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The American Justice of the Peace, Legal Populism, and Social Intermediation: 1645 to 1860

1. Introduction

In *Democracy in America*, Alexis de Tocqueville notes that the English institution of the justice of the peace had been transplanted to the American colonies, while “removing from it the aristocratic character that distinguishes it in the mother country.”

Precisely what contrast Tocqueville intended his reader to focus on is not completely clear. Like their English siblings, American justices of the peace as a county court exercised considerable criminal, civil, and administrative powers. In addition, individual justices of the peace in England and America exercised criminal jurisdiction over petty crimes. Yet, English and American justices of the peace were crucially different. Americans did not use the office, as Francis Bacon said the English did, to knit together noblemen and gentlemen — nor did American justices of the peace share their English siblings aristocratic bias against trade, manufacture, and commerce. Quite on the

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4 W. S. Holdsworth, *A History of English Law, Volume 1*, 3rd ed. (Boston: Little, Brown, and Co., 1922), 291. In the remainder of the passage, Bacon says the English system of justices of the peace allows
contrary, justices of the peace in America became instruments of commerce and trade, establishing a nationwide network of small claims courts, in a way they never did in England. The American justice of the peace thus became an instrument for the recording and seizing of property, a site of information for where credit had been extended, and a forum in which the coercive legal authority of the state could be mediated through community norms. An early nineteenth century justice of the peace manual captures the American attitude toward the institution well when its author draws the following contrast: "In England, the government is *monarchical*, and the policy of their laws has been to support an order in society distinct from the great body of the people, and to invest them with certain privileges... In America, all the features of governments are strongly *republican*, and the policy of our law directs to an equal distribution of property."\footnote{\emph{Summary of the Duties of a Justice of the Peace Out of Sessions}, 4\textsuperscript{th} edition (London: Butterworth and Sons, 1827), which attempts to present in an assessable form the duties of the English justice of the peace when not sitting collectively as a county court, makes no mention of civil jurisdiction for justices of the peace. Rather, it contains statutes relating to a host of minor and serious criminal offences, ranging from how bricks and tiles must be made to felonies, such as homicide and larceny. Likewise, Holdsworth does not mention the civil jurisdiction of justices of the peace out of sessions. See, \textit{A History of English Law, Volume I}, 129-134. Professor Joanna Innes of Oxford University finally confirmed for me that historically individual English justices of the peace lacked jurisdiction over small claims. (on file). The only scholar I am aware of who notices that Americans gave individual justices of the peace civil jurisdiction, while the English did not, and that this had something to do with the demand by Americans for easy justice, is James Willard Hurst. See James Willard Hurst, \textit{The Growth of American Law: The Law Makers} (Clark: The Lawbook-Exchange, 2007), 147-148.}

\footnote{William Waller Henning, \textit{The New Virginia Justice. Comprising the Office and Authority of a Justice of the Peace, The Commonwealth of Virginia Together with a Variety of Useful Precedents, Adapted to the Laws Now in Force to Which is Added An Appendix, Containing All the Most Approved Forms in Conveyancing, Such as Deeds or Bargain and Sale, of Lease and Release, of Trusts, Mortgages,}
The aim of this paper is to illustrate the “social intermediation” role justices of the peace played in early American society. By “social intermediation” I mean that societies require institutions to solve the problems associated with complex human cooperation in large social groups. Justices of the peace, through their ability to coercively enforce obligations, and facilitate information sharing, provided the institutional infrastructure required of large social networks. By closing the gap between continuing personal relationships and the enforcement of impersonal legalities, justices of the peace simultaneously encouraged human cooperation, and, somewhat counter-intuitively, built the colonial and postcolonial American state’s coercive capacity.

2. **Social Intermediation: A Social Science Interlude...**

Before I turn to the intellectual context within which the American justice of the peace operated, and then spell out the procedures by which the office extended to Americans the instrumentalities of civil law, let me briefly say something about the puzzle of complex human cooperation in large social groups, and thus why I am interested in studying the American justice of the peace, not only as a legal historian, but also as a social scientist.

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* Bills of Sale, &c. Also, The Duties of the Justice of the Peace Arising Under the Laws of the United States, 2nd ed. (Richmond: Johnson & Warner, 1810), iv.

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7 On the theme of “infrastructural power,” see William Novak, “The Myth of the ‘Weak’ American State,” *American Historical Review*, June 2008, 763. Novak, following the sociologist Michael Mann, defines “infrastructural power” as the ability to “penetrate civil society and implement policies throughout a given territory.” In that essay, Novak says, “In contrast to the myth of the weak American state, the historical revision already well under way attempts to document the conscious and continuous construction of new forms of state power throughout American history. This story of state development does not fit into established categories such as classical liberalism vs. modern social democracy or Gilded Age Conservatism vs. Progressive Era reform” (760). Along a different but parallel path, emphasizing the need within the social sciences for an understanding of the interface of self-government and institutions, see Avenash K. Dixit, *Lawlessness and Economics: Alternative Modes of Governance* (Princeton: Princeton University Press, 2004), 13.
Working along different but parallel lines, evolutionary psychologists, economists and sociologists have highlighted the difficulty of maintaining cooperative relationships among large social groups. Robin Dunbar, the evolutionary psychologist, for instance, has highlighted the fact that human brain size places limits on the cognitive ability to keep track of more than approximately 150 people.  

Dunbar’s number, as it is called, suggests that reciprocal relationships among large social groups is particularly challenging and requires the formation of institutions to support cooperative activity much beyond that size. Similarly, economists and sociologists tell us that exchange relationships – especially relationships between people in which the quid and the quo of an exchange are separated by time or space – can be facilitated through social networks or bilateral repeated interactions, yet run into difficulties as group size increases.  

The reason for this is straightforward: social networks and bilateral repeated interactions increase the information each person has about the other person’s reputation for the meeting of reciprocal obligations, but as the size of the group in which a person’s reputation circulates increases, the veracity of the information about his or her reputation decreases, and the ability to enforce reciprocal obligations along with it. As a result, cooperative relationships between people that otherwise would be observed are not

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carried out because the transaction costs of the interactions have become too high.

The cognitive challenge individuals face in tracking large numbers of human relationships, along with the inability of social networks or bilateral repeated interactions to solve this problem, suggests complex human cooperation in large social groups is facilitated by two further mechanisms. First, an increase in the ability to coercively enforce obligations, and second, the provision of institutions for information sharing in order to reduced the friction the flow of information encounters as the size of a group increases.

Relatively well-functioning, modern, pluralist democracies have arguably solved this problem of complex human cooperation in large social groups by increasing the coercive power of the state, and providing institutions that facilitate the flow of information within society. This is particularly evident in the field of credit transactions, an area of social life that requires complex human coordination, and one with which this paper will be particularly concerned. Without complex financial intermediaries, such as banks, credit card companies, bond markets, and many more, that provide the institutional infrastructure necessary for credit transactions, modern states and economies, as recent history seems to have underscored, could not function.10

But not all societies will have in place the institutions we associate with modern, pluralist, democracies for these tasks, and thus will need to develop different institutions

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10 In addition to regulated institutions, modern pluralist democracies have now become dependent upon what has been called a global “shadow banking system” – composed of private equity, hedge funds, and sovereign wealth funds, among other institutions – that operate heavily in derivative markets, and which are only lightly if at all regulated. That modern pluralist democracies depend on this shadow banking system should highlight how very different the credit markets in such a society are from those of eighteenth and nineteenth century America. See, Paul Vlocker’s April 2, 2008, address to The Economic Club of New York, unpublished. See, too, Nouriel Roubini, “The Shadow Banking System is Unraveling,” September 21, 2008, The Financial Times, 15.
that enforce reciprocal obligations and increase information sharing. The early American state was not, I suggest, in a position to adopt the modern institutions we associate with the coercive power of the state or complex information sharing. Instead, it built those capacities through other institutional means. The puzzle, then, is what were these other institutional means? How, that is, was the power of the early American state expanded through its facilitation of human cooperation? One piece of this puzzle, as this essay argues, is that the American justice of the peace, in the absence of the institutions associated with relatively well-functioning, modern, pluralist democracies, helped build the coercive power of the state, by facilitating the enforcement of reciprocal obligations and information sharing.\(^{11}\)

