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## Special Juries in the Supreme Court

**ABSTRACT.** The Seventh Amendment mandates juries in federal courts for cases that would have required them at common law. Yet the nation's highest federal court has presided over a jury trial in only one reported case, *Georgia v. Brailsford* (1794). The prospect of a jury trial in the Supreme Court makes the case intriguing enough. *Brailsford*, however, is even more well-known for its provocative language on the jury's power to decide the law as well as the facts. Nevertheless, the trial remains largely unstudied. This Note examines the case's extant documents and argues that the jury the Supreme Court used was a special jury of merchants in the tradition of Lord Mansfield. This conclusion offers insights into how the Supreme Court might negotiate a jury trial in a future case if the Seventh Amendment should demand it. Further, this Note's finding provides a context to understand better Chief Justice Jay's words on the jury's authority to determine the law as well as the facts.

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## INTRODUCTION

*In Suits at common law . . . the right of trial by jury shall be preserved . . . .*<sup>1</sup>

The Seventh Amendment requires juries in federal common law suits that historically would have used juries.<sup>2</sup> Yet, one federal court has not sat with a jury for over two centuries: the Supreme Court of the United States.

This was not always the case. In its first decade of existence, the Supreme Court impanelled juries as a matter of course at the beginning of every Term. The Court heard at least three cases with juries in the 1790s, only one of which was reported: *Georgia v. Brailsford*.<sup>3</sup>

*Brailsford* pitted Georgia against a British creditor. Each claimed the right to collect a debt from a Georgia citizen. Because a state was a party, the case fell within the Supreme Court's original jurisdiction. Moreover, because *Brailsford* was a common law action, the Supreme Court impanelled a jury; in this case a "special jury."

*Brailsford* has continued to pique interest over the past two centuries. First, the case presents the intriguing prospect of the Supreme Court presiding over a jury trial. Second, the case contains provocative language regarding the power of juries to decide the law as well as the facts. Despite this interest, however, the case's details have not been much studied, and its contemporary significance remains obscure. Scholars have lamented that "the published court records provide no clues as to the jury's composition or how it was selected."<sup>4</sup>

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1. U.S. CONST. amend. VII.

2. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (stating the two-part historical test, examining first whether the cause of action "either was tried at law at the time of the founding or is at least analogous to one that was," and if so, "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791"); *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935) ("In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791."); *United States v. Wonson*, 28 F. Cas. 745, 750 (Story, Circuit Justice, C.C.D. Mass. 1812) (No. 16,750) ("Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence.").

3. 3 U.S. (3 Dall.) 1 (1794).

4. Daniel D. Blinka, "This Germ of Rottedness": *Federal Trials in the New Republic, 1789-1807*, 36 CREIGHTON L. REV. 135, 163 (2003); see also *id.* at 189 n.161 (noting that 1 JULIUS GOEBEL JR., HISTORY OF THE SUPREME COURT: ANTECEDENTS AND BEGINNINGS TO 1801, at 743 (1971), "was unable to shed any additional light on [the jury's] composition").

There are, however, several extant documents that have not previously been explored.

This Note analyzes these documents from the Supreme Court's only published jury trial. It examines forty individuals named in the case's hitherto unstudied *venire facias*, or list of potential jurors, and shows that ninety-five percent of the potential jurors were merchants. It then analyzes the extant notes from the oral argument of Brailsford's attorney, and shows that the defense made extensive reference to the law merchant, a body of internationally-derived mercantile customs and practices. This Note concludes from these and other pieces of evidence that the "special jury" the Court employed was a jury of merchants in the tradition of Lord Mansfield, Chief Justice of King's Bench from 1756 to 1788. Lord Mansfield commonly used special juries of merchants to determine mercantile custom and to help incorporate it into the common law.

*Brailsford* is the only published case in which the Supreme Court has presided over a jury trial. Today, it would seem incongruous for this multi-member court, which is almost exclusively focused on appellate matters, to oversee a jury trial. The overwhelming majority of cases that the Supreme Court does hear in its original jurisdiction are equitable in nature and therefore do not require a jury. Instead, the Court delegates any fact-finding to a special master. Scholars have called the prospect of a jury trial before the Supreme Court "appalling" and "to be avoided at all costs."<sup>5</sup> Nevertheless, the Seventh Amendment mandates the Supreme Court to impanel a jury in cases that traditionally would have used one. This Note's conclusion that the Supreme Court used a special jury of merchants thus offers a possible way to reconcile constitutional mandate with seemingly impractical procedure. An expert jury on a particularly complex and sensitive issue would be both consistent with historical practice and feasible for the Court if it were to hear another case that mandated a jury trial.

Scholars also often discuss Chief Justice John Jay's statement in *Brailsford* regarding the power of juries to find the law as well as the facts. In the only published jury charge that the Supreme Court ever delivered, Chief Justice Jay uttered words that continue to spark controversy. Specifically, he told the jury that, although judges typically find the law and juries the fact, "you have nevertheless a right to take upon yourselves to judge of both, and to determine

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5. See, e.g., 17 CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4054 (3d ed. 2013) ("The prospect of a jury trial conducted by nine justices at the expense of other cases is appalling. If ever a citizen defendant should insist on a jury trial, the Court should resign further proceedings in favor of an action in a district court.").

the law as well as the fact in controversy.”<sup>6</sup> Some have called these words an “anomaly,”<sup>7</sup> while others have considered them the foundation of the jury’s right to nullify.<sup>8</sup> This Note’s conclusion that the Court once used a special jury of merchants, however, helps resolve this tension as well. The purpose of using a special jury of merchants was for the expert jury to help the judge determine the law merchant and incorporate it into the larger corpus juris. Thus, Chief Justice Jay’s words are more reasonable and less anomalous when we better understand the type of jury he was addressing.

In Part I, this Note begins by describing special juries in general and special juries of merchants in particular. Though dating back centuries, the practice of impanelling expert juries of merchants became especially prevalent in England and America in the second half of the eighteenth century, largely due to the influence of Lord Mansfield.

Part II discusses *Brailsford* in depth, while Part III details this Note’s original findings. After investigating the individuals who were called to be prospective jurors, this Note finds that ninety-five percent of them were merchants. This rate corresponds to that among special merchant juries impanelled in England. Further, this Note analyzes the unpublished oral arguments from the case. These arguments appeal to the “law of merchants,” mercantile custom, and the “prospects of future credit,” the precise types of arguments that attorneys would make to special juries of merchants. After examining several other strands of evidence, this Note concludes that the special jury impanelled before the Supreme Court in *Brailsford* was a Mansfieldian special jury of merchants.

In Part IV, this Note examines the subsequent history of juries in the Supreme Court, and the Court’s modern original jurisdiction practice. It then considers the possible scope of the Court’s discretionary power to decline to hear cases in its exclusive original jurisdiction. Finally, it considers whether a situation might ever arise in which the Supreme Court would be required to preside over a jury trial.

Part V examines how this Note’s conclusions affect the two questions presented by the case: (1) what happens when the Seventh Amendment confronts the Supreme Court’s original jurisdiction; and (2) how we should understand Chief Justice Jay’s jury charge in *Brailsford*. As to the first question,

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6. 3 U.S. at 4.

7. See, e.g., Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 317 (1966); Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 627 (2001).

8. See *infra* notes 209-212 and accompanying text.

this Note concludes that if the Supreme Court ever were constitutionally required to preside over a jury trial, it could impanel an expert jury just as it did in 1794—in essence, a special jury of special masters. As to the second question, this Note finds that Chief Justice Jay’s words were particularly appropriate for a special jury of merchants, because such juries were often tasked with determining the relevant mercantile custom that should control in a given case. Further, in America they were sometimes given the authority, with the judge’s instructions and oversight, to adopt that custom as a lasting precedent.

## I. SPECIAL JURIES

The term “special jury” refers to a jury that possesses some combination of three characteristics. First, “special jury” sometimes denotes a jury of experts, such as a jury made up of merchants for hearing commercial disputes.<sup>9</sup> Second, “special jury” sometimes refers to a jury made up of upper-class individuals for hearing particularly important or sophisticated matters, the so-called “blue-ribbon jury.”<sup>10</sup> Finally, the term “special jury” nearly always refers to a particular procedure of composing a jury, the “struck” jury, explained below.<sup>11</sup> Some “special juries” had all three characteristics, others were “struck” but composed of the upper-class and not merchants per se, and still others were “struck” and made up of expert jurors, chosen for their expertise, and not necessarily their socioeconomic station. The practice of these “special juries” stretches back at least to the beginning of the seventeenth century,<sup>12</sup> if not further. In particular, expert juries composed of merchants were used as far back as the fourteenth century.<sup>13</sup>

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9. See, e.g., James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 136, 173-75 (1983).

10. For analyses and defenses of so-called “blue-ribbon” juries, see Richard C. Baker, *In Defense of the “Blue Ribbon” Jury*, 35 IOWA L. REV. 409 (1950); and Jeannette E. Thatcher, *Why Not Use the Special Jury?*, 31 MINN. L. REV. 232 (1947).

11. See *infra* text accompanying notes 15-18; James Oldham, *The History of the Special (Struck) Jury in the United States and Its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges*, 6 WM. & MARY BILL RTS. J. 623, 629-32 (1998).

12. See Oldham, *supra* note 9.

13. JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 94-95 (1898); Oldham, *supra* note 9, at 173-76. Oldham does, however, note that “few reports of such cases [of merchant juries in the fourteenth century] exist.” *Id.* at 173. Some scholars have called for a revival of special juries of merchants to determine complex civil cases. See, e.g., James Oldham, *On the Question of a Complexity Exception to the Seventh Amendment Guarantee of Trial by Jury*, 71 OHIO ST. L.J. 1031, 1051-53 (2010); Rita Sutton, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. CHI.

The institution of the special jury was codified in 1730 in England by statute.<sup>14</sup> The procedure for composing a “special jury” or “struck jury” was as follows: Names of potential special jurors were regularly put on books and lists from which the clerk of the court could draw names for the *venire facias*.<sup>15</sup> Certain books would contain the names of merchants for special juries of merchants.<sup>16</sup> When it came time to impanel a jury, the clerk of the court, sometimes with the assistance of the parties,<sup>17</sup> collate forty-eight “qualified” jurors. These qualifications could be based on expertise or property, depending on the type of special jury. The parties would then take turns striking off names from the venire until they reached the required number—thus the appellation “struck” jury.<sup>18</sup> Although the practice of special juries in general, and special juries of merchants in particular, originated in the medieval period, Lord Mansfield brought special juries of merchants into widespread use upon his appointment as Chief Justice of King’s Bench in 1756. Under Mansfield, special juries of merchants became prevalent throughout England and the colonies in the late eighteenth century.<sup>19</sup>

Special juries of merchants served two main functions. First, they were sophisticated fact-finders whose expertise assisted them in understanding the complex facts underlying difficult cases. As Blackstone wrote of special juries in general, “Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders . . . .”<sup>20</sup> The second function of the special jury of merchants was to advise the

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LEGAL F. 757; Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155 (1980).

14. An Act for the Better Regulation of Juries, 3 Geo. 2, c. 25 (1730) (Eng.).

15. *Id.* § 17.

16. JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 25 n.48 (2004); Oldham, *supra* note 13, at 1042–43; James Oldham, *Special Juries in England: Nineteenth Century Usage and Reform*, 8 J. LEGAL HIST. 148, 150 (1987); *Law Report: Curteen v. Gill*, TIMES (London), May 30, 1794, at 3. For instance, James Oldham has discovered a list of potential special jurors from 1816. Of the 499 names, 477 were merchants, making a 95% merchant rate. Oldham has concluded that this was likely a list for potential special juries of merchants. Oldham, *Special Juries in England, supra*, at 150.

17. See *infra* note 132 and accompanying text.

18. Oldham, *supra* note 11, at 631.

19. Oldham, *supra* note 9, at 140 n.13 (“[The special jury’s] height of popularity occurred in the late eighteenth and early nineteenth centuries, prompted considerably by Lord Mansfield during his tenure as Chief Justice of King’s Bench (1756–1788).”); see CECIL HERBERT STUART FIFOOT, LORD MANSFIELD 114 (1936).

20. 3 WILLIAM BLACKSTONE, COMMENTARIES \*357–58. Mansfield described one special jury of merchants as “underst[anding] the question very well, and kn[owing] more of the subject

court as to the prevailing custom in the law merchant, and, in the late eighteenth century, assist the judge in incorporating aspects of the law merchant into the wider body of common law.<sup>21</sup>

The law merchant, or *lex mercatoria*, was a system of mercantile customs, both locally and internationally derived. Blackstone, for instance, considered the law merchant to be a part of the law of nations.<sup>22</sup> He stated that “in mercantile questions . . . the law-merchant, which is a branch of the law of nations, is regularly and constantly adhered to.”<sup>23</sup> For Lord Mansfield, too, the law merchant was in part derived from the law of nations.<sup>24</sup> As Judge Scrutton put it, “Mansfield . . . constructed his system of Commercial law by moulding the findings of his special juries as to the usages of merchants (which had often a Roman origin) on principles frequently derived from the Civil law and the law of nations.”<sup>25</sup>

The history of the law merchant is traditionally divided into three stages of development.<sup>26</sup> In the first stage, encompassing medieval England until the beginning of the seventeenth century, mercantile cases were largely administered not by common law courts but by specialist mercantile courts<sup>27</sup>:

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of it than any body else present.” *Lewis v. Rucker*, (1761) 97 Eng. Rep. 769 (K.B.) 770; 2 Burr. 1167, 1168.

