Preserved or Pickled?: The Right to Trial by Jury after the Merger of Law and Equity in Maryland

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I. INTRODUCTION

Is the right to jury trial in civil cases a historical relic for "pickling," or is it a valuable right for preserving? What effect has the merger of Law and Equity had on the jury right? These issues have been faced by lawyers and judges all over the country. In Maryland, the issues came into focus in 1984 with the adoption of new rules of procedure.

In 1993, Professors Richard Bourne and John Lynch published a book on Maryland Civil Procedure. A chapter of that book deals with the right to jury trial in civil cases. Professors Lynch and Bourne also "taught this course" before in a law review article.

1. The phrase "merger of Law and Equity" is used to denote that certain, separate procedural rules for trying Law cases on the one hand, and Equity cases on the other hand, have been united. The merger of Law and Equity occurred in 1984 in Maryland. See Md. Rule 2-301. The merger of Law and Equity in federal courts occurred in 1938. See Fed. R. Civ. P. 2.

As suggested by the framers of the revised MARYLAND RULES, the idea of a merger of Law with Equity is complex. Md. Rule 2-301 provides: "There shall be one form of action known as 'civil action.'" A committee note to the rule provides: "The effect of this Rule is to eliminate distinctions between law and equity for purposes of pleadings, parties, court sittings, and dockets. It does not affect the right to jury trial."

Separate courts of Equity were abolished before the 1984 revision. As the committee note provided, the revision affected pleadings, parties, court sittings, and dockets, but not the right to jury trial. Commentators have noted that the revision did not affect distinctions between legal and equitable causes of action and remedies. See Paul V. Niemeyer & Linda M. Schuett, Maryland Rules Commentary 153 (2d ed. 1992). The distinction between Law and Equity continues as to other matters, such as subject matter jurisdiction of the district court and application of statutes of limitations (or laches). See Md. Code Ann., Cts. & Jud. Proc. §§ 4-402(a), 5-101 (1995).

Of course, the "merger of Law and Equity" is also complicated because it refers to one element of procedural reform that often includes other elements, such as elimination of common-law forms of action, ready joinder of claims and parties, comprehensive discovery, liberal amendment of pleadings, and simplified appeal. See generally Fleming James, Jr. et al., Civil Procedure 19-22 (4th ed. 1992).

2. "Law" and "Equity" are capitalized in this Article to reflect traditional usages, and to distinguish Law and Equity as separate systems of procedure from other meanings of the words. See Md. Const., Decl. of Rights arts. 5, 23. Quotations from outside sources, however, have not been capitalized. Rather, I will take their words as I find them.


4. Chapter 5 is entitled "Trial by Jury." Id. at 305.

5. See Richard W. Bourne & John A. Lynch, Jr., Merger of Law and Equity Under
Here, I review their book chapter and their earlier article and set forth my own ideas about the right to jury trial.

Professors Lynch and Bourne and I are colleagues at the University of Baltimore School of Law, teachers of Civil Procedure, and friends. Yet, we are in fundamental disagreement about the nature of the Maryland Constitution, its guarantee of the right to trial by jury, and the relative merits of trial by judge and by jury. This is more than an intramural squabble over some fine procedural point. Our dispute goes to the heart of the legal system: whether that system is one of law or expedience, and whether it is one of democratic government or rule by the elite.

A. The Lynch and Bourne Book Chapter and Article

In their book chapter and article, Professors Lynch and Bourne assess the Maryland Constitution’s provisions for the right to trial by jury in civil cases from an historical perspective. They ask basic questions about the jury right contained in those provisions: What happens to the common-law right to jury trial now that the 1984 Maryland Rules merged Law and Equity? How is the jury right to be adapted to other procedural innovations, such as the declaratory judgment? Should Maryland’s jury right be interpreted independently of the federal jury right contained in the Seventh Amendment to the United States Constitution, which has been held inapplicable to state courts? Should the state jury right mirror the federal right because Maryland cases, rules, and the Maryland Constitution have tended to follow the federal example?

B. My Thesis

I believe Lynch and Bourne try to pickle, not preserve,6 the constitutional right to trial by jury. They do recognize recent developments in Maryland and federal courts favoring the jury right. However, they seem less interested in preserving the jury right than in limiting its scope to what it was before the merger of Law and Equity. I believe this approach is unsatisfactory in three respects. First, it largely ignores the constitutional aspect of the jury right. Second, it restricts, or does not protect, the jury right in both theory and practice. Third, it is apparently premised on the belief that trial by a jury is inferior to trial by a judge.

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6. See generally infra note 59 and accompanying text.
C. The Lynch and Bourne Approach

Lynch and Bourne largely ignore the constitutional aspect of the right to jury trial. They are like the college instructor who reads to students the school catalog description of the course on the first day of class, and then boldly departs from that description in his syllabus, proceeding to teach the course the way he always has, reluctantly incorporating a few new developments. Lynch and Bourne's "principled discretionary" theory gives lip service to the Maryland Constitution's jury right. However, they then abandon this theory in favor of an "approximation of pre-merger" approach, relying on pre-1984 Maryland precedent to resolve current problems, except where they reluctantly accept recent Maryland cases or persuasive federal authority.

Lynch and Bourne do quote Article 5\(^7\) and Article 23\(^8\) of the

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7. See LYNCH & BOURNE, supra note 3, at 305 n.2 (quoting Md. Const. Decl. of Rights art. 5 (the "Reception Provision"); see also Bourne & Lynch, supra note 5, at 30 n.192. The Reception Provision provides:
   a. That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. And the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles the First to Caecilius Calvert, Baron of Baltimore.
   b. The parties to any civil proceeding in which the right to a jury trial is preserved are entitled to a trial by jury of at least 6 jurors.
   c. That notwithstanding the Common Law of England, nothing in this Constitution prohibits trial by jury of less than 12 jurors in any civil proceeding in which the right to a jury trial is preserved.

MD. CONST., DECL. OF RIGHTS art. 5.

8. See LYNCH & BOURNE, supra note 3, at 305 n.1 (quoting Md. Const. Decl. of Rights art. 23); see also Bourne & Lynch, supra note 5, at 3 n.2 (quoting provision before amendment increasing amount from $500 to $5,000). In pertinent part, Article 23 provides:
   The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in
Maryland Declaration of Rights which guarantee the right to jury trial. They also quote a fragment of the convention debate on the forerunner to Article 23, intended by its framers to protect the jury right from legislative encroachment. 9

1. Principled Discretionary Theory

After a description of the Maryland Constitution’s provisions and a fragment of the convention debate, Lynch and Bourne set forth their own theory of how the right to jury trial is to be determined after the merger of Law and Equity. Theirs is what might be called a “principled discretionary” theory. 10 That is, the jury right controversy exceeds the sum of five thousand dollars, shall be inviolably preserved.

MD. CONST., DECL. OF RIGHTS art 23.

9. See Bourne & Lynch, supra note 5, at 32 n.210. The forerunner was Md. Const. of 1851 art. X, § 4. The convention debate, in a longer version than that quoted by Lynch and Bourne, includes the following dialogue:

MR. CONSTABLE said that there was no guaranty in the Constitution of Maryland for the trial by jury in civil cases. In the Federal Government there was a provision, but it was only applicable to the Federal courts.

MR. CONSTABLE read the third article of the declaration of rights [the Reception Provision].

MR. CONSTABLE added that the Legislature had the express right to repeal the whole of this article, and they had constantly exercised the power to modify it. He had little fear of any inroad upon the trial by jury; but he should prefer to have it in the Constitution rather than have it left with the Legislature.

MR. CHAMBERS inquired if the gentleman meant to be understood that the expression in relation to repeal by the Legislature was applicable the trial by jury?

MR. CONSTABLE replied in the affirmative. It applied to the whole article; and the Legislature had exercised the power upon every point but this one. They had changed the common law in a hundred respects. If this were a doubtful point, it should be placed beyond all controversy; for it was the great safeguard and bulwark of security for property and persons ....

2 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION 766-67 (1851) [hereinafter 1851 DEBATES].

10. Lynch and Bourne’s theory is best developed in their law review article. See generally Bourne & Lynch, supra note 5.

Characterization of their theory as a unified “approach” may be problematic. That characterization rests on the following evidence. Lynch and Bourne recognize that approaches to the question of the right to jury trial
should be within the discretion of Maryland trial judges,\textsuperscript{11} guided by certain standards. First, they contend that the judge's discretion should be guided by four traditional principles governing the separation of Law and Equity:

The first principle is that Maryland's Constitution \textit{preserves} the right to trial by jury as it existed at the time of the adoption of the Constitution \textit{vis à vis} the scope of equity. Second, the scope of equity has historically been measured with due respect to the importance of the right to trial by jury. Third, the scope of equity is necessarily limited by the principle that equity will not intervene where the remedy at law is full, expeditious and adequate. Finally, it has been recognized that the scope of equity in Maryland may be expanded by statute or judicial decision.\textsuperscript{12}

Second, Bourne and Lynch assert that the discretion of Maryland trial judges should be guided by the common-sense notion that judicial economy is better served by trial by judge than by trial by jury.\textsuperscript{13} Third, the discretion of trial judges should be guided by the implicit notion that Equity is superior to Law as a mode of trial.

2. Approximation of Pre-Merger Approach

When Lynch and Bourne actually determine the situations in which the jury trial right should apply, they largely ignore the Maryland Constitution and abandon their own "principled discretionary" theory. Instead, absent recent Maryland precedent or persuasive fed-

\begin{itemize}
  \item after merger of Law and Equity may be generalized. For example, after the merger of Law and Equity in the federal courts under the \textit{Federal Rules of Civil Procedure}, several approaches developed. \textit{See} Bourne & Lynch, \textit{supra} note 5, at 16-17 (jury priority); \textit{id.} at 17-19 (basic issue analysis); \textit{id.} at 19-20 (waiver of jury by joinder of legal and equitable claims); \textit{id.} at 4, 46, 64, 67-69, 78 (\textit{Beacon} doctrine); \textit{see also} Lynch & Bourne, \textit{supra} note 3, at 334-37 (\textit{Beacon} doctrine). Lynch and Bourne's theory, which criticizes unbridled judicial discretion as eroding the jury right, suggests that the trial judge's discretion and certain principles guiding that discretion can coexist. \textit{See} Lynch & Bourne, \textit{supra} note 3, at 328, 331; Bourne & Lynch, \textit{supra} note 5, at 16, 20, 23, 29, 44.
  \item \textit{See} Bourne & Lynch, \textit{supra} note 5, at 59; \textit{see also} \textit{id.} at 3-4, 29, 46-47, 77; Lynch & Bourne, \textit{supra} note 3, at 326, 328, 331.
  \item Bourne & Lynch, \textit{supra} note 5, at 59-60 (footnotes omitted); \textit{see also} Lynch & Bourne, \textit{supra} note 3, at 305, 312 (first principle); \textit{id.} at 306-07, 326 (second principle); \textit{id.} at 307, 326 (third principle); \textit{id.} at 316-17, 321 (fourth principle).
  \item \textit{See} Bourne & Lynch, \textit{supra} note 5, at 2-3, 60.
\end{itemize}
eral authority, their actual approach is what might be called “approximation of pre-merger.” In other words, they reflexively follow pre-1984 precedent regarding whether a matter was to be tried at Law or in Equity in determining whether a matter is now to be tried by jury or judge.14

D. The Jury Trial as Constitutional Right

In contrast, the usual way of interpreting a constitutional provision, such as the right to jury trial, is to consider the following: its text (the words of the constitution); its history (the intent of the framers); its structure (the framework of government and the relationships between citizens and government); prudential concerns (the practical wisdom of using courts in a particular way); doctrine (principles derived from precedent and commentary on that precedent); ethical matters (the sort of people we are and the sort of institutions we have);15 and the nature of the constitution (its paradoxical character as both “written” or unchangeable, and “living” or adaptable to new circumstances).

This article next takes an in-depth look at the usual ways of interpreting the Maryland Constitution’s provisions for the right to jury trial, the Lynch and Bourne theory, and their actual approach


My typology of constitutional arguments is not a complete list, nor a list of wholly discrete items, nor the only plausible division of constitutional arguments. The various arguments illustrated often work in combination. Some examples fit under one heading as well as another. . . . A different typology might surely be devised through some sort of recombination of these basic approaches, and there can be no ultimate list because new approaches will be developed through time.

Bobbitt, supra, at 8. The question of how the constitutional arguments fit together or weigh against each other is considered in Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189 (1987).
to determining how the jury right should be interpreted after the merger of Law and Equity.

II. USUAL WAYS OF INTERPRETING THE CONSTITUTION

As stated above, a constitution is ordinarily interpreted by considering its nature, text, history, structure, doctrine, prudential concerns, and ethical matters.

A. Nature

Paradoxically, the Maryland Constitution is both "written" and "living." It is at the same time unchangeable other than by amendment, and adaptable to new circumstances.

1. Written Constitution

By its nature, a written constitution is specific, enacted, enforceable and supreme. The early Maryland case of Whittington v. Polk, which established the power of judicial review, described these qualities. A written constitution is specific—it has prescribed limitations and restrictions. It is enacted—it is a compact of the people through an elected convention. A written constitution is enforceable—it is law to be applied by courts. A written constitution is supreme—it prevails when in conflict with other law, such as acts of the legislature.

A good example of the concept of a written constitution comes

17. 1 H. & J. 236 (Md. 1802).
18. See id at 242.
19. See id.
20. See id. at 244; Brawner v. Curran, 141 Md. 586, 602-04, 119 A. 250, 255 (1922); see also Md. Const. art. I, § 9 (requiring oath of office to support the constitution and laws of Maryland); Md. Const., DECL. OF RIGHTS art. 8 (separation of powers); id. art. XIV (providing amendment of Md. Const. only by the people); id., DECL. OF RIGHTS art. 5 (Reception Provision, declaring what law is in force and directing the judiciary as to what law is to apply, including the Md. Const.); id. art. IV, § 2 (providing judges selected from those admitted to practice law in the state, and distinguished, among other things, for sound legal knowledge); Whittington, 1 H. & J. at 243 (noting powers of making, judging, and executing law are separate and distinct).
from outside the jury trial arena. In *Brawner v. Curran*, the Court of Appeals of Maryland sustained a challenge to the Soldiers' Bonus Act of 1922. Because its validity was conditioned upon the approval of a majority of the qualified voters of the state, the court held that the Act violated the Maryland Constitution's provisions that endowed the legislature with the power of making laws and the governor with the veto power. Thus, the legislature may not itself amend the written Maryland Constitution by adding a referendum provision.

2. Living Constitution

The nature of a living constitution is probably best stated by the idea that the Maryland Constitution is to be interpreted by "the spirit . . . , and not by the letter." Stated another way:

While the principles of the Constitution are unchangeable, in interpreting the language by which they are expressed, it will be given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee.

Again, a good illustration of the nature of the living constitution comes from outside the jury trial arena. In *Norris v. Mayor of Baltimore*, the court of appeals held that a clause in the Maryland Constitution, which provides that "[a]ll elections shall be by ballot" permits voting by voting machine. The court reasoned that this method of voting comported with the constitutional meaning of

23. See *Brawner*, 141 Md. at 593-604, 119 A. 250-51 (1922). The proposed referendum was neither attached to a purely local bill, which has been permitted in Maryland, nor petitioned by a percentage of the voters pursuant to the referendum amendment. See generally Md. Const. art. XVI. The nature of the written constitution was underscored by a later amendment to the Maryland Constitution, adopted in 1924, which permitted the legislature to pass a Soldiers' Bonus Act and make it subject to a statewide referendum of the people. See Md. Const. art. III, § 34. See generally Carl N. Everstine, *The Legislative Process in Maryland*, 10 Md. L. Rev. 91, 138-54 (1949).
24. See Md. Const. art. III.
25. See id. art. II, § 17.
27. *Id.*
elections by "ballot"—an accurate and secret means of voting.\textsuperscript{30} Thus, courts may give the Maryland Constitution life by applying it to new circumstances.

These principles are equally applicable to the right to jury trial. As part of the written constitution, the jury right must be recognized by the legislature and by judges. However, the interpretation of a living constitution requires the adaptation of the jury right to new circumstances, such as the merger of Law and Equity.

\textbf{B. Text}

The right to jury trial in civil cases appears in a number of places in the Maryland Constitution—the Reception Provision, the Principal Provision, and other provisions. The text of the Maryland Constitution is also noteworthy for its omissions.

1. The Original Provision: Article 5 (Reception Provision)

The original provision is the Reception Provision, now Article 5 of the \textit{Maryland Declaration of Rights}.\textsuperscript{31} It dates back to 1776.\textsuperscript{32} That Reception Provision receives as the law of the new state of Maryland, the common law of England (including trial by jury), certain English statutes, and certain acts of the provincial legislative Assembly. While its meaning is not absolutely clear, the text of the Reception Provision may establish whether jury trial is a right, what law supplies the jury right, as of when (if at any particular time) that law is adopted, and whether that law may be modified by the legislative or judicial branches.

The Reception Provision seemingly provides a \textit{right} to trial by jury. First, because the provision makes express reference to the jury trial—a traditional common-law "right,"\textsuperscript{33} it cannot be argued that the provision merely recognizes the jury trial as one of the laws to be in force after independence, such as the common law, English statutes, and acts of the Assembly.\textsuperscript{34} Second, although the provision's text uses the term "entitled" as opposed to "right," the provision itself is contained in the \textit{Maryland Declaration of Rights}. Furthermore, elsewhere in the same document the two terms are used

\begin{itemize}
\item \textsuperscript{30} See Norris, 172 Md. at 673-81, 192 A.2d at 534-37.
\item \textsuperscript{31} See Md. Const., Decl. of Rights art. 5.
\item \textsuperscript{32} See Md. Const. of 1776, Decl. of Rights art. III.
\item \textsuperscript{33} See infra notes 97-100 and accompanying text.
\item \textsuperscript{34} Cf. Md. Const. of 1776, Decl. of Rights art. XLI (stating resolutions of colonial conventions also in force as laws).
\end{itemize}
The law supplying the jury trial right is the common law of England. The Reception Provision provides that "the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law . . . ." It is not clear when, if at any particular time, Maryland adopted the English common-law jury right. Because of the order, punctuation, and language of the Reception Provision, the date of reference, July 4, 1776, appears to apply only to the reception of English statutes, not to the reception of English common law and trial by jury.

Regardless of the date of reference, the Reception Provision arguably leaves the jury right subject to modification by the legislature. A proviso expressly makes certain laws "subject, nevertheless,

35. See id. art. III (providing that inhabitants of Maryland are "entitled" to property derived from grants under the original Maryland charter); see also id. art. XXXIII (providing that Christians are "entitled" to protection in their religious liberty and that clergy of the church of England are "entitled" to support for a time).

Later, in the debates on the Md. Const. of 1851, the Reception Provision trial by jury was characterized as a constitutional right "considered so conclusive and imperative that it had even been doubted whether even by consent of parties, a trial of facts could be submitted to the court." 2 1851 Debates, supra note 9 at 767.

36. But cf: infra notes 609-10 and accompanying text (Maryland common law); infra notes 612-613 (idealized common law).

37. Md. Const., Decl. of Rights art. 5.

38. See id. The date of reference follows immediately after "the English statutes" without commas in later Maryland Constitutions. See id.; Md. Const. of 1864, Decl. of Rights art. 4; Md. Const. of 1851, Decl. of Rights art. 3. But cf. Md. Const. of 1776, Decl. of Rights art. III.

39. The earliest Md. Const. received English laws that "existed at the time of [the inhabitants of Maryland] first emigration" and "such others as have been since made in England." Md. Const. of 1776, Decl. of Rights art. III (emphasis added). The making of law applies better to statutes than common law or the trial by jury. Further, the Reception Provision refers to English laws that "have been introduced, used and practiced by the Courts of Law or Equity." Id. The use of "laws" in "Courts of Law or Equity" applies better to statutes than common law or the trial by jury, both traditionally applicable only to courts of Law.

40. That was the understanding of the Reception Provision held by the propo­nent of the principal provision for the jury right adopted in 1851. See supra note 9 and accompanying text. In contrast, other provisions of the Md. Const. of 1776 expressly made rights subject to legislative revision. See, e.g., Md. Const. of 1776, Decl. of Rights art. XX (privilege against self-incrimination); id. art. XXVIII (prohibition against quartering of soldiers in wartime);
to the revision of, and amendment or repeal by, the Legislature of this State.”41 The proviso immediately follows the reception of acts of the Assembly. However, because of punctuation42 and logic,43 the proviso appears to relate both to English statutes and English common law, perhaps including the jury right as well.

Arguably, the Reception Provision also leaves the jury right subject to modification by the judiciary. Maryland did not receive all existing laws, but only those “which, by experience, have been found applicable to their local and other circumstances.”44 Further, the common law which supplied the jury trial right is by definition shaped by judges.45 Thus, while the Reception Provision did provide a jury right, it may have been one subject to modification by the legislature and the judiciary.

2. The Principal Provision: Article 23

The principal provision in the Maryland Constitution for the right to jury trial in civil cases is Article 23 of the Maryland Declaration of Rights.46 Article 23 dates back to the Maryland Constitution of 1851,47 and its meaning is clearer than that of the Reception Provision.

Article 23 expressly recognizes the “right” to trial by jury48 and

id. art. XXXVII (rights, privileges, and benefits of the City of Annapolis).
41. MD. CONST., DECL. OF RIGHTS art. 5 (Reception Provision).
42. See id. The proviso includes punctuation setting it apart from the immediately preceding phrase, “Acts of Assembly,” causing the proviso to modify the “Common Law of England” and “English statutes” as well. See id. (semicolon). But see MD. CONST. of 1864, DECL. OF RIGHTS art. 4 (commas); MD. CONST. of 1851, DECL. OF RIGHTS art. 3 (commas).
43. If the whole of English common law may be changed by statute, so may the part of English common law governing trial by jury. But cf. MD. CONST. of 1776, DECL. OF RIGHTS art. XLII (stating that provisions of the MD. CONST., DECL. OF RIGHTS ought not be changed by the legislature, except as the Convention prescribes); MD. CONST. of 1776 art. LIX (permitting amendment of MD. CONST., DECL. OF RIGHTS by acts of two successive legislatures).
44. But cf. MD. CONST., DECL. OF RIGHTS art. 5. This phrase may only relate to “English statutes,” not to the “Common Law of England” and “trial by Jury.”
45. But cf. infra notes 97-99 and accompanying text (noting jury right is based on the Magna Carta and the Bill of Rights, as well as common law molded by judges). See generally infra note 612 and accompanying text (noting that theoretically, common law is “found,” not “made” by judges).
46. See supra note 8 and accompanying text (quoting MD. CONST., DECL. OF RIGHTS art. 23).
47. See MD. CONST. of 1851 art. X, § 4.
48. Presumably, the right to trial by jury is a “civil right,” conferred by positive
is contained in the *Maryland Declaration of Rights*.\textsuperscript{49} The Article also provides for the jury right in courts of Law, as distinguished from courts of Equity,\textsuperscript{50} also known as courts of chancery.\textsuperscript{51} Article 23 also demands recognition of the jury right; it uses the mandatory term “shall,” instead of a directory term such as “should,”\textsuperscript{52} or a permissive term such as “may.” Moreover, unlike the Reception Provision, Article 23 contains no terms tending to subject the jury right to legislative or judicial modification.\textsuperscript{53} Indeed, according to the 1851 convention debate, the purpose of the provision was to safeguard the jury right from legislative change or repeal.\textsuperscript{54}

That Article 23 “preserves” the jury right raises two questions. First, why is the right not “granted” or “established”? The answer is that the jury trial was already a right in the colony under English law\textsuperscript{55} and in the state under the Reception Provision.\textsuperscript{56} Article 23 simply continued, or “preserved” that right.


\textsuperscript{49} An amendment transferred the right from the body of the Md. Const. to the Md. Const., Decl. of Rights. See 1977 Md. Laws ch. 681; \textit{cf.} Md. Const. of 1867 art. XV, § 6 (“Miscellaneous” article); Md. Const. of 1864 art. XII, § 5 (“Schedule” article); Md. Const. of 1851 art. X, § 4 (“Miscellaneous” article).

\textsuperscript{50} See Md. Const. of 1851 art. IV, § 11; \textit{see also id.} art. IV, §§ 15, 28.

\textsuperscript{51} \textit{See id.} art. IV, §§ 8, 23.

\textsuperscript{52} The distinction, useful in interpreting statutes, has been criticized in interpreting constitutions. \textit{See 1} Thomas M. Cooley, Constitutional Limitations 159 (8th ed. 1927).

\textsuperscript{53} \textit{Cf.} Md. Const. of 1851, Decl. of Rights arts. 20 (providing privilege against self-incrimination exists except with regard to past court practice or future legislative direction); \textit{id.} art. 28 (discussing wartime quartering of soldiers in houses, without the consent of the owners, only as the legislature directs); \textit{id.} art. 37 (discussing Annapolis’s existing rights, privileges, and benefits subject to legislative alteration).

\textsuperscript{54} \textit{See supra} note 9 and accompanying text.

\textsuperscript{55} \textit{See Maryland Act for the Liberties of the People} (1639), \textit{reprinted in} 1 Archives of Maryland 41 (1883). \textit{See generally} Cooley, \textit{supra} note 52, at 865.

\textsuperscript{56} \textit{See supra} notes 33-35 and accompanying text.

\textsuperscript{57} Albert Constable, the proponent of the jury right provision in the 1851 convention, implied that the provision would be a “guaranty” for trial by jury in civil cases. \textit{See 2} 1851 Debates, \textit{supra} note 9, at 766.

\textsuperscript{58} Constable viewed trial by jury as “the great safeguard and bulwark of security
mean static—synonymous with terms like "conserve," "defend," "keep," "maintain," "save," and "retain"? While the same ambiguous term exists in the free press provision of the Maryland Constitution of 1851, the term takes on a dynamic meaning in other provisions of that constitution. This ambiguity in the term "preserve" is apparent in dictionaries of that period and today.

Finally, Article 23 provides that the jury right shall be inviolably preserved. The early constitutions of other states suggest that the inviolable nature of the jury right might relate to its historically "sa-
cred" character, its protection "forever," or its exemption from legislative change. Therefore, by keeping the jury right provision free from legislative or judicial modification, Article 23 established the jury right on a surer basis than did the Reception Provision.

3. Other Provisions

Two other provisions in the Maryland Constitution protect the right to jury trial in civil cases, and specific provisions of the constitution guarantee the jury right in eminent domain cases.

First, the Due Process Clause of the Maryland Declaration of Rights provides that no person shall be "deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." The phrase "judgment of his peers" has been understood to mean trial by jury. That phrase may even suggest a requirement that the jury be drawn from a cross-section of the community.

Second, Article 20 of the Maryland Declaration of Rights provides that "the trial of facts, where they arise, is one of the greatest securities of the lives, liberties and estate of the People." This provision may rather indefinitely establish a right of local venue for jury and

65. See N.C. Const. of 1776, Decl. of Rights art. XVI; Pa. Const. of 1776, Decl. of Rights art. XI; Va. Const. of 1776, Decl. of Rights art. 11.
66. See N.J. Const. of 1776 art. XXII.
67. See N.H. Const., Bill of Rights of 1784, art. XX.
68. Cf. Md. Const., Decl. of Rights art. 21 (right to speedy trial by an impartial jury in criminal cases); id. art. 23 (right to jury trial of law as well as fact in criminal cases).
70. Md. Const., Decl. of Rights art. 24.
73. Md. Const., Decl. of Rights art. 20.
74. The Court of Appeals of Maryland has held that the common-law rule requiring cases of a criminal nature to be tried in the county where the offense was committed is not required by the Md. Const. However, the com-
other trials.\textsuperscript{75} Indeed, one early commentator equated “trial of the fact in the neighborhood” with “jury trial of the vicinage” in original state constitutions.\textsuperscript{76} Thus, these two additional constitutional provisions support the jury right in Maryland: one provision requiring a trial by peers, a second providing for local venue.

4. Omissions

Omissions from the Maryland Constitution are noteworthy. The text of the constitution includes neither a requirement of separate courts of Law and Equity, nor a square right to trial by judge.

There is no explicit constitutional requirement of separate courts of Law and Equity. There are references to separate courts of Law and Equity in the Maryland Constitution in the Reception Provision\textsuperscript{77} and the principal jury trial guarantee.\textsuperscript{78} However, those references appear to assume, rather than mandate the separation. Separate courts of Equity (the court of chancery\textsuperscript{79} and the Circuit Court of Baltimore City)\textsuperscript{80} have been abolished, and their jurisdictions reassigned by the Maryland Constitution. The constitution grants the legislature certain power over the courts: the Reception Provision makes English common law and statutes subject to legislative revision,\textsuperscript{81} the “necessary and proper” clause provides for legislative law-making for any department,\textsuperscript{82} and a third provision authorizes the legislature to prescribe circuit court jurisdiction.\textsuperscript{83} The Maryland Constitution also grants power to the court of appeals to

\textsuperscript{75} Cf. Del. Const. of 1776, Decl. of Rights § 13 (“[T]rial by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people.”)

\textsuperscript{76} Letter IV of Letters from the “Federal Farmer” to “The Republican” (Oct. 12, 1787), reprinted in 1 The Debate on the Constitution 279 (Bernard Bailyn ed., 1993).

\textsuperscript{77} See Md. Const., Decl. of Rights art. 5.

\textsuperscript{78} See Md. Const., Decl. of Rights art. 23; see also Md. Const. art. IV, § 1(A) (permitting continuation of existing courts “at Law and in Equity”); id. at § 8(c) (allowing removal of “suits or actions at law”).

\textsuperscript{79} See Md. Const. of 1851 art. IV, §§ 8, 23.

\textsuperscript{80} See 1980 Md. Laws ch. 523 (amending Md. Const. art. IV, § 20(a), and repealing Md. Const. art. IV, § 29).

\textsuperscript{81} See Md. Const., Decl. of Rights art. 5.

\textsuperscript{82} See Md. Const. art. III, § 56.

\textsuperscript{83} See Md. Const. art. IV, § 20.
make rules regarding practice and procedure for all the courts. Legislative and judicial modifications of the respective jurisdictions of Law and Equity, when not infringing on the right to jury trial, have apparently withstood constitutional scrutiny.

There is no explicit constitutional right to trial by judge in the same way that other provisions recognize the right to trial by jury. Section 8(a) of Article IV of the Maryland Constitution does provide that “[t]he parties to any cause may submit the cause to the court for determination without the aid of a jury.” However, that provision does not establish a right to trial by judge for five reasons.

First, the provision does not contain the term “right.” Second, section 8(a) provides that the parties “may” submit their case to the court, a term that suggests discretion, not right. Third, the submission of a case to a judge for determination requires the consent of “[t]he parties,” which is not typical of a “right.” Fourth, it may

84. See Md. Const. art. IV, § 18; see also Md. Code Ann., Cts. & Jud. Proc. § 1-201(a) (1995) (providing that the rule-making power of the court of appeals is to be liberally construed to include “unification of practice and procedure in actions at law and suits in equity”).


86. Cf. Maryland Community Developers, Inc. v. State Roads Comm’n, 261 Md. 205, 213-14, 274 A.2d 641, 646 (1971) (stating that there is no right to trial by judge in the Md. Const.); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959) (holding that there is no constitutional right to trial by judge in federal courts). See generally Note, The Right to a Nonjury Trial, 74 Harv. L. Rev. 1176 (1961). But cf. Luppino v. Gray, 336 Md. 194, 209-10, 647 A.2d 429, 437 (1994) (holding that, under Md. Const., there is a constitutional right to trial by judge for all consenting parties to a case, not any one party). See also Hyman Ginsberg, Equity Jurisprudence & Procedure in Maryland 290 (1928) (“The right to have an equity suit dealt with by equitable methods is as sacred as the right to a trial by jury at law. . . .”). Ginsberg cited no authority for his proposition. Ginsberg’s precursor cites only a case from Michigan. See Charles Edward Phelps, Juridical Equity 170 n.4 (1894).

87. Md. Const. art. IV, § 8(a).

88. See Md. Const. art. IV, § 8(a); cf. Md. Const. art. IV, § 8(b)(c) (providing for “right” of removal to have a fair trial).

89. The convention debate on the provision which is now Md. Const. art. IV, § 8(a), includes reference to the “privilege” or “option” of the parties. See 2 Debates of the Constitutional Convention 1395 (1864) [hereinafter 1864 Debates]; see also Desche v. Gies, 56 Md. 135, 137 (1881) (referring to the provision for consent or agreement to trial by judge).

90. See 2 1864 Debates, supra note 89, at 1395; Desche, 56 Md. at 137. A waiver of the right to trial by jury does not constitute consent to trial by judge. See Luppino, 336 Md. at 210, 647 A.2d at 437.
well be that a judge has discretion in deciding whether or not to
determine a case once submitted by the parties because there is no
language in Section 8(a) directing the judge do so.\textsuperscript{92} The 1864 con-
vention debate on Section 8(a) notes that judges may want juries,
not themselves, to hear serious criminal cases, or cases where the
facts are complicated.\textsuperscript{93} Fifth, the discretionary power a court of Eq-
uity had before 1961\textsuperscript{94} to refer disputed issues of fact to a court of
Law for an advisory jury verdict\textsuperscript{95} apparently withstood constitutional
challenge. Thus, the text of the Maryland Constitution provides
comprehensive protection for the right to jury trial in civil cases.

The Maryland Constitution's provisions protecting the jury
right are interrelated.\textsuperscript{96} Each provision identifies the source of the
right as the common law of England. Each describes the issues to
be tried by jury—issues of fact, not law, and issues in courts of Law,
not Equity. The provisions perhaps even describe the jury and place
of trial—a cross section of the local community in a local venue.
Each provision inviolably preserves the right by putting it beyond
the reach of the legislature. Finally, the Maryland Constitution con-
tains no provisions, such as for separate courts of Law and Equity or
for a right to trial by judge, which might detract from the jury
right.

C. \textit{History}

The history of the civil jury trial right in England and in Mary-
land, including the circumstances surrounding the adoption of the
original and the principal jury trial provisions, shows a tradition
protective of the right. A brief sketch follows.

91. Thus, if one party claimed a right to trial by jury and another claimed a
right to trial by judge, the jury right would prevail. \textit{See} Lanahan v. Heaver, 77.
Md. 605, 26 A. 866 (1893).

92. \textit{Cf.} Md. \textit{Const.} art. IV, § 8(b)-(c) (stating that the court "shall" order the
case transmitted to another court for trial if removal for a fair trial is prop-
erly demanded); Md. \textit{Rule} 12-207 (stating that the court "shall" determine
the matter so submitted without a jury in eminent domain cases after an
election of all the parties for court determination without a jury).

93. \textit{See} 2 1864 \textit{Debates, supra} note 89, at 1394-95.

94. This ancient, seldom-used practice was abolished by court rule. \textit{See} Md. \textit{Rule}


96. \textit{But cf.} Alfred S. Niles, \textit{Maryland Constitutional Law} 343 (1915) (arguing
either the principal provision, on one hand, or the Reception Provision and
the Due Process Clause, on the other hand, are surplusage).
1. English History

In England, the history of the jury trial right began in 1215 with the Magna Carta. In Chapter 39, the Due Process Clause of the Magna Carta granted a "judgment of . . . peers."97 The Petition of Right in 1628 restated that grant,98 and the Bill of Rights in 1689 more plainly provided for jury trial.99 Blackstone praised the jury trial as the "principal bulwark of our liberties," "the glory of the English law," and "the best criterion, for investigating the truth of facts, that was ever established in any country."100

The English Parliament has subsequently restricted the right of civil jury trial to certain specified situations, such as fraud, defamation, malicious prosecution, and false imprisonment.101 However, the Court of Appeals of Maryland has noted that acts of Parliament are not limited by a written constitution, as are acts of the Maryland legislature.102

2. Colonial Maryland History

In colonial Maryland, Article X of the Maryland Charter of 1632 granted colonists all the rights of English citizens, including the right to jury trial.103 In 1639, the Maryland Act for the Liberties of the People restated and reinforced that general grant.104

3. History of the Original Jury Right Provision

The circumstances surrounding the original jury right provision began with a protest and ended with a new Maryland Constitution. A convention of delegates from the counties of Maryland adopted the Declaration of July 6, 1776, charging that the legislative and executive powers of England, among other abuses, had deprived the

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97. 1 SCHWARTZ, supra note 72, at 12. But cf. POLLOCK & MAITLAND, supra note 71, at 173 (stating original meaning was trial by men of equal or greater rank, not trial by jury).
98. See 1 SCHWARTZ, supra note 72, at 20.
99. See id. at 43.
100. 3 WILLIAM BLACKSTONE, COMMENTARIES ** 350, 379, 385.
101. See Supreme Court Act, 1981, ch. 54, § 69(1) (Eng.) (providing that the court of general jurisdiction is the Queen's Bench Division of the High Court of Justice); County Courts Act, 1959, 7 & 8 Eliz. 2, ch. 22, § 94(3) (Eng.) (providing that the courts of limited jurisdiction are the county courts).
102. See McCoy v. Johnson, 70 Md. 490, 17 A. 387 (Md. 1889).
103. See WILLIAM KILTY, THE LAWS OF MARYLAND (1799).
104. See 1 ARCHIVES OF MARYLAND 41 (1883).
colonists in many cases of their right to trial by jury.\textsuperscript{105} Of course, the protest resembled that then being made in the colonies generally.\textsuperscript{106} A similar convention later adopted the \textit{Maryland Declaration of Rights} and Maryland Constitution in November of 1776. The \textit{Maryland Declaration of Rights} included a Reception Provision accepting the jury trial as part of the common law of England,\textsuperscript{107} and a Due Process Clause providing for a "judgment of . . . peers."\textsuperscript{108} On May 25, 1776, even before the declaration, the convention had established a court of admiralty with a right to trial by jury.\textsuperscript{109} This court was recognized in the Maryland Constitution of 1776,\textsuperscript{110} and heard prize cases during the Revolutionary War.\textsuperscript{111} However, the Maryland Constitution also authorized a chancellor and a court of chancery (without a jury) for the administration of equity.\textsuperscript{112}

4. History of the Principal Jury Right Provision

The circumstances of the principal jury right provision were reformatory in nature. The proponent of that right in the 1851 convention, Albert Constable, specifically wanted to put the jury right

\textsuperscript{105} See \textit{Proceedings of the Convention of the Province of Maryland in 1774, 1775, & 1776}, at 201 (1836) [hereinafter 1774 \textit{Proceedings}]. The cases were actions for penalties and forfeitures for violations of various trade and revenue acts. In England, those actions were heard in common-law courts. However, in America the actions might be brought either in common-law courts or in admiralty courts. If brought in admiralty courts, there was no jury trial, and perhaps no local venue. See \textit{Julius Goebel Jr., Antecedents and Beginnings to 1801}, at 85-88 (IC The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, 1971).

\textsuperscript{106} See \textit{Declaration of Rights and Grievances, 1765}, in \textit{Schwartz, supra} note 72, at 196, 197 (stating that extension of the jurisdiction of the Court of Admiralty deprived the colonists of their right to jury trial); see also \textit{The Rights of the Colonists and a List of Infringements and Violations of Rights, 1772}, in \textit{Schwartz, supra} note 72, at 200, 209; \textit{The Declaration of Independence} para. 19 (U.S. 1776).

\textsuperscript{107} See \textit{Md. Const.} of 1776, \textit{Decl. of Rights} art. 3.

\textsuperscript{108} \textit{Md. Const.} of 1776, \textit{Decl. of Rights} art. 21. See \textit{supra} notes 70-72 and accompanying text for a discussion of the current provision.

\textsuperscript{109} See 1774 \textit{Proceedings, supra} note 105, at 155.

\textsuperscript{110} See \textit{Md. Const.} of 1776 art. LVI.


\textsuperscript{112} See \textit{Md. Const.} of 1776 arts. 40, 48, 56; \textit{cf. The Federalist No. 83, 546-47} (Alexander Hamilton) (Modern Library 1937) (providing that eight of the other 13 states had no courts of chancery after the American Revolution).
beyond the reach of the legislature and, generally, to extend democratic limitations on the power of government.

Under the Maryland Constitution of 1776, the legislature had a double check on the jury trial right. Under the Reception Provision, the jury right, as part of the common law of England, was arguably subject to amendment or repeal by the legislature. Also, the legislature, by acts of two successive sessions, could amend the constitution. The Maryland Constitution of 1851 removed both of those checks. First, it included the new principal jury right which, according to the convention debate, was not subject to legislative change. Second, the new Maryland Constitution provided for constitutional amendment only by the action of a convention of the people.

Other provisions of the Maryland Constitution of 1851 indicate concern with the legislature encroaching on the right to jury trial. Those other provisions guaranteed the right to jury trial in eminent domain cases and on appeals to the circuit courts from the judgments of justices of the peace.

The intent of the framers of the principal jury right was generally to increase democratic limitations on the powers of govern-

113. See supra note 7 for the current provision.
114. See supra notes 37, 39-40, 43 and accompanying text.
115. See Md. Const. of 1776 art. LIX.
116. See Md. Const. of 1851 art. X, § 4. See supra note 8 for the current provision.
117. See supra note 9 for the legislative history. See also supra notes 48, 52-54 and accompanying text.
118. See Md. Const. of 1851 art. XI.
119. See id. art. III, § 46.
120. See id. art. IV, § 19. But see id. art. III, § 25. (continuing the legislative power of contempt unchecked by jury trial); cf. Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 705-07 (1973) (noting civil jury trial was generally considered to be a check on legislative excesses in taxation).
121. Here, the term “democratic” is used in the sense of limiting the power of government in favor of the rights of individuals. The jury may also be democratic in three other respects: (1) it permits popular participation in the administration of justice; (2) it permits determination by a group representing the community, rather than determination by a single judge; and (3) it permits nullification of law in order to do justice in a particular case. See Harry Kalven, Jr. & Hans Zeisel, The American Jury 5, 7-9 (1966).