\(^{11}\) Paul Milgrom, Douglass North, and Barry Weingast suggest a solution to the problem of complex human cooperation that has direct implications for research on the role of justices of the peace in the civil legal system of the early American state. They say, “In a large community, we argue, it would be too costly to keep everyone informed about what transpires in all trading relationships, as a simple reputation system might require. So the system of private judges is designed to promote private resolution of disputes and otherwise to transmit just enough information to the right people in the right circumstances to enable the reputation mechanism to function effectively for enforcement.” Paul Milgrom, Douglass C. North, and Barry Weingast, “The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs,” Economics and Politics 2 (1990): 1-23. Several other legal scholars have noted the relationship or non-relationship between complex human cooperation, social networks, and law. Highlighting the non-relationship, Stewart Macaulay says “networks regulate a great deal of behavior in any society; we are all subject to many private governments where the influence of the public legal system is unclear. Long-term continuing relationships have their own norms and sanctions, often far more powerful than anything the legal system has to offer.” Stewart Macaulay, “Law and the Behavioral Sciences: Is There Any There There?” Law & Policy 6, No. 2 (1984): 149-187. See also Robert C. Ellickson, Order without Law: How Neighbors Settle Disputes (Cambridge: Harvard University Press 1991). In contrast, highlighting the relationship between complex human cooperation, social networks, and law, the British legal historian Craig Muldrew has built on the insight that legal institutions may facilitate the construction or deconstruction of reputations, which in turn facilitate or frustrate cooperative behavior. More precisely, he argues that local courts in seventeenth century England allowed people to construct and deconstruct their reputations in order to further or frustrate cooperative social relations having to do with credit. See in particular, Craig Muldrew: The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England (New York: St. Martin’s Press, 1998); “Credit and the Courts: Debt Litigation in a Seventeenth-Century Urban Community,” The Economic History Review 46, No. 1 (Feb., 1993): 23-38; “Interpreting the Market: The Ethics of Credit, and Community Relations in Early Modern England,” Social History 18, No. 2 (May 1993): 163-183; “The Culture of Reconciliation: Community and the Settlement of Economic Disputes in Early Modern England,” Historical Journal 39, No. 4 (1996): 915-942; “Rural Credit and Legal Institutions in the Countryside in England 1550-1700,” in Communities and Courts in Britain, 1150-1900, eds. C. W. Brooks and Michael Lobban (London: Hambledon, 1997); “Hard food for Midas’, Cash and its Social Value in Early Modern England,” Past and Present, 170 (2001): 78-
3. **Intellectual Context: Legal Populism and Justices of the Peace**

Americans, though, did not set out to use the office of the justice of the peace to solve the problems associated with complex human cooperation in large social groups. Nor were they guided to create the institution of the American justice of the peace by impersonal evolutionary forces or structures of state power beyond their ken. Rather, they inherited from the popular mid-seventeenth century English legal reform movement a set of ideas and attitudes that turned the aims of the office on its head – making it less an instrument of the county gentry, with their aristocratic bias against trade, manufacture, and commerce, and more an instrument of the middling sort to facilitate exactly those non-aristocratic activities.¹²

To see this, we need to first gain an appreciation of the intellectual context within which the American justice of the peace came to be given civil jurisdiction. Because the ideas associated with it centered on the notion that as a matter of constitutional and moral right, law and legal institutions should serve the people, rather than the people serve the law, as well as that the people are opposed to and oppressed by an elite, I call this *mentalité,* "legal populism."

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¹² It is worth noting, however, that Americans expressed dislike for the office of the justice of the peace when it exhibited oligarchic tendencies, and violated the separation of powers principle, by combining the administration of county affairs with judicial power, because they thought it anti-republican. Still, as our discussion of James Wilson’s commentary will make plain, when viewed as a means of community arbitration over small civil disputes, with deep ties to an inherited folk tradition, the office could be viewed much more sympathetically.
More a folkway and habit of mind than an explicit political theory, legal populism had its roots in a widely influential oppositional political culture, whose most vehement assertion occurred in England during the 1640s, as common people put forth reformist and indeed radical proposals for legal reform.\(^{13}\) As Donald Veall puts it, this movement for law reform:

...sought support from the common people by obtaining signatures to petitions, by printing and selling pamphlets on a large scale, by meetings, by the appeal to the weight of numbers as an argument... The people who participated in this agitation were drawn from “the hobnails, clouted shoes, the private soldiers, the leather and woollen aprons and the laborious and industrious people in England” and “the oppressed friends, the commoners of England, the inferior tenants and poor labourers” who had to beg work for day wages.\(^{14}\)

Several different factions advocated law reform, and sought to mobilize the population around it. One of the features of the legal system attacked by all sides was the centralized system of civil justice then in existence in England.\(^{15}\) Despite the existence of local courts at the county and township level, these courts, which had originally been established in the fourteenth century, had by the seventeenth century declined and no longer sufficiently served the needs of the population.\(^{16}\) Thus, claims for slight injuries and small debts had to be brought to Westminster even if the parties lived in distant parts of the country.


\(^{15}\) A range of pamphlets was published on this subject, all of which argued for easy and speedy local justice as a solution to the centralization of civil justice at Westminster. Ibid., 100-122; 168-178. The Levellers, however, were particularly interested in this cause.

\(^{16}\) Ibid., 38.
A striking feature of this criticism is its employment of an historical narrative, which Christopher Hill called the theory of the Norman Yoke. Its essential outline ran as follows:

Before 1066 the Anglo-Saxon inhabitants of this country lived as free and equal citizens, governing themselves through representative institutions. The Norman Conquest deprived them of this liberty, and established the tyranny of an alien King and landlord. But the people did not forget the rights they had lost. They fought continuously to recover them, with varying success. Concessions (Magna Carta, for instance) were from time to time extorted from their rulers, and always the tradition of lost Anglo-Saxon freedom was a stimulus to ever more insistent demands upon the successors of the Norman Conquest.¹⁷

Radicals and reformers alike used the theory of the Norman Yoke to criticize the system of centralized courts. For instance, petitioners in northern England asked, “That we may have justice, given not bought; courts of justice in all counties, so established and maintained at the public charge…that justice everywhere may come down like a mighty stream, free for the poorest to resort unto, too strong for the richest to divert.”¹⁸ In another pamphlet entitled, The Lawyers Bane or the Laws Reformed and New Model (1646), the author argued that if courts were set up in each county for civil matters, then justice would be “equally and freely administered to all men even at their own doors.”¹⁹ Similarly, another writer, James Frese, who had spend many years in prison for debt and claimed to speak for the poor, argued that, “Every man should have justice at his own door as in the days of King Edward and King Alfred who hanged up to forty-five county


¹⁹ Ibid., 169.
judges in one year for taking bribes and passing false judgments."\textsuperscript{20} John Lilburne too, tradesmen, lieutenant-colonel in the Parliamentary army in the Civil War, and influential Leveller political leader, argued in \textit{The Just Man's Justification} (1646), that William the Conqueror "had destroyed the Old Saxon laws and set up the centralized common law courts in opposition to the local...courts."\textsuperscript{21}

These arguments for decentralized local civil justice, speedily and easily administered, were not idiosyncratic, but represented a powerful line of argument in the pamphlet literature. As Veall points out, "A theory put forward by many of these pamphleteers was that the evils of the law were due to the Norman Conquest." That theory, he summarizes thus:

The theory was that in Anglo-Saxon times there had been a society where men lived as free and equal citizens with representative institutions, a law justly administered, readily and cheaply available in local hundred and county courts... Then came the Norman Conquests and that model society was shattered. In its place William the Conqueror was alleged to have "erected a trade of judges and lawyers, to sell justice and injustice at his own unconscionable rate and in what time he please; the corruption whereof is yet remaining upon us to our continual impoverishing and molestation." The Conquest was the cause of the law's intricacies, expense, foreign language, and the reason why the "poor commons [were] forced to trudge up to London from all parts of the land" to the centralized Norman courts presided over by Norman judges.\textsuperscript{22}

This account obviously runs close to the theory explicated by Hill, of which Veall's own work indicates he is aware. But what Veall's work uncovers, not made clear by Hill, is how the argument for decentralized local civil justice was woven together with the theory of the Norman Yoke in the mid-seventeenth century.

\textsuperscript{20} Ibid., 103-104.

\textsuperscript{21} Ibid., 75.

\textsuperscript{22} Ibid., 105. The quotation Veall uses comes from \textit{A Remonstracion of Many Thousands of Citizens and other Freeborn People of England} published in 1646.
American attitudes and ideas about the law were deeply influenced by the seventeenth century legal reform movement — influencing state constitutional development, fueling the distaste for lawyers but the love of litigiousness, establishing the county as the gravitational center of the American legal system before the Civil War, and serving as a justification for the multiplication and extension of evermore counties across the United States.\(^{23}\)

But particularly significant for understanding the origin of the civil jurisdiction of the American justices of the peace is the demand by seventeenth century legal reformers for the passage of Parliamentary acts for the “more easy and speedy recovery of small debts.” In the 1640s, English legal reformers sought to extend throughout England an early seventeenth century law entitled, “An Act for Recovery of Small Debts, and relieving of poor Debtors in London.”\(^{24}\) They were, however, unsuccessful. The Hale Commission, established by Parliament after the regicide of Charles I in 1649, recommended the extension of acts for the easy and speedy collection of debts as a way

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\(^{23}\) On the influence of the seventeenth century legal reform movement, see Patrick Peel, *Building Judicial Capacity in the Early American State*, dissertation, Johns Hopkins University, 2009. Along broader lines, Dorothy Ross has emphasized how ideas of ancient Anglo-Saxon liberty infused American culture at least until the early nineteenth century. She says: “American writers often linked their national history to the account of Anglo-Saxon liberty developed in England. American self-government was attached to a continuous inheritance that went back to the Teutonic tribes that vanquished Rome. Its institutions were carried by the Saxons to England, preserved in Magna Carta and the Glorious Revolution, and planted in the colonies, where it reached its most perfect form in the American Revolution and the Constitution. The American Republic was the latest link in the chain of Teutonic liberty, and the exemplar of liberty to the world.” Dorothy Ross, *The Origins of American Social Science* (New York: Cambridge University Press, 1998), 24-25.

