounts under forty shillings without jury. There was no appeal, and thus no access to a jury in a higher court, in cases involving less than ten shillings.\textsuperscript{174} In 1724, appeal, and thus access to a jury, was limited to cases involving twenty shillings or more.\textsuperscript{175} In 1736, if debt was due by bond and did not exceed forty shillings, no appeal, and thus no access to jury, was afforded.\textsuperscript{176} In 1767, the jurisdiction of the justice of the peace to try cases without a jury was raised to five pounds and, in 1769, the right of appeal for all cases so tried was removed.\textsuperscript{177} When the Connecticut Constitution was adopted, justices of the peace tried cases without jury or right to appeal in cases involving less than seven dollars.\textsuperscript{178}

Some years after the Connecticut constitutional jury trial guarantee statute had imposed a fee upon parties demanding juries for small claims. The court found that a subsequent raise in the fee was not an unconstitutional denial of the right to jury, in light of the relative purchasing power of money and the increased cost and time entailed in jury trials.

\begin{itemize}
  \item Colgrove v. Battin, 413 U.S. 149, 159-60 (1973).
  \item As noted in section II, in the 1600s and 1700s, Parliament determined that forty shillings was the proper ceiling for juryless proceedings in the courts of request. Beginning in the early 1800s, Parliament began to raise the ceiling with subsequent court of request acts so that the norm eventually became five pounds. See supra notes 77-79 and accompanying text.
  \item This five pound ceiling was carried over to the new county courts. See supra notes 88-90 and accompanying text.
  \item See generally supra notes 111-25 and accompanying text.
  \item Curtis v. Gill, 34 Conn. 49, 55 (1867).
  \item Id.
  \item Id.
  \item Id.
  \item Id. at 54.
\end{itemize}
was adopted the state legislature raised the threshold for appeals from the still juryless justice of the peace court from seven to fifteen dollars. In *Guile v. Brown*, the Connecticut Supreme Court rejected arguments that the post constitution increase was an unconstitutional denial of the right to jury trial in those cases involving between seven and fifteen dollars, reasoning that the constitutional guarantee was not intended to freeze the final jurisdiction of a justice of the peace at the sum of seven dollars:

The framers of the constitution did not descend to particulars, but contented themselves with embodying and promulgating certain general principles, leaving the details to be supplied by ordinary legislation... The history of legislation on this subject will show that the legislature, prior to the adoption of the constitution, varied the extent of the final jurisdiction of justices of the peace and other inferior tribunals from time to time as occasion required, so that, during the whole period since the settlement of the state, there has been no fixed, definite sum that has marked the limit of that jurisdiction... It cannot be said therefore that the constitution, even by implication, fixes the limit at any definite sum.

Evidence that the constitution's framers intended the ceiling for juryless proceedings to be adjusted as the need arose can also be found in the history of legislative activity immediately following the adoptions of the constitutions in some states. For example, the legislatures in Ohio and Pennsylvania raised the justice of the peace's final jurisdiction very shortly after adopting their respective constitutions, which indicates that they understood that the framers intended that this could be done.

State legislatures should have the authority to determine, in light of current economic conditions, what presently constitutes a "small claim" for purposes of the right to jury. The courts should serve only as a check on any legislation that is inconsistent with the spirit and pur-

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179. 38 Conn. 237, 241 (1871).
180. *Id.* at 241; see *Curtis*, 34 Conn. at 55.
181. *See supra* notes 113, 120 and accompanying text.
182. *See Crouchman*, 192 Cal. App. 3d at 108, 217 Cal. Rptr. at 913 ("the determination of a reasonable small claims jurisdiction amount [is] an appropriate legislative function now as it was in 1850"); *Curtis*, 34 Conn. at 55 ("So long as the legislature keeps substantially within the limits prescribed to itself by long usage, taking into consideration the relative depreciation in the value of money and the altered condition of the business interests of the state, we have no disposition to interfere by way of judicial veto"); *The Federalist* No. 83, at 625 (A. Hamilton) (J. Hamilton ed. 1904) ("[T]he changes which are continually happening in the affairs of society may render a different mode of determining questions of property, preferable in many cases, in which that mode of trial [jury trial] now prevails... 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.")
pose of the small claims exception existing at the adoption of the constitutional guarantee.  

Conclusion

Given the historical test for defining the right to jury, and in light of the early English and American practice of withholding a jury in cases involving small monetary claims, modern legislatures in many states should have the flexibility to fashion a small claims procedure that dispenses altogether with access to a jury. Such legislative action would remove an inherently inequitable strategic measure to frustrate resolution of small claims on the merits that presently is available to wealthy parties. Juryless small claims procedures will satisfy constitutional requirements as long as legislatures stay within the spirit of the original exception to the right to jury trial, and only provide for juryless procedures in those actions in which the amount-in-controversy does not justify the cost of a jury.

184. See J. Proffatt, supra note 100, § 100, at 145. Empirical research would be useful to determine the amount at which a claim will not be rendered impractical to litigate from an economic standpoint if a jury trial is demanded.

185. This probably would not be the case, of course, in states in which a minimum amount-in-controversy for the right to jury is expressly stated in the constitution. See supra note 131 and accompanying text.