In other ways, of course, the right to jury trial is not democratic. First, individual rights may limit the exercise of power by the legislature, the most democratic branch of government and one that may best reflect the will of a majority of the people. Second, individual rights may require enforcement
ment. That was the general intent of Constable, his political party, and a majority of the convention. Constable was a member of the Democratic Party,\textsuperscript{122} the "reform" party at the convention.\textsuperscript{123} He proposed limits on the taxing, spending, and borrowing powers of the legislature.\textsuperscript{124} The convention adopted other popular reforms: reapportionment of the legislature; limitations on legislative power to contract debts and create corporations by special act, popular election of judges and local officials; and the right of the people to amend the Constitution by convention.\textsuperscript{125}

5. Subsequent History of the Jury Right in Maryland

The subsequent history of the jury right in Maryland has also been protective of the right. The original and principal jury rights were restated in the 1864\textsuperscript{126} and 1867 Maryland Constitutions.\textsuperscript{127} The principal jury right was restated in a 1970 amendment that increased the amount in controversy requirement from $5 to $500,\textsuperscript{128} in a 1973 amendment that transferred the guarantee from the body of the Maryland Constitution to Article 23 of the Maryland Declaration of Rights,\textsuperscript{129} and in a 1992 amendment that increased the amount in controversy from $500 to $5,000.\textsuperscript{130} The original jury right was also restated in a 1992 amendment providing for juries of at least six persons and allowing for juries of fewer than twelve.\textsuperscript{131}

\begin{itemize}
\item by the judiciary, the least democratic branch of government, based on its professional tradition, its initial appointment by the executive, and its election for long terms (ten or fifteen years). See Md. Const. art. IV, §§ 3, 5, 5A(b)-(d), 41D.
\item See James Warner Harry, The Maryland Constitution of 1851 at 15, 24, 25, 28 (1902).
\item See 1 1851 Debates, supra note 9, at 395.
\item See Md. Const. of 1851 art. III, §§ 3, 22, 47; id. art. IV, §§ 4, 8-9, 12-13, 17-20; id. art. V, § 1; id. art. XI; id., Decl. of Rights art. 1. See generally Harry, supra note 123; Fletcher Melvin Green, Constitutional Development in the South Atlantic States, 1776-1860 at 272-87 (1930).
\item See Md. Const. of 1864, Decl. of Rights art. 4; id. art. XII, § 5.
\item See Md. Const. of 1867, Decl. of Rights art. 5; id. art. XV, § 6.
\item See 1969 Md. Laws ch. 789.
\item See 1977 Md. Laws ch. 681.
\item See 1992 Md. Laws, chs. 205, 206.
\item See id. chs. 203, 204. Of course, the decrease in the number of jurors, from the traditional twelve to as few as six, and the increase in the amount in controversy requirement from $5 to $500 and then $5,000, can be seen not only as not protective of the jury right, but as reducing its importance. It
\end{itemize}
Two rejected constitutional proposals underscore a tradition protective of the jury trial right. After ratifying the United States Constitution, the Maryland Convention of 1788 appointed a committee to draft amendments to the proposed Maryland Constitution. The committee proposed certain amendments, including a right to jury trial in civil cases. When a minority of the committee insisted on presenting to the convention other proposals rejected by a majority of the committee, the majority decided to report no amendments to the convention. 132

The Maryland Constitutional Convention of 1967-68 proposed a constitution that would have included a right to jury trial in civil cases. The right would have been similar to a provision drafted by the Constitutional Convention Commission, which commented that the right “is firmly rooted in the Maryland tradition.” 133

Of course, the more recent reaffirmations of the right to civil jury trial came in the face of criticisms of the civil jury in general, 134 and in Maryland in particular. 135

Thus, the history of the civil jury right in England and in America, and the circumstances surrounding the adoption of the original and the principal jury trial provisions, evidence a tradition protective of the right.

D. Structure

“If men were angels, no government would be necessary.” 136 Men are not angels, thus government is necessary. In order to promote liberty and avoid tyranny, 137 the government must be structured in a way to make it subject to external and internal controls. The external controls are the powers retained by the people—a further security being the multiplicity of interests the people have. 138 The internal controls include federalism (the division of powers be-

also is outside the scope of the present inquiry, which is, in what situations does the jury right apply? Cf. Colgrove v. Battin, 413 U.S. 149, 157 (1973) (stating that the size of the jury is incidental, not essential to the right to jury trial under the Seventh Amendment).

132. See 2 SCHWARTZ, supra note 72, at 729, 732.
133. REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION 105 (1967).
134. See KALVEN & ZEISEL, supra note 121, at 4 n.2, 9 n.9, for a collection of authorities.
135. See GEORGE KENNETH REIBLICH, A STUDY OF JUDICIAL ADMINISTRATION IN THE STATE OF MARYLAND 79-80, 84, 137-38 (1929).
137. See id. No. 47, at 312-13 (James Madison).
between state and national governments) and the separation of powers among the legislature (further divided into two different houses), the executive, and the judiciary\(^{139}\) (further divided into trial and appellate courts).\(^{140}\) Regarding external controls, some powers are retained by the people.\(^{141}\) Regarding internal controls, governmental powers are divided between the United States and the State of Maryland.\(^{142}\)

The legislative, executive, and judicial powers of state government are expressly separated,\(^{143}\) although each branch has checks on the others. For example, the executive may veto bills passed by the legislature\(^{144}\) and fill vacant judicial offices.\(^{145}\) The legislature may impeach executive or judicial officers.\(^{146}\) The judiciary may hold the acts of the executive\(^{147}\) and legislative\(^{148}\) branches to be unconstitutional and void.

The jury trial is another check against the legislative,\(^{149}\) executive\(^{150}\) and judicial\(^{151}\) branches.\(^{152}\) The jury trial illustrates many of the structures established by the Maryland Constitution to promote

\(^{139}\) See id. at 337-39.

\(^{140}\) See id. No. 81, at 522-33 (Alexander Hamilton).

\(^{141}\) See Md. Const., Decl. of Rights arts. 3-4; see also id. art. I (elective franchise); id. art. XIV (providing for amendments to the constitution); id. art. XVI (the referendum); cf. id., Decl. of Rights art. 45 (retained rights).

\(^{142}\) See Md. Const., Decl. of Rights arts. 2-3.

\(^{143}\) See id. art. 8; see also id. art. II (executive); id. art. III (legislative); id. art. IV (judiciary).

\(^{144}\) See id. art. II, § 17.

\(^{145}\) See id. § 10; id. art. IV, §§ 5, 5A.

\(^{146}\) See id. art. III, § 26.

\(^{147}\) See Watkins v. Watkins, 2 Md. 341 (1852).


\(^{149}\) See The Federalist No. 29, at 177 (Alexander Hamilton) (Modern Library 1937) (power of taxation).

\(^{150}\) See id. No. 83, at 543 (Alexander Hamilton) (barrier to the tyranny of a popular magistrate).

\(^{151}\) See id. No. 65, at 426 (Alexander Hamilton) (noting that the jury stands between the judge who pronounces sentence and the party who receives it); see also id. No. 83, at 545 (Alexander Hamilton) (stating that judge and jury offer double security against corruption). But cf. id. No. 65, at 427 (Alexander Hamilton) (noting that juries are frequently influenced by the opinions of judges and sometimes are asked to find special verdicts, which leave the main questions to the decision of judges).

\(^{152}\) Of course, in addition to these "structures," there are other controls on the government, such as a written constitution, a federal government having only limited powers, and individual rights. See Brant, supra note 16, at 16-22.
liberty and avoid tyranny. The right to jury trial establishes a role for the people in our representative democratic form of government, with its separation of powers. Jury procedures that make exceptions to strict separation of powers between judge and jury provide checks and balances. For example, the judge provides a check on the jury by ruling on the admissibility of evidence, by instructing the jury on the law, and by setting aside erroneous verdicts. The appellate courts provide a further check on the jury by reviewing judgments on jury verdicts. The jury provides a check on the judge by finding facts and by softening the harshness of legal doctrine. Where a judgment may be unpopular with the legislature, the executive, or the people, the jury, by supporting the judge, provides a check on the popular branches of government.

Thus, the right to jury trial is worth preserving as one of the structures of government established to retain powers of the people, and to check the judiciary and other branches of government.

153. See Md. Const., Decl. of Rights arts. 5, 23; see also supra notes 31-76 and accompanying text.
155. One commentator noted that a government enactment must avoid the vetoes of five bodies—lower house, senate, executive, judge, and jury. See Lysander Spooner, An Essay on the Trial by Jury 11 (1852); see also infra notes 376-88 and accompanying text.
157. See Md. Rule 2-513 to 2-517, 2-520, 2-532 to 2-535; see also Md. Rule 2-520(d) (providing that the judge’s power to summarize or comment on the evidence also provides a check on the jury). See generally Charles W. Joiner, Civil Justice and the Jury 19-20, 67-68 (1962).
158. See Md. Const. art. IV, § 14 (Court of Appeals of Maryland); id. § 14A (intermediate courts of appeal).
159. However, reexamination of facts tried by a jury is implicitly limited by the Md. Const. See Board of Shellfish Comm’rs v. Mansfield, 125 Md. 630, 94 A. 207 (1915).
160. See Md. Const., Decl. of Rights art. 23.
161. See infra notes 1043-1103 and accompanying text.
163. See generally Landsman, supra note 162, at 20; see also supra notes 149-50 and accompanying text.
Traditionally, Maryland courts and commentators have been protective of the right to jury trial in civil cases. Before the merger of Law and Equity in Maryland in 1984, however, there were both favorable and unfavorable interpretations in particular situations. Since the merger, Maryland courts have clearly taken a protective approach, following the federal courts. However, Maryland’s approach raises several questions. Exactly what is the protective approach? That is, how is that approach to be applied in particular cases? Is Maryland’s protective approach tied to Seventh Amendment precedent in the federal courts? Why is the protective approach better than alternatives that other courts adopted after the merger of Law and Equity?

1. Traditional Interpretations

Maryland courts have generally endorsed the right to jury trial. In one case, the Court of Appeals of Maryland, citing a Supreme Court opinion, stated that “[t]he trial by jury is justly dear to the American people.”164 The court of appeals has also noted that the constitutional guarantee was a limitation on the legislature’s power to fix the jurisdiction of Law and Equity courts.165

Commentators from Maryland have also generally endorsed the jury right. Professor Alfred S. Niles wrote that “the courts will be careful to preserve the [jury] right and declare any law in substantial violation thereof unconstitutional.”166 Professor Christopher Brown, anticipating the merger of Law and Equity in Maryland, predicted that the right to jury trial, which had been undermined in


165. See Fooks’ Ex’rs v. Ghingher, 177 Md. 612, 625-26, 192 A. 782, 788 (1937), noted in Bourne & Lynch, supra note 5, at 32-33. Fooks’ apparently eroded a contrary precedent. See Capron v. Devries, 83 Md. 220, 34 A. 251 (1896), noted in Lynch & Bourne, supra note 3, at 321; Bourne & Lynch, supra note 5, at 31-32; see also infra notes 792-837 and accompanying text. However, in Capron the court of appeals did note that the statute, which conferred power theretofore exercised by Law courts on courts of Equity, was enacted in 1841, before adoption of Article 23. Article 23 is the principal guarantee of the civil jury trial right in Maryland, and puts the right beyond legislative reach. See generally supra note 8.

166. Niles, supra note 96, at 344. However, Niles wrote that the jury right may be waived, and that the right was not infringed by reasonable conditions or by initial trial without a jury if a jury trial was held on appeal. See id. at 343.
several ways, would be revitalized in a merged system. Lynch and Bourne, while adopting an ambiguous stance regarding the right to jury trial, noted that Maryland courts have traditionally been quite protective of the jury right.

2. Pre-Merger Interpretations

Before the merger of Law and Equity in 1984, Maryland practice was not uniformly protective of the right to jury trial. Legislative and judicial interpretations of the right in particular situations, relevant to the distinction between Law and Equity and their merger, varied. Favorable interpretations, many of which have been noted by Lynch and Bourne, include the following: (1) the occasional conclusion that the legislature may not abridge the right to jury trial by conferring on courts of Equity the jurisdiction to determine legal rights; (2) the equitable prerequisite of no adequate remedy at Law; (3) the transfer from Equity to Law; (4) the transfer from district court to circuit court for jury trial; (5) the injunction as ancillary relief in an action at Law; (6) the conclusiveness of earlier jury factual findings on the judge as to such ancillary injunctive relief; (7) the right to jury trial in certain situations in Equity cases; (8) the right to jury trial in certain special pro-

167. See Brown, supra note 85, at 427.
168. As we have seen, Lynch and Bourne adopt a principled discretionary theory. See supra notes 10-13 and accompanying text. In practice, they use an approximation of pre-merger approach. See supra note 14 and accompanying text.
169. See Lynch & Bourne, supra note 3, at 306; see also Bourne & Lynch, supra note 5, at 29-34.
170. See Fooks' Ex'res v. Ghingher, 177 Md. 612, 192 A. 782 (1937); McCoy v. Johnson, 70 Md. 490, 17 A. 387 (1889).
175. See Beane v. McMullen, 265 Md. 585, 613-14, 291 A.2d 37, 52 (1972).
176. For example, interpleader, see Md. Rule BU73 (1977) (repealed 1984), attachment on an Equity judgment, see Md. Rule F5 (1977) (repealed 1984), appointment without consent of a personal guardian for a disabled person, see Md. Rule R77(b)(1)(a) (repealed 1997), and challenge to commitment after a finding of not guilty to criminal charges by reason of insanity, see Md. Code Ann., Health-Gen. § 12-114(c)(1) to (3) (1982), repealed by 1984 Md. Laws ch. 501, § 1.
ceedings;\textsuperscript{177} and (9) the right to jury trial on appeal from certain special proceedings.\textsuperscript{178}

Unfavorable interpretations before the merger of Law and Equity, many of which have been noted by Lynch and Bourne, include the following: (1) the abolition of the practice of chancellors in Equity referring disputed issues of fact to Law courts for jury trial;\textsuperscript{179} (2) the erosion of the equitable prerequisite of no adequate remedy at Law;\textsuperscript{180} (3) the growth of "clean-up" jurisdiction in Equity;\textsuperscript{181} (4) the denial of jury trial initially, although not on appeal, in administrative agency determinations, workers' compensation decisions, and medical malpractice arbitration awards;\textsuperscript{182} and (5) the denial of jury trial in certain special proceedings.\textsuperscript{183}

3. Post-Merger Interpretations

Since the merger of Law and Equity in 1984, Maryland courts have clearly taken a protective approach to the right to jury trial in civil cases. The seminal case is \textit{Higgins v. Barnes}.\textsuperscript{184} There, Barnes sued Higgins for an equitable remedy: specific performance of a contract. Higgins answered and demanded a jury trial, asserting a counterclaim for legal relief and damages for breach of the same contract. Barnes opposed the jury demand on the ground that the initial claim was equitable and, once equitable jurisdiction attached, the entire case had to be determined by a judge.

The court of appeals upheld Higgins's demand for jury trial. The court held that, where Barnes's claim and Higgins's answer and


\textsuperscript{178} For example, administrative agency determinations, see \textit{Md. Rule B11} (1977) (rescinded 1993); see also \textit{infra} note 1594, workers' compensation decisions, see \textit{Md. Code Ann., Lab. & Empl.} § 9-745(d) (1991), and awards of medical malpractice arbitration panels, see \textit{Md. Code Ann., Cts. & Jud. Proc.} § 3-2A-06(b) (1995).

\textsuperscript{179} \textit{See infra} notes 561-62 and accompanying text.

\textsuperscript{180} \textit{See infra} note 563 and accompanying text.

\textsuperscript{181} \textit{See infra} note 564 and accompanying text.

\textsuperscript{182} \textit{See supra} note 178 and accompanying text.


\textsuperscript{184} 310 Md. 532, 530 A.2d 724 (1987), \textit{noted in Lynch & Bourne, supra} note 3, at 315, 327-37.
The counterclaim contained the common legal issue of breach of contract, Higgins had a right to jury trial of that issue before the judge considered any equitable claims of Barnes for specific performance and reformation.

**Higgins** stands for a number of propositions. First, the historical division between Law and Equity survives in that claims and remedies are still characterized and sorted out for trial by judge or jury. Breach of contract is a legal claim and damages is a legal remedy, both triable by a jury. Specific performance and reformation are equitable remedies, both triable by a judge.

Second, **Higgins** adopts a protective approach to the jury right. "Jury decisions of disputed legal issues are clearly favored ..." Indeed, jury trial of legal issues may be denied only under the "most imperative circumstances."

Third, because the Maryland Constitution protects the right to jury trial, not the right to a bench trial, factual issues common to both legal and equitable claims must be tried first by the jury. Otherwise, an earlier judicial determination would bind and delay a later jury determination.

Fourth, **Higgins** relied on federal precedent—the line of cases beginning with *Beacon Theatres, Inc. v. Westover* as persuasive authority for interpreting the Maryland Constitution’s right to jury trial. The **Higgins** court relied on the federal cases for the following reasons: (1) those cases give primacy to the constitutional jury right; (2) federal courts faced the same situation as Maryland courts of interpreting the jury right after the merger of Law and

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185. See Higgins, 310 Md. at 552, 530 A.2d at 733.
186. See id. at 552, 530 A.2d at 734.
187. Id. at 541, 530 A.2d at 728.
189. See id. at 547, 551 n.12, 530 A.2d at 730, 733 n.12.
190. See id. at 552, 530 A.2d at 733-34. But cf. id. at 545-47, 551 n.12, 530 A.2d at 730-31, 733 n.12 (noting that "most imperative circumstances" may justify judge trial ahead of jury trial of common factual issues).
191. See id. at 545, 530 A.2d at 730.
192. 359 U.S. 500 (1959). But cf. Bourne & Lynch, supra note 5, at 16 (suggesting that because of the *Beacon* court’s distortions of jury right and scope of Equity, Maryland might look to federal cases decided after merger and before *Beacon* for guidance).
193. See Higgins, 310 Md. at 541-51, 530 A.2d at 728-33.
Equity by court rule;\textsuperscript{194} (3) federal interpretations of Federal Rules have traditionally been relied upon by Maryland courts interpreting analogous Maryland Rules\textsuperscript{195} and Maryland Rule 2-301\textsuperscript{196} merging Law and Equity was patterned after Federal Rule 2; and (4) other approaches to the right to jury trial after the merger of Law and Equity failed to safeguard the right.\textsuperscript{197}

4. Current Questions

After Higgins, exactly what is the protective approach? Philosophically, the Higgins court endorsed the federal approach, permitting denial of the constitutional right to jury trial of legal issues only under "the most imperative circumstances."\textsuperscript{198} Practically, the Higgins court also endorsed the federal application of the jury right in a number of situations. There is a right to jury trial of facts in a legal counterclaim for contract damages, or in an answer alleging breach of contract raised in an equitable proceeding for specific performance of the contract. Where facts are common to both the legal counterclaim or defense and the equitable claim, there is a right to have the jury determine those facts first.\textsuperscript{199} The court in Higgins also cited with approval federal cases that "saw through" a party's attempt to characterize legal issues in equitable terms;\textsuperscript{200} federal cases that saved the right to jury trial of facts in a legal claim for damages, although the claim was joined with an equitable claim for injunctive relief;\textsuperscript{201} federal cases that found legal issues triable of right by a jury in an equitable procedural device, such as the shareholders' derivative action;\textsuperscript{202} and federal cases that analogized newly-created actions to those that existed at common law to determine if

\textsuperscript{194} See id. at 543-44, 530 A.2d 729.
\textsuperscript{195} See id. at 543, 530 A.2d at 729.
\textsuperscript{196} See id.
\textsuperscript{197} See id. at 548, 530 A.2d at 732.
\textsuperscript{198} Id. at 544-45 n.5, 546-47, 551, 530 A.2d at 730 n.5, 731, 733.
\textsuperscript{199} See id. at 543-47, 551-52, 530 A.2d at 729-31, 733-34. The court of appeals noted the similarity of Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).
\textsuperscript{200} See Higgins, 310 Md. at 545-46, 551, 530 A.2d at 728, 730, 733 (citing Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962)). In Dairy Queen, the Supreme Court held that a plaintiff's claim for an equitable accounting for breach of contract or for infringement of trademark could be remedied by legal damages.
\textsuperscript{201} See Higgins, 310 Md. at 545-46, 551, 530 A.2d at 728, 730, 733 (citing Dairy Queen, Inc., 369 U.S. at 469).
\textsuperscript{202} See id. at 541, 545-46, 530 A.2d at 728, 730-31 (citing Ross v. Bernhard, 396 U.S. 531 (1970)).
they were triable of right by a jury. In *Higgins*, the Court of Appeals of Maryland also speculated that neither procedural "complexity" nor equitable protection of a plaintiff from irreparable harm was a likely ground for denying a jury trial.

The protective approach, however, will not save the jury right in all Law cases. In *Higgins*, the court of appeals assumed that an earlier determination of fact properly tried by a judge would collaterally estop a later trial of the same issue by a jury. In a later case, the court of appeals assumed that reasonable regulations of the jury right, such as the requirement of a timely demand, do not violate the right.

Maryland cases show that parties themselves can protect their right to jury trial by the way they structure their claims. A plaintiff may assert a claim triable by a jury, such as breach of contract, rather than a claim not triable by a jury, such as breach of trust. A plaintiff may seek a remedy triable by a jury, such as damages or declaratory judgment, rather than a remedy not triable by a jury, such as an injunction. A plaintiff may also join legal and equitable

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204. *See Higgins*, 310 Md. at 547 n.7, 530 A.2d at 731 n.7.

205. *See id.*; *see also* *supra* note 191.

206. *See infra* note 269 and accompanying text.

207. *See Higgins*, 310 Md. at 545, 551-52, 530 A.2d at 730, 733-34. In *Higgins*, the fact issue in one case was common to both legal and equitable claims. Thus, it was reversible error for the judge to hear the trial of fact first. However, if the fact had been subject to separate judge and jury determinations in two different actions, a determination of fact first tried properly by a judge would likely have collaterally estopped a later trial of the same issue by a jury. *Cf.* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (holding that precluding a party from relitigating facts resolved in an equity proceeding by a judge did not violate Seventh Amendment right to jury trial).


210. *See Atman/Glazer P.B. Co.*, 323 Md. at 606-07, 594 A.2d at 145 (dictum); *see also* *Bourne & Lynch*, *supra* note 5, at 33-34, 61, 63-64 (punitive damages may be awarded only at Law, not at Equity). However, a plaintiff's ability to avoid a jury trial by choosing an equitable remedy may be limited because of the equitable prerequisite that there be no adequate remedy at Law, and be-
claims having common issues of fact, which would be triable by a jury.\textsuperscript{211}

Similarly, a defendant may raise issues triable by a jury by way of answer or counterclaim\textsuperscript{212} or, absent res judicata, by way of a separate action.\textsuperscript{213} Of course, in structuring the counterclaim or defense, a defendant may also choose one triable by a jury.\textsuperscript{214}

After \textit{Higgins}, a second question is whether Maryland's protective approach is tied to interpretations of the federal courts. As has been shown,\textsuperscript{215} \textit{Higgins} relied on the \textit{Beacon} line of cases. Some of the reasons for that reliance suggest similar Maryland and federal interpretations: Maryland and federal courts faced the same situation after the merger of Law and Equity; Maryland's merger rule was patterned after the federal merger rule, and Maryland traditionally has relied upon federal interpretations of analogous rules. However, other reasons for the \textit{Higgins} court's reliance on federal cases suggest that Maryland's primary allegiance is not to federal cases, but rather to the Maryland Constitution. Federal cases are persuasive insofar as they give primacy to the constitutional jury right, while other approaches inadequately safeguard the right.

A recent commentator on the Maryland Constitution noted that our constitutional history includes evidence of all three typical approaches to state constitutional development in relation to fed-

\begin{footnotes}
\footnote{See \textit{Dairy Queen v. Wood}, 369 U.S. 469 (1962), \textit{cited in Higgins}, 310 Md. at 546, 530 A.2d at 731.}
\footnote{See \textit{Hashem v. Taheri}, 82 Md. App. 269, 273, 571 A.2d 837, 840 (1990). In \textit{Hashem}, a shareholder joined a legal claim for his own damages with a traditionally equitable derivative suit for an injunction. The court of special appeals held that the issue of whether plaintiff was a shareholder, which was common to both legal and equitable claims, was triable by a jury. \textit{But cf.} \textit{Bourne & Lynch, supra} note 5, at 6 (under \textit{Bourne & Lynch}'s approximation of pre-merger approach, plaintiff could protect the jury right on the legal claim by filing separate suits).}
\footnote{See \textit{Higgins}, 310 Md. at 535 & n.1, 552, 530 A.2d at 725 & n.1, 733-34. For this reason, "winning a race to court" is unlikely to be helpful for one in the natural position of a defendant. See \textit{Lynch & Bourne, supra} note 3, at 328, 337 (discussing \textit{Higgins}); see also \textit{Bourne & Lynch, supra} note 5, at 49 & n.309 (discussing \textit{Beacon}).}
\footnote{See \textit{supra} notes 192-207 and accompanying text.}
\end{footnotes}
eral constitutional development. In the first approach, the “lockstep” model, state courts rely on federal analogues. In the second approach, the primacy model, state courts undertake an independent analysis of the text, structure, and historical intent of the state constitution and use decisions of the United States Supreme Court and of other state courts for guidance. In the third approach, the supplemental model, state courts “fill in the gaps” in areas unprotected, unsettled, or not addressed by federal law. This commentator concluded that the Maryland courts followed “lockstep” with the developments in federal law regarding the right to trial by jury in criminal cases. Of course, the Sixth Amendment right to jury trial in criminal cases has become binding upon the states through the Fourteenth Amendment. The Seventh Amendment, providing for a right to jury trial in civil cases, has not become binding upon the states.

Several things suggest that Maryland’s protective approach to the jury right in civil cases need not follow “lockstep” with federal court interpretations of the Seventh Amendment, but instead may be more protective. First, Higgins gave primacy to the Maryland Constitution, not federal precedents. Second, the Maryland Constitution does not just provide that the right to jury trial shall be “preserved,” as does the Seventh Amendment. Rather, the Maryland Constitution provides that the right shall be “inviolably preserved.” Third, the convention debate on the principal Maryland


217. See id.

218. See id.

219. See id. at 97-102.

220. See id.

221. See id. at 86.

222. See infra notes 346-48 and accompanying text.

223. See generally Robert F. Williams, State Constitutional Law 166-203 (2d ed. 1993). Williams suggested a number of general considerations justifying state courts exercising independence in the interpretation of their constitutions: the primacy of state constitutions, historically and logically; the utility of state experimentation in our federal system; the diversity of state circumstances and interests; state courts’ familiarity with their states’ own circumstances and interests; and the United States Supreme Court’s increasingly conservative interpretation of individual rights in the 1970s and 1980s. See id.

224. See supra note 192 and accompanying text.

225. See U.S. Const. amend. VII.

226. See Md. Const., Decl. of Rights art. 23. See supra note 8 for text of Article 23.
The right to jury trial shows a specific intent to protect it from encroachment by the legislature. Finally, the right to jury trial is protected at a sub-constitutional level by Maryland statutes and rules.

After Higgins, a third question is why the protective approach is better than alternatives adopted or considered by other courts after the merger of Law and Equity. In adopting a protective approach to the jury right, the Higgins court considered and rejected a variety of other approaches. The court reasoned that an approach making the jury right dependent upon whether the issues in a case were predominantly legal or predominantly equitable is unpredictable and fails to safeguard the right to jury trial of a legal issue which might be characterized as incidental to an equitable issue.

227. See supra note 9 and accompanying text.
228. See WILLIAMS, supra note 223, at 194-203.
229. See MD. ANN. CODE art. 23, §§ 318-19 (1996) (actions against telegraph or telephone company for damages to land from construction of lines); id. art. 25, § 80 (1996) (review of determination by county commissioners regarding injury to land from ditch or drainage improvement); MD. CODE ANN., REAL PROP. § 8-332(b) (1996) (review of action of distress for rent); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-06(b)(2) (1995) (action to nullify an award of health care malpractice claims arbitration panel); id. § 3-404 (action for declaratory judgment); id. § 3-8A-02 (action for mandamus); MD. CODE ANN., HEALTH-GEN. I § 7-507(e) (1994) (action for release of person with mental retardation from state residential center); id. § 10-805(e) (1994) (action for release of person with mental disorder from residential facility or Veterans' Administration hospital); MD. CODE ANN., TAX-PROP. § 4-403(b) (1994) (state action against county collector of taxes or surety for failure to remit taxes); MD. CODE ANN., FAM. LAW § 5-1026(a) (1991) (alleged father in an action for paternity); MD. CODE ANN., LAB. & EMPL. § 9-745(d) (1991) (review of decision of Workers' Compensation Commission); MD. CODE ANN., NAT. RES. II § 9-305(b) (1990) (review of administrative determination of designation of land as wetlands); MD. CODE ANN., TAX-GEN. § 13-526(a) (1988) (issue referred from Tax Court).
230. See infra notes 1541-1621 and accompanying text.
231. See Higgins, 310 Md. at 540, 542, 546, 530 A.2d at 728, 729, 731; see also Bourne & Lynch, supra note 5, at 17-19, 57-59 ("essentially" or "basically" legal or equitable).
232. See Higgins, 310 Md. at 548, 530 A.2d at 732; see also Bourne & Lynch, supra note 5, at 18, 58, 68. Lynch and Bourne also suggest that the characterization of what relief is primary is outmoded after the merger of Law and Equity, and may leave too much discretion in making the characterization to the trial judge, who may be biased against trial by jury. See Bourne & Lynch, supra note 5 at 52, 58-59.
233. See Higgins, 310 Md. at 548, 530 A.2d at 730, 732; Bourne & Lynch, supra note 5, at 20, 54-55.
234. See Higgins, 310 Md. at 544-45, 530 A.2d at 730.
An approach which would make the jury right depend upon the nature of the first claim asserted might deprive defendants of a right to jury trial of legal issues later asserted by giving plaintiff a unilateral choice of trial by judge. An approach which deems a defendant to have waived a jury right by joining a legal counterclaim to an equitable claim might, in light of res judicata, deprive the defendant of a right to jury trial of a legal counterclaim. An approach that, in deference to history or efficiency, would have a judge determine an entire case involving any equitable issue, might deprive the parties of a right to jury trial of legal issues.

Interestingly, Higgins itself is an example of how the protective approach safeguards the jury right where each of these other approaches might not. First, the court of appeals compared the facts of the case, which combined an equitable claim and a legal counterclaim, with similar federal appellate court cases. Those federal cases ultimately overturned trial court decisions denying the jury right on the ground that equitable issues predominated over legal issues. Second, the court held that the legal issue of breach of contract, raised by answer and counterclaim, was not precluded from trial by jury because the first claim asserted was equitable. Third, the court held that jury trial of the legal issue in the counterclaim was not waived by being joined to the plaintiff's equitable claim. Fourth, the court rejected Barnes's contention that, be-

235. See id. at 548-49, 530 A.2d at 732.
236. See id.
237. See id. at 543, 548, 530 A.2d at 729, 732. Joinder of claims is encouraged by the revised Maryland Rules. See Bourne & Lynch, supra note 5, at 3, 56.
238. See Higgins, 310 Md. at 543-44, 548, 550-51, 530 A.2d at 729, 732, 733; see also Bourne & Lynch, supra note 5, at 6-10, 57, 67-68.
239. See Higgins, 310 Md. at 536-37, 530 A.2d at 726; Bourne & Lynch, supra note 5, at 44, 46; see also id. at 61-62, 64, 69, 76-77. But cf. id. at 54-55 (stating merger eliminates the justification for equitable clean-up due to the cost, delay, and inconvenience of separate actions at Law and Equity in a bifurcated system).
240. See Higgins, 310 Md. at 540, 530 A.2d at 728; see also Bourne & Lynch, supra note 5, at 2-3, 63-64 & n.408, 69 & n.437, 78. But cf. infra notes 889-96 and accompanying text (providing that modern procedures permit expedition while preserving the jury right).
242. See id. at 545, 548-49, 530 A.2d at 730, 732.
243. See id. at 543-44, 530 A.2d at 729-30.
244. See id. at 535 n.1, 552, 530 A.2d at 725 n.1, 734.
245. See id. at 552, 530 A.2d at 733-34.
246. See id. at 535-36, 530 A.2d at 725-26.
cause specific performance was historically an equitable action, the entire case must be tried by a judge.247

The protective approach of *Higgins* may also be compared with a variety of alternatives adopted by other jurisdictions or suggested by commentary. First, some courts have taken an approximation of pre-merger approach: cases which would have been tried at Law before merger are to be tried a jury; cases which would have been tried in Equity before merger are to be tried by a judge.248 However, the approximation of pre-merger approach is deficient because it erodes the right to trial by jury of legal issues.249 For example, in *Higgins*, that approach would have denied Higgins a right to jury trial of factual issues in the defense and counterclaim for damages250 for breach of contract due to equitable clean-up.251 Also, the approximation of pre-merger approach is difficult to apply because of definitional and timing problems.

Even before merger, the distinction between Law and Equity was often difficult to make because of overlaps, such as remedies for violation of contract,252 due to Law's borrowing from Equity, or joinder of parties253 and discovery254 because of the development of new rights and remedies, such as the declaratory judgment.255 The merger of Law and Equity makes the distinction even more difficult because of the liberal joinder of legal and equitable claims and defenses in an action.256

As to timing problems, if an approximation of pre-merger approach is taken, it may not be clear what time before merger is to be approximated—immediately before merger,257 the time during adoption of the Maryland Constitution,258 or some other time.259 In

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247. See id. at 551-52, 530 A.2d at 733-34.
248. See, e.g., JONATHAN M. LANDERS ET AL., CIVIL PROCEDURE 701 (3d. ed. 1992); see also supra note 14 and accompanying text; infra notes 1128-1514 and accompanying text.
249. See LYNCH & BOURNE, supra note 3, at 331; see also Bourne & Lynch, supra note 5, at 52.
250. See *Higgins*, 310 Md. at 551-52, 530 A.2d at 733-34.
251. See id. at 540, 530 A.2d at 728; see also id. at 535-36, 530 A.2d at 725-26.
252. See Bourne & Lynch, supra note 5, at 61-62.
253. See id. at 38, 73-76.
254. See id. at 39-40, 45 n.291, 71.
255. See id. at 45-46.
256. See id. at 55-71.
257. See id. at 44-46.
258. See id. at 59 ("Maryland's Constitution preserves the right to trial by jury as it existed at the time of the adoption of the Constitution vis à vis the scope of
any event, the approximation of pre-merger approach seems outmoded after the merger of Law and Equity.

Merger eliminates the justification for much of the traditional Equity jurisdiction. As the *Beacon* court stated, whether there is no adequate remedy at Law, the prerequisite for Equity jurisdiction "must be determined, not by precedents decided under discarded procedures, but in the light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules." Merger also eliminates the justification for the equitable clean-up doctrine: the idea that once Equity jurisdiction attached, Equity would resolve all aspects of a controversy, even those aspects being litigated in a court of Law.

Second, some courts have taken an approach which largely leaves the mode of trial, by judge or by jury, to the discretion of the trial judge. In this sense, "discretion" means judicial action largely unrestricted by standards. However, the discretionary approach is defective because it threatens the right to jury trial, at least where standards for exercising that discretion are undefined, and appel-

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259. The time prior to Maryland's adoption of its Uniform Declaratory Judgments Act may serve as an example. See Bourne & Lynch, supra note 5, at 47-50. The Act was adopted in 1939. See 1939 Md. Laws supra note 5, at 294.

260. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 507 (1959). Interestingly, the *Beacon* Court cited *Maryland Theatrical Corp. v. Brennan*, 180 Md. 377, 24 A.2d 911 (1942) (demonstrating the utility of the declaratory judgment). That case held that a court may issue a declaration of the unconstitutionality of legislation, notwithstanding that an injunction instead of a declaratory judgment was sought, because the defendant was not charged with enforcing the legislation, and because the official charged with its enforcement would presumably abide by the judgment. See *Maryland Theatrical Corp.*, 180 Md. at 388, 24 A.2d at 917.


262. See id. at 19-20, 66; see also id. at 16, 57; LYNCH & BOURNE, supra note 3, at 326, 328, 330 n.191, 331.

263. See infra note 459 and accompanying text; cf. Bourne & Lynch, supra note 5, at 19, 58-59, 65 (providing "discretion" in characterizing a case as basically, essentially, or predominantly legal or equitable); *supra* notes 10-13 and accompanying text ("principled discretionary theory").

264. See Bourne & Lynch, supra note 5, at 16, 20, 23, 29, 44; see also LYNCH & BOURNE, supra note 3, at 326, 328, 331.

265. See Bourne & Lynch, supra note 5, at 20; see also LYNCH & BOURNE, supra note 3, at 331; cf. Bourne & Lynch, supra note 5, at 2-3, 58-59 (discussing bias of
late review is limited to abuse of discretion.266

The third and fourth approaches that are suggested by commentary would characterize cases as legal or equitable not according to what rights are asserted and what remedies are sought,267 but according to which courts try the case. Thus, the third approach considers all civil actions to be actions at Law triable by a jury,268 subject only to constitutional limitations—fact, not law, and more than $5000 in controversy.269 That is, Equity courts have been abolished and all courts are “Courts of Law” within the meaning of the Maryland Constitution’s jury right.270 Those courts, in addition to their historical functions, may administer traditionally equitable discovery procedures271 and joinder devices272 and may issue declaratory judgments273 and injunctive relief.274 There is some basis for this all-Law approach in the Maryland Constitution. The principal jury trial provision does provide for the right in civil proceedings in the “Courts of Law,”275 not, as the Seventh Amendment does, in “suits at common law.”276 Even before merger, it was standard practice for Equity courts to refer disputed issues of fact to Law courts for jury trial.277 The term “Courts of Law” was adopted in 1851.278 At

266. See Bourne & Lynch, supra note 5, at 59 & n.374.
268. See JAMES, supra note 1, at 448; Arthur F. Kingdon, The New Rules are Inadequate, 23 J. AM. JUD. SOC'y 133, 135 (1939). Kingdon, speaking of the merger of Law and Equity under the Federal Rules, saw bringing the jury in every case as a “step backward” because the jury has no special qualifications, it is too large, it is not under close enough control by the judge, and it delays the trial of cases. See id.

A variation on this approach would be to treat all actions as legal because of the availability of “legal” declaratory relief. See supra note 260 and accompanying text; infra note 1176 and accompanying text. Supplementary injunctive relief would be available, if necessary, to secure compliance with the declaratory judgment. See MD. CODE ANN., CTS. & JUD. PROC. § 3-412 (1995).
269. See MD. CONST., DECL. OF RIGHTS art. 23.
270. See id.
271. See Bourne & Lynch, supra note 5, at 36, 45 n.291, 76.
272. See id. at 45 n.291, 72-76.
273. See id. at 47-50.
274. See supra note 174 and accompanying text.
275. See MD. CONST., DECL. OF RIGHTS art. 23.
276. See U.S. CONST. amend. VII.
277. See infra notes 304-06 and accompanying text. The reference practice was later abolished. See supra note 179 and accompanying text.
the same time, the office of chancellor and the court of chancery were marked for abolition,\(^{279}\) and that court's jurisdiction was assigned to the circuit courts,\(^{280}\) denoted as "courts of law."\(^{281}\) However, that interpretation seems contrary to an existing practice which was continued after 1851. The existing practice was for the trial courts (the county courts) to have separate sittings as courts of Law or courts of Equity.\(^{282}\) The jurisdiction of the county courts was assigned to the circuit courts in 1851.\(^{283}\) The circuit courts' separate sittings\(^{284}\) and dockets continued until their abolition in 1984 by the revised Maryland Rules.\(^{285}\) The 1984 reforms, according to their framers, were not intended to affect the right to jury trial either.\(^{286}\)

The fourth approach is the opposite—to consider no civil actions to be actions at Law triable by a jury.\(^{287}\) That is, the courts existing after the merger of Law and Equity are a hybrid, they are not "Courts of Law" or courts of Equity. If they must be categorized as one or the other, they are more like Equity courts.\(^{288}\) They may administer traditionally equitable discovery procedures\(^{289}\) and joinder devices.\(^{290}\) They may issue essentially equitable declaratory judgments,\(^{291}\) and, like traditional Equity courts,\(^{292}\) may order other ap-

\(278.\) See Md. Const. of 1851 art. X, § 4.
\(279.\) See id. art. IV, § 23.
\(280.\) See id. art. IV, § 8.
\(281.\) See id. art. IV, § 10 (Court of Common Pleas of Baltimore City); id. § 11 (Superior Court of Baltimore City); id. § 24 (filling judicial vacancies); id. § 28 (transfers of venue); id. § 31 (pro se appearances); see also id. art. I, § 2; id. art. IV, §§ 4, 9, 14; id. art. V, § 1 (criminal convictions disqualifying government officials). But see id. art. IV, § 11 (Superior Court of Baltimore City with jurisdiction also as a "court of equity").
\(282.\) See Edgar G. Miller, Equity Procedure 2-3 & n.8 (1897); see also Md. Const. of 1851 art. IV, § 15.
\(283.\) See Md. Const. of 1851 art. IV, § 8.
\(284.\) See id. art. IV, § 28.
\(285.\) See Md. Rule 2-301 & com.
\(286.\) See id.
\(287.\) See Milton D. Green, Basic Civil Procedure 179-80 (2d ed. 1979).
\(289.\) See supra note 254 and accompanying text.
\(290.\) See supra note 253 and accompanying text.
\(291.\) See Bourne & Lynch, supra note 5, at 47 n.297. But cf. id. ("[T]he courts have steadfastly refused to so hold."); id. at 47-50 (declaratory judgments are categorized as legal or equitable depending upon the relief for which they are substituted).
appropriate relief even if not requested.\textsuperscript{293} However, this all-Equity approach has little basis in the Maryland Constitution or practice. Maryland's Constitution contains various provisions protecting the right to trial by jury,\textsuperscript{294} but no right to trial by judge.\textsuperscript{295} The merger of Law and Equity in 1984, according to the framers of the revised rules, was not intended to affect the right to jury trial.\textsuperscript{296} Further, if other approaches permitting choice between trial by a judge or by a jury unduly restrict the right to jury trial,\textsuperscript{297} then considering no actions to be actions at Law triable by jury is improper.

Fifth, commentary suggests that where legal and equitable issues are joined, the case should be tried by a jury. The verdict is then binding as to legal issues and advisory as to equitable issues.\textsuperscript{298} However, the advisory verdict has been abolished in Maryland.\textsuperscript{299}

Therefore, Maryland doctrine is protective of the jury right. Although Maryland's protective approach is somewhat difficult to define, it has followed federal interpretations of the jury right. There is some basis, however, for Maryland being even more protective of the jury right than the federal courts have been. In any event, Maryland's protective approach is better than other alternatives that have been suggested.

