The Limits of History: The English Fire Courts, Congress, and the Seventh Amendment Civil Jury Trial

A Response to Jay Tidmarsh, *The English Fire Courts and the American Right to Civil Jury Trial*, 83 U Chi L Rev 1893 (2016).

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INTRODUCTION

The Supreme Court of the United States has used history to help inform the meaning of the Constitution.[1] The influence that history should have on constitutional interpretation has been controversial.[2] Despite this ongoing debate, the text of the Seventh Amendment uniquely provides that "common law" governs the civil jury trial, and thus the Court has recognized the important role of history in the interpretation of that Amendment.[3] As a result, the Court has used history—specifically, the substance of the English common law in 1791 (the date when the Seventh Amendment was adopted)—to decide the meaning of the Amendment.[4] The Court has used this history to determine, among other questions, the conditions under which there is a right to a jury trial.[5] For the issues on the

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1 See, for example, *National Labor Relations Board v Noel Canning*, 134 S Ct 2550, 2559 (2014) ("[I]n interpreting the [Recess Appointments] Clause, we put significant weight upon historical practice.").

2 See generally, for example, Robert W. Bennett and Lawrence B. Solum, *Constitutional Originalism* (Cornell 2011) (debating the merits of originalism and living constitutionalism).

3 See US Const Amend VII. See also James Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries* 6 (NYU 2006); Suja A. Thomas, *The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries* 113–14 (Cambridge 2016).

4 Thomas, *The Missing American Jury* at 113–14 (cited in note 3).

5 In my book *The Missing American Jury*, I discussed how the civil jury was not intended to be significantly different than the grand jury or the criminal jury. I concluded that despite the term "right" in the Seventh Amendment, the civil jury actually possesses the power to decide in a manner similar to that set forth for criminal and grand juries in Article III, § 2 and the Fifth Amendment. See id at 87–88.

scope of that right, the Court analyzes whether the contemporary cause of action is analogous to a common-law cause of action and whether the relief sought is of the kind that juries decided in the English common-law courts in the late eighteenth century.[6] In determining whether a jury should decide, the Court has also considered the practical abilities and limitations of juries.[7] Using these factors, the Court decided that Congress can give decisionmaking authority—previously reserved for juries—to non–Article III, nonjury bodies to determine claims with damages, which Congress created, that involve public rights issues.[8]

Despite this grant of authority to nonjury bodies, the Court has never permitted Congress to delegate similar decisionmaking authority to Article III courts. In his Article *The English Fire Courts and the American Right to Civil Jury Trial*, Professor Jay Tidmarsh argues that Congress has such authority to shift certain claims with damages to Article III courts.[9] In his view, the lost history of the English Fire Courts grants Congress qualified, but significant, authority to further restrict the jury trial right. Although Tidmarsh gives a fascinating historical description of the fire courts, his Article provides a good opportunity to recognize the limits on the use of history—here, as it relates to the Seventh Amendment.

In the seventeenth century, the Great Fire of London virtually destroyed the city.[10] In response, Parliament established a Fire Court, which could suspend the jury trial.[11] Later, in similar circumstances, more fire courts were established.[12] Parliament created the fire courts in 1666, 1675, 1676, 1694, 1731, 1762, and 1807, and these Courts could decide claims that juries previously decided, including damages. As a result, Tidmarsh argues that Congress has the authority to shift

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6 See, for example, *Curtis v Loether*, 415 US 189, 194–96 (1974) (discussing Court precedent surrounding the applicability of a jury to administrative- and bankruptcy-law contexts).

7 *Ross v Bernhard*, 396 US 531, 538 n 10 (1970). There is no historical support for taking these factors into account. See generally Suja A. Thomas, *A Limitation on Congress: "In Suits at common law",71 Ohio St L J 1071 (2010).*

8 *See, for example, Granfinanciera, SA v Nordberg, 492 US 33, 51–52 (1989). But there is no historical support for this shift. See generally Thomas, 71 Ohio St L J 1071 (cited in note 7).*

9 *See generally Jay Tidmarsh, The English Fire Courts and the American Right to Civil Jury Trial, 83 U Chi L Rev 1893 (2016).*

10 Id at 1905.

11 Id at 1917 ("Parliament generally left the decision to use juries to the discretion of the court.").

12 See id at 1921–23.

decisionmaking power from juries to courts during national crises that are analogous to the English fires.[13] In support of his argument, Tidmarsh marshals impressive historical evidence about the fire courts' creation.

