

# Merchant Courts, Arbitration, and the Politics of Commercial Litigation in the Eighteenth-Century British Empire

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John Locke worried that the common law was bad for business. Although he recognized the political importance of common law institutions such as juries,<sup>1</sup> he also thought that the cumbersome procedures of English courts might hamper economic development in England and its colonies.<sup>2</sup> The Fundamental Constitutions of Carolina, which Locke helped draft in

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1. See J.R. Milton and Philip Milton, "Selecting the Grand Jury: A Tract by John Locke," *Historical Journal* 40 (1997): 185–94.

2. See, for example, John Locke, *An Essay Concerning Human Understanding*, reprinted in *Works of John Locke* (London: C. & J. Rivington et al., 1824), 2.332; and John Locke, "Instructions for the Education of Edward Clarke's Children" (February 8, 1686), reprinted

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1669, tried to reconcile these competing political and economic concerns. Although the Constitutions guaranteed “Freemen” a right to trial by jury, the document also provided for specialized judges in port towns to “try cases belonging to [the] law-merchant.”<sup>3</sup> These commercial judges would allow merchants to settle their disputes “as shall be most convenient for trade,” rather than by the expensive formality of the common law.<sup>4</sup>

In the 1690s, Locke, then a member of the Board of Trade, again looked for a way to resolve commercial disputes in a manner more “convenient for trade” than ordinary courts. But instead of again turning to merchant judges, he drafted a statute that directed existing courts to enforce arbitration agreements.<sup>5</sup> This time, rather than erecting new tribunals, the state would outsource commercial dispute resolution to private arbitrators.

Locke’s two proposals reflected an enduring problem for British policy makers in the century before the Industrial Revolution. Throughout the late seventeenth and eighteenth centuries, lawyers and merchants alike warned that English law was inadequate for a modern economy.<sup>6</sup> Their concern was partly with substantive law, but they also argued that English procedure—with its cumbersome pleadings, expensive lawyers, and judges inexperienced in trade—was poorly suited to commercial litigation. One option was to reform the Westminster courts, either judicially or legislatively,<sup>7</sup> but many commentators argued that merchants needed a radically different alternative: either commercial courts, as Locke suggested for Carolina; or court-enforced arbitration, as he proposed to the Board of Trade. These proposals had very different fates. Arbitration became ubiquitous and, especially

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in *Electronic Enlightenment* (2013), [http://www.e-enlightenment.com/item/lockjoOU0020772\\_1key001doc](http://www.e-enlightenment.com/item/lockjoOU0020772_1key001doc) (December 30, 2015).

3. *The Fundamental Constitutions of Carolina* (1669), in *Works of John Locke*, 9.175; see also David Armitage, “John Locke, Carolina, and the ‘Two Treatises of Government,’” *Political Theory* 32 (2004): 611. For Locke’s role in the *Fundamental Constitutions*, see Richard Ashcraft, *Revolutionary Politics & Locke’s Two Treatises of Government* (Princeton: Princeton University Press, 1986), 85, 122 n.164.

4. *Fundamental Constitutions of Carolina*.

5. Henry Horwitz and James Oldham, “John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century,” *Historical Journal* 36 (1993): 138.

6. See David Lieberman, “The Legal Needs of a Commercial Society: The Jurisprudence of Lord Kames,” in *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment*, ed. Istvan Hont and Michael Ignatieff (Cambridge: Cambridge University Press, 1986), 203–34; and David Lieberman, “Property, Commerce, and the Common Law: Attitudes to Legal Change in the Eighteenth Century,” in *Early Modern Conceptions of Property*, ed. John Brewer and Susan Staves (London: Routledge, 1995), 144–58.

7. See David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989).

after 1750, increasingly “court-related” and “legalized.”<sup>8</sup> Proposals for commercial courts, however, repeatedly failed until the 1890s.<sup>9</sup>

Britain’s decision not to create merchant courts poses a puzzle. Historians have noted that the absence of merchant courts is “curious” and “very different from” the practice elsewhere in Europe,<sup>10</sup> where commercial courts were common.<sup>11</sup> But although scholars have long emphasized the significance of eighteenth-century commercial law<sup>12</sup>—whether as an influence on founding-era procedural rights<sup>13</sup> or because of the Weberian debate over the importance of law for economic

8. Horwitz and Oldham, “Arbitration,” 137; Hubert Lister Parker, *The History and Development of Commercial Arbitration* (Jerusalem: Magnes Press, Hebrew University, 1959), 13; and Bruce H. Mann, “The Formalization of Informal Law: Arbitration before the American Revolution,” *New York University Law Review* 59 (1984): 443.

9. T.E. Scrutton, “The Work of the Commercial Courts,” *Cambridge Law Journal* 1 (1921): 16; and John Macdonell, “The Codification of the Commercial Law of the Empire,” *Journal of the Society of Comparative Legislation* 16 (1916): 276–77. Britain added separate mercantile courts a century later. “Mercantile Courts,” *Ministry of Justice* (August 24, 2012) <https://www.justice.gov.uk/courts/rcj-rolls-building/mercantile-court> (December 30, 2015). The latter have “administrative and supervisory jurisdiction over arbitration claims and awards relating to cases of a mercantile nature,” and they typically handle less complex claims than the commercial court, which primarily serves overseas litigants. “Why Have Mercantile Courts?” *Ministry of Justice* (February 18, 2012), <https://www.justice.gov.uk/courts/rcj-rolls-building/mercantile-court/why-have-mercantile-courts> (December 30, 2015). England did have merchant courts during the Middle Ages, but they lapsed by the seventeenth century. W.S. Holdsworth, *A History of English Law* (London: Methuen & Co., 1903), 1.334.

For a comparative discussion of debates regarding arbitration and commercial courts in nineteenth-century Britain, France, and the United States, see Claire Lemerrier, *Un modèle français de jugement des pairs: Les tribunaux de commerce, 1790–1880* (unpublished manuscript, 2012), <https://tel.archives-ouvertes.fr/tel-00685544/document> (May 16, 2016).

10. L. Stuart Sutherland, “The Law Merchant in England in the Seventeenth and Eighteenth Centuries,” *Transactions of the Royal Historical Society Fourth Series* 17 (1934): 154; see also Lieberman, *Province of Legislation Determined*, 100–101.

11. See, for example, Alexander Justice, *A General Treatise of Monies and Exchanges* (London: S. and J. Sprint, and J. Nicholson, 1707), 73–82; Amalia D. Kessler, *A Revolution in Commerce: The Parisian Merchant Court and the Rise of Commercial Society in Eighteenth-Century France* (New Haven: Yale University Press, 2007); Robert Sidney Smith, *The Spanish Guild Merchant: A History of the Consulado, 1250–1700* (Durham: Duke University Press, 1940), 3–17; and John Weskett, *Plan of the Chamber of Commerce* (London: sold by Richardson and Urquhart, 1782), 6.

12. See, for example, Norman S. Poser, *Lord Mansfield: Justice in the Age of Reason* (Montreal: McGill-Queen’s University Press, 2013), 4; and Lieberman, “Property, Commerce, and the Common Law,” 149–50.

13. See, for example, James Oldham, “On the Question of a Complexity Exception to the Seventh Amendment Guarantee of Trial by Jury,” *Ohio State Law Journal* 71 (2010): 1031–54; and Lochlan Shelfer, “Special Juries in the Supreme Court,” *Yale Law Journal* 123 (2013): 208–52.

development<sup>14</sup>—scholars have never explored one of its most salient institutional features: its development within ordinary courts. Instead, scholars have assumed “that there was no general desire among merchants for a special court” during the eighteenth century.<sup>15</sup> But as I will describe below, this is simply false.<sup>16</sup> And even if eighteenth-century merchants did fail to pursue commercial courts, it still needs to be explained why their preferences differed from those of merchants elsewhere in Europe and in nineteenth-century Britain.

This article offers the first explanation for Britain’s decision not to create a merchant court. Britain made that choice not because merchants did not want one (they did), nor because it was alien to the English legal tradition (it was not),<sup>17</sup> but because of a combination of interest and partisan politics. Starting in the seventeenth century, English lawyers resisted the creation of courts merchant, which would have threatened their monopoly on litigation. (Merchant courts emerged more successfully in the colonies, where the bar had less power.)<sup>18</sup> In the 1760s, however, the need for a merchant court became more acute, as litigation levels rose, legal costs skyrocketed,<sup>19</sup> and dispute resolution became increasingly expensive.<sup>20</sup> However, just as merchant courts should have been most appealing,<sup>21</sup> political polarization impeded institutional innovation, as radical Whigs opposed the creation of any new court that might undermine civil juries.<sup>22</sup> Meanwhile, several reforms to common law litigation, particularly the

14. For example, Joel Mokyr, *The Enlightened Economy: An Economic History of Britain, 1700–1850* (New Haven: Yale University Press, 2009), 368–448; Douglass C. North and Robert Paul Thomas, *The Rise of the Western World: A New Economic History* (Cambridge: At the University Press, 1973), 156; Jean-Laurent Rosenthal and Roy Bin Wong, *Before and Beyond Divergence: The Politics of Economic Change in China and Europe* (Cambridge: Harvard University Press, 2011), 67–98; and Paul R. Milgrom, Douglass C. North, and Barry R. Weingast, “The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs,” *Economics & Politics* 2 (1990): 1–23.

15. William C. Jones, “An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States,” *University of Chicago Law Review* 25 (1958): 457–58.

16. See Part II.

17. Claire Lemerrier has made a similar argument regarding nineteenth-century resistance to commercial tribunals in England. Lemerrier, *Un modèle français de jugement des pairs*, 345–46.

18. See Section III.A.

19. See Section I.A.

20. See Sections I.B and I.C.

21. See Section I.D.

22. See Section III.B.

expanded use of merchant juries, reduced pressure for more fundamental reform and allowed political concerns to predominate.<sup>23</sup>

Britain's decision not to create merchant courts in the eighteenth century offers a new perspective on juryless litigation in Anglo-American law, both as a means of resolving private disputes, and as a tool of the administrative state. The enduring absence of merchant courts enabled theorists such as Albert Venn Dicey to posit an Anglo-American legal tradition in which specialized courts had no place.<sup>24</sup> Instead, Dicey and like-minded authors argued, English and American litigants traditionally resolved their disputes in "ordinary" courts or through "private" arbitration. The result has been a lasting discomfort with juryless courts that continues to trouble scholarship on civil litigation and administrative law.

## I. Inadequate Alternatives to Merchant Courts

Eighteenth-century merchants had three principal means of resolving a commercial dispute: they could litigate in ordinary courts, arbitrate the dispute informally, or pursue formal, court-enforced arbitration. In the 1760s, the inadequacy of these choices led merchants in many cities to develop a fourth option: arbitration facilitated by chambers of commerce. None of these methods, however, proved fully satisfactory.