\textsuperscript{292} See \textit{Md. Rule} 370(a)(3)(1977) (repealed 1984) (permitting the general equitable plea for "such other and further relief as is just").

\textsuperscript{293} \textit{Cf.} \textit{Fed. R. Civ. P.} 54(c) ("Except as a party against whom a judgment is entered by default, every final judgment shall grant the relief which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.").

\textsuperscript{294} See \textit{supra} notes 31-76 and accompanying text.

\textsuperscript{295} See \textit{supra} notes 86-95 and accompanying text.

\textsuperscript{296} See \textit{supra} note 286 and accompanying text.

\textsuperscript{297} See \textit{supra} notes 233, 236, 238, 242, 249-51, 264-66 and accompanying text.

\textsuperscript{298} See Fraser v. Geist, 1 F.R.D. 267, 269 (E.D. Pa. 1940) (dictum); see also \textit{James, supra} note 1, at 441-42; \textit{cf.} Bourne & Lynch, \textit{supra} note 5, at 28 & n.181 (stating jury verdict in a tort claim against the United States and others was merely advisory against the United States).

\textsuperscript{299} See \textit{Md. Rule} 2-511(d), discussed in Bourne & Lynch, \textit{supra} note 5, at 35 & n.221; see also id. at 44 n.284. But \textit{cf.} Fitzgerald v. United States Lines, 374 U.S. 16 (1963) (a seaman's related claims under the Jones Act, triable of right by a jury, and under admiralty doctrines of unseaworthiness and maintenance and cure, not triable of right by a jury, should both be tried by the jury). Of course the advisory verdict could be reinstated either by legislative act or court rule. See \textit{infra} notes 1531-66 and accompanying text.
F. Prudential Concerns

Courts may sometimes avoid deciding issues of constitutional law, and other times decide issues in subtle, indirect ways rather than on principle. Courts often invoke doctrines such as case-or-controversy or justiciability, abstention, vagueness, and overbreadth to avoid deciding a case on the merits. In order to keep from creating new principles of law, courts may decide the merits but invoke case-by-case adjudication techniques of balancing the benefits of an action against its costs or considering all the facts and circumstances of a situation. Courts use these techniques to safeguard their own positions, saving their authority for other cases that should be decided on the basis of new legal principles. They also do so to activate the political processes, permitting resolution of problems by legislators.\textsuperscript{300}

The right to jury trial presents three prudential concerns. First, which is superior, trial by judge or by jury? This general issue is treated in some detail in two other contexts below.\textsuperscript{301} Second, in view of our system of separated powers and checks and balances, are not both judge and jury desirable? This other general issue is discussed above as the structural mode of constitutional interpretation.\textsuperscript{302} Third, and I believe the most pressing prudential concern, what are the benefits that flow to judges and our justice system generally when juries, instead of judges, decide cases?

Traditionally, the benefits of trying issues of fact by jury have been taken for granted in Maryland. Cases on the Law side were historically tried by jury. It was not until 1864 that the Maryland Constitution expressly permitted submission of a case for determination by the court without a jury.\textsuperscript{303} Historically, issues of fact in suits

\textsuperscript{300} See BOBBITT, supra note 15, at 62-71.

\textsuperscript{301} See infra notes 867-955 and accompanying text (discussing judicial economy); infra notes 956-1124 (discussing the argument that Equity is superior to Law as a mode of trial). Bourne and Lynch appear to treat these matters as pure policy concerns, unrelated to constitutional interpretation. See infra notes 870, 959-1124 and accompanying text. In any event, these prudential concerns were specifically overridden when the jury right was adopted as part of the Md. Const. See infra notes 933-35, 1114-15 and accompanying text.

\textsuperscript{302} See supra notes 136-63 and accompanying text.

\textsuperscript{303} See Md. Const. of 1864 art. IV, § 8 (providing in part that “the parties to any cause may submit the same to the Court for determination without the aid of a jury”). In the convention debate, an opponent argued that the provision was “imposing upon the judge a duty which has not hither been devolved upon him.” 2 1864 DEBATES, supra note 89, at 1394.
in Equity were regularly referred to Law courts for jury trial. Professor Brown summarized the reasons for the referral procedure. Jury resolution of factual disputes on the basis of live testimony was viewed as superior to the chancellor's fact-finding on the basis of sworn pleadings and written depositions. Jury trial was considered to be required in several situations—where facts were strongly disputed, causing reasonable doubt in the chancellor's mind, where documentary evidence would not clearly resolve the conflict, or where the credibility of witnesses was important. However, the chancellor would resolve factual issues where proof was clear, leaving no reasonable doubt, or where the referral to Law for a jury trial was impractical considering the small amount in controversy.

Generally, commentators have noted a number of benefits to judges and our justice system of having juries. First, by providing for public participation in trials, the jury helps legitimize outcomes. That legitimacy comes from opening the jury to all citizens, thus bringing the authority of the people—the sovereign in a democratic society—to the execution of the laws. That legitimacy is particularly needed where the decision is difficult.

Second, the jury may be a "lightning rod for animosity" that might otherwise center on the judge. Because the jury is repre-
sentative, largely anonymous, and discontinuous, it can deflect criticism that might otherwise be concentrated on a single, visible, and continuously sitting judge.\textsuperscript{313}

Third, the jury provides a “black box” decision\textsuperscript{314} in some situations where the giving of a reasoned decision might not be appropriate.\textsuperscript{315} The jury’s “judgment call” might be best where all the facts and circumstances require an individualized decision,\textsuperscript{316} where the facts are difficult to resolve,\textsuperscript{317} where the jury’s decision is more “equitable” than a strict application of the law,\textsuperscript{318} or where a conflict between fundamental values leaves only a “tragic choice.”\textsuperscript{319} Moreover, this “black box” decision is subject to only limited appellate review.\textsuperscript{320}

\begin{footnotesize}
\begin{enumerate}
\item See Abram Chayes, \textit{The Role of the Judge in Public Law Litigation}, 89 \textit{Harv. L. Rev.} 1281, 1287 (1976).
\item Cf. Galanter, supra note 313, at 61-62 (stating jury decisions in the aggregate, along with other predictors, provide a kind of precedent, signaling what other juries might do).
\item See Guido Calabresi & Philip Bobbitt, \textit{Tragic Choices} 55, 206-07 n.5 (1978).
\item See supra note 306 and accompanying text. In the convention debate on a provision, adopted as Md. Const. of 1864 art. IV, § 8, expressly permitting submission of a case for determination by the court without a jury, an opponent objected that in such cases the judge would have to try the facts as well as construe the law and that the facts might be complicated. See 2 1864 Debates, supra note 89, at 1394. See generally Richard Lempert, \textit{Civil Juries and Complex Cases: Taking Stock After Twelve Years}, in \textit{Verdict, Assessing the Civil Jury System} 181 (Robert E. Litan ed., 1993) (concluding that juries may do as well as judges in deciding complex cases).
\item See Kalven & Zeisel, supra note 121, at 107-08 & n.7. Interestingly, the authors did call this “jury equity.”
\item See Calabresi & Bobbitt, supra note 316, at 57, 110. \textit{But cf.} Priest, supra note 313, at 107-09, 125-26 (stating civil jury does not make decisions involving life and death, but does determine liability and damages).
\item See supra note 159 and accompanying text.
\end{enumerate}
\end{footnotesize}
G. Ethical Matters

As noted above, "ethical matters" reflect "the sort of people we are" and the sort of institutions we have.\textsuperscript{321} However, in order for ethical argument to be a mode of constitutional interpretation, it must be tied to the constitution, unlike ethical and moral argument generally.\textsuperscript{322} Professor Philip Bobbitt described three varieties of ethical interpretation of the United States Constitution. One is a general principle in the constitutional text itself, a principle that may need interpretation in specific cases. The Ninth Amendment rights retained by the people\textsuperscript{323} and the Fourteenth Amendment "liberty" protected by due process are good examples.\textsuperscript{324} A second variety of ethical interpretation is a "textual cousin," or an analogy to the constitutional text.\textsuperscript{325} The best example is the incorporation of provisions of the Bill of Rights against the states through the Fourteenth Amendment.\textsuperscript{326} A third variety of ethical interpretation is the use of the constitutional text, not for its own force, but as evidence of a more general, non-textual principle.\textsuperscript{327} The best example is the general right of privacy described in \textit{Griswold v. Connecticut},\textsuperscript{328} which was suggested by the specific provisions of the First (right of association), Third (prohibition of quartering of soldiers), Fourth (right against unreasonable searches and seizures), Fifth (right against self-incrimination), and Ninth Amendments (other retained rights).\textsuperscript{329}

Ethical argument may help answer two questions. First, how protective of the jury right should Maryland courts be? Second, should Maryland courts be at least as protective of the jury right as the federal courts have been in interpreting the Seventh Amendment? Next, this article examines the three modes of ethical argument—explicit principles, textual cousins, and non-textual principles—to try to answer these two questions.

\textsuperscript{321} BOBBITT, \textit{supra} note 15, at 95.
\textsuperscript{322} See BOBBITT, \textit{supra} note 15, at 94-95, 138-41.
\textsuperscript{323} See id. at 101, 144, 152, 172-73.
\textsuperscript{324} See id. at 98-99, 172-73.
\textsuperscript{325} See id. at 142-43.
\textsuperscript{326} See id. at 100, 143, 147-53, 168.
\textsuperscript{327} See id. at 142.
\textsuperscript{328} 381 U.S. 479 (1965).
\textsuperscript{329} Cf. BOBBITT, \textit{supra} note 15, at 169-75 (classifying various types of constitutional arguments in \textit{Griswold}).
1. Explicit Principles

Several explicit principles in the Maryland Constitution bear on the interpretation of the jury right. Two provisions in the Maryland Constitution appear not to protect the jury right. The first provision refers to separate courts of Law and Equity. However, as has been shown, those provisions assume, as opposed to mandate, separate courts of Law and Equity. The second provision allows a party to submit a case to the court for determination without a jury. However, as previously demonstrated, that provision establishes no right to trial by judge.

Another provision in the Maryland Constitution arguably requires application of the federal, jury-protective Seventh Amendment to Maryland courts. Article 2 of the Maryland Declaration of Rights makes the federal Constitution and laws supreme over the Maryland Constitution and laws. That provision states:

The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding.

However, the convention debates regarding Article 2 make clear that this supremacy clause was a recognition that the United States was a union of states, not a compact of sovereign states that remained free to claim "states' rights," to nullify federal law, or secede from the Union. Specifically, Article 2 was held not to affect

330. The principles discussed here are general principles. Specific principles bearing on the jury right are discussed above as part of the constitutional "text." See supra notes 31-76 and accompanying text.
331. See supra notes 77-83 and accompanying text.
332. See supra notes 86-95 and accompanying text.
333. Md. Const., Decl. of Rights art. 2.
334. See Debates of the Maryland Constitutional Convention of 1867, at 99-107 (1867) [hereinafter 1867 Debates]. The predecessor to Article 2 provided: The Constitution of the United States and the laws made in pursuance thereof being the supreme law of the land, every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and is not bound by any law or ordinance of this State in contravention or subversion thereof.
Supreme Court holdings concerning incorporation of the Bill of Rights.\textsuperscript{335} Thus, Article 2 does not require application of the unincorporated Seventh Amendment to state court proceedings.

Yet another provision in the Maryland Constitution might limit the jury right in certain cases. As Lynch and Bourne suggest, Maryland's Due Process Clause may limit the jury right in "complex cases" for two reasons.\textsuperscript{336} First, the jury could not comprehend the issues and evidence in a case.\textsuperscript{337} Second, the length of time to try the case would make business and professional people unable to participate, depriving the parties of a fair cross section of the com-

\begin{quote}
\textsc{Md. Const.} of 1864, \textsc{Decl. of Rights} art. 5. However, the convention debates on Article 5 and the one case interpreting Article 5 are silent on any intent to make the Bill of Rights generally, or the Seventh Amendment particularly, applicable to the State of Maryland.

The convention debates on the supremacy clause of Article 5 have suggestive references to the Bill of Rights and to its specific provisions. However, there is little support for the idea that the supremacy clause requires application of the Seventh Amendment or any other provisions of the Bill of Rights. The many references to the "bill of rights" are not to the first ten Amendments to the U.S. Constitution, but to the \textsc{Md. Const., Decl. of Rights}, the \textsc{Mass. Const., Bill of Rights}, or bills of rights generally. \textit{See} 1 1864 Debates, \textit{supra} note 89, at 296, 306, 326, 327, 328, 329, 469, 494, 497, 502, 504, 510, 515, 525, 526 (referring to the \textsc{Md. Const.}); \textit{id.} at 502 (referring to the Massachusetts Bill of Rights); \textit{id.} at 305, 329 (referring to bills of rights generally). No references to the Seventh Amendment could be found in the convention debates.

There are references to other provisions of the Bill of Rights. However, those references are not to rights to be applied against the state. \textit{See id.} at 445-46 (rights which limit the federal government); \textit{id.} at 520 (rights improperly suspended during the Civil War by the federal government); \textit{cf. id.} at 295-97, 510 (comparing Maryland free speech in parliamentary debate with federally protected speech).

Similarly, the one case interpreting the 1864 version of Article 5 viewed it as a supremacy clause requiring allegiance to federal law, not as a provision requiring incorporation of the Bill of Rights against the state. \textit{See} Anderson v. Baker, 23 Md. 531, 617 (1865).

\textsuperscript{335} Two Maryland cases rely on the old rule from \textit{Barron v. Baltimore}, 32 U.S. (7 Pet.) 243 (1833), that the Bill of Rights did not apply to the states. \textit{See} Robb v. State, 190 Md. 641, 60 A.2d 211 (1948) (holding Fifth Amendment double jeopardy does not apply in Maryland state proceedings), \textit{overruled by} Benton v. Maryland, 395 U.S. 784 (1969); Slansky v. State, 192 Md. 94, 63 A.2d 599 (1949) (holding Sixth Amendment jury trial does not apply in Maryland state criminal cases), \textit{overruled by} Duncan v. Louisiana, 391 U.S. 145 (1968).

\textsuperscript{336} \textit{See} \textsc{Lynch & Bourne}, \textit{supra} note 3, at 334; \textit{see also infra} note 969 and accompanying text.

\textsuperscript{337} \textit{See} \textit{In re U.S. Fin. Sec. Litig.}, 609 F.2d 411, 419, 427 (9th Cir. 1979).
Nevertheless, a complexity exception has been rejected in Maryland. Therefore, these explicit principles neither add nor detract from the protection of the right to jury trial.

2. Textual Cousins

Three federal constitutional and two state constitutional textual cousins may protect the right to jury trial in civil proceedings in Maryland courts. The first federal textual cousin is the Sixth Amendment. Of course the Sixth Amendment, via the Fourteenth Amendment, requires a jury trial in state criminal prosecutions. By analogy, the Sixth Amendment may protect the right to jury trial in some civil cases, such as administrative proceedings and civil contempt proceedings that substitute for criminal proceedings. In such cases, a civil jury operates like the criminal jury to protect citizens from arbitrary or unlawful state prosecution. The Sixth Amendment makes no distinction between Law and Equity, but excepts "petty offenses" and may be more protective of the jury right than Maryland constitutional provisions.

The second federal textual cousin is the Seventh Amendment. The Supreme Court has held that the Seventh Amendment is not applicable to the states directly or through the Fourteenth Amendment. Those holdings have recently been reaffirmed.

338. See id. at 427 n.54.
339. See infra notes 959-73 and accompanying text.
342. Cf. Juidice v. Vail, 430 U.S. 327, 335-36 (1977) (stating that the state's interests in punishing contempt, whether labeled civil, criminal, or quasi-criminal, are important enough to cause a federal court to abstain under Younger v. Harris, 401 U.S. 37 (1971)).
343. Cf. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 515 (1959) (Stewart, J., dissenting); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 284 (1988) (stating that declaratory judgments are neither legal nor equitable, but may be considered as substitutes for either legal or equitable relief for purposes of jury trial and appeal).
344. See generally Priest, supra note 313, at 109.
However, the reaffirmations have come without consideration of the change in the test for determining whether a right housed in the Bill of Rights is applicable to the states by the Fourteenth Amendment. Previously, the formulation was whether a right was "of the very essence of a scheme of ordered liberty,"\(^{349}\) a formulation relying on a more conceptual than historical basis. Currently, the formulation is whether a right is "fundamental to the American scheme of justice,"\(^{350}\) a formulation relying on American tradition and practice.

Regarding American tradition, the right to jury trial in civil cases was continued by state constitution, statute, or common-law practice in each of the thirteen original states after independence.\(^{351}\) The lack of a guarantee of the civil jury right in the United States Constitution was a leading cause for the anti-federalist attack before its adoption, and a catalyst for the adoption of the Bill of Rights soon after ratification.\(^{352}\)

Nearly every state constitution guarantees the right to jury trial in civil cases.\(^{353}\) Upon reconsideration, therefore, the Supreme Court might conclude that the Seventh Amendment right to jury trial is "fundamental to the American scheme of justice" and, hence, should be applied to the states. Likewise, the Supreme Court might abandon the process of deciding which provisions of the Bill of Rights should be applied against the states and conclude that all provisions should be incorporated.\(^{354}\)

The third federal textual cousin is the Equal Protection Clause of the Fourteenth Amendment. Professor Don Sampen argued that the right to jury trial should apply in all cases.\(^{355}\) He concluded that the distinction between Law and Equity is grounded solely on historical circumstances and has no rational basis. Thus, the distinction


\(^{351}\) See Wolfram, supra note 120, at 655.

\(^{352}\) See id. at 656-66.

\(^{353}\) See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 473 (1993); cf. id. at 473 n.2 ("Colorado, Louisiana, and Wyoming have no constitutional guarantee to jury trial in civil cases.").

\(^{354}\) Virtually the entire Bill of Rights has been applied against the states. See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW 423 (2d ed. 1992).

\(^{355}\) See Don R. Sampen, Law and Equity, the Right to a Jury Trial, and Equal Protection, 70 ILL. B.J. 376 (1982).
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The right to jury trial in state courts is not a fundamental right protected by the Seventh and Fourteenth Amendments. See supra notes 346-48 and accompanying text. Therefore, discrimination against the exercise of the right to jury trial would not be subject to strict scrutiny, requiring a compelling state interest and narrowly tailored means. Cf., e.g., Zablocki v. Redhail, 434 U.S. 374 (1978) (applying strict scrutiny to a classification interfering with the exercise of the right to marry, part of the fundamental right to privacy). But see Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956) (access to appellate courts); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote in state elections).

356. See id. The right to jury trial in state courts is not a fundamental right protected by the Seventh and Fourteenth Amendments. See supra notes 346-48 and accompanying text. Therefore, discrimination against the exercise of the right to jury trial would not be subject to strict scrutiny, requiring a compelling state interest and narrowly tailored means. Cf., e.g., Zablocki v. Redhail, 434 U.S. 374 (1978) (applying strict scrutiny to a classification interfering with the exercise of the right to marry, part of the fundamental right to privacy). But see Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956) (access to appellate courts); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote in state elections).

357. See Sampen, supra note 355.


359. See U.S. Const. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity . . . .”).

360. See supra notes 337-42 and accompanying text.

361. See generally Tolley, supra note 216, at 97-102.


363. See infra notes 956-1103 and accompanying text.
of Law, as well as of fact."364

The second state textual cousin is the implied guarantee of equal protection in the Due Process Clause of Article 24 of the Maryland Declaration of Rights.365 Generally, the state and federal guarantees of equal protection have been similarly interpreted.366 The right to jury trial is a fundamental right under the Maryland Constitution.367 Classifications significantly interfering with fundamental rights are subject to strict scrutiny.368 Therefore, classifications such as the one between Law issues (triable by a jury) and Equity issues (not triable by a jury) might be subject to strict scrutiny. The distinction between Law and Equity has been described as "outmoded"369 and a "historical fortuity,"370 "historically accidental,"371 and "accidental and anomalous."372 These descriptions suggest the distinction no longer has any rational basis. If the distinction between Law and Equity does not satisfy deferential, rational basis scrutiny, then the distinction does not satisfy strict scrutiny, requiring a compelling governmental interest and narrowly tailored means. On the other hand, this argument may not prevail. It may well be that the distinction between Law and Equity does not significantly interfere with the right to jury trial,374 which exists only at Law.375

364. MD. CONST., DECL. OF RIGHTS art. 23. This provision has been narrowly interpreted to include the law of the crime and not procedural and evidentiary law within the province of the judge. See, e.g., Stevenson v. State, 289 Md. 167, 177-80, 423 A.2d 558, 564 (1980).
366. See id. at 705, 426 A.2d at 941. But see id. at 717-22, 426 A.2d at 948-50 (stating that occupation, although not mentioned in the MD. CONST., is an "important private right" requiring "heightened scrutiny"); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 650-51, 458 A.2d 758, 786-87 (1983) (providing that education, although an express right in the MD. CONST., is not a "fundamental right" requiring strict scrutiny).
368. See id.
369. Brown, supra note 85, at 444.
370. Id. at 455.
372. Phelps, supra note 86, at 184 (citing other commentators).
373. See Sampen, supra note 355 and accompanying text; see also Kirsch v. Prince George’s County, 381 Md. 89, 626 A.2d 372 (1993).
3. Non-textual Principles

The text of the Maryland Constitution provides evidence of a number of general, non-textual principles bearing on the interpretation of the jury right. Although some of these principles are protective of the jury right, others are ambiguous.

The first general, non-textual principle is that of limited government.376 Express limits on government in the Maryland Constitution include the following: the reservation of powers and rights in the people—a general reservation of powers;377 the right to alter, reform, or abolish the form of government;378 the right to vote;379 the right of referendum;380 and the rights and liberties typical of bills of rights.381 Express limits on government also include the following: a constitution;382 the supremacy of federal law;383 the separation of government powers among legislative, executive, and judicial branches;384 a bicameral legislature;385 checks and balances among the branches;386 the grant of “home rule” powers to local govern-

375. See Md. Const., Decl. of Rights art. 5 (granting right of “trial by Jury, according to the course of that [Common] Law”); id. art. 23 (granting “right of trial by Jury . . . in the several Courts of Law”).
376. Even the inherent plenary authority of the states, as opposed to the supposedly limited enumerated powers of the federal government, is limited. See Bobbitt, supra note 15, at 147-53; see also Whittington v. Polk, 1 H. & J. 236, 242-43 (Md. 1802).
377. See Md. Const., Decl. of Rights art. 3.
378. See id. arts. 1, 6.
379. See id. art. 7; id. art. I, § 1.
380. See id. art. XVI, § 1.
381. See, e.g., id. Decl. of Rights art. 13 (right to petition); id. art. 19 (right to remedy); id. arts. 16, 21, 23, 25-27 (rights of accused); id. art. 24 (due process); id. art. 31 (quartering of soldiers); id. arts. 36-37 (freedom of religion); id. art. 40 (free press and speech); id. art. 45 (other retained rights); id. art. 23 (right to trial by jury); see also Md. Const., Decl. of Rights art. 46 (equal rights); id. art. 47 (rights of victims of crime); supra notes 32-69 and accompanying text.
382. See Md. Const., Decl. of Rights art. 44 (stating that the Md. Const. is applicable in time of war, as well as peace, notwithstanding any plea of necessity).
383. See id. art. 2; U.S. Const. art. VI, cl. 2.
384. See Md. Const., Decl. of Rights art. 8.
385. See id. art. III, § 1.
386. See, e.g., id. art. II, § 10 (senate advice and consent of executive appointments); id. Decl. of Rights art. 17 (executive veto of legislation); id. art. 20 (executive pardon); See also id. art. III, § 24 (house of delegates as grand inquest of the state); id. § 26 (impeachment by legislature).
ments;\textsuperscript{387} and many others.\textsuperscript{388}

The principle of limited government requires that the jury right be protected. The jury, through its functions of finding fact and applying law to fact, may limit the executive branch, which enforces public law and represents the government in criminal and civil cases.\textsuperscript{389} Through the power of nullification, juries may limit the legislature, which enacts the laws that courts apply. The jury may also limit the judiciary, which, without the jury, would have sole discretion to find facts and apply laws.\textsuperscript{390}

The second general, non-textual principle is that of government by the people, or popular participation in government.\textsuperscript{391} Express provisions in the Maryland Constitution which illustrate this principle include the following: the making of the constitution by the people;\textsuperscript{392} the origination of government from the people;\textsuperscript{393} the right of the people to alter, reform, or abolish the government;\textsuperscript{394} the right of the people to regulate the internal government and police of the state;\textsuperscript{395} the right of citizens to vote for government officers;\textsuperscript{396} the right of the people to petition the legislature;\textsuperscript{397} freedom of speech and of the press;\textsuperscript{398} the right of victims to be heard in criminal proceedings;\textsuperscript{399} the ability of citizens to hold public office;\textsuperscript{400} citizen participation on government commissions;\textsuperscript{401} the right

\textsuperscript{387} See id. art. XI (Baltimore City); id. art. XI-A (charter counties); id. art. XI-E (municipal corporations); id. art. XI-F (code counties).

\textsuperscript{388} See, e.g., id. DECL. OF RIGHTS art. 6 (accountability of government officers); id. art. 30 (subordination of the military to the civil power); id. art. 35 (prohibition of multiple office-holding); id. art. 41 (prohibition of monopolies); id. art. II, § 1 (limiting the governor’s term in office); id. art. III, § 21 (open legislative proceedings); id. §§ 27-35, 52, 55 (other procedural and substantive limitations on legislation).

\textsuperscript{389} See, e.g., id. art. II, § 1 (executive power).

\textsuperscript{390} See Landsman, supra note 162, at 38-39 (Seventh Amendment purposes); see also supra notes 149-63 and accompanying text (jury role in checks and balances).

\textsuperscript{391} See Bobbitt, supra note 15, at 129 (government of the people or republican form of government).

\textsuperscript{392} See Md. CONST. preamble (“We, the People . . . declare . . .”).

\textsuperscript{393} See id. DECL. OF RIGHTS art. 1.

\textsuperscript{394} See id. arts. 1, 6.

\textsuperscript{395} See id. art. 4.

\textsuperscript{396} See id. art. 7; id. art. I, § 1.

\textsuperscript{397} See id. DECL. OF RIGHTS art. 13.

\textsuperscript{398} See id. art. 40.

\textsuperscript{399} See id. art. 47.

\textsuperscript{400} See, e.g., id. art. III, § 9 (right of state citizens to hold office of senator or
of citizens to nominate persons for office; and the right of referendum.

The principle of government by the people requires that the jury right is preserved. As de Tocqueville put it, the jury is above all a "political institution," a consequence of "the sovereignty of the people," and a "means of making the people rule."

The third general, non-textual principle is government for the people. The purpose of government is to secure the liberty of the people. The Maryland Constitution expressly states that it was established to secure "our civil and religious liberty." The principle of government for the people also requires that the jury right be protected. Like the jury in criminal cases, in civil cases, when the government is a party, the jury provides a safeguard from the arbitrary or unlawful exercise of governmental authority. That safeguard is needed where the government brings suit against a citizen, where a citizen sues the government, and in other cases where the government, its agent, or employee is a party. Of

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401. See, e.g., id. art. IV, § 4A (Commission on Judicial Disabilities).

402. See, e.g., id. art. XI-A, § 1 (members of charter county board).

403. See id. art. XVI, § 1.

404. 1 DE TOCQUEVILLE, supra note 309, at 291-97.

405. See BOBBITT, supra note 15, at 98-100, 172-73; see also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that governments are instituted to secure certain inalienable rights, including life, liberty, and the pursuit of happiness).

406. Md. Const. preamble; see id. DECL. OF RIGHTS art. 6 (stating that the people may reform the old government or establish a new government when public liberty is manifestly endangered); id. art. 7 (providing that the best security of liberty is the right of suffrage); id. art. 33 (stating that the independence and uprightness of judges are a great security to the rights and liberties of the people).

407. See Priest, supra note 313, at 109-10.

408. For example, for condemnation of property. See id. at 110. The need for a safeguard may explain why there may be a jury right in proceedings by the government to collect taxes. See Allnutt v. Comptroller of Treasury, 61 Md. App. 517, 527 & n.3, 487 A.2d 670, 675 & n.3 (1985) (dictum); see also infra notes 1597-1621 and accompanying text (discussing jury right by court rule in certain proceedings for guardianship of the person). But cf. Allnutt, 61 Md. App. at 524-27, 487 A.2d at 674-76 (finding no jury right in Maryland Tax Court), noted in LYNCH & BOURNE, supra note 3, at 322 n.148. See generally Wolfram, supra note 120.

409. Perhaps for damages for false arrest, false imprisonment, assault, or malicious prosecution by a police officer. See Priest, supra note 313, at 110, 118.

410. See id. at 117-18. Priest found that these cases were infrequently heard by ju-
course, if the possibility of arbitrary or unlawful governmental authority includes the actions of the judge in a case, the jury may be needed as a safeguard in all civil cases as well.

The fourth general, non-textual principle is the rule of law. That is "ours is a government of laws, and not of men." Express provisions of the Maryland Constitution which support the principle of the rule of law include the following: the making of a constitution; the reception of English common law and statutes and acts of the provincial assembly as law in the new state; the accountability of government officials for their official actions; the reformation or replacement of arbitrary and oppressive government; the principle that the laws and their execution ought not be suspended; the principle that the law should provide remedies and justice for injuries; the principle that martial law should not prevail, except for persons in the armed services; that the constitution applies both in time of war and in time of peace and should not be departed from under the plea of necessity; the requirement that officers take an oath to support the constitution and laws; the duty of the governor to take care that the laws are faithfully executed; the principle that judges are to be selected from those who have been admitted to practice law and who are most distinguished for sound legal knowledge; and the principle that judges are to be disqualified for interest in their cases or for relation to the parties involved.

ries. See id. at 118. However, these cases may be increasing in number because of the erosion of governmental immunities and expansion of remedies. See id. at 110.

411. See supra note 162.
413. See Md. Const. preamble.
414. See id. Decl. of Rights art. 5.
415. See id. art. 6.
416. See id.
417. See id. art. 9.
418. See id. art. 19.
419. See id. art. 32.
420. See id. art. 44.
421. See id. art. I, § 9.
422. See id. art. II, § 9.
423. See id. art. IV, § 2. Judges are also to be distinguished for their integrity and wisdom. See id.
424. See id. art. IV, § 7.
The principle of the rule of law is ambiguous in relation to the jury right. On the one hand, the jury seems to be the rule of men, not the rule of law, because the jury is "aresponsible"—it need give no reason for its decision, which is generally unreviewable. The jury has also been characterized as capricious—as "a twelve-man ephemeral legislature not elected by voters"—and as a "lawbreaker." On the other hand, the right to jury trial is expressly provided for in the highest law, the United States Constitution. Indeed, the Due Process Clause prohibits the deprivation of life, liberty, or property except by the judgment of one’s peers or by the law of the land. The jury may ensure that the spirit of the law governs, rather than insisting on strict applications, to ensure justice in particular cases. In view of these ambiguities, the principle of the rule of law offers little help in determining whether the jury right should be protected.

The fifth general, non-textual principle is equal justice under the law. Express provisions in the Maryland Constitution which support this principle are the guarantees of due process and an impartial trier of fact. The Maryland Due Process Clause has been held to guarantee, by implication, the equal protection of the laws. The guarantee of an impartial trier of fact includes the following: the oath taken by all officeholders to act without partiality

425. See KALVEN & ZEISEL, supra note 121, at 8. This conclusion is a complaint of critics of the jury.
426. See CALABRESI & BOBBIT, supra note 316, at 57.
427. See Priest, supra note 313, at 105; see also supra notes 159, 315, 320 and accompanying text. But cf. MD. RULE 2-532 (motion for judgment notwithstanding the verdict); MD. RULE 2-533 (motion for new trial); MD. RULE 2-535 (revisory power).
429. JEROME FRANK, COURTS ON TRIAL 129-30 (1949).
430. See supra notes 31-76 and accompanying text.
431. See supra note 71 and accompanying text.
432. See MD. CONST., DECL. OF RIGHTS art. 24.
433. See KALVEN & ZEISEL, supra note 121, at 8-9.
435. See MD. CONST., DECL. OF RIGHTS art. 24.
or prejudice,\textsuperscript{437} the requirement of an impartial jury,\textsuperscript{438} the requirement of an impartial judge,\textsuperscript{439} and the right of removal upon a showing that a fair and impartial trial could not be had in the court where the case is pending.\textsuperscript{440} However, the principle of equal justice under the law is ambiguous as it relates to the jury right. On the one hand, the jury may be an equalizer between the poor and oppressed and the rich and powerful.\textsuperscript{441} On the other hand, it may be argued that justice requires that all litigants be treated alike.\textsuperscript{442} In view of this ambiguity, the principle of equal justice under the law offers little help in determining whether the jury right should be protected.

The sixth general, non-textual principle is that of free political exchange,\textsuperscript{443} or, more specifically, the free flow of information from government to the people.\textsuperscript{444} Express provisions in the Maryland Constitution supporting that principle are as follows: freedom of speech and of the press;\textsuperscript{445} the diffusion of knowledge and virtue, and a system of general education;\textsuperscript{446} open legislative proceedings;\textsuperscript{447}

\begin{itemize}
\item \textsuperscript{437} See Md. Const. art. I, § 9.
\item \textsuperscript{438} See id., Decl. of Rights art. 21 (right to impartial jury in criminal prosecutions); see also Md. Code Ann., Cts. & Jud. Proc. § 8-210(b)(2) (1995) (excuse from a particular jury for inability to render impartial jury service).
\item \textsuperscript{439} See Md. Const. art. IV, § 7 (disqualification of judge for interest, relation, or representation); see also id. art. IV, § 15 (disqualification of judge who participated in the same case in a lower court).
\item \textsuperscript{440} See id. art. IV, § 8(c).
\item \textsuperscript{441} See ABA/Brookings, supra note 308, at 9. In the 18th century, a leveling force may have been needed against creditors. See Landsman, supra note 162, at 37-38. In the 19th century, a leveling force may have been needed against merchants, bankers, and industrialists. See id. at 43. In the 20th century, a leveling force may be needed against manufacturers of toxic substances and defective products. See id. at 53. However, the research on whether the jury actually functions as a leveler is ambiguous. See Galanter, supra note 313, at 71-72.
\item \textsuperscript{442} The ambiguity as to whether equal justice requires a leveling on the one hand, or a strict neutrality on the other hand, is similarly present in arguments over affirmative action—whether equal protection requires a race-conscious or a color-blind Constitution. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
\item \textsuperscript{443} See Bobbitt, supra note 15, at 101.
\item \textsuperscript{444} Free political exchange, more broadly, might also involve people informing the government through popular participation. See supra notes 391-403 and accompanying text. It might also include people-to-people exchanges, intra-governmental exchanges, and inter-governmental exchanges.
\item \textsuperscript{445} See Md. Const., Decl. of Rights art. 40.
\item \textsuperscript{446} See id. art. 43; id. art. VIII, § 1 (free public education).
\end{itemize}
membership on government commissions open to the public;\textsuperscript{448} publication of reports of appellate judicial decisions;\textsuperscript{449} publication of an abstract of the accounts of the treasurer;\textsuperscript{450} and publication of proposed amendments to the constitution.\textsuperscript{451} The principle of free political exchange requires that the jury right be protected. The jury is one way to assure public access to information about our system of justice.\textsuperscript{452}

Thus, four of the six general, non-textual principles suggest a protective interpretation of the jury right. The other two principles are ambiguous.

This detailed study of the usual ways of interpreting the constitutional provision for the right to jury trial reveals a solid basis for a protective approach to the jury right in Maryland. Lynch and Bourne take a different approach with their principled discretionary

\begin{footnotesize}
\begin{enumerate}
\item See \textit{id.} art. III, §§ 21, 22, 30 (referring to open meetings, published journals of proceedings and published laws, respectively).
\item See, e.g., \textit{id.} art. IV, § 4A (Commission on Judicial Disabilities).
\item See \textit{id.} art. IV, § 16.
\item See \textit{id.} art. VI, § 4.
\item See \textit{id.} art. XIV, § 1.
\end{enumerate}
\end{footnotesize}
and actual approximation of pre-merger theory, to which we now turn.

III. THE LYNCH AND BOURNE PRINCIPLED DISCRETIONARY THEORY

In their book chapter\(^{453}\) and in an earlier law review article,\(^{454}\) Lynch and Bourne largely ignore the constitutional aspect of the right to jury trial. The authors do quote the original and the principal jury trial provisions in the Maryland Constitution and a fragment of the relevant convention debate.\(^{455}\) They then set forth their own “principled discretionary” theory, which maintains that the right to jury trial after the merger of Law and Equity is to be left to the discretion of Maryland’s trial judges, who in turn must be guided first by standards which reflect four traditional principles governing the separation of Law and Equity:

The first principle is that Maryland’s Constitution preserves the right to trial by jury as it existed at the time of the adoption of the Constitution \textit{vis à vis} the scope of equity. Second, the scope of equity has historically been measured with due respect to the importance of the right to trial by jury. Third, the scope of equity is necessarily limited by the principle that equity will not intervene where the remedy at law is full, expeditious and adequate. Finally, it has been recognized that the scope of equity in Maryland may be expanded by statute or judicial decision.\(^{456}\)

Second, the principled discretionary theory directs that the discretion of Maryland’s trial judges should be guided by the common sense notion that judicial economy is better served by trial by a judge than trial by a jury. Third, their theory directs that the discretion of trial judges should be guided by the notion that Equity is superior to Law as a mode of trial.\(^{457}\)

The principled discretionary theory may be criticized on four grounds—two in passing and two in detail. In passing, Lynch and Bourne do not actually apply that theory when deciding the proper situations in which the jury right is to apply—their approximation

\(^{453}\) See \textit{Lynch \& Bourne}, \textit{supra} note 3.

\(^{454}\) See Bourne \& Lynch, \textit{supra} note 5.

\(^{455}\) See generally \textit{supra} notes 7-8 and accompanying text; \textit{supra} note 9 and accompanying text.

\(^{456}\) Bourne \& Lynch, \textit{supra} note 5, at 59-60 (footnotes omitted).

\(^{457}\) See \textit{supra} notes 10-13 and accompanying text.
of pre-merger approach.\textsuperscript{458} Also, Lynch and Bourne’s principled discretionary theory is a hodgepodge of inconsistent policies. It is like a faculty meeting without an agenda—interesting, but lacking structure. That structure should be provided by the constitutional right to jury trial.

Of course, the idea of principled discretion is an apparent contradiction in terms. To the extent that judges have discretion, they are not limited by standards. To the extent that judges are limited by standards, they have no discretion.\textsuperscript{459} However, as developed below, discretion and standards often go together.\textsuperscript{460}

The standards themselves are also inconsistent with each other and come from different sources. Regarding sources, the six standards include two pure policy matters, three policies describing equitable jurisdiction, and one matter of constitutional law. The pure policy matters concern the common sense notion that judicial economy is served by trial by a judge, rather than a jury,\textsuperscript{461} and Equity’s superiority to Law as a mode of trial.\textsuperscript{462} The three policies undergirding equitable jurisdiction include Equity’s respect for the importance of the jury right,\textsuperscript{463} Equity’s prerequisite that there be no adequate remedy at Law,\textsuperscript{464} and Equity’s expansion and contraction of the jury right by statute or judicial decision.\textsuperscript{465} The matter of constitutional law is the preservation of the jury right as it existed at the time of the Maryland Constitution’s adoption.\textsuperscript{466}

On their faces, these standards reflect different attitudes towards the constitutional right to jury trial. Three of the standards—expansion of Equity (and contraction of the jury right) by statute or judicial decision,\textsuperscript{467} the common sense notion that judicial economy is better served by trial by a judge than by a jury,\textsuperscript{468} and Equity’s su-

\textsuperscript{458} See supra note 14 and accompanying text; see also infra notes 1128-1514 and accompanying text.
\textsuperscript{460} See infra notes 974-1003 and accompanying text.
\textsuperscript{461} See infra notes 867-70 and accompanying text.
\textsuperscript{462} See infra notes 956-68 and accompanying text.
\textsuperscript{463} See infra notes 636-38 and accompanying text.
\textsuperscript{464} See infra notes 704-07 and accompanying text.
\textsuperscript{465} See infra note 788 and accompanying text.
\textsuperscript{466} See infra note 600 and accompanying text. \textit{But see infra} notes 591-632 and accompanying text.
\textsuperscript{467} See infra notes 838-39 and accompanying text.
\textsuperscript{468} See infra notes 918-19 and accompanying text.
priority to Law as a mode of trial, \(^{469}\) obviously restrict the jury right. Three of the standards—preservation of the jury right as it existed at the time of the constitution’s adoption, \(^{470}\) Equity’s respect for the jury right, \(^{471}\) and Equity’s prerequisite that there be no adequate remedy at Law \(^{472}\)—are nominally protective of the jury right. Thus, instead of having a unifying theme of the right to jury trial under the Maryland Constitution, Lynch and Bourne patch together a theory based on a variety of inconsistent standards from different sources.

The principled discretionary theory suffers from two additional defects. Each aspect of Lynch and Bourne’s theory restricts, rather than protects, the right to jury trial. Each aspect of their theory is also contrary to many of the usual ways of interpreting the Maryland Constitution. Those criticisms will now be considered in detail.

A. Trial Judges’ Discretion

The first aspect of the principled discretionary theory advanced by Lynch and Bourne is the notion that the right to a jury trial is within the discretion of Maryland trial judges \(^{473}\) who are to be guided by specified standards. This idea is not protective of the right to trial by jury and is contrary to accepted methods of interpreting the Constitution.

1. Not Protective of the Jury Right

The idea of allowing trial judges the discretion, subject to certain standards, to determine whether a trial should be by judge or by jury may not fully protect the constitutional right to a jury trial. Lynch and Bourne recognize that judicial discretion may erode the jury right, at least where standards for exercising that discretion are undefined and where appellate review is limited to abuse of discretion. \(^{474}\) That erosion is particularly likely because of the bias held by

\(^{469}\) See infra notes 1104-06 and accompanying text.

\(^{470}\) See infra notes 531-90 and accompanying text.

\(^{471}\) See infra note 633 and accompanying text. But see infra notes 685-93 and accompanying text.

\(^{472}\) But see infra notes 719-86 and accompanying text.