21. See *infra* text accompanying notes 39–69.
22. See Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351, 361 (1983).
23. 4 WILLIAM BLACKSTONE, COMMENTARIES \*67 (footnote omitted); see also 1 WILLIAM BLACKSTONE, COMMENTARIES \*264 (“[T]he affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of. And in particular the law of England does in many cases refer itself to it, and leaves the causes of merchants to be tried by their own peculiar customs.”).
24. I.A. Hunter, *Proving Foreign and International Law in the Courts of England and Wales*, 18 VA. J. INT’L L. 665, 677 (1978); F.D. MacKinnon, *Origins of Commercial Law*, 52 L.Q. REV. 30, 33 (1936) (“[T]he maritime law is not the law of a particular country, but the general law of nations.” (quoting *Luke v. Lyde*, (1761) 97 Eng. Rep. 614 (K.B.) 617; 2 Burr. 883, 887 (Mansfield, C.J.))).
25. 1 THOMAS EDWARD SCRUTTON, THE INFLUENCE OF THE ROMAN LAW ON THE LAW OF ENGLAND 180 (1885); see also J.H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295, 321 (1979) (arguing that the law merchant “was not an importation from the *ius gentium*, though without doubt internationally current moral views and economic practices informed this branch of the law as they informed others”).
26. William C. Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445, 445 (1958); Thomas Edward Scrutton, *General Survey of the History of the Law Merchant*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN HISTORY 7, 9 (1909).
27. For the argument that merchant court procedures were not as different from those at

courts of admiralty,<sup>28</sup> arbitrators,<sup>29</sup> and courts arising at fairs, markets, and ports.<sup>30</sup> These merchant courts, often sitting with a merchant judge and a merchant jury, would arbitrate disputes using mercantile custom.<sup>31</sup> These courts used a flexible procedure, allowing for both much faster results and a wider range of admissible evidence, in particular non-sealed instruments and mercantile custom.<sup>32</sup> Ex ante, this body of merchant custom established a standard of appropriate behavior for mercantile dealings; ex post, the *lex mercatoria* allowed merchants to resolve their disagreements by looking to internal norms as opposed to external restraints.<sup>33</sup>

The second stage of law merchant's development began with Lord Coke becoming Chief Judge of the Court of Common Pleas in 1606.<sup>34</sup> In this phase, common law courts began to exercise more jurisdiction over the mercantile cases.<sup>35</sup> In particular, in actions for *assumpsit* the common law courts began to allow proof of mercantile custom.<sup>36</sup> The mercantile customs, however, were treated purely as matters of fact and not law. Thus, the litigants had to prove the prevailing mercantile custom as facts in each case, and none of the customs was codified as law by precedent.<sup>37</sup> During this second stage, the specialty mercantile courts largely disappeared.<sup>38</sup>

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common law during this era as some have suggested, and that in fact merchants sometimes did use common law courts in this period, see Baker, *supra* note 25, at 299-300, 302.

28. Jones, *supra* note 26, at 451.

29. *Id.*

30. LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 16 (1983); Jones, *supra* note 26, at 447; S. Todd Lowry, *Lord Mansfield and the Law Merchant: Law and Economics in the Eighteenth Century*, 7 J. ECON. ISSUES 605, 607-08 (1973); Scrutton, *supra* note 26, at 9-12.

31. Jones, *supra* note 26, at 446-48, 451; Oldham, *supra* note 9, at 173.

32. A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* 133-40 (2003).

33. See TRAKMAN, *supra* note 30, at 18.

34. Scrutton, *supra* note 26, at 12-13.

35. Lord Coke stated that the *lex mercatoria* was "part of the law[s] of this realm." 2 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON* 182a (Neil H. Alford, Jr. et al. eds, 1985) (1638). Matthew Hale in the seventeenth century wrote that in *lex mercatoria* cases, "if it be a question touching the custom of merchants[,] merchants are usually jurors at the request of either party." See J.H. Baker, *Ascertainment of Foreign Law: Certification to and by English Courts Prior to 1861*, 28 INT'L & COMP. L.Q. 141, 144-45 (1979) (citing Hale's treatise on Admiralty jurisdiction).

36. J. MILNES HOLDEN, *THE HISTORY OF NEGOTIABLE INSTRUMENTS IN ENGLISH LAW* 27-36 (1955); Baker, *supra* note 25, at 296-97.

37. 3 JOHN LORD CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* 275 (1874)

The final stage of the development of the law merchant began in 1756 when Lord Mansfield became Chief Justice of King's Bench.<sup>39</sup> Sensing that England, now an international mercantile capital, lacked a body of mercantile law, Mansfield endeavored to incorporate the law merchant into the common law.<sup>40</sup> He expanded the admissibility of prevailing mercantile custom, and allowed the common law to establish these customs as binding precedent.<sup>41</sup>

Mansfield used special juries of merchants to assist him in this project of incorporating the law merchant into the common law.<sup>42</sup> He invited the special merchant jurors to "call[] upon their own experience and knowledge in reaching their verdicts."<sup>43</sup> Further, he would allow parties to argue merchant custom to the jury.<sup>44</sup> Instead of having to prove a particular custom as a matter of fact in every case, Mansfield, with the assistance of his special juries of merchants, incorporated the law merchant into the common law and allowed these customs to become a part of the law itself.<sup>45</sup> If the judge approved of the

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("Mercantile questions were so ignorantly treated when they came into Westminster Hall, that they were usually settled by private arbitration among the merchants themselves. If an action turning upon a mercantile question was brought into a court of law, the judge submitted it to the jury, who determined it according to their own notions of what was fair, and no general rule was laid down which could afterwards be referred to for the purpose of settling similar disputes."); 12 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 527 (1938); TRAKMAN, *supra* note 30, at 26-27; Scrutton, *supra* note 26, at 13.

38. Scrutton, *supra* note 26, at 13.

39. *Id.*

40. See CAMPBELL, *supra* note 37, at 274-76; Lowry, *supra* note 30, at 605-06.

41. TRAKMAN, *supra* note 30, at 28; M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 302 ("Mansfield brought, 'with considerable success,' merchant customs 'harmoniously' into the common law." (quoting OLDHAM, *supra* note 16, at 365, 368)); see also Lowry, *supra* note 30, at 609 ("Mansfield . . . was undertaking . . . to bring under formal legal supervision and management a system that had perpetuated and maintained itself for centuries as a voluntaristic, unmanaged structure of rules developed by the merchants themselves for the conduct of business.").

42. HOLDEN, *supra* note 36, at 114; HOLDSWORTH, *supra* note 37, at 524-26; 1 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 93-95 (1992); Scrutton, *supra* note 26, at 13-15.

43. Oldham, *On the Question*, *supra* note 13, at 1045-46; see also *Vallejo v. Wheeler*, (1774) 98 Eng. Rep. 836 (K.B.) 841 (Mansfield, C.J.) ("I should pay great respect to the gentlemen of the special jury who were considerable merchants, the proper judges of a cause of this nature."); *Lewis v. Rucker*, (1761) 97 Eng. Rep. 769 (K.B.) 770 (Mansfield, C.J.) ("The special jury [of merchants] . . . formed their judgment from their own notions and experience, without much assistance from any thing that passed.").

44. See, e.g., *Carvick v. Vickery*, (1783) 99 Eng. Rep. 414 (K.B.) 415 (Mansfield, C.J.).

45. CLIVE M. SCHMITTHOFF, *SELECT ESSAYS ON INTERNATIONAL TRADE LAW* 5 (1988).

law merchant custom, he could make it a part of the *corpus juris*.<sup>46</sup> In rare occasions, a prevailing mercantile custom might even serve to overturn contrary precedent and establish a new legal rule.<sup>47</sup> As Oldham has put it, “What Mansfield did was to perceive how the special jury might be used instrumentally to establish legal principles by identifying mercantile practices and folding those practices into the common law.”<sup>48</sup>

In late eighteenth-century America, as in England, use of special juries of merchants was widespread.<sup>49</sup> New York in particular followed England in commonly providing for special juries of merchants in complex commercial cases.<sup>50</sup> South Carolina authorized special merchant juries for disputes between merchants,<sup>51</sup> and made extensive use of them throughout the second half of the eighteenth century.<sup>52</sup> Pennsylvania’s statute providing for special juries of merchants dated to 1701 and allowed a special jury to hear maritime mercantile

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46. JAMES OLDHAM, *TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES* 162 (2006) (“[U]ndisputed merchant practices that were brought out in litigation [did not] automatically bec[o]me part of the common law. Practices might do so . . . where they made sense to the court and offended no established legal principle, but not otherwise.”).
47. JAMES STEVEN ROGERS, *THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES* 221 & n.91 (2004).
48. OLDHAM, *supra* note 16, at 368. Mansfield “regarded the merchants as advisory experts as much as fact finders,” and tasked them with a variety of functions, including “hearing testimony, asking questions, informing the court about mercantile customs, and ultimately rendering verdicts.” *Id.* at 26-27.
49. Oldham, *supra* note 11, at 632 (“By the time of American independence, the custom had expanded so that in commercial cases, special juries of merchants were commonplace.”); see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 155-58 (1977).
50. HORWITZ, *supra* note 49; see 1786 N.Y. Laws 279-80; WILLIAM WYCHE, *A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW-YORK IN CIVIL ACTIONS* 141-42 (New York: T. & J. Swords 1794); see also GEORGE CAINES, *A SUMMARY OF THE PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW-YORK* 454 (New York, Isaac Riley 1808) (“[A] struck or special jury . . . [was] resorted to in cases of importance which may be thought too difficult of decision by persons of ordinary information.”); ALEXANDER HAMILTON, *PRACTICAL PROCEEDINGS IN THE SUPREME COURT OF THE STATE OF NEW YORK* (ca. 1783), *reprinted in* 1 JULIUS GOEBEL JR., *THE LAW PRACTICE OF ALEXANDER HAMILTON* 55, 61 (1964) (“In a Cause of Great Importance one of the Parties may wish for a special Jury.”).
51. An Act for Establishing Courts, Building Gaols, and Appointing Sheriffs, and other Officers, for the More Convenient Administration of Justice in this Province, § 17, 1769 S.C. Acts 268, 272.
52. See HORWITZ, *supra* note 49, at 158 (“Even more than in New York, merchant juries seem to have exerted a powerful influence over the course of development of post-revolutionary South Carolina commercial law.”).

disputes before a jury made up of “twelve merchants, masters of vessels or ship carpenters.”<sup>53</sup> Special juries of merchants continued in use in Pennsylvania through the 1790s.<sup>54</sup> Georgia by statute provided for “special jur[ies] of merchants” for disputes between “merchants, dealers,” and “ship-masters” concerning “contracts” and “debts.”<sup>55</sup> Other states also had long made use of special juries of merchants.<sup>56</sup> Expert special juries even made an appearance in one of the drafts of the Constitution in the summer of 1787.<sup>57</sup>

In America, moreover, judges would sometimes give special juries of merchants the authority to establish a particular rule of law for a given jurisdiction, although always with the advice of the judge. In *Winthrop v. Pepon*, for instance, a common jury had heard the case in the first trial, and had assigned a particular quantum of damages.<sup>58</sup> The defendants moved for a new trial, alleging that the method used to quantify the damages was contrary to the law of merchants, and asked that the new trial be heard by a special jury of merchants.<sup>59</sup> As the report states, “the new trial was ordered in this case, not on account of any difficulty of the first part, but in order to have the point of

53. 1701 Pa. Laws 149; see An Act for the Better Regulation of Juries, § 17, 1785 Pa. Laws 262, 267 (providing for “special juries” at the request of either party, “in such manner as special juries have heretofore been struck.”); 1 FRANK M. EASTMAN, COURTS AND LAWYERS OF PENNSYLVANIA: A HISTORY, 1623-1923, at 182 (1922).

54. See, e.g., *Respublica v. Le Caze*, 1 Yeates 55 (Pa. 1791).

55. An Act for Holding Special or Extraordinary Courts of Common Pleas, for the Trial of Causes Arising Between Merchants, Dealers and Others, and Ship-Masters, Super-Cargoes, and Other Transient Persons, Preamble, 1763 Ga. Laws 162, 162-63.

56. Special juries of merchants were once prevalent in Massachusetts, although by 1815 at the latest they had “been long disused.” *Peisch v. Dickson*, 19 F. Cas. 123, 125 n. (Story, Circuit Justice, C.C.D. Mass. 1815). They could be impanelled in Virginia as well. See *Hadfield v. Jameson*, 16 Va. 53, 75 (1811).

57. Edmund Randolph, while a member of the Committee of Detail, proposed an expert jury to help determine salaries for senators. Randolph suggested that the Supreme Court would call a “special jury of the most respectable merchants and farmers” to declare what the average value of wheat had been for the last six years. The senators would then receive for each day of service the average value of a bushel of wheat. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 142 (Max Farrand ed., 1911). This idea was soon abandoned, but Randolph’s recourse to expert juries indicates how natural such an institution seemed. Randolph’s language here was lifted verbatim from a draft constitution for Virginia that Thomas Jefferson penned in 1783. 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON, 1776-1826, at 254 (James Morton Smith ed., 1995) (“[A] special jury of the most respectable merchants and farmers to be summoned to declare what shall have been the averaged value of wheat.”).