### A. Litigation

Early modern merchants avoided litigation for reasons of cost, predictability, and reputation. Creditors often sued to collect simple debts,<sup>25</sup> but merchants hesitated to litigate more complex cases, a fact reflected in declining litigation volume between 1690 and 1750.<sup>26</sup> The first reason was cost. In

23. See Section III.C.

24. French jurists also perceive the dual system of ordinary courts and private arbitration as a distinctly "Anglo-American" model. See Claire Lemerrier, "The Judge, the Expert and the Arbitrator: The Strange Case of the Paris Court of Commerce (ca. 1800-ca. 1880)," in *Fields of Expertise: A Comparative History of Expert Procedures in Paris and London, 1600 to Present* (Newcastle: Cambridge Scholars Publishing, 2007), 115–45.

25. See Clinton W. Francis, "Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts, 1740–1840," *Northwestern University Law Review* 80 (1986): 809.

26. See Christopher W. Brooks, *Lawyers, Litigation, and English Society Since 1450* (London: Hambledon Press, 1998), 30; Henry Horwitz and Patrick Polden, "Continuity or Change in the Court of Chancery in the Seventeenth and Eighteenth Centuries?" *Journal of British Studies* 35 (1996): 24–57; and David Lemmings, *Professors of the Law:*

England, litigation expenses doubled between 1680 and 1750<sup>27</sup> and continued to rise throughout the eighteenth century,<sup>28</sup> so that costs often exceeded the amount recovered.<sup>29</sup> Litigation in colonial courts was likewise extraordinarily expensive, relative both to the sums at issue and to average incomes.<sup>30</sup> Moreover, English fee-shifting rules, which required a losing plaintiff to bear all litigation costs, made lawsuits risky for all but the surest cases.<sup>31</sup> Jury trials were particularly expensive and—because the outcome seemed to depend mostly on lawyers’ tricks and juries’ whims—unpredictable.<sup>32</sup>

Many merchants considered litigation not just imprudent but also dishonorable.<sup>33</sup> Daniel Defoe, for example, argued that a trader “that will seek Justice in the Law, ought to be first very sure he can obtain Justice no other Way.”<sup>34</sup> Religion reinforced this norm among Quakers, who were prominent in many mercantile communities.<sup>35</sup> Someone seen as litigious risked damaging crucial business relationships,<sup>36</sup> with pernicious

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*Barristers and English Legal Culture in the Eighteenth Century* (Oxford: Oxford University Press, 2000), 85.

27. C.W. Brooks, “Interpersonal Conflict and Social Tension,” in *The First Modern Society: Essays in English History in Honour of Lawrence Stone*, ed. A. L. Beier, David Cannadine, and James M. Rosenheim (Cambridge: Cambridge University Press, 2005), 380–82.

28. See Lemmings, *Professors of the Law*, 197 (estimating that during the eighteenth century, barristers’ fees tripled, while consumer prices doubled).

29. Francis, “Practice, Strategy, and Institution,” 945.

30. Claire Priest, “Colonial Courts and Secured Credit: Early American Commercial Litigation and Shay’s Rebellion,” *Yale Law Journal* 108 (1999): 2417, 2424–29.

31. See Francis, “Practice, Strategy, and Institution,” 821–24.

32. *Ibid.*, 818 n.31.

33. See Eben Moglen, “Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law,” *Yale Law Journal* 93 (1984): 139.

34. Daniel Defoe, *The Complete English Tradesman in Familiar Letters, Directing Him in the Several Parts and Progressions of Trade*, 2d ed. (London: Printed for C. Rivington, 1727), 237–98.

35. Carli N. Conklin, “Transformed, Not Transcended: The Role of Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey,” *American Journal of Legal History* 48 (2006): 70, 74.

36. Sheryllyne Haggerty, “*Merely for Money?*” *Business Culture in the British Atlantic, 1750–1815* (Liverpool: Liverpool University Press, 2014), 103; and David Hancock, *Citizens of the World: London Merchants and the Integration of the British Atlantic Community, 1730–1785* (Cambridge: Cambridge University Press, 1995), 248–49.

consequences for obtaining insurance,<sup>37</sup> credit,<sup>38</sup> and even success in future litigation.<sup>39</sup>

### B. Informal Arbitration

The disadvantages of litigation led many merchants to prefer arbitration, which they perceived as relatively cheap and predictable. As one merchant explained, arbitration could be “decided by three men who no doubt I shall know & without any considerable expence,” whereas litigation was “left to the decision of 12 men, who I may not know & likewise done at a very heavy expence.”<sup>40</sup> Arbitration also offered merchants a way to resolve disputes in a manner more sensitive to their reputational needs. Unlike litigation, which necessarily focused on a single cause of action, arbitration offered a way to conclude “all manner of . . . Actions . . . depending . . . between the said Parties,” whether “trading Differences” or “private Injuries.”<sup>41</sup> As a result, a successful arbitration could restore the relationship between disputants, as well as protect their reputations.<sup>42</sup> Finally, arbitration offered several functional advantages: compared with common law courts, arbitrators could hear a broader set of actions,<sup>43</sup> employ

37. See Adrian Leonard, “Contingent Commitment: The Development of English Marine Insurance in the Context of New Institutional Economics, 1577–1720,” in *Questioning Credible Commitment: Perspectives on the Rise of Financial Capitalism*, ed. D’Maris Coffman, Adrian Leonard, and Larry Neal (Cambridge: Cambridge University Press, 2013), 51.

38. Hancock, *Citizens of the World*, 244.

39. See, for example, Waddell Cunningham to William Halliday and Hugh McQuoid (June 20, 1756), in Thomas M. Truxes, ed., *Letterbook of Greg & Cunningham, 1756–57: Merchants of New York and Belfast* (New York: Oxford University Press, 2001), 155. For the same reason, merchants were particularly reluctant to sue “persons of Great Reputation.” See Robert Plumstead to William Plumsted [sic] (1756), GBR/0012/MS Add. 2798, p. 68, Cambridge University Library.

40. C.D. [unidentified merchant] to Robert Smyth (December 11, 1766), C.D. Letterbook, Beinecke Rare Book and Manuscript Library, Yale University (hereafter Beinecke); see also C.D. to Moses Lindo (September 30, 1765), in *ibid.*

41. Edward Hatton, *The Merchant’s Magazine: Or Trades Man’s Treasury* (London: Printed for C. Coningsby, 1719), 257 (quoting a model arbitration agreement); compare Stewart Kyd, *A Treatise on the Law of Awards* (London: S. Crowder and B.C. Collins, 1791), 2 (noting that whereas lawsuits could only decide single questions, “the variety of transactions” arising “from the nature of improved society” required resolution in a single forum that could “put an end at once to all their disputes”).

42. Waddell Cunningham to Samuel Kimble (November 16, 1756), in Truxes, *Letterbook of Greg & Cunningham*, 241.

43. For example, before Mansfield’s reforms to insurance litigation, it would have been necessary to bring a separate suit against each underwriter. W.S. Holdsworth, “The Early History of the Contract of Insurance,” *Columbia Law Review* 17 (1917): 106–7; and

more relaxed evidentiary rules,<sup>44</sup> supervise documentary discovery,<sup>45</sup> and order a broader range of remedies.<sup>46</sup>

Nonetheless, arbitration had a major disadvantage: it was ultimately voluntary.<sup>47</sup> In 1661, for example, the merchant Thomas Crocker complained that he had been thrown into debtor's prison during litigation over a sale of goods, despite having offered repeatedly to arbitrate. "For prevention of such hellish practises," he wrote, "it were to be wished, that there were a Court Merchant erected in *England*, as is usual in other Countries where Trade is most encouraged."<sup>48</sup> A merchant court, Crocker suggested, would be able to compel even litigious parties to settle disputes in a more efficient—and humane—manner than the common law.

### C. Formalized Arbitration

Until the middle of the eighteenth century, the voluntariness of arbitration was a fairly minor problem for merchants, who were usually able to resolve

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Christopher Kingston, "Marine Insurance in Britain and America, 1720–1844: A Comparative Institutional Analysis," *Journal of Economic History* 67 (2007): 389. Common law courts also struggled with suits between partners. See Kelly A. De Luca, "Beyond the Sea: Extraterritorial Jurisdiction and English Law, c. 1570–1640" (PhD diss., Columbia University, 2009), 66. Chancery offered an imperfect alternative for some types of litigation, but its notorious costs and delays seem to have deterred many litigants, especially in smaller matters. See Horwitz and Polden, "Continuity or Change?" 26–27.

44. The availability of the parties' sworn testimony was especially important. James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (Chapel Hill: University of North Carolina Press, 1992), 154; and Kyd, *A Treatise on the Law of Awards*, 2–3; see also John H. Langbein, "Historical Foundations of the Law of Evidence: A View from the Ryder Sources," *Columbia Law Review* 96 (1996): 1186.

45. See Oldham, *Mansfield Manuscripts*, 154; compare Kingston, "Marine Insurance in Britain and America," 382.

46. In particular, arbitrators were more likely to award specific performance of a contract. See John Mille to Richard Oswald (September 11, 1764), in Letters to Richard Oswald, box 9, folder 21, Beinecke. Although King's Bench sometimes issued orders combining damages awards with specific performance (see James Oldham, *English Common Law in the Age of Mansfield* [Chapel Hill: University of North Carolina Press, 2004], 68–69), specific performance remained a primarily equitable remedy.

47. As I explain in the next section, parties could bind themselves *ex ante* to arbitrate disputes, but only by mutual consent. By the eighteenth century, judges could also "refer" cases to arbitration—that is, recommend that the litigants agree to arbitration—a suggestion that the parties typically accepted. Nonetheless, parties averse to arbitration were able to avoid it.

48. Philadelphus Verax, *The Knavish Merchant (Now Turn'd Warehouseman) Characterized or a Severe Scourge, for an Unjust, Cruel, and Unconsonable Adversary* (London 1661), 5–6. The author described himself as "a cordial friend to his honest (though injuriously oppressed) acquaintance Thomas Crocker."



disputes without invoking courts.<sup>49</sup> That began to change in the 1750s: for a number of reasons, merchants began looking for more coercive means of settling their disputes.<sup>50</sup> As a result, arbitration became “increasingly legalized,”<sup>51</sup> “formalized,” and “court-related,”<sup>52</sup> both in England and in Britain’s colonies. Lawyers became more frequently involved as arbitrators and advisors to the parties, arbitral procedures became more complex, and courts intervened more frequently to enforce awards.<sup>53</sup>

Although the formalization of arbitration made it easier for merchants to commit to arbitration *ex ante*, it also introduced new problems. Merchants still had no mechanism for compelling arbitration *after* a dispute arose. As a result, a vexatious litigant could still force a case into court.<sup>54</sup> At the same time, formalized arbitration took longer and cost more than informal arbitration.<sup>55</sup> Finally, merchants complained that as lawyers became more involved, they introduced the very legal formalities arbitration was supposed to avoid.<sup>56</sup> As a result, by the 1760s, arbitration had become both insufficiently coercive and too much like litigation.

#### D. Chambers of Commerce

Growing dissatisfaction with arbitration led many business communities to experiment with yet another alternative to litigation: chambers of commerce. Eighteenth-century chambers often functioned like their modern equivalents, bringing a local business community together for lobbying purposes.<sup>57</sup> But they also provided a forum for dispute

49. For example, although the Arbitration Act of 1698, 9 & 10 Will. 3, c. 15, allowed parties to make an agreement to arbitrate enforceable as a rule of court, litigants rarely invoked it until the 1750s.

50. I am now working on an article explaining why this change occurred.

51. Horwitz and Oldham, “Arbitration,” 137; and Parker, *Commercial Arbitration*, 13.

52. Mann, “Formalization of Informal Law.”

53. Horwitz and Oldham, “Arbitration,” 137, 150; Mann, “Formalization of Informal Law,” 456–63, 475; Moglen, “Commercial Arbitration in the Eighteenth Century,” 139–40, 145; and Oldham, *Mansfield Manuscripts*, 93.

54. See, for example, *Animadversions Upon the Present Laws of England* (London: printed for M. Cooper, 1750), 19; and Justice, *A General Treatise of Monies and Exchanges*, 73–82.

55. See Moglen, “Commercial Arbitration in the Eighteenth Century,” 143 (discussing colonial New York from 1758 to 1762); Horwitz and Oldham, “Arbitration,” 159; Mann, “Formalization of Informal Law,” 473–81; and Lemmings, *Professors of the Law*, 100–101. This was in part because lawyers learned to bill for arbitration-related services. Brooks, “Interpersonal Conflict and Social Tension,” 381.

56. See, for example, *A Detest Against the Common Scheme of Arbitration . . .* (Boston: s.n., 1770).

57. Robert J. Bennett, “Network Interlocks: The Connected Emergence of Chambers of Commerce and Provincial Banks in the British Isles, 1767–1823,” *Business History* 55 (2013): 1288–1317.

resolution,<sup>58</sup> which typically involved a relatively formal set of procedures, including appeals, but without recourse to courts.<sup>59</sup> Enforcement of judgments depended upon fining or expelling members.<sup>60</sup> In a sense, these chambers were essentially secular versions of Quaker “arbitration courts” that had been operating for more than a century.<sup>61</sup>

Nonetheless, the chambers proved inadequate for several reasons. Because they were not established “by Authority,” as one proponent of merchant courts complained, they necessarily relied on the voluntary cooperation of their members, which was insufficiently reliable to provide a stable forum.<sup>62</sup> Moreover, these fundamentally local associations could not

58. Chambers of commerce that provided arbitration services emerged in New York (1769), Glasgow (1783), Jersey (1785), Waterford (1787), Dublin (1780s), and Edinburgh (1792). Robert J. Bennett, *Local Business Voice: The History of Chambers of Commerce in Britain, Ireland, and Revolutionary America, 1760–2011* (Oxford: Oxford University Press, 2011), 550. Robert Bennett suggests that one also emerged in London in 1782 under the direction of John Weskett, but he found no evidence that the London chamber amounted to anything more than “a one-man operation without wider impact.” *Ibid.*, 100–101. The emergences of chambers of commerce continued in the United States after the Revolution. See Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge: Harvard University Press, 1977), 148, 317 n.47 (noting the establishment in 1794 of chambers at Boston and New Haven).

59. *Earliest Arbitration Records of the Chamber of Commerce of the State of New York* (New York: Press of the Chamber, 1913), 124. The New York chamber’s judicial functions never seem to have taken on the character of state action. For example, even though the local government occasionally referred disputes to the chamber (*ibid.*), its charter from George III made no mention of its judicial functions. See Charter of the New York Chamber of Commerce (1770), in *The Charter and By-Laws, with a History of the Chamber of Commerce of the State of New York* (New York: William Van Norden, 1849), 19. Accordingly, the institution operated by force of reputation alone. See Moglen, “Commercial Arbitration in the Eighteenth Century,” 143–47.

60. British merchants proposed to create a chamber of commerce in Quebec in 1777 specifically to avoid recourse to local courts, which applied French commercial law. See Edouard Fabre-Surveyer, “The Struggle for English Commercial Law in Canada,” *Commercial Law League Journal* 34 (1929): 622. The proposal is reprinted in Adam Shortt and Arthur G. Doughty, eds., *Documents Relating to the Constitutional History of Canada, 1759–1791*, 2nd ed. (Ottawa: J.L. Taché, 1918), 462. Proponents of the Quebec chamber of commerce may have had French merchant courts in mind as a model. See Memorandum by Adam Lymburner (January 24, 1788), PRO 30/8/98/1, p. 118, National Archives, Kew, UK.

61. See Thomas Clarkson, *A Portraiture of Quakerism as Taken from a View of the Moral Education, Discipline, Peculiar Customs, Religious Principles, Political and Civil Oeconomy and Character of the Society of Friends* (London: printed by R. Taylor and Co. for Longman, Hurst, Rees and Orme, 1806), 83–88 (noting Quakers’ role in setting up a commercial “arbitration court” in Newcastle in 1793).

62. John Weskett, *A Complete Digest of the Theory, Laws, and Practice of Insurance* (London: Printed by Frys, Couchman & Collier, 1781), viii; see also Clarkson, *Portraiture of Quakerism*, 88.

resolve disputes with non-members in other cities. Chambers of commerce approximated merchant courts but could not replace them, which is perhaps why they never heard more than a few cases each year.<sup>63</sup> Nonetheless, their emergence after 1760 underscores merchants' appetite for alternatives both to arbitration and litigation in ordinary courts.

## II. The Movement to Create Courts Merchant

The inadequacy of existing options led some merchants and economic writers to call on Parliament to create merchant courts. As England grew into a modern commercial nation in the century after the Restoration, many observers believed that the only way to ensure the country's continued economic vitality was to extend England's tradition of using specialized courts for commercial disputes.

### A. England's History of Specialized Civil Courts

Specialized courts had a long history in England. Examples relevant to commerce included the medieval piepowder and staple courts,<sup>64</sup> early modern bankruptcy commissions,<sup>65</sup> and the Elizabethan Court of Assurances.<sup>66</sup> By the end of the seventeenth century, all of these had fallen into disuse,<sup>67</sup> although other forms of juryless adjudication survived and even expanded in the eighteenth century.<sup>68</sup> Excise tribunals were

63. Bennett, *Local Business Voice*, 553. For a more detailed comparison between of chambers of commerce and merchant courts, see Lemerrier, *Un modèle français de jugement des pairs*, 241–350.

64. De Luca, "Beyond the Sea," 56; and Holdsworth, *History of English Law*, 1.334.

65. Holdsworth, *History of English Law*, 14.184.

66. Geoffrey W. Clark, *Betting on Lives: The Culture of Life Insurance in England, 1690–1775* (Manchester: Manchester University Press, 1999), 20. It is unclear why the court fell into disuse. See Leonard, "Contingent Commitment," 66. Part of the problem may have been its extremely limited jurisdiction, which was confined to London, to policies on goods, and to claims by the insured. Charles Wright and C. Ernest Fayle, *A History of Lloyd's from the Founding of Lloyd's Coffee House to the Present Day* (London: published for the Corporation of Lloyd's by Macmillan and Co., 1928), 38.

67. See J.H. Baker, "The Law Merchant and the Common Law before 1700," *Cambridge Law Journal* 38 (1979): 306–8. Technically, the medieval piepowder courts were only abolished in 1977, but they had not been used for centuries. De Luca, "Beyond the Sea," 56 n.2, 68–69.

68. John Brewer, *The Sinews of Power: War, Money, and the English State, 1688–1783* (New York: Alfred A. Knopf, 1989), 113–14; Lieberman, *Province of Legislation Determined*, 13–19; and John Brewer, "The Wilkites and the Law, 1763–74: A Study of Radical Notions of Governance," in *An Ungovernable People: The English and Their*

particularly prominent. Their summary procedure carried obvious risks for defendants—Blackstone declared that their “rigour and arbitrary proceedings” were “hardly compatible with the temper of a free nation”<sup>69</sup>—but merchants appreciated their speedy determinations.<sup>70</sup>

For civil litigants, perhaps the most important specialized courts in the eighteenth century were courts of requests: juryless courts, supervised by lay “commissioners,” with jurisdiction over suits for small debts (typically under 40 s). Although the courts, also known as courts of conscience, dated at least from the reign of Henry VIII, they fell into disfavor during the seventeenth century, in part because of the Stuarts’ abuse of juryless tribunals.<sup>71</sup> During the Interregnum, however, with the Stuart threat (temporarily) eliminated, the Hale Commission recommended a national network of small-claims courts.<sup>72</sup> Following the Restoration of Charles II in 1660, courts of requests again became controversial,<sup>73</sup> but after the Glorious Revolution, and again in the 1740s, growing frustration with the cost of debt litigation led to the creation of several new courts of conscience in important commercial centers.<sup>74</sup> Between 1748 and 1800, Parliament or the crown chartered new courts of requests nearly every year, including in India<sup>75</sup> and Sumatra.<sup>76</sup> In 1779, the secretary of state for the colonies directed the governor of Quebec to erect such a court, which he called “necessary for the convenience of both Debtor & Creditor.”<sup>77</sup> Creditors, at least, seem to have agreed: many courts of requests saw their caseloads rise

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*Law in the Seventeenth and Eighteenth Centuries*, ed. John Brewer and John Styles (New Brunswick: Rutgers University Press, 1980), 136–38.

69. Quoted in Brewer, *The Sinews of Power*, 92.

70. See, for example *Animadversions*, 19.

71. Julian Hoppit, “The Use and Abuse of Credit in Eighteenth-Century England,” in *Business Life and Public Policy: Essays in Honour of D. C. Coleman*, ed. Neil McKendrick and R.B. Outhwaite (Cambridge: Cambridge University Press, 1986), 74–75. Courts of requests also undermined the social hierarchy. See *ibid.* (noting that courts of requests could “compel ‘persons of quality to submit for small debts to a company of shopkeepers’” (quoting F.H. Blackburne Daniell, ed. *Calendar of State Papers, Domestic Series, 1675–1676* [London: His Majesty’s Stationery Office, 1907], 86).

72. Margot C. Finn, *The Character of Credit: Personal Debt in English Culture, 1740–1914* (Cambridge: Cambridge University Press, 2003), 198–99.

73. *Ibid.*, 200–201.

74. W.H.D. Winder, “The Courts of Requests,” *Law Quarterly Review* 52 (1936): 371–73; Hoppit, “Use and Abuse of Credit,” 75; and Michele Slatter, “The Norwich Court of Requests: A Tradition Continued,” *Journal of Legal History* 5 (1984): 97–107.

75. Brooks, “Interpersonal Conflict and Social Tension,” 374–75. (noting that the periods from 1760 to 1765 and from 1775 to 1785 were especially fertile for the creation of these courts).

76. Charter of Justice for Fort Marlborough (1760), IOR/G/35/12, p. 127, British Library.

77. Lord George Germain, Secretary of State, to Frederick Haldimand, Governor of Quebec (April 16, 1779), Add. MS 21703, p. 81, British Library.

significantly, even as litigation in most other courts declined.<sup>78</sup> Their success is particularly remarkable in light of repeated complaints about their maladministration, particularly in London.<sup>79</sup>

The vitality of courts of requests led some policy makers to see them as a solution to the perceived inefficiency of civil litigation, and politicians occasionally suggested expanding their subject-matter jurisdiction.<sup>80</sup> Nobody, however, suggested that these courts—staffed by amateur judges—offered a suitable venue for more complex commercial cases. Their jurisdiction generally remained confined to simple debts under 40 s. “Debt,” moreover, was construed strictly to exclude any actions involving real property or actions on the case for breach of agreement or unliquidated damages.<sup>81</sup> Litigants sometimes tried to circumvent these jurisdictional limits by instituting multiple suits, each worth less than 40 s, to recover on a larger bond.<sup>82</sup> These efforts reveal both the inadequacy of existing small-claims courts and—because some litigants preferred to undergo

78. The volume of litigation in the London court of requests (measured by suitors’ cash received) more than doubled between 1773 and the end of the century. House of Commons, *A Return from the Different Courts of Requests Within the Bills of Mortality, Stating the Amount of Suitors’ Cash* 352 (London 1835); see also William Priest, *An Account How Many Summonses Are Issued in a Year That Do Not Come to a Hearing for Ten Years Past* (1768), COL/CC/CRC/01/002, London Metropolitan Archives (suggesting a 10% increase in case volume between 1758 and 1768 in the London court); John Scrope to Sir Michael Foster (February 26, 1736), F28, Taussig Collection, Foster Papers, Beinecke (noting complaints that the London court has “too much business”). The caseload in the Birmingham court of requests more than tripled between 1772 and 1787. William Hutton, *Courts of Requests: Their Nature, Utility, and Powers Described, with a Variety of Cases Determined in That of Birmingham* (Birmingham: Pearson and Rollason, 1787). Newcastle bucked this trend, experiencing a decline in the second half of the century. See Brooks, *Lawyers, Litigation, and English Society*, 40–41. For litigation volume in the Westminster courts, see *ibid.*, 31; and Horwitz and Polden, “Continuity or Change?”

79. Sub-Committee To Enquire into the Practice and Fees of the Court of Requests &c. (January 27, 1774), COL/CC/CRC/01/003, p. 7, London Metropolitan Archives (noting that the clerk of the London court had been suspended twice for malfeasance); Sub-Committee To Enquire into the Practice and Fees of the Court of Requests &c. (February 21, 1774), COL/CC/CRC/01/003, p. 44, London Metropolitan Archives (noting that some litigants “often lost small Debts rather than go the trouble of attending the Court of Requests” because of its maladministration); see also Winder, “The Courts of Requests,” 377.

80. See, for example, Sir Michael Foster to John Scrope (February 23, 1736), F27, Taussig Collection, Foster Papers, Beinecke; Second Set of Regulations Proposed by the Court of Directors to the General Court, for the More Advantageous Management of the Company’s Affairs, and for the Due Administration of Justice in India ([1772?]), IOR/A/2/8, pp. 404–11; Alexander Wedderburn ([1772?]), R2903-0-4-E, Edmund Burke Fonds, National Archives of Canada (suggesting an institution modeled on the court of requests for Quebec).

81. Winder, “The Courts of Requests,” 388–89.

82. See Oldham, *Mansfield Manuscripts*, 175 n.1.

multiple suits in a court of requests than a single suit in Westminster Hall—the perceived inefficiency of litigation in the central courts.

### *B. Proposals for Courts Merchant, 1660–1760*

From the Restoration through the eighteenth century, writers and merchants proposed adding another specialized court: a merchant court, as Locke had suggested for Carolina.<sup>83</sup> Many of the arguments for merchant courts presented them not only as a convenience for individual traders, but as essential for national prosperity. One of the earliest proposals came from Slingsby Bethel, a republican former member of Parliament, whose prescription for boosting English trade included “constituting a Court Merchant, after the example of other Countries, to prevent tedious and chargeable Sutes in Law, taking men off from their business.”<sup>84</sup> At approximately the same time, an anonymous pamphlet claimed that England’s failure to erect a court merchant was a major cause of the wool industry’s decline vis-à-vis the Dutch.<sup>85</sup> The economic writer Carew Reynell included courts merchant in his proposal for a broader program of economic research and education.<sup>86</sup> Other early advocates, such as John Cary,<sup>87</sup> John Egleton,<sup>88</sup> and Daniel Defoe,<sup>89</sup> also framed merchant courts as part of a broader agenda of economic development, often arguing that England was losing a legal arms race against France and the Netherlands, which already had such courts.<sup>90</sup> Proponents of merchant courts argued for their superiority over arbitration as well as litigation. Although early arguments focused on arbitration’s lack of coerciveness,<sup>91</sup>

83. See notes 3–4 and accompanying text.

84. Slingsby Bethel, *The Present Interest of England Stated by a Lover of His King and Country* (London: Printed for D.B., 1671), 9.

85. *Englands Glory by the Benefit of Wool Manufactured Therin, from the Farmer to the Merchant* ([London?]: printed by T. M., 1669), 32–33.

86. Carew Reynell, *The True English Interest, Or, an Account of the Chief National Improvements in Some Political Observations* (London: Printed for Giles Widdowes, 1674), 16.

87. John Cary, *A Discourse on Trade, and Other Matters Relative to It* (London: printed for T. Osborne, 1744).

88. J[ohn] Egleton, *A Letter Written to a Member of Parliament, Relating to Trade* (n.p., 1702).

89. Daniel Defoe, *An Essay Upon Projects* (London: printed by R.R. for Tho. Cockerill, 1697), 305–12.

90. Richard Lawrence, *The Interest of Ireland in Its Trade and Wealth Stated in Two Parts* (Dublin: printed by Jos. Ray for Jos. Howes, 1682), 10. The argument remained relevant a century later. Weskett, *Complete Digest*, viii.

91. See, for example, *Animadversions*, 19; and Justice, *A General Treatise of Monies and Exchanges*, 73–82.

criticism evolved as arbitration became more formalized, eventually focusing more on court-enforced arbitration's excessive legalism.<sup>92</sup>

Authors did not always specify exactly what a merchant court would entail. Proposals usually referred to a few fundamental features: merchant judges; a faster, simpler procedure than ordinary courts; low fees; decisions based on mercantile custom; and state authorization that would enable some type of compulsory process. Other details varied. The proposals of Josiah Child (1693) and Daniel Defoe (1697), for example, both suggested allowing limited appeals from the trial judges to a second panel, also composed of merchants. Child and Defoe also agreed that no appeal should lie from courts merchant to ordinary courts. Child's proposal offered a more detailed plan for regulating costs,<sup>93</sup> whereas Defoe focused more closely on procedural rules.<sup>94</sup> Both authors also gave merchants a role in selecting the judges. For Defoe, that meant that Parliament should erect a court "composed of six judges commissioners," to be chosen (it is unclear by whom) from "the most eminent merchants of the kingdom." These commissioners, in turn, would select "a council of merchants" in London and each major port, which would hear disputes in the first instance. (Appeals would lie from the councils to the commissioners.) Child, in contrast, specified that the liverymen of London would directly elect merchant-judges.<sup>95</sup>

Merchant courts were a rare bipartisan cause in an era characterized by deep partisan divisions. Bethel, Reynell, Egleton, Cary, and Defoe were all Whigs,<sup>96</sup> but influential Tory authors made similar arguments. Child, the

92. See Weskett, *Complete Digest*, xxii.

93. For example, Child specified that judges would be paid set fees based on the value of the sum at issue: 6 d for cases up to £10, 12 d for cases up to £100, and 2 s for cases exceeding £100. Josiah Child, *A New Discourse of Trade* (Glasgow: R. and A. Foulis, 1751), 102–3. He also provided that court officers would be paid according to a table of fees established by the merchant judges—termed "judiciary merchants" by Child—and confirmed by the chief judges of King's Bench and Common Pleas and the lord chief baron of the Exchequer. *Ibid.*, 103.

94. For example, Defoe, unlike Child, specified that merchants could argue cases themselves or ask "any person" to argue on their behalf. He also provided that the courts would be able to admit as evidence both foreign and domestic affidavits, and that litigants would commence their case by presenting written briefs. Defoe, *Essay Upon Projects*, 306–9.

95. Child, *New Discourse of Trade*, 104.

96. For the politics of these authors, see Steve Pincus, "Rethinking Mercantilism: Political Economy, the British Empire, and the Atlantic World in the Seventeenth and Eighteenth Centuries," *William and Mary Quarterly* 69 (2012): 20; Kenneth Morgan, "Cary, John (1649–1719x22)," *Oxford Dictionary of National Biography* (2007) <http://www.oxforddnb.com/view/article/4840> (December 30, 2015); and "Minutes of a Whig Club: 1715," in *London Politics 1713–1717*, 15–36, ed. H. Horwitz, W.A. Speck, W.A. Gray, 1981, <http://www.british-history.ac.uk/report.aspx?compid=38803> (May 16, 2016); Justin

leading Tory political economist of the late seventeenth century, called the absence of a court merchant “a great bar to the progress and grandeur of the trade of this kingdom.”<sup>97</sup> Matthew Decker enthusiastically revived Child’s work in the 1740s, declaring (with some exaggeration) that “[a] Court-Merchant is proved to be the Cause of Trade.”<sup>98</sup> A few years later, Malachy Postlethwayt synthesized Tory and Whig arguments to support his own case for a “mercantile college” that would prepare merchants to sit as judges.<sup>99</sup> No matter what their political leanings, these authors agreed that traditional courts cost too much and wasted merchants’ time by “taking men off from their business,” to the loss of private parties and the public alike.<sup>100</sup>

Defoe presented the most developed argument for merchant courts. The problem with ordinary courts, he argued, was not their substantive law, which already incorporated—at least in theory—commercial custom. Lawyers, however, often misunderstood that custom. “Never was Young Parson more put to it to make out his Text when he’s got into the Pulpit without his Notes,” Defoe remarked, “than I have seen a Council at the Bar, when he wou’d make out a Cause between two Merchants.” Judges were equally confused, and juries even more so. Moreover, common law evidentiary rules hamstrung courts by making it impossible to introduce documentary evidence that was routinely crucial to commercial cases. As a result, even if a case was decided correctly, it took too much time and money to get there.<sup>101</sup>

With such prominent and politically diverse advocates, it is unsurprising that the issue of merchant courts soon came before Parliament. When the House of Commons passed a resolution in 1696 calling for the establishment of a Board of Trade, it asked that its commissioners “be impowered to consider the best Methods of settling a Court-Merchant,”<sup>102</sup> but although the resolution passed without recorded objection, neither Parliament nor the

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duRivage, “Taxing Empire: Political Economy and the Ideological Origins of the American Revolution, 1747–1776” (PhD diss., Yale University, 2013), 45–46; Robert J. Bennett, “Malachy Postlethwayt 1707–67: Genealogy and Influence of an Early Economist and ‘Spin-Doctor,’” *Genealogists’ Magazine* 31 (2011): 1–7.

97. Child, *New Discourse of Trade*, 99.

98. Matthew Decker, *An Essay on the Causes of the Decline of the Foreign Trade, Consequently of the Value of the Lands of Britain, and on the Means to Restore Both* (London: printed for J. Brotherton, 1744), 101.

99. Malachy Postlethwayt, *The Universal Dictionary of Trade and Commerce* (London: printed for John and Paul Knapton, 1751), 2.236–39.