\(^{473}\) See Lynch & Bourne, supra note 3, at 326; Bourne & Lynch, supra note 5, at 44; Lynch & Bourne, supra note 3, at 328, 330 n.191, 331; see also Bourne & Lynch, supra note 5, at 34, 29, 46-47, 59, 77. But cf. Lynch & Bourne, supra note 3, at 331 (stating that the discretion of trial judges must be restricted in some circumstances to protect the right to trial by jury); see also Bourne & Lynch, supra note 5, at 29, 44, 47.

\(^{474}\) See supra notes 262-66 and accompanying text.
many trial judges against trial by jury.475

As developed below, Lynch and Bourne try to define the standards which should guide judicial discretion in determining whether trial should be by judge or jury. However, their definition does not protect the jury right. Moreover, their position is contrary to discernible trends in state and federal law to curtail judicial discretion regarding the jury right. In Higgins v. Barnes,476 the Court of Appeals of Maryland described judicial discretion and quoted the Supreme Court in Beacon Theatres, Inc. v. Westover477 for the proposition that “such discretion is very narrowly limited and must, whenever possible, be exercised to preserve jury trial.”478 Maryland trial judges have traditionally had substantial discretion concerning the conduct of a trial,479 including determinations as to whether a case is equitable and triable by a judge, or legal and, thus, more properly tried by a jury.480

475. See Bourne & Lynch, supra note 5, at 58-59; see also id. at 2-3. But cf. infra note 681 and accompanying text (noting that judges generally favor retention, not abolition, of the jury trial).

476. 310 Md. 532, 551 n.12, 530 A.2d 724, 733 n.12 (1987).


478. Higgins, 310 Md. at 544, 530 A.2d at 730; see also Lynch & Bourne, supra note 3, at 331.


Thus, the determination of whether a case is an equitable one or a legal one might be of the same variety as the application of a procedural rule to a particular factual situation. See Northwestern Nat'l Ins. Co. v. Samuel R. Rosoff, Ltd., 195 Md. 421, 73 A.2d 461 (1950). However, it is not clear to what extent the determination of whether a case was equitable or legal was a matter for the discretion of the trial judge. In part, this uncertainty is a result of the different contexts in which the determination was made. For instance, a judge's discretion may be limited because the scope of Equity may be overshadowed by a defendant's right to a jury trial. See Bourne & Lynch, supra note 5, at 31-32, for a review of cases holding that Equity should not have exercised jurisdiction when it deprived the defendant of the jury trial to which he otherwise would have been entitled. Adding to the confusion is the fact that the line between Law and Equity is slowly evaporating. For instance,
even where there is an adequate remedy at law, equity may still exercise jurisdiction. For a discussion of cases allowing equity courts to support the jurisdiction of a court of law, see id. at 37-44.

Even the characterization of issues as either legal or equitable guides the judge's decision. See id. at 47-50 (noting that law and equity have concurrent jurisdiction in declaratory judgment situations); id. at 51-53 (typically, claims of title to land are treated as legal); id. at 53-55 (recission and restitution based upon fraud is handled by a court of law because merger overcomes the shortcomings of an equity court alone hearing the case). Further confusion arises when equity "cleans up" legal claims. See id. at 55-71. The compatibility of the defenses and replications available between the two courts also may direct a judge's decision toward one court as opposed to another. See id. at 29, 34, 64 n.412. The judge may also have less discretion when determining the appropriateness of dismissing or transferring a case to a court that lacked jurisdiction originally. See id. at 72-73 (noting a judge has less discretion because transfer from equity to law is mandated for various questions of fact). A judge's decision to refer an equitable suit to a law court is disfavored. See id. at 35-35, 44 n.284 (noting abolition of advisory juries in equity). Some issues, however, are individually triable by jury. See id. at 72. Also, the judge's decision may be facilitated by the fact that maryland courts maintain, as much as possible, the separation of legal and equitable claims. See id. at 34.

The classification of a claim as either legal or equitable is also made more difficult by the traditional complexities involved in distinguishing among matters of discretion, law, and fact, and in deciding among applicable standards of appellate review. Of course, deciding whether the nature of a case is a matter of discretion or is instead a question of law or a mixed question of law and fact is itself a question of law, fully reviewable upon appeal. See Emory v. Faith, 113 Md. 253, 256-57, 77 A. 386, 387 (1910) (noting that no appeal lies from an order determining a matter committed to the discretion of the lower court; the appellate court decides whether the judge's decision was within that discretion and whether that discretion was so exercised as not to impair the established rights of a party).

There are cases suggesting that the scope of equity jurisdiction or the requirements of the constitutional right to jury trial are questions of law for determination by the trial judge. Cf. Capron v. Devries, 83 Md. 220, 223-24, 34 A. 251, 251-52 (1866) (holding statutory equity jurisdiction existed, notwithstanding the jury right); Spangler v. Dan A. Sprosty Bag Co., 183 Md. 166, 174, 36 A.2d 685, 689 (1944) (holding jurisdiction lies in equity because of its more flexible and adaptive remedies). But cf. McCoy v. Johnson, 70 Md. 490, 490-92, 17 A.2d 387, 387 (1989) (holding equity had no jurisdiction because of the jury right); Glorius v. Watkins, 203 Md. 546, 548-52, 102 A.2d 274, 275-77 (1954) (holding equity had no jurisdiction because there was an adequate remedy at law). Thus, the determination might be of the same variety as the construction of a statute in a case that required the court to determine whether a sled was a vehicle. See generally Moon v. Weeks, 25 Md. App. 322, 333-36, 333 A.2d 635, 641-43 (1975) (holding a sled is a vehicle as opposed to a motor vehicle, which made it subject to the state's vehicle
Presumably, a trial judge's determination that a case should not be tried by jury was reviewable by an appellate court under an abuse of discretion standard. That appellate review was not pro-

laws). If the determination is a question of law, it would be fully reviewable on appeal. See Rohrbaugh v. Estate of Stern, 305 Md. 443, 447 n.2, 505 A.2d 113, 115 n.2 (1986) (holding lower courts' interpretations of law are afforded no presumption of correctness).

Other cases suggest that the determination is a mixed question of law and fact for the trial judge. See, e.g., Moore v. McAllister, 216 Md. 497, 505-11, 141 A.2d 176, 181-83 (1958) (reasoning that whether Equity has jurisdiction is in essence a determination of whether the party seeking equitable re-

lief is entitled to it on the merits under the historic principles of Equity). Thus, the determination might be of the same variety as the application of the constitution to a case determining whether or not a motion picture was obscene. See generally Wagonheim v. Maryland State Bd. of Censors, 255 Md. 297, 305-06, 258 A.2d 240, 244-45 (1969), aff'd sub nom. Grove Press, Inc. v. Maryland State Bd. of Censors, 401 U.S. 480 (1971). If the determination is a mixed question of law and fact, the standard of appellate review the court would probably apply would be the full independent review normally afforded determinations of constitutional fact, rather than the deferential clearly erroneous standard afforded to review of facts tried by a trial judge. See Wagonheim, 255 Md. 297 at 306, 258 A.2d at 244.

Even if the determination of whether a case was an equitable one or a legal one is for the discretion of the trial judge, that discretion varies. Only in some cases is it absolute and not open to review. See Newcomer v. Miller, 166 Md. 675, 680-81, 172 A. 242, 244 (1934). The trial judge's discretion is not absolute where its exercise invades established rights. See id.; cf. Bourne & Lynch, supra note 5, at 23 (stating that in the federal courts, Beacon requires that judicial discretion be limited by the constitutional jury right); id. at 46 n.295 (stating that a few states have adopted a rule similar to Beacon).

In any event, an appellate court reviewing the exercise of a trial judge's discretion in determining whether a case is an equitable one or a legal one may, as a practical matter, require a statement of reasons supporting the determination. If no reasons are stated, the appellate court may find it difficult to affirm that exercise of discretion. If reasons supporting the determination are stated, the appellate court may review those reasons to see that the trial judge's discretion was not abused. Cf. Canterbury Riding Condominium v. Chesapeake Investors, Inc., 66 Md. App. 635, 648-53, 505 A.2d 858, 865-67 (1986) (discussing discretion in certifying as final a judgment as part of a multiple claim and multiple party action). But see Allnutt v. State, 59 Md. App. 694, 478 A.2d 321 (1984) (stating that in a tax court proceeding, where no right to jury trial exists, but where a statute provides that the court in its discretion may submit issues of fact to a court of Law for trial by jury on a party's request, the tax court did not abuse its discretion by not submitting issues without stating reasons).

481. See Brown, supra note 85, at 447-48, 464, 465; see also Moore v. McAllister, 216 Md. 497, 512, 141 A.2d 176, 184 (1958) (stating in dicta that a court might abuse its discretion by raising lack of equity jurisdiction and dismissing a
tective of the jury right, however. First, the abuse of discretion standard is a very lenient one, requiring substantial deference to the decision of the trial judge.\textsuperscript{482} The trial judge’s choice regarding the mode of trial may have reflected hostility toward the jury\textsuperscript{483} and was often, according to Lynch and Bourne, based upon principles which provided little guidance.\textsuperscript{484} Second, the trial judge’s determination of the mode of trial was not immediately appealable and may have eluded review altogether. The decision to conduct a trial by judge or jury was interlocutory, not a final decision from which an immediate appeal might be taken before conclusion of the case in chief.\textsuperscript{485} That the determination of the mode of trial may have eluded review is most apparent where the party desiring jury trial prevailed in a trial by judge.\textsuperscript{486} Even where the party seeking a jury trial lost in a trial by judge, the error would be harmless if the appellate court concluded that a jury would have reached the same decision.\textsuperscript{487} The error might also elude review if the jury right was waived by the parties. In that event, the mode of trial would have been reviewed on appeal only if the trial court raised the issue \textit{sua-}

\textsuperscript{482} See Northwestern Nat’l Ins., 195 Md. at 436, 73 A.2d at 467; \textit{cf. supra} note 480 (stating that discretion varies). Only in some cases is discretion absolute and closed from review. \textit{But cf. Northwestern Nat’l Ins.,} 195 Md. at 436, 73 A.2d at 467 (noting that the equitable/legal determination may be outside the trial judge’s discretion; it may be a question of law fully reviewable upon appeal, or a mixed question of law and fact, or constitutional fact, subject to independent appellate review).

\textsuperscript{483} See \textit{supra} note 475 and accompanying text.

\textsuperscript{484} See \textit{supra} note 265 and accompanying text.

\textsuperscript{485} See \textit{Ex parte} Johnson, 215 Md. 391, 138 A.2d 347 (1958). Some doubt about this proposition developed because of the general principle that a decision settling a constitutional right is an immediately appealable final judgment. \textit{See Condon v. Gore,} 89 Md. 230, 234, 42 A. 900, 902 (1899). However, the \textit{Condon} principle was eroded and then, \textit{sub silentio}, overruled. \textit{See Old Cedar Dev. Corp. v. Jack Parker Constr. Corp.,} 320 Md. 626, 579 A.2d 275 (1990) (holding that an order striking a demand for a jury trial was not immediately appealable as a “final judgment” under the “collateral order doctrine”). \textit{Old Cedar} did leave open the possibility that denial of the jury right might be reviewable by mandamus under extraordinary circumstances. \textit{See id. at} 633 n.2, 579 A.2d at 279 n.2 (citing Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988)).

\textsuperscript{486} \textit{Cf. Master Royalties Corp. v. Mayor of Baltimore,} 235 Md. 74, 96, 200 A.2d 652, 664 (1964) (holding that \textit{grant} of jury trial was not prejudicial error).

\textsuperscript{487} \textit{But see Brown, supra} note 85, at 447-48 (denial of jury trial may be prejudicial error).
Thus, that aspect of Lynch and Bourne's principled discretionary theory which states that the jury right should be left to the trial judge's guided discretion is not protective of the right to jury trial.

2. Contrary to the Usual Ways of Interpreting the Constitution

The idea of leaving the determination of the right to jury trial to the discretion of trial judges is also contrary to accepted notions of constitutional construction. This judicial discretion is contrary to the nature of a written constitution—specific, enforceable, and supreme. The constitutional jury right aims to restrain governmental power. Leaving the jury right to the discretion of trial judges frustrates this larger purpose. The constitutional right to trial by jury is clearly not a matter properly left to judicial discretion.

Moreover, such judicial discretion is also contrary to the text of the constitution. The principal jury right provision provides for a "right" of trial by jury that is "inviolably preserved." While the text of the original jury right provision may have left the right subject to modification by the judiciary, that original provision has been supplemented by the principal jury right provision.

The breadth of judicial discretion urged by Lynch and Bourne is also contrary to the history of the Maryland Constitution. In England, the jury right was intended in part to function as a check on royal power. In Maryland, the purpose of the right to a jury trial was to put the right beyond the reach of the legislature and, presumably, the judiciary.

Such judicial discretion may be contrary to the structure of government. This discretion may be used to eliminate trial by a jury, which may otherwise soften the harshness of legal doctrines and serve as a check on the trial judge. The standard of appellate review of a trial judge's discretion also limits the scope of appellate re-

489. See generally supra note 15 and accompanying text.
490. See supra notes 16-21 and accompanying text.
491. See supra note 8; see also supra notes 48, 52-69 and accompanying text.
492. See supra notes 40-45 and accompanying text.
493. See supra note 491 and accompanying text.
494. See 1 Schwartz, supra note 72, at 4-7, 17-19, 40-41; see also supra notes 97-100 and accompanying text.
495. See supra notes 9, 21, 117 and accompanying text.
496. See supra notes 160-62, and accompanying text.
Such judicial discretion is contrary to current doctrine in Maryland. As we have seen, by following the Supreme Court’s opinion in *Beacon*, the Court of Appeals of Maryland has curtailed judicial discretion to protect the jury right. That doctrine has clarified an ambiguity as to whether a trial judge has discretion to determine whether a case was equitable or legal and, thus, triable by a jury.

Such judicial discretion may be contrary to prudential concerns. Absent clear proof, the jury benefits judges and our justice system by legitimizing outcomes by being a “lightning rod” for animosity, and by providing a “black box” decision. Those benefits are lost if a trial judge’s discretion is exercised to deny trial by jury.

Judicial discretion is contrary to some ethical matters. Subjecting the determination of the right to jury trial to the trial judges’ discretion may violate equal protection. Where the determination is not made on a rational basis, the judge’s decision *a fortiori* fails to meet the strict scrutiny standard required for an infringement of a fundamental right. Additionally, a trial judge exercising the jury’s functions of fact-finding and applying law to fact violates the principle of limited government by eroding an express limitation on governmental power. Similarly, the trial judge eliminates popular participation in government by exercising jury functions, thereby violating the principle of government by the people. When exercising jury functions, a judge essentially eliminates the jury, a safeguard for the liberty of the people. In doing so, a judge might be violating the principle of government for the people. The trial judge, exercising jury functions, may also violate the principle of free political exchange.

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497. *Cf. supra* note 320 and accompanying text (discussing appellate court review of jury verdicts).
498. *See supra* notes 476-78 and accompanying text; *see also supra* notes 184, 187-88, 189-97 and accompanying text.
499. *See supra* note 480 and accompanying text.
500. *See supra* notes 312-15, 320 and accompanying text.
501. *See supra* notes 365-73 and accompanying text.
502. *See supra* notes 376-82, 390 and accompanying text.
503. *See supra* notes 391, 404 and accompanying text.
504. *See supra* notes 405-11 and accompanying text.
505. *See supra* notes 443-52 and accompanying text.
B. Strict Historical Test

The second aspect of Lynch and Bourne’s principled discretionary theory is that “Maryland’s Constitution preserves the right to trial by jury as it existed at the time of the adoption of the Constitution vis à vis the scope of equity.”

Thus, Lynch and Bourne suggest that federal and Maryland courts have used, or should use, a static historical test in determining the right to a jury trial. That is, if a matter would have been heard at Law by a jury at the time the Maryland Constitution was adopted, it should so be heard now; if a matter would have been heard in Equity by a judge, it should so be heard now.

Lynch and Bourne’s strict historical test may be criticized on three grounds. First, the test is unworkable. Problems arise from the use of history generally, and the history of Law and Equity in particular.

General problems of arguing from history include the nature of history and the motivations of those invoking an historical argument. Regarding the nature of history, a strict historical test would, presumably, be based on patterns, not on isolated occurrences. However, gleaning patterns from practices, which may be patternless, may be based on fiat, not on history. Of course, history

506. Bourne & Lynch, supra note 5, at 59; see also Lynch & Bourne, supra note 3, at 305, 312.
507. See Bourne & Lynch, supra note 5, at 11, 15, 29. Elsewhere, of course, Bourne & Lynch recognize that the effect of Beacon and its progeny has been to soften the strictness of the historical test in favor of the jury right. See id. at 20-29; Lynch & Bourne, supra note 3, at 313, 330, 337.
508. See Lynch & Bourne, supra note 3, at 305, 312; Bourne & Lynch, supra note 5, at 36 & n.232, 59. Elsewhere, of course, Bourne & Lynch recognize that the effect of Higgins, relying on Beacon and other federal precedents, may be to soften the strictness of the historical test in favor of the jury right. See Lynch & Bourne, supra note 3, at 334-35, 337.
509. The use of history is not easy even when only a single item, not a pattern of occurrences, is considered. See, e.g., Stanley Fish, Fish v. Fiss, 36 Stan. L. Rev. 1325, 1327 (1984). The inquiry includes the following questions: What is history? Is this item history? If this item is history, what is the item’s meaning?
510. Cf. Edith Guild Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289, 336 (1966) (noting that judge-jury relations in the 13 original states at the time of the adoption of the Seventh Amendment were nearly patternless). Another commentator has noted a dispute about the early practice of the chancellor’s referral of issues of fact to a Law court for jury trial. See Brown, supra note 85, at 458-60.
511. Cf., e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 544 (1985) (noting that reliance on history to determine what state governmental func-
may be perceived as a process, not a set of occurrences. 512

Regarding motivation, history may be perceived as establishing a particular set of results, for example, the duplication of traditional judge or jury trial practices, or as establishing a principle such as the preservation or denial of the right to a jury trial. 513 Even if history is used to establish a particular set of results—a strict historical test—that test may be used, depending upon the motivation of the user, to preserve the jury right or deny it. As will be demonstrated, as often as not, the test is not used. 514 Moreover, when it is used, the historical test generally causes denial of the right. 515

Problems arise from the history of Law and Equity, particularly in construing a strict historical test as of 1776. These problems include the evolutionary nature of our civil justice system, the uncertainty of the boundary between Law and Equity, and the encroachment on Law by Equity since 1776, notwithstanding the test.

Coordinate systems of Law and Equity were just one stage in the evolution of our Anglo-American civil justice system. Earlier stages included a system of justice that was basically administrative, 516 followed by the development of the common law, 517 and then by the development of a supplementary system of Equity. 518 The coordinate systems of Law and Equity as they existed in 1776 519 have been largely replaced by a system which has merged Law and Equity in most instances. 520 In view of that evolution, a strict historical test of the right to jury trial is arbitrary in several respects. First, that test freezes the right at a particular time, without regard to earlier


514. See infra notes 532-90 and accompanying text.

515. See infra notes 539-42, 546 and accompanying text.


517. See id. at 20-21, 27.

518. See id. at 673, 675, 681, 684.

519. See id. at 681-82, 684, 692.

520. See MD. RULE 2-301; see also FED. R. CIV. P. 2.
and later developments in the relationship between Law and Equity. Second, the choice by litigants between Law and Equity might have been based not only on whether a judge or a jury was the trier of fact, but upon a number of other considerations, such as avoidance of multiplicity of suits, varying rules of evidence, and the availability of particular remedies. 521 However, the merged procedure has abolished many of the considerations for choosing between Law and Equity. 522 Third, the selection of the year 1776 as a benchmark is problematic. 523

The boundary between Law and Equity in 1776, as at other times, was uncertain. 524 The distinction between Law and Equity, has often been difficult to discern because of overlaps between the two systems, because of Law and Equity’s borrowings from each other, and because of the development of new rights and remedies. 525

Notwithstanding the strict historical test, Equity has encroached on Law since 1776. The traditional reference by the chancellor to a Law court for a jury trial of disputed issues of fact has been abolished, 526 the equitable prerequisite that there be no adequate remedy at law has been eroded, 527 and the clean-up doctrine has been extended. 528 Apparently, these encroachments have come without challenge to the right to jury trial. 529

Thus, Lynch and Bourne’s strict historical test is unworkable. As developed below, the federal and Maryland courts are now tak-

521. See James et al., supra note 1, at 418-20. Other considerations which might have influenced a litigant’s choice between Law and Equity procedures include different officials (judge or chancellor), different procedures for commencement of actions (summons or subpoena), pleadings, joinder of claims and parties, discovery, presentation of evidence (orally or in writing), final order (judgment or decree), execution (levy or contempt), scope of appellate review, different grounds for relief (of right or by discretion), and different principles of adjudication (precedent or “reason and conscience”). See generally Ginsberg, supra note 86; Miller, supra note 282; Phelps, supra note 86.

522. See Lynch & Bourne, supra note 3, at 319-30; Bourne & Lynch, supra note 5, at 45 n.292, 52, 54-55, 76.

523. See infra notes 602-08 and accompanying text.

524. See Lynch & Bourne, supra note 3, at 326; Bourne & Lynch, supra note 5, at 33, 44-46; see also id. at 29, 34.

525. See Bourne & Lynch, supra note 5, at 45-46.

526. See infra note 562 and accompanying text.

527. See infra note 563 and accompanying text.

528. See infra note 564 and accompanying text.

529. See Brown, supra note 85, at 451, 469.
ing a more dynamic historical approach. More importantly, for the purposes of this Article, Lynch and Bourne's strict historical test may be criticized because it is not protective of the jury right and because it is contrary to accepted constitutional principles.

1. Not Protective of the Jury Right

A strict historical test is nominally protective of the jury right. That is, if a matter would have been heard at Law by a jury at the time the Maryland Constitution was adopted, it should be heard by a jury now. However, Lynch and Bourne use the strict historical test for determining whether trial should be by judge or jury because this test tends to restrict rather than protect the right to jury trial. The test is like a college quota system originally used to assure the admission of a minimum number of minority students, but later used to cap the number of minority admissions.

Lynch and Bourne cite a number of Maryland and federal cases as authorities for a strict historical test. The Maryland cases include *Higgins v. Barnes*, *Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc.*, *Pennsylvania ex rel. Warren v. Warren*, and *Fooks' Executors v. Gingham*. A strict historical test in Maryland courts, according to Lynch and Bourne, would freeze the right to jury trial in Law actions as of 1776, the date of the first constitutional jury right.

There is language in *Higgins*, citing *Knee v. Baltimore City Passenger Railway*, supporting a strict historical test. However, *Higgins* is not a good example of the use of a strict historical test. There,

530. See infra notes 628-29 and accompanying text.
531. But cf. Brown, supra note 85, at 457-69 (discussing the strict historical test used to protect the jury right).
532. See LYNCH & BOURNE, supra note 3, at 312 n.48; Bourne & Lynch, supra note 5, at 33, 36 & n.232.
533. See Bourne & Lynch, supra note 5, at 11 n.46, 15.
536. 204 Md. 467, 105 A.2d 488 (1954).
537. 172 Md. 612, 192 A. 782 (1937).
538. See LYNCH & BOURNE, supra note 3, at 305, 312; see also Bourne & Lynch, supra note 5, at 33, 36, 59. See generally Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 655 & n.4 (1963) (providing that a state constitution generally preserves the right to jury trial as it existed in English history at the date of that state's first constitution).
539. 87 Md. 623, 40 A. 890 (1898).
540. See Higgins, 310 Md. at 542-43, 530 A.2d at 729.
Barnes sued Higgins for specific performance of a contract. Higgins answered and counterclaimed for damages for breach of the same contract, and demanded a jury trial. The court of appeals assumed that because specific performance was historically an action in Equity, once equitable jurisdiction attached, the entire case would have been determined by the judge and not a jury. Thus, Equity's "clean-up" jurisdiction would have included Higgins's answer and counterclaim for damages for breach of contract, legal issues historically triable by jury. However, the court of appeals held that, after merger of Law and Equity, the constitutional right to jury trial required that the legal issues in Higgins's answer and counterclaim must be heard by a jury, before the judge decided upon the equitable specific performance claim. Because a jury trial was granted as to certain legal issues in a context which would have been heard historically by the judge exercising equitable clean-up jurisdiction, Higgins did not use a strict historical test, although the case was protective of the jury right.

There is language in Knee supporting a strict historical test. Knee is also a good example of the use of a strict historical test, but in a different context. Knee claimed that a statute, requiring that costs of his earlier trial be paid before a new trial began, deprived him of the right to jury trial in the new action. The court of appeals upheld the statute because a similar common-law practice antedated the Maryland Constitution. Thus, Knee used a strict historical test, not to distinguish between actions at Law triable by a jury and suits in Equity not triable by a jury, but to determine what regulations of the jury right were permitted. Knee's use of a strict historical test in that context was used to restrict the jury right.

There is language in Impala supporting a strict historical test. Nevertheless, Impala is not a good example of the use of a strict historical test. In Impala, the plaintiff sued at Law for contract damages. One of two defendants counterclaimed, asserting a number of legal and equitable claims and remedies. Presumably, a case combining legal and equitable issues could only have been heard in Equity; once equitable jurisdiction attached, the entire case would have been determined by the judge. When the plaintiff objected to trial by jury, the defendant was allowed to strike from the counter-
claim all relief other than the legal remedy of damages. The verdict for defendant on the counterclaim was upheld on appeal as properly tried by a jury. Plaintiff's objection, that defendant was allowed to recover damages on an equitable claim for breach of fiduciary relationship, was rejected because that issue was held to be one which might be tried at Law as equitable estoppel or fraud. Because a jury trial was granted as to issues in a context which would have been heard historically by the judge, Impala did not use a strict historical test. Yet, Impala was protective of the jury right.

There is language in Warren supporting a strict historical test, and that case is also a good example of the use of such a test. Warren was an action for support of wife and children brought at Law, with a demand for jury trial. The court of appeals held that the action should have been brought in Equity, where such actions had been tried in Maryland as early as 1727. Warren used a strict historical test, but used it to restrict the jury right.

There is language in Fooks' supporting a historical test, but not a strict historical test. The receiver of an insolvent bank sought to liquidate the bank's assets by enforcing its stockholders' liability under an assessment statute enacted in 1910. In a related case, Allender v. Ghinger, the court of appeals held that two of the receiver's suits against the stockholders in Equity were improper, among other reasons, because joinder rules at Law provided an adequate remedy precluding Equity jurisdiction based on multiplicity, and because of the constitutional right to jury trial. Other stockholders in Fooks' then claimed that a decree entered against them several years before in a third suit was also void as outside the jurisdiction of Equity. The court of appeals concluded that because of the "vague and shadowy" distinctions between Law and Equity, the decree was not void, but only voidable. Being several years after the time for seeking appellate review had run, the stockholders' challenge to the decree was untimely.

544. Apparently, equitable estoppel could not be heard on the Law side until long after 1776. See 1888 Md. Laws ch. 547.
545. Apparently, fraud historically could be heard either in Law or in Equity, depending upon the relief sought. See Impala, 283 Md. at 321 n.11, 389 A.2d at 902 n.11; see also Richardson v. Stillinger, 12 G. & J. 477 (Md. 1842).
548. 170 Md. 156, 183 A. 610 (1936).
Apparently, no claim to the jury right was made in *Fooks*, as it had been in *Allender*, although the issue was similar—the respective jurisdictions of Law and Equity. However, a strict historical test would not have helped the stockholders in *Fooks* and *Allender*. The assessment statute under which the receiver sued the stockholders was not enacted until 1910. Accordingly, no right to jury trial existed in 1776. *Fooks*, therefore, could not have used a strict historical test. Although the related case, *Allender*, was protective of the jury right, no claim to that right was made in *Fooks*. Had such a claim been made as part of the stockholders' belated claim in *Fooks*, that case would not have been protective of the right.

Thus, four out of five of these Maryland authorities—*Higgins*, *Knee*, *Impala*, and *Warren*—have language supporting a strict historical test. The fifth, *Fooks*, has language supporting a historical test, but not a strict historical test. However, three out of the five authorities—*Higgins*, *Impala*, and *Fooks*—do not actually use a strict historical test. Of the two authorities that do use a strict historical test, *Knee* and *Warren*, both restrict the jury right. *Knee* uses the test not to distinguish between Law and Equity, but to determine what regulation of the jury right is permitted. Thus, while Lynch and Bourne's Maryland authorities have language supporting a strict historical test, more often than not, the test is not applied. Furthermore, when the strict historical test is applied, it is used to restrict the jury right.

Many other Maryland authorities not cited by Lynch and Bourne do not use a strict historical approach. Some of those authorities ignore a strict historical test, while protecting the jury right. By statute in the nineteenth century and by court rule in the twentieth century, ancillary injunctive relief was provided in actions at Law; thus, jury trial of legal issues could be had in cases which earlier could only have been heard in Equity.\footnote{549. See supra note 174 and accompanying text.} Similarly, by court rule in the twentieth century a number of other equitable procedures, including discovery, class actions, and intervention, were provided in actions at Law.\footnote{550. See Bourne & Lynch, supra note 5, at 72-73.} By court rule in the twentieth century certain issues in interpleader actions were specifically permitted to be transferred to Law courts for trial by jury.\footnote{551. See id. at 73-74.} By statute in the twentieth century the jury right was preserved in certain new pro-
ceedings, for example, declaratory judgment actions.\(^{552}\)

Other cases and authorities refuse to apply a strict historical test, while restricting the jury right. Among the cases are *Attorney Grievance Commission v. Kerpelman*\(^ {553}\) and *Houston v. Lloyd’s Consumer Acceptance Corp.*\(^ {554}\). *Kerpelman* denied an attorney a right to jury trial in disciplinary proceedings because the Maryland Rules provided that such proceedings should be governed by rules which applied in Equity. However, the Court of Appeals of Maryland cited no historical authority that attorney disciplinary proceedings were equitable in 1776, although the court did cite later precedents from federal and state courts. The court also noted that a statutory procedure for referring factual issues from Equity Law courts for jury determination had been abolished.\(^ {555}\) *Houston* upheld a court rule requiring a written election for jury trial, although no such requirement existed at the time the Maryland Constitution was adopted. Analogizing the requirement to the rule of costs in *Knee v. Baltimore City Passenger Railway*\(^ {556}\) and the federal jury demand requirement,\(^ {557}\) the court of appeals upheld the rule as a reasonable regulation of the right to jury trial.

There are still other authorities that refuse to apply a strict historical test, while restricting the jury right. *Bringe v. Collins*\(^ {558}\) upheld the practice of providing a jury trial only on appeal to a circuit court from a landlord’s action in a district court to recover property. The court of appeals upheld the practice, although the action was historically one at Law which the right to jury trial attached, although a 1793 statute provided for jury trial in the initial proceedings, and although the jury in the initial proceedings was not abolished by statute until 1886. Summary judgment\(^ {559}\) and directed verdict\(^ {560}\) also have been approved, although they did not exist in 1776.

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552. See *id.* at 47-50; *cf.* *Md. Code Ann., Fam. Law §§ 5-1026(a), 5-1027(b)* (1991) (paternity proceedings).
553. 288 Md. 341, 420 A.2d 940 (1980).
555. See infra note 586 and accompanying text.
556. 87 Md. 623, 40 A. 890 (1898). See generally supra notes 541-42 and accompanying text.
559. See *Fletcher v. Flournoy*, 198 Md. 54, 81 A.2d 232 (1951).
One commentator noted three other developments. First, the eighteenth century practice of a chancellor in Equity referring disputed issues of fact to a Law court for jury trial became discretionary in the nineteenth century, and was abolished by court rule in the twentieth century. Second, the equitable prerequisite of no adequate remedy at Law was eroded by a nineteenth century statute and by a twentieth century court rule that damages at Law were inadequate unless the party against whom damages were sought posted a bond or otherwise showed property ownership from which the damages could be satisfied. Third, equitable clean-up jurisdiction grew after 1776.

The federal cases Lynch and Bourne cite, including Baltimore & Carolina Line Inc. v. Redman, Dimick v. Schiedt, and Liberty Oil Co. v. Condon National Bank, illustrate the strict historical test. According to Lynch and Bourne, a strict historical test in federal court would freeze jury trial practice as of 1791, the date of the Seventh Amendment.

There is language in Redman supporting a strict historical test. However, given that Redman arose in a different context, that case is not a good example of the use of a strict historical test.

In Redman, the Supreme Court held that the court of appeals had the power to give judgment notwithstanding a jury verdict for a plaintiff, and that a judgment notwithstanding the verdict did not violate the jury right. The Supreme Court referred to a common-law practice of a trial judge submitting a case to the jury while re-

561. See infra note 586 and accompanying text.
562. See Brown, supra note 85, at 458-66; see also Bourne & Lynch, supra note 5, at 34-35, 44 n.284, 72.
563. See Brown, supra note 85, at 450, 466-69; see also Lynch & Bourne, supra note 3, at 318 n.113.
564. See Brown, supra note 85, at 470-73; see also James et al., supra note 1, at 416-17 (noting that in 1786, English and then American Equity courts began granting legal relief rather than dismissing a case when the basis for equitable jurisdiction failed).
566. 293 U.S. 474 (1935).
568. See Lynch & Bourne, supra note 3, at 312; Bourne & Lynch, supra note 5, at 11, 15, 29.
569. See Redman, 295 U.S. at 657.
570. Redman qualified Slocum v. New York Life Insurance Co., 228 U.S. 364 (1913), which did use a strict historical approach, and used it to protect the jury right. See id. at 656.
serving a point of law for later decision.\textsuperscript{571} A commentary on \textit{Redman} has noted that the later decision was made by the court en banc at Westminster.\textsuperscript{572} However, the old common-law practice differs in at least two respects from the practice approved in \textit{Redman}. First, the trial judge at common law reserved the point for the judges en banc; he did not decide it himself.\textsuperscript{573} In \textit{Redman}, the trial judge reserved the point only until after verdict. He then decided the point himself, rejecting the defendant's motion to dismiss and motion for directed verdict.\textsuperscript{574} Second, the judgment notwithstanding the verdict at common law came from a court sitting en banc.\textsuperscript{575} In \textit{Redman}, the judgment notwithstanding the verdict came from an appellate court, the Supreme Court.\textsuperscript{576} Thus, \textit{Redman} dealt not with a distinction between Law and Equity, but with the judgment notwithstanding the verdict, a device with which the judge in a case at Law may control the jury. \textit{Redman}, therefore, arose in a specific context, did not use a strict historical test, and restricted the jury right.

There is language in \textit{Dimick} supporting a strict historical test.\textsuperscript{577} Interestingly, \textit{Dimick}’s holding, but not its dictum, is a good example of the use of a strict historical test. Like \textit{Redman}, \textit{Dimick} arose in a specific context. In \textit{Dimick}, the Supreme Court rejected the additur device of granting a new trial if the defendant did not consent to an increase in damages. The Court held that additur violated the Seventh Amendment because no such practice existed in 1791. However, the Court in dictum endorsed the remittitur device of granting a new trial if the plaintiff did not consent to a decrease in damages. The Court rested its endorsement of remittitur on federal practice dating back only to 1822, and on “the practice of some of the English judges—a practice which has been condemned ... by every reasoned English decision, both before and after the adoption of the federal Constitution,” as contrary to common-law principles.\textsuperscript{578} Thus, \textit{Dimick} dealt not with a distinction between Law and Equity, but with the conditional new trial, a device by which the judge may control the jury in a Law case. Therefore, \textit{Dimick}’s holding, which rejected additur, used a strict historical test and pro-

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{571}
\item See id. at 659-60.
\item See \textit{Redman}, 295 U.S. at 659-60.
\item See id. at 659.
\item See supra note 572 and accompanying text.
\item See \textit{Redman}, 295 U.S. at 659, 661.
\item Id. at 484.
\end{enumerate}
\end{footnotesize}
tected the jury right. By endorsing remittitur in dictum, however, *Dimick* did not apply a strict historical test, and restricted the jury right.

*Liberty Oil* contains language supporting a strict historical test,579 and is a good example of the use of that test. In *Liberty Oil*, a contract purchaser of oil lands deposited money with a bank pending the vendors' proof of titles. Alleging a defect in title, the purchaser sued the bank for damages. The bank, claiming that it was a disinterested stakeholder and that the vendors had also claimed the deposited money, interpleaded the vendors and asked to be discharged.

The Supreme Court upheld the Law and Equity Act of 1915, which permitted the bank's use of equitable interpleader defensively in an action at Law. The Court held that the defensive interpleader under the Act was like historical practice. Under the Act, the judge not only had authority to decide the equitable interpleader, but had discretion to try any legal issues. Historically, a defendant with an equitable defense to a Law action could file a bill in Equity to enjoin the action, determine the equitable defense, and, in the judge's discretion, clean up the legal issues. While a jury had been waived in writing, the issue was similar, characterizing the case as one at Law or one in Equity. Moreover, the Supreme Court in dictum considered the implications of the Seventh Amendment right. The Court held that the case was one in Equity which could be more fully reviewed by appeal, rather than one at Law subject to more limited review by writ of error. *Liberty Oil*, therefore, used a strict historical test. No claim of jury right was made. Had such a claim been made, the case would not have been protective of the right because of the judge's discretionary clean-up jurisdiction.

Thus, all three of these Supreme Court authorities—*Redman, Dimick, Liberty Oil*—have language supporting a strict historical test. *Redman* and *Dimick* use the test in determining which of the judge's devices to control the jury are permitted, but not in distinguishing between Law and Equity. The *Redman* and *Dimick* dicta do not actually use a strict historical test. The *Dimick* and *Liberty Oil* holdings do use a strict historical test. In *Dimick*, the Court uses the test to protect the jury right, while in *Liberty Oil*, the Court uses the test to restrict the jury right. Thus, although Lynch and Bourne's Supreme Court authorities have language supporting a strict historical test, as

often as not, those cases do not apply the test. When the test is applied, it is used to restrict the jury right.

In other ways, Lynch and Bourne depart from a strict historical test in order to restrict the jury right. They assume that with Equity having broad discretion to try all the issues without a jury, in 1776 virtually any combination of legal and equitable claims could be joined.\textsuperscript{580} In this context, however, Lynch and Bourne's assumption is inconsistent with the state of affairs in 1776—the separation of Law and Equity;\textsuperscript{581} the limitations on joinder of legal and equitable claims;\textsuperscript{582} Equity's respect for the jury right;\textsuperscript{583} Equity's prerequisite of no adequate remedy at Law;\textsuperscript{584} the possibility that Equity's discretion to hear legal issues was very narrowly limited;\textsuperscript{585} and the power of Equity to refer issues of fact to Law courts for trial by jury.\textsuperscript{586}

Moreover, elements of Lynch and Bourne's restrictive principled discretionary theory seem inconsistent with a strict historical approach given the expansion of Equity by statute or judicial decision since 1776,\textsuperscript{587} and the modern notions that judicial economy is better served by trial by a judge than trial by a jury\textsuperscript{588} and that Equity is superior to Law as a mode of trial.\textsuperscript{589} This departure from a strict historical test may reflect a more dynamic historical approach—the approximation of pre-merger approach (reflecting developments up to 1984) Lynch and Bourne take when they actually decide the situations in which the jury right applies.\textsuperscript{590}

\textsuperscript{580} See Bourne \& Lynch, supra note 5, at 46; see also id. at 54-55, 60, 62, 75-77; cf. id. at 12-15 (federal practice in 1791); see generally Lynch \& Bourne, supra note 3, at 307.

\textsuperscript{581} See Lynch \& Bourne, supra note 3, at 306, 326; Bourne \& Lynch, supra note 5, at 11, 29, 34, 44-45, 55, 64.

\textsuperscript{582} See Bourne \& Lynch, supra note 5, at 34-35, 55, 64.

\textsuperscript{583} See infra notes 633-703 and accompanying text.

\textsuperscript{584} See infra notes 704-87 and accompanying text.

\textsuperscript{585} See James, supra note 538, at 693.

\textsuperscript{586} See Lynch \& Bourne, supra note 3, at 307 n.12; Bourne \& Lynch, supra note 5, at 34-35, 72. One commentator described this practice as virtually creating a right to have factual issues in Equity resolved by a jury at Law. See Brown, supra note 85, at 458-66.

\textsuperscript{587} See infra notes 788-89 and accompanying text.

\textsuperscript{588} See infra notes 867-955 and accompanying text.

\textsuperscript{589} See infra notes 956-1124 and accompanying text.

\textsuperscript{590} See infra notes 1128-1514 and accompanying text.
2. Contrary to the Usual Ways of Interpreting the Constitution

A strict historical test is also contrary to many of the usual ways of interpreting the constitution. A strict historical test is contrary to the nature of a "living Constitution," one to be interpreted by its "spirit," not by its "letter." Generally, the constitutional right to jury trial should be protected, not restricted, in new circumstances such as the development of substantial rights and remedies, the "borrowing" by Law of procedural devices from Equity such as joinder and discovery, and the merger of Law and Equity.

Analogously, changes in jury qualifications and selection since the framing of the Maryland Constitution indicate the unworkability of a strict historical test in interpreting another aspect of the right to jury trial. Shortly after the Maryland Constitution was adopted, persons qualifying for jury service were freemen, residents of the county having the most wisdom and experience, possessing a freehold of fifty acres in the county or possessing property in the state worth three hundred pounds or more. Selection of jury panels

591. See supra notes 26-27 and accompanying text; see also McCoid, supra note 513, at 11. The inconsistency of constitutionalism with a strict historical test for interpreting the Seventh Amendment to the United States Constitution has been noted even by a proponent of that test:

[B]lind adherence to history would seem to place modern judicial administration in an historical strait jacket, controlled by the policies of a society of 200 years ago. Traditional constitutional analysis has never been so limited. Ever since Chief Justice Marshall admonished that it "is a Constitution we are expounding," courts generally have been willing to read the broad language of the Constitution to account for changing social conditions. A rigid historical approach in the interpretation of the seventh amendment would seem to be out of step with the more flexible interpretive approaches generally employed in delimiting the scope of other constitutional provisions. Martin H. Redish, Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making, 70 Nw. U. L. Rev. 486, 487 (1975) (footnote omitted). But cf. id. at 517, 531 (stating that the rigid historical approach provides flexibility by allowing the legislature to authorize a jury trial).