Although this archival research is quite interesting, Tidmarsh fails to acknowledge the limits of history's influence on the Seventh Amendment, as well as the actual conditions for the right to a jury trial in 1791. First, there were no fire courts during the relevant time period for determining the scope of the Seventh Amendment—the late eighteenth century. In this period of time, juries generally decided cases with damages.[14] It was under only extremely rare circumstances that judges decided claims with damages, and, almost invariably, these situations were controversial. Second, although Parliament possessed the authority to change the power of the common-law courts and the jury, the Framers did not give Congress similar authority under the US Constitution.[15]

Third, even if there had been fire courts in the late eighteenth century—which there were not—there would need to have been extensive fire courts in this period for courts to be able to hold this authority that juries traditionally held. An exceptional practice cannot establish the substance of the English common law.[16] Moreover, because Tidmarsh argues that Congress can give courts the authority to suspend juries in crises outside of circumstances involving fires, Tidmarsh would be required to show that Parliament permitted the suspension of the jury in such crises. Again, otherwise, an exceptional practice would establish the substance of the English common law.

Even if there were extensive fire courts and other such courts in national crises, Congress could not give courts jurisdiction unless several requirements from the fire courts' law (in addition to Tidmarsh's proposed requirements) were met. Parliament established these courts only because a general law

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13 See Tidmarsh, 83 U Chi L Rev at 1923–38 (cited in note 9).

14 See Thomas, 71 Ohio St L J at 1101 (cited in note 7) ("Courts of law with juries heard claims with damages, and courts of equity decided claims seeking specific performance and injunctions. In rare cases, when a court of equity otherwise had jurisdiction, a court of equity might order damages, but this exercise of jurisdiction to order damages was quite controversial.").

15 See id at 1101–07 ("Different from [Parliament's] constitutional structure, the United States' Constitution grants Congress certain specified authority in Article I, which does not give Congress any authority over the jury.").

16 See *Galloway v United States*, 319 US 372, 392 (1944) (holding that the "[Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements").

could not be fashioned to fix the issues.[17] Fire courts were given the authority to suspend juries only in circumstances in which there were terms in place that could not work: for example, under the terms of leases, tenants were required to pay to rebuild, and owners would not obtain possession if tenants failed to rebuild. Parliament then gave courts the authority to change the terms, but it prevented courts from doing more than allocating the proportional share of the cost according to the parties' interests.[18] Finally, three or more judges were required to decide each case and seven or more judges heard cases on appeal—conditions that indicate the importance attached to these issues and the unwillingness to permit one or even two judges to decide.[19] So, even if there had been many fire courts and the frequent suspension of juries in times of other crises in late eighteenth-century England, many other conditions would need to be satisfied in order for Congress to have the power to shift decisionmaking authority from juries to courts in America.

Part I of this Response describes Tidmarsh's argument that Parliament's establishment of fire courts gives Congress historical authority to shift certain cases from juries to Article III courts. Part II explains the scope of the jury's historically based constitutional authority. It then shows how the sporadic existence of the fire courts in England outside of the late eighteenth century does not limit the American jury's authority. Part III describes the differences between the constitutional power of Parliament and the constitutional authority of Congress to change the jurisdiction of the jury. Finally, Part IV shows that even if extensive fire courts existed in the relevant period of time, many additional safeguards would be required to establish analogous American fire courts. For example, a tribunal of three or more judges would be required to decide the case instead of a jury.

I. A HISTORY-BASED ARGUMENT TO EXTEND THE POWER OF ARTICLE III COURTS OVER JURIES

In his Article, Professor Tidmarsh describes the fires that occurred at different times during the seventeenth through the

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17 18 & 19 Car II ch 8 (1667), in 5 *Statutes of the Realm* 601, 601 (1819). See also Tidmarsh, 83 U Chi L Rev at 1912 (cited in note 9) ("Due to the variety of property arrangements, Parliament recognized that 'noe certaine generall rule can be prescribed.'").