\(^{24}\) Two historical economists, Dan Bogart and Gary Richardson, in an interesting unpublished paper entitled, “Law, Property Rights, and Economic Development in England: New Evidence from Acts of Parliament, 1600-1815,” have counted the number of acts for “speedy and easy recovery of small debts.” Professor Bogart has kindly shared his data with me. That data shows that between 1603 and 1823 Parliament passed 86 such acts. Only two acts before 1688 entitled, “An Act for Recovery of Small Debts, and relieving of poor Debtors in London,” were passed. (On file)
to redress the complaints of reformers. Yet, despite these recommendations, leaders of the revolution, including Oliver Cromwell and Matthew Hale, did not think this law reform feasible. Thus, the first act after the English Civil War for easy and speedy collection of debts was not passed until 1688, when two such acts were passed, creating local courts for the collection of small debts in Bristol, Gloucester, and Newcastle upon Tyne. Ultimately, it was not until the middle of the eighteenth century, and well into the nineteenth century, that Parliament began passing such acts in earnest. When they did, these acts gave small claims jurisdiction to courts of conscience or courts of request, rather than justices of the peace. Furthermore, the impetus for these reforms in the eighteenth and nineteenth century were more technical and less ideological, and thus did not reflect the social impulses of the seventeenth century law reform movement.

By contrast, the demand that grew out of the seventeenth century law reform movement for the establishment of local courts to recover small debts easily and speedily

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25 G. B. Nouse, “Law Reform Under the Commonwealth and Protectorate,” 520. The title of the bill proposed was “For the More Speedy and Easy Recovery of Debts and Damages not Exceeding the Sum of Four Pounds.”

26 Between 1662 and 1702, Margot Finn points out, there were 40 unsuccessful attempts to establish courts for petty debts. Margot C. Finn The Character of Credit: Personal Debt In English Culture, 1740-1914 (Cambridge: Cambridge University, 2003), 198-202.

27 Bogart and Richardson’s data show that between 1603 and 1700 only four Parliament acts for the recovery of small debts were passed. Then from 1700 through 1793, 51 similar acts were passed for various cities and counties in England. From 1800 through 1823, 29 similar acts were passed extending these laws to more cities and counties. See Margot C. Finn on the eighteenth century creation of small claims courts in The Character of Credit: Personal Debt In English Culture, 1740-1914, 198-202.


had an early and much more profound influence on the legal development of the United States. The American colonies studied here – Massachusetts, New Hampshire, Pennsylvania, New York, Virginia, and South Carolina – each had early laws for the collection of small debts.\(^{30}\) The case of Pennsylvania, though, is particularly interesting, and since that state was influential, I shall restrict my discussion to it.

Five years before the 1688 acts passed in England, the Pennsylvania assembly passed Chapter 76 of its Great Laws, which reads as follows:

For the Speedy Justice to the poor and in small matters... Be it Enacted &c: That all matters of debt or dues under 40 shillings shall be heard & determined upon Sufficient Evidence, by any two Justices of the peace of that County, where the cause arises, And that Such Justices shall Report their judgment to the next County-Court, and the same shall be Recorded by the Clerk of the County Court, as good and binding, if the Court approve the same.\(^{31}\)

That same year, the assembly took a further and more consequential step when that law was made a “fundamental law.” Chapter 76 was made a “fundamental law” we are told because “in all governments, there are some Laws more essentially requisite to the well-

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being” of the society. Some of the other fundamental laws included the liberty of conscience, the process of naturalization, the election of representatives, taxes, the openness of courts, and the requirement that the laws be in English. 32 The law “For Speedy justice to the poor and in small matters” was said to be “fundamental” because it could not be diminished or repealed in whole or in part, without the consent of the Governor and six-sevenths of the members of the Provincial Council and Assembly. In essence, then, the law was to be constitutionally entrenched. Furthermore, the law only became a fundamental law of the colony by enactment of the Governor and the unanimous consent of the Provincial-Council and Assembly, as the representatives of the freemen of the province. 33

The basic seventeenth century Pennsylvania law giving the justice of the peace civil jurisdiction over small debts, although expanded around the margins, and overlaid with increasing technical specification, remained intact until the American Civil War. Pennsylvania laws after those passed in the seventeenth century continued to specify the purpose of the law as making justice more accessible. For instance, a consequential eighteenth century revision of the law entitled, “For the More Easy and Speedy Recovery of Small Debts,” included the following preamble: “it is found by experience that a great number of the lawsuits which are commenced in this province are brought against the

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32 In all, fifteen other laws were made “fundamental laws” of the colony.

33 Given the requirements to enact and to alter this law, it is difficult to doubt the approbation of Pennsylvanians toward it. But if there is any doubt, it should be eased by noting the dispute the citizens of Pennsylvania had with the new governor of the province, Benjamin Fletcher, when William Penn lost control of the colony in 1693. In the process of this dispute, the provincial assembly issued a “Petition of Right” – thus using the same phrase the English Parliament used when issuing their demands to Charles I before the English Civil War – demanding that under the new governor they continue to have the right to determine debts under forty shillings through justices of the peace. Pennsylvania, A Petition of Right, The Statutes at Large of Pennsylvania in the Time of William Penn, Volume 1, 1680 to 1700, 179.
poorer sort of people for small sums of money, who are unable to bear the expense arising by the common method of prosecution." Ultimately, this act was adopted as part of the first legal code of the Northwest Territory, which then served as a basis for the state laws of Ohio, Indiana, Illinois, Wisconsin, and Minnesota. As such, this Pennsylvania colonial law had considerable influence on the development and establishment of courts for small claims throughout much of the United States.

The precise reason colonial justices of the peace were given civil jurisdiction over small debts, while English justices of the peace were not, is unclear. However, the Oxford legal historian Joanna Innes suggests the answer may lie in the fact that the English centralized common law courts prohibited the development of small claims courts in England until the eighteenth century because they were perceived of as threatening their jurisdiction. There were, she points out, attempts in the seventeenth century to establish local small claims courts, but for some reason that remains obscure, these courts failed. Needless to say, the lack of any centralized administrative capacity in the United States until quite late in its history marks a significant contrast. As Robert Wiebe has noted American remained throughout the nineteenth century "a society of island communities." "A century after France had developed a reasonably efficient

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35 The act is in Maxwell's Code. It is explicitly adopted from the Pennsylvania law, and is entitled, A Law for the Easy and Speedy Recovery of Small Debts, June 3, 1795, The Laws of the Northwest Territory, 1788-1800, edited with an introduction by Theodore Calvin Pease (Springfield: Trustees of the Illinois State Historical Library, 1925), 143-149.

36 Correspondence with Joanna Innes (on file).
centralized administration," he says, "Americans could not even conceive of a managerial
government. Almost all of a community's affairs were still arranged informally."37

Americans not only adopted the seventeenth century legal reformers proposal for
the creation of small claims courts. They, also, linked the history of the civil jurisdiction
of the justice of the peace to the ideal society of free and equal citizenship thought to
have been lost under the weight of Norman Yoke. Here I discuss only one particularly
influential account, James Wilson's Lectures on Laws.

In his Lectures on Law, James Wilson singles out the fact that the Pennsylvania
justice of the peace is distinct from the justice of the peace in England in virtue of the
office's civil jurisdiction, which he considers "a very important branch of the power of a
justice of the peace." It is important, he tells us, because it facilitates the "expeditious
administration of justice," which is a requirement of good government itself.38
Furthermore, the justice of the peace lends legitimacy to the state, because it fosters
reciprocal obligations between citizens themselves and between citizens and the state.
"Every citizen," he tells us, "should be always under the eye and under the protection of
the law and of its officers; each part of the judicial system should give and receive
reciprocally an impulse in the direction of the whole."39 The justice of the peace, he tells
us, is able to have these beneficial effects because they operate within the subdivisions of
the county, and therefore serve the needs of the population in contexts where counties

39 Ibid., 112.
themselves are too extensive in size. Finally, he suggests the office of the justice of the peace is in fact best thought of as a peacemaker, and thus as a community arbitrator.

More telling, however, is the account of the origin of the civil jurisdiction of the justice of the peace Wilson gives. He traces the origin of justices of the peace with civil jurisdiction to the days before the Norman Yoke, and implies America is exceptional because it has continued the long tradition of giving justices civil jurisdiction. He says, “Among the Saxons, there was a magistrate called the hundredary, who presided over that division of a shire which was called a hundred. This magistrate was known to the ancient Germans, as we find, in Tacitus, an express reference made to his jurisdiction.” Ultimately, though, the institution came to be modeled on “a law of the great Alfred.” In that form, “Many petty causes came before it. Its proceedings were simple and summary: but if any one thought himself aggrieved by its decisions, he had the right of appealing to a superior tribunal.”

The attitudes and beliefs that Americans inherited from the seventeenth century legal reform movement – with its narrative of a society of free and equal citizenship, and a law justly administered, speedily and easily available in local courts, but then lost under the weight of the Norman Yoke – provided Americans with ideological resources to claim easy access to civil justice was a constitutional and indeed moral right. To that end, Americans extended the instrumentalities of civil justice to the office of the justice of the peace, removing from it, as Tocqueville said, “the aristocratic character that distinguishes it in the mother country.”

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40 Ibid., 113.
3. Justices of the Peace as Small Claims Courts: A Forum of Conflict and Community

In a book written for a non-American audience, entitled *Travels in North America, in the Years 1827 and 1828*, the British naval officer Basil Hall did not find the demand for easy and speedy justice, and the proliferation of justices of the peace to meet that need, a virtue of American democracy. "No person," he said, "be his situation or conduct in life what it may, is free from the never ending pest of lawsuits. Servants, labourers, every one, in short, on the first occasion, heirs off to the neighbouring lawyer or justice of the peace, to commence an action. No compromise or accommodation is ever dreamt of. The law must decide every thing! The life of persons in easy circumstances is thus rendered miserable..."41

What Hall’s complaint misses, of course, is an appreciation of the fact that access to civil justice may alleviate the sharper elements of inequality and the sting of dependency - and thus that a republican society may wish to extend the processes of civil law to wide range of members, despite their rank or position.

But what were these processes of civil law justices of the peace extended to, as Hall put is, servants, labourers, and everyone? Put otherwise, the ideology of legal populism aside, how did Americans actually use the small claims courts to which they demanded access?42

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42 The information in this section was generated by studying the civil jurisdiction of justices of the peace in five regional divisions of the United States, including New England, the Middle Atlantic, South...
This section contains five diagrams summarizing the processes Americans could use when attempting to resolve conflicts over small debts and demands. Where appropriate, it also provides historical context to help explain the legal practice documented, including footnotes that define technical common law terms.

Figure 1 shows the four steps individuals might take when accessing the civil legal system through a justice of the peace. The sections below specify the rules that compose each step.

### 3.1 Civil Complaints

From the colonial period until the Civil War, the core of the civil complaints justices of the peace could hear concerned petty debts and torts, excluding matters that concerned the title of real estate. This jurisdiction, though, was expressed variously: state laws might give justices jurisdiction over petty “debts and demands,” “debts and damages,” or “debts and trespasses.” But the distinction between a complaint

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Atlantic, South, and Middle West. I selected two states within each region to study. The states studied were the following: in New England, Massachusetts and New Hampshire; in the Middle Atlantic, New York and Pennsylvania; in the South Atlantic, Virginia and South Carolina; in the South, Kentucky and Alabama; and in the Middle West, Ohio and Illinois.

43 The diagrams are “ideal types” in Max Weber’s sense of that phrase. According to Weber, an “ideal type” is a synthesis of “a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to a [viewpoint]...into a unified analytical construct...” Max Weber, The Methodology of the Social Sciences, edited by Edward Shils and Henry Finch (New York: Free Press, 1949), 90. Weber’s approach to presenting historical research solves the epistemological dilemma any historical social science research faces of being either too general or particular and thus failing to specify salient features of the situation under investigation. With the help of historical research, the construction of an idea type by the social scientist allows him to build up a model of the phenomenon under investigation with a minimum of preconceived theoretical assumptions, and yet without reconstructing in its particularity the historical social world from which he draws his data.

44 Trespass is a common law form of action dating from the thirteenth century. It is the origin of tort law, and was viewed as a means to force a defendant to compensate a plaintiff for damage to his property or person. See “Trespass,” in West’s Encyclopedia of American Law, Volume 10, 2nd ed. (Detroit: Gale, 2005), 99. One version of trespass that seems to have been particularly popular in early America and England was “trespass on the case,” sometimes referred to as “action on the case,” or simply “case” or even
concerning a small debt and tort might blur into one another in a justice’s court, thus obscuring the more subtle legal distinction between a debt and a civil wrong.

Figure 1
Accessing the Civil Legal System
Through Justices of the Peace

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Complaint

Process

Trial

Execution
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“assumpsit.” These actions were intended to protect a plaintiff’s legal rights, rather than her person or property per se, and thus, since they were more general in nature, could blend complaints concerning petty debts and torts.
Debts and demands might include matters as various as disputes involving contracts, notes, simple agreements, merchandise sold or delivered, and work or rent, among other services and goods. A nineteenth century Illinois law illustrates the specificity and generality that could be written into the very same law:

...the justices of the peace in this state, shall have jurisdiction within their respective counties, to hear and determine all civil suits, for any debts or demands of the following description, viz: For any debt claimed to be due on a promissory note, contract, or agreement in writing, where the whole amount of such written contract, agreement, or note shall not exceed one hundred dollars. For any debt due upon a verbal contract or promise for a valuable consideration, not exceeding one hundred dollars. For any debt claimed to be due for goods, wares, or merchandise sold and delivered; or for work or labor done, or service rendered, where the amount claimed shall not exceed one hundred dollars. For any debt claimed to be due for money had and received, for money lent, for money paid by the plaintiff for the defendant at this request, and for money received by the defendant for the plaintiff's use, not exceeding one hundred dollars. For any debt claimed to be due upon open and unsettled account, where the balance settled and ascertained between the parties, and remaining unpaid, shall not exceed one hundred dollars. For any debt claimed to be due upon a contract for rent, not exceeding one hundred dollars. For any debt claimed to be due for any specific article of property, whether due by bond, note, or verbal promise, not exceeding one hundred dollars.\footnote{45 Illinois, An Act Concerning Justices of the Peace and Constables, The Revised Laws of Illinois: Containing All Laws of a General and Public Nature Passed by the Eighth General Assembly, at Their Session Held at Vandalia, Commencing on the Third Day of December, 1832, and Ending the Second Day of March, 1833 (Vandalia: Greiner & Sherman, 1833), 386. For another illustration of a wide ranging law for debts and demands see, Alabama, An Act to Revise Consolidate and Amend the Several Acts Relative to Justices of the Peace, and Constables, December 27, 1814, Digest of the Laws of the State of Alabama Containing the Statutes and Resolves in Force at the End of the General Assembly in January, 1823, compiled by Harry Toulmin (Cahawba: Gin & Curtius, 1823), 510-518.}

The law concludes by simply stipulating that justices are empowered to hear cases “for all debts claimed to be due, not exceeding one hundred dollars, for which the action of debt or of assumpsit would like.”\footnote{46 Illinois, An Act Concerning Justices of the Peace and Constables, The Revised Laws of Illinois: Containing All Laws of a General and Public Nature Passed by the Eighth General Assembly, at Their Session Held at Vandalia, Commencing on the Third Day of December, 1832, and Ending the Second Day of March, 1833, 386. Assumpsit is a fourteenth century common law form of action, which literally means in Latin, “he undertook or he promised.” See “assumpsit,” in West's Encyclopedia of American Law, Volume 1, 2\textsuperscript{nd} ed. (Detroit: Gale, 2005), 378.} In short, justices were to hear virtually all complaints
concerning the relatively small sums of money one person thought due to them from another person.

Early laws specifying the civil jurisdiction of justices of the peace might be even more general than the above Illinois law. Indiana Territorial law, for example, neither specified the types of debts or demands justices could hear, nor a monetary limit to those complaints. Rather the law simply stated that, "Every action of debt or other demand...shall be, and the same is hereby made cognizable before any Justice of the peace or magistrate in the township, either where the debt or cause of action was contracted, or arose, where the plaintiff resides, or where the defendant may be found." 47 To not impose a limit to the jurisdictional amount of a complaint was rare. Giving justices jurisdiction over a wide range of debts and demands, and blurring the legal distinction between the two, was not. 48 In fact, states could entrench in their constitutions such wide civil jurisdiction for justices that the blurring of the legal distinction between petty debts and civil wrongs itself seemed entrenched. Michigan's 1850 constitution, for instance, required "In civil cases, justices of the peace shall have exclusive jurisdiction to the amount of one hundred dollars, and concurrent jurisdiction to the amount of three


48 For an illustration of the blurring of the debt and damage distinction, see the following New Hampshire law that only refers to "damages," while clearly applying also to debts. New Hampshire, Of Justices of the Peace, The Revised Statutes of the State of New Hampshire Passed December 23, 1842 (Concord: Carroll & Baker, 1843), 346-347. As one editor of a digest of Virginia law put the matter, "...it is not to be presumed that the Legislature meant to perplex the justice with the distinction between various actions at law... The well settle practice under the former law, so long acquiesced in, is against such a presumption." James M. Matthews, Digest of the Laws of Virginia, of a Civil Nature, and of a Permanent Character and General Operation, Volume II (Richmond: C. H. Wynne, 1857), 839.
hundred dollars, which may be increased to five hundred dollars, with such exceptions and restrictions as may be provided by law."