593. See Lynch & Bourne, supra note 3, at 319-20; Bourne & Lynch, supra note 5, at 31, 36, 55-76.

594. See supra note 1 and accompanying text.

595. See Feb. 1777 Md. Laws ch. 15, § 10; Oct. 1777 Md. Laws ch. 16. Apparently, the person was required to be 21 years of age or older. See 1797 Md. Laws ch. 87, § 5 (age set at 25); cf. Judiciary Act of 1789, ch. 20, § 29 (providing that federal courts apply standards of the state in which they sit).
was apparently left to the discretion of the county sheriffs.\textsuperscript{596} Today, persons qualifying for jury service are citizens of Maryland, residents of the county in which the court sits, registered voters, at least eighteen years old, and proficient in English.\textsuperscript{597} In addition, selection of jury panels is random\textsuperscript{598} and discrimination on the basis of race, color, religion, sex, national origin, or economic status is prohibited.\textsuperscript{599}

A strict historical test is also contrary to the text of the Constitution, namely Article 23, the original Reception Provision, and the principal jury trial provision. The test is also contrary to the legal implications that stem from constitutional omissions. The Reception Provision appears to adopt a strict historical test. That provision states that “the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six.”\textsuperscript{600}

However, further investigation of that provision does not support a strict historical test. First, because of the order, punctuation, and language of the Reception Provision, the July 4, 1776 reference date may apply only to the reception of English statutes, not the reception of English common law and the trial by jury.\textsuperscript{601} Thus, the jury right would not be tied to any historical date.

Second, there are other ambiguities in the Reception Provision about time and place, casting doubt upon a strict historical test. With respect to time, it is not clear whether a historical test would use 1634, 1776, 1851, 1867, or some other year as the time of reference. As developed above, the Reception Provision now establishes the date for the reception of English law as July 4, 1776.\textsuperscript{602} However,

\textsuperscript{596}. See Feb. 1777 Md. Laws ch. 15, § 10 (incorporating provincial law); see also 1715 Md. Laws ch. 37, § 1; cf. 1797 Md. Laws ch. 87, §§ 1-2 (sheriff’s oath, assuring integrity, experience, and intelligence of jurors).


\textsuperscript{600}. MD. CONST., DECL. OF RIGHTS art. 5.

\textsuperscript{601}. See supra notes 36-47 and accompanying text.

\textsuperscript{602}. See supra note 600 and accompanying text. That date was set in 1851. See Md. CONST. OF 1851, DECL. OF RIGHTS art. 3.
the original version of the Reception Provision\textsuperscript{603} established a much earlier time for the reception of English law: that of the first immigration to Maryland in 1634.\textsuperscript{604} Of course, the principal provision, Article 23 of the Maryland Declaration of Rights, may have changed the time of reference. The predecessor of Article 23, which was initially adopted in 1851, "inviolably preserved" the right.\textsuperscript{605} It was re-adopted as part of a new Maryland Constitution in 1864,\textsuperscript{606} was again adopted as part of the current Maryland Constitution in 1867,\textsuperscript{607} and was subsequently amended in 1970, 1978, and 1992.\textsuperscript{608}

Regarding place, it is not clear whether the English common-law jury right was an idealized right, or the right as practiced in England or in Maryland. Maryland jury trial practice is suggested by the Reception Provision's reference to the use of presumably local, provincial Maryland "[c]ourts of Law or Equity."\textsuperscript{609} However, a complaint of Maryland residents was that English authorities had deprived them in many cases of trial by jury.\textsuperscript{610} English jury trial practice is suggested by the provision of Article 5 that trial by jury is to be "according to the course of that [English Common] Law."\textsuperscript{611} However, a truer idea of the common-law jury right was one of an idealized eternal system of principles, of which judicial practice was only evidence.\textsuperscript{612} Thus, the common-law jury right was not amenable

\textsuperscript{603} See Md. Const. of 1776, Decl. of Rights art. III.

\textsuperscript{604} The first English settlement in Maryland was in 1634 under a charter granted in 1632. See Maryland Manual 1994-1995, at 17.

\textsuperscript{605} Md. Const. of 1851 art. X, § 4.

\textsuperscript{606} See Md. Const. of 1864 art. XII, § 5.

\textsuperscript{607} See Md. Const. of 1867 art. XV, § 6.

\textsuperscript{608} See supra notes 128-30 and accompanying text.

\textsuperscript{609} Md. Const., Decl. of Rights art. 5. See supra note 5 for full text of the Reception Provision.

\textsuperscript{610} See 1774 Proceedings, supra note 105, at 201. The residents of all 13 colonies made the same complaint. See The Declaration of Independence para. 20 (U.S. 1776).

\textsuperscript{611} Md. Const., Decl. of Rights art. 5; cf. Markman v. Westview Instruments, Inc., 116 S. Ct. 1384, 1389 & n.3 (1996) (stating that the historical test for determining the meaning of the Seventh Amendment does not deal with "the possibility of conflict between actual English common-law practice and American assumptions about what that practice was, or between English and American practices at the relevant time").

\textsuperscript{612} See State v. Buchanan, 5 H. & J. 317, 356-59 (Md. 1821). Put another way, the common law was not just a body of rules, but a system of jurisprudence combining stability (adherence to precedent) and change (adaptation to new circumstances). See generally Arthur R. Hogue, Origins of the Common Law 5, 244-45, 247 (1966).
to a strict historical test.613 Third, the Reception Provision expressly makes the received English law, perhaps including the jury right, subject to modification by the legislature,614 and impliedly makes that law subject to modification by the judiciary.615

A strict historical test is also contrary to the principal jury trial provision, Article 23. That provision has language suggesting a historical test, stating that the right of trial by jury in "Courts of Law," distinguished from courts of Equity (or Chancery),616 shall be "inviolably preserved."617 However, there is no hint in Article 23 of a strict historical test, freezing the jury trial practice as of a certain date. Even if such a test were adopted, Article 23 offers no guidance as to what the date should be.618

A strict historical test as used by Lynch and Bourne, which more often restricts the jury right,619 is contrary to implications which stem from omissions from the Maryland Constitution. As developed above, the Maryland Constitution preserves the right to trial by jury, not trial by judge or even separate courts of Law and Equity.620 The strict historical test should be used to preserve, not just restrict, the jury right.621

613. See Wolfram, supra note 120, at 736-39, 744-45 (1973); cf. supra notes 567-75 and accompanying text (a strict historical test is contrary to the nature of a "living" constitution). A strict historical test may not work even in long-standing statutory schemes such as those embodied in federal statutes enacted before the Federal Rules of Civil Procedure which conform federal procedure to state procedure as of certain dates. See Charles Alan Wright, Federal Courts 424-26 (5th ed. 1994).

614. See supra notes 40-43 and accompanying text.

615. See supra notes 44-45 and accompanying text.

616. See supra notes 47-48 and accompanying text.

617. See supra notes 52-69 and accompanying text. Interestingly, Bourne and Lynch often use the term "preserve" and its variants, not in a historical sense, but as a synonym for "protect." See Lynch & Bourne, supra note 3, at 328, 331; Bourne & Lynch, supra note 5, at 15 n.77, 16, 44, 47, 49, 57, 65, 66 n.417, 70-73.


619. See supra notes 531-90 and accompanying text.

620. See supra note 77 and accompanying text.

621. See Wolfram, supra note 120, at 735-36 (1973) (providing that the historical test under the Seventh Amendment should "preserve" the right to jury trial, not jury practice in 1791); McCoid, supra note 513, at 14 (providing that the Seventh Amendment's pro-jury bias, reflected in Beacon's flexible historical test, operates only to expand, not curtail, the jury trial).
A strict historical test is contrary to the history of the jury right.
That history spans a period from the Magna Carta in 1215 to the
most recent amendment in Maryland in 1992. Selection of the
date of July 4, 1776 to freeze the jury right seems particularly arbi-
trary given that colonists were then complaining that they were be-
ing deprived of their jury right. Selection of that date also seems
contrary to the purpose of Article 23, which put the jury right be-
yond the power of amendment or repeal by the legislature, a power
held by these branches in 1776.

A strict historical test may be contrary to the structure of gov-
ernment. Juries, which find facts and soften the harshness of legal
doctrine, provide a check on the trial judge. When the strict his-
torical test is used to restrict rather than protect the jury right, this
check on the trial judge is eliminated.

The strict historical test is also contrary to doctrine. There is
some past support in Maryland and federal doctrine for a strict
historical test. However, Lynch and Bourne recognize that the fed­
eral courts now take a dynamic, rather than a strict historical ap­
proach, which Maryland follows.

A strict historical test may also be contrary to prudential con­
cerns. Having the jury decide cases benefits judges and our justice
system. The jury helps legitimize the outcome, acts as a “lightning
rod,” and provides a “black box” decision. These benefits are lost
when the strict historical test is used to restrict, rather than protect
the right to jury trial.

A strict historical test may also be contrary to some ethical mat­
ters. A strict historical test as of 1776, and one used more often to
restrict than protect the jury right, seems likely to fail deferential
equal protection scrutiny under either the Fourteenth Amendment
of the United States Constitution, or Article 24 of the Maryland Dec-

622. See supra notes 97-131 and accompanying text.
623. See supra notes 105-06 and accompanying text.
624. See supra notes 113, 115-17 and accompanying text.
625. See supra notes 160-62 and accompanying text.
626. See supra notes 531-48 and accompanying text.
627. See supra notes 565-72 and accompanying text.
628. See LYNCH & BOURNE, supra note 3, at 330, 337; see also Bourne & Lynch, supra
note 5, at 4; cf. JAMES ET AL., supra note 1, at 422 (“elastic” historical test);
McCoid, supra note 513, at 14, 23-24 (“flexible” or “principled” historical
test); Redish, supra note 591, at 487-502, 530-31 (“rational” historical test).
629. See LYNCH & BOURNE, supra note 3, at 337.
630. See supra notes 308-20 and accompanying text.
laration of Rights. Used in this way, a strict historical test may also violate the principles of limited government, government by the people, government for the people, and free political exchange.

Thus, the aspect of Lynch and Bourne’s principled discretionary theory that the Maryland Constitution requires use of a strict historical approach in determining the jury right, is not protective of the jury right and is contrary to many of the usual ways of interpreting the constitution.

C. Equity Respects the Jury Right

The third aspect of Lynch and Bourne’s principled discretionary theory is that “the scope of equity has historically been measured with due respect to the importance of the right to trial by jury.” That principle applies in both federal and Maryland courts. Apparently, this principle of Equity’s respect for the jury right is more a policy of Equity than a matter of constitutional right in both federal and Maryland courts. Lynch and Bourne seem to make the right to jury trial discretionary with trial judges.

This reduction of a constitutional right to a discretionary policy is somewhat like the disclaimer in many college catalogs. After setting forth admission, tuition, curriculum, degree, and other requirements, the catalog notes that those requirements are subject to change at any time, and that the catalog is not to be considered a contract.

A number of examples illustrate the principle that Equity respects the jury right. Some examples of limitations on equitable jurisdiction based on respect for the right to jury trial mentioned by Lynch and Bourne include the following: the equitable prerequisite that there be no adequate remedy at Law, the ability of Equity to...

631. See supra notes 365-74 and accompanying text.
632. See supra notes 376-441, 443-52 and accompanying text.
633. Bourne & Lynch, supra note 5, at 59-60; see also LYNCH & BOURNE, supra note 3, at 306-07, 326.
634. See Bourne & Lynch, supra note 5, at 17; see also id. at 23.
635. See id. at 17, 34, 59-61; see also id. at 29-33, 50, 78.
636. See LYNCH & BOURNE, supra note 3, at 335.
637. See Bourne & Lynch, supra note 5, at 16. But cf. id. at 23, 49 (emphasizing jury trial being a constitutional right in Beacon).
638. See id. at 29, 31-33, 34. But cf. id. at 50; LYNCH & BOURNE, supra note 3, at 328 (emphasizing jury trial being a constitutional right).
639. Cf. supra notes 473-505 and accompanying text (stating that the first aspect of principled discretionary theory was the trial judge’s discretion).
640. See infra notes 704-09 and accompanying text.
transfer cases with legal issues to Law courts,\textsuperscript{641} the unwillingness of Equity courts to identify declaratory judgment actions as inherently equitable,\textsuperscript{642} and the ability of Law courts to issue injunctions as ancillary relief.\textsuperscript{643}

Examples of limitations on equitable jurisdiction based on respect for the right to jury trial which Lynch and Bourne fail to mention include the following: the right to jury trial of the issue of paternity in equitable paternity proceedings,\textsuperscript{644} the right to jury trial regarding the appointment by Equity of a guardian for an allegedly disabled person who has not consented to the appointment,\textsuperscript{645} and the reluctance of Equity courts to issue injunctions in certain cases.\textsuperscript{646}

Still other limitations on Equity might indicate respect for the right to jury trial, but seem to be motivated by other concerns. Those limitations include both the gradual evolution of Maryland courts from separate courts of Law and Equity to a merged court system\textsuperscript{647} and the statutory limitations on equitable power.

In early colonial Maryland, common-law courts adjudicated legal matters and a chancellor administered Equity.\textsuperscript{648} The grants of

\begin{itemize}
\item 641. See supra note 586 and accompanying text.
\item 642. See Bourne & Lynch, supra note 5, at 19 & n.109; Lynch & Bourne, supra note 3, at 337-38; see also Bourne & Lynch, supra note 5, at 47-50.
\item 643. See supra note 174 and accompanying text. In cases where an injunction was issued as ancillary relief in an action at Law, the order of trial reflects the principle that Equity respects the jury right. The claim for legal relief was required to be tried first, and the judge, in fashioning injunctive relief, was required to follow the factual findings of the jury. See Bourne & Lynch, supra note 5, at 55-56.
\item 644. See supra note 552.
\item 645. See Md. Rule 10-205(b).
\item 646. See, e.g., Prucha v. Weiss, 233 Md. 479, 480, 197 A.2d 253, 256 (1964) (anticipatated libel).
\item 647. See infra notes 648-56 and accompanying text (describing the principal steps in that evolution). For a discussion of other steps in the evolution, see supra note 586 and accompanying text (discussing the ability of Equity to transfer cases with legal issues to Law courts), Lynch & Bourne, supra note 3, at 319 & n.124, 336 (discussing the borrowing by Law courts of certain equitable procedures such as discovery), Bourne & Lynch, supra note 5, at 39-40, 42-43, 75-76 (discussing same), id. at 14-15, 29, 34 (discussing the borrowing by Law courts of certain equitable defenses such as fraud), and supra note 174 and accompanying text (discussing the ability of Law courts to issue injunctions as ancillary relief).
\item 648. See Miller, supra note 282, at 2-3. The history of the chancellor and courts of chancery from the beginning of the Province of Maryland is summarized in Carroll T. Bond, The Court of Appeals of Maryland 4-5 (1928).
\end{itemize}
some Equity powers to the common-law courts in 1763, and full Equity powers to the common-law courts in 1815, together with the abolition of the office of chancellor in 1851, seem to have been based on efficiency rather than on respect for the right to jury trial.

The grant of Equity powers to the common-law courts which existed in each county, rather than the retention of all Equity powers in one chancellor for all of Maryland, was apparently designed to make Equity accessible to all residents of Maryland, especially those in counties remote from the chancellor. The abolition of the office of chancellor seemed to have been an economy measure. The chancellor’s work could be accomplished by the common-law courts which had Equity powers. The 1984 merger of Law and Equity procedures also was designed for simplicity and efficiency.

Statutory limits on equitable power do not indicate respect for the right to jury trial. An old lower federal court case, Baker v. Bidwell, established a framework for analyzing the issue. English courts were of general jurisdiction. Resulting overlaps in jurisdictions between the courts of Law and Equity were left to be defined by those courts by their own usages. In the United States, the limited jurisdiction of the federal courts was defined by constitutional provisions and by statute, and the powers of both Law and Equity were vested in the same courts. Thus, the Equity powers of the federal courts were limited by the interlocking provisions of the Seventh Amendment right to jury trial, and the Judiciary Act of 1789’s denial of Equity jurisdiction where there was an adequate remedy at Law.

649. See 1763 Md. Laws ch. 23, § 5.
650. See 1815 Md. Laws ch. 163, § 1.
651. See Md. Const. of 1851 art. IV, § 23.
652. Cf. Elbert M. Byrd, The Judicial Process in Maryland 9 (1961) (stating that accessibility was the motivation for an earlier constitutional amendment establishing judicial districts).
653. See 2 1851 Debates, supra note 9, at 502, 562, 568-69, 592.
654. See id. at 562, 632.
655. See Md. Rule 2-301 committee note.
658. See id. at 445-46.
659. See id. at 446.
660. See id. at 443-45. The Seventh Amendment was proposed by the First Congress, which also enacted the adequate remedy at Law provision of the Judi-
state courts, having general jurisdiction, followed the English tradition of judicially defined jurisdictional limits.\textsuperscript{661} Of course, the jurisdiction of the state courts was also limited by supreme federal law\textsuperscript{662} and by whatever constitutional and statutory provisions the states themselves chose to adopt.

While Maryland has constitutional limits, including the right to jury trial, on the equitable powers of its trial courts, there are no specific statutory limits on those powers. That is, there is no statute denying Equity jurisdiction where there is an adequate remedy at Law.\textsuperscript{663} On the other hand, there is no statute preferring the rules of Equity to those of Law where the two differ.\textsuperscript{664} The only significant statutory limitations on Equity powers are general in nature, and reserve jurisdiction to other tribunals. The jurisdiction and powers of the circuit courts, which are the trial courts of general jurisdiction, are defined as follows:

The circuit courts are the highest common-law and equity courts of record exercising original jurisdiction within the State. Each has full common-law and equity powers and jurisdiction in all civil and criminal cases within its county, and all the additional powers and jurisdiction conferred by the Constitution and by law, except where by law jurisdiction has been limited or conferred exclusively upon another tribunal.\textsuperscript{665}

Thus, the circuit courts have full Equity powers,\textsuperscript{666} except where ju-

\textsuperscript{661} See Baker, 2 F. Cas. at 445.
\textsuperscript{662} In some cases, acts of Congress have made the jurisdiction of the federal courts exclusive of the state courts. See Wright, supra note 613, at 43-44. Such acts are supreme over state law under the provisions of the Supremacy Clause. See U.S. Const. art. VI.
\textsuperscript{663} Cf. Lynch & Bourne, supra note 3, at 307, 326; Bourne & Lynch, supra note 5, at 60 (equitable principle). See generally infra notes 704-09 and accompanying text.
\textsuperscript{664} Cf. Bourne & Lynch, supra note 5, at 58 n.373 (citing a Connecticut statute).
\textsuperscript{666} See Miller, supra note 282, at 1-2; Phelps, supra note 86, at 27.
risdiction has been limited, for example, by the constitutional right to jury trial, or where jurisdiction is exclusively granted to other tribunals, such as the federal courts, health care malpractice arbitration panels, district courts, and workers’ compensation commissions. There are express limits on the Equity jurisdiction of the other state trial courts, the district courts, but the effect of those limits is merely to reserve the remaining Equity jurisdiction to the circuit courts.

Lynch and Bourne’s principle, that Equity respects the jury right, may be criticized on several grounds. One is that the principle is unworkable for a number of reasons. First, as we have seen, the boundary line between Law and Equity is uncertain. Indeed, a primary rationale for distinguishing between the two is the circular proposition that Law uses the jury trial and Equity does not. Thus, Equity’s respect for the jury trial is likely to be of little help in defining the scope of Equity.

Second, the best protection for the right to jury trial has historically been the separation of Law and Equity. Of course, the

667. See supra note 662.
669. See id. §§ 4-401, 4-405.
672. See Lynch & Bourne, supra note 3, at 69-70.
673. See supra note 545 and accompanying text.
674. See Phelps, supra note 86, at 33, 185.
675. See Lynch & Bourne, supra note 3, at 306, 326; Bourne & Lynch, supra note 5, at 11, 29, 34, 44-45. The separation of Law and Equity in modern times in Maryland may not have offered the same limits on Equity jurisdiction that the separation of the two systems had in England at the time of American independence. One commentator noted the existence in the seventeenth and eighteenth centuries of three checks on the English chancellor’s encroachment on common-law jurisdiction: opposition from Law courts, opposition from Parliament, and appellate review by the House of Lords, which was, as a practical matter, controlled by common lawyers. See Phelps, supra note 86, at 14-18. In Maryland, similar checks do not now exist. Law and Equity are administered by the same courts. See supra notes 648-56 and accompanying text. There is no “war between the courts.” Phelps, supra note 86, at 14-17. The state legislature has not limited Equity’s encroachment on Law. See supra notes 663, 665-72 and accompanying text; see also infra notes 788-866 and accompanying text. There is appellate review of Equity’s exercise of jurisdiction. See generally Md. Const. art. IV; Md. Code Ann., Cts. & Jud. Proc. §§ 12-101 to -702 (1995). However, there is no practical control of state appellate courts by attorneys from the common-law bar in Maryland, see 1831 Md. Laws ch. 268, §§ 1, 3, as in England, see Supreme Court of Judicature.
merger of Law and Equity removes that protection.\textsuperscript{676}

Third, Equity may be expanded by statute or judicial decision.\textsuperscript{677} Yet, that expansion might come at the expense of Law and the jury right.\textsuperscript{678} Often, the courts do not even recognize the threat to jury trial from the expansion of equitable jurisdiction.\textsuperscript{679} 

Fourth, trial judges may be biased against jury trial.\textsuperscript{680} That bias appears paradoxical in light of the principle that Equity has respected the right to jury trial and in light of surveys showing that trial judges generally favor retention, not abolition, of the jury trial in civil cases.\textsuperscript{681} However, the bias may be explained by the following distinctions: (1) the bias may be that of trial judges,\textsuperscript{682} not the appellate judges whose opinions are reported as respecting the right to jury trial;\textsuperscript{683} (2) the bias may be one occasionally reflected in denying jury trial in particular situations, such as “complex” cases,\textsuperscript{684} not in the generality of situations; (3) the bias may not reflect institutional bias, but rather the personal self-regard of trial

Act, 1873, 36 & 37 Vict., ch. 66, § 87 (repealed). The common-law and Equity bars have been integrated. However, a check on Equity jurisdiction that exists now in Maryland, but did not then exist in England, is a democratic influence on the selection of judges. Now in Maryland, the judge in a court exercising Equity jurisdiction is popularly elected or is appointed by a popularly elected official. See Md. Const. art. IV, §§ 3, 5, 5A, 41D. In England, the chancellor has historically been an official appointed by a hereditary monarch. See Goebel, supra note 105, at 493.

\textsuperscript{676} See Lynch & Bourne, supra note 3, at 307, 326; Bourne & Lynch, supra note 5, at 4, 15, 20, 46-47, 78.

\textsuperscript{677} See Bourne & Lynch, supra note 5, at 60. See generally infra notes 788-866 and accompanying text; Lynch & Bourne, supra note 3, at 321.

\textsuperscript{678} See infra note 789 and accompanying text.

\textsuperscript{679} See Bourne & Lynch, supra note 5, at 77; see also supra note 529 and accompanying text. In many cases there may have been no question of the right to jury trial because no jury was demanded or no question of fact was in dispute. See Bourne & Lynch, supra note 5, at 52-53, 77.

\textsuperscript{680} See Bourne & Lynch, supra note 5, at 2-3, 59.

\textsuperscript{681} See, e.g., May/June 1977 ATL A Bar News 5. In that survey of 6,049 state and 495 federal trial judges in which nearly 53% responded, 92.5% of state judges and 89.3% of federal judges favored retention of the jury trial. See id.

\textsuperscript{682} See supra note 680 and accompanying text.

\textsuperscript{683} See Bourne & Lynch, supra note 5, at 23, 49 (Supreme Court of the United States); id. at 17, 29-31, 33, 50, 59-60 (Court of Appeals of Maryland).

judges who may believe that they themselves can judge a case better than a jury could, despite believing that the jury is generally a good thing.

Perhaps more significantly for the purposes of this Article, Lynch and Bourne's principle that Equity respects the jury right may also be criticized because it fails to protect the jury right, and because it is contrary to accepted methods of constitutional interpretation.

1. Not Protective of the Jury Right

Of course, the principle that Equity respects the jury right is nominally protective of the right to jury trial. However, as described by Lynch and Bourne, the principle fails to protect the right to jury trial in three ways—two in theory and one in practice. First, the principle seems to be one of policy, not of constitutional right. Thus, like other policy, the principle is subject to change by the legislature or judiciary; the principle is not fundamental, like a constitutional right. Second, the principle is just one of six aspects of Lynch and Bourne's principled discretionary theory. Thus, it is not afforded the supremacy ordinarily conferred upon constitutional rights as against other conflicting policies. Third, the principle that Equity respects the jury right has not proven effective in practice.

Lynch and Bourne identify the following past equitable encroachments by Equity on Law: the growth of the equitable clean-up doctrine, the abolition of the traditional reference by the chancellor to a Law court for jury trial of disputed issues of fact, the erosion of the equitable prerequisite that there be no adequate remedy at Law, and the intervention of Equity in certain areas involving legal rights because of the presence of fraud, the need for an accounting, or the danger of multiplicity of actions. Thus,

685. See supra notes 636-38 and accompanying text.
686. See infra note 694 and accompanying text.
687. See infra note 695 and accompanying text.
688. See Lynch & Bourne, supra note 3, at 307; Bourne & Lynch, supra note 5, at 13, 54, 57, 60, 62, 75, 78. Other commentators have noted the expansion of the clean-up doctrine. See supra note 564 and accompanying text.
689. See supra note 562 and accompanying text.
690. See supra note 563 and accompanying text.
691. See Bourne & Lynch, supra note 5, at 38-42; see also Lynch & Bourne, supra note 3, at 316, 335 n.219.
692. See Lynch & Bourne, supra note 3, at 318-19, 335 n.219, 336-37; Bourne & Lynch, supra note 5, at 42-43. But cf. Lynch & Bourne, supra note 3, at 332-
the aspect of Lynch and Bourne’s principled discretionary theory that Equity respects the right to jury trial is not protective of the right to jury trial.

2. Contrary to the Usual Ways of Interpreting the Constitution

The principle that Equity respects the right to jury trial is also contrary to accepted principles of constitutional interpretation. Thus, the aspect of Lynch and Bourne’s principled discretionary theory that Equity respects the jury right fails to protect or “preserve” the jury right and is contrary to many of the usual ways of interpreting the Maryland Constitution. An equitable policy of respect for the jury right is contrary to the nature of a written constitution. The jury right is fundamental law—it is part of a constitution, which is a compact of the people through an elected convention. The jury right is not just policy subject to change by the legislature or judiciary. The constitutional jury right is also supreme—it prevails over other conflicting laws and policies.

An equitable policy of respect for the jury right is also contrary to the text of the constitution. The principal jury right provision expressly provides for a “right” of trial by jury, mandates recognition of that right, and provides that it be “inviolably preserved.”

An equitable policy of respect for the jury right is contrary to the history of the Maryland Constitution. The purpose of the principal jury right provision was to put the right beyond the reach of policy-making by the legislature and, presumably, the judiciary.

An equitable policy of respect for the jury right is contrary to doctrine. While support for the jury right before merger of Law and Equity was somewhat ambiguous, since Higgins followed the Supreme Court’s lead in Beacon, Maryland courts have clearly taken a protective approach to the jury trial as a constitutional right. That protective approach is consistent with commentators on Mary-

33, 336 (stating that Dairy Queen limits the need for accounting in federal courts).

693. See Bourne & Lynch, supra note 5, at 43-44. But cf. Lynch & Bourne, supra note 3, at 320 (stating that merger, joinder, and long-arm jurisdiction may render multiplicity obsolete); Bourne & Lynch, supra note 5, at 44.

694. See supra notes 23-25 and accompanying text.

695. See supra note 21 and accompanying text.

696. See supra notes 49-69 and accompanying text.

697. See supra notes 9, 20, 116-18 and accompanying text.

698. See supra notes 170-83 and accompanying text.

699. See supra notes 184-97 and accompanying text.
land's jury right, other than Lynch and Bourne.
The equitable policy of respect for the jury right is contrary to one of the ethical matters. Ours is a limited government, expressly restricted by a constitution, which includes a right to jury trial as a limit on the policy-making branches of government.

D. Equity Will Not Act Where the Remedy at Law is Adequate

The fourth aspect of Lynch and Bourne’s principled discretionary theory is that “the scope of equity is necessarily limited by the principle that equity will not intervene where the remedy at law is full, expeditious and adequate.” This principle that there be no adequate remedy at law applies in both federal and Maryland courts. According to Lynch and Bourne, this principle is a bulwark, protecting the right to jury trial in both federal and Maryland courts.

Although Professor Douglas Laycock wrote that the adequate

700. See Brown, supra note 85, at 455-74; NILES, supra note 96, at 343-44.
701. But cf. supra notes 636-38 and accompanying text (discussing the conflict between respect for the jury right as policy and as constitutional right).
702. See supra note 382 and accompanying text.
703. See supra note 381 and accompanying text.
704. Lynch & Bourne, supra note 5, at 60; see infra notes 706-07.
705. This adequate remedy at law prerequisite is the “longstanding principle of equity” to which Lynch and Bourne referred in their article. See Bourne & Lynch, supra note 5, at 22. In the article, they concluded that the Supreme Court misread its precedents, and that Beacon misread Scott. See Bourne & Lynch, supra note 5, at 22-23. Bourne & Lynch wrote that Beacon derived from Scott the “longstanding principle of equity” that the right to jury trial cannot be impaired by any blending of legal and equitable claims. The authors misread Beacon. The “longstanding principle of equity” to which Beacon referred is that “equity has always acted only when legal remedies were inadequate.” Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509 (1959); see id. at 505, 506-07, 516-17 (Stewart, J., dissenting).
706. See LYNCH & BOURNE, supra note 3, at 329-33, 337; Bourne & Lynch, supra note 5, at 4, 12-25.
707. See LYNCH & BOURNE, supra note 3, at 307, 316; Bourne & Lynch, supra note 5, at 29-77.
remedy at Law principle\textsuperscript{710} is dead.\textsuperscript{711} Lynch and Bourne's conclusion that the principle protects the right to jury trial has some truth to it.\textsuperscript{712} Laycock's thesis was that those cases stating the principle actually reached their conclusions on other grounds.\textsuperscript{713} However, his focus was on the adequate remedy at Law principle as a basis for courts choosing between legal remedies, such as damages, and equitable remedies, such as injunctive and other forms of specific relief.\textsuperscript{714} Laycock conceded that the adequate remedy at Law principle was used occasionally to protect the right to jury trial.\textsuperscript{715} However, Laycock concluded that the rule is not a factor in most jury trial disputes and may even be a basis for denying the jury right.\textsuperscript{716} Thus, in this context, Laycock's report of the death of the adequate remedy at Law principle is an exaggeration.\textsuperscript{717} Nonetheless, the report of the death of the principle was not much of an exaggeration until

\textsuperscript{710} See DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 8 (1991). Laycock equates two rules: (1) Equity will act only to prevent irreparable injury, and (2) Equity will act only if there is no adequate legal remedy because "what makes an injury irreparable is that no other remedy can repair it." \textit{Id.} (endnote omitted); see also \textit{id.} at 239.

\textsuperscript{711} See \textit{id.} at vii, 5, 7, 24; cf. JAMES ET AL., supra note 1, at 448 (stating the principle "had been in a state of substantial atrophy for two hundred years" before \textit{Beacon}); Bourne & Lynch, \textit{supra} note 5, at 45 n.290 (citing Blackstone, discussing the extent and variety of cases in Equity courts that suggest that the law was a "dead letter"). \textit{But cf.} LYNCH & BOURNE, \textit{supra} note 3, at 329 (stating that \textit{Beacon} "reincarnated the concept of the adequacy of the legal remedy" in the context of the right to jury trial).

\textsuperscript{712} See \textit{supra} notes 708-09 and accompanying text.

\textsuperscript{713} Those other grounds include courts' fear of ordering preliminary relief prior to full trial and deliberation, deference to other tribunals such as courts, administrative agencies, or the executive branch, fear of interference with countervailing rights such as free speech and the right to work, fear of imposing hardship on a defendant or others, deference to more particular law, hostility to the merits of plaintiff's case, avoidance of cases that are moot or not ripe, and avoidance of decrees that would be difficult to supervise. \textit{See} LAYCOCK, \textit{supra} note 710, at 5, 110-236.

\textsuperscript{714} See \textit{id.} at 12-16. Laycock was not interested at all in the adequate remedy at Law principle as a basis for courts choosing between Law and Equity, generally. He found the distinction purely historical and dysfunctional in court systems with merged procedure. \textit{See} \textit{id.} at viii, ix, 11-16.

\textsuperscript{715} See \textit{id.} at 213-17.

\textsuperscript{716} See \textit{infra} notes 767-69 and accompanying text.

\textsuperscript{717} \textit{Cf.} THE OXFORD DICTIONARY OF QUOTATIONS 550 (2d ed. 1955) (citing Samuel Langhorne Clemens (Mark Twain) in a cable from Europe to the Associated Press: "The report of my death was an exaggeration.").
Lynch and Bourne’s principle that Equity acts only where there is no adequate remedy at Law may be criticized because it fails to protect the jury right and because it is contrary to accepted principles of constitutional interpretation.

1. Not Protective of the Jury Right

The principle that Equity acts only where there is no adequate remedy at Law is nominally protective of the right to jury trial. That is, if there is an adequate remedy at Law triable by jury, Equity will not take jurisdiction. However, as described by Lynch and Bourne, the principle is not protective of the right to jury trial. This is true for several reasons. First, as a matter of function, the principle is usually restrictive of the jury right. Historically, the prerequisite of Equity that there be no adequate remedy at Law was not just a policy of deference or comity with respect to courts of Law. It was also separate grounds for Equity jurisdiction. That is, the principle was not a limit on, but an extension of, Equity’s power. This was true both in federal and in Maryland courts. This tendency of the adequate remedy at Law principle to increase the jurisdiction of Equity at the expense of jurisdiction of Law and the right to jury trial was magnified by the structural, source, definitional dynamics, and procedural and tactical matters discussed below.

718. See infra notes 741-49 and accompanying text.

719. One commentator suggested the ultimate extension of Equity’s power. See Doug Rendleman, The Inadequate Remedy at Law Prerequisite for an Injunction, 33 U. Fla. L. Rev. 346, 355 (1981). He found the remedy at Law might be inadequate because the jury determination might frustrate the underlying substantive law, or because three features of the jury system—new jurors for each trial, lack of expertise, and unanimous secret deliberations—make the jury inadequate in Equity actions which might continue for years. See id. However, another commentator concluded that the jury cannot be considered as inadequate because the Constitution considers it a virtue. See Owen M. Fiss, The Civil Rights Injunction 39 (1978).

720. See Lynch & Bourne, supra note 3, at 332-33 n.204; Bourne & Lynch supra note 5, at 12 & n.55, 13.


723. See infra note 728 and accompanying text.

724. See infra notes 729-32 and accompanying text.

725. See infra notes 733-40 and accompanying text.

726. See infra notes 741-49 and accompanying text.
Thus, the adequate remedy at Law principle is comparable to a college's practice regarding prerequisites for an elective course. When an insufficient number of students register for the course, the college waters-down or abolishes the prerequisites so that more students will sign up.

Second, as a matter of structure, the principle that Equity acts only where there is no adequate remedy at Law is not protective of the jury right. After the abolition of separate courts of Law and Equity and the merger of Law and Equity procedures, most of the political and institutional checks to enforce Equity's deference to Law no longer exist.\textsuperscript{728}

Third, as a matter of the source of the principle, that Equity acts only where there is no adequate remedy at Law, the principle is not protective of the jury right. In Maryland, the application of the principle is discretionary with judges; it has not been enacted by the legislature as a limitation on judicial jurisdiction. This point is developed in the old lower federal court case of \textit{Baker v. Biddle}.\textsuperscript{729} That case distinguished between the federal courts on the one hand, and English and state courts on the other hand. The federal courts were limited by a statute, enacted by the first Congress, which provided that "suits 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."\textsuperscript{730} While that statute introduced no new rule and was merely declaratory of the common law, it added the authority of the legislature, such that the principle was not left en-

\begin{footnotes}
\footnote{727. See infra notes 767-70 and accompanying text.}
\footnote{728. See supra note 675. The adequate remedy at Law principle was entrusted to the Equity courts themselves. See \textsc{Laycock}, \textit{supra} note 710, at 20-21.}
\footnote{729. 2 F. Cas. 439 (C.C.E.D. Pa. 1831) (No. 764).}
\footnote{730. Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 82, \textit{repealed by} Act of June 25, 1948, ch. 646, 62 Stat. 996. The legislative history to the repealer provided: "Section [16] is obsolete in view of Rules 1 and 2 of the \textsc{Federal Rules of Civil Procedure} abolishing distinctions between actions at law and suits in equity." H.R. \textsc{Rep.} No. 308, 80th Cong., 1st Sess. A236 (1947). However, the principle that Equity will not intervene where there is an adequate remedy at Law survived the merger of Law and Equity in 1938. See \textsc{Beacon Theatres, Inc.} v. \textsc{Westover}, 359 U.S. 500, 506-07 (1959). The principle governs the substantive aspects of Equity, although separate equitable procedures have been abolished by merger. See \textsc{Grauman v. City Co. of N.Y., Inc.}, 31 F. Supp. 172, 174 (S.D.N.Y. 1939). One commentator has written that the principle persists after merger because of the jury right. See \textsc{Owen M. Fiss}, \textsc{Injunctions} 12 (1972).}
\end{footnotes}
tirely to the discretion of the judiciary.\textsuperscript{731} On the other hand, the English and state courts have generally not been limited by statutory enactment of the equitable prerequisite of no adequate remedy at Law, so the principle has been left to the discretion of the courts.\textsuperscript{732}

Fourth, as a matter of the definition of the principle that Equity acts only where there is no adequate remedy at Law, the principle is not protective of the jury right. It is not just an "adequate" remedy at Law\textsuperscript{733} that precludes equitable jurisdiction, it is a "full, expeditious and adequate" remedy,\textsuperscript{734} an adequate, complete, and certain remedy,\textsuperscript{735} an "adequate, complete, and sufficient" remedy,\textsuperscript{736} a "plain, adequate and complete" remedy,\textsuperscript{737} or a "complete, practical, and efficient" remedy.\textsuperscript{738} Any of these formulations would seem to increase equitable jurisdiction at the expense of common-law jurisdiction and the jury right, when compared with a formulation that Equity will not intervene where there is an "adequate" remedy at Law.\textsuperscript{739} Historically, the legal remedy infrequently met one of these fuller formulations.\textsuperscript{740}

\textsuperscript{731} See Baker, 2 F. Cas. at 444. The adoption of the Seventh Amendment added the authority of the Constitution, so the principle was not left to the discretion of the legislature. See id.

\textsuperscript{732} See id. at 445. But cf. supra notes 706-07 and accompanying text (providing the principle in Maryland is similar to that in the federal courts).

\textsuperscript{733} Fiss has pointed out that there are inherent ambiguities in the doctrine that Equity will act only where there is no adequate remedy at Law. First, how inadequate must the legal remedies be? Second, which type of inadequacies—the retrospective nature of the damage action, the use of a jury, or the future financial unresponsiveness of the defendant—count for purposes of applying the doctrine? Third, which alternative remedies—damages action, criminal prosecution or defense, habeas corpus, removal, transfer, administrative proceeding, or appeal—must be shown to be inadequate? See Fiss, supra note 719, at 38-39; see also Laycock, supra note 710, at 22.

\textsuperscript{734} Bourne & Lynch, supra note 5, at 60.

\textsuperscript{735} See Lynch & Bourne, supra note 3, at 317 (citing Brown, supra note 85, at 428).

\textsuperscript{736} Bourne & Lynch, supra note 5, at 40 (citing Johnson v. Bugle Coat, Apron & Linen Serv., 191 Md. 268, 277, 60 A.2d 686, 690 (1948)).

\textsuperscript{737} Bourne & Lynch, supra note 5, at 12 (citing Insurance Co. v. Bailey, 80 U.S. (13 Wall.) 616 (1871)).

\textsuperscript{738} Laycock, supra note 710, at 22.


\textsuperscript{740} See Laycock, supra note 710, at 4, 23, 237.
Fifth, as a matter of dynamics, the principle that Equity acts only where there is no adequate remedy at Law is not protective of the jury right. In applying the adequate remedy at Law principle, the courts have confronted two questions. First, may equitable jurisdiction grow in ways that by comparison make traditional legal remedies inadequate? Second, does the improvement in the adequacy of legal remedies erode existing equitable jurisdiction? The hornbook law answers to both of these questions worked to erode any protection the principle had for the right to jury trial. Equitable jurisdiction could grow in ways that, in comparison, made the remedy at Law inadequate. For example, equitable clean-up jurisdiction grew, and a later statute and court rule provided that damages at Law were inadequate unless the defendant showed security for a judgment.

The improvement in the adequacy of legal remedies also did not generally oust existing equitable jurisdiction. For example, jurisdiction over injunctions was not supplanted by the rule permitting injunctions as ancillary relief in an action at Law, and equitable jurisdiction of accounting was not ousted entirely by the availability of discovery in actions at Law.

Lynch and Bourne, with some exceptions, seem to endorse the hornbook answers, which tend to erode the protection of the adequate remedy at Law principle for the jury right. Thus, Lynch and Bourne generally agree that equitable jurisdiction could grow in ways that in comparison make the remedy at Law inadequate.

741. See William F. Walsh, A Treatise on Equity 134 (1930); Phelps, supra note 86, at 198; see also 1 Pomeroy’s Equity Jurisprudence 155-56 (Spencer W. Symons ed., 5th ed. 1941); cf. Henry L. McClintock, Handbook of the Principles of Equity 77 (2d ed. 1948) (stating that Equity may give relief even where there is no precedent).