18 Tidmarsh, 83 U Chi L Rev at 1912 (cited in note 9).

19 Id at 1916.

nineteenth centuries in urban areas of England.[20] After some of the fires, Parliament established fire courts to resolve the disputes that landlords and tenants had over rebuilding.[21] Without the development of fire insurance at that time, these were particularly important issues. Under the leases, tenants were required to pay to repair or to rebuild the property, even when the tenant was not at fault for the damage. Tenants also had to continue to pay rent after the fire, even when the place was uninhabitable. The courts were serious about enforcing terms of leases. In fact, in the past, there was an example in which a court had required a tenant to pay rent, even when the tenant was forced out by a war involving the enemy. There were opposing opinions about a tenant's responsibilities, however. A Frenchman confessed to the crime of setting the London fire,[22] and France was allied with the Dutch, who were at war with England at the time. As a result, some thought that tenants should not be required to pay for damage caused by the enemy during the London fire.[23]

Tidmarsh points out that not only tenants suffered after the fires; owners also faced problems.[24] If the owner sued to enforce the terms of the lease and won in the law court, the tenant could bring a case in the equity court to request that the lease not be enforced. This process could require significant time and money. Also, if the tenant did not rebuild and the lease had not ended, the owner might not be able to regain possession of the property. Moreover, if a tenant had a short time left on the lease, there was little incentive to rebuild—and even less motivation given the significant cost including the expensive brick required by the new building code. And courts did not possess the power to change the lease terms.[25]

Parliament decided that the fire courts could alleviate these issues.[26] Three or more judges sat on each case. The fire courts were required to use the principle that the parties should pay according to their interests, and they could choose to use juries

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20 See id at 1905–20.

21 See id.

22 Although he was executed for the crime to which he confessed, it was later discovered he could not have committed the crime, as he was aboard a ship. See Tom Geoghegan, *The Untold Story of the Great Fire of London* (BBC, June 30, 2010), archived at http://perma.cc/G3AN-M54B.

23 See Tidmarsh, 83 U Chi L Rev at 1910 (cited in note 9).

24 See id at 1911–12.

25 Id ("The law, however, did not permit judges to calibrate the parties' legal rights to achieve the best incentives to rebuild.").

26 See id at 1911–20.

to decide the claims. For the most part, however, they did not use juries and decided the issues themselves.[27] Seven or more judges heard appeals. Parliament limited the time period of the fire courts' jurisdiction and extended and renewed their power at different times.

Tidmarsh accepts that the Supreme Court's jurisprudence on the Seventh Amendment governs whether a jury or a court must decide a case. More specifically, the substance of the English common law of the late eighteenth century determines the scope of the authority of the jury and the court under the Seventh Amendment. Using this jurisprudence, Tidmarsh asserts that the newly found history of the fire courts can be interpreted in three different ways. It can authorize a broad, narrow, or intermediate power of courts to determine factual issues that juries have traditionally decided, including damages.[28] According to Tidmarsh, under the broad view, courts can take authority to decide such jury issues whenever courts deem it beneficial to do so. Under the narrow view, courts have no additional authority to determine jury issues. Under the intermediate view, courts can possess authority to decide jury issues only in the types of circumstances that resulted in Parliament giving fire courts power in the seventeenth to the nineteenth centuries.

Tidmarsh takes this last, intermediate position.[29] In rejecting the broad interpretation of courts' power, Tidmarsh emphasizes that there was little fact-finding in the fire courts, and almost invariably when there was, the remedy was equitable—not a matter for the common-law courts or the jury. Tidmarsh also sets aside the narrow view that there should be no more additional court authority. Under the narrow view, the fire courts are already covered under the Supreme Court's public rights exception, which permits Congress to give non–Article III bodies certain cases traditionally decided by juries.[30] Tidmarsh counters that the fire courts were not equity courts or administrative bodies but instead analogous to Article III courts. As a result, these courts do not fit into the non–Article III public rights exception. Moreover, Tidmarsh notes that the practical abilities and limitations analysis, and thus the public rights

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[27] See Tidmarsh, 83 U Chi L Rev at 1917 (cited in note 9) ("Out of the 1,585 cases that the London Fire Court decided, the records reflect only 1 case in which the Fire Court referred a matter to a jury.").

[28] See id at 1923–33.

[29] See id.

[30] See id at 1925. See also *Granfinanciera, SA v Nordberg*, 492 US 33, 51 (1989).

analysis, applies only when there is a historically strong basis for the jury trial.[31] Here, on the other hand, there was no question that Parliament could change the jury's jurisdiction.