Despite the broad jurisdictional powers of justices of the peace to hear debts or demands, throughout the period under investigation justices were generally prohibited from hearing cases involving the title of real estate. Highlighting how enduring legal habits can be, this prohibition stretched back to seventeenth century colonial practice, but continued to operate at least through the antebellum period.

One last aspect of the complaint portion of the civil jurisdiction of the justice of the peace needs to be mentioned. States during the period under investigation passed laws allowing one litigant to enter into a legal recognizance with another litigant.  

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49 Michigan Constitution 1850, Article VI, Section 18.

50 See the following colonial laws that do not make mention of the exclusion of real estate:  

51 Blackstone defines a recognizance as "an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with conditions to do some particular act; as to appear at the assises, to keep the peace, to pay a debt, or the like." William Blackstone, Commentaries on the Laws of England, Volume II, Of the Right of Things (Chicago: University of Chicago Press, 1979), 341. The term originates from the Latin recognoscere meaning to acknowledge. See, "Recognizance," in West's Encyclopedia of American Law, Volume 8, 2nd ed. (Detroit: Gale, 2005).
These acts empowered justices of the peace to have debtors come before them and
confess judgment.\textsuperscript{52} The legal recognizance Massachusetts used took the following form:

Know all Men that I, C.D. of _____ in the County of _____ do owe unto E.F. the
Sum of ___ of the Lawful Money of Massachusetts, to be paid to the said E.F. on
the ___ Day of _____ 17_ and if I shall fail of the Payment of the Debt aforesaid, by
the time aforesaid, I will, and grant, that the said Debt shall be levied of my
Goods and Chattels, Lands and Tenements, and in want thereof, of My Body.\textsuperscript{53}

This legal recognizance was to be signed and sealed by the justice of the peace who
witnessed it, and it was to be entered by him in a book for that purpose. That book was


\textsuperscript{53} Massachusetts, An Act for the repealing of one Act of this Commonwealth, made and passed on the Third Day of May last, entitled, “An Act providing a speedy Method of recovering Debt, and for preventing Unnecessary Costs attending the Same” and for making other Provisions which may better answer the Ends designed by the Said Act, October 19, 1782, The Laws of the Commonwealth of Massachusetts, from November 28, 1780 to February 28, 1807, Volume I (Boston: J. T. Buckingham, for Thomas & Andrews and Manning & Loring, 1807), 79-83. See the earlier act, Massachusetts, An Act Providing A More Speedy Method of Recovering Debts, and For Preventing Unnecessary Costs Attending the Same, May 3, 1782, Acts and Laws of the Commonwealth of Massachusetts (Boston: Benjamin Edes & Sons, 1890), 584-589.
then to serve as a public record for the indebtedness of the person who entered into the
cognizance. The process of recording a confession of judgment could be quite simple.

An Illinois justice of the peace docket from 1834 provides a useful example:

Charles W. Nabb vs. F. Price
March 2 came forward & confessed judg. 5.56
March 22 execution issued I. Walker
June 1st returned satisfied

W.G. Haydon J.P.

On March 2, 1834, Price, who borrowed $5.56 from Nabb, confessed judgment before a
justice of the peace, W. G. Haydon. On March 22, an execution for $5.56 was issued to
I. Walker, who on June 1 returned to the court to report that the debt had been satisfied,
where Haydon recorded it.54

The significant implication of such laws is the following: Americans used the
institution of the justice of the peace to transform a transaction between a creditor and
debtor into a secured transaction. Today, a “secured transaction” is a loan with a security
interest in the debtor’s property. By placing the creditor in a certain relationship to the
claims of the debtor’s other creditors, that security interest protects the creditor from
competing with other would-be creditors in the case of the debtor’s insolvency. Article 9
of the Uniform Commercial Code governs secured transactions in private property in the
United States.55 Yet the need for security on loans has historically taken simpler legal

54 R. Eden Martin, The Whitley Point Record Book: The Justice of the Peace Docket Book, Estray
List and County Store Record of the Earliest Settlement in Moultrie County, Illinois (Chicago: Eden Martin,
1996), 20.

55 See, “Commercial Law,” in West’s Encyclopedia of American Law, Volume 3, 2nd ed. (Detroit:
Gale, 2005), 14-15.
and institutional forms than the more or less centrally organized and institutionally complex legal code Americans now rely upon.⁵⁶

The economic historian M. M. Postan many years ago showed that the practice of acknowledging debts before a judicial tribunal stretches back to at least the thirteenth century.⁵⁷ The evidence for his claim is the existence of many several thousands of “recognizances” in England that are recorded on various official registers of courts, and eventually on special rolls after the passage of the Statute of Acton Burnell in 1283.⁵⁸ “There cannot be,” Postan concludes, “many topics in the economic history of the middle ages on which the evidence is as copious as on credit. The bulk of the evidence consists of records of debts. Most numerous of all are the recorders of ‘recognizances’ – i.e. debts acknowledged before judicial tribunals and entered upon their rolls.”⁵⁹ According to

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⁵⁶ The simplest form of security on a loan is the pledge or pawn, whereby some piece of property is held as collateral on that loan. By holding a piece of property in exchange for a loan, the creditor is protected from the possibility that a debtor will have borrowed from several people using the same piece of property as security. Unfortunately, pawning a piece of property requires the debtor give up his possession of the property and thus his ability to make productive use of the property.

⁵⁷ Similar practices can be found elsewhere. In Rome, Renata Ago highlights the use of courts to record debts in the fifteenth century. According to Ago, “the extension and very existence of credit networks have to be viewed not only in the context of currency scarcity but also with regard to the peculiarities of the pre-industrial economy.” More specifically, he argues, “in early pre-consumer societies where transactions were largely unwritten, litigation occurred as a way of establishing the terms of transactions.” Thus, he concludes, “The amount of conflict in this community is therefore much more apparent than real and needs to be treated as such. It gains real meaning only if we analyze it in relation to the means of certification more well known to us…” Renata Ago, “Enforcing Agreements: Notaries and Courts in Early Modern Rome,” Continuity and Change 14, Issue 2, (1999): 202.


⁵⁹ M. M. Postan, “Credit in Medieval Trade,” The Economic History Review 1, No. 2 (Jan., 1928), 236. In addition to this source, Postan cites the numerous instances of court cases dealing with disputes over credit. Also, he points out that this practice spread to non-merchant creditors, who began recording small debts. However, this practice was stopped by the state. See also M. M. Postan, “Private Financial Instruments in Medieval England,” in Medieval Trade and Finance (Cambridge: Cambridge University Press, 1973). Also, see T. F. T. Plucknett, Legislation of Edward I (Oxford: Oxford University Press,
Postan, the enrollment of a recognizance converted a simple obligation between two parties into a legal obligation of a certain type. A *recognito*, he tells us, meant “a formal acknowledgement by one party of the right of the other in an actual or potential lawsuit.” It thus differed from a bond – which also was a public recognition of an obligatee’s right – in that it did not require the authentication of the written document before the execution of a judgment by a court. This was the case, because the recognizance already represented a judicial recognition of a plaintiff’s right. “By recognizing the obligation before a court,” Postan concludes, “the debtor conceded to the creditor in advance the right to proceed with the execution as soon as he defaul ted. At the conclusion of a typical recognizance the debtor would state that should he fail to pay (‘nisi etc.’) execution could forthwith be had against his lands, goods and person.”

The similarity to the recognizance cited above from Massachusetts should be clear. Some five hundred years after it originated in England, Americans appear to have been using the same legal practice to secure debts.

Postan’s research shows that, because it gave creditors executory power, the legal recognizance “became one of the favourite financial instruments of the Middle Ages, employed whenever even greater legal security was needed than that which an ordinary bond could provide.”

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60 M. M. Postan, “Credit in Medieval Trade,” *The Economic History Review* 1, No. 2 (Jan., 1928): 236.