58. 1 S.C.L. (1 Bay) 468, 468 (1795).

59. *Id.*

damages established by a *jury of merchants*.<sup>60</sup> Counsel then argued the law merchant to the special jury of merchants.<sup>61</sup> The court stated that the special jury of merchants “were now finally to settle this point; and therefore [the court] left it again to the jury now sworn . . . [to set the law] as they thought most agreeable to the law of merchants.”<sup>62</sup> The report concludes that the jury’s finding of the appropriate quantum of damages “may be considered as establishing the law on this point.”<sup>63</sup> Thus, special juries of merchants were at times relied upon to draw on their expertise of the law merchant in order to set the law for a certain jurisdiction.<sup>64</sup>

Another case where the judges left it to a special jury of merchants to ascertain a prevailing mercantile custom and establish it as the law was *Davis v. Richardson*.<sup>65</sup> The question was what interest rate should apply to an otherwise silent debt.<sup>66</sup> The plaintiff argued to the jury the custom of merchants in England.<sup>67</sup> As the panel of judges stated per curiam to the special jury of merchants, although the case was not difficult, it “is of extensive importance to the community, that the principle should now be settled and ascertained with precision . . . and it is fortunate, that so respectable a jury are convened for the purpose of fixing a standard for future decisions.”<sup>68</sup> The court then directed the jury to find for the plaintiff, and to establish a particular principle, and “[t]he jury found accordingly.”<sup>69</sup>

Thus, when the Court heard the *Brailsford* case in 1794, there would have been precedent throughout the Republic for convening such an expert jury. Moreover, there also would have been precedent for the judges treating such a special jury with a measure of deference, and even at times assigning to them the task of ascertaining the appropriate custom to incorporate into the general law, within the bounds of the judges’ instructions.

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60. *Id.* (emphasis added).

61. *Id.* at 468-69.

62. *Id.* at 469.

63. *Id.* at 470.

64. M. Leigh Harrison, *A Study of the Earliest Reported Decisions of the South Carolina Courts of Law*, 16 AM. J. LEGAL HIST. 51, 58 (1972) (“The case of *Winthrop v. Pepon, Otis and Company* suggests that it was deemed proper for the court to depend upon a jury of merchants to settle new questions arising in mercantile transactions.”).

65. *Davis v. Ex’rs of Richardson*, 1 S.C.L. (1 Bay) 105 (1790).

66. *Id.* at 105.

67. *Id.*

68. *Id.* at 106.

69. *Id.* at 106-07.

II. *GEORGIA V. BRAILSFORD*

The dispute that eventually became *Georgia v. Brailsford* began during the Revolutionary War. Many states, including Georgia, enacted legislation that “sequestered” debts owed to British creditors.<sup>70</sup> When the war ended, the 1783 Treaty of Peace between England and the United States established protections for foreign creditors.<sup>71</sup> The Treaty stated in Article Four that “Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted.”<sup>72</sup> Before the creation of federal courts, this provision had been de facto unenforceable; state laws, state judges, and state juries all sided with American debtors.<sup>73</sup> But once the federal district courts opened their doors and dockets in 1790, foreign creditors rushed in.<sup>74</sup>

*Georgia v. Brailsford* was one such case. James Spalding, a Georgia citizen, owed Samuel Brailsford,<sup>75</sup> a British subject,<sup>76</sup> a bond dated 1774.<sup>77</sup> Brailsford filed a suit at law against Spalding in Georgia federal circuit court in 1790 before two judges: Justice James Iredell, riding circuit, and Judge Nathan Pendleton. Georgia tried to interplead itself as the true plaintiff, stating that Spalding rightfully owed the debt to the state, not to Brailsford. Georgia argued that it had sequestered the debts of all British creditors by statutes it

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70. MATTHEW P. HARRINGTON, JAY AND ELLSWORTH, *THE FIRST COURTS: JUSTICES, RULINGS, AND LEGACY* 130 (2008); see John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1920-23 (1983).

71. See David M. Golove, *Treaty-making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1116-17 (2000); Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 VA. J. INT'L L. 757, 773-74 (2002).

72. Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80, reprinted in 12 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 8, 11 (Charles I. Bevans ed., 1974).

73. See Charles F. Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797*, 92 VA. MAG. HIST. & BIOGRAPHY 176, 176-77 (1984). For the suggestion that the Court decided to impanel a special jury in *Brailsford* in order to circumvent such obstinate jurors, see Blinka, *supra* note 4, at 166.

74. HARRINGTON, *supra* note 70, at 131.

75. There were also two other creditors, Powell and Hopton, whose debts were sequestered by South Carolina. 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 73-74 (Maeva Marcus ed., 1998) [hereinafter 6 DHSC].

76. Brailsford was treated as a British subject for this case, but he seems in fact to have been a South Carolina citizen. *Id.* at 74-75.

77. *Id.* at 74.

passed before the Treaty of Peace, and that the state had therefore replaced the British creditors.<sup>78</sup> Justice Iredell believed that, if the state of Georgia interpled itself, the circuit court would not have jurisdiction to hear the case, since a state would be a party.<sup>79</sup> Further, he had not heard of interpleading being allowed in a suit at law, as opposed to in equity.<sup>80</sup> Therefore, Georgia's petition was denied.<sup>81</sup>

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78. Letter from James Iredell to George Washington (Feb. 23, 1792), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 241 (Maeva Marcus ed., 1989) [hereinafter 2 DHSC].

79. Letter from James Iredell to Edmund Randolph (Jan. 1792), *reprinted in* 6 DHSC, *supra* note 75, at 91 (“[I]t was evident that in such a case, the State being a Party, a Bill in Equity would not lie in the Circuit Court, but could only lie in the Supreme Court.”); *see* Letter from James Iredell to George Washington (Feb. 23, 1792), *reprinted in* 2 DHSC, *supra* note 78, at 241 (“It was also questionable . . . whether inasmuch as by such a Proceeding a State would become a Party, though collaterally to the principle action, it was not a case which ought to be tried in the Supreme Court.”).

In the Constitution's first decade, Justice Iredell argued in several cases that it did not allow Congress to grant the lower federal courts concurrent authority to hear cases within the Supreme Court's original jurisdiction. *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 406 (1792); *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 298-99 (Iredell, Circuit Judge, C.C.D. Pa. 1793). Justice Wilson, on the other hand, argued that doing so would be perfectly constitutional. *Brailsford*, 2 U.S. at 407 (Wilson, J.); *Ravara*, 2 U.S. at 298 (Wilson, J.) (“[A]lthough the Constitution vests in the Supreme Court *an original* jurisdiction, in cases like the present, it does not preclude the Legislature from exercising the power of vesting a *concurrent* jurisdiction, in such inferior Courts, as might by law be established . . .”). Chief Justice Marshall at first seemed to agree with Iredell. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original[,] . . . the distribution of jurisdiction, made in the constitution, is form without substance.”). Later, however, Marshall sided with Wilson, albeit again in dicta. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 395 (1821). The Court later unambiguously found that Congress may make cases that fall within the Supreme Court's original jurisdiction concurrently triable in lower federal courts. *Ames v. Kansas*, 111 U.S. 449, 469 (1884) (“[W]e are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction.”); *Börs v. Preston*, 111 U.S. 252, 260 (1884). The Court has also held that Congress may grant state courts concurrent authority to decide some cases otherwise falling within the Supreme Court's original jurisdiction. *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 521 (1898).

80. Letter from James Iredell to George Washington (Feb. 23, 1792), *reprinted in* 2 DHSC, *supra* note 78, at 241.

81. James Iredell's Circuit Court Opinion, May 2, 1792, *reprinted in* 6 DHSC, *supra* note 75, at 106.

Proceeding without Georgia as a party, the debtor Spalding deployed Georgia's argument, namely that Brailsford could not collect from Spalding because Georgia was the true owner of the debt. The judges then set to work construing the words of Georgia's statute. Section Four "confiscated to and for the use and benefit of the state" the "debts[,] dues and demands" owed to British citizens, "except debts or demands due or owing to British Merchants."<sup>82</sup> In the next section, the statute declared that "all debts[,] dues[,] or demands, due or Owing to [British] merchants" were "[s]equestered."<sup>83</sup>

Judge Pendleton first argued that, by the statute's own terms, "sequestered" and "confiscated" clearly had different meanings.<sup>84</sup> He also construed the text by recourse to the law merchant, arguing that the Georgia legislature may have avoided confiscating the debts of British merchants because "debts contracted on the faith of commercial intercourse ought to be deemed of a sacred and inviolable nature . . . ."<sup>85</sup> Judge Pendleton then stated that sequestration was a civil law, not common law, term meaning to deposit or entrust, and that therefore the right to collect Spalding's debts never vested in Georgia; rather, ownership of the debt always remained with Brailsford.<sup>86</sup> Moreover, even if Georgia had confiscated the debt, Judge Pendleton concluded, the Treaty of Peace trumped the state statute and revived Brailsford's right to sue to recover his debt.<sup>87</sup>

Justice Iredell agreed with his fellow judge, and further argued that the custom of the law of nations regarding merchants suggested that the Georgia law would best be construed as not confiscating the debts.<sup>88</sup> Justice Iredell echoed Vattel, the Swiss author of the definitive treatise on the law of nations, for the proposition that it is "agreeable to the modern practice in Europe not to

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82. Georgia Confiscation Act of 1782 § 4 (emphasis added).

83. *Id.* § 5 (emphasis added).

84. Nathaniel Pendleton's Circuit Court Opinion, May 2, 1792, reprinted in 6 DHSC, *supra* note 75, at 96-97.

85. *Id.* at 96.

86. *Id.* at 98-99.

87. *Id.* at 99-102.

88. James Iredell's Circuit Court Opinion, May 2, 1792, reprinted in 6 DHSC, *supra* note 75, at 106.

confiscate Debts due to an Enemy.”<sup>89</sup> Justice Iredell and Judge Pendleton found for Brailsford.<sup>90</sup>

Georgia then filed a bill in equity against Brailsford and Spalding in the Supreme Court’s original jurisdiction, arguing that the Georgia statute, by sequestering the debt, had vested the right to collect the debt in the state, and that the Treaty of Peace did not affect that right.<sup>91</sup> Brailsford objected to the bill in equity, arguing that since the law provided a complete remedy, there was no basis for the Court to hear the case in equity.<sup>92</sup> Chief Justice John Jay, writing for the Court, agreed. On February 18, 1793, the Court held that it did not have jurisdiction to hear the bill in equity because Georgia could pursue its claim at common law.<sup>93</sup> The Court told Georgia to file a suit at law the next Term,<sup>94</sup> and enjoined disbursement of the debt until the case was resolved.<sup>95</sup>

The parties, however, did not know how to proceed at common law. Because the debt had not yet been disbursed to Brailsford, and the two parties had no contract between themselves, Georgia had no common law action against Brailsford.<sup>96</sup> In order to try the case at common law, the two sides eventually agreed to a fictional set of facts.<sup>97</sup> They stipulated that Brailsford had already received payment of the debt.<sup>98</sup> Georgia then claimed, for the purposes of pleading, that Brailsford had promised to pay the debt to Georgia, while Brailsford denied the promise.<sup>99</sup> Thus, issue was joined, and Georgia

89. *Id.*; see *id.* at 106 n.7 (suggesting that Iredell’s source for this proposition was EMMERICH DE VATEL, *LAW OF NATIONS*, bk. 3, ch. 5, § 77, at 323 (G.G. & J. Robinson, 1797) (1758) (stating that a sovereign may confiscate debts during wartime, but noting that “at present, a regard to the advantage and safety of commerce has induced all the sovereigns of Europe to act with less rigour on this point. And as the custom has been generally received, he who should act contrary to it, would violate the public faith”)).

90. 6 DHSC, *supra* note 75, at 77.

91. *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 403 (1792).

92. *Demurrer*, Feb. 4, 1793, reprinted in 6 DHSC, *supra* note 75, at 132-34; see also Judiciary Act of Sept. 24, 1789, ch. 20, § 16, 1 Stat. 73, 82 (“[S]uits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.”).

93. *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 415, 418-19 (opinion of Jay, C.J.).

94. *Id.* at 419.

95. *Id.*

96. Maeva Marcus, *Georgia v. Brailsford*, 2 J. SUP. CT. HIST. 57, 65 (1996).

97. *Id.*

98. *Agreement of Parties* (June 3, 1793), reprinted in 6 DHSC, *supra* note 75, at 153 (agreeing that these facts “shall be admitted for the purpose of trying the merits of the question between the said parties”).

99. Marcus, *supra* note 96, at 65.

was able to sue Brailsford for trespass on the case based on these fabricated facts.<sup>100</sup> The Supreme Court, although apparently aware that the facts were fictional,<sup>101</sup> accepted the pleadings, and ordered the case heard the following Term.<sup>102</sup>

On January 13, 1794, attorneys for the two parties met to compose a special jury.<sup>103</sup> They took turns striking names from a list of forty-eight merchants,<sup>104</sup> until they reached twenty-four to be summoned, twelve of whom would serve as special jurors.<sup>105</sup> On February 3, 1794, trial began before this special jury,<sup>106</sup> the first time that the Supreme Court had sat with a jury. This was the first case on the Court's docket for the Term, and had gained considerable publicity, at times referred to as "the famous Georgia case."<sup>107</sup>

The *Brailsford* case presented two questions. First, when Georgia "sequestered" Brailsford's debt, did the debt vest in the state? This first question was a matter of statutory interpretation. Second, if it did vest in Georgia, was the state's title to the debt later abrogated by the Treaty of Peace?<sup>108</sup> This second question concerned issues of the supremacy of treaties and state sovereignty. At this point in the proceedings, the *Brailsford* case did not concern any factual dispute, as the parties had stipulated all the facts.<sup>109</sup>

100. Agreement of the Parties (June 3, 1793), reprinted in 6 DHSC, *supra* note 75, at 153.

101. There are two reasons to conclude that the Court was aware that the stipulated facts were fabricated. First, the Court itself had enjoined the federal marshal from disbursing the debt to Brailsford, *see supra* text accompanying note 95, so it knew that Brailsford had not been paid. Second, when Dallas reported the case he did not try to conceal that the case was based on agreed-upon facts. *See Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 1 (1794) (describing the case as based on an "amicable issue").

102. Marcus, *supra* note 96, at 65.

103. Venire for a Special Jury (Jan. 13, 1794), reprinted in 6 DHSC, *supra* note 75, at 154-55.

104. For the evidence that the list was composed almost entirely of merchants, *see infra* Appendix.

105. Marcus, *supra* note 96, at 70-71 n.68.

106. Dallas also refers to the jury as a "special jury." *See Brailsford*, 3 U.S. at 1.

107. 6 DHSC, *supra* note 75, at 85 & n.72; *see also* Nathaniel Pendleton's Circuit Court Opinion (May 2, 1792), reprinted in 6 DHSC, *supra* note 75, at 92 ("[This] case . . . is a cause of great expectation, not only as it respects a great number of persons in a similar situation, but from the importance of the principles on which the decision will be founded . . ."); *Brailsford*, 3 U.S. at 3 ("This cause has been regarded as of great importance; and doubtless it is so.").

108. *Brailsford*, 3 U.S. at 1.

109. *See supra* notes 97-100 and accompanying text.

The counsel in this case argued the law to the Justices and jury.<sup>110</sup> Alexander Dallas and Jared Ingersoll represented Georgia. They averred that when Georgia's statute "sequestered" the debt, it had in fact confiscated it, and title to the debt had vested in the state. Calling the jury's attention to such august authorities as Blackstone and Vattel, counsel for the plaintiff argued that Georgia had the authority as a sovereign state to confiscate the debts of an "alien enemy," which it had intended to do by its sequestration.<sup>111</sup> Moreover, Dallas cited to the same Vattel passage that Justice Iredell had referenced in his circuit court opinion,<sup>112</sup> but this time for the opposite proposition: that, although disfavored and generally avoided, sovereignties did have the *power* to confiscate debts due to enemies in times of war.<sup>113</sup> The plaintiffs then argued that Article Four of the Treaty of Peace only referred to "subsisting" debts, not sequestered or confiscated debts. They concluded that it was for the parties to the treaty, i.e., the states, and not the federal government, to construe its provisions.<sup>114</sup>

On the other side, William Bradford, Jr., the Attorney General of the United States, addressed the jury on behalf of Brailsford. He argued that Georgia had not confiscated the debt, but had merely sequestered it, meaning that ownership of the debt had never vested in the state. Moreover, he asserted that the Treaty of Peace had given creditors a right of action to recover their debts.<sup>115</sup> These are the main arguments that Dallas, also the plaintiff's attorney in this case, detailed in the official report.

There was, however, another side to Bradford's oral argument that Dallas did not reproduce, which has consequently been left unanalyzed. As recorded in his notes, Bradford also extensively referenced the law merchant and mercantile custom in general.<sup>116</sup> In the next Part, I will analyze these invocations of mercantile law and custom and the light they shed on the case.<sup>117</sup>

After four days of oral arguments,<sup>118</sup> Chief Justice John Jay addressed the jury before it deliberated. He stated that the Court was of the unanimous

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110. *Brailsford*, 3 U.S. at 3.

111. *Id.* at 1-2.

112. See *supra* note 89 and accompanying text.

113. VATTEL, *supra* note 89, at 323.

114. *Brailsford*, 3 U.S. at 2-3.

115. *Id.* at 3.

116. William Bradford, Jr.'s Notes for Argument in the Supreme Court (Feb. 4, 1794), reprinted in 6 DHSC, *supra* note 75, at 163-64.

117. See *infra* text accompanying notes 140-143.

118. HARRINGTON, *supra* note 70, at 132.

opinion that Georgia's statute did not confiscate but merely sequestered the debt. Therefore, Chief Justice Jay concluded, under the law of nations and the Treaty of Peace, resolution of the conflict with England revived Brailsford's right of action to sue for recovery of the debt.<sup>119</sup>

Chief Justice Jay then addressed the jury on the subject of the distinction between law and fact. He first reminded the jury of the "good old rule" that questions of fact were the "province of the jury" and questions of law were the "province of the court."<sup>120</sup> "But," he continued, "you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."<sup>121</sup> He assumed that the jury would "pay that respect, which is due to the opinion of the court," because "juries are the best judges of facts" and "the court are the best judges of law."<sup>122</sup> Nevertheless, he concluded, both the law and the fact were "within your power of decision."<sup>123</sup>

After conferring among themselves, the special jury asked the Court whether the sequestration vested the debt in the state of Georgia.<sup>124</sup> The Court responded that sequestration does not divest property, and that the right to collect the debt had never actually been taken from Brailsford.<sup>125</sup> The special jury, "without going again from the bar," found for Brailsford.<sup>126</sup>

### III. THE SPECIAL JURY IN *BRAILSFORD*

What did it mean that the jury in *Brailsford* was a "special jury"? Scholars have generally assumed that there is no more specific information about what sort of a jury was convened in *Brailsford*, or how it was composed.<sup>127</sup> This Part provides a detailed analysis of the extant documents referring to the special jury in *Brailsford* and concludes that the special jury was an expert jury, i.e., a special jury of merchants in the Mansfieldian tradition that was prevalent in America at the time.

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119. 3 U.S. at 3-4.

120. *Id.* at 4.

121. *Id.*

122. *Id.*

123. *Id.*

124. Questions Proposed by the Petit Jury (Feb. 7, 1794), reprinted in 6 DHSC, *supra* note 75, at 171.

125. 3 U.S. at 5.

126. *Id.*

127. See *supra* note 4.

As we have seen, the term “special jury” had several possible meanings.<sup>128</sup> The “special jury” was virtually always created by the “struck” procedure. Moreover, a jury of merchants would also often qualify as an “upper-class” jury.<sup>129</sup> An “upper-class” jury, on the other hand, while it would ordinarily contain merchants, would likely not overwhelmingly be made up of merchants.<sup>130</sup> So which kind of special jury was the one impanelled in *Brailsford*?

Remarkably, the *venire facias* for *Brailsford* is extant, and offers insight into this question.<sup>131</sup> The *venire facias* was the list of the forty-eight names collated in order to perform the struck procedure to impanel the special jury.<sup>132</sup> The extant *Brailsford* *venire* is lacunose, but together with notes from the Supreme Court,<sup>133</sup> forty of the forty-eight names from the original *venire* can be reconstructed. By analyzing the men who were chosen for prospective jury service, we can better understand what sort of special jury was composed for the *Brailsford* case.

For this Note, I have analyzed all of these names, and also all the names on the one other extant special jury *venire facias*, which the Supreme Court convened on August 1, 1796. For details on this analysis, see the Appendix, below. For the two special juries, the share of prospective jurors who were merchants is ninety-four percent. For the *Brailsford* jury *venire* alone, at least thirty-eight of the forty potential jurors were merchants, a ninety-five percent merchant rate. This equals the merchant rate of what appears to be a list of potential jurors for special juries of merchants in England.<sup>134</sup>

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128. See *supra* text accompanying notes 9-13.

129. See Oldham, *supra* note 9, at 173 & n.196.

130. Other professions that would qualify as sufficiently “upper-class” might include gentleman, clergyman, sea captain, manufacturer, lawyer, banker, politician, and teacher.

131. *Venire* for a Special Jury (Jan. 13, 1794), reprinted in 6 DHSC, *supra* note 75, at 154, 154-55.

132. The extant document does not reveal who gathered the initial list of forty-eight names that the two parties struck in order to compose the special jury. It is likely that either the clerk of the court, the parties themselves, or some combination of all three participated. Oldham, *supra* note 9, at 179-90. There is evidence that parties would have had the opportunity to contribute names to the *venire* in America during this period. See *Ex'rs of Lynch v. Horry*, 1 S.C.L. (1 Bay) 229, 230 (1792) (“[I]n cases of special juries, each party has the right to give in his own list.”).

133. *Fine Minutes of the Supreme Court*, Feb. 4, 1794, reprinted in 1 DOCUMENTARY HISTORY OF THE SUPREME COURT 219, 222 (Maeva Marcus & James R. Perry eds., 1985) [hereinafter 1 DHSC].

134. See *supra* note 16.

Moreover, the name “Robert Smith” in the *Brailsford* venire, and then again in the minutes of the Supreme Court, was designated as a merchant.<sup>135</sup> Because there were at least three adults living in Philadelphia at this time named Robert Smith, one a merchant, one a mariner, and one a sailmaker,<sup>136</sup> this presumably was meant to distinguish the merchant from the others, further suggesting a preoccupation with impanelling a jury of merchants.

A special jury of merchants in *Brailsford* would also be consistent with the widespread use of such merchant juries in America at this time.<sup>137</sup> In particular, Pennsylvania, where the trial was held, New York, where Chief Justice John Jay had practiced law and had served as chief justice from 1775-1777,<sup>138</sup> and Georgia,<sup>139</sup> which was the plaintiff in this case, used special juries of merchants.

Perhaps the most suggestive piece of evidence that the Court in *Brailsford* employed a special jury of merchants, however, is the way that Brailsford’s attorney William Bradford argued to the jury. As preserved in his notes, Bradford appealed to mercantile law and custom at length to the jury. Bradford told the jury that the statutory construction for which Georgia argued would be “opposed” to “[t]he principle of the Mercantile law.”<sup>140</sup> He went on, telling the jury that “many merchants [would be] well affect[e]d” by an adverse ruling.<sup>141</sup> “[T]he faith of Commercial intercourse ought not to be violated,” he argued, referencing Judge Pendleton’s suggestion in the lower court that the law merchant should be used to construe the text of the Georgia statute and the intent of the legislators.<sup>142</sup> Bradford went on to ask the special jury about the “Prospect of future Credit,” if they ruled against this bona fide creditor, before referencing the “[rule] of merchants.”<sup>143</sup> Thus, Bradford’s arguments to the jury on behalf of Brailsford made extended invocations of mercantile law and custom in order to persuade the jury to embrace his client’s position.

135. Venire for a Special Jury, *supra* note 131 (“Mrcht”); Original Minutes: Samuel Bayard’s Notes for Fine Minutes – February 1792 Term to August 1794 Term, *reprinted in* 1 DHSC, *supra* note 133, at 352, 375 & n.65 (“Merct”).

136. JAMES HARDIE, *THE PHILADELPHIA DIRECTORY AND REGISTER* 143 (Philadelphia, Jacob Johnson & Co., 2d ed. 1794) [hereinafter HARDIE, 1794].

137. *See supra* text accompanying notes 49-69.

138. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 36 (1922).

139. *See supra* note 55 and accompanying text.

140. William Bradford, Jr.’s Notes for Argument in the Supreme Court (Feb. 4, 1794), *reprinted in* 6 DHSC, *supra* note 75, at 164.

141. *Id.* at 165.

142. *Id.*; *see supra* note 85 and accompanying text.

143. William Bradford, Jr.’s Notes for Argument in the Supreme Court (Feb. 4, 1794), *reprinted in* 6 DHSC, *supra* note 75, at 165.

These were precisely the sorts of arguments that attorneys would make to special juries of merchants. Attorneys would regularly argue that their opponent's argument was not "conformable to the general sense and usage of merchants,"<sup>144</sup> or "conformable to the *law* of merchants."<sup>145</sup> The parties would bring witnesses to argue to the jury what was the "common practice, in dealing with respectable merchants."<sup>146</sup> In short, the arguments that Bradford made to the special jury in *Brailsford* were exactly what one would expect if he were arguing to a special jury of merchants.

Furthermore, the Supreme Court possessed the power and inclination to imitate the special juries of merchants frequently used at King's Bench.<sup>147</sup> The Judiciary Act of 1789 gave the federal courts the power to establish their own procedural rules.<sup>148</sup> The Supreme Court accordingly in 1792 adopted the procedures of the English courts King's Bench and Chancery.<sup>149</sup>

The *Brailsford* case, moreover, was particularly appropriate for a special jury of merchants. As we have seen, special juries of merchants served two purposes. First, they provided mercantile expertise. This would have been helpful for a complex case like *Brailsford*. The case revolved around the issues of debts changing hands and vesting, and it concerned a wide variety of partnerships and parties who acted as plaintiffs in one action and defendants in the next.

The second function of a special jury of merchants was to advise the court on the controlling mercantile custom from the law merchant, and, if the law was unsettled, to assist the court in incorporating that custom into the corpus juris. In *Brailsford*, this was the only task for the jury, as all the facts had been stipulated.<sup>150</sup> As Chief Justice Jay put it in the beginning of his charge to the

144. *Pollack v. Donaldson*, 3 U.S. (3 Dall.) 510, 511 (C.C.D. Pa. 1799).

145. *Bay v. Freazer*, 1 S.C.L. (1 Bay) 66, 69 (1789); see *Winthrop v. Pepon*, 1 S.C.L. (1 Bay) 468, 469 (1795) (recording a party making an argument of "the law of merchants" to a "jury of merchants").

146. *Bailey v. Ogden*, 3 Johns. 399, 401 (N.Y. Sup. Ct. 1808).

147. See *supra* text accompanying notes 39-48.

148. Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83 ("[A]ll the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting [of] business in the said courts, provided such rules are not repugnant to the laws of the United States.").

149. Rule, 2 U.S. (2 Dall.) 411, 413-14 (1792) ("The Court considers the practice of the courts of *King's Bench* and *Chancery* in *England*, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.").

150. See *supra* text accompanying notes 97-101.

jury, “The facts comprehended in the case, are agreed; the only point that remains, is to settle what is the law of the land arising from those facts; and on that point, it is proper, that the opinion of the court should be given.”<sup>151</sup> Thus, the special jury was to help decide the case, with the advice of the Court, and thereby to help settle the law of the land. As we have seen, such special jury charges that outlined the opinion of the court, but left it to the merchants to establish binding precedent on the issue, were a part of the American legal system.<sup>152</sup>

Moreover, *Brailsford* focused on the precise matters that special juries of merchants had always been called on to decide: the law merchant. The case would decide how to construe state acts sequestering foreign debts, and how the subsequent Treaty of Peace affected those statutes. The parties argued to the jury that the state acts should be construed in light of international law merchant norms. They further argued that the Treaty of Peace should be construed by reference to the law of nations. These international mercantile customs constituted the core of special merchant juries’ expertise.

Thus, the evidence suggests that, in its first decade, when the Supreme Court was confronted with the prospect of presiding over a case at law touching on the major issues of the law of nations and mercantile law, it turned to a special jury of merchants to help decide the case.

#### IV. JURIES IN THE SUPREME COURT AND THE SCOPE OF THE COURT’S DISCRETION TO DECLINE CASES

This Part examines the subsequent history of juries in the Supreme Court. It then discusses the modern Court’s prevalent use of special masters instead of juries as fact-finders in cases within its original jurisdiction. It next considers the scope of the Court’s discretionary power to decide which cases to hear in its original jurisdiction, and which to decline. Finally, it considers what sort of case at law might require the Court both to hear it and to impanel a jury.

Beginning with *Brailsford*, the Supreme Court regularly impanelled a jury at the beginning of each of its biannual Terms in February and August.<sup>153</sup> The first jury was impanelled for *Brailsford* in February 1794.<sup>154</sup> In August 1794, the

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151. *Brailsford v. Georgia*, 3 U.S. (3 Dall.) 1, 4 (1794).

152. See *supra* notes 58-69 and accompanying text.

153. Minutes of the Supreme Court, Aug. 5, 1795, Mar. 14, 1796, Aug. 6, 1796, Aug. 12, 1796, Feb. 12, 1797, Aug. 15, 1797, Feb. 10, 1798, reprinted in 1 DHSC, *supra* note 133, at 245-46, 273, 276, 283-84, 286, 291, 298, 303.

154. Minutes of the Supreme Court, Feb. 4, 1794, reprinted in 1 DHSC, *supra* note 133, at 222.

Court called a jury to determine damages in the wake of *Chisholm v. Georgia*,<sup>155</sup> but dismissed it when it became clear that there were no issues to determine at that time.<sup>156</sup> In February 1795, one year after its first jury trial, the Court again presided over a jury trial in the unpublished case of *Oswald v. New York*, which remains the only case before the Supreme Court in which a private citizen sued a state for damages before a jury and won.<sup>157</sup> In August 1797, the Supreme Court heard its third and apparently last jury trial, the unpublished case *Cutting v. South Carolina*.<sup>158</sup> The Court again discussed summoning a jury in August 1798, apparently for the last time, but did not do so.<sup>159</sup>

For more than two centuries since 1797, the Supreme Court has avoided presiding over a jury trial. The Seventh Amendment does not apply to bills in equity, and therefore in such cases it is within the Court's discretion whether or not to impanel a jury.<sup>160</sup> The Court has held that a jury is "not necessary" to decide a few simple facts,<sup>161</sup> and that in such cases a commissioner's report summarizing his findings can be "considered . . . of the same force as a verdict of a jury."<sup>162</sup> In one case at common law that the Court did hear, the parties waived their right to a jury trial.<sup>163</sup> Justice Douglas has even suggested several times that it is an open question whether the Seventh Amendment applies at all to the Supreme Court's original jurisdiction.<sup>164</sup>

155. 2 U.S. (2 Dall.) 419 (1793).

156. Minutes of the Supreme Court, Aug. 5, 1794, reprinted in 1 DHSC, *supra* note 133, at 230; CHRISTOPHER SHORTELL, RIGHTS, REMEDIES AND THE IMPACT OF STATE SOVEREIGN IMMUNITY 39 (2008).

157. Minutes of the Supreme Court, Feb. 5, 1795, reprinted in 1 DHSC, *supra* note 133, at 233-34; 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 57 (Maeva Marcus ed., 1994) [hereinafter 5 DHSC].

158. Minutes of the Supreme Court, Aug. 8, 1797, reprinted in 1 DHSC, *supra* note 133, at 292.

159. Minutes of the Supreme Court, Aug. 8, 1798, reprinted in 1 DHSC, *supra* note 133, at 308.

160. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 734 (1838); see *United States v. Louisiana*, 339 U.S. 699, 706 (1950).

161. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 568 (1852) ("A jury, in such a case could give no aid to the court, nor security to the parties.").

162. *Id.* at 568-69. Chief Justice Taney, in a vigorous dissent, argued that Pennsylvania had a proper remedy at law, and that, therefore, because it was inappropriate to hear its suit in equity, the Constitution mandated a jury trial. *Id.* at 588-90; see also *id.* at 608 (Daniel, J., dissenting) (arguing that a jury trial would have been proper at common law).

163. *Casey v. Galli*, 94 U.S. 673, 681 (1876) ("The parties have filed a written stipulation submitting the issues raised upon the first plea to the court and waiving the intervention of a jury.").

164. See, e.g., *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 511 (1971) (Douglas, J., dissenting) (stating that it was no longer the practice for the Supreme Court to sit with a jury, and that

Because the Court has not heard a case that would require a jury over the past two centuries, it has had to look elsewhere for fact-finders in the equity cases it does hear. In the nineteenth century, the Court largely acted as its own fact-finder, although it would sometimes appoint commissioners to ascertain particular points of fact.<sup>165</sup> Today, however, when the Court accepts an original jurisdiction case it calls a special master to act as fact-finder,<sup>166</sup> granting to this position a combination of the traditional jury role and certain functions of a trial-court judge.<sup>167</sup> The special master presides over the proceedings and delivers to the Court a summary of them.<sup>168</sup> This initial proceeding allows the Court to act in a manner analogous to an appellate body.<sup>169</sup> The proceedings presided over by special masters do not use juries,<sup>170</sup> and it is doubtful that they could, considering the Court's ruling that, at least in a criminal case, magistrates exceed their authority if they impanel a jury.<sup>171</sup>

The practice of delegating fact-finding in original jurisdiction cases to special masters has become institutionalized, although some commentators<sup>172</sup> and Justices<sup>173</sup> have expressed discontent with the procedure. Moreover, some

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if it were, "there would be powerful arguments for abstention in many cases"); *Louisiana*, 339 U.S. at 706 (doubting whether the Seventh Amendment "extend[s] to cases under our original jurisdiction"); see also *Mississippi v. Arkansas*, 415 U.S. 289, 296 n.1 (1974) (Douglas, J., dissenting) (stating that, after *Brailsford*, jury trials in the Supreme Court were "soon abandoned").

165. Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185, 714-15 (1993).
166. See *Maryland v. Louisiana*, 451 U.S. 725, 734 (1981) ("[A]s is usual, we appointed a Special Master to facilitate handling of the suit.").
167. See *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984) (noting that a "[Special] Master's findings . . . deserve respect and a tacit presumption of correctness," although "the ultimate responsibility for deciding what are correct findings of fact remains with" the Court).
168. Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 655 (2002).
169. See *Maryland*, 451 U.S. at 765 (Rehnquist, J., dissenting) (referencing the "appellate-type review which this Court necessarily gives to [the Special Master's] findings and recommendations"); Carstens, *supra* note 168, at 656.
170. See Final Report of the Special Master, *New Jersey v. New York*, (No. 120, Orig.), 1997 WL 291594, at \*15 (Mar. 31, 1997).
171. *Gomez v. United States*, 490 U.S. 858, 859-61, 872-73 (1989).
172. See ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 562 (8th ed. 2002) (arguing that even with special masters, the Justices are ill-equipped to hear anything but appellate-matters); Carstens, *supra* note 168 (arguing that special masters undermine and skirt rules that protect fair adjudication).
173. See *Maryland*, 451 U.S. at 762-63 (Rehnquist, J., dissenting) (criticizing the practice of "empowering an individual to act in our stead").

Justices have been critical of the idea that special masters' findings should be accorded any deference.<sup>174</sup> This has not prevented the Court, however, from regularly appointing special masters in all of its original jurisdiction cases.

In these original jurisdiction cases, moreover, the Court has not followed its traditional maxim that courts may not decline to exercise their jurisdiction.<sup>175</sup> Because the overwhelming majority of cases in the Supreme Court's original jurisdiction sound in equity,<sup>176</sup> the Court often refuses petitions on the equitable basis of alternative fora.<sup>177</sup> In 1971, the Court

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174. See Transcript of Oral Argument at 27, *South Carolina v. North Carolina*, 130 S. Ct. 854 (2010) (No. 138, Orig.) (recording Chief Justice Roberts's statement that he "regard[s] the special master as more akin to a law clerk than a district judge. We don't defer to somebody who's an aide that we have assigned to help us gather things here"); Transcript of Oral Argument at 3, *Kansas v. Colorado*, 556 U.S. 98 (2009) (No. 105, Orig.) (recording Justice Scalia's question "Why do you keep talking about the Special Master? He's just—he's just our amanuensis. Ultimately it's our discretion, isn't it?"); see also FED. R. CIV. P. 53 (f)(3)-(4) (providing for "de novo" review of objections to special masters' findings of fact and conclusions of law); EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 557 (8th ed. 2002) ("[T]he Master's reports and recommendations are advisory only. . . .").
175. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("[The Court] must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."); see also *The Steamer St. Lawrence*, 66 U.S. (1 Black) 522, 526 (1861) ("[T]he court could not . . . refuse to exercise a power with which it was clothed by the Constitution and laws . . ."); *Fisher v. Cockerell*, 30 U.S. (5 Pet.) 248, 259 (1831) ("As this court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it.").
176. See McKusick, *supra* note 165, at 198-99. These cases in equity include boundary and water-rights disputes, among others.
177. See, e.g., *California v. Latimer*, 305 U.S. 255 (1938) (dismissing a bill in equity to test the constitutionality of a federal statute and enjoin its enforcement, because an adequate remedy at law was available; namely, a defense of unconstitutionality to any legal action that the federal government might bring to compel compliance); *Georgia v. City of Chattanooga*, 264 U.S. 472, 479-80 (1924) (dismissing a bill in equity because the matter was better resolved in Tennessee state court). This threshold monitoring system has allowed the Court to exercise its original jurisdiction sparingly. See, e.g., *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam) ("We seek to exercise our original jurisdiction sparingly . . ."); *Utah v. United States*, 394 U.S. 89, 95 (1969); *Louisiana v. Texas*, 176 U.S. 1, 15 (1900) ("[I]t is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute . . ."); *California v. S. Pac. Co.*, 157 U.S. 229, 261 (1895) (similar). In order to commence an action under the Court's original jurisdiction, a party must file a motion for leave to file; only if the Court grants leave may the case proceed. SUP. CT. R. 17. In contrast to the "rule of four" that governs voting on certiorari petitions, an equally divided Court denies a motion for leave to file a bill of complaint under the Court's original jurisdiction. *Oklahoma ex rel. Williamson v. Woodring*, 309 U.S. 619, 623 (1940). The Court examines three factors to determine whether it should exercise its original jurisdiction: (1) who the parties are, (2) how

unambiguously announced that it had the power to decline to hear a case within its concurrent original jurisdiction,<sup>178</sup> because as an appellate tribunal it was “ill-equipped for the task of factfinding.”<sup>179</sup> It has regularly applied this doctrine.<sup>180</sup> More controversially, however, the Court has also asserted that it may decline to hear cases in its *exclusive* original jurisdiction.<sup>181</sup> Both commentators<sup>182</sup> and Justices<sup>183</sup> have criticized this practice, and it may not entirely be in favor.<sup>184</sup> Nevertheless, the Court has not officially repudiated it.