100. Bethel, *Present Interest*, 9. Later authors adopted this language almost verbatim. Compare Child, *New Discourse of Trade*, 100.

101. Defoe, *Essay Upon Projects*, 306–9; compare note 44.

102. *H.C. Jour.* 11.423 (January 31, 1696).



Board ever took further action on the subject.<sup>103</sup> (London merchants seem to have tried to set up a merchant court themselves in the early 1690s, but this failed in the absence of political support.<sup>104</sup>)

Courts merchant had better success in England's colonies. Charles II erected the first one in Tangier in 1668.<sup>105</sup> Although the Board of Trade disallowed Nevis's court merchant in 1708, citing its "arbitrary and uncertain" power, the Board also suggested that the legislature try again.<sup>106</sup> Other Caribbean colonies seem to have learned from Nevis's example, because the Board later approved courts merchant in St. Christopher (St. Kitts) in 1736<sup>107</sup> and in Montserrat in 1751.<sup>108</sup> After Antigua created a merchant court in 1717, the island's governor proudly reported that it "has considerably advanced our trade in general."<sup>109</sup> He claimed that local merchants clamored for access to the "peculiar advantage" of the tribunal, whose jurisdiction was initially limited to "transient" merchants bringing claims under £100.<sup>110</sup> Merchant courts, long the desire of economists and projectors, had become a reality in England's colonies.

### III. The Defeat of Merchant Courts

Why did merchant courts emerge in the colonies but not in the metropole; and why did they emerge in England during the Middle Ages and again in the 1890s, but not during the eighteenth century? The answers lie in the contingencies of British politics; specifically, a combination of self-interested lobbying by lawyers and a growing ideological commitment by radical Whigs to protecting civil juries.

103. A minor exception was a short-lived court to settle disputes over book prices. Copyright Act, 1709, 8 Anne, c. 19, § 4; Importation Act, 1738, 12 Geo. 2, c. 36, § 3.

104. Child recommends that three merchant-judges should constitute a court, "as the judges did lately at Clifford's-inn," one of the Inns of Chancery. Child, *New Discourse of Trade*, 102.

105. Tristan Stein, "Tangier in the Restoration Empire," *Historical Journal* 54 (2011): 999.

106. Cecil Headlam, ed., *Calendar of State Papers, Colonial Series, America and West Indies* (London: Her Majesty's Stationery Office, 1860), No. 264, 42.188 (hereafter *CSP Colonial*).

107. *Ibid.*, No. 465, 42.108.

108. K.H. Ledward, ed., *Journal of the Commissioners for Trade and Plantations* (London: His Majesty's Stationery Office, 1920), 9.193.

109. *CSP Colonial*, No. 328, 31.176.

110. *Ibid.*, No. 654, 36.343. The governor and local merchants suggested that a new tax on transient merchants might level the playing field. *Ibid.*; see also *ibid.*, No. 328, 31.176 (reporting that local merchants found the court merchant "very grievous and burthensom" because transients, but not local merchants, had the advantage of access to it).

### A. The Hostility of Lawyers

The first question is why merchant courts emerged more readily in the colonies. Part of the answer was that Parliament had delegated the matter to the Board of Trade, which soon became overwhelmed with colonial business and was relatively toothless domestically. Although the Board was sensitive to merchants' needs, "it could only serve as a sympathetic complaints bureau, with no power to solve their problems," and it could do no more than react to initiatives begun elsewhere.<sup>111</sup>

Such initiatives came mostly from the colonies, where the legal profession exercised less power to block institutional innovation than in London. By the end of the seventeenth century, common lawyers had proven their ability to resist challenges to their monopoly on litigation. In the 1650s and 1660s, for example, barristers and judges had collaborated to eviscerate the Court of Assurances.<sup>112</sup> Later, they obstructed efforts to create a national land title registry, despite the idea's enjoying support from the crown, economists, and some landowners.<sup>113</sup> Unsurprisingly, then, contemporaries blamed lawyers for England's failure to create merchant courts.<sup>114</sup> Lawyers opposed the new courts, one pamphleteer claimed, because the new tribunals would "hinder the hellish grist [of fees] coming to their Mill."<sup>115</sup> Especially in the decades after the Glorious Revolution, when common lawyers enjoyed an especially elevated reputation, their objections carried significant political weight,<sup>116</sup> and at least a few non-lawyers

111. See Ian Kenneth Steele, *Politics of Colonial Policy: The Board of Trade in Colonial Administration 1696–1720* (Oxford: Clarendon, 1968), 3–18, 35.

112. Holdsworth, "Insurance," 103–4.

113. Philip Hamburger argues that lawyers collaborated with gentry, who feared that registration would expose defects in their title. Philip Hamburger, "The Conveyancing Purposes of the Statute of Frauds," *American Journal of Legal History* 27 (1983): 354–85. Julian Hoppit, in contrast, contends that much of the landed interest actually supported registration, and he places responsibility squarely on lawyers. Julian Hoppit, "The Landed Interest and the National Interest, 1660–1800," in *Parliaments, Nations and Identities in Britain and Ireland, 1660–1850*, ed. Julian Hoppit (Manchester: Manchester University Press, 2003), 91–92.

114. For example, Bethel, *Present Interest*, 9; and *Englands Glory*, 33. Many proponents of merchant courts also supported land registration; therefore, they would have been familiar with lawyers' power as lobbyists.

115. Verax, *Knavish Merchant*, 6.

116. See Michael Burrage, *Revolution and the Making of the Contemporary Legal Profession: England, France, and the United States* (Oxford: Oxford University Press, 2006), 448–49; and Henry Horwitz, "Changes in the Law and Reform of the Legal Order: England (and Wales) 1689–1760," *Parliamentary History* 21 (2002): 315.

seem to have accepted lawyers' argument that no court could function properly without a trained bar.<sup>117</sup>

Civil lawyers also resisted merchant courts. The civilian Richard Zouch, for example, acknowledged the superiority of the law merchant for handling commercial disputes. He insisted, however, that they were best resolved in the existing court of admiralty, of which he had been a judge, and before which civil lawyers could practice.<sup>118</sup> (Merchants and economists generally disagreed, finding admiralty just as "tedious and expensive" as common law courts, and of insufficiently broad jurisdiction to meet many merchants' needs.<sup>119</sup>)

Lawyers' opposition helps to explain why courts merchant emerged in England's colonies but not in England. London-based lawyers had little incentive to interfere with colonial litigation; most colonies lacked a powerful bar of their own, which freed them to experiment with new legal institutions;<sup>120</sup> and the Crown or colonial legislatures could erect overseas courts without parliamentary approval. As a result, merchant courts quickly found strong support both in the colonies and among metropolitan administrators. It is possible that if England had created merchant courts, lawyers would have found a way to colonize them, just as they colonized local courts (and arbitration) during the eighteenth century,<sup>121</sup> but it was safer for the profession to resist reform altogether.<sup>122</sup>

Although lawyers played an important role in shaping the geography of merchant courts, professional interest politics offers only a partial explanation for their continued absence in England. After 1751, even colonies stopped creating merchant courts.<sup>123</sup> At approximately the same time, the legal profession grew increasingly ideologically fragmented, and

117. [John Blanch], *The Interest of Great Britain Consider'd; In an Essay upon Wool, Tin and Leather* ... (London: printed for Eman. Matthews, 1707), 115–17.

118. Richard Zouch, *The Jurisdiction of the Admiralty of England Asserted Against Sr. Edward Coke's Articuli Admiraltatis* (London: printed for Francis Tyton and Thomas Dring, 1663).

119. Child, *New Discourse of Trade*; and John Praed, *An Essay on the Coin and Commerce of the Kingdom Trade and Treasure (Which Are Twins) Being the Only Supporters Thereof Next to Religion and Justice* (London, 1695).

120. See Peter Charles Hoffer, *Law and People in Colonial America*, rev. ed. (Baltimore: Johns Hopkins University Press, 1998), 29–49.

121. Lawyers successfully participated in the French merchant court, for example. Kessler, *A Revolution in Commerce*.

122. Lemmings, *Professors of the Law*, 100–101.

123. The Georgia Constitution of 1777 confirmed that state's existing "court merchant," but proceedings in that court were by judge and special jury. See *De Lamar v. Dollar*, 128 Ga. 57 (1907).

barristers began to generate some of the most radical calls for reform.<sup>124</sup> If lawyers alone were to blame for England's initial failure to create merchant courts, then the colonies should have continued to create them, and England should have started to experiment with them, in the 1750s.

### B. *The Politicization of Law Reform*

Partisan politics was the decisive factor in Britain's rejection of merchant courts after 1750. The broad support courts merchant had enjoyed during the seventeenth and early eighteenth centuries had been an unusual departure from England's broader tradition of distrusting juryless tribunals. On one hand, under the Stuarts, many Englishmen had been deeply suspicious of juryless courts, which they associated with royal abuse of power.<sup>125</sup> The Court of Star Chamber—known both for its importance in commercial adjudication and for its politically motivated prosecutions—was the most notorious example, although the Court of Chancery also created anxiety.<sup>126</sup>

Starting in the 1690s, however, the fear of juryless courts faded. After the Glorious Revolution, Parliament met more frequently, which improved its ability to supervise the judiciary,<sup>127</sup> and the “doctrinalization” of Chancery convinced many observers that equity jurisdiction had evolved from the mere discretion of royally appointed chancellors into a predictable body of law.<sup>128</sup> At the same time, England's rapid economic growth convinced many observers of the inadequacy of existing legal institutions.<sup>129</sup>

By the early eighteenth century, the combination of a reduced threat from a tyrannical crown and an urgent need for reform generated a broad willingness to experiment with alternatives to common law procedure.<sup>130</sup> The lawyer Joshua Fitzsimmonds, for example, garnered positive reviews when he argued that courts should offer different procedures depending upon the amount in controversy. He proposed that full trials would be reserved for debts worth more than £10; debts between £5 and

124. Jeremy Bentham is the most prominent example; others included Joshua Fitzsimmonds and John Lind.

125. See Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014), 133–40.

126. John H. Langbein, Renée Lettow Lerner, and Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (New York: Aspen, 2009), 316–17.

127. *Ibid.*, 351–53.

128. *Ibid.*

129. See note 6 and accompanying text; Lemmings, *Professors of the Law*, 11–12.

130. See, for example, Lieberman, *Province of Legislation Determined*, 25–26, 288; see also *Animadversions*, 1 (reciting the “frequently used” proverb that “[t]hat no Nation hath better Laws, nor worse executed, than the English”).

£10 would be handled by juries in local sheriff's courts; and debts worth less than £5 would fall to courts of requests.<sup>131</sup>

The willingness to experiment collapsed starting in the 1760s, as law reform—like other aspects of British life—became more sharply politicized. In the wake of the Seven Years' War, British politics experienced a major realignment, as an increasingly influential group of “authoritarian Whigs”<sup>132</sup> sought to reshape law and governance in the British Empire. Authoritarian Whigs were a loose alliance more than a party—even contemporaries struggled to assign them party labels<sup>133</sup>—but they shared a common legal ideology. Like earlier Whigs, authoritarian Whigs considered the common law an important pillar of Britain's revolutionary settlement, but they also saw social disorder as a growing threat to that settlement, both because a disorderly Britain was more vulnerable to external attack and because disorder undermined the rule of law by substituting mob-dominated juries for the impartial justice promised by the Glorious Revolution.<sup>134</sup> Eventually, these concerns led many authoritarian Whigs to conclude that only by reducing litigation—and curtailing the role of juries—could they defend the promise of English law more generally.

One of the leaders of this movement was Lord Chief Justice Mansfield, who enjoyed a complicated relationship with juries. Like his colleagues on

131. Fitzsimmonds also suggested that Parliament establish an inferior equity court for cases worth less than £100. Joshua Fitzsimmonds, *Free and Candid Disquisitions, on the Nature and Execution of the Laws of England, Both in Civil and Criminal Affairs* (London: printed for M. Sheepey, 1751), 19, 22–38. For a favorable review, see “Monthly Catalogue,” *Monthly Review* 4 (March 1751): 378–79.

132. I take the term from duRivage, “Taxing Empire,” 42–56; Sarah Kinkel, “Disorder, Discipline, and Naval Reform in Mid-Eighteenth-Century Britain,” *English Historical Review* 128 (2013): 1451–82; and Sarah Kinkel, “The King's Pirates? Naval Enforcement of Imperial Authority, 1740–76,” *William and Mary Quarterly* 71 (2014): 3–34. See also James Vaughn, “The Politics of Empire: Metropolitan Socio-Political Development and the Imperial Transformation of the British East India Company, 1675–1775” (PhD diss., University of Chicago, 2009) (describing authoritarian politics as “neo-Tory”).

133. See Ian R. Christie, “Party in Politics in the Age of Lord North's Administration,” *Parliamentary History* 6 (1987): 59; P.J. Marshall, “Empire and Authority in the Later Eighteenth Century,” *Journal of Imperial and Commonwealth History* 15 (1987): 110. Many authoritarian Whigs followed the Duke of Bedford and Lord North, compare Huw V. Bowen, *Revenue and Reform: The Indian Problem in British Politics, 1757–1773* (Cambridge: Cambridge University Press, 1991), 172; John Brewer, *Party Ideology and Popular Politics at the Accession of George III* (Cambridge: Cambridge University Press, 1976); and David Bromwich, *The Intellectual Life of Edmund Burke: From the Sublime and Beautiful to American Independence* (Cambridge: Belknap Press of Harvard University Press, 2014), 130, but the loyalty of others was harder to identify. For example, Henry Legge described Lord Mansfield, the leading authoritarian Whig jurist, as “the Tory head of a Whig body.” Poser, *Lord Mansfield*, 135.

134. See Kinkel, “The King's Pirates?” 24.

the bench, Mansfield recognized juries' utility as fact-finders, particularly in commercial cases, in which he used merchant juries with great success to identify merchant customs and to sort through complex facts.<sup>135</sup> But like other judges, Mansfield also depended heavily on various mechanisms of jury control.<sup>136</sup> Over time, he seems to have become increasingly concerned about juries' tendency to ignore judicial direction and to render verdicts contrary to the law, particularly in politically charged cases.<sup>137</sup> Even as he made expert use of merchant juries in his development of commercial doctrine, he sought to limit juries' power in a number of other respects, particularly in England's colonies.<sup>138</sup> From his position in the House of Lords, Mansfield also sought unsuccessfully to have judges decide, "in a summary manner" and without juries or a right of appeal, all cases involving annuities.<sup>139</sup>

Other Whigs, especially "radical" or "patriot" Whigs such as William Pitt the Elder and John Wilkes, objected sharply to the authoritarian legal agenda. In contrast to authoritarian Whigs' fear of social disorder, radicals worried primarily about the abuse of executive power, and they saw politically conscious juries as essential defenders of British freedom.<sup>140</sup> (One leading radical lawyer, Lord Camden, led opposition to Mansfield's proposal to remove juries from annuities cases.<sup>141</sup>) Radicals accused authoritarian Whigs of trying to make "the trial by jury useless and ridiculous," both in the colonies and in England,<sup>142</sup> and of importing civilian ideas derived from Roman law and Jacobitism. "The Roman code, the law of nations, and

135. Oldham, "Complexity Exception."

136. John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003); and Renée Lettow Lerner, "The Rise of Directed Verdict: Jury Power in Civil Cases before the Federal Rules of 1938," *George Washington Law Review* 81 (2013): 458–59.

137. Langbein, *Origins*, 322.

138. See, for example, Philip Lawson, *The Imperial Challenge: Quebec and Britain in the Age of the American Revolution* (Montreal: McGill-Queen's University Press, 1989), 131–33 (discussing Mansfield's successful efforts to deny civil juries to Quebec); see also John Campbell, *The Lives of the Chief Justices of England*, 3rd ed. (London: J. Murray, 1874), 2.553–54 (noting Mansfield's remark, with respect to Scotland, that "[t]he partial introduction of trials by jury seems to me big with infinite mischief, and will produce much litigation. . . . A great deal of law and equity in England has arisen to regulate the course and obviate the inconveniences which attend this mode of trial.").

139. For Mansfield's speech, see *The North-British Intelligencer: Or Constitutional Miscellany* (Edinburgh: s.n., 1777), 5.22. The final act was passed as the Grants of Life Annuities Act (1777), 17 Geo. III c. 26.

140. See Brewer, "Wilkites and the Law"; and Kinkel, "Disorder, Discipline, and Naval Reform," 1746–77.

141. *The North-British Intelligencer*, 5.22.

142. John Cannon, ed., *The Letters of Junius* (Oxford: Clarendon Press, 1978), 211.

the opinion of foreign civilians, are your preferred theme,” charged the radical pamphleteer “Junius”; “but whoever heard you mention Magna Charta or the Bill of Rights with approbation or respect?”<sup>143</sup>

Radicals took little comfort from claims that Mansfield’s reforms focused on commercial litigation. As David Lieberman has noted, “If the logic of commercial society was to transform ‘every man’ into ‘some measure a merchant,’ then over how isolated an area of economic life could the commercial law be contained?”<sup>144</sup> Radicals worried that authoritarian reformers would use the popularity of their private law efforts to undermine common law protections more generally.<sup>145</sup>

By the 1770s, it became clear that radicals had reason for concern. Starting in the 1740s, but especially after 1760, authoritarian Whigs succeeded in restricting the access of many soldiers, sailors, and colonial subjects to common law courts.<sup>146</sup> These efforts, although successful in many respects, were extremely controversial, particularly the Quebec Act (1774), which restored French civil law to Canada, and thereby excluded civil juries from much of North America.<sup>147</sup> On one hand, authoritarian policy in the colonies and the armed forces alerted many moderates to the potential implications of the authoritarian Whigs’ hostility to juries; on the other, it associated juryless, summary courts with subordinate status and imperial domination.<sup>148</sup> “Lord Mansfield will have at length the Pleasure of triumphing over what he so much hates, the Trial by Jury,” one newspaper warned after the Quebec Act’s passage. “The first West Wind may blow this arbitrary System over to this Country, when once it is established in that.”<sup>149</sup>

As a result, after the 1760s, any proposal to create non-common law courts in England faced deep suspicion.<sup>150</sup> Even courts of requests—seen

143. *Ibid.*, 208–9. Similarly, Horace Walpole grumbled that Mansfield wanted to replace English law with Scotland’s. W.S. Lewis, ed., *The Yale Edition of Horace Walpole’s Correspondence* (New Haven: Yale University Press, 1937), 28.67.

144. Lieberman, “Property, Commerce, and the Common Law,” 151.

145. Cannon, *Letters of Junius*, 209–10.

146. See Navy Bill, 1749, 22 Geo. 2, c. 33; *Barwis v. Keppel* (1766) 95 Eng. Rep. 831 (K. B.) (per curiam); Kinkel, “Disorder, Discipline, and Naval Reform”; Richard D. Rosen, “Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial,” *Military Law Review* 108 (1985): 14–16; and Arthur Mitchell Fraas, “‘They Have Travailed Into a Wrong Latitude’: The Laws of England, Indian Settlements, and the British Imperial Constitution 1726–1773” (PhD diss., Duke University, 2011), 14.

147. Lawson, *Imperial Challenge*; and Hilda Neatby, *Quebec: The Revolutionary Age, 1760–1791* (Toronto: McClelland and Stewart, 1966).

148. See, for example, P.J. Marshall, *The Making and Unmaking of Empires: Britain, India, and America c.1750–1783* (Oxford: Oxford University Press, 2005), 205.

149. “London,” *Public Advertiser*, May 19, 1774, 2.

150. See Lieberman, “Property, Commerce, and the Common Law,” 151.

as indispensable throughout the eighteenth century—came under attack. Reformers had once hoped that the popularity of these courts might pave the way for broader experiments in civil procedure.<sup>151</sup> Now, however, supporters of the courts found themselves on the defensive. Blackstone denounced their “petty tyranny” in his influential *Commentaries*,<sup>152</sup> and even the *Monthly Review*—which had favorably viewed Fitzsimmonds’s far-reaching reform proposal thirty years earlier—came to embrace Blackstone’s conservative vision of the legal institutions.<sup>153</sup>

These attacks put politicians in a difficult position. On one hand, they had little interest in abolishing courts of request completely. Although Members of Parliament had started to doubt the courts’ ability “to further Justice” and to worry that their power was “too great for the little Solemnity in the process, the rapidity of the determination, and the quality and Number of the Magistrates,” even as staunch a Whig as Edmund Burke recognized that small-claims courts played a well-defined and irreplaceable role in facilitating the circulation of credit.<sup>154</sup> Parliament eventually settled on the compromise of resisting the creation of new courts and limiting the power of existing ones. In 1779, Parliament eliminated their authority to imprison defendants for debts under £10, much to the dismay of merchant creditors.<sup>155</sup> Seven years later, another statute instituted new property requirements for the courts’ commissioners (i.e., lay judges) and further regulated their power of arrest.<sup>156</sup> Colonial legislatures also took note: by 1774, it was clear that courts of conscience in Georgia, for example, would employ juries.<sup>157</sup>

With legislatures skeptical of even well-established juryless courts, advocates of merchant courts faced a difficult task in explaining why those new tribunals would be consistent with traditional forms of English liberty.

151. Alexander Grant, *The Public Monitor, Or, a Plan for the More Speedy Recovery of Small Debts* . . . (London: printed and sold by the author, 1789), 22.

152. William Blackstone, *Commentaries on the Laws of England* (1765–69), 3.82.

153. “Art. XV, [Review of Hutton, *Dissertation on Juries*],” *Monthly Review* 3 (December 1790): 435–36.

154. See Edmund Burke to Committee of Correspondence of the General Assembly of New York (April 16, 1773), in Thomas W. Copeland, ed., *The Correspondence of Edmund Burke* (Cambridge: At the University Press, 1958), 2.431.

155. See, for example, Petition from Southwark (April 10, 1780), *H.C. Jour.* 11.766 (“[T]aking away the Terrors of a Gaol,” wrote petitioners from Southwark, will “defeat the good Intention of the Legislature” in erecting the courts in the first place, i.e., “promoting and encouraging useful Credit amongst the lower Class of People.”).