States is difficult to say. However, legal historians have noticed that confessing
judgment before a court could serve to secure credit relationships. In a 2006 paper,
David Thomas Konig notes the way early Americans used the law to transform personal
obligations into legal obligations, thereby giving personal obligations more security
through the apparatus of the state. In county courts, Konig says, early Americans “used
the law to raise one type of obligation to a higher level that admitted of no uncertainty in
its terms or legal basis...and conferred ‘the protective color of law and legal right’ on a
personal obligation. Creditors need not have taken execution on their judgment debts...
but their entry in the court’s records gave them a security far greater than that of the
initial obligation.”62 Although Konig’s paper is the most explicit on the use of courts to
secure personal obligations, the work of Bruce Mann and Thomas Russell indicates they
believe many of the debt case they observed in eighteenth and nineteenth century
American trial courts should be viewed as securing transactions between creditors and
debtors.63

62 David Thomas Konig, “Credit, Courts, and the Forming of a Property Regime in Seventeenth-
Century Virginia,” 14. (paper presented to the New York University Legal History Colloquium, New
York, NY, March 8, 2006).

63 Bruce Mann, Neighbors & Strangers: Law and Community in Early Connecticut (Chapel Hill: 
University of North Carolina Press, 1987), 39-40. Claire Priest contests the claim by Mann that many cases
on court dockets were pro forma confessions of judgment. See Priest’s “The Nature of Litigation in Early
New England,” The Yale Law Journal 111, No. 7 (May, 2002): 1881-1887. See also her “Colonial Courts
and Secured Credit: Early American Commercial Litigation and Shays’ Rebellion,” The Yale Law Journal
Domain: Trial-Court Activity in South Carolina and The Concomitance of Lending and Litigation,” The
and law more generally, see Bruce H. Mann, “Transformations of Law and Economy in Early American
Law,” in The Cambridge History of Law in America, Volume I, Early America (1580-1815), edited by
For the nineteenth century, see Tony A Freyer, “Legal Innovations and Market Capitalism,” in The
Cambridge History of Law in America, Volume II, The Long Nineteenth Century (1789-1920), edited by
Michael Grossberg and Christopher Tomlins (Cambridge: Cambridge University Press, 2008), 449-482.
3.2 Process for Serving Defendants

Like the nature of the civil complaints handled by justices of the peace, the method by which process was served to defendants also remained relatively stable before the Civil War. The laws examined required that a summons or capias be issued as the case required. The conditions that determined what type of writ was issued to a constable or sheriff depended upon several facts, but the core issue around which they all centered was whether or not a plaintiff would be able to seize a defendant's property if necessary to recover a debt or demand. If a plaintiff would not be able to seize a defendant's property, then the defendant was to be arrested; if a plaintiff would be able to seize a defendant's property, then the defendant was issued a summons.

The key decision-points as to whether a defendant was to receive a summons or a capias entailed specific rules. Most commonly, a capias was issued if the plaintiff believed he would lose his debt or demand. However, laws also specified that if the defendant was a freeholder within a county he was entitled to receive a summons, while if he did not own sufficient property to qualify as a freeholder, he was arrested.

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64 A capias is an arrest warrant, which was one of a series of writs of assistance that conferred supplementary powers upon a sheriff or constable in order to enforce the judgment of a court. The full Latin phrase was, capias ad respondendum, meaning literally, "you are to seize until reply is made." See the Oxford Dictionary of Law, s.v. "capias."


Freeholders could usually still be arrested if the plaintiff swore that he believed he would lose his debt or demand, absent the arrest of the defendant. In any of these cases, however, whether a defendant had sufficient or insufficient property within the county, he was usually allowed to pay the debt or demand at the time of receiving his summons or arrest warrant, thus ending the litigation process. In the event that a defendant was arrested, he was to be held in jail until a justice of the peace could hear his case, or until the defendant gave bail via a surety who had entered into a recognizance to pay his debt.

Although the core of the serving process remained constant, there were variations around the margins, both in terms of relatively minor rules and more seemingly significant rules. Some state laws required summons to be given to the defendant, while other laws allowed them to be left at the defendant’s home or with a neighbor. Such rules in fact could be quite specific. Indiana’s territorial law, for instance, allowed a summons to be left at a defendant’s home, only if it was done so in the presence of a member of the family who was at least ten years old.  


Figure 3.2
Process for Serving the Defendant

Summons or Capias:
From Justice of the Peace
To Constable

Summons:
Freeholder within the County;
Summons Delivered in Person
Payment of Debt or Demand to Stop Suit
Defendant Appears at the Time and Place Stated in Summons

Capias:
Non-Freeholder; if Debt or Demand Will be Lost

Capias:
Freeholder if Debt or Demand Will be Lost
Defendant Held by Sheriff in Jail or Gives Bail via Surety
Bail: Recognizance
States might also require the cause of action be specified on every summons, while other states simply remained silent on that requirement. Not only were there variations in minor rules, but also in rules of greater consequence. Some laws entitled non-freeholders to all the benefits to which any freeholders was entitled, if they could produce a good and sufficient freeholder, who resided in the county, to join with him in a confession of judgment to the plaintiff. By "confessing judgment," the defendant — as we have already seen — would thus have given the plaintiff a no contest means of moving straight to the collection of the debt or demand owed, either from himself or the freeholder who underwrote his debt or the demand made of him. Other laws permitted a justice to issue an attachment to property if a plaintiff swore that he believed the defendant who did not live in the county was about to remove a piece of property from the county.

On a law specifying that all warrants list the cause, see: Virginia, An Act Further to Extend the Jurisdiction of Justices of the Peace, December 23, 1806, 1806, The Statutes at Large of Virginia, From October Session 1792, To December Session 1806, Inclusive, Being a Continuation of Hening, Volume III, compiled by Samuel Shepard (Richmond: Samuel Shepard, 1836), 286. See also the early and substantial South Carolina law: South Carolina, An Act for the Trial of Small and Mean Causes, October 15, 1692, The Earliest Printed Laws of South Carolina, 1692-1732, Volume I, 27-29. But see the early Massachusetts law that is not specific on the nature of writs: Massachusetts, An Act Describing the Powers of Justice of the Peace in Civil Actions, March 11, 1784, The Laws of the Commonwealth of Massachusetts, From November 28, 1780...To February 28, 1807. With Constitutions of the United States of America, and of the Commonwealth, Prefixed, Volume I, 146-148.


Alabama passed a defendant friendly law placing considerable constraints on a plaintiff seeking to attach the defendant's property. It required the plaintiff to swear that the "attachment is not sued out for the purpose of vexing or harassing the defendant, or other improper motive; and also give bond and sufficient security, in double the amount of the demand sworn to, conditional, that the plaintiff shall prosecute his or her attachment to effect, and pay the defendant all such damages he or she may sustain by the wrongful or vexatious suing out such attachment." Alabama, An Act to Revise, Consolidate, and Amend the Several Acts Relative to Justices of the Peace and Constables, December 27, 1814, Digest of the Laws of the State of Alabama: Continuing the Statutes and Resolutions in Force at the End of the General Assembly in January, 1823, 18-19. On attachments to prevent absconding debtors, see: Virginia, Of Attachments, The Code of Virginia, With The Declaration of Independence and of Constitution of the United States, and the Declaration of Rights, Constitution of Virginia, Published Pursuant to An Act of the General Assembly Passed on the Fifteenth Day of August 1819 (Richmond: William F. Ritchie, 1849), 691; Illinois, Attachments Before Justices of the Peace, March 3, 1845, Revised States of the State of Illinois, Adopted by The General Assembly of Staid State, At Its Regular Session, Held in the Year, A. D., 1844-5,
so, a defendant could have a constable or sheriff seize and hold a piece of property owned by the plaintiff to pay a debt or demand. In this way, a defendant, regardless of whether he would ultimately be successful in his suit, could ensure that sufficient property existed to pay the debt or demand owed to him.

As these rules indicate, the issue around which the serving process revolved was the question of whether or not a defendant had property to which the plaintiff could gain access. Put otherwise, as was the case with the practice of confessing judgment, the rules governing the serving process centered on legal means for increasing the security of transactions.

3.3 Discovery, Trial, and Appeals

Once a defendant and plaintiff appeared before a justice of the peace court, a simple two-part discovery process generally took place. First, justices could usually issue continuances, so that defendants and plaintiffs could each, ostensibly, put together their case. Continuances often had time limits placed upon them. For instance, in Ohio, continuances could not be granted for longer than twenty days, unless both parties requested it. However, reflecting the importance distances played in judicial proceedings of the time, continuances could be issued for up to ninety days, if the witnesses or parties resided in another county.\footnote{Ohio, An Act Describing the Powers and Duties of Justices of the Peace and Constables, in Civil Cases, March 14, 1831, Acts of a General Nature, Enacted, Revised and Ordered to be Reprinted at the First Session of the Twenty-Ninth General Assembly of the State of Ohio, Volume XXIX (Columbus: Olmsted & Bailhache, 1831), 170-194.} Second, each party was to file with the justice a bill of particulars. In the case of the defendant and the plaintiff, this might include any debts or

demands the defendant owed the plaintiff, or conversely debts or demands the plaintiff owed the defendant, including written evidence of indebtedness, be it a bond, bill of exchange, or promissory note.\textsuperscript{72}

After discovery, the justice then moved to the trial of the dispute. Several significant rules structured the outcome of a trial. Most significantly, a dispute usually could be tried not only by a justice, but also by members of the community in the form of an arbitration panel, referee, or jury.\textsuperscript{73} Most laws left the choice of the means by which a


case was determined up to the litigants. But the rules on the matter varied: some states required a jury trial over a certain dollar limit; other states only allowed arbitration if both parties agreed. Several other significant rules could structure the trial of a civil dispute. First, if a defendant without any good reason did not appear at the time and place specified by the summons, justices could be empowered to hear the case without the presence of the defendant. Second, parties might be allowed to waive process and move to judgment and execution. Third, justices were often empowered to consolidate the various debts and demands between the parties. Fourth, if a plaintiff dropped his

Consent, and Confessions of Debt Before a Justice of the Peace, The Revised Statutes of the State of New Hampshire Passed December 23, 1842 to Which are Prefixed the Constitutions of the United States and the State of New Hampshire (Concord: Carroll & Baker, 1843), 426-428. This law required litigants to swear the following to a justice of the peace: “Know all men by these presents, that of in the county of of State of and of in the county of and State of have agreed to submit the demand made by the said against the said which is hereto annexed, (or, ‘and all other demands between said parties,’ as the case may be,) to the determination of the report of whom, or the major part of whom, being made as soon as may be to the court of common pleas for the said county of judgment thereon shall be final. And if either party shall neglect to appear before said referees, after proper notice given to them of the time and place appointed by the referees for hearing the parties, the referees may proceed in his absence” (427). A nineteenth century Pennsylvania law fined referees two dollars, to be paid to the poor, if they refused to act as a referee once chosen. This law suggests, I believe, that acting as a referee in small claims disputes could be viewed as a community obligation. See: Pennsylvania, An Act for the Recovery of Debts and Demands not Exceeding One hundred Dollars, Before a Justice of the Peace, and for the Election, of Constables, and Other Purposes, March 28, 1804, The Statutes at Large of Pennsylvania from 1802 to 1805, Volume XVII, 1802-1805, commissioners James T. Mitchell, J. Willis Martin, and Hampton L. Carson (Harrisburg: WM Stanley Ray, 1915), 782-797.


76 See, for instance, Indiana Territory, An Act Establishing Courts for the Trial of Small Causes, September 17, 1807, The Laws of Indiana Territory, 1801-1809, 375-388. Also, see note 56 on “set-offs.”

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suit without the consent of the defendant, the justice might be required to give judgment for the defendant for the costs he had accrued.\textsuperscript{77}

Appeals were also a general feature of laws specifying the civil jurisdiction of justices of the peace.\textsuperscript{78} Here too several significant rules could structure the appeals process. First, appeals were to be made to the county’s primary county court, and time limits could be placed on how long a litigant could wait to file an appeal. Early laws did not specify much detail about the appeals process. But later laws might include considerable detail, including very specific requirements about the manner and means by which justices were to transfer the information contained in their dockets to the primary county court, even specifying penalties on justices who failed to do so correctly.\textsuperscript{79}

\textsuperscript{77} Indiana Territory, An Act Establishing Courts for the Trial of Small Causes, September 17, 1807, The Laws of Indiana Territory, 1801-1809, 375-388.


Second, appeals often required that the litigant requesting the appeal enter into a recognizance, with at least one sufficient surety. The sums required could vary. They could be relatively minor, or they could be considerable. An Indiana Territory law, for instance, required the recognizance to be a sum of at least twice the amount of the justice’s judgment, and “sufficient to answer all costs, to prosecute the said appeal with effect, and to abide the order which the court of Common Pleas may make.”

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80 Ibid.
Figure 3.3
Discovery, Trial, and Appeals

Discovery:
- Continuances
- Bill of Particulars: Including any debts or demands by the Defendant against the Plaintiff

Arbitration:
- Panel of referees
- Forecloses the Right of Appeal

Justice of the Peace Trial:
- Right to Appeal

Jury Trial:
- Forecloses the Right of Appeal

Plaintiff does not appear: Dismiss Case and Assign Costs to Plaintiff, or Find for Defendant

Defendant does not appear: Hear Case

Defendant can re-open case if he pays costs

If Plaintiff owes Defendant Debt or Demand, Find for Defendant against Plaintiff for Amount Owed.

If Defendant owes Plaintiff Debt or Demand, Find for Plaintiff against Defendant for Amount Owed

Appeal to Primary County Court.
- Required to Enter into a Recognizance with one Good Surety to Adverse Party
3.4 Execution, Stay of Execution, and Execution After Stay

After having lost a case, and having decided not to appeal the judgment, a litigant was now legally required to pay the debt or demand he owed. If he did not pay his debt or demand, then a further series of complex legal processes began, each of which was governed by a series of rules that further structured the interaction of the litigants.

Execution of a judgment was generally handled in one of two ways. First, constables or sheriffs were permitted to take and sell the goods and moveable property of debtors to settle a debt or demand which the justice’s court had ruled upon. Second, if insufficient goods or moveable property were present, the constable or sheriff was empowered to seize the body of the debtor and place him in jail.\(^{81}\) In the second case, laws could allow the creditor to take a transcript of his judgment from the justice of the peace to the primary county court and receive an execution against the lands of the debtor, an action generally prohibited directly from a justice’s court.\(^{82}\) Despite this broad grant of authority to justices of the peace to collect a debt or demand, significant limiting conditions also might be set on a litigant attempting to collect what was owed him. Some laws, for example, prohibited the types of goods and moveable property that could be seized. Goods that might be prohibited could include the following: clothing, food, tools,

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beds, Bibles, school books, cows, pigs, hay, cooking stoves, interest in a pew at any meetinghouse, and the right of burial in any cemetery. Other laws prohibited the seizure of a debtor for excessively small sums of money, or allowed him to escape his debt by taking a debtor’s oath.

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83 New Hampshire, An Act to Exempt Certain Goods and Chattels of Debtors from Attachment and Execution, June 16, 1806, Laws of New Hampshire including Public and Private Acts, Resolves, Votes, Etc., Volume Seven, Second Constitutional Period, 1801-1811, edited and published under the direction of the Secretary of State (Concord: Evans Printing Co. 1918), 583-585. This law also required the town clerk to keep a record of all attachments, in addition to a general index of all attachments.

84 New Hampshire, An Act Authorizing Two Justices of the Peace, of the Quorum, To Administer the Oath or Affirmation to Persons Imprisoned for Debt, And to Approve of Bonds by them Given, June 23, 1814, Laws of New Hampshire including Public and Private Acts, Resolves, Votes, Etc., Volume Eight, Second Constitutional Period, 1811-1820, edited and published under the direction of the Secretary of State (Concord: Evans Printing Co., 1920), 343-344.
Figure 3.4
Execution, Stay of Execution, and Execution After Stay

**Execution**
- Sufficient Goods and Chattels: Constable Seizes them and Sells Them in a Public Place to Pay Debt
- Insufficient Goods and Chattels: Constable Seizes the Body of the Debtor and Places Him in Jail
  - Creditor can take Transcript of Justices Judgment to Second-Tier County Court, which will issue an Execution on the Lands and Buildings of the Debtor

**Stay of Execution**
- Debtor enters into a Recognizance to Creditor, providing a Surety who Resides in the County for the Amount of Debt, Interest, and Costs
  - Stay of Execution ranging in Time Depending on Debt
  - Sufficient Goods and Chattels: Constable Seizes Them and Sells Them in a Public Place to Pay Debt
  - Insufficient Goods and Chattels: Constables Collects Debt from Surety
    - Creditor can Set Aside Stay if Surety Moves to another County
    - Creditor can Set Aside Stay if he will Loose the Debt if Execution Does not Take Place Immediately
  - If Surety has Insufficient Goods and Chattels, Seize body of Debtor
    - Surety can set aside the Stay if he thinks Debtor cannot Pay the Debt at End of Stay
  - If Surety cannot Pay, Seize his Goods and Chattels
States provided for a third way a debt or demand might be collected. Through the extension of the legal device of an attachment, garnishment laws were passed that allowed a creditor to collect debts or demands owed him indirectly by collecting debts or demands directly owed the person to whom he had been a creditor. This required a complex process whereby third parties had to appear before a justice and declare in court whether or not they owed or knew of anybody who owed the debtor any goods, services, or money. Section 9 of an 1845 Illinois law stated the issue thus:

When any constable shall be unable to find personal property of any defendant sufficient to satisfy any attachments issued under the provisions of this chapter he is hereby required to notify any and all person within his county, whom the creditor shall designate as having any property, effects or choses in action in his possession or power belonging to the defendant, or who are in any wise indebted to such defendant, to appear before such justice on the return day of the attachment, then and there to answer upon oath what amount he or she is indebted to the defendant...