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important the subject matter is, and (3) whether an alternative forum exists. McKusick, *supra* note 165, at 197; see *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972).

178. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496-97 (1971) (citing *Cohens*, but concluding that “although it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so, . . . changes in the American legal system and the development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all or most legal disputes” in the Court’s original jurisdiction).
179. *Id.* at 498.
180. See, e.g., *Arizona v. New Mexico*, 425 U.S. 794 (1976) (per curiam); *United States v. Nevada*, 412 U.S. 534 (1973); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Washington v. Gen. Motors Corp.*, 406 U.S. 109 (1972).
181. That is, cases between two states. 28 U.S.C. § 1251 (“The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.”). See, e.g., *Louisiana v. Mississippi*, 488 U.S. 990 (1988) (denying Louisiana leave to file against Mississippi in a boundary dispute); *California v. West Virginia*, 454 U.S. 1027 (1981); *Arizona*, 425 U.S. at 797 (denying Arizona leave to file an original action alleging unconstitutionality of a New Mexico tax because an action was pending in state court).
182. PAUL M. BATOR ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 344 (3d ed. 1988) (asking rhetorically if the Court’s suggestion that it need exercise its “obligatory jurisdiction only in appropriate cases” is an “oxymoron”); Carstens, *supra* note 168, at 640 (2002) (“[U]nder a theory of strict construction [the Supreme Court] cannot refuse to entertain cases falling within its original jurisdiction if no other forum is available.”); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 561 (1985); *id.* at 576 (“A grant of exclusive jurisdiction to resolve certain controversies should be read as depriving the court of discretion to determine that it is an inappropriate forum, at least when the ‘appropriate’ forum lacks jurisdiction under the terms of the granting statute.”).
183. *Louisiana*, 488 U.S. at 990-91 (White, J., dissenting) (arguing that the Court should hear the case because “the Court has exclusive jurisdiction over controversies between States. No other court may entertain Louisiana’s complaint against Mississippi”); *West Virginia*, 454 U.S. at 1028 (Stevens, J., dissenting); *California v. Texas*, 437 U.S. 601, 606 (1978) (Stewart, J., concurring) (“This Court has original and exclusive jurisdiction of disputes between two or more States, and it has a responsibility to exercise that jurisdiction when it is properly invoked.”) (citation omitted).
184. The saga of *Louisiana v. Mississippi* may call into question the Court’s power to decline cases within its exclusive jurisdiction. The Court denied Louisiana’s motion for leave to file a bill of complaint against Mississippi, prompting a dissent from Justice White, joined by Justices Stevens and Scalia. *Louisiana*, 488 U.S. at 990 (White, J., dissenting). The Mississippi

*California v. West Virginia* has elicited particular criticism for the assertion that the Court may decline to hear cases within its exclusive original jurisdiction. The case concerned a contract claim brought by California against West Virginia. The contract arranged for two collegiate football games between the San Jose State Spartans and the West Virginia Mountaineers, two state university teams. When West Virginia allegedly broke the contract, California sued in the Supreme Court's original jurisdiction.<sup>185</sup> The Supreme Court denied leave to file, likely because the Justices did not consider this case to be weighty enough to merit the Court's attention.<sup>186</sup>

Justice Stevens dissented, arguing that the Court cannot refuse to hear cases in its original jurisdiction where Congress has made that jurisdiction exclusive.<sup>187</sup> David Shapiro, although a proponent of courts' broad discretion to decline to hear cases, called Justice Stevens's dissent "unanswerable," and argued that "[a] grant of exclusive jurisdiction to resolve certain controversies should be read as depriving the court of discretion to determine that it is an inappropriate forum, at least when the 'appropriate' forum lacks jurisdiction under the terms of the granting statute."<sup>188</sup>

*California v. West Virginia*, however, could have been even more interesting from a jurisdictional point of view. The case concerned a breach of contract, an injury whose remedy could sound in either law or equity. California filed a motion for leave to file a bill of complaint, which is usually an equitable action. The state could, however, have pursued an action at law for damages without seeking any equitable remedies, in which case two interesting complications may have resulted.

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federal district court then asserted jurisdiction to hear the case, but the Court overruled it, holding that the Supreme Court had exclusive jurisdiction. *Mississippi v. Louisiana*, 506 U.S. 73 (1992). The Court then finally allowed Louisiana to file a bill of complaint in its original jurisdiction. *Louisiana v. Mississippi*, 510 U.S. 941 (1993); see RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 256 (6th ed. 2009).

185. Carstens, *supra* note 168, at 640 & n.73; McKusick, *supra* note 165, at 198 & n.72.
186. 17 WRIGHT & MILLER ET AL., *supra* note 5, § 4053 n.13 ("That the Court might prefer not to devote its attention to such disputes may seem pardonable to many."); McKusick, *supra* note 165, at 198 ("Th[e] suit . . . was probably thought too insubstantial to be worthy of attention by the highest federal tribunal.").
187. *West Virginia*, 454 U.S. at 1028 (Stevens, J., dissenting) (stating that the Court's discretion to decline to hear cases in its original jurisdiction when that jurisdiction is concurrent is "inapplicable to cases in which our jurisdiction is exclusive"); see also *Wyoming v. Oklahoma*, 502 U.S. 437, 474 n.\* (1992) (Thomas, J., dissenting) (citing Stevens's dissent favorably, but concluding that "the Court has held otherwise and those precedents have not been challenged here").
188. Shapiro, *supra* note 182, at 561, 576.

The first complication is the possible application of the *Quackenbush* principle to the Supreme Court's exclusive original jurisdiction discretion. *Quackenbush* held that federal courts have the power to dismiss or remand cases based on abstention principles only where the relief sought is equitable, and not in common-law actions for damages.<sup>189</sup> Because declining to hear a case within the Court's exclusive original jurisdiction is not dissimilar to dismissing a case based on abstention principle, the *Quackenbush* principle may cast doubt on the Supreme Court's discretion to decline to hear common law cases in the Court's exclusive original jurisdiction.

Second, and more pertinent to our present purposes, consider a hypothetical *California v. West Virginia* suit that was at law instead of equity. Such a case may be in the Court's mandatory jurisdiction, as we have seen. Moreover, the Seventh Amendment would seem to apply, even though both parties were states.<sup>190</sup> Indeed, in the only cases where this issue has been considered, federal courts of appeals have found that, based on the historical test, the Seventh Amendment *does* apply to states, at least when the state is a defendant,<sup>191</sup> or is a plaintiff and is asserting a proprietary interest and also acting as *parens patriae*.<sup>192</sup> As the Ninth Circuit held in *Standard Oil Co. of California v. Arizona*, states are analogous to the sovereign, and the Crown historically had the right to a jury.<sup>193</sup> Thus, if *California v. West Virginia* had been a case at law, the Seventh Amendment may have applied to it, in which case the Court would have had to confront the jury issue.

Indeed, there may come a time when the Seventh Amendment and the Supreme Court's original jurisdiction collide, and the Court may be forced to preside over a jury trial. As discussed in the next Part, this Note's contribution

189. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996).

190. The Supreme Court has not addressed whether the Seventh Amendment would require a jury in a case at law between states. The Court dismissed the request for a jury trial in *United States v. Louisiana*, 339 U.S. 699 (1950) because the case was in equity, not because a state did not have the constitutional right to a civil jury.

191. *United States v. New Mexico*, 642 F.2d 397 (10th Cir. 1981).

192. *Standard Oil Co. of Cal. v. Arizona*, 738 F.2d 1021 (9th Cir. 1984); see 50A C.J.S. Juries § 16 (citing *Standard Oil* and stating that "[t]he Seventh Amendment right to a civil jury trial in federal court is not limited to individuals, and applies to . . . state[s], at least where a state issuing in its proprietary capacity or as representative of its citizens") (footnotes omitted); cf. Julia A. Dahlberg, Note, *States As Litigants in Federal Court: Whether the Seventh Amendment Right to Jury Trial Applies to the States*, 37 HASTINGS L.J. 637 (1986) (arguing on policy grounds that states should have a Seventh Amendment right to a jury trial).

193. 738 F.2d at 1027-28. *But see* Dahlberg, *supra* note 192, at 642-54 (criticizing the court's historical claims and analogical reasoning).

to our understanding of the Court's early practice with juries may provide assistance to the Court in navigating such a constitutional mandate.

## V. ADDRESSING THE PUZZLES POSED BY *BRAILSFORD*

### A. *The Seventh Amendment and the Supreme Court's Original Jurisdiction*

Some commentators have argued that a jury trial before today's Supreme Court would be unworkable, and should be avoided at all costs.<sup>194</sup> The image of the Supreme Court presiding over a jury trial seems so incongruous to modern commentators that some have searched for a reason why the Court could possibly have used a jury in *Brailsford*.<sup>195</sup> The simple explanation, however, is that *Brailsford* was a case at law, and therefore the Seventh Amendment mandated a jury trial. Indeed, scholars still generally agree that the Seventh Amendment would apply to cases at law within the Supreme Court's original jurisdiction.<sup>196</sup> Moreover, Congress continues to mandate juries to try issues of fact in all common law cases against U.S. citizens in the Supreme Court's original jurisdiction, just as it has since 1789.<sup>197</sup> As Wright and Miller have stated, the application of the Seventh Amendment to cases at law in the Supreme Court, in particular those disputes between states in the Supreme Court's exclusive original jurisdiction, "may raise unanswerable questions."<sup>198</sup>

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194. See, e.g., 17 WRIGHT & MILLER ET AL., *supra* note 5, § 4054 ("The prospect of a jury trial conducted by nine justices at the expense of other cases is appalling. If ever a citizen defendant should insist on a jury trial, the Court should resign further proceedings in favor of an action in a district court.").

195. See F. Regis Noel, *Vestiges of a Supreme Court Among the Colonies and Under the Articles of Confederation*, 37 RECS. COLUM. HIST. SOC'Y 123, 125 (1935) ("The use of the jury system in the early days of the United States Supreme Court, as well as the Admiralty Courts under the Confederation, was due to an insistent demand by some of the Colonies for trial by jury in all cases at a time when an effort was being made to get them to accept a Federal Tribunal."); Henderson, *supra* note 7, at 318 ("Since the newly formed Court had just ruled against Georgia in *Chisholm v. Georgia*, presumably [it] had no objection to sharing the responsibility of this decision with a jury.").

196. See FALLON ET AL., *supra* note 184, at 253.

197. 28 U.S.C. § 1872 ("In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury."); see Judiciary Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 81 ("And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury.").

198. 17 WRIGHT & MILLER ET AL., *supra* note 5, § 4054 n.9.

Thus, there may be a case at law in the future that requires the Court to convene a jury, especially considering the possibly circumscribed status of the Court's power to decline to hear cases that fall within its exclusive original jurisdiction when no alternative forum is available.<sup>199</sup> It may be a case between states, or when one party is an ambassador, or when a state sues an out-of-state individual. At some point the Court may even be amenable to or desirous of hearing an issue of great importance in its original jurisdiction, perhaps for expediency purposes. Indeed, the Court has reached out to exercise its original jurisdiction in a number of high-profile cases in the past. These cases have examined such issues as whether Congress could require states to register eligible citizens between the ages of eighteen and twenty-one to vote in state elections,<sup>200</sup> whether Section 5 of the Voting Rights Act was constitutional,<sup>201</sup> and whether a provision of the federal tax code violated the Tenth Amendment.<sup>202</sup> In the future, such a case may be at law and constitutionally require a jury, and the parties may insist on it.

The hitherto untold details of the special jury in *Brailsford* that this Note has uncovered may provide the Supreme Court with a way of managing the burden of sitting with a jury: impanelling a jury of experts. Historically, one reason to convene a special jury was for its expertise in a particular area.<sup>203</sup> Thus, in cases of great complexity and national import, the Court may feel more comfortable using a jury of experts that it impanels together with the parties in order to have sophisticated individuals finding complex and sensitive facts. Such a jury of experts, moreover, may be agreeable to the parties, especially if they are able to help compile the initial venire, as was sometimes the case with special juries.<sup>204</sup> With this deeper understanding of *Georgia v. Brailsford*, the Court has a broader range of ways to negotiate its original jurisdiction and the Seventh Amendment.

One potential source of expert jurors is the same pool of individuals from which special masters are drawn, creating a special jury of special masters. Such a panel would not be historically unprecedented under the Seventh

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199. See *supra* notes 182-189.

200. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

201. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

202. *South Carolina v. Regan*, 465 U.S. 367 (1984).

203. See *supra* note 20 and accompanying text.

204. See *supra* note 132. Party participation would also help dissipate the fear that the "struck jury" is too plastic in governmental hands and tends towards jury-packing, a fear that led to the procedure's demise in the nineteenth century. See Oldham, *supra* note 16, at 155.

Amendment test.<sup>205</sup> In 1737, King George II appointed a twenty-person commission to determine the facts of a dispute over the boundary between Massachusetts and New Hampshire; the Privy Council ultimately heard the case, and accepted the commission's legal recommendation.<sup>206</sup> In the 1790s, too, the Supreme Court delegated the task of taking depositions in two original jurisdiction equity cases to commissions made up of prominent men.<sup>207</sup>

Thus, an appropriate course of action for the Supreme Court, were it required to impanel a jury in the future, would be to compose an expert special jury: a special jury of special masters. To be sure, there has been considerable controversy associated with treating special masters like juries or according their findings any deference.<sup>208</sup> For such a special jury to be valid, it would have to be composed as special juries were at common law: collated with the consent and even participation of the parties, impanelled through the struck procedure, and placed under oath. If all of these requirements were complied with, however, a "special[ist] jury" may offer the Court a realistic and constitutionally valid method of complying with the Seventh Amendment in its original jurisdiction.

### B. *Brailsford and the Power of the Jury*

This Note's findings may also help resolve the lingering uncertainty over the meaning of *Brailsford's* statements regarding the jury's power to find the law.

Chief Justice Jay's jury instructions in *Brailsford* have presented something of a puzzle for scholars. On the one hand, *Brailsford* is invariably the case cited for the proposition that juries had law-finding power at the Founding.<sup>209</sup>

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205. See *supra* note 2 and accompanying text.

206. See *New Hampshire v. Maine*, 426 U.S. 363, 366-67 (1976); JOSEPH F. ZIMMERMAN, *INTERSTATE DISPUTES: THE SUPREME COURT'S ORIGINAL JURISDICTION* 43 (2006). The boundary dispute was ultimately resolved more than two centuries later. *New Hampshire v. Maine*, 426 U.S. at 370.

207. *Van Staphorst v. Maryland* (1791), 5 DHSC, *supra* note 157, at 19; *Moultrie v. Georgia* (1797), *id.* at 509-10.

208. See *supra* text accompanying notes 172-174.

209. See, e.g., Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 672 n.80, 674 & n.95 (2012); Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 418 & n.47 (1999); Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 199 n.113 (2000); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 758 (1993); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 173-74 (1964).

Citing *Brailsford*, some scholars conclude that early American juries “determined questions of law,”<sup>210</sup> and indeed, “quite generally . . . determined the law in civil cases.”<sup>211</sup> One scholar has stated that “[i]f there was any doubt about whether the jury’s right to decide issues of law had survived the American Revolution, such doubt was promptly laid to rest in the 1794 case of *Georgia v. Brailsford*.”<sup>212</sup>

Other commentators, however, have noted that Chief Justice Jay’s instructions to the jury fit better with criminal cases, in particular seditious libel prosecutions, but are aberrant in a civil trial context. For instance, in *Sparf v. United States*, the case often cast as *Brailsford*’s antithesis, Justice Harlan wondered whether *Brailsford* had been misreported, considering that it gave the jury the right to decide the law in a civil case.<sup>213</sup> Several scholars have also argued that in a civil case, Chief Justice Jay’s language was “anomalous.”<sup>214</sup>

210. Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 368 & n.53 (1994).

211. R.J. Farley, *Instructions to Juries — Their Rôle in the Judicial Process*, 42 YALE L.J. 194, 202 (1932).

212. Jon P. McClanahan, *The ‘True’ Right to Trial by Jury: The Founders’ Formulation and Its Demise*, 111 W. VA. L. REV. 791, 794 (2009).

213. *Sparf v. United States*, 156 U.S. 51, 65 (1895) (Harlan, J.) (“Mr. Justice Curtis in *U.S. v. Morris*, 1 Curt. 23, 58, Fed. Cas. No. 15,815, expressed much doubt, for the reason that the chief justice is reported as saying that, in civil cases—and that was a civil case,—the jury had the right to decide the law . . .”). Justice Curtis, whom Harlan cited here, argued that the entire case was likely incorrectly reported. “[T]he whole case is an anomaly,” he said:

It purports to be a trial by jury, in the supreme court of the United States, of certain issues out of chancery. And the chief justice begins by telling the jury that the facts are all agreed, and the only question is a matter of law, and upon that the whole court were agreed. If it be correctly reported, I can only say, it is not in accordance with the views of any other court, so far as I know, in this country or in England, and is certainly not in accordance with the course of the supreme court for many years.

*United States v. Morris*, 26 Fed. Cas. 1323, 1334 (D. Mass. 1851). Indeed, Dallas, the reporter in the case, had an adverse interest because he was the attorney for Georgia, a role that does not instill confidence that he reported the case accurately. Nor was Dallas known for his accuracy, even in cases in which he was not professionally involved. As one historian has put it, “[d]elay, expense, omission and inaccuracy: these were among the hallmarks of Dallas’ work.” Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1305 (1985).

In this case, however, the exact text that Dallas later used in his reports appeared verbatim in a newspaper article describing the case a mere ten days after the decision. DUNLAP’S AMERICAN DAILY ADVERTISER, Feb. 17, 1794, reprinted in 6 DHSC, *supra* note 75, at 171-75. Thus, there was little opportunity for memory to fade, or for partisans to concoct ex post pronouncements of jury power out of whole cloth. The presence of this newspaper

This Note's findings offer insight into this difficulty as well, revising the traditional understanding of *Brailsford* as an anomalous statement regarding jury rights on the one hand, or an uncomplicated espousal of civil jury nullification on the other. If, as this Note has argued, the special jury in *Brailsford* was a special jury of merchants, then Chief Justice Jay's instructions fit better with historical practice. As discussed above,<sup>215</sup> special juries of merchants were impanelled precisely to assist the court in ascertaining mercantile law and incorporating it into the corpus juris. As Oldham has shown, "the special jury was used frequently and instrumentally by Lord Chief Justice Mansfield in the shaping of a coherent body of commercial law."<sup>216</sup> In cases with special juries of merchants throughout the common law world, those juries would inform the court of a prevailing mercantile custom, and the judge could then incorporate that custom of the law merchant into the general law if he felt that it was appropriate.<sup>217</sup> In America at this time, moreover, where there was not yet a well-established mercantile law, judges could leave it to a special jury of merchants to establish as law the custom that they considered most in harmony with the international law merchant.<sup>218</sup>

Thus, if understood in its context, Chief Justice Jay's jury charge includes the natural instructions that a judge in a trial at bar would give to an expert special jury of merchants, which was expected to play a part in incorporating mercantile law into the larger body of law. After all, the facts in *Brailsford* had already all been stipulated,<sup>219</sup> and thus finding the law was the only matter left for the special jury to determine. In the case of *Brailsford*, a special jury of merchants would be expected to apply to this case the prevailing law merchant

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article suggests that Chief Justice Jay's actual jury charge at least resembled the versions reproduced in the newspaper and later included in Dallas's reports. See Marcus, *supra* note 96, at 57 (arguing that Chief Justice Jay's jury charge "[was] indeed reported correctly").

214. JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 484 (2009) ("Jay's view was already somewhat anomalous in 1794."); Henderson, *supra* note 7, at 317-18; Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 517 (1996); see Woolhandler & Collins, *supra* note 7, at 625-30.
215. See *supra* text accompanying notes 39-48.
216. OLDHAM, *supra* note 46, at 153.
217. See, e.g., *Banbury v. Lisset*, (1744) 93 Eng. Rep. 1134 (K.B.) 1135; 2 Str. 1211, 1212 (reporting that, since the legal issue depended on "a mercantile transaction, [the judge] left it to the special jury of merchants"); see OLDHAM, *supra* note 46, at 157.
218. See *supra* notes 58-69.
219. See *supra* text accompanying notes 97-101, 150.

customs. This would assure the wide mercantile community that the courts of the nascent Republic would not be insular and partisan, but would apply the *lex mercatoria* to international mercantile disputes.<sup>220</sup>

It is important to recognize that Mansfield's use of special juries of merchants did not violate the rule that judges find the law and juries the fact.<sup>221</sup> His special juries would ascertain the appropriate controlling custom by looking to their own expertise, counsel's and witnesses' appeals to the law merchant and prevailing practices, and finally the judge's instructions. After the jury determined the case, the judge would then decide whether to establish the custom as a rule of law; that is, whether to incorporate the mercantile custom into the common law.<sup>222</sup> Thus, judges in England during the second half of the eighteenth century were in control, but special juries of merchants

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220. For the argument that in its first decade the Republic was particularly anxious for international actors to consider it a legitimate sovereign, see David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

221. As James Bradley Thayer put it,

Lord Mansfield and others built up the commercial law by taking the opinion of special juries and their reports as to mercantile usage, and founding rules of presumption upon them when they appeared to be reasonable. To aid them in the construction of writings, judges may well have the evidence of mercantile experts. And, on the same principle, they may take the opinion of a special jury; and may submit to any jury any proper question, that is to say, any question depending upon a judgment of matters which the jury may fairly be supposed to know more about than the court. In such cases, instead of first receiving the opinion of the jury and then deciding the point, a judge may leave the question to them with contingent instructions, e.g., that if they find that the usage, custom, understanding, or practice of merchants is so and so, then they shall find so and so as to the interpretation of a certain contract or a certain transaction.

James Bradley Thayer, "*Law and Fact*" in *Jury Trials*, 4 HARV. L. REV. 147, 173 (1890); see *id.* at 175 ("The simple truth in such cases appears to be, that the court, whether or not they be quite ready as yet to adopt the opinion which they ask, as giving the legal rule, are wishing to know that opinion, as an aid to them, in laying down the law. They are not cases of submitting questions of law to the jury.").

222. Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 3 (1922) (describing Mansfield as "converting the questions of the customs of merchants into questions of law that needed no jury for their determination after the conclusive work of his famous special jury of merchants"). Blackstone provided a guide for how a judge should make such a determination, stating that the judge should consider the custom's length of use, and whether it was continuous, peaceable, reasonable, certain, compulsory, and consistent. 1 WILLIAM BLACKSTONE, COMMENTARIES \*76-78.

did participate in this process of transforming mercantile custom into precedent with the force of law.<sup>223</sup>

Special juries of merchants in America during the 1780s and 1790s also did not violate the separation between judge-found law and jury-found fact. Nevertheless, it was more common there for the special jury of merchants to decide what the prevailing law should be, based on their own expertise and knowledge of the international law merchant, as well as on the judge's own instructions.<sup>224</sup> The judges may have relied so heavily on the expertise of the special juries in part because of the dearth of legal expertise on American benches at the beginning of the Republic.<sup>225</sup> Moreover, late eighteenth century America was particularly amenable to incorporating customs more generally into the prevailing law.<sup>226</sup> Finally, this fledgling system of government, saddled as it was with foreign debts and conscious of the need for future borrowing, recognized the importance of conforming their mercantile law to prevailing law merchant norms.<sup>227</sup>

For special juries to assist in establishing a prevailing custom as law is not the same as finding against the evidence or nullifying established law. This Note does not comment on the extent to which juries possessed such a power in civil cases at the beginning of our Republic. It is clear, however, that in the late eighteenth century, if a jury found against the evidence or against the law, or even found against the judge's instructions, the losing party would likely move for a new trial.<sup>228</sup> When the law was unsettled to begin with, however, it was more difficult for the case to result in a new trial. To be sure, Mansfield on occasion would call for a new trial when he disagreed with the conclusion of the special jury of merchants.<sup>229</sup> But it was rare for Mansfield to do so if the

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223. See *supra* note 46 and accompanying text.

224. See *supra* text accompanying notes 48-64.

225. John Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 566-68 (1993).

226. LANGBEIN, LERNER & SMITH, *supra* note 214, at 498-99.

227. See Golove & Hulsebosch, *supra* note 220, at 970-71 ("There was a close connection between financial credit and the reputation of a nation."); John Jay, Charge to the Grand Jury, Richmond, Virginia (May 22, 1793), reprinted in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 479 (Henry P. Johnston ed., New York, G.P. Putnam's Sons 1891) ("The man or the nation who eludes the payment of debts ceases to be worthy of further credit, and generally meets with deserts in the entire loss of it, and in the evils resulting from that loss.").

228. See LANGBEIN, LERNER & SMITH, *supra* note 214, at 439-50 (discussing new trial's widespread use in England in the second half of the eighteenth century); *id.* at 522-29 (discussing new trial's widespread use in America in the first half of the nineteenth century).

229. OLDHAM, *supra* note 16, at 17.

result was neither against the evidence nor against the law, even when he heartily disagreed with the verdict.<sup>230</sup> Indeed, in the late eighteenth century, the conclusions of special juries of merchants were accorded particular deference by English judges, at least when they did not contravene law already on the books.<sup>231</sup> Even when they did conflict with existing law, moreover, Mansfield on occasion would overturn precedent and incorporate a mercantile custom as the new law on the matter.<sup>232</sup> Even here, however, the judge remained in control of the proceedings, the extent to which the custom was entrenched as precedent, the amount of deference accorded to the special jury's expertise, and whether to grant a new trial. The special jury, meanwhile, remained in control of the final outcome of a particular trial, even if it was later overturned for a new trial.

Thus, when understood in their original context, Chief Justice Jay's words to the special jury in *Brailsford* are neither aberrant nor the font of nullification power. Instead, they are the appropriate words addressed to a particular juridical body tasked with particular responsibilities.