156. 26 Geo. III c. 38 (requiring real estate worth £20 per annum or a personal estate of £500); see also Finn, *Character of Credit*, 207–19 (noting an effort in 1780 to abolish the courts’ power of imprisonment altogether).

157. *Acts Passed by the General Assembly of the Colony of Georgia: 1755 to 1774* (Wormsloe, GA: s.n., 1881), 420–21.



The insurance writer John Weskett, for example, suggested that the courts might publish reports of their decisions<sup>158</sup>—a practice still not fully developed in the Westminster courts<sup>159</sup>—so as to improve transparency.<sup>160</sup> Weskett was so enthusiastic about his plans for a commercial tribunal that he sent a copy to John Adams, then the American ambassador in London, but his proposals never found an audience in England.<sup>161</sup>

Another rhetorical possibility was to recast merchant courts in the language of common law institutions. This technique had been a promising way to defend courts of request, whose defenders reframed the tribunals, which were composed of five or more commissioners, as specialized juries.<sup>162</sup> Thomas Mortimer tried a similar approach in rebranding courts merchant as “commercial juries,” not all that different from the special juries used in common law courts,<sup>163</sup> but that approach was quickly becoming problematic, as special juries themselves started to face the wrath of radicals. Although critiques of special juries would reach a new pitch in the nineteenth century, the attack began in the 1770s. The value of special juries, especially in merchant cases, derived from the jurors’ superior expertise. (Thomas Gorman, for example, served at various times as a special juror, an arbitrator, and an expert witness.)<sup>164</sup> But as special jurors became known as experts on whom judges might repeatedly call, radicals questioned their independence. Writers had long worried about abuse of special

158. Weskett, *Complete Digest*, 149.

159. John Philip Dawson, *The Oracles of the Law* (New York: Legal Classics Library, 1994).

160. Two centuries later, German chambers of commerce, which shared many features with Weskett’s proposal, began to publish collections of commercial opinions. See James Q. Whitman, “Commercial Law and the American Volk: A Note on Llewellyn’s German Sources for the Uniform Commercial Code,” *Yale Law Journal* 97 (1987): 169.

161. John Weskett to John Adams (August 23, 1785), in *Founders Online*, <http://founders.archives.gov/documents/Adams/99-01-02-0197> (December 30, 2015).

162. See Grant, *The Public Monitor, Or, a Plan for the More Speedy Recovery of Small Debts* . . . , 16 n.† (“It has indeed been objected to the Establishment of Courts of Request that such Courts tend to abolish the Trial by Jury.—I confess I do not see the Force of this Argument. The trial by Jury is certainly an invaluable Privilege . . . . If, in order to decide Causes *legally*, five Commissioners are deemed too few, I see no Impropriety in augmenting the Number to *twelve* and making them take the same Oath which is administered to Jurymen.”); William Hutton, *A Dissertation on Juries* (Birmingham: printed by Pearson and Rollason, 1789).

163. Thomas Mortimer, *The Elements of Commerce, Politics and Finances, in Three Treatises on Those Important Subjects* (London: printed for S. Hooper, 1772), 74. Josiah Child had offered a similar argument in the 1690s. See Child, *New Discourse of Trade*, 105.

164. Oldham, *English Common Law*, 20–21; and James Oldham, “Special Juries in England: Nineteenth Century Usage and Reform,” *Journal of Legal History* 8 (1987): 148–49.

juries in seditious libel cases—one writer speculated that the government bribed jurors with “an elegant dinner at Appleby’s,”<sup>165</sup> and Samuel Johnson had fantasized about a golden age when there were “no special juries known”<sup>166</sup>—but they now became suspect even in commercial cases.<sup>167</sup> By 1793, Thomas Erskine needed to explain that “[s]pecial juries do not exist, *as many people seem to suppose*, by the authority of a modern statute; on the contrary, They are as ancient as the law itself.”<sup>168</sup> Radical critiques were insufficiently powerful to undermine the well-established institution of special juries. They were sufficiently troubling, however, to prevent the creation of new institutions that moved closer to transforming jurymen into dependent officers of the court.

### *C. Improvements in Common Law Litigation*

Although radicals portrayed juryless litigation as an authoritarian project, the leading authoritarian Whigs never embraced merchant courts. Mansfield, in particular, never seems have given courts merchant much consideration. Instead, he focused on making King’s Bench more hospitable to commercial cases, such as by developing rules to expedite litigation.<sup>169</sup> Perhaps more importantly, he replicated one key advantage of merchant courts—allowing merchants themselves to pronounce on commercial custom—by expanding the use of special juries, often composed of experienced merchants who served frequently as advisors in mercantile cases.<sup>170</sup> Mansfield’s efforts were exceptional, but they fit into a broader pattern of common law courts’ finding ways to improve their treatment of commercial litigation. In addition to special juries, these included the use of expert assessors who sat with the judge during the trial, calling merchants as expert witnesses, and consulting merchants for *ex parte* advice.<sup>171</sup> By the end of the century, these innovations had helped to shape commercial litigation not only in England but in the newly independent United States.<sup>172</sup>

165. “To the Printer of the Gazetteer,” *Gazetteer and New Daily Advertiser*, March 31, 1774, 1.

166. Samuel Johnson, “London: A Poem in Imitation of the Third Satire of Juvenal” (May 1738), in *Poems*, ed. E.L. McAdam, Jr. and George Milne (New Haven: Yale University Press, 1964), 61; see also Oldham, “Special Juries in England,” 153.

167. Oldham, “Special Juries in England,” 163 n.35.

168. Quoted in *ibid.*, 149 (emphasis added); see also *ibid.*, 163–64.

169. Oldham, *Mansfield Manuscripts*, 1.140–41.

170. Oldham, *English Common Law*, 20–26.

171. Oldham, “Complexity Exception,” 1040–41, 1043.

172. See Shelfer, “Special Juries in the Supreme Court.”

By incorporating special jurors and other merchant-advisers into common law litigation, Mansfield was also able to advance his project of building commercial cases into a coherent body of law.<sup>173</sup> One of his primary objectives in reforming commercial law was to provide litigants with certainty—which he called “the great object in every branch of the law, but especially in mercantile law”<sup>174</sup>—even at the expense of other values, such as jury participation or developing a perfect substantive law.<sup>175</sup> Several of Mansfield’s innovations, including his focus on the science of pleading and the use of special juries and alternative verdicts, were intended primarily to clarify the holding of each case in a way that would guide future conduct.<sup>176</sup> Delegating commercial litigation to a separate court would have undermined these efforts. Although a merchant court might have published its decisions,<sup>177</sup> England’s jurisdictional multiplicity already hampered the development of precedent, and it would have taken time for courts to clarify the relative weight of authority between decisions of the new tribunal and those of existing courts.<sup>178</sup> (Of course, a new tribunal would also have detracted from the authority of Mansfield and his brother judges, which may have further reduced their enthusiasm for courts merchant.)

Authoritarian Whigs also had reasons to encourage arbitration, rather than merchant courts, as an alternative to common law litigation. As James Oldham has noted, “Mansfield’s encouragement of arbitration was but one aspect of his relentless efforts to get parties to settle their disputes.”<sup>179</sup> Mansfield’s desire to reduce unnecessary litigation reflected his politics, as well as a desire for judicial economy. As noted, authoritarian Whigs such as Mansfield worried that excessive litigation was destabilizing society. Frivolous lawsuits, they argued, sapped both the economy and the social ties that underpinned an orderly society.<sup>180</sup> Authoritarian Whigs worked especially hard to reduce the volume of litigation in the

173. See Oldham, *English Common Law*, 68–69.

174. *Milles v. Fletcher*, (1779) 99 E.R. 151; 1 Douglas 231 (K.B.).

175. Oldham, *English Common Law*, 103; Poser, *Lord Mansfield*, 218; and Lieberman, “Property, Commerce, and the Common Law,” 151.

176. See Michael Lobban, *The Common Law and English Jurisprudence, 1760–1850* (Oxford: Clarendon Press, 1991), 114.

177. See note 165 and accompanying text.

178. James Allan Park, *A System of the Law of Marine Insurances* (London: printed by His Majesty’s Law Printers for T. Whieldon, 1787), xlii.

179. Oldham, *English Common Law*, 72.

180. See *ibid.*, 61 (discussing Mansfield’s annoyance at excessive barristers’ fees); and Douglas Hay, “Moral Economy, Political Economy and Law,” in *Moral Economy and Popular Protest: Crowds, Conflict and Authority*, ed. Adrian Randall and Andrew Charlesworth (New York: St. Martin’s Press, 2000), 98–99.

colonies, where imperial administrators considered or implemented a number of experiments to curtail litigiousness,<sup>181</sup> including the hated Stamp Act, which its sponsors hoped would “discourage a spirit of unnecessary litigation” in the colonies by taxing legal documents.<sup>182</sup> Encouraging arbitration at home furthered the same goal of reducing “that Litigation . . . which is already a Disgrace to the Country,” as Mansfield once described it.<sup>183</sup>

In short, the economic and political agenda of authoritarian Whigs led them to steer some disputes toward arbitration while improving the efficiency of litigating big commercial cases in the central courts. These reforms were far-reaching but incomplete cures for the perceived evils of commercial dispute resolution. Lawsuits in common law courts remained expensive and slow, and those courts continued to struggle with fact-finding in commercial cases.<sup>184</sup> As important as Mansfield’s reforms were, they seem to have been most beneficial for large, trans-Atlantic trading firms, rather than smaller merchants and manufacturers.<sup>185</sup> Nonetheless, litigants seem to have responded favorably. Litigation in King’s Bench, which had declined in the decades before Mansfield’s tenure, increased in the half century after 1750, even as litigation in Common Pleas and Chancery declined. The only courts to see comparable growth in volume were the courts of requests.<sup>186</sup>

181. See, for example, James Marriott, *Plan of a Code of Laws for the Province of Quebec* (London, 1774), 61–62; *Proceedings of the Governor and Council at Fort William, Respecting the Administration of Justice amongst the Natives in Bengal* (London: printed for J. Almon, 1775), 18 (proposing to fine or imprison litigants who engage in certain types of forum shopping); Guy Carleton to Lord Hillsborough (March 28, 1770), CO 42/7, 261, National Archives, Kew, UK (arguing that justices of the peace should have expanded summary jurisdiction); and Alexander Wedderburn, Report on Administration of Justice in Canada (1772), R2903-0-4-E, National Archives of Canada (recommending summary jurisdictions to curtail litigiousness).

182. Claire Priest and Justin duRivage, “The Stamp Act and the Political Origins of American Legal and Economic Institutions,” *Southern California Law Review* 88 (2015): 875–911; see also William Knox, *The Controversy Between Great-Britain and Her Colonies Reviewed* (London: J. Almon, 1769), 43 (praising the Stamp Act’s tendency to curtail litigation).

183. Jeremy Krikler, “The Zong and the Lord Chief Justice,” *History Workshop Journal* 64 (2007): 29–47 (quoting *Rex v. Inhabitants of Harberton* [1785] [Mansfield, C.J.]); compare Melissa Ann Macauley, *Social Power and Legal Culture: Litigation Masters in Late Imperial China* (Stanford: Stanford University Press, 1998), 336 (noting that movements to encourage alternative dispute resolution have often emerged from a concern with social unrest).