86 Chose in Action is the right to bring a lawsuit to recover chattels, money, or a debt. See “Chose in Action,” West’s Encyclopedia of American Law, Volume 2, 2nd ed. (Detroit: Gale, 2005), 379.

A case illustrating the actual operation of the law can be found in a nineteenth century Illinois justice of the peace docket.\textsuperscript{88} On July 13, 1840, George Munson brought an action against Joseph Duncan for money owed him on a note for $68.46. The next day Duncan appeared in court, and the justice, Amos Waggoner, found for Munson the full sum. On July 16, an execution on the property of Duncan was issued to the constable. But on July 17, the constable had returned to report that no property could be found to satisfy the debt. That same day, Munson swore an oath that he had good reason to believe that “John Kenedy & Ths Tandol James Poor Wm Miller Richmond Webb E.G. Day C. Cockerham Garret Bonam and David Munroe” were all indebted to Duncan. That same day the constable summoned each of these persons before the justice. Three days later on July 20, each of the garnishees appeared, where they were examined on oath. Upon hearing their testimony, the justice found that Munson was to be paid in the following way: Bonam was to pay Munson $9.40 from a note he owed Duncan; John Kenedy was to pay Munson $14.70 from an account he owed Duncan; William Miller was to pay Munson $19.25 he owed Duncan; and E. D. Day was to pay Munson $3.93 he owed Duncan. This process went on with each of the garnishees until much of the debt Duncan owed Munson had been paid by third parties to the dispute between Duncan and Munson. As this example makes clear, garnishments used to collect debts or demands from third parties to a dispute, not only facilitated the collection of debts or demands, but created through the civil legal system, a network of creditors and debtors who otherwise might not have interacted with one another.

Stays of execution were also generally permitted. As was the case with serving process, the distinction between persons within the county with sufficient property and persons without might assert itself. County freeholders could be given considerable grace periods.\(^{89}\) Executions on the freeholders in Indiana Territory, for instance, could only take place after 30 days on a judgment for six dollars or less, 60 days on judgments of between six and twelve dollars, and 90 days on judgments of twelve dollars and up.\(^{90}\) Yet, laws generally allowed the immediate execution on a claim if litigants swore an oath that they would loose their debt or demand if the execution were delayed. Even in such cases as these, though, some laws allowed debtors to forestall the immediate collection of a debt if he gave sufficient security.\(^{91}\) Non-freeholders, too, might be entitled to the same grace periods as freeholders, if they entered into a recognizance, with one sufficient surety, to pay the debt or demand. In an echo of the modern bail bond system, sureties, in some cases, might escape their obligation for the debt or demand of the debtor, if they turned the body of the debtor over to the constable or sheriff at the termination of the grace period. In general, then, as was the case with the rules governing the process of serving a defendant, the rules governing a stay of execution hinged importantly upon whether or not a debtor had property to which a creditor could gain access.

\(^{89}\) States could still incorporate stays into their laws without drawing a distinction between freeholders and non-freeholders. For instance, Virginia permitted stay periods, ranging from 40 to 90 days on sums from less than 10 dollars to more than 30 dollars. Virginia, Of Justices of the Peace, The Code of Virginia Second Edition, Including Legislation to the year 1860 Published Pursuant to Law, 276-278.


\(^{91}\) Ibid., 375-388.
4. Conclusion

Civil legal systems, as H.L.A. Hart points out, in addition to being coercive, also “provide individuals with facilities for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law.”92 These structures of rights and duties, which individuals are able to create, with the assistance of the coercive framework of the law, allows for patterns of behavior based on mutual expectations. Put simply, civil legal systems, as I suggested at the outset of this paper, facilitate complex human cooperation.

How, then, did justices of the peace facilitated social intermediation before industrialization – that is, how did they encouraging the enforcement of reciprocal obligations and information sharing?

First, and most fundamentally, a nationwide network of small claims courts at the subcounty level were made easily accessible to a wide range of people, who having exchanged with one another, generated debts or demands, in need of sorting out.

Second, a series of rules increased the security of transactions between individuals. Recognizances, confessions of judgment, attachments, sureties, the seizure of property, and the distinction between county freeholders and non-county, non-freeholders, each added security to transactions.

Third, a set of rules increased the public transparency of transactions. Each legal action was to be recorded and thus available for public inspection. In addition, the use of attachments to collect debts or demands from third parties within the community, jury

trials composed of neighbors and friends, and the use of neighborly referees and panels of arbitrators facilitated information sharing within the community.

Fourth, a series of rules increased the likelihood that whatever the outcome of the dispute it would encourage the norms of reciprocity and solidarity within the community, thus encouraging repeated interactions among its members, rather than asymmetrical bargaining by those who could afford to use legal technicalities: the system required justices to simultaneously hear the complaints of plaintiffs and defendants; the use of attachments to collect debts from third parties within the community; the non-professional nature of justices of the peace and the weak professional guidelines for hearing complaints; the use of neighborly referees and panels of arbitrators; and the use of juries composed of friends and neighbors.

As late as 1913, Roscoe Pound could still recall from his childhood that the job of justices of the peace was to “bring justice to every man’s door.” 93 A generation later, Willard Hurst similarly noted that the justice of the peace was “the arch symbol of our emphasis on local autonomy in the organization of courts.” “Its widespread adoption,” he said, “responded to the practical need, in a time of poor and costly communication, to bring justice close to each man’s door.” 94

This sentiment, that justices of the peace provided easy access to civil justice, and therefore promoted free and equal democratic citizenship, has largely been lost from view.


– and so too an appreciation of the role the institution played in building the colonial and postcolonial American state’s coercive capacity.  

Cursory research suggests the Pound-Hurst view of the institution slipped out of sight for three reasons. First, as the American bench and bar became more professional, they increasingly made the civil jurisdiction of the justice of the peace more technical and less effective, as they strengthened their control on American legal institutions. Second, a survey of state legal cases after the Civil War suggests corporations who did not like being dragged into local justice of the peace courts by citizens for petty disputes challenged the civil jurisdiction of justices of the peace.

Third, and perhaps most fundamentally, a general cultural shift occurred. Having fought a war to be free of imperial rule, Americans wished to view themselves as democratic citizens, rather than dependent subjects. They therefore did not originally view local law and its institutions as the natural domain of an elite: Americans believed that the law was to serve the people, just as it had before the Norman Yoke, rather than the people serve the law, as it had under the Norman Yoke. But overtime the creation myth originally associated with the American judiciary and law changed: the hagiography of John Marshall and the Supreme Court came to replace that of the seventeenth century legal reform movement with its emphasis on the Norman Yoke and the role of local courts in fostering free and equal citizenship. Ultimately, progressives

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95 In stark contrast to the admiration of Pound and Hurst for this non-professional hybrid legal-governmental institution, a 2006 New York Times three-part exposé on justices of the peace entitled “Broken Bench” was full of scorn and lament. “Some of the courtrooms,” the series decried, “are not even court rooms...there is no word-for-word record of the proceedings... Nearly three-quarters of the judges are not lawyers, and many – truck drivers, sewer workers or laborers – have scant grasp of the most basic legal principles.” William Glaberson, “This Is Not America,” Sept. 25, 2006 NYT; William Glaberson, “You Learn By Mistakes,” Sept. 26, 2006, NYT; William Glaberson, “Nothing Gets Done,” Sept. 27, 2006, NYT. Those articles show that there are still more than 1250 justice of the peace courts in New York, which handle more than 2 million cases a year, and that 30 states still have justice of the peace courts.
came to view justices of the peace as instruments of party politics and corruption, as they sought to build modern courts to address the ills of urbanization - and eventually the history of legal populism, justices of the peace, and their social intermediation role in American political development was lost from view.96

Today the bourgeoisie lives in a very different world than it did two hundred plus years ago. The world many Americans live in now is characterized by vast transportation and communication networks that have compressed time and space, making the distance required to access local courts less significant. Further, Americans today live in a world of complex bureaucratic organizations that mediate their relationships with one another, making the use of courts to structure and regulate their mutual expectations seem less significant and indeed even alienating.

But most of the world’s population does not have access to the institutions associated with modern bureaucratic societies. Relationships between creditors and debtors, for instance, are worked out through social networks, moneylenders, and other informal and at times brutal mechanisms. Nor does much of the world’s population have access to legal institutions to resolve the disputes that naturally arise through relationships of dependence and inequality. A better understanding of justices of the peace, legal populism, and social intermediation in American history will not provide us with answers to the problems of today. Yet, it may encourage an appreciation of the contribution access to civil justice makes to the development of states – and perhaps more importantly an appreciate of the contribution access to civil justice makes to the self-respect that is a precondition of democratic citizenship.