Next, adopting the intermediate position, Tidmarsh describes how the history of the fire courts affects the power of courts today.[32] He argues that Congress can suspend juries in circumstances beyond those in which the fire courts were established, landlord–tenant disputes based around catastrophic urban fires. He emphasizes that the authority of the jury is drawn from the substance of the common law—not from the technical requirements at the time. On the other hand, stating that juries "are a check against overreaching by government," he argues that the limitation on jury decisionmaking must be "narrow and necessary, and ideally should require the assent of multiple branches of government."[33] History, the remedy, and the public rights exception should all be considered.

He concludes that Congress can limit the jury trial if the following conditions are met: (1) there is a significant crisis; (2) the law does not give the "socially desirable" result; (3) the new law can give the "socially desirable" result and further recovery from the crisis; and (4) the new law gives courts the ability to suspend traditional jury authority when juries would hinder the "socially desirable" result.[34] Tidmarsh emphasizes that his proposal requires the safeguard of all branches of the government agreeing to suspend the jury trial. Additionally, he argues that his proposed requirements are consistent with the broad purposes of equity—to act only when adequate legal remedies were not available—and are consistent with moving adjudication to nonjury bodies through the public rights exception.[35]

Tidmarsh goes through possible crises and laws to give examples of his proposal.[36] For example, after September 11th, if lawsuits threatened the airline industry, legislation that allowed judges to apportion losses—like in the fire courts—

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31 See Tidmarsh, 83 U Chi L Rev at 1926 (cited in note 9).

32 See id at 1930–33.

33 Id at 1929.

34 Id at 1930.

35 Tidmarsh, 83 U Chi L Rev at 1933 (cited in note 9). Tidmarsh also argues that there is no question that Congress could give agencies issues that satisfy the four criteria. See id at 1933 n 172. He does not appreciate that Congress does not have such authority—despite the Court's attempt to justify it. See Thomas, 71 Ohio St L J at 1101–07 (cited in note 7). See also note 50.

36 Tidmarsh, 83 U Chi L Rev at 1933–38 (cited in note 9).

would have been permitted under his proposal.[37] He argues: the crisis would have been the viability of the airline industry; the obstacle of the law would have been massive liability; the law apportioning losses would help dissipate the crisis; and permitting judges to eliminate juries would help alleviate the crisis. He also describes the mortgage foreclosure crisis as another example for which law could have been properly created to alleviate the crisis.[38]

II. THE PROPER HISTORICAL BAILIWICK OF THE JURY

Tidmarsh uncovers fascinating history about the exercise of Parliament's power to distribute decisionmaking authority from juries to courts. However, for this history to be relevant, it must be tied to the Seventh Amendment's requirements. The Seventh Amendment sets forth the circumstances under which a jury tries a civil case. It 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 reexamined in any Court of the United States, than according to the rules of the common law.[39]

The question is what jury trial right was preserved. A short period after the adoption of the Amendment, Justice Joseph Story, serving as a circuit-court judge, declared that "common law" in the Seventh Amendment referred to the English common law, and thus this common law governed when a right to a jury trial existed.[40] Later, in 1820, in *Parsons v Bedford*,[41] Story, now sitting as a Supreme Court justice, pointed out that new causes of action had existed in states and the jury trial had applied to them.[42] Moreover, the text of the Judiciary Act of 1789[43] provided that juries were to try all issues of fact that were not under equity, admiralty, or maritime jurisdiction.[44] So, the Court concluded that the Seventh Amendment or jury trial applied not just to old common-law causes of action but also to new legal

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37 Id at 1934.
38 Id.
39 US Const Amend VII.
40 *United States v Wonson*, 28 F Cases 745, 750 (CC D Mass 1812).
41 28 US 433 (1830).
42 Id at 447.
43 1 Stat 73.
44 See Judiciary Act of 1789 § 9, 1 Stat at 76–77.

rights or causes of action with damages.[45] In other words, the Seventh Amendment limited Congress's lawmaking authority over juries, including any attempts of Congress to give courts' or other bodies authority that they did not possess at common law.[46] Accordingly, Congress could not give the appellate courts power to order a new jury trial—authority that those bodies did not hold at common law.[47]

Although the Court had formerly used past practices to interpret the Seventh Amendment, in 1898 it first explicitly stated that the English common law in the late eighteenth century—the period when the Seventh Amendment was adopted—governed the scope of the Seventh Amendment jury trial.[48] In its Seventh Amendment jurisprudence, the Court has also emphasized that the jury trial must conform to the substance or essentials—not the exact form—of the late eighteenth-century English jury trial.[49]

I note that despite the precedent requiring the use of the late eighteenth-century English common law to interpret the jury trial right, the Court deviated from these practices when it held that congressionally established, non–Article III bodies could decide claims with damages when the issues involve public rights issues—issues that juries had traditionally decided.[50]

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45 See *Parsons*, 28 US at 447.