## CONCLUSION

This Note has shed light on the early, yet still controversial, case of *Georgia v. Brailsford*. It has examined the extant primary source material related to the case, in particular the *venire facias* and the notes from counsel's oral arguments. It has shown that the *venire* was almost exclusively made up of merchants, and that Brailsford's attorney repeatedly invoked the law of merchants in his address to the jury. It has concluded from these and other strands of evidence that in the Supreme Court's first and only reported jury trial, it employed a special jury of merchants in the Mansfieldian tradition.

As this Note has argued, this discovery about *Brailsford* offers insights into the two provocative questions that emerge from the case. First, could there ever

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230. *Id.* at 18.

231. See, e.g., *Middlewood v. Blakes*, (1797) 101 Eng. Rep. 911 (K.B.) 914 (Grose, J.) (“[I]t must be remembered, that this cause was tried by a special jury of merchants of London, persons peculiarly conversant in commercial transactions, and who perfectly well knew the ordinary risk of such a voyage, and what would vary that risk; and they were of the opinion that the underwriter was not liable.”); *Driscoll v. Passmore*, (1798) 126 Eng. Rep. 858 (C.P.) 860; 1 B. & P. 200, 203 (Eyre, C.J.) (“If I had continued to doubt I should be unwilling to interfere with a verdict of a special jury of merchants on a subject of this kind, unless I clearly saw that some principle of law had been mistaken; or unless I was bound by authorities to pronounce that verdict wrong.”).

232. See *supra* note 47 and accompanying text.

be a case in the future that would require the Supreme Court to preside over a jury trial, and if so, how should the Court convene such a jury? Second, what did Chief Justice John Jay mean when he informed the *Brailsford* jury that they had both the power and the right to determine the law?

This Note has argued that there may in fact be situations in the future in which the Supreme Court may be amenable to hearing, or may even be required to hear, a case in its original jurisdiction that necessitates a jury trial. By looking to its history, the Court may wish to imitate its forebears and impanel a jury of experts, a “special jury of special masters.” Such a jury may reduce concerns that the Court might have regarding presiding over a jury trial.

The findings of this Note also suggest that Chief Justice Jay’s jury charge was neither “anomalous” nor an expression of ubiquitous jury nullification power. Instead, his words may have been tailored to the particular jury he addressed. Because courts often used special juries of merchants to determine the mercantile custom—to help the court decide a matter of law and incorporate the law merchant into the wider corpus juris—Chief Justice Jay’s words were particularly appropriate for such a panel.

## APPENDIX

This Appendix analyzes all of the individuals who were designated as prospective jurors before the Supreme Court in a special jury. The list provides the occupation of each individual. Of the prospective jurors for the special jury called in *Georgia v. Brailsford*, at least 38 of the 40 names are merchants, for at least a 95% merchant rate. Of the prospective jurors for the special jury called in 1797, 45 of the 48 names are merchants, for a 94% merchant rate. Some names are spelled inconsistently in the primary sources. I have chosen the spelling most frequently attested. If more than one individual in Philadelphia possessed one of the names from the list of potential jurors, I have assumed that the parties intended to designate the merchant.<sup>233</sup>

Table 1.

PROSPECTIVE JURORS FOR THE SPECIAL JURY IN *GEORGIA V. BRAILSFORD*, WITH THEIR OCCUPATIONS<sup>234</sup>

NAME	OCCUPATION	REFERENCE
Alexander Anderson	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 3; GREG H. WILLIAMS, <i>THE FRENCH ASSAULT ON AMERICAN SHIPPING, 1793-1813</i> , at 176 (2009).
Joseph Anthony	Merchant	JAMES HARDIE, <i>THE PHILADELPHIA DIRECTORY AND REGISTER 3 (1793)</i> [hereinafter HARDIE, 1793]; ABRAHAM RITTER, <i>PHILADELPHIA AND HER MERCHANTS 65 (1860)</i> .
Francis Bailey	Printer	HARDIE, 1794, <i>supra</i> note 136, at 6; 2 ROBERT A. GROSS & MARY KELLEY, <i>A HISTORY OF THE BOOK IN AMERICA: AN EXTENSIVE REPUBLIC: PRINT, CULTURE, AND SOCIETY IN THE NEW NATION, 1790-1840</i> , at 138 (2010).
Hilary Baker	Merchant	1 HOWARD MALCOLM TENKINS & GEORGE OVERCASH SEILHAMER, <i>MEMORIAL HISTORY OF THE CITY OF PHILADELPHIA: FROM ITS FIRST SETTLEMENT TO THE YEAR 1895</i> , at 408 (1895).
Joseph Ball	Merchant	THOMAS M. DOERFLINGER, <i>A VIGOROUS SPIRIT OF ENTERPRISE: MERCHANTS AND ECONOMIC DEVELOPMENT IN REVOLUTIONARY PHILADELPHIA 294 (1986)</i> .

233. See *supra* notes 135-136 and accompanying text.

234. Venire for a Special Jury, Jan. 13, 1794, *reprinted in 6 DHSC, supra* note 75, at 154-55; see also Minutes of the Supreme Court, Feb. 4, 1794, *reprinted in 1 DHSC, supra* note 133, at 222.

Clement Biddle	Merchant	WARREN R. HOFSTRA, <i>THE PLANTING OF NEW VIRGINIA: SETTLEMENT AND LANDSCAPE IN THE SHENANDOAH VALLEY</i> 276 (2004).
Mat[t]hew Clarkson	Merchant	DEBORAH MATHIAS GOUGH, <i>CHRIST CHURCH, PHILADELPHIA: THE NATION'S CHURCH IN A CHANGING CITY</i> 188 (1995).
Stephen Collins	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 29; Kenneth Morgan, <i>Business Networks in the British Export Trade to North America, 1750-1800</i> , in <i>THE EARLY MODERN ATLANTIC ECONOMY</i> 36, 51 (John J. McCusker & Kenneth Morgan eds., 2000).
Henry Drinker	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 41; DOERFLINGER, <i>supra</i> Appendix, at 52.
Thomas Ewing	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 43; Advertisement, <i>PHILA. GAZ.</i> , May 9, 1794, at 4.
John Field	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 44.
Owen F[o]ulke, Jr.	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 47.
Edward Fox	Merchant	STUART BANNER, <i>ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690-1860</i> , at 130 (1998).
[Peter W.] Gallaudet	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 49; Advertisement, <i>PA. PACKET</i> , Apr. 29, 1790, at 4.
George Harrison	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 60.
John Haz[le]wood	Merchant	8 <i>THE PAPERS OF ROBERT MORRIS, 1781-1784: MAY 5-DECEMBER 31, 1783</i> , at 13, n.1 (Elmer James Ferguson ed., 1995); Josiah Granville Leach, <i>Commodore John Hazlewood, Commander of the Pennsylvania Navy in the Revolution</i> , 26 <i>PA. MAG. HIST. &amp; BIOGRAPHY</i> 1, 1 (1902).
Samuel Hodgdon	Merchant	GERARD H. CLARFIELD, <i>TIMOTHY PICKERING AND THE AMERICAN REPUBLIC</i> 85 (1980).
David Jackson	Apothecary	HARDIE, 1794, <i>supra</i> note 136, at 76.
Reynold Keen	Merchant	ANNE M. OUSTERHOUT, <i>A STATE DIVIDED: OPPOSITION IN PENNSYLVANIA TO THE AMERICAN REVOLUTION</i> 190 (1987).
John Leamy	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 83; Letter from John Leamy to George Washington, in 15 <i>THE PAPERS OF GEORGE WASHINGTON: 1 JANUARY-30 APRIL 1794</i> , at 685 (Christine Sternberg Patrick ed., 2009).
Hugh Lenox	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 83.

SPECIAL JURIES IN THE SUPREME COURT

Mordecai Lewis	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 84.
Nathaniel Lewis	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 84.
Caleb Lownes	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 86.
Archibald McCall	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 91.
Blair McClenachan	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 102; DAVID A. WILSON, UNITED IRISHMEN, UNITED STATES: IMMIGRANT RADICALS IN THE EARLY REPUBLIC 41 (1998).
Mathew McConnell	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 98.
Jacob Morgan, Jr.	Merchant	MORTON L. MONTGOMERY, HISTORY OF BERKS COUNTY, PENNSYLVANIA, IN THE REVOLUTION, FROM 1774 TO 1783, at 250-53 (1894).
Charles Petit	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 120.
Robert Ralston	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 117.
John Reynolds	Merchant	JOHN W. JORDAN, COLONIAL AND REVOLUTIONARY FAMILIES OF PENNSYLVANIA 32.
Jonathan B. Smith	Merchant	JACK FRUCHTMAN, JR., THOMAS PAINE: APOSTLE OF FREEDOM 229 (1994).
Robert Smith	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 134.
Isaac Snowden	Merchant	J. JEFFERSON LOONEY & RUTH L. WOODWARD, PRINCETONIANS: 1791-1794, at 449 (1991).
Walter Stewart	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 139.
John Stille	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 139.
Joseph Swift	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 142.
Robert Wall	Merchant(?)	HISTORICAL SOCIETY OF PENNSYLVANIA, NON-IMPORTATION AGREEMENT SIGNED BY THE MERCHANTS OF PHILADELPHIA, Oct. 25, 1765, at 4, <i>available at</i> <a href="http://www.shear.org/nehlandmarks/PDF/Philadelphia%20Non-Importation%20Agreement,%201765.pdf">http://www.shear.org/nehlandmarks/PDF/Philadelphia%20Non-Importation%20Agreement,%201765.pdf</a> .
Thomas Willing	Merchant	JOHN L. COTTER ET AL., THE BURIED PAST: AN ARCHAEOLOGICAL HISTORY OF PHILADELPHIA 184 (1993).
William Wister	Merchant	Hardie, 1793, <i>supra</i> Appendix, at 159; BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 318 n. 23 (2002).

Table 2.

PROSPECTIVE JURORS FOR THE SPECIAL JURY FROM AUGUST, 1796, WITH THEIR OCCUPATIONS<sup>235</sup>

NAME	OCCUPATION	REFERENCE
George Bickham	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 12.
Peter Blight	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 12.
Joshua B. Bond	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 13.
Samuel Breck, Jr.	Merchant	JEAN GORDON LEE, PHILADELPHIANS AND THE CHINA TRADE: 1784-1884, at 61 (1984).
Samuel Clarkson	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 24.
Curtis Clay	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 24.
David H. Conyngham	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 27.
James Cox	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 29.
William Crammond	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 30.
John Duffield	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 38.
John Dunlap	Printer/ Publisher	HARDIE, 1793, <i>supra</i> Appendix, at 39.
John Field	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 44.
Samuel Fisher	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 45.
Thomas W. Francis	Merchant	RITTER, <i>supra</i> Appendix, at 50.
John Hall	Merchant	<i>Died</i> , PHILA. ALBUM, Mar. 26, 1831 <i>reprinted in</i> 5 THE PHILADELPHIA ALBUM AND LADIES' LITERARY PORT FOLIO 104 (Phila, Jesper Harding 1831).
George Harrison	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 60.

235. Fine Minutes of the Supreme Court, August 1796 Term, *reprinted in* 1 DHSC, *supra* note 133, at 273.

SPECIAL JURIES IN THE SUPREME COURT

Jonathan Harvey	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 66.
Thomas Hockley	Ironmonger	HARDIE, 1794, <i>supra</i> note 136, at 70.
Wilson Hunt	Merchant	1 THE PAPERS OF HENRY CLAY 160 (James F. Hopkins ed., 1959).
Jonathan Jones	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 79.
John Kaighn	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 80.
Peter Kuhn	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 80.
George Lauman	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 82.
Thomas Mackie	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 87.
Samuel Meeker	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 96.
James Miller	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 99.
William Montgomery	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 107.
Patrick Moore	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 108.
Benjamin W. Morris	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 109.
Philip Nicklin	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 105.
Joseph P. Norris	Merchant	RON CHERNOW, ALEXANDER HAMILTON 449 (2004).
John Oldden	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 108.
Isaac Penington	Sugar Refiner	HARDIE, 1793, <i>supra</i> Appendix, at 111.
Israel Pleasants	Merchant	HISTORICAL SOCIETY OF PENNSYLVANIA, GUIDE TO THE MANUSCRIPT COLLECTIONS OF THE HISTORICAL SOCIETY OF PENNSYLVANIA (1991).
Norton Pryor	Merchant	ROBERT V. REMINI, THE LIFE OF ANDREW JACKSON 49-50 (1988).
Richard Rundle	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 124.
Edward Shoemaker	Merchant	34 THE PAPERS OF THOMAS JEFFERSON: 1 MAY TO 31 JULY 1801, at 332 (Barbara B. Oberg et. al. eds., 2007).
John Simpson	Merchant	WILLIAMS, <i>supra</i> Appendix, at 368.

Joseph Sims	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 132.
George Thompson	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 154.
John Thompson	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 154.
James Vanuxem	Merchant	HARDIE, 1794, <i>supra</i> note 136, at 158.
John Vaughan	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 149.
Emanuel Walker	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 150.
Robert Wescott	Merchant	18 THE PAPERS OF ALEXANDER HAMILTON, JANUARY 1795 – JULY 1795, at 266 n.20 (Harold C. Syrett ed., 1973).
Francis West	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 154.
William West	Merchant	HARDIE, 1793, <i>supra</i> Appendix, at 154.
George Willing	Merchant	JORDAN, <i>supra</i> Appendix, at 127.