742. See supra note 564 and accompanying text.

743. See supra note 563 and accompanying text.

744. See McClintock, supra note 741, at 115-17; Phelps, supra note 86, at 198, 259-60.

745. See Lynch & Bourne, supra note 3, at 318-19; Bourne & Lynch, supra note 5, at 39, 55-56.

746. See Lynch & Bourne, supra note 3, at 319 & n.124, 336; Bourne & Lynch, supra note 5, at 42-43.

747. The exceptions are where Maryland cases already require a more jury-protective approach.

748. See Bourne & Lynch, supra note 5, at 28-29. This growth could be by statute or court decision. See id. at 32, 60 & n.381; see also Lynch & Bourne, supra note 3, at 321; Bourne & Lynch, supra note 5, at 33 n.210, 63 & n.403. But cf. id. at 32 n.206, 35 n.225, 50 & n.322, 51 (providing that constitutional right
They also generally agree with the hornbook idea that the improvement in the adequacy of legal remedies does not oust existing equitable jurisdiction. 749

Of course, Beacon in the federal courts 750 and Higgins in the Maryland courts 751 established a dynamic adequate remedy at Law principle, one that protects the jury right. However, Lynch and Bourne are critical of this dynamism at every step.

As we have noted above, the adequate remedy at Law principle may be seen either as a policy of deference or comity with respect to courts of Law—protecting the right to jury trial by limiting Equity's jurisdiction—or as a separate basis for Equity jurisdiction—extending Equity's power. 752 Before Higgins, Lynch and Bourne, choosing between Beacon's protection of the jury right and a more traditional expansion of the scope of Equity, wrote that Maryland courts should pick the expansion of Equity. 753 Thus, they believed that the protection of the jury right might be left to the discretion of the trial judge. 754 Several factors underscored their choice of an expansive Equity, rather than a protective jury right. These factors include their preference for pre-Beacon precedents rather than for

749. See Bourne & Lynch, supra note 5, at 36 n.229, 77; see also supra notes 745-46. But cf. Bourne & Lynch, supra note 5, at 44 (providing that Equity's considerable discretion in adjudicating legal claims is unlikely to be decreased by procedural reforms, but the exercise of Equity's discretion should consider the right to trial by jury).

750. See Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). Lynch and Bourne wrote that after Beacon the legal remedy will almost never be found inadequate because such inadequacy must be assessed in light of modern procedural reforms. The merger of Law and Equity and the permissive joinder of legal and equitable claims now allows a court to grant preliminary injunctive relief before a jury trial of legal issues, see Lynch & Bourne, supra note 3, at 330-31, and final injunctive relief afterward, see Bourne & Lynch, supra note 5, at 60-61. Discovery is available in all cases, see Lynch & Bourne, supra note 3, at 319; party joinder may avoid the threat of multiple litigation, see id. at 320; the Declaratory Judgment Act provides a new remedy for violation of legal rights, see id. at 330, 338; and the availability of masters under the Federal Rules of Civil Procedure gives juries assistance in complex financial matters, see id. at 333, 337.


752. See supra notes 704-27 and accompanying text.

753. See Bourne & Lynch, supra note 5, at 28-29.

754. See id. at 16, 17, 19, 29, 44, 60. But cf. id. at 20, 29, 34, 44 (threat to the right to jury trial).
Beacon itself,755 their understanding that the majority opinion misread precedent,756 that the opinion's reasoning was "radical,"757 and by their sympathy for the Beacon dissent.758

Even before Higgins, Lynch and Bourne conceded that the Maryland courts had used a dynamic adequate remedy at Law principle in certain areas, such as joinder of parties,759 joinder of claims and remedies,760 and discovery.761 Even after Higgins preliminarily endorsed the Beacon line of cases,762 Lynch and Bourne criticized those cases,763 tried to limit them to their facts,764 and distinguished them where possible,765 even while conceding that the Beacon line of cases will likely be fully accepted in Maryland.766

Sixth, as a matter of procedure and tactics, the principle that Equity acts only where there is no adequate remedy at Law is not protective of the jury right. Professor Christopher Brown wrote that the impact of the choice between Law and Equity on the right to jury trial has largely escaped notice.767 Douglas Laycock says this is so because in most cases it is the plaintiffs who benefit from jury

755. See id. at 17; see also id. at 29, 78. But cf. infra note 1159 and accompanying text (discussing reliance on post-Beacon lower federal court cases, including some not protective of the jury right).
756. See supra note 705.
757. Bourne and Lynch criticized two points made by Beacon: (1) that the Declaratory Judgment Act limited Equity by providing a legal remedy, and (2) the constitutional jury trial right limits judicial discretion. See Bourne & Lynch, supra note 5, at 49. Neither of these points seems radical. See infra notes 1168-84 and accompanying text; see also supra notes 473-504 and accompanying text.
758. See Lynch & Bourne, supra note 3, at 329-30 nn.188 & 191; see also Bourne & Lynch, supra note 5, at 21 n.121, 22 n.129; cf. Lynch & Bourne, supra note 3, at 333 n.209, 334 n.212 (expressing sympathy with the dissent in Ross v. Bernhard, 396 U.S. 531 (1970)).
759. See Bourne & Lynch, supra note 5, at 31, 38.
760. See id. at 37 (discussing injunction as an ancillary remedy at Law).
761. See id. at 36, 38, 72.
762. See Lynch & Bourne, supra note 3, at 315, 327-35.
763. See id. at 329 n.188, 330 n.191, 333 n.209, 334 n.212 (quoting Justice Stewart's dissents); see also id. at 329-31.
764. See id. at 331, 334.
765. See id. at 318-19, 336-37 (stating that equitable accounting in Maryland is based not only on the need for discovery, but the existence of confidential relationships and complicated accounts); id. at 335 & n.216, 337 (providing no masters in Maryland to assist juries).
766. See id. at 335, 337.
767. See Brown, supra note 85, at 458, 473.
sympathy or the possibility of a larger award of damages. Presumably, those plaintiffs desiring a jury trial will structure their cases to clearly be actions at Law.

In some cases, however, either plaintiffs or defendants may manipulate the Law-Equity distinction to avoid jury trial. In those situations, the jury rights of other parties may have escaped notice because of waiver for lack of timely demand, because the harmless error rule precluded an interlocutory review of the denial of jury trial, or because of the deferential scope of appellate review of the trial judge's abuse of discretion.

2. Contrary to the Usual Ways of Interpreting the Constitution

The principle that Equity will not act where the remedy at Law is adequate was traditionally used to expand Equity at the expense of the right to jury trial. Lynch and Bourne's approval of the principle as traditionally applied, and their limited acceptance of a dynamic interpretation of that principle to protect the right to jury trial, are contrary to many accepted principles of constitutional interpretation.

The adequate remedy at Law principle, as traditionally used, is contrary to the nature of a written constitution. The constitutional right to jury trial is supreme; it prevails over other conflicting laws and policies, such as a principle which permits Equity to grow at the expense of Law and the jury right. The adequate remedy at Law principle, as traditionally used, is also contrary to the nature of a "living" constitution; the right to jury trial, not the jurisdiction of Equity at the jury right's expense, should be dynamic.

The adequate remedy at Law principle, as traditionally used to permit Equity to grow at the expense of the jury right, is contrary to the text of the Maryland Constitution. The principal jury right provision, Article 23, expressly mandates recognition of the jury

768. See supra note 710, at 214.
769. For example, before the merger of Law and Equity, plaintiffs could sue for damages for violation of a legal right in a Law court. See supra notes 209-11 and accompanying text.
771. See supra notes 474-88 and accompanying text.
772. See supra notes 719-27, 733-46 and accompanying text.
773. See supra notes 748-49 and accompanying text.
774. See supra notes 753-66 and accompanying text.
775. See supra note 21 and accompanying text.
776. See supra note 26 and accompanying text.
right and provides that it be "inviolably preserved." In addition, it is the jury right that is protected, not separate courts of Law and Equity nor the right to trial by a judge.

The adequate remedy at Law principle, as traditionally used, is contrary to the history of the Maryland Constitution. The purpose of Article 23 was to put the right beyond the reach of Equity's incursions pursuant to legislative and, presumably, judicial decisions.

The adequate remedy at Law principle, as traditionally used, may also be contrary to the structure of government. A dynamic, not an over-looked, jury right is needed now that most of the political and institutional checks to enforce Equity's deference to Law no longer exist. If the adequate remedy at Law principle is used to expand Equity at the expense of Law, the jury's checks on the judge may be lost.

The adequate remedy at Law principle, as traditionally used, is contrary to doctrine. The Court of Appeals of Maryland's decision in Higgins, following the Supreme Court's lead in Beacon, requires a dynamic adequate remedy at Law principle protecting the jury right. That approach is consistent with the commentary of Professor Christopher Brown on the jury right in Maryland.

Moreover, the adequate remedy at Law principle, as traditionally used, may be contrary to some prudential concerns. If the adequate remedy at Law principle is used to expand Equity at the expense of Law, the benefits of the jury to the judge and our legal system, such as helping to legitimize outcomes, acting as a "lightning rod," and providing a "black box" decision, are lost.

The adequate remedy at Law principle, as traditionally used, is contrary to ethical matters. The adequate remedy at Law principle used to restrict the jury right may violate the principles of limited government, government by the people, government for the people,

777. See supra notes 48-69 and accompanying text.
778. See supra notes 77-95 and accompanying text.
779. See supra notes 10, 21, 113, 117 and accompanying text.
780. See supra notes 767-71 and accompanying text.
781. See supra note 675 and accompanying text.
782. See supra notes 160-62 and accompanying text.
783. See supra notes 184-97 and accompanying text.
784. See supra notes 750-51 and accompanying text.
785. See Brown, supra note 85, at 448-51.
786. See supra notes 308-20 and accompanying text.
E. Equity May Expand by Statute or Judicial Decision

The fifth aspect of Lynch and Bourne's principled discretionary theory is that "the scope of equity in Maryland may be expanded by statute or judicial decision." This expansion may be at the expense of the right to jury trial. Lynch and Bourne apparently base that conclusion on one authority: the "seldom cited" or "old and little noted" case of Capron v. Devries. It is appropriate, however, that Capron is "seldom cited" and "little noted."

In Capron, Devries was a trustee who obtained an order from a court of Equity that certain real property be sold. The purchaser was Mrs. Capron, a married woman. Alleging a defect in title, she refused to accept and pay for the property. Therefore, the court ordered that the property be resold at her risk. When the property

787. See supra notes 376-411, 443 and accompanying text.
788. Bourne & Lynch, supra note 5, at 60; see id. at 32; cf. id. at 33 n.210, 63; Lynch & Bourne, supra note 3, at 321 (expansion by the legislature).
789. See Lynch & Bourne, supra note 3, at 321; Bourne & Lynch, supra note 5, at 32.
792. 83 Md. 220, 34 A. 251 (1896). Other authorities suggested by Bourne and Lynch for their conclusion that the scope of Equity may be expanded by statute or judicial decision at the expense of the right to jury trial do not appear to be substantial.

The first such authority states that the original 1776 constitutional right to jury trial was subject to restriction by the legislature. See Bourne & Lynch, supra note 5, at 30 & n.192. However, Bourne and Lynch go on to note that the principle 1851 constitutional right to jury trial was adopted to "protect the jury trial right from encroachment by the legislature." Bourne & Lynch, supra note 5, at 32 n.210. Then, they conclude that Capron "obviously indicates that the 1851 provision has not been construed to preclude contraction of the right to [jury] trial by the Legislature." Id. at 33 n.210.

The second set of authorities suggested by Lynch and Bourne for their conclusion that the scope of Equity may be expanded by statute or judicial decision at the expense of the right to jury trial, states that the legislature and the court of appeals have classified certain actions as equitable by statute or court rule. See Lynch & Bourne, supra note 3, at 316-18; Bourne & Lynch, supra note 5, at 35. However, Bourne and Lynch state that such power may be limited by the right to jury trial. See Bourne and Lynch, supra note 5, at 35 & n.225; see also Lynch & Bourne, supra note 3, at 321.

793. See Capron, 83 Md. at 223, 34 A. at 251.
794. See id.
795. See id.
was resold for a price lower than the earlier sale, the Equity court ordered Mrs. Capron to pay the deficiency to the trustee.\footnote{796}{See id.}

On appeal, Mrs. Capron argued that the statute as applied violated her constitutional right to a jury trial in common-law cases.\footnote{797}{See id. at 224, 34 A. at 251-52.}

Second, Mrs. Capron argued that as a married woman acting alone and without her husband, she was not personally liable on an unwritten contract.

The Court of Appeals of Maryland rejected plaintiff's argument. First, it held that the legislature properly enlarged the jurisdiction of Equity to permit deficiency decrees in trustee sales.\footnote{798}{See id. at 224, 34 A. at 252.}

Because the suit was properly within equitable jurisdiction, the right to trial by jury in common-law cases was not applicable.\footnote{799}{See id.}

Second, the court of appeals held that, according to settled authority, a married woman was personally liable on the contract.\footnote{800}{See id.}

\textit{Capron} does not support Lynch and Bourne's principle that the scope of Equity may be expanded by statute or judicial decision at the expense of the jury right. \textit{Capron}, as Lynch and Bourne's article recognized, has been "seldom cited" and "little noted." Furthermore, \textit{Capron} apparently did not recognize that the expansion of Equity might contract the jury right. In any event, there are other alternative explanations for the holding in \textit{Capron}.

As noted above, Lynch and Bourne themselves characterize \textit{Capron} as being "seldom cited" and "little noted."\footnote{801}{See supra notes 790-91 and accompanying text.} \textit{Capron} has subsequently been cited in only two published Maryland opinions addressing situations where the legislative or judicial power has come into possible conflict with the right to jury trial.\footnote{802}{In two other published Maryland opinions citing \textit{Capron}, there was no conflict between legislative or judicial power and the jury right. In the first case, \textit{Mercantile Bank v. Maryland Title Guarantor Co.}, 153 Md. 320, 138 A. 251, 254 (1927), the issue was not the jury right, but the power of an Equity court to enter a deficiency judgment, without an order of payment of the balance due, against a defaulting purchaser at a foreclosure sale. \textit{See id.} In the second case, \textit{In re Anderson}, 272 Md. 85, 93-94, 321 A.2d 516, 521 (1974), the issue was the power of the legislature to establish juvenile courts in Equity with different principles, regarding the right to appeal by the State and the protections of the double jeopardy clause, than the principles applicable in criminal proceedings. \textit{See id.}}
tion, *Allender v. Ghingher*, the Court of Appeals of Maryland approved, but distinguished, *Capron* from the case at hand involving a statutory proceeding to enforce a banking corporation's legal right to assess its stockholders. Unlike *Capron*, which involved a valid legislative grant of equitable jurisdiction, *Ghingher* involved no valid statutory or judicial grant of equitable jurisdiction.

In the second situation, the Attorney General of Maryland approved the legislature's creation of a housing court in Baltimore City. As part of the existing courts in Baltimore City, the housing court was to exercise both Law and Equity jurisdiction. However, the opinion noted that the jurisdiction of the court would have to be exercised in a manner consistent with the constitutional right to jury trial.

*Capron* apparently failed to recognize that the expansion of Equity jurisdiction might contract the jury right. That failure may have been based on ignorance of the purpose of the 1851 constitutional jury trial provision, on an alternative belief that the 1776 constitutional jury trial provision applied to the case, or on a belief that Equity's expansion was not at the expense of the jury right.

If *Capron* is authority for the principle that Equity may be expanded by statute or judicial decision, thus diminishing the scope of the jury right, the case is squarely contrary to the intent of the framers of the 1851 constitutional jury trial provision. The proponents of the 1851 provision noted the legislature's power to repeal or modify the original 1776 constitutional jury trial provision and stated their intention of putting the right beyond reach of the legislature. The *Capron* court's ignorance of the added vitality of the right to jury trial after 1851 is perhaps understandable. While the record of the debates on the Maryland Constitution of 1851 is readily available, the record is not indexed. The portion of that re-

803. 170 Md. 156, 183 A. 610 (1936), *discussed in* Lynch & Bourne, *supra* note 3, at 321 n.137 (describing *Allender* as acknowledging the continuing validity of *Capron*); Bourne & Lynch, *supra* note 5, at 31-32 (describing *Allender* as citing *Capron* with approval); *see also* id. at 32-33 (discussing Fooks’ Ex'rs v. Ghingher, 172 Md. 612, 192 A. 782 (1937) (emphasizing that the power of the legislature to fix the jurisdiction of Law and Equity was limited by the constitutional right of trial by jury, and that the boundary line between Law and Equity was "vague and shadowy").


805. *See* id. at 299.

806. *See* supra note 9.

cord dealing with the jury trial provision\(^808\) has no heading in the text and has been cited in no published Maryland opinions.\(^809\) Furthermore, the principal commentator on the Maryland Constitution later called the 1851 provision possibly “surplusage” in light of the 1776 provision.\(^810\)

However, Capron may have applied to the original 1776 constitutional jury trial provision, not the 1851 constitutional jury trial provision. As Capron noted in another connection, the statute conferring jurisdiction on Equity\(^811\) was enacted by the legislature in 1841.\(^812\) Thus, the statute was enacted when the only applicable constitutional right to jury trial was the original 1776 provision, which arguably was subject to legislative\(^813\) and judicial power.\(^814\) Capron quoted the 1851 constitutional jury trial provision,\(^815\) but dismissed it as not being a limitation on the power of the legislature to enlarge the jurisdiction of Equity.\(^816\) Capron failed to note the likely irrelevance of the 1851 jury right to the earlier 1841 legislation.\(^817\)

Capron may not support the proposition that “either the legislature or an appellate court may contract the scope of the right to trial by jury by expanding the scope of equity.”\(^818\) Instead, Capron

\(^808\). See id. at 766-67.

\(^809\). However, the portion of the debates dealing with the right to jury trial in criminal cases and making the jury the judges of law as well as fact has been cited in at least one Maryland case. See Slansky v. State, 192 Md. 94, 105, 63 A.2d 599, 603 (1949).

\(^810\). See Niles, supra note 96, at 343.

\(^811\). Mrs. Capron also argued on appeal that the statute, by enlarging the powers of Equity, violated the constitutional grant of common-law jurisdiction of certain specified courts in Baltimore City. See Capron v. Devries, 83 Md. 220, 222, 34 A. 251, 252 (1896). The court of appeals rejected that argument. See id.

\(^812\). See id. at 221, 34 A. at 252 (citing 1841 Md. Laws ch. 216).

\(^813\). See supra notes 38-43 and accompanying text.

\(^814\). See supra notes 44-45 and accompanying text.

\(^815\). See Capron, 83 Md. at 224, 34 A. at 252.

\(^816\). See id. Capron may have been based on a belief that Equity’s expansion was not at the expense of the jury right. See supra notes 811-15 and accompanying text; see infra notes 818-27 and accompanying text.

\(^817\). The court of appeals assumed in another connection that a constitutional provision regarding the common-law courts in Baltimore City was irrelevant as a limitation on the earlier 1841 legislation. See Capron, 83 Md. at 224, 34 A. at 252. See generally New Cent. Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537 (1873) (stating the rule that constitutional amendments are to apply prospectively, not retroactively, unless a retroactive intent is clear).

\(^818\). Bourne & Lynch, supra note 5, at 32.
may be based on a belief that Equity's expansion was not at the expense of the jury right. To be sure, the 1841 statute,819 as interpreted previously,820 expanded the scope of Equity by permitting new remedies such as resale of the property purchased by the woman, and a deficiency judgment against her separate property. Those remedies might be considered equitable because they were available in suits within the exclusive jurisdiction of Equity—a trustee's sale of property ordered by a court of Equity821 or a married woman's separate property.822 In either event, the statute permitting the remedies would not expand Equity jurisdiction at the expense of the right to jury trial because common-law courts never had jurisdiction in such cases. Even if those statutory remedies might be considered legal, they would be available in an existing equitable proceeding and would, therefore, be within Equity's clean-up jurisdiction.823 The statute permitting those remedies would expand Equity jurisdiction at the expense of the jurisdiction of the common-law courts. Traditionally, however, Equity's clean-up jurisdiction was not perceived as violating the right to jury trial.824

The language of the Capron case indicates that it failed to recognize that the expansion of Equity jurisdiction might contract the jury right:

It is now argued that the statute under which the Court passed this order is unconstitutional. . . . It is maintained that it is in violation of articles five and twenty-three of the Maryland Declaration of Rights, and of the sixth section of Article fifteen of the Constitution. These citations were intended to show the inviolable character of the right of trial by jury and of [the] Magna Carta. This will not be questioned. The section from the fifteenth Article is in these words: Sec. 6. "The right of trial by jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five dollars,

819. See supra notes 811-12 and accompanying text.
821. See 1 Pomeroy's Equity Jurisprudence, supra note 741, § 151; see also Brown, supra note 85, at 429.
822. See 1 Pomeroy's Equity Jurisprudence, supra note 741, § 159; 4 id. § 1099; see also Brown, supra note 85, at 429.
823. See generally supra notes 250-51 and accompanying text (discussing Higgins v. Barnes, 310 Md. 532, 530 A.2d 724 (1987)).
824. See supra notes 564, 741-42 and accompanying text.
shall be inviolably preserved." It must be evident that there is no reference to a trial of an issue of fact in another jurisdiction: a Court of Equity, for instance. It can hardly be established that the Legislature has not the power to enlarge the jurisdiction of equity. The system of equity jurisprudence has been of steady growth ever since its origin; sometimes by the effect of judicial decisions; and sometimes by statute law. It is difficult to see a reason why the Legislature could not give it the jurisdiction to pass a decree for the payment of a sum of money which the Court finds to be due from one suitor to another in a proceeding pending before it . . . .

Thus, Capron emphasized the inviolability of the right to jury trial and noted that the matter was pending in Equity, where there was no such right. The case did not recognize the conflict between the expanding powers of Equity and the right to jury trial, much less recognize the legislature's power to contract that right.

Other evidence that Capron did not recognize the conflict between the expanding powers of Equity and the jury right is suggested by its treatment of precedent. McCoy v. Johnson826 was an earlier case squarely holding that the power of the legislature to expand Equity jurisdiction was limited by the constitutional jury right. Although counsel for Mrs. Capron raised McCoy in argument,827 the Capron opinion did not mention McCoy. By implication, Capron did not recognize that there was a conflict between legislative expansion of Equity and the jury right.

Rather than being decided on the ground that Equity may be expanded by statute or judicial decision, thus contracting the jury right, Capron may have been decided on one or more alternative grounds. As previously noted, one such ground was that the applicable constitutional jury trial right was the original 1776 provision expressly subject to legislative power and implicitly subject to judicial power,828 not the 1851 provision intended to put the jury right beyond the reach of the legislature.829

A second alternative ground for Capron is that it may merely re-

825. Capron, 83 Md. at 224, 34 A. at 251-52 (emphasis added).
826. 70 Md. 490, 17 A. 387 (1899), cited in Bourne & Lynch, supra note 5, at 32 n.206, 35 nn.225-26, 50 n.322, 51 & n.324, 70 n.442.
827. See Capron, 83 Md. at 222, 34 A. at 251.
828. See supra notes 40-45, 813-17 and accompanying text.
829. See supra notes 9, 806 and accompanying text.
Reflect the limited nature of appellate review. An alleged denial of the right to jury trial, like other objections, must be timely raised or it is waived. There is no indication in *Capron* that the objection was raised in the trial court, for example, by way of motions for dismissal or for reference of an issue, or transfer of the case to a common-law court. Review was had by appeal of a final deficiency decree, not by appeal of an order denying the right to jury trial or by a mode of interlocutory review, such as mandamus. Also, only prejudicial errors are reviewable on appeal. The court of appeals's finding, that the merits of the case were decided in accordance with precedent, suggests that any error in denying a jury trial may have been considered harmless, not prejudicial.

A third alternative ground for *Capron* is that it may merely reflect hostility to the merits of the jury claimant's case and support for earlier precedent establishing her liability. Regarding the merits, the jury claimant had purchased real property at a sale decreed by a court of Equity. When she alleged a defect in title and refused to pay for the property, the court ordered its resale at her risk. On resale, the property brought less than at the prior sale, therefore, the court ordered her to pay the deficiency. She did not convince the trial court of the alleged defect of title and did not state on appeal the grounds for the defect. In addition to alleging that the trial court lacked power and that the statute providing for equitable jurisdiction was unconstitutional, she relied upon the limited capacity of married women to make contracts, which would be a legal defense, but might be considered "inequitable" on the other side of the court. The court of appeals, relying on earlier precedents, summarily rejected the argument.

Thus, *Capron* does not support Lynch and Bourne's principle that the scope of Equity may be expanded by statute or judicial decision at the expense of the jury right. More importantly for the purposes of this Article, that principle may be criticized because it

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830. See supra note 487 and accompanying text.
831. See *Capron*, 83 Md. at 223, 34 A. at 251.
832. See supra note 485.
833. See supra note 487 and accompanying text.
834. See infra note 837 and accompanying text.
835. See generally *Capron*, 83 Md. at 221-23, 34 A. at 249-50 (argument of counsel).
fails to protect the jury right and it contradicts the usual ways of interpreting the Maryland Constitution.

1. Not Protective of the Jury Right

Lynch and Bourne's principle that the scope of Equity may be expanded by statute or judicial decision at the expense of the jury right is obviously restrictive of the right to jury trial. The principle is not only that Equity may be expanded by statute or judicial decision, but that the expansion may be at the expense of the jury right.

2. Contrary to the Usual Ways of Interpreting the Constitution

The aspect of Lynch and Bourne's principled discretionary theory that the scope of Equity may be expanded by statute or judicial decision at the expense of the jury right is not protective of the jury right and is contrary to many of the usual ways of interpreting the Constitution.

The principle of legislative or judicial expansion of Equity at the expense of the jury right is contrary to the nature of a written constitution. The constitutional jury right is supreme as it prevails over other conflicting laws and judicial decisions, such as those expanding the scope of Equity at the expense of the jury right. The principle of an expanding Equity is also contrary to the nature of a "living" constitution. The right to jury trial, not the jurisdiction of Equity at the jury right's expense, should be expansive.

The principle of legislative or judicial expansion of Equity at the expense of the jury right is also contrary to the text of the Maryland Constitution. The principal jury right provision, Article 23, expressly mandates recognition of the jury right and provides that it shall be "inviolably preserved." Moreover, it is the jury right that is protected, not separate courts of Law and Equity or the right to trial by a judge.

The principle of legislative or judicial expansion of Equity at the expense of the jury right is also contrary to the history of the Maryland Constitution. The purpose of Article 23 was to put the right beyond the reach of Equity's incursions pursuant to legislative

838. See supra note 788 and accompanying text.
839. See supra note 789 and accompanying text.
840. See supra note 21 and accompanying text.
841. See supra notes 26-29 and accompanying text.
842. See supra notes 48-71 and accompanying text.
843. See supra notes 77-95 and accompanying text.
and, presumably, judicial decisions.\textsuperscript{844}

The principle of legislative or judicial expansion of Equity at the expense of the jury right is also contrary to the structure of government. An expansive jury right, not an expanded Equity at the expense of the jury right, is needed now that most of the political and institutional checks to enforce Equity's deference to Law no longer exist.\textsuperscript{845} If Equity is expanded at the expense of Law, the jury's checks on the judge of finding fact and softening the harshness of legal doctrine may be lost.\textsuperscript{846}

The principle of legislative or judicial expansion of Equity at the expense of the jury right is also contrary to doctrine. We have already seen that the \textit{Capron} case, apparently Lynch and Bourne's only authority for the principle,\textsuperscript{847} may not support it.\textsuperscript{848} Furthermore, Lynch and Bourne admit that the power of the legislature and the courts to expand Equity at the expense of the jury right is limited in some way by the jury right, and that there are authorities conflicting with their interpretation of \textit{Capron}.

The primary authority that Lynch and Bourne cite for jury limits on Equity's expansion is \textit{McCoy v. Johnson}.\textsuperscript{849} That case includes the following passage affirming the constitutional right to jury trial:

\begin{quote}
[I]t is clear the Legislature has no power to confer on Courts of equity the jurisdiction to determine legal rights, in regard to which Courts of law exercise exclusive jurisdiction. In such cases the Constitution guarantees suitors the right of trial by jury, and this right the Legislature cannot abridge or take away. The Act of 1888 [purporting to give the court, in its discretion, power to declare legal title to property] was borrowed, we find, word for word from the Code of the Indian Empire, but the British Parliament is not controlled, nor is its power limited, as is the power of the Legislature in this State, by a written Constitution. The jurisdiction then conferred by the Act of 1888, can only be exercised in regard to such matters as are properly cognizable by a Court of equity; and its exercise in regard to these,
\end{quote}

\textsuperscript{844} See supra notes 9, 52-67 and accompanying text.
\textsuperscript{845} See supra note 675 and accompanying text.
\textsuperscript{846} See supra notes 156-62 and accompanying text.
\textsuperscript{847} See supra notes 789-92 and accompanying text.
\textsuperscript{848} See supra notes 793-837 and accompanying text.
\textsuperscript{849} 70 Md. 490, 17 A. 387 (1889), cited in Bourne & Lynch, supra note 5, at 32 n.206, 35 & n.225, 50 n.322, 51 & nn.324-25, 70 n.442.
the Act merely provides, shall rest in the discretion of the Court.\textsuperscript{850}

The authorities Lynch and Bourne cite as conflicting with their interpretation of *Capron* are *State v. Rutherford*\textsuperscript{851} and other cases permitting agency determinations without a jury where a right to jury trial was preserved on appeal de novo.\textsuperscript{852}

Of course, Lynch and Bourne discuss *Higgins v. Barnes*,\textsuperscript{853} the Maryland case following *Beacon Theatres, Inc. v. Westover*.\textsuperscript{854} However, Lynch and Bourne do not mention that *Higgins* noted a concern that expansion of Equity jurisdiction had eroded the jury right.\textsuperscript{855} Nor do Lynch and Bourne mention that *Higgins* concluded that the constitutional jury right remains as "absolute" after merger of Law and Equity as before, and that court rules are something short of the Maryland Constitution.\textsuperscript{856}

\textsuperscript{850}McCoy, 70 Md. at 492-93, 17 A. at 387.

\textsuperscript{851}145 Md. 363, 125 A. 725 (1924), overruled by In Petition for Writ of Prohibition, 312 Md. 280, 539 A.2d 664 (1988), discussed in Lynch & Bourne, supra note 3, at 321-22. *Rutherford* does have a statement strongly supporting the constitutional right to jury trial. See *Rutherford*, 145 Md. at 370, 125 A. at 728. The case treats the jury trial as something that could be denied by specific design of the legislature. See id. at 371, 125 A. at 728. There is also language in *Allender v. Ghingher*, 170 Md. 156, 167-68, 183 A. 610, 616 (1936), strongly supporting the constitutional right to jury trial, while suggesting that a legislative enactment or judicial decision could abridge the right. The language in both *Rutherford* and *Allender* suggesting that the jury trial could be denied by legislation or by judicial decision, however, is dictum and conflicts with the idea in *McCoy* that the constitutional jury right is a limit on legislative authority. In addition, the language in *Rutherford* and *Allender* is squarely contrary to the intent of the framers of the 1851 constitutional jury trial provision. See supra note 374 and accompanying text.

\textsuperscript{852}See Lynch & Bourne, supra note 3, at 322 & n. 147 (workers' compensation appeals); see also id. at 322 & n.148 (health care malpractice claims arbitration appeals).

\textsuperscript{853}310 Md. 532, 530 A.2d 724 (1987), discussed in Lynch & Bourne, supra note 3, at 327-37.

\textsuperscript{854}359 U.S. 500 (1959).

\textsuperscript{855}See Higgins, 310 Md. at 532, 530 A.2d at 728.

\textsuperscript{856}See id. at 542-43, 530 A.2d at 729. *Higgins* reached that conclusion in the context of an allegation that raising a counterclaim, permissive or compulsory under court rules, would constitute a waiver of the right to jury trial. See id. Other commentators on the Maryland Constitution would protect the jury right at the expense of equity. See Niles, supra note 96. Professor Niles wrote that "the courts will be careful to preserve the right [of trial by jury] and declare any law in substantial violation thereof unconstitutional." Id. at 344; see also Brown, supra note 85. Professor Brown noted the trend toward Equity's
Lynch and Bourne also conclude that, in reconciling the jury right with expanding Equity jurisdiction after *Higgins*, Maryland cases are likely to follow federal doctrine. They recognize that federal cases are generally protective of the jury in that context, with a few narrow exceptions, such as where the legislature delegates the determination of "public rights" to administrative agencies, under "most imperative circumstances," and other situations.

The principle of legislative or judicial expansion of Equity at the expense of the jury right is also contrary to some prudential concerns. The benefits a jury provides include legitimizing outcomes, being a "lightning rod," and providing a "black box" decision.

The principle of legislative or judicial expansion of Equity at the expense of the jury right is also contrary to some ethical matters. While it may be reasonable to maintain a traditional distinction between Law and Equity, particularly a distinction mentioned in the federal and state constitutions, allowing ad hoc changes to Equity may not be reasonable under the equal protection guarantees of the Fourteenth Amendment or the Maryland Constitution. A *fortiori*, those changes would not satisfy equal protection strict scrutiny where the fundamental right to jury trial under the Maryland Constitution is implicated. In addition, the principle of legislative or judicial expansion of Equity at the expense of the jury right may violate the principles of limited government, government by the

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expansion came at the expense of the jury right, see id. at 427, 448, 451, 473-74, and noted that the expansion of Equity at the expense of the jury right came about largely through oversight, see id. at 451, 473, but concluded that the jury right should, see id. at 451, and predicated that it soon would, see id. at 474, be protected. The *Higgins* court, noting that the expansion of Equity eroded the constitutional jury right, cited Brown. See id. at 541, 530 A.2d at 728.


858. See id. at 323 & nn.149-54. But cf. id. at 323-24 & nn.155-56 ("private rights").


861. See *supra* notes 308-20 and accompanying text.


863. See *supra* notes 365-73 and accompanying text.

864. See *supra* notes 365-73 and accompanying text.

865. See *supra* notes 330-75 and accompanying text.
people, government for the people, and free political exchange. 866

F. Judicial Economy

The sixth aspect of Lynch and Bourne's principled discretionary theory is the common-sense notion that judicial economy is better served by trial by a judge than by trial by a jury. 867 Judicial economy 868 is a widely shared value. 869 Lynch and Bourne conclude that as a matter of common sense, judicial economy is better served by trial by a judge than by trial by a jury. 870 The concept that jury trials take more time and, therefore, more effort and expense than judge trials, is commonly accepted. 871

A jury trial may take more time from beginning to end than trial by a judge. Even before trial, the judge may be called upon to hear argument and rule on whether a jury trial may be had. 872 A panel of potential jurors must be selected from the public, 873 and a jury must be selected from that panel through questioning 874 and by allowing challenges for cause and peremptory challenges. 875 Lawyers' arguments and presentation of evidence may take more time in a case tried by a jury than in a case tried by a judge. 876 The judge

866. See supra notes 376-452 and accompanying text.
867. See Bourne & Lynch, supra note 5, at 60.
868. The term "judicial economy" is broadly considered to include economy of all resources, such as time, effort, and money, and economy of all interested groups, including courts, parties, other trial participants, and the public.
869. See, e.g., Md. Rule 1-201(a). Md. Rule 1-201(a) provides: "These rules shall be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay." Id. (emphasis added). Fed. R. Civ. P. 1 provides: "These rules . . . shall be construed . . . to secure the just, speedy, and inexpensive determination of every action." Id. (emphasis added).
870. See Bourne & Lynch, supra note 5, at 60; see also id. at 2-3, 63, 64 & n.408, 69 & n.437. The value of judicial economy is recognized under several names, including efficiency, economy, judicial administration, expedition, and avoidance of delay. See id.
871. One estimate was that a personal injury case may be tried by a judge in 40% less time than a jury. See Hans Zeisel et al., Delay in the Court 81 (1959). But cf. Geoffrey C. Hazard Jr., Book Review, 48 Cal. L. Rev. 360, 370 n.22 (1960) (contending jury trials are 300% longer than bench trials); 1 De Tocqueville, supra note 309, at 292 n.4 (providing that introduction of juries allows for diminishing the number of judges). See generally infra notes 910-16 and accompanying text.
872. See Md. Rule 2-325.
874. See Md. Rule 2-512(c), (d).
876. See Casper, supra note 308, at 417.
must instruct the jury,877 and the jury must deliberate and reach a verdict, which ordinarily must be unanimous.878 Moreover, jury verdicts may result in more appeals than judge trials.879

This common-sense notion of judicial economy, however, merits close examination. It is like faculty governance. Anyone who has sat through a faculty meeting would agree that faculty democracy does not appear to be the most efficient way to get things done. Nevertheless, faculty democracy serves values other than efficiency, is required by accrediting agencies, and has some efficiencies of its own as compared with unilateral action by a dean. Also, there are ways of improving faculty democracy.

Like faculty democracy, the jury serves values other than efficiency. Lynch and Bourne cite an early Maryland case for the proposition that a Law trial is superior to an Equity trial.880 They also identify other important values of the jury trial such as commonsense justice881 reached by a democratic process.882 As developed below, the jury promotes structural,883 prudential,884 and ethical885 values.

Many of the inefficiencies of jury trial have been reduced by modern procedural developments, such as merger of Law and Equity, expedited procedures, summary determination, and improvements to the jury. Moreover, the merger of Law and Equity has made the process more efficient.886 Lynch and Bourne note that

877. See Md. Rule 2-520.
878. See Md. Rule 2-251, -522.
880. See Bourne & Lynch, supra note 5, at 30 & n.187 (citing Richardson v. Stil linger, 12 G. & J. 477 (1842)). That proposition was based on the rule that Equity has no jurisdiction where there is an adequate remedy at Law. See Richardson, 12 G. & J. at 479-84. The rule, in turn, was apparently based on three advantages of the Law courts as follows: (1) the jury trial, (2) the taking of testimony in open court (rather than by deposition), (3) and the admissibility of testimony of persons with an interest in the case. See id. at 480. Modern procedural developments have eliminated those distinctions, except for the jury trial. See Md. Rule 2-301 & committee note. Nevertheless, the jury provides a mode of trial that is superior in many respects to a judge trial. See infra notes 956-1124 and accompanying text.
881. See Bourne & Lynch, supra note 5, at 3.
882. See id. at 49 n.311.
883. See infra notes 936-38.
884. See infra note 952.
885. See infra notes 947-53, 964.
886. See supra note 1 and accompanying text.
having to litigate a claim in the separate systems of Law and Equity resulted in additional cost, delay, and inconvenience. However, merger of the separate systems eliminated those inefficiencies.

Modern procedures permit litigation to be expedited, while protecting the jury right. Lynch and Bourne note that preliminary injunctive relief may be granted before jury trial and final injunctive relief afterward. Of course, judges have authority to shorten time requirements and assign cases for trial so as to dispose of them expeditiously. Lynch and Bourne also note that the legislature may expedite trial of certain cases. They cite a Supreme Court case, Pernell v. Southall Realty, which concluded that there was no necessary inconsistency between the desire for speedy justice and the right to jury trial. To support that proposition, the Court cited as examples the laws of thirteen states guaranteeing jury trial in summary eviction proceedings.

Even in cases where the jury right exists, many determinations, such as summary judgment, motion for judgment, and issues of

887. See Bourne & Lynch, supra note 5, at 45 n.292, 54-55, 76 and accompanying text. Equity’s clean-up doctrine could eliminate those inefficiencies in some situations, but only at the expense of the jury right. See id. at 45 n.292, 54, 55, 57, 60, 76.

888. See id. at 45 n.292, 54-55; see also id. at 78. See generally Lynch & Bourne, supra note 3, at 326-37.


890. See Bourne & Lynch, supra note 5, at 64.

891. See Md. Rule 1-204(a).

892. See Md. Rule 1-211.

893. See Bourne & Lynch, supra note 5, at 64 n.408, 69 n.437 (federal bankruptcy proceedings); id. at 69 n.435 (mechanics’ lien adjudications); see also, e.g., Md. Code Ann., Cts. & Jud. Proc. § 3-409(e) (1995) (declaratory judgment); id. § 3-704(a) (habeas corpus); Md. Code Ann., Real Prop. § 8-332(b) (1996) (distress); Md. Code Ann., State Gov’t § 10-623(c) (1993) (access to public records); Md. Rule 2-221(b) (interpleader).


895. See Pernell v. Southall Realty, 416 U.S. 363, 384 (1974). The Court noted that in many cases where liability was conceded, no jury would be requested, and that in other cases where there was no dispute of fact, summary judgment would be granted. See id. The Court also noted that delay might be required by fairness and due process. See id. at 385.

896. See id. at 384 & n.34.

897. See Fletcher v. Flournoy, 198 Md. 53, 81 A.2d 232 (1951); Md. Rule 2-501.

law, generally\textsuperscript{899} will be made by the judge, not the jury. To that extent, any efficiencies of trial by the judge will be retained.

Additionally, efforts are being made to make jury trials even more efficient.\textsuperscript{900} For example, judges can be better trained in trial management, modern technology, and communications skills.\textsuperscript{901} Lawyers can be better trained in trial advocacy and communications skills,\textsuperscript{902} while jury selection can be improved by the use of written questionnaires\textsuperscript{903} and lawyers’ opening statements made to the entire venire.\textsuperscript{904} Rules of evidence can be simplified and trials shortened,\textsuperscript{905} and trial exhibits can be improved by the use of modern technology.\textsuperscript{906} There have been suggestions, generally rejected, to modify jury verdicts by abandoning the unanimity requirement,\textsuperscript{907} reducing jury discretion by providing statutory schedules for non-economic damages,\textsuperscript{908} and bifurcating trials in liability and then damages phases.\textsuperscript{909}

Maintenance of a justice system using two arbiters, judge and jury, appears in obvious ways to be less efficient in time, effort, and expense than using only a judge.\textsuperscript{910} However, commentators in re-

\textsuperscript{899} See Md. Rule 2-502; cf. Md. Const., Decl. of Rights art. 23 (preserving the right of trial by jury of issues of fact).

\textsuperscript{900} See, e.g., ABA Standards Relating Juror Use and Management (1983); see also Verdict, supra note 162; ABA/Brookings, supra note 308.

\textsuperscript{901} See ABA/Brookings, supra note 308, at 4, 12, 25.

\textsuperscript{902} See id. at 4, 21.

\textsuperscript{903} See id. at 32.

\textsuperscript{904} See id. at 4, 21, 32.

\textsuperscript{905} See id. at 15-17, 22, 24-25.

\textsuperscript{906} See id. at 3, 16-17, 19, 22.

\textsuperscript{907} See id. at 26-27.

\textsuperscript{908} See id. at 4, 13, 27.

\textsuperscript{909} See id. at 27-28.