46 Id.

47 See id at 447–49.

48 *Thompson v Utah*, 170 US 343, 350 (1898) ("[T]he word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption.").

49 See, for example, *Colgrove v Battin*, 413 US 149, 156 (1973), citing *Baltimore & Carolina Line, Inc v Redman*, 295 US 654, 657 (1935).

50 See *Curtis v Loether*, 415 US 189, 193–97 (1974) (discussing past Supreme Court decisions on the Seventh Amendment). Since then, a number of scholars have weighed in on whether the Seventh Amendment permits Congress to give public rights issues to these nonjury bodies. For example, Professors Martin H. Redish and Daniel J. La Fave have stated that for the Court's jurisprudence to be consistent, Congress would not have this power. Martin H. Redish and Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 Wm & Mary Bill Rts J 407, 417–29 (1995). They left open the possibility that overruling *Parsons* would make the Court's jurisprudence defensible. Id at 452. More recently, I analyzed the historical background of the "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved" language in the Seventh Amendment, and concluded that this language is indeed a limitation on Congress. In the late eighteenth-century English common-law courts, juries almost invariably decided cases with damages. So, using the substance of the common law, the Seventh Amendment gave people with claims for damages the right to have juries decide their cases. Thus, I argued, among other things, that the public rights exception is unconstitutional. See Thomas, 71 Ohio St L J at 1101–07 (cited in note 7).

Using the Seventh Amendment jurisprudence of the Supreme Court, the question becomes how, if at all, Parliament's establishment of the fire courts in 1666, 1675, 1676, 1694, 1731, 1762, and 1807 affects the right to a jury trial under the Seventh Amendment. First, because the Seventh Amendment right is based on the scope of the late eighteenth-century jury trial, Parliament's creation of these courts in the seventeenth century, in the early and mid-eighteenth century, and its later establishment of the courts again in the nineteenth century is irrelevant to the Seventh Amendment right. Juries decided cases with damages in the relevant time period of the late eighteenth century, and Parliament did not act against this general authority in that time period.[51] As we know, the common law and statutes changed over time. The Supreme Court has stated that the Framers based the jury right on the late eighteenth century so the seventeenth century, the early and mid-eighteenth century, and the early nineteenth century have no relevance.

Tidmarsh states that Alexander Hamilton *may* have had the fire courts in mind when he argued against a civil jury right in the Constitution.[52] It is more likely that the Framers were not focused on this anomalous, infrequent situation in which juries did not make the decision—one that did not even occur in the late eighteenth century. In any event, Hamilton and others had acknowledged that if a jury trial were established in the Constitution, Congress's authority over the jury would be abridged.[53] And Congress's authority was indeed curtailed when only courts were given specific authority over the jury when the jury trial right was established in the Seventh Amendment.[54]

III. THE POWER OF PARLIAMENT VERSUS THE POWER OF CONGRESS

As stated in Parts I and II, there were no fire courts in the late eighteenth-century English period that governs the Seventh Amendment jury trial right. As a result, under the Supreme Court's jurisprudence, only juries have the authority to decide the types of issues that fire courts determined.

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51 Thomas, 71 Ohio St L J at 1101–07 (cited in note 7).

52 Tidmarsh, 83 U Chi L Rev at 1927 n 144 (cited in note 9) (discussing Hamilton's comments on the lack of a civil jury trial right in the Constitution in Federalist 83).

53 Thomas, *The Missing American Jury* at 64–65 (cited in note 3).

54 US Const Amend VII. See also Part III.

It is unclear if Professor Tidmarsh is trying to argue that Congress has certain authority over the jury because Parliament itself possessed authority to change the jurisdiction of courts and the jury before, during, and after the late eighteenth century. For example, along with other information, Tidmarsh uses the presence of fire courts in the nineteenth century to contend that Congress can create analogous fire courts now. The nineteenth century would matter to the interpretation of the Seventh Amendment only if Congress possesses the authority to act in the same circumstances that Parliament could. Indeed, Parliament held much power over the jury's realm. In 1858, it enacted the Chancery Amendments Act,[55] which permitted courts of equity to decide most issues that juries had decided in the past.[56]

The Framers did not give Congress this type of extensive power to change courts' and the jury's jurisdiction. Instead Congress possesses limited authority under the Constitution. Article I, along with the Seventh Amendment, does not give Congress any special authority to control the jury's jurisdiction. Only the courts are given authority over the jury. If the Framers had wanted Congress to have any similar power, they would have made explicit Congress's authority to take power from the jury, instead of making explicit only the courts' common-law authority over the jury.

On the other hand, the English Constitution gave Parliament more authority than the US Constitution gave Congress.[57] Parliament was supreme. Parliament always had the authority to change the common law and the jurisdiction of the courts.

Because of the constitutional limitations on Congress, it does not have the authority to give cases preserved for the jury under the Seventh Amendment to Article III courts.[58] It is irrelevant to Congress's authority that Parliament established the fire courts at certain times outside of the late eighteenth century and could have established them in the late eighteenth century. Congress does not hold the same authority as

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55 21 & 22 Vict ch 27 (1858).

56 Thomas, 71 Ohio St L J at 1098–99 (cited in note 7). If Congress could act like Parliament, it could actually eliminate the Seventh Amendment. This would be inconsistent with the text of the Amendment that "preserve[s]" the common-law right to a jury trial. US Const Amend VII.

57 Thomas, 71 Ohio St L J at 1102–03 (cited in note 7) ("[T]here was a general belief that Parliament could take any actions, including the alteration of the common law.").

58 See id at 1103–07.

Parliament, including the authority to change the courts' and the jury's jurisdiction.

If, in the late eighteenth century, Parliament had given courts extensive authority to shift cases from juries to themselves to decide, this would be relevant. But courts were not given this authority, and Congress has no authority under the Constitution to change the jurisdiction of the courts and the jury. The fire courts are therefore irrelevant.

In his Article, Tidmarsh makes an additional argument for the propriety of a shift to courts from juries in present circumstances similar to the fire courts: each of the branches would check the assertion of power before the jury loses authority. For example, the legislature, the executive, and the courts must decide to shift cases to courts from juries.[59] However, it is important to recognize the powers and limitations attached to each of these constitutional actors, including the executive, the legislature, the judiciary, the states, and the jury.[60] The jury was supposed to hold significant authority and protect against these bodies. Instead, each of the other bodies has taken authority away from the jury, resulting in the jury deciding few cases. Currently, for example, juries decide less than one percent of the civil cases in the federal courts.[61] Using history in the manner Tidmarsh argues would continue to diminish the jury's power in a historically inaccurate manner.

IV. IF THERE HAD BEEN FIRE COURTS IN LATE EIGHTEENTH-CENTURY ENGLAND . . .

Finally, I want to consider the conditions under which Congress would possess the authority described by Professor Tidmarsh to shift cases from juries to courts. First, there would need to have been extensive fire courts in the late eighteenth century—in other words, evidence that the Framers clearly considered these courts to be part of the common law. Otherwise, to permit fire courts to influence the scope of the Seventh Amendment's right to a jury trial would be to allow the exception of courts deciding in certain circumstances to become

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59 See Tidmarsh, 83 U Chi L Rev at 1930–33 (cited in note 9).

60 See Thomas, *The Missing American Jury* at 11–48, 83–90 (cited in note 3).

61 See id at 2.

the rule. Indeed, Tidmarsh acknowledges that Parliament did not always create fire courts when there were fires.[62]

Tidmarsh has also argued that Congress has the authority to create courts analogous to fire courts in other similar crisis situations. But there may have been other crises in England during which Parliament did not create courts analogous to fire courts. So, in order for Congress to be able to shift claims to courts to decide outside of fire court circumstances, there should be evidence that when those types of situations existed in late eighteenth-century England, courts analogous to fire courts heard them. Only if juries decided under these conditions could Congress consider creating such courts.