184. Oldham, “Complexity Exception,” 1033–34.

185. See Lemmings, *Professors of the Law*, 85.

186. “Return from Courts of Requests Within Bills of Mortality of Amount of Suitors’ Cash in Court,” in *House of Commons Sessional Papers* 45.115 (1835); Brooks, *Lawyers, Litigation, and English Society*, 40–41; and Hutton, *Courts of Requests*, 374–75.

At a time when merchant courts were politically suspect, Mansfield's reforms made it harder to argue that new legal institutions were economically necessary. James Allan Park, who wrote an important treatise on marine insurance, noted "the fashion of late years to insist upon the advantages" of creating a specialized insurance court,<sup>187</sup> but he dismissed these calls as "proof of the weakness and fallibility of the human mind"; the Court of King's Bench, he insisted, was more than adequate. Park was undoubtedly guilty of flattering Mansfield, a friend and mentor,<sup>188</sup> but Park's belief that Mansfield had clarified insurance law and cured several "defects . . . in the proceedings of our courts" was widely shared.<sup>189</sup> Not everyone agreed with Park's generous assessment, but in a time when juryless courts were politically toxic, the existing system of formalized arbitration and more commercially intelligent courts in Westminster Hall had become good enough to dampen calls for more fundamental reform.

#### IV. Conclusion

Britain's decision not to create merchant courts had important implications for the development of Anglo-American law. By rejecting specialized courts for commercial cases, Britain ensured that future doctrinal development remained in the hands of generalist judges, even in a relatively technical field. Although courts outsourced complex fact-finding, and sometimes even law-finding, to arbitrators, experts, Chancery masters, and special juries, ultimate control remained with judges themselves.

The continuing absence of merchant courts in England both reflected and enabled an increasingly Manichean distinction, especially among radical Whigs, between "good" common law courts and unacceptable alternatives. Dispute resolution mechanisms that did not fit neatly into either category were quashed (such as merchant courts), explained away as traditional exceptions (such as courts of requests), or, in the case of arbitration, conceptually exiled from the realm of litigation altogether. Arbitration was particularly problematic for radical Whigs: it was too deeply rooted in

187. Park, *A System of the Law of Marine Insurances*, xxxviii.

188. See J.A. Hamilton and Jonathan Harris, "Park, Sir James Alan (1763–1838)," *Oxford Dictionary of National Biography* (2004), <http://www.oxforddnb.com/view/article/21274> (May 17, 2016).

189. For example, Thomas Parker, *The Laws of Shipping and Insurance, with a Digest of Adjudged Cases* (London: printed by W. Strahan and M. Woodfall for T. Cadell, T. Evans, and Brotherton and Sewell, 1775), v; see also Park, *A System of the Law of Marine Insurances*, xl–xliv (noting that foreign litigants, "sensible of the superior advantages" of English jurisprudence, "fly to this country . . . [to] have the benefit of its laws").

English history and practice to abolish, but it also seemed to flaunt the traditional norm of trial by jury.<sup>190</sup> “There is one feature which a submission to arbitration, and a delegation of jurisdiction to a specialized tribunal . . . have in common,” Sir William Holdsworth noted a century ago. “[I]n both cases jurisdiction is taken from the ordinary courts and is exercised by other tribunals.”<sup>191</sup> How, then, could radical opponents of specialized courts reconcile themselves to arbitration?

Over time, radicals reconceived of arbitration as a purely private affair, even when courts enforced arbitral awards. The ideological privatization of arbitration was already beginning by the time Blackstone wrote his *Commentaries*. Although he acknowledged the role of courts in enforcing arbitral awards, he did so in a chapter titled “the redress of private wrongs *by the mere act of the parties*.”<sup>192</sup> Blackstone’s conception of arbitral panels as “peaceable and *domestic* tribunals”—fundamentally private, albeit vaguely court-like—helps explain why he praised arbitration but condemned juryless public courts. Later writers distinguished between courts and arbitration even more sharply. In 1787, for example, the Connecticut Supreme Court defined arbitration as “a kind of domestic tribunal, which the courts are cautious not to meddle with.”<sup>193</sup> The ideological privatization of arbitration was complete by 1805, when Thomas Paine argued that arbitration “concerns [people] as individuals, and not as a State or community, and is not a proper case for a Governor to interfere in, *for it is not a State or government concern*.”<sup>194</sup> Remarkably, Paine wrote this passage in defense of a law that would have made arbitration compulsory. But as someone deeply rooted in and committed to the radical Whig tradition—including its staunch commitment to civil juries<sup>195</sup>—Paine had little choice but to represent arbitration as fundamentally beyond the state, if he was going to accept the practice at all.

This is not to say that the debates of the late eighteenth century totally foreclosed the possibility that the Anglo-American legal tradition might find room for merchant courts. British and American reformers seriously

190. See Brewer, “Wilkites and the Law,” 138.

191. Holdsworth, *History of English Law*, 14.197.

192. Blackstone, *Commentaries*, 3.16 (emphasis added).

193. *Sumner v. Lyman*, 1 Kirby 241, 245 (Conn. Super. Ct. 1787); see also *Mulder v. Cravat*, 2 S.C.L. 370, 372 (S.C. Const. App. 1802).

194. Thomas Paine, *Thomas Paine to the Citizens of Pennsylvania, on the Proposal for Calling a Convention* (Philadelphia: William Duane, 1805), reprinted in Moncure Daniel Conway, ed., *The Writings of Thomas Paine* (New York: G.P. Putnam’s Sons, 1894), 4.457 (emphasis added).

195. See Darrell A.H. Miller, “Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second,” *Yale Law Journal* 122 (2013): 938 n.110.

considered them, as well as related bodies such as conciliation courts, throughout the nineteenth century. Even these reformers, however, tended to see such tribunals as European imports, rather than the revival of an institution with a long history in English thought and colonial practice.<sup>196</sup> As a result, nineteenth-century debates over specialized courts tended to reinforce the fiction that in common law jurisdictions, “ordinary courts” handled adjudication.<sup>197</sup> This fiction, in turn, would underpin the influential critique by Dicey and others of administrative courts, which they saw as fundamentally antithetical to the Anglo-American legal tradition.<sup>198</sup> (It surely added plausibility to Dicey’s critique that Britain had just rejected another attempt to establish tribunals of commerce in the 1870s.<sup>199</sup>)

England’s tradition of ordinary courts continues to shape analyses of juryless litigation today, particularly in the context of administrative law. For example, two prominent studies by Jerry Mashaw and Philip Hamburger, although quite different in their normative conclusions, agree that a system of specialized courts, unreviewable by common law judges, would have been alien to Anglo-American constitutional traditions.<sup>200</sup> Hamburger goes farther, arguing that our current system of administrative adjudication runs afoul of our nation’s longstanding historical commitment to trial by jury. Although he acknowledges England’s history of prerogative tribunals, such as excise commissions, he argues that such “nonjudicial adjudications” were so widely hated that they “cannot be considered a reliable precedent for contemporary administrative adjudication.”<sup>201</sup>

196. Amalia D. Kessler, “Deciding against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication,” *Theoretical Inquiries in Law* 10 (2009): 423; and Lemerrier, *Un modèle français de jugement des pairs*, 346–47.

197. See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan and Co., 1920), xxxvi.

198. See Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge: Cambridge University Press, 2007), 314; H.W. Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business,” *Osgoode Hall Law Journal* 17 (1979): 12; see also Daniel R. Ernst, “Dicey’s Disciple on the D.C. Circuit: Judge Harold Stephens and Administrative Law Reform, 1933–1940,” *Georgetown Law Journal* 90 (2002): 787.

199. Arthurs, “Rethinking Administrative Law,” 11–12.

200. Hamburger, *Is Administrative Law Unlawful?*, 143; and Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012), 308 (“[O]ne could imagine subsequent American developments that might have created a separate set of administrative courts . . . as the embodiment of rule-of-law principles . . . . But that is a path long not taken, and one that our common law heritage probably foreclosed. Access to the ordinary courts to pursue common law remedies was, as Dicey recognized, a core part of our understanding of the rule of law . . .”).

201. Hamburger, *Is Administrative Law Unlawful?*, 206–8.

In presenting “nonjudicial” tribunals as invariably imposed on an unwilling populace, Hamburger overlooks early modern efforts to erect merchant courts. From 1660 until about 1760, Whigs and Tories who were often skeptical of executive power nonetheless demanded the creation of merchant courts: new juryless tribunals, more akin to administrative tribunals than ordinary courts, without a right of appeal to common law judges. Until the 1760s, there is no evidence that England’s failure to create merchant courts derived primarily from concerns about prerogative adjudication or the absence of juries. Rather, lawyers’ lobbying and the institutional weakness of the Board of Trade were most responsible for the lack of institutional innovation.

Nonetheless, Hamburger rightly emphasizes many Americans’ and Britons’ deep distrust of non-common law adjudication after 1760. By the time of the American Revolution, that distrust had spread even to once-uncontroversial courts merchant, as radical Whigs looked to civil juries as an essential bulwark against authoritarian governance. Although radicals initially looked to juries primarily in cases in which the government had a clear interest—such as seditious libel and other politically sensitive cases—radicals came over time to insist on juries even for purely private disputes,<sup>202</sup> including commercial litigation.<sup>203</sup>

This relatively rapid evolution in the political valence of civil juries complicates any attempt to look to history for guidance about the role of juries today. The common law “tradition” treats juries quite differently, depending upon whether we look narrowly to radical Whig attitudes in the generation before the American founding, to institutional practice in England, or more broadly to colonial practice and British intellectual history throughout the early modern period. As we reconsider the place of juryless courts today—whether administrative tribunals or new

202. Renée Lettow Lerner, “The Uncivil Jury, Part 1: Americans’ Misplaced Sentiment about the Civil Jury,” *Volokh Conspiracy*, May 26, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/26/the-uncivil-jury-part-1-americans-misplaced-sentiment-about-the-civil-jury/> (December 30, 2015); Renée Lettow Lerner, “The Uncivil Jury, Part 3: The Perils of Jury Trial, Efforts to Control Juries, and the Deceptive Allure of Nullification,” *Volokh Conspiracy*, May 27, 2015, 3, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/27/the-uncivil-jury-part-3-the-perils-of-jury-trial-efforts-to-control-juries-and-the-deceptive-allure-of-nullification/> (December 30, 2015).

203. Later, Anti-Federalists also emphasized the role of civil juries in private disputes, largely because they were sympathetic to debtors. Over time, that sympathy “came to be seen as a liability.” Renée Lettow Lerner, “The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial,” *William & Mary Bill of Rights Journal* 22 (2014): 826–29. Earlier radicals’ insistence on civil juries was not based on their friendliness to debtors; many radicals were merchants who were likely to be creditors, at least in some cases.



experiments in private dispute resolution—we would do well to be clear about which history we are invoking, to recall the contingencies that have shaped the system we have inherited, and to remember that what we hold for ancient law was itself the product of partisan debate.