\textsuperscript{910} See supra note 871 and accompanying text. The distinction seems to be between the efficiencies of trial by the jury and trials by the judge, not between trials at Law and in Equity. Equity is not inherently more expeditious than Law. For example, in 19th century England it was said that “delay and expense reign supreme” in the Court of Chancery. See Charles Syng Christoph Bowens, Progress in the Administration of Justice During the Victorian Period, in 1 Select Essays in Anglo-American Legal History 516, 516 (1907); see also Charles Dickens, Bleak House 7-8 (Modern Library ed., 1985) (1853) (footnotes omitted).

Jarnyce and Jarmyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. . . . Innumerable children have been born in the cause; innumerable young people have married in it; innumerable old people have died out of it. Scores of persons have deliriously
cent years have noted a number of ways in which a jury trial may be more efficient than a judge trial. First, because of the possible discussion of allegations that may be inadmissible as evidence and, therefore, require disqualification of the trier of fact, a judge may be more likely to participate in negotiations leading to settlement in a case to be tried by a jury than in a case to be tried to that judge. Second, jury trials are much more likely than judge trials to be concentrated and continuous, bringing a closure of case development and allowing few interruptions. Third, in a complex case, more clarity is required from the lawyers and the judge in a jury trial than in a judge trial. Fourth, evidence is more likely to be excluded in a jury trial than in a judge trial, resulting in a shorter trial. Fifth, the jury reaches its verdict summarily, in a matter of hours or days, while the judge, who must make findings of fact and conclusions of law, may deliberate and labor over an

found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffeehouse in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.

DICKENS, supra, at 7-8. Indeed, one cause of the merger of Law and Equity in England in the 19th century was the public's arousal "by the intolerable expense and delay in equitable procedure." McCUNTOCK, supra note 741, at 17.

911. See MORRIS J. BLOOMSTEIN, VERDICT 120-21 (1968).
912. See Galanter, supra note 313, at 88.
913. See Patrick E. Higginbotham, Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power, 56 Tex. L. Rev. 47, 54 (1977). One commentator has concluded that the jury trial requires clarity of lawyers and judges in presenting the law to the jury in every case. See Edson L. Haines, Preface to JOINER, supra note 157, at vii-viii.
914. See Stephen A. Saltzburg, Improving the Quality of Jury Decision-making, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 341, 343 (Robert E. Litan ed., 1993); Stanley E. Sacks, Preservation of the Civil Jury System, 22 Wash. & Lee L. Rev. 76, 83-84 (1965); At least this is true if the time which would have been taken for the presentation of evidence exceeds the time taken for arguments over its admissibility.
opinion for months. Sixth, appellate review of jury-tried facts is more strictly limited than appellate review of judge-tried facts.

There are even some doubts about the data that supposedly demonstrate that trial by a judge is more efficient than trial by a jury. Some commentators have suggested that generalizations are difficult, because of a skewed sample of cases. That is, the small percentage of cases that do reach the jury may be the closest, hardest, and most insoluble ones. Thus, at least some of the extra time, effort, and cost in jury trials is a result of the nature of the case, not a result of the trier being a jury as opposed to a judge.

More importantly for purposes of this Article, Lynch and Bourne's common-sense notion that judicial economy is better served by trial by a judge than by trial by a jury may be criticized because it is restrictive of the jury right and because it is contrary to the usual ways of interpreting the Maryland Constitution. Just as faculty democracy is required by accrediting agencies, the jury trial may be required by the Maryland Constitution.

1. Not Protective of the Jury Right

Lynch and Bourne's common-sense notion that judicial economy is better served by trial by a judge than by trial by a jury is obviously restrictive of the right to jury trial. Lynch and Bourne make it clear that this notion of judicial economy may motivate either the legislature or the judiciary to restrict the jury right.

915. See Higginbotham, supra note 913, at 55; JOINER, supra note 157, at 72-73. Compare FED. R. CIV. P. Form 31 (jury findings as to liability and damages), with FED. R. CIV. P. 52(a) (judge findings of fact and conclusions of law), and MD. RULE 2-522(a) (judge statement of reasons and basis for determining damages).

916. See Higginbotham, supra note 913, at 58; JOINER, supra note 157, at 74; cf. Board of Shellfish Comm'rs v. Mansfield, 125 Md. 630, 94 A. 207 (1915) (stating that constitutional jury trial guarantee implicitly prohibits appellate review of jury-found facts); Charlton Bros. Transp. Co. v. Garrettson, 188 Md. 85, 51 A.2d 642 (1947) (holding appellate review only of legal sufficiency, not of weight of the evidence, in jury verdict). But cf. Md. RULE 8-131(c) (applying clearly erroneous standard to appellate review of judge's evidentiary findings). Compare U.S. CONST. AMEND. VII "[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law," and Lavender v. Kurn, 327 U.S. 645 (1946) (allowing appellate reexamination only if the verdict was not based on substantial evidence or was unreasonable), with FED. R. CIV. P. 52(a) (allowing appellate review of judge's findings of fact by a clearly erroneous standard).

917. See, e.g., Schuck, supra note 893, at 307-08.

918. See Bourne & Lynch, supra note 5, at 3 n.3, 64 n.408, 69 n.437.
2. Contrary to the Usual Ways of Interpreting the Constitution

Lynch and Bourne's common-sense notion that judicial economy is better served by trial by a judge than by trial by a jury is not protective of the jury right. Moreover, it is contrary to many of the usual ways of interpreting the Maryland Constitution.

That common-sense notion is contrary to the nature of a written constitution. The jury right is specific, enacted, and enforceable, and it is supreme as it prevails over other conflicting laws and policies, such as judicial economy. The jury right is consistent with a "living" constitution. It has survived the merger of Law and Equity, and it may be protected at the same time that litigation is expedited.

The common-sense notion that judicial economy is better served by trial by a judge than by trial by a jury is also contrary to the text of the Maryland Constitution. The principle jury right provision, Article 23, expressly mandates that the jury right shall be inviolably preserved.

Article 23 does invoke judicial economy in one respect. Article 23 includes a $5,000 amount in controversy requirement, precluding jury trial of small claims. There is no other language in Article 23, however, which suggests that policies, such as judicial economy, may be invoked to erode the jury right.

Indeed, Article 44 of the Maryland Declaration of Rights generally rules out pleas to "necessity" to excuse departures from the Maryland Constitution. While Article 19 of the Maryland Declaration of Rights provides that legal reme-

919. See id. at 2-3, 60, 63, 69.
920. See supra notes 16-21 and accompanying text.
921. See supra note 1 and accompanying text.
922. See supra notes 889-909 and accompanying text.
923. See supra notes 47-67 and accompanying text.
924. See supra note 8.
925. Cf. U.S. CONST. AMEND. IV (right to be free of "unreasonable" searches and seizures); Md. Const., Decl. of Rights art. 5 (providing that inhabitants of Maryland are entitled the benefit of English statutes in existence on July 4, 1776, "which, by experience, have been found applicable to their local and other circumstances"); id. art. 25 (right to be free of "excessive" bail and "excessive" fines).
926. See Md. Const., Decl. of Rights art. 44 ("That the provisions of the Constitution of the United States, and of this State, apply, as well in time of war, as in time of peace; and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good Government, and tends to anarchy and despotism.").
dies should be available "speedily without delay,"\(^\text{927}\) we have seen that modern procedural developments permit expeditious jury trials.\(^\text{928}\) Furthermore, the Maryland Constitution preserves the right to trial by jury, not to trial by judge.\(^\text{929}\)

The common-sense notion that judicial economy is better served by trial by a judge than by trial by a jury is contrary to the history of the Maryland Constitution. That history shows hundreds of years of reverence for the jury right.\(^\text{930}\) English deprivation of that right, under the plea of efficiency,\(^\text{931}\) was one of the abuses leading to the American Revolution.\(^\text{932}\)

The framers of Article 23 recognized that jury trials may take more time than trials by judges,\(^\text{933}\) but they adopted the jury right anyway.\(^\text{934}\) The framers of Article 23 wanted to put the jury right beyond the reach of the legislature and, presumably, the judiciary.\(^\text{935}\)

The common-sense notion that judicial economy is better served by trial by a judge than by trial by a jury is contrary to the structure of government. Eliminating the jury eliminates a check by the people on the government, generally.\(^\text{936}\) Eliminating the jury also eliminates the jury's check on the trial judge by finding facts

\(^{927}\) Md. Const., Decl. of Rights art. 19 provides:
That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.

\(^{928}\) See supra notes 889-899 and accompanying text.

\(^{929}\) See supra notes 86-95 and accompanying text.

\(^{930}\) See supra notes 100-04, 107-08 and accompanying text.

\(^{931}\) See Goebel, supra note 105, at 85-87 (enforcement of trade laws and collection of revenues).

\(^{932}\) See supra notes 105-06 and accompanying text.

\(^{933}\) On April 30, 1851, the constitutional convention debates regarding the number of judges to be provided for Baltimore City included the following discussion: "[J]ury trials . . . imposed the heaviest burdens upon the courts . . . [I]t was jury trials, where the cases were argued before the court, and exceptions were taken, and the court instructs the jury, that consumes time . . . ." 2 1851 Debates, supra note 9, at 644. However, the convention record also noted the existence of a backlog of 2,500 cases in the court of chancery because of dilatory course of proceedings.

\(^{934}\) The jury trial guarantee was adopted by the convention on May 7, 1851, one week after the discussion. See supra note 933; see also 2 1851 Debates, supra note 9, at 766-67.

\(^{935}\) See generally supra note 9 and accompanying text.

\(^{936}\) See supra notes 153-63 and accompanying text.
and by softening the harshness of legal doctrine. Eliminating the jury also eliminates the jury's check, by supporting the judge, on the popular branches of government.

The common-sense notion that judicial economy is better served by trial by a judge than by trial by a jury is contrary to doctrine. As has been shown, the Court of Appeals of Maryland has recognized that the constitutional jury right is a limitation on the legislature's power to fix the jurisdictions of Law and Equity. Traditionally, Maryland courts have not been very alert to the erosion of the jury right. However, *Higgins v. Barnes* suggests a new regime. *Higgins* expressly rejected an approach preferring the "efficiency" of a judge trial in favor of "a jealous protection of the right of jury trial." *Higgins* narrowly limited the discretion of trial judges to restrict the jury right to situations where the jury itself would obstruct a satisfactory disposition of the issue or where "most imperative circumstances" exist.

Another commentator suggested that the right to jury trial should be limited because it is as impractical as it is instructive. The commentator was Professor Redish in *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*. Redish himself noted three criticisms of the idea of limiting the right to jury trial on the ground that it is impractical. First, that idea may lead to determinations based on judicial whim. Second,

937. See *supra* notes 161-62 and accompanying text.
938. See *supra* note 163 and accompanying text.
939. See *supra* note 165 and accompanying text. *But cf.* Houston v. Lloyd's Consumer Acceptance Corp., 241 Md. 10, 215 A.2d 192 (1965) (holding that the exercise of the jury right is subject to a requirement that the election of a jury trial be in writing); NILES, *supra* note 96, at 18, 343 (citing Knee v. Baltimore City Pass. Ry., 87 Md. 623, 40 A. 890 (1898) (providing that reasonable regulations of the exercise of the jury right are permitted)).
942. *Id.*
943. See *id.* at 543-44 & n.12, 550-51, 530 A.2d at 730, 733 & n.12.
944. See *id.* at 550-51, 530 A.2d at 733. *But cf. id.* at 546 n.7, 530 A.2d at 731 n.7 (providing no such case was found to exist).
945. *Id.* at 543-44, 546, 550-51, 530 A.2d at 730, 731, 733. Complexity of the issues is unlikely to constitute "most imperative circumstances." *Id.* at 546 n.7, 530 A.2d at 731 n.7.
946. See Redish, *supra* note 591.
947. See *id.* at 512. Redish recognized this problem in all situations where legal realism or sociological jurisprudence (rather than law as narrowly defined) is the basis for decision.
other social values competing with efficiency exist and must be balanced against it. Others have criticized Redish's idea of limiting the right to jury trial because it is impractical. Moreover, a criticism directed specifically at Redish was that his approach was elitist—to the extent judges perceive that the jury is not just like them, judges may use their power to try to curb jurors. A general criticism of the judicial economy approach to interpreting the jury trial right is that the approach would be rejected out of hand if it was applied to other provisions of the Bill of Rights. Thus, the approach suggests a lack of sympathy for the objectives of the constitutional right of jury trial.

The common-sense notion that judicial economy is better served by trial by a judge than by trial by a jury is contrary to a prudential concern. The jury is a benefit to judges and our justice system by helping legitimize outcomes, by being a “lightning rod” for animosity, and by providing a “black box” decision.

The common-sense notion that judicial economy is better served by trial by a judge than by trial by a jury is contrary to certain ethical concerns. For purposes of equal protection, the jury right is a fundamental constitutional right. Thus, any classification significantly interfering with the exercise of the right would be

948. See id; see also supra notes 880-85 and accompanying text; cf. supra notes 911-16 and accompanying text (showing conflicting views of the relative efficiency of trial judge and trial jury).

949. See Redish, supra note 591, at 513-14. Thus, the future might bring different evaluations of efficiency or of how efficiency and other values should be weighed.


The judges would believe that deciding cases “on the law and the evidence” requires a disciplined mind, the sort of mind the judge believes himself to have. A temptation that seduces the judge is for him to say that the best juror is a person who is just like himself. Insofar as the jurors are not just like the judges, and insofar as the difference is perceived by the judges as a lack of discipline, then to that extent the judges will use their power to try to curb the jurors.

Id. (footnote omitted)

951. See Wolfram, supra note 120, at 649 n.33; see also Wilkens v. State, 293 Md. 335, 444 A.2d 445, 448 (1982) (a criminal contempt case quoting Bloom v. Illinois, 391 U.S. 194, 208-09 (1968) (“Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice in favor of jury trial has been made, and retained, in the Constitution.”)).

952. See supra notes 308-20 and accompanying text.
strictly scrutinized.\textsuperscript{953} However, judicial economy, like other efficiency measures, is likely to satisfy only deferential rational basis review, not strict scrutiny.\textsuperscript{954} Therefore, any significant limitation on the jury right imposed for the purpose of judicial economy would violate equal protection.

The common-sense notion that judicial economy is better served by trial by a judge than by trial by a jury also violates the principles of limited government, government by the people, government for the people, and free political exchange.\textsuperscript{955}

\textbf{G. Equity is Superior to Law as a Mode of Trial}

The seventh aspect of Lynch and Bourne's principled discretionary theory is their suggestion that Equity is superior to Law as a mode of trial.\textsuperscript{956} After the merger of Law and Equity,\textsuperscript{957} that superiority is generally of trial by judge over trial by jury.\textsuperscript{958}

Arguments over which is 'the better decision-maker, judge or jury, is a little like asking who should make decisions for a school—the dean or the faculty? Both unitary decision-makers like a dean, and collegial decision-makers, like a law faculty, have strengths and weaknesses. Both decision-makers typically consider mercy and ad hoc matters, on the one hand, as well as justice and reason, on the other hand. Of course, faculty decisions are usually made in a context of power-sharing with the dean, who may initially refer matters to the faculty and who often later exercises some reviewing authority over faculty decisions. Thus, faculty decision-making provides the checks and balances of participation by both the faculty and the

\textsuperscript{953} See \textit{supra} notes 365-68 and accompanying text.

\textsuperscript{954} But cf. Reed v. Reed, 404 U.S. 71 (1971) (providing that while judicial economy was a legitimate objective, a preference of males over females to administer decedents' estates was arbitrary discrimination violating equal protection).

\textsuperscript{955} See \textit{supra} notes 376-411, 443-52 and accompanying text.

\textsuperscript{956} See \textit{infra} notes 959-1044 and accompanying text; cf. \textit{supra} note 305 and accompanying text (stating that Equity proceedings did not include oral testimony until 1890). But cf. Bourne & Lynch, \textit{infra} note 5, at 30 (citing Richardson v. Stillinger, 12 G. \& J. 477 (1842) (holding that a court of Law is the superior method of trial for most civil cases)).

\textsuperscript{957} See \textit{supra} note 1 and accompanying text.

\textsuperscript{958} The distinction between substantive \textit{equitable} rights and remedies and substantive \textit{legal} rights and remedies, a distinction which survives merger, is considered below. See \textit{infra} notes 1125-1514 and accompanying text (discussing Lynch and Bourne's approximation of pre-merger approach for actually deciding in what situations the jury right is to apply).
dean. In any event, the school's decisions typically are subject to review by higher authority—the provost, the president, and the board.

Lynch and Bourne's suggestion, that Equity is superior to Law as a mode of trial, appears to be based on five elements expressly or impliedly stated in their work: expertise, decision-making process, expedition, judicial economy, and result.

First, Lynch and Bourne, by references to the "chancellor," suggest that a judge has expertise that a jury does not have. Generally, a judge does not have expertise in the usual sense. An official in an administrative agency or on a specialized tribunal develops expertise, a special claim to competency based on knowledge of and experience with certain substantive rules and special procedures. While an experienced trial judge may have expertise in the trial of fact, at least compared with appellate judges, that expertise is different, but not necessarily greater, than the expertise of a jury.

The relative competence of judge and jury were summarized in Kalven and Zeisel's classic study of the American jury:

On the one hand, it is urged that the judge, as a result of training, discipline, recurrent experience, and superior intelligence, will be better able to understand the law and analyze the facts than laymen, selected from a wide range of intelligence levels, who have no particular experience with matters of this sort, and who have no durable official re-

959. See Lynch & Bourne, supra note 3, at 329, 331; Bourne & Lynch, supra note 5, at 29, 44, 47, 56, 62-64, 69, 75, 77. The office of chancellor no longer exists in Maryland. See supra notes 648-51 and accompanying text. Moreover, separate courts of Equity have been abolished. See id. The last hold-out was Baltimore City, where separate courts of Law and Equity with rotating judges existed until 1980. See Md. Const. art. IV, §§ 27-33 (1867) (repealed 1980). Thus, by referring to "chancellor," Bourne and Lynch must be referring to a judge. See Lynch & Bourne, supra note 3, at 329 ("In a merged system ... the powers of the chancellor are present in every action.").


962. See id. at 481; Fiss, supra note 960, at 1, 34-35.


964. Cf. Harry Kalven, Jr., The Dignity of the Civil Jury, 50 Va. L. Rev. 1055, 1058 (1964) (stating that a jury, having common sense and the feel of the community, is an expert at deciding negligence and at pricing damages).
sponsibility. On the other hand, it is argued that twelve heads are inevitably better than one; that the jury as a group has wisdom and strength which need not characterize any of its individual members; that it makes up in common sense and common experience what it may lack in professional training, and that its very inexperience is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye.\textsuperscript{965}

The debate over the respective competence of judge and jury is fierce, long-standing, and filled with value judgments.\textsuperscript{966} However, it should not be surprising that judges and juries have different characteristics, for they complement each other in function.\textsuperscript{967} In any event, the debate is largely theoretical as long as there is a constitutional right to jury trial.\textsuperscript{968}

Where complex cases are involved, however, the judge is likely to have an expertise that the jury does not have. Thus, Lynch and Bourne suggest that complex cases may be more suitable for trial by judge than trial by jury.\textsuperscript{969} Lynch and Bourne recognize, however, that this idea of a complexity exception to the right to jury trial has not been accepted in either Maryland\textsuperscript{970} or federal\textsuperscript{971} courts for several reasons. First, after procedural reforms, complex issues may be adjudicated in an action at law.\textsuperscript{972} Second, the complexity idea may

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\textsuperscript{965} \textit{Kalven} \& \textit{Zeisel}, \textit{supra} note 121, at 8. \textit{Kalven} and \textit{Zeisel} concede that all judges are not alike and that all juries are not alike. For example, some juries will be more rule-minded than the average judge, while some judges will have more of an open sentiment than the average jury. \textit{See id.} at 99-100.

In Maryland, it is a jury of six, not twelve, whose heads may be better than one. \textit{See supra} note 7. It is not six heads or one head, but both in a jury trial, which is conducted under supervision of a judge. \textit{See supra} notes 157-63 and accompanying text.

\textsuperscript{966} \textit{See Kalven} \& \textit{Zeisel}, \textit{supra} note 121, at 3-9; \textit{see also} \textit{Galanter}, \textit{supra} note 313, at 69-91.

\textsuperscript{967} \textit{See supra} notes 157-62 and accompanying text.

\textsuperscript{968} \textit{See supra} notes 7-15 and accompanying text.

\textsuperscript{969} \textit{See Lynch} \& \textit{Bourne}, \textit{supra} note 3, at 334; \textit{Bourne} \& \textit{Lynch}, \textit{supra} note 5, at 27, 42; \textit{see also id.} at 24, 30-31, 60. \textit{See generally} Deirdre W. Bastian Lee \& Eugenia Cooper Wootton, Comment, \textit{Complex Federal Civil Litigation — Can Jury Trials be Constitutionally Avoided?} \textit{11} \textit{U. Balt. L. Rev.} 110 (1981).

\textsuperscript{970} \textit{See Lynch} \& \textit{Bourne}, \textit{supra} note 3, at 335 \& n.218; \textit{Bourne} \& \textit{Lynch}, \textit{supra} note 5, at 42 n.267; \textit{see also supra} notes 336-39 and accompanying text.

\textsuperscript{971} \textit{See Lynch} \& \textit{Bourne}, \textit{supra} note 3, at 332-33, 334, 335; \textit{Bourne} \& \textit{Lynch, supra} note 5, at 24-25, 42 n.267. \textit{But see id.} at 27 n.162.

\textsuperscript{972} \textit{See Lynch} \& \textit{Bourne}, \textit{supra} note 3, at 332-33; \textit{Bourne} \& \textit{Lynch, supra} note 5, at 42.
\end{flushright}
run afoul of the constitutional right to trial by jury.\textsuperscript{973} Thus, Equity is not superior to Law as a mode of trial because of any expertise.

Second, Lynch and Bourne suggest that Equity is superior to Law as a mode of trial because the decision-making process of Equity (the judge), is better than the decision-making process of Law (the jury). Lynch and Bourne mention only one aspect of Equity's supposed superiority of the decision-making process—the existence of discretion. In that respect, however, the decision-making processes of Equity and Law are similar. In certain other respects not mentioned by Lynch and Bourne, the decision-making processes of the judge and the jury are different, but neither one is clearly superior to the other. In one other respect, however, the jury trial is clearly superior to a judge trial—the jury trial includes a system of checks and balances.

Lynch and Bourne note that a significant characteristic of Equity is its discretion.\textsuperscript{974} While they do not systematically describe Equity's discretion,\textsuperscript{975} Lynch and Bourne do mention several of its aspects. That discretion permits weighing or balancing the interests of the parties,\textsuperscript{976} as well as that of the public,\textsuperscript{977} in determining whether

\textsuperscript{973.} See \textit{Lynch \& Bourne}, supra note 3, at 332-33, 335; Bourne \& Lynch, \textit{supra} note 5, at 27 n.162. One commentator has concluded that a jury is required where the issues are difficult in order to permit public scrutiny and thereby assure that justice is not lost in the maze. See Wolfram, \textit{supra} note 120, at 746-47. Cf. \textit{supra} note 913 and accompanying text (jury trial may be preferable to a judge trial in complex cases because of the greater clarity required of the lawyers and the judge in a jury trial).

\textsuperscript{974.} See Bourne \& Lynch, \textit{supra} note 5, at 44, 47 n.297, 63; cf. \textit{Lynch \& Bourne}, \textit{supra} note 3, at 318 ("equity and good conscience").

Other commentators have noted that this discretion is judicial, not personal, which is informed by principles of equity, law, and public policy and which considers all of the circumstances of a case. See, \textit{e.g.}, \textit{Phelps, supra} note 86, at 212-15.

\textsuperscript{975.} Fiss has more systematically identified several different aspects of Equity's discretion. First, unlike most legal relief, equitable relief is discretionary in the sense that it is extraordinary or not of right. See Fiss, \textit{supra} note 719, at 1. Second, equitable relief is discretionary because it is not controlled by precise rules. See Fiss, \textit{supra} note 730, at 91. Third, equitable relief is discretionary in that appellate review is limited. See \textit{id.} Fourth, discretion may be exercised at many different stages of a case in Equity, including the determinations of whether or not the equitable prerequisites have been satisfied, whether or not a substantive right has been violated, whether or not an equitable remedy is be granted, and, if so, what the nature of that remedy is to be. See \textit{id.} at 91-93.

\textsuperscript{976.} See Bourne \& Lynch, \textit{supra} note 5, at 62 n.393; cf. \textit{Lynch \& Bourne}, \textit{supra} note 3, at 326 ("equitable inquiry" in civil coercive contempt).
relief should be granted. Equity's discretion also permits considering all of the circumstances in determining what relief should be granted.978

The idea that Equity is superior to Law because of Equity's discretion is a philosophical and historical oversimplification that does not accurately reflect modern practice. Philosophically, Dean Pound saw rules of law and the exercise of discretion as two antagonistic ideas in the administration of justice.979 Although rules of law are characteristic of the common law980 and the exercise of discretion is characteristic of Equity,981 Law and Equity react with one another982 and any boundaries between the two are accidental.983

Historically, to associate discretion with Equity and not with Law is an oversimplification. Prior to the development of Equity, common-law courts exercised significant powers of discretion984 and heard appeals to conscience.985 Traditionally, Law courts have also issued certain extraordinary, or discretionary remedies, such as mandamus.986

Indeed, Henry McClintock has hinted that Law courts could be just as flexible as Equity in deciding cases to meet changing needs. The common-law theory was that precedents were based on "immemorial custom." Law courts interpreted and applied precedents to decide cases. Thus, Law courts might exercise flexibility in two different ways. First, a Law court had to determine the content of the immemorial custom on which the precedents were based. Second, a Law court had to interpret precedents and apply them to a particular case.987

977. See Bourne & Lynch, supra note 5, at 43-44.
978. See LYNCH & BOURNE, supra note 3, at 314 n.65, 315; see also Bourne & Lynch, supra note 5, at 62.
979. See Roscoe Pound, The Decadence of Equity, 5 COLUM. L. REV. 20 (1905); see also KALVEN & ZEISEL, supra note 121, at 9; cf. DAN B. DOBBS, LAW OF REMEDIES 67 (2d ed. 1993) ("Discretion of equity courts . . . makes possible decisions that are flexible, intuitive, and tailored to the particular case. It also makes possible decisions that are unanalyzed, unexplained, and unthoughtful.").
980. See generally Pound, supra note 979, at 20-35.
981. See id. at 22.
982. See id. at 24.
983. See id. at 23.
984. See PLUCKNETT, supra note 516, at 158, 675.
985. See id. at 680.
987. See McGINTOCK, supra note 741, at 10; cf. Calvin Woodard, Is the United States a Common Law Country? (changes in common-law theory in England and
Even before merger of Law and Equity, Law courts exercised substantial discretion regarding procedural aspects of a law case, such as ordering separate trials, transferring cases to another county, requiring production of evidence, submitting a case for a special verdict, ruling on a new trial motion, revising a judgment within thirty days of its entry, and directing entry of final judgment on part of a multiple claim or multiple party action.

Historically, the scope of discretion in Equity courts became restricted as Equity was systematized under the influence of chancellors who were lawyers and as the principle of stare decisis or precedent became accepted. In modern practice, because Law and Equity are administered by the same judges, there is a tendency to overlook historical distinctions between Law and Equity.

Ironically, the discretionary element of the decision-making process of Equity is also available in the jury trial of Law cases. In that respect, the two processes have been characterized as func-

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989. Md. Rule 317 (1977) (repealed 1984), applicable generally, provided that the circuit court, where venue was improper, might dismiss or transfer the action.


991. Md. Rule 560(a) (1977) (repealed 1984), applicable at Law, expressly made the method of submission of the issues to the jury within the court's discretion.


995. See Plucknett, supra note 516, at 688.

996. See id. at 690, 692.

997. See McClintock, supra note 741, at 51.
tional equivalents. Indeed, Kalven and Zeisel have identified a function of the jury as applying "common-sense equities" to a case, a role ordinarily not permitted the judge. Lynch and Bourne note the "common sense justice of civil juries."

Of course, in any society with rules, discretion must have limits. Where the standards for the exercise of discretion are undefined, the only limit may be the conscience of the one who exercises that discretion, which is like making the standard for measuring length vary with the "chancellor's foot."

The jury trial, by providing checks and balances between judge and jury, does limit discretion. The judge provides a check on jury discretion by ruling on the admissibility of evidence, instructing the jury on the law, and setting aside erroneous verdicts. The jury provides a check on the judge's discretion by finding facts and softening the harshness of legal doctrine. In this respect, jury trial is clearly superior to judge trial.

Generally, Lynch and Bourne do not compare other aspects of

998. See Fiss, supra note 719, at 27. Fiss stated elsewhere that one aspect of equitable discretion is the use of open-ended concepts, such as "reasonable," which are also applied (by the jury) in common-law actions. See Fiss, supra note 730, at 92.

999. See Kalven & Zeisel, supra note 121, at 8-9, 87, 107, 115, 285, 291, 299, 304, 346, 375, 395, 399, 443 n.18, 477 n.4, 489-95, 498-99. Kalven and Zeisel also appeared to equate jury "equity" with jury "discretion." See id. at 498; see also Roscoe Pound, An Introduction to the Philosophy of Law 66 (rev. ed. 1954) (reporting that "the jurors are chancellors"); Chayes, supra note 313, at 1287 ("[O]ne of the virtues of the jury was thought to be its exercise of a rough-hewn equity, deviating from the dictates of the law where justice or changing community mores required." (emphasis added)); Valerie P. Hans & Neil Vidmar, Judging the Jury 116 (1986) ("[J]uries frequently apply a measure of fairness and equity to a case that a judge, preoccupied with the fine points of the law, will ignore." (emphasis added)); Spooner, supra note 155, at 64, 81, 110-12, 191 (stating old common-law courts were courts of conscience in which jurors decided cases according to their own notions of natural equity).

1000. Bourne & Lynch, supra note 5, at 3; see also ABA/Brookings, supra note 308, at 9 (stating that the jury expresses "the community's sense of fairness, of justice, of right and wrong" and balances competing values).


1002. Cf. supra notes 262-66 and accompanying text (discussing discretion of the trial judge as an approach to determining the right to jury trial after merger).

1003. John Selden, Table Talk 52 (1821).

1004. See supra note 157 and accompanying text.

1005. See supra notes 160-62 and accompanying text.
the decision-making processes of the judge and the jury. Those aspects may be divided into four general categories for purposes of comparison: the composition of the decision-maker, its inputs, its deliberation, and its outputs. As developed below, neither the judge nor the jury has a clear overall superiority as to prominent aspects of decision-making in those categories.

With respect to the composition of the decision-maker, we have already seen mixed results. Kalven and Zeisel concluded that in certain respects a judge is superior to the jury: the judge is better able than a layperson to understand the law and the facts because of the judge’s superior intelligence—contrasted with the jury’s wide range of intelligence—and because of the judge’s training, discipline, and experience—contrasted with the jury’s lack of professional training and its inexperience. However, Kalven and Zeisel concluded that in other respects the jury is superior to the judge: the wisdom and strength of twelve is greater than that of one, the jury’s common sense and broad experience may offset the judge’s professional training, and the jury’s fresh perception of a trial is better than the judge’s stereotypes.

Other debate on the composition of the decision-maker, centered on fairness and responsibility, has reached differing conclusions. Regarding fairness, some have seen the jury as more biased and emotional than the judge, while others have seen the jury as less elitist and more representative of the community, less corruptible, and more subject to scrutiny and challenge for bias than the judge. Regarding responsibility, some have seen the

1006. Cf. supra notes 969-73 and accompanying text (complex cases).
1007. See supra note 965 and accompanying text.
1008. Cf. supra note 7 (jury of six in Maryland).
1009. See supra note 965 and accompanying text.
1010. See John W. Wigmore, A Program for the Trial of Jury Trial, 12 J. AM. JUD. SOC’Y 166, 168 (1929). But cf. supra note 1009 and accompanying text (judicial stereotypes); JOINER, supra note 157, at 26, 34, 66 (background biases resulting from accumulated experiences); SEYMOUR WISHMAN, ANATOMY OF A JURY 146-47 (1986) (prior lawyer roles influence judicial behavior).
1011. See HANS & VIDMAR, supra note 999, at 49-50; JOINER, supra note 157, at 65.
1012. See KALVEN & ZEISEL, supra note 121, at 7-8 (stating that 12 are more difficult corrupt than one); SPOONER, supra note 155, at 124 (providing that jurors, until they come to the jury box, are unknown to the parties).
1013. See HANS & VIDMAR, supra note 999, at 63-78 (stating that jurors are subject to voir dire and challenges for cause). See generally Schuck, supra note 879, at 309-10 (providing that judges’ systematic biases of social status, wealth, political activity, peer group, professional training, and socialization are more ob-
temporary nature of the jury's role as a weakness,\textsuperscript{1014} while others have seen it as a strength.\textsuperscript{1015}

With respect to the inputs of the decision-making process, the judge has a clear superiority over the jury in understanding applicable law, and the judge has some superiority in gathering facts. With regard to understanding the law, we have already seen that the judge, who has professional training, is superior to the jury, which lacks that training.\textsuperscript{1016} With regard to gathering facts, the judge, unlike the jury, may question witnesses\textsuperscript{1017} and take notes during trial.\textsuperscript{1018} However, the collective memory of the jury may be superior to the memory of the judge.\textsuperscript{1019}

With respect to the deliberation of the decision-maker, the jury has a clear superiority over the judge. We have already seen that twelve (or six) heads are usually better than one.\textsuperscript{1020} The representative nature of the jury\textsuperscript{1021} also permits the inclusion of a variety of groups, classes, and viewpoints.\textsuperscript{1022} The deliberation of the jury permits group interaction, such as discussion, exchange of ideas, argument, and criticism—qualities not characteristic of the deliberation
of a single person.\textsuperscript{1023} Of course, different juries and different judges vary regarding whether they truly deliberate. One commentary noted that some juries are "verdict-driven," emphasizing voting rather than deliberation, while others were "evidence driven," emphasizing deliberation rather than voting.\textsuperscript{1024} Whether judges begin with premises, rather than with conclusions, has also been questioned by legal realists.\textsuperscript{1025}

With respect to the outputs of the decision-maker, the judge's reasoned judgment\textsuperscript{1026} appears clearly superior to the jury's "black box" verdict.\textsuperscript{1027} However, as developed below, that apparent superiority is not necessarily a real superiority.\textsuperscript{1028} Thus, Equity is not superior to Law as a mode of trial because of decision-making processes.

Third, Lynch and Bourne say that Equity is superior to Law as a mode of trial because Equity is expeditious.\textsuperscript{1029} However, as detailed above, modern procedures permit litigation to be expedited, while protecting the jury right.\textsuperscript{1030}

Fourth, Lynch and Bourne imply that Equity is superior to Law as a mode of trial because Equity better serves judicial economy.\textsuperscript{1031}

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\textsuperscript{1023}. See Joiner, \textit{supra} note 157, at 25-35; see also Wigmore, \textit{supra} note 1010, at 171. Wigmore concluded that the best means for reaching a judgment is to reconcile the conclusions of a number of persons selected at random. By analogy, Wigmore noted that the final standing of a student at a university is determined not by any single professor, but by the net result of 20 or more professors' judgments.

The jury may also be better than the judge at generating solutions to problems and correcting factual errors. See MacCoun, \textit{supra} note 1019, at 167.

\textsuperscript{1024}. See Hastie \textit{et al.}, \textit{supra} note 1022, at 163-65 (study of mock juries); cf. Kalven & Zeisel, \textit{supra} note 121, at 488-89, 496 (providing the real decision is usually made before deliberation begins; deliberation is the means by which unanimity is reached).

\textsuperscript{1025}. See, \textit{e.g.}, Jerome Frank, \textit{Law and the Modern Mind} 108-26 (1963 ed.). Kalven and Zeisel noted that the issue of whether the evidence or the conclusion comes first rises in the study of both jury and judge decision-making. See Kalven & Zeisel, \textit{supra} note 121, at 490.

\textsuperscript{1026}. See Md. Rule 2-522(a) (statement of reasons required in bench trial).

\textsuperscript{1027}. See Chayes, \textit{supra} note 314, at 1287.

\textsuperscript{1028}. See \textit{infra} notes 1068-89 and accompanying text (jury sentiments about the law); see also \textit{supra} notes 314-20 and accompanying text (prudential concerns).

\textsuperscript{1029}. See Bourne & Lynch, \textit{supra} note 5, at 52, 53 n.349, 61, 63, 64 & n.408, 69 & n.437.

\textsuperscript{1030}. See \textit{supra} notes 889-906 and accompanying text.

\textsuperscript{1031}. See \textit{supra} notes 867-79 and accompanying text.
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That notion has already been set forth and criticized in detail.\textsuperscript{1032} Fifth, Lynch and Bourne suggest that Equity is superior to Law as a mode of trial, because the result\textsuperscript{1033} of trial by a judge is superior to that of trial by a jury.\textsuperscript{1034} As examples, Lynch and Bourne make reference to two areas of law: medical malpractice\textsuperscript{1035} and contracts.\textsuperscript{1036} Their suggestion is subject to a number of criticisms, some of a general nature and some directed to the two examples. Generally, the extent of the difference in result between a judge and jury trial is difficult to assess. There seems to be a large measure of agreement, however, between the results of the two types of trials.\textsuperscript{1037} Kalven and Zeisel's study of the jury in four thousand civil cases found that judge and jury agreed on liability in about 78\% of the cases.\textsuperscript{1038} Contrary to the expectation that the jury favors the plaintiff, the disagreement in the remaining 22\% of the cases was distributed fairly evenly—the jury was more favorable to the plaintiff in 12\% of the cases, and the judge was more favorable to the plaintiff in 10\% of the cases.\textsuperscript{1039} The jury's award of damages was on

1032. See supra notes 880-958 and accompanying text.
1033. The element of result may be related to most of the other elements relating to the superiority of Equity as a method of trial—expertise, decision-making process, and expedition. See supra notes 959-1030 and accompanying text.
1034. See Bourne & Lynch, supra note 5, at 2-3. Bourne and Lynch recognize that those who favor juries believe that juries give better results than judges. See id. at 3 (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting)).
1035. See Bourne & Lynch, supra note 5, at 3 n.3 (stating that the legislature found "the societal costs of jury adjudication too high in the area of health care malpractice"). But see Neil Vidmar, Medical Malpractice and the American Jury: Confronting the Myths About Jury Incompetence, Deep Pockets, and Outrageous Damages Awards (1995).

The statutory scheme provides for decision by an arbitration panel, not by a judge. See Md. Code Ann., Cts. & Jud. Proc., §§ 3-2A-01(b), 3-2A-03(c), 3-2A-04(d), 3-2A-05(a) (1995). The panel's award is subject to judicial review with trial by a jury if properly elected. See id. § 3-2A-06(b). However, Bourne and Lynch cite medical malpractice as an example of the civil jury "as a burdensome constitutional luxury, the costs of which must be lessened by restriction." Bourne & Lynch, supra note 5, at 2-3 (footnotes omitted). Presumably, Bourne and Lynch believe that trial by a judge would generally provide a more satisfactory result than trial by a jury.
1036. See Bourne & Lynch, supra note 5, at 54 n.354.
1038. See Kalven & Zeisel, supra note 121, at 64, 521-23 (prior studies).
1039. See id. at 64.
the average about 20% higher than that of the judge.\textsuperscript{1040}

The value of these statistics, however, is problematic. While the verdicts of the jury were, presumably, a matter of record, the decisions of the judge were hypothetical because they were rendered in cases actually decided by the jury, and because they were as reported by the judge.\textsuperscript{1041} The reasons for judge-jury disagreement covered a variety of items,\textsuperscript{1042} including evaluation of evidence, application of the burden of proof, facts available to the judge but not the jury, disparity of counsel, sentiments about the parties, and sentiments about the law.\textsuperscript{1043} Of course, any jury study is limited by its methodology—the identification and selection of judges trying jury cases and the selection and number of cases reported.\textsuperscript{1044}

Lynch and Bourne, using examples from the substantive legal domains of medical malpractice and contracts to illustrate the jury's inferiority, suggest that judge-jury disagreements may be based on sentiments about the law.\textsuperscript{1045} Kalven and Zeisel have con-

\textsuperscript{1040} See id. at 64 n.13.
\textsuperscript{1041} See id. at 48. The judge and jury may have agreed because the judge subtly conveyed to the jury the judge's feelings about the case, and because the jury was influenced by those cues. See Wishman, supra note 1010, at 145-46. On the other hand, the judge's decision may have agreed with the jury verdict, in part, because of the judge's respect for the jury system. See MacCoun, supra note 1019, at 165.
\textsuperscript{1042} The reasons for the disagreement were those reported by the judge as categorized by the authors of the study. See Kalven & Zeisel, supra note 125, at 106-09.
\textsuperscript{1043} See id. at 106-09.
\textsuperscript{1044} See id. at 33-54.
\textsuperscript{1045} Judge-jury disagreements in the two areas of medical malpractice and contracts may also be affected by sentiments about the parties, as the following discussion suggests.

Kalven and Zeisel have concluded that sentiments about the defendant account for 11% of judge-jury disagreements. See id. at 115. Although they were considering only party defendants in criminal trials, their conclusions may be relevant in the civil context because they noted that juries tend to equate criminal cases and civil cases, treating the victims in criminal cases as plaintiffs. See id. at 493. Sentiments about the parties relate to individual characteristics that affect jury sympathy. See id. at 194. Individual characteristics that affect credibility are considered as relating to the evidence. See id.