And even if all of these circumstances were true, several other conditions must be in place to create analogous fire courts.[63] First, a general law must not be possible to remedy the issues. Second, the legal regime must be unworkable, just as the leases at issue in eighteenth-century England could not be enforced. For example, in one circumstance, tenants could not pay for rebuilding and owners could not regain possession. Third, there must be an inherent unfairness of the circumstances to both parties. The leases at issue were unfair, imposing substantial costs on tenants who were not responsible for the harm and forcing difficult conditions on owners. Fourth, juries should be difficult to constitute, just as jurors were likely less available when London had been all but completely destroyed during the fires. Fifth, three or more judges must be required. Three or more judges were required to decide these cases in which lease terms were being altered, even though a quick determination was desired. This requirement shows the significance attached to taking away the jury trial right and altering substantive rights under the lease. The jury was taken away and the lease was altered only when a significant group of judges decided that this should happen. Sixth, the law must fairly apportion the loss according to the interests of the parties. Judges could frame new remedies, but the law required the proportional allocation of the loss according to the parties' interests. Seventh, multiple judges should decide appeals. An appeal was possible if less than seven judges decided the initial matter. Seven or more judges would decide the appealed case.

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[62] See Tidmarsh, 83 U Chi L Rev at 1921 n 119 (cited in note 9) ("Despite pressure to do so, Parliament failed to enact a statute to deal with a fire in Buckingham in 1724, much to the detriment of the town.").

[63] See id at 1905–23.

Again, this requirement shows the significance attached to taking away the jury trial right and altering substantive rights under the lease. The lease terms were definitely altered on appeal only when a large group of judges decided that it was correct to do so. Finally, juries should be used in certain circumstances. Parliament required juries to decide issues regarding the valuation of land.[64]

Tidmarsh does not acknowledge the important distinctions above. To establish courts analogous to the fire courts, there would need to have been extensive fire courts and extensive crisis situations in which juries did not decide in the late eighteenth century. Suspension of the jury right would be permitted only if these conditions and all of the above-mentioned conditions were satisfied—not just the ones set forth by Tidmarsh.

As an example, Tidmarsh argues that a shift in decisionmaking authority to judges would have been appropriate if the airline industry were in danger of collapsing after September 11th because of massive liability.[65] However, he would need to show that Parliament gave courts the power to decide similar crises in England in the late eighteenth century, which he cannot show. There are several other problems with Tidmarsh's conclusion that Congress could have delegated such cases to courts. For example, the fire courts were formed when both parties were in difficult, legally binding circumstances and those Courts could be mutually beneficial. In the hypothesized September 11th situation, though, only one party stood to benefit from the change in terms.[66]

Tidmarsh also argues that the mortgage foreclosure circumstances of 2008 created a crisis that could have been remediable by courts instead of juries because of the past existence of fire courts.[67] Again, in order for Congress to have been able to shift authority from juries to courts, Parliament must have actually given courts power in similar crises in England in the late eighteenth century and there is no evidence of such a shift. Also, to the extent there were legally binding documents, both parties would need to benefit from the

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64 See id at 1921 n 121.

65 See id at 1936.

66 Note also that fear of a foreign enemy—whether or not real—may have played some role in the establishment of the fire courts. See Geoghegan, *The Untold Story of the Great Fire of London* (cited in note 22).

67 See Tidmarsh, 83 U Chi L Rev at 1936–37 (cited in note 9).

proceedings. In the mortgage crisis situation, it appears again that only one party would benefit from this law.

CONCLUSION

Professor Tidmarsh uncovers some fascinating history about the fire courts in England and argues that Congress should be able to delegate authority traditionally held by juries to courts in limited analogous circumstances. However, the fire courts were not in existence in the late eighteenth century. Moreover, Congress does not possess the same constitutional power that Parliament held, so Congress cannot presently take away the jury's authority. Also, even if fire courts had existed, while Tidmarsh acknowledges significant characteristics of the fire courts, he fails to recognize important issues. Fire courts would need to have been extensive in the late eighteenth century to be considered the common-law practice. Moreover, if extended beyond fire courts, there would need to be evidence that Parliament gave courts the authority to bypass juries in such crisis situations. Otherwise, there would be no common-law authority for courts to decide these issues. Even if this were all true, Congress still could not take away authority unless other conditions were met. Unworkable, unfair circumstances to both parties appeared to motivate the establishment of the fire courts as well as the Parliament-created solution that required fairness. The requirements to have three or more judges decide and seven or more judges hear an appeal are even more significant illustrations of the seriousness with which Parliament treated these issues. These and other matters would need to be carefully considered if extensive fire courts had existed.

Most importantly, fire courts did not exist in late eighteenth-century England, so Congress lacks any authority to establish such analogous courts. If other courts that could displace jury authority are discovered to have existed in the late eighteenth century, the specific circumstances underlying the courts need to be taken into account before the traditional jurisdiction for the jury is altered.