By hypothesis, the likely candidates for jury sympathy would be the "little guys" such as the medical malpractice plaintiff in a suit against the health care provider (a medical professional or institution). See James Kevin MacAlister & Alfred L. Scanlan, Jr., Health Claims Arbitration in Maryland: The Experiment Has Failed, 14 U. Balt. L. Rev. 481, 501 (1985). It could also be the debtor defendant sued by a creditor (a merchant or a financial institution).
cluded that such sentiments account for 29% of judge-jury disagreements. 1046 Those sentiments have been characterized more plainly as the jury's quarrel with the law, 1047 revolt from the law, 1048 war with the law, 1049 the jury's ability to disregard substantive rules of law, 1050 the jury's power to nullify the law, 1051 and as jury equity. 1052

In the case of judge-jury disagreements, Kalven and Zeisel concluded that not only do the jury's reasons withstand public scrutiny, but they usually are the law in other jurisdictions. 1053 In this sense, the jury may be viewed as a "little parliament." 1054 Generally, commentators have identified a number of areas where the jury may disagree with the law: the jury might ignore a slight amount of contributory negligence where that would bar plaintiff's recovery; 1055 the

See Wolfram, supra note 120, at 672-705. In both situations, jury sympathy for the little guys might be a legitimate factor in a society that prizes equal justice under law. But see supra notes 434-42 and accompanying text. In medical malpractice cases, jury sympathy for the patient would help counterbalance jury sympathy for the defendant, a member of a respected occupation (medicine). See Kalven & Zeisel, supra note 121, at 207. In contract cases, jury sympathy for the debtor would help offset the comparatively superior economic status of the creditor and its consequent likely superior legal counsel. Cf. id. at 115, 351-72 (stating disparity of counsel accounts for 4% of judge-jury disagreements). A contingent fee arrangement is unlikely to be available to a debtor defendant, although it would likely be available to a medical malpractice plaintiff. See generally F.B. Mackinnon, Contingent Fees for Legal Services 25-28 (1964). Thus, jury sentiment may tend to make the jury verdict superior to the decision of a judge. But cf. Kalven & Zeisel, supra note 121, at 99-100 (stating neither all judges nor all juries are alike—some judges may be more open to sentiment than the average jury).

1046. See Kalven & Zeisel, supra note 121, at 115. Note that the 29% of the cases in which jury sentiments about the law cause judge and jury to disagree is a percentage of the 22% of the cases in which judge and jury disagree. See supra notes 1053-54 and accompanying text. Thus, jury sentiments about the law caused judge and jury to disagree in only about 6% of the cases studied.

1047. See Kalven & Zeisel, supra note 121, at 499.

1048. See id. at 165, 427, 433.

1049. See id. at 495.

1050. See Wolfram, supra note 120, at 671.

1051. See Kalven & Zeisel, supra note 121, at 311-12, 433. That phrase seems be used in connection with juries in criminal cases. Compare Hans & Vidmar, supra note 999, at 149-60 (criminal cases), with id. at 160-63 (civil cases).

1052. See Kalven, supra note 964, at 1071-72; see also supra note 998 and accompanying text.

1053. See Kalven & Zeisel, supra note 121, at 497.


1055. See infra note 1076 and accompanying text (noting that under Arizona law, judges determine questions of contributory negligence); cf. Kalven & Zeisel,
jury might award damages for pain and suffering in an amount which compensates plaintiff for attorney's fees where those fees are not legally an element of damages; or the jury might ignore the law on collateral benefits, imputed negligence, and the violation of criminal statutes to establish negligence.

By hypothesis, there are a number of sentiments about the law that may explain judge-jury disagreements in the two specific areas mentioned by Lynch and Bourne. For example, contrary to current Maryland law, a jury in a medical malpractice case might apply a rule of strict liability in light of the existence of liability insurance and the opportunity for spreading the risk. Similarly, contrary to current Maryland Law, a jury might apply the doctrine of res ipsa loquitur.

In a contracts case for breach of an implied warranty of merchantability of goods, a jury, contrary to current Maryland law, might find that the warranty was negated and that the merchant was excused for the poor quality of goods because the buyer was "looking for a bargain and got beat at it." In an unlicensed home improvement contractor's suit for payment for work

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supra note 121, at 108, 242-57 (discussing "contributory negligence" of the victim as a defense to criminal rape). But see Kalven, supra note 964, at 1072 (opining that, contrary to the popular view, the jury does not ignore the contributory negligence rule and apply comparative negligence).

1056. See HANS & VIDMAR, supra note 999, at 161; MACKINNON, supra note 1045, at 145-46; see also Kalven, supra note 964, at 1069-71.

1057. See Kalven, supra note 964, at 1072.


1059. A rule of strict liability exists in other tort areas. See W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 538-59 (5th ed. 1984) (animals, fire, abnormally dangerous things and activities). But cf. Kalven, supra note 964, at 1072 (opining that, contrary to the popular view, the jury has not created a strict liability system in personal injury cases).

1060. See, e.g., MacAlister & Scanlan, supra note 1045, at 486.

1061. See, e.g., id. at 517.


1064. A warranty that goods are merchantable is ordinarily implied in a contract of sale between merchant and buyer. See MD. CODE ANN. COM. LAW I § 2-314 (1992); cf. id. § 2-316 (exclusion or modification of warranties).

1065. Cf. KALVEN & ZEISEL, supra note 121, at 246 (reason for acquittal in a criminal case of fraud).
completed, a jury, contrary to current Maryland law,1066 might find that the contractor was entitled to payment because the homeowner 
"had originally selected this contractor because in operating without a license he was cheaper than a more respectable contractor would have been."1067

The jury should be permitted its own sentiments about the law. The jury is a "black box"1068 which is expected to give its verdict without a statement of reasons.1069 The spirit of the law,1070 justice,1071 or the equities1072 may require a different result than the letter of the law. Although the same sentiments may have an effect on the judge, the judge is less likely than the jury to be influenced by them.1073 The dividing line between law and fact is uncertain1074 and it is where the evidence is in doubt that the jury is most likely to yield its sentiments about the law.1075 Some state constitutions expressly recognize this aspect of the jury process. For example, an Arizona provision makes the jury the judge of questions of contributory negligence or assumption of the risk1076 and a Maryland provision makes the jury in criminal cases the judge of law as well as of fact.1077

1067. Cf. Kalven & Zeisel, supra note 121, at 246-47 (discussing reason for acquittal in a criminal case of acting as a home improvement contractor without a license).
1068. See supra note 314 and accompanying text.
1069. Cf. supra note 1026 and accompanying text (judge's reasoned judgment).
1070. See Kalven & Zeisel, supra note 121, at 8, 346.
1071. See id. at 8-9.
1072. See supra note 999.
1073. See Kalven & Zeisel, supra note 121, at 108-09 & n.8. But cf. id. at 99-100 (stating that all judges are not alike and all juries are not alike; "some jurors will be more rule-minded than the average judge," and some judges will be more open to sentiment than the average jury).
1075. See Kalven & Zeisel, supra note 121, at 164-65, 432-33.
1077. See Md. Const., Decl. of Rights art. 23, which provides: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." Id.
There is other support for the proposition that the jury should be permitted its own sentiments about the law. The Maryland Constitution's Due Process Clause provides that no man ought be "deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Arguably, that clause authorizes members of the jury to give judgment according to their consciences without regard to law. Furthermore, the oath prescribed for state officers, presumably including jurors, is a general oath, not an oath requiring jurors to apply the law in the instructions given them by the judge. And generally, as developed above, a function of the jury is to apply common sense, rather than

1078. Id. art. 24.
1079. Cf. Spooner, supra note 155, at 111 (interpretation of a similar phrase in the Magna Carta).
1080. See Md. Const. art. I, § 9. Section 9 provides:

Every person elected, or appointed, to any office of profit or trust, under this Constitution, or under the Laws, made pursuant thereto, shall, before he enters upon the duties of such office, take and subscribe the following oath, or affirmation: I... do swear, (or affirm, as the case may be,) that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully, without partiality or prejudice, execute the office of... according the Constitution and Laws of this State.

Id.; see also Md. Ann. Code art. 70, § 10 (1995). Section 10 provides:

The oath to be administered to a person who has an appointment which requires him to take an oath, but who is not embraced in the provisions of [art. I, § 9] of the Constitution, shall be that he will faithfully discharge his duty, unless a different form of oath is prescribed by law or ordinance.


1082. See Safeway Trails, Inc. v. Smith, 222 Md. 206, 218, 159 A.2d 823, 830 (1960) (jurors' oath to "well and truly try the issues between the parties and a true verdict given according to the evidence.").

the law narrowly conceived.footnote{1083}

Jury sentiments about the law are likely to influence a verdict only occasionally. As developed above, the judge and jury disagree on liability in only 22% of the cases.footnote{1084} Sentiments about the law account for only 29% of the disagreements.footnote{1085} Kalven and Zeisel suggest that so few cases are influenced by the jury's sentiments on the law for the following reasons: the law has adjusted well to the equi­
ties—the gap between official values and popular values is a small one;footnote{1086} the group nature of the jury decision moderates eccentric views;footnote{1087} and the jury is invested with a public task brought under the influence of a judge, put to work in solemn surroundings, and not told it has the power to disagree with the law.footnote{1088} It is only where the evidence is in doubt that the jury is likely to yield to its sentiments about the law.footnote{1089}

Functionally, the judge has many techniques to assure that the result of a case, triable of right by a jury, is the same as the result of a case not so triable.footnote{1090} The judge may preliminarily decide a case before trial, where the position of one party clearly lacks merit.footnote{1091} The judge supervises the process of selecting the jury.footnote{1092} The judge

footnote{1083}. See supra note 1000 and accompanying text.

footnote{1084}. See supra note 1038 and accompanying text.

footnote{1085}. See supra note 1046 and accompanying text.

footnote{1086}. Kalven and Zeisel conclude that the jury's quarrel with the criminal law has been, historically, over seditious libel laws and Prohibition and, generally, over game, liquor, gambling, drunk driving, blue, regulatory, and tax laws. See Kalven & Zeisel, supra note 121, at 286-97.

footnote{1087}. See id. at 498.

footnote{1088}. See id.; see also Maryland Civil Pattern Jury Instructions 3, 5, 20 (3d ed. 1993) (stating that the jury is instructed to base its verdict upon the evidence and upon the law as the judge gives it).

footnote{1089}. See Kalven & Zeisel, supra note 121, at 164-65, 432-33.

footnote{1090}. It is the judge who decides whether a case is triable of right to a jury, i.e., whether the case is a “civil proceeding” in one of the “Courts of Law” and whether the $5,000 amount in controversy is satisfied. See Md. Const., Decl. of Rights art. 23. It is also the judge who decides whether a particular issue is one of “fact” to be decided by the jury. See id. It is also the judge who decides whether jury trial has been properly and timely demanded. See Md. Rule 2-325.

footnote{1091}. See, e.g., Md. Rule 2-322 (preliminary motions to dismiss for failure to state a claim upon which relief can be granted and strike an insufficient defense); Md. Rule 2-501 (summary judgment); Md. Rule 2-506 (voluntary dismissal); Md. Rule 2-613 (default judgment).

footnote{1092}. See, e.g., Md. Code Ann., Cts. & Jud. Proc. § 8-201 (1995) (plan for random selection of jurors); id. § 8-207 (determination of prospective juror's qualifications); id. § 8-210 (excuse from jury service); id. § 8-211 (ruling on chal-
determines the structure, location, and timing of trial. The judge determines what evidence may be presented at trial. The judge instructs the jury on the law and may summarize the evidence. The judge chooses whether the jury will return a general verdict or a special verdict. In the event that a party's evidence is insufficient, the judge may grant judgment before the case goes to the jury or, after the jury's verdict, may grant a judgment notwithstanding the verdict. In the event of error or the verdict being against the weight of the evidence, the judge may grant a complete, partial, or conditional new trial. In certain situations, the judge may exercise revisory power over the judgment. In the event of error or a judgment being based on insufficient evidence, appellate judges may reverse or modify a judgment. Thus, Equity is not superior to Law as a mode of trial because of the result.

1. Not Protective of the Jury Right

Lynch and Bourne's suggestion that Equity is superior to Law as a mode of trial seems obviously restrictive of the right to jury trial. Indeed, Lynch and Bourne call for checking the expansion of the jury, if not restricting it.

See, e.g., MD. RULE 2-520.
See, e.g., MD. RULE 2-522.
See, e.g., MD. RULE 2-519.
See, e.g., MD. RULE 2-532.
See, e.g., MD. RULE 2-533.
See, e.g., MD. RULE 2-535.

See, e.g., MD. CODE ANN., CTS. & JUD. PROC. §§ 12-301 to 304, -308 (1995) (review of circuit court judgments on appeal by the court of special appeals); id. §§ 12-201 to 203, -307 (further review on writ of certiorari by the court of appeals).

See supra note 973.

See Bourne & Lynch, supra note 5, at 60 ("There is no reason why Maryland must expand the right to trial by jury in the wake of merger at a time when its suitability for the pressures of modern litigation has been called into question.").

See id. at 2-3 ("When romantic notions about the contribution of juries are
2. Contrary to the Usual Ways of Interpreting the Constitution

Lynch and Bourne's suggestion that Equity is superior to Law as a mode of trial is also contrary to many of the usual ways of interpreting the constitution.

That suggestion is contrary to the nature of a written constitution. The jury right is specific, enacted, enforceable, and supreme law by which the people-themselves have chosen the jury as the superior mode of trial. The jury right is consistent with a "living" constitution—it has survived the merger of Law and Equity, and other procedural reforms permit the jury continued superiority.

The suggestion that Equity is superior to Law as a mode of trial is contrary to the text of the Maryland Constitution. The principal jury right provision, Article 23, expressly mandates that the jury right shall be inviolably preserved. On the other hand, the text of the Maryland Constitution includes neither a requirement of courts of Equity nor a square right to trial by judge.

The suggestion that Equity is superior to Law as a mode of trial is also contrary to the history of the Maryland Constitution. Blackstone praised the jury trial as "the best criterion, for investigating the truth of facts . . . ." Protests in Maryland, and in the colonies generally, charged that England had deprived the colonists in many cases of trial by jury. The proponents of the principal constitutional jury right in 1851 strengthened the right as part of a general program to extend democratic limitations on the power of government. Subsequent constitutional reaffirmations of the jury right came in the face of criticisms of the jury trial.

The suggestion that Equity is superior to Law as a mode of trial is contrary to the structure of government. As developed above, the jury trial, which includes both judge and jury, permits the two to

1107. See supra notes 16-21 and accompanying text.
1108. See supra note 1 and accompanying text.
1109. See generally supra note 960 and accompanying text.
1110. See supra notes 46-67 and accompanying text.
1111. See supra notes 77-95 and accompanying text.
1112. 3 BLACKSTONE, supra, note 100, at *385.
1113. See supra notes 105-06 and accompanying text.
1114. See supra notes 121-25 and accompanying text.
1115. See supra note 134 and accompanying text.
check each other. 1116

The suggestion that Equity is superior to Law as a mode of trial
is contrary to doctrine. The Court of Appeals of Maryland, citing
United States Supreme Court opinions, has stated that “[t]he trial
by jury is justly dear to the American people,” 1117 and that “[j]ury
decisions of disputed legal issues are clearly favored.” 1118 Moreover,
the court of appeals has rejected the “efficiency” of the judge trial
for “a jealous protection of the right to jury trial,” 1119 except in the
“most imperative circumstances.” 1120

The suggestion that Equity is superior to Law as a mode of trial
is contrary to some prudential concerns. The jury trial is superior to
the judge trial because the jury helps legitimize outcomes, acts as a
“lightning rod” for animosity, and provides a “black box” decision. 1121

The suggestion that Equity is superior to Law as a mode of trial
is contrary to some ethical matters. For purposes of equal protec­tion,
the jury right is a fundamental constitutional right; any classifi­cation
significantly interfering with the exercise of the right would
be strictly scrutinized. 1122 However, a general favoritism of judge trial
as superior to jury trial would not satisfy even deferential review. 1123

The suggestion that Equity is superior to Law as a mode of trial
runs counter to the principles of limited government, government
by the people, government for the people, and free political
exchange. 1124

Thus, the aspect of Lynch and Bourne’s principled discretion­ary theory that Equity is superior to Law as a mode of trial, is not
protective of the jury right, and is contrary to many of the usual
ways of interpreting the Maryland Constitution. In addition, Lynch
and Bourne do not actually apply their theory when deciding the

1116. See supra notes 1004-05 and accompanying text. See generally supra notes 149-
63 and accompanying text.
1117. Allender v. Ghingher, 170 Md. 156, 183 A. 610 (1936) and supra text accom­pany­ing note 164.
1119. Id.
1120. Id. at 545, 530 A.2d at 730.
1121. See supra notes 312-20 and accompanying text.
1122. See supra note 365-75 and accompanying text.
1123. Cf. supra notes 356, 359 and accompanying text (distinction between Law and
Equity, generally).
1124. See supra notes 443-52 and accompanying text.
situations in which the jury right is to apply. Let us now turn to those practical situations.

IV. LYNCH AND BOURNE’S APPROXIMATION OF PRE-MERGER APPROACH

The thesis of this Article is that Lynch and Bourne try to “pickle,” not preserve, the right to jury trial. The Introduction to this Article mentions that Lynch and Bourne give lip service to the Maryland Constitution, but then boldly propose a principled discretionary theory which they abandon in favor of an approximation of pre-merger approach to resolve current problems. As developed below, Lynch and Bourne reluctantly accept recent Maryland cases and some analogous federal authority.

As already developed above, Lynch and Bourne’s principled discretionary theory, is not the approach they actually use. It is a hodgepodge of inconsistent policies and is restrictive (or not protective) of the right. Moreover, it is contrary to many of the usual ways of interpreting the Maryland Constitution. Next, this article looks at the defects in Lynch and Bourne’s actual approximation of pre-merger approach to deciding whether the jury right applies in particular problem situations.

Lynch and Bourne’s approximation of pre-merger approach generally states that the jury right should exist as it did before the merger of Law and Equity in 1984. That is, matters which would have been tried at Law before merger are now to be tried by jury; matters which would have been tried in Equity before merger are now to be tried by judge. If Lynch and Bourne accept recent,
post-merger Maryland precedents and analogous federal authority, they do so only reluctantly. Lynch and Bourne’s approximation

ble encroachments upon jurisdiction of courts of Law); id. at 46 (“tradition”); id. at 47 (“Maryland precedents”); id. at 78 (“Maryland’s established limitations”). But see, e.g., LYNCH & BOURNE, supra note 3, at 307 (“the federal experience and the evolving adaptation of this experience in Maryland”); id. at 323 (“resort to the experience of the federal courts”); id. at 324 (“federal courts . . . may provide useful guidance”); Bourne & Lynch, supra note 5, at 4 (“consider approaches . . . in light of federal and state experience,” as well as “prior Maryland practice”); id. at 16 (“guidance . . . in the federal cases decided after merger and before Beacon”); id. at 60 (“re-examine . . . in light of the post-merger remedial powers”).

The approximation of pre-merger approach, generally, has been criticized as eroding the jury right, as inconsistent with Higgins, and as difficult to apply. See supra notes 249-61 and accompanying text.

1129. This reluctance to accept analogous federal precedent is most marked in Bourne and Lynch’s article. It is apparent not only in their discussion of the problem situations considered below, but in the other parts of their article. See, e.g., Bourne & Lynch, supra note 5, at 4 (stating much in Maryland jurisprudence supports the approach of many other states, contracting the jury right); id. at 11 (“[T]here is limited support in Maryland jurisprudence for the vigorous jury trial policy ultimately adopted by the federal courts.”); id. at 16 (“Beacon . . . would find little sanction in Maryland jurisprudence.”); id. at 28-29 (explaining that the tendency in Maryland legal history is to expand the scope of Equity, not to expand the scope of the right to jury trial as in the federal courts); id. at 29 (“[T]here appears to be little Maryland authority compelling the courts to adopt doctrines comparable to those adopted by the Supreme Court in Beacon.”); id. at 68 (“Adoption of the rule in Beacon Theatres might inappropriately restrict the scope of equitable adjudication and expand the availability of trial by jury.”); id. at 78 (“Fidelity to the historic right to trial by jury after merger demands not blind subservience to Beacon Theatres, but a common sense attentiveness to Maryland’s established limitations on the appropriate exercise of equitable jurisdiction.”); cf. id. at 35 & n.225 (discussing the power of the legislature to classify actions as equitable and its limitations); id. at 38 (“Bachman and the discovery cases suggest that the ‘inadequate remedy at law’ requirement for equitable jurisdiction retains dynamism in Maryland similar to that accorded the parallel federal notion in Beacon Theatres.” (footnote omitted)); id. at 42 n.267 (discussing both a 1922 Maryland case and Dairy Queen which held that adequate remedies at Law may limit the use of equitable accounting); id. at 56 (discussing Md. Rule BF40 (repealed 1984), which in a manner very similar to Beacon, provided for trial of a jury claim before trial of an equitable claim). By the time of Bourne and Lynch’s book, Higgins had generally adopted the protective federal approach. But see id. at 11 (“The experience of the federal courts . . . provides substantial guidance to the Maryland judiciary . . . .”). See generally, e.g., LYNCH & BOURNE, supra note 3, at 307 (“[T]he Maryland courts have relied heavily on the federal experience.”); id. at 323 (“[R]esort to the experience of the federal courts . . . may provide useful
of pre-merger approach largely ignores the constitutional aspect of the jury right\textsuperscript{1130} and their own principled discretionary theory.\textsuperscript{1131}

\textsuperscript{1130} Bourne & Lynch, in dealing with various problem situations, frequently refer to the right to trial by jury. See Lynch & Bourne, supra note 3, at 312-38; Bourne & Lynch, supra note 5, at 47-77. However, those references are almost entirely in the context of questioning whether or not there is a jury right and of concluding either that there is or that there is not a jury right.

With a few exceptions, the authors' approximation of pre-merger approach is unrelated to the usual ways of interpreting the Md. Const. Their approach is essentially based on doctrine—principles derived from precedents—which is one of those usual ways. See supra note 15 and accompanying text. Bourne and Lynch cite hundreds of cases from the courts of Maryland, the federal system, and other states. See Lynch & Bourne, supra note 3, 312-38 nn. 48-234; Bourne & Lynch, supra note 5, 47-77 nn. 298-490. However, the authors' approximation of pre-merger approach is inconsistent with recent Maryland precedents and the Higgins line of cases. Compare supra notes 187-97 and accompanying text, \textit{with} supra notes 248-61 and accompanying text.

There are some noteworthy exceptions, some respects in which the authors do properly consider a variety of the usual ways (other than doctrinal) of interpreting the Maryland Constitution. First, on several occasions, Bourne and Lynch cite McCoy v. Johnson, 70 Md. 490, 17 A. 387 (1889), for the proposition that the constitutional jury right should govern where it conflicts with contrary legislation. See Bourne & Lynch, supra note 5, at 50 & n.322, 51 & nn.324-25; \textit{see also} id. at 32 n.206, 70 n.442. \textit{But see} Lynch & Bourne, supra note 3, at 321 (citing Capron v. Devries, 83 Md. 224, 34 A. 251 (1896)). See Bourne & Lynch, supra note 5, at 60 & n.381, 63 n.403, for the proposition that the legislature may expand Equity at the expense of the jury right. By citing McCoy for the supremacy of the Maryland Constitution over ordinary legislation, the authors suggest that the Maryland Constitution should be interpreted by considering its nature as \textit{written}. See \textit{generally} supra notes 16-25 and accompanying text.

Second, Bourne and Lynch recognize that the jury right will have to be reinterpreted in light of new circumstances such as the merger of Law and Equity. See Lynch & Bourne, supra note 3, at 306-07, 312, 326-37; Bourne & Lynch, supra note 5, at 3-4, 29-78. \textit{See generally} infra note 1132. Bourne and Lynch generally take an approximation of pre-merger approach: the creation of new causes of action. See Lynch & Bourne, supra note 3, at 313, 315. \textit{But see} id. at 312 (stating that the jury right is preserved as it existed in 1776); \textit{id.} at 337-38 (referring to new remedies); Bourne & Lynch, supra note 5, at 47-50. By recognizing the need for reinterpreting the jury right in light of these new circumstances, the authors suggest that the Maryland Constitution should be interpreted by considering its nature as \textit{“living.”} \textit{See generally} supra notes 26-29 and accompanying text.

Third, Bourne and Lynch state that the Maryland Constitution preserves the jury right as it existed in 1776. See Lynch & Bourne, supra note 3, at 312. \textit{But see} supra notes 506-632 and accompanying text (criticism of Bourne and
Also, their approximation of pre-merger approach is more designed to limit, or "pickle" the jury right than preserve or protect it.

Lynch and Bourne deal with a variety of problem situations in both their article and their book chapter. In each of these situations, this Article will consider in detail three characteristics of their approach. First, they usually try to approximate the way the jury right was applied before the merger of Law and Equity. Second, the authors only reluctantly accept, if at all, post-merger Maryland precedent and analogous federal authority. Third, they often overlook ways to preserve the constitutional jury right in light of modern procedural developments. Thus, their approximation of pre-merger approach generally restricts the jury right.

In considering these problem situations, keep in mind that the constitutional right to jury trial can be violated in a number of

Lynch's strict historical test). By relying on that language in the first Maryland Constitution, Bourne and Lynch suggest that the Md. Const. should be interpreted by considering its text. See generally supra notes 31-95 and accompanying text.

1131. Lynch and Bourne, in dealing with the various problem situations, frequently refer to the elements of their principled discretionary theory. See LYNCH & BOURNE, supra note 3, at 312-38; Bourne & Lynch, supra note 5, at 47-77. That theory is a hodgepodge of inconsistent policies. Thus, the elements of that theory have little effect on the authors' approximation of pre-merger approach, unless those elements are selectively invoked as in the cases of divorce and mechanics lien. See Bourne & Lynch, supra note 5, at 62-64, 68-69 (stating that a jury trial might interfere with equitable discretion, the legislature has power to expand equitable jurisdiction by statute, and judicial economy is better served by judge trial than by jury trial).

1132. Those developments include the merger of Law and Equity. See LYNCH & BOURNE, supra note 3, at 306; Bourne & Lynch, supra note 5, at 3, 29. The developments also include the availability, in the trial of Law actions, of certain Equity procedures, such as discovery. See LYNCH & BOURNE, supra note 3, at 319 & n.124, 336; Bourne & Lynch, supra note 5, at 36, 45 n.291, 71-72. Joinder devices, such as class action, intervention, and interpleader are included. See LYNCH & BOURNE, supra note 3, at 335-36; Bourne & Lynch, supra note 5, at 73-74. Developments have been made regarding equitable remedies such as preliminary and final injunctions. See LYNCH & BOURNE, supra note 3, at 319 n.126, 331 n.194; Bourne & Lynch, supra note 5, at 4 n.9, 37, 51-52, 55-56 & n.360, 61. Those modern procedural developments also include the liberal joinder of claims, remedies, defenses, and parties. See Bourne & Lynch, supra note 5, at 5, 70; see also LYNCH & BOURNE, supra note 3, at 307, 320, 326, 328; Bourne & Lynch, supra note 5, at 3, 34, 38, 45 n.291, 64, 72. Modern procedural developments also include the declaratory judgment remedy, see LYNCH & BOURNE, supra note 3, at 330 n.193, 337-38; Bourne & Lynch, supra note 5, at 46 n.293, 47-50; and the long-arm statute, see LYNCH & BOURNE, supra note 3, at 320; see also supra note 750.
ways. Such problem situations can be illustrated by the facts of the *Beacon* case. In *Beacon*, Fox brought suit asking for a declaratory judgment that it had not violated antitrust laws by exclusively contracting with movie distributors to show new movies at its theaters.\(^\text{1133}\) Fox also asked for an injunction against Beacon, a competitor who was interfering with those contracts by threatening Fox and its distributors with treble damages suits under the antitrust laws.\(^\text{1134}\) Beacon responded, filed a counterclaim for antitrust treble damages, and demanded a jury trial.\(^\text{1135}\)

The first way the jury right may be violated is by the trial court holding that there was no right to jury trial at all. That is, because Fox's claim for declaratory and injunctive relief was "essentially equitable,"\(^\text{1136}\) the rest of the case was within Equity's clean-up jurisdiction.\(^\text{1137}\) The court may have also found that Beacon had waived its right to jury trial on the legal counterclaim by joining the counterclaim to Fox's equitable claim.\(^\text{1138}\) The *Beacon* Court held that there was a jury right as to the antitrust issues, whether they were raised in Fox's claim for declaratory relief, or in Beacon's counterclaim for treble damages.\(^\text{1139}\)

The second way the jury right may be violated is by a trial court holding, as it did in *Beacon*, that Fox's essentially equitable claim should be tried by the court before jury trial of Beacon's counterclaim.\(^\text{1140}\) In *Beacon*, Fox's equitable claim and Beacon's legal counterclaim contained a common issue of fact, the reasonableness of the exclusive contracts.\(^\text{1141}\) Thus, the effect of trying the equitable claim first was that the court's determination of the factual issues would preclude, by way of res judicata or collateral estoppel, a later determination of those issues by the jury.\(^\text{1142}\) The *Beacon* Court held

\(^{1134}\) See id.
\(^{1135}\) See id. at 502-03.
\(^{1136}\) See id. at 503.
\(^{1137}\) See id. at 505.
\(^{1138}\) See id. at 519 (Stewart, J., dissenting). Justice Stewart noted the anomaly of a waiver theory where, as in *Beacon*, the counterclaim was compulsory under FED. R. CIV. P. 13(a).
\(^{1139}\) See id. at 504, 508.
\(^{1140}\) See id. at 503.
\(^{1141}\) See id. at 503-04.
\(^{1142}\) See id. Bourne and Lynch seek a solution to the obvious lack of finality, a requirement for res judicata or collateral estoppel. See Bourne & Lynch, *supra* note 5, at 21 n.120; cf. Larry L. Tepljen & Ralph U. Whitten, *Civil Procedure* 944-45 (1994) (stating that the doctrine of law of the case precludes relitiga-
that the jury right required that the factual issue common to the legal and equitable claims be tried first by the jury.\textsuperscript{1143}

\textit{Beacon} also suggested that a third, and less obvious way\textsuperscript{1144} that the jury right may be violated is by delay. The trial of legal issues was postponed until the trial of equitable issues, presumably even when there was no factual overlap between the two.\textsuperscript{1145} This postponement had the effect of an equitable injunction of the legal claims.\textsuperscript{1146} The \textit{Beacon} Court suggested that the jury right required that trial of the legal issues not be delayed, but that they be tried ahead of the equitable issues.\textsuperscript{1147}

Let us begin with the problem situations in Lynch and Bourne's article that was published in 1984, the year when Law and Equity merged in Maryland.\textsuperscript{1148}

A. \textit{The Article}

Lynch and Bourne's article examines eleven problem situations. First, the authors consider three problems of characterizing issues as legal or equitable—declaratory judgments, land titles, and fraud. Then, they treat actions in which separate legal and equitable claims are joined. In three of those situations the plaintiff joins claims or remedies— injunction with damages in tort, specific performance with damages in contract, and divorce with tort damages. In three other situations, the plaintiff, by claim, and the defendant, by counterclaim, join separate legal and equitable claims in one action of issues of law at successive stages of the same case). Although the issues in \textit{Beacon} were factual issues originally, the court's determination of those issues would include not only a historical or pure fact question (were Fox's and Beacon's theaters in competition with each other?) and a mixed law and fact question (were the exclusive contracts between Beacon and the film distributors reasonable?), but a question which looks very much like a question of law (does Fox have a legal right to make exclusive contracts with film distributors?).

\textsuperscript{1143.} See \textit{Beacon}, 359 U.S. at 508, 510-11.
\textsuperscript{1144.} Query, does the \textit{Beacon} Court's statement that trial of one claim to two factfinders (part to a judge and part to a jury) is undesirable, see id. at 508 & n.10, support a fourth way that the jury right may be violated (by the inefficiency of separate trials)?
\textsuperscript{1145.} See id. at 508.
\textsuperscript{1146.} See id. at 507.
\textsuperscript{1147.} See id. at 507, 508.
\textsuperscript{1148.} See \textit{supra} note 1 and accompanying text. At that time, there was no recent, post-merger Maryland precedent. Nonetheless, there were good reasons to accept the line of federal cases beginning with \textit{Beacon} as persuasive authority. \textit{See supra} notes 192-97 and accompanying text.
tion—enforcement of lien with breach of contract, quiet title with
ejectment or trespass, and contract with accounting. Finally, Lynch
and Bourne address two situations in which traditionally equitable
issues must be resolved before legal issues may be tried—historically
equitable joinder devices such as class actions, intervention, and in­
terpleader, in which plaintiff seeks damages, and actions in which
plaintiff seeks an equitable remedy, such as reformation or rescis­
sion as a prerequisite to damages.1149

1. Declaratory Judgments

Lynch and Bourne take an approximation of pre-merger ap­
proach, characterizing the declaratory judgment, a modern statu­
tory remedy, as legal or equitable. Before the merger of Law and
Equity, the declaratory judgment was available at Law as well as in
Equity. After merger, the declaratory judgment is difficult to
characterize as being either legal or equitable. Lynch and Bourne
view the declaratory judgment as a substitute either for legal relief
or for equitable relief. If alternative legal relief would have tra­
tionally been available, the declaratory judgment action would be
triable of right by a jury. Otherwise, the declaratory judgment ac­tion
must be tried by a judge.1154

Lynch and Bourne are reluctant to accept persuasive federal
authority, such as the Beacon line of cases, which addresses the right
to jury trial in declaratory judgment actions. They are reluctant to
accept Beacon because it rejects a traditional approximation of pre­
merger approach in favor of an approach that takes account of
modern procedural developments and protects the jury right.1157

1149. Bourne and Lynch treat these last two problems under one heading, "Ac­
tions in Which Adjudication of Equitable Issues is a Prerequisite to Adjudica­
tion of Claims Triable by a Jury." Bourne & Lynch, supra note 5, at 72-77.
1150. Here, the pre-merger date seems to be prior to the adoption of the declara­
tory judgment act. See id. at 50.
1151. The Maryland Uniform Declaratory Judgments Act was adopted in 1939.
1939 Md. Laws ch. 294. But cf., e.g., McCoy v. Johnson, 70 Md. 490, 17 A. 387
(1889) (describing an earlier act providing for a declaratory judgment in
certain matters).
& Lynch, supra note 5, at 50.
1153. See Bourne & Lynch, supra note 5, at 45-46 & n.293, 47.
1154. See id. at 47, 50.
1156. See id. at 506, 507-09.
1157. See id. at 504, 506, 508, 510-11.
This reluctance is apparent in three ways. First, Lynch and Bourne rely not on *Beacon*, which was in part a suit for declaratory relief, but on a number of lower federal court decisions after *Beacon*. Some of these decisions are protective of the jury right while others are not. *Beacon* and other Supreme Court cases have been very protective of the jury right in declaratory judgment actions. Second, Lynch and Bourne note only a limited exception to their approximation of pre-merger approach, where they would instead use a “basic nature of the issue” approach. In a few cases, the determination of the jury right would depend upon whether the claims or other issues underlying the declaratory remedy are of an inherently legal nature, triable by a jury, or are of an inherently equitable nature, triable by a judge. However, the basic nature of the issue approach may be more widely used in the federal courts than the authors suggest. In *Beacon* itself, the Supreme Court held that the antitrust issues on which plaintiff sought a declaratory judgment


1160. *See, e.g.*, infra notes 1484-1514.

1161. Bourne & Lynch, *supra* note 5, at 19. This basic nature of the issue approach should be distinguished from a basic nature of the action approach, which would characterize an entire action containing both legal and equitable issues as legal or equitable, depending on which predominated. *See, e.g.*, id. at 20 (stating that the trial court in *Beacon* viewed the complaint, which contained claims for both declaratory and injunctive relief, as “essentially equitable”); id. at 24 (stating that the trial court in *Dairy Queen* viewed the complaint, which contained claims for both injunctive relief and an accounting, as either “purely equitable” with possibly “incidental” legal issues); id. at 26 (stating that the court of appeals in *Ross* viewed a shareholder’s derivative action as “entirely equitable”); cf. id. at 50 (stating that the Illinois approach, when relief in addition to a declaratory judgment is sought, is to determine the right to jury trial by the nature of that additional relief).

1162. Bourne and Lynch cite two federal district court cases where a jury trial was granted because the issues were “inherently legal.” *See id.* at 48 & nn.306-07 (slander of title in a patent infringement suit and mental capacity of a party in an insurance contract rescission action, respectively); *see also id.* at 52 (characterizing as legal a claim for a judgment to declare void a deed).

were "essentially" jury questions.\textsuperscript{1164} In \textit{Simler v. Conner},\textsuperscript{1165} the Supreme Court held that a contract for legal services, upon which plaintiff sought a declaratory judgment that the fee was unreasonable, was "essentially" a legal matter for the jury.\textsuperscript{1166} Indeed, later in their book, Lynch and Bourne characterize the "basic nature of the issue" as the federal approach that should be adopted in Maryland.\textsuperscript{1167} Third, the authors go out of their way to criticize \textit{Beacon} as "radical" for suggesting that declaratory judgment provides a legal remedy.\textsuperscript{1168} Yet, Lynch and Bourne elsewhere concluded that declaratory judgments are not inherently equitable.\textsuperscript{1169} In fact, Lynch and Bourne suggest that they might be basically legal,\textsuperscript{1170} particularly where the underlying issues were inherently legal.\textsuperscript{1171} Lynch and Bourne also criticize \textit{Beacon} for requiring that judicial discretion be exercised to preserve the constitutional jury right.\textsuperscript{1172} Yet, they recognize that the jurisdiction of Equity is limited by the constitutional right to jury trial.\textsuperscript{1173}

In some cases, by characterizing the declaratory judgment as a substitute for equitable relief,\textsuperscript{1174} Lynch and Bourne allow the constitutional jury right to be violated by the trial judge holding that there is no right to jury trial at all.\textsuperscript{1175} In doing so, they overlook a number of ways, in light of modern procedural developments, to preserve the jury right in declaratory judgment actions. First, the

\textsuperscript{1164} The Supreme Court rejected the lower courts' holdings that the declaratory remedy was essentially equitable either because it was joined with a plea for injunctive relief, or because the complaint could traditionally have been heard only in Equity. \textit{See} \textit{Beacon Theatres, Inc. v. Westover}, 359 U.S. 500, 504-08 (1959).
\textsuperscript{1165} 372 U.S. 221 (1963) (per curiam).
\textsuperscript{1166} The Supreme Court rejected the lower court's holding that the declaratory remedy was purely equitable because it was basically for cancellation of a contingent fee contract.
\textsuperscript{1167} \textit{LYNCH \& BOURNE, supra} note 3, at 337-38.
\textsuperscript{1168} \textit{See} \textit{Bourne \& Lynch, supra} note 5, at 49 (citing \textit{Beacon}, 359 U.S. at 509).
\textsuperscript{1169} \textit{See} \textit{Bourne \& Lynch, supra} note 5, at 19 & n.109.
\textsuperscript{1170} \textit{See id.} at 19.
\textsuperscript{1171} \textit{See id.} at 48.
\textsuperscript{1172} \textit{See id.} at 49.
\textsuperscript{1173} \textit{See id.} at 50-51 (citing McCoy v. Johnson, 70 Md. 490, 17 A. 387 (1889)). The Maryland Uniform Declaratory Judgments Act expressly provides that "[t]he fact that a proceeding is brought under this [Act] does not affect a right to jury trial which otherwise may exist." \textit{MD. CODE ANN., CTS. \& JUD. PROC. § 3-404} (1995).
\textsuperscript{1174} \textit{See supra} note 1154 and accompanying text.
\textsuperscript{1175} \textit{See Bourne \& Lynch, supra} note 5, at 47-48.
declaratory judgment may be considered as an adequate remedy at Law that in many cases limits the jurisdiction of Equity.1176 Second, like the Federal Rules, the revised Maryland Rules permit a determination of the jury right on an "issue-by-issue" basis, rather than on an "action" basis.1177 Thus, even if the "court" (a judge) grants the declaratory judgment,1178 a jury may determine the underlying factual issues.1179 Third, where new statutory rights are created, they may be tried by a jury if they are analogous to common-law rights.1180 Similarly, new statutory remedies should be triable by a jury if they are analogous to common-law remedies. The declaratory judgment may be similar to a judgment at Law for the defendant1181 or for the plaintiff on the issue of liability alone.1182 Therefore, the declaratory judgment may be triable by a jury. Fourth, the need for immediate relief should not preclude the jury right in a declaratory

1176. See id. at 47 & n.298 (noting that the declaratory judgment was traditionally available in Maryland in both Law and Equity); see also LYNCH & BOURNE, supra note 3, at 330 (discussing Beacon); Bourne & Lynch, supra note 5, at 21-22, cf. Maryland Theatrical Corp. v. Brennan, 180 Md. 377, 388-89, 24 A.2d 911, 917 (1942) (holding that Equity may grant a declaratory judgment, rather than an injunction, against a public official in order to stop enforcement of an invalid law), cited with approval in Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 507 n.9 (1959). See generally Bourne & Lynch, supra note 5, at 38, (suggesting that the inadequate remedy at Law requirement for equitable jurisdiction in Maryland is as dynamic as the requirement in federal courts under Beacon).

1177. See Bourne & Lynch, supra note 5, at 6, 45, 72.


1179. See, e.g., Beacon, 359 U.S. at 508 (providing jury verdict, then judge's injunction); see also Tull v. United States, 481 U.S. 412 (1987) (providing jury trial of violation of statute, but judge trial of amount of penalty). This development occurred after the Bourne and Lynch article. Cf. LYNCH & BOURNE, supra note 3, at 333-34; Bourne & Lynch, supra note 5, at 25-26 (discussing Ross v. Bernhard, 396 U.S. 531 (1970) (upholding judge's determination of the stockholder's right to sue on behalf of the corporation, then jury verdict on tort and contract damages)).

1180. See Bourne & Lynch, supra note 5, at 27-28; see also LYNCH & BOURNE, supra note 3, at 313-14 (discussing Curtis v. Loether, 415 U.S. 189 (1974)). For a development after the Bourne and Lynch article, see LYNCH & BOURNE, supra note 3, at 314-15 (discussing Tull).

1181. Cf. Fed. R. Civ. P. Form 31 (providing judgment on a jury verdict that the plaintiff take nothing).

judgment action. The Maryland Uniform Declaratory Judgments Act expressly provides for expedited treatment. If necessary, provisional injunctive relief may be granted pending trial of the declaratory judgment action. Thus, Lynch and Bourne’s approximation of pre-merger approach, their reluctance to accept persuasive federal authority, and their overlooking of ways to preserve the jury right, all exemplify their generally restrictive approach to the right to jury trial in declaratory judgment actions.

2. Land Titles

Nominally, Lynch and Bourne reject an approximation of pre-merger approach in favor of a protective approach to the jury right in cases involving land titles. They conclude, with only a few exceptions, that claims of title are legal and, therefore, triable by a jury. Lynch and Bourne’s approach to such claims, however, is more an approximation of pre-merger approach. That is, after the merger of Law and Equity, actions of or defenses to ejectment and trespass, traditionally available at Law, will be triable by a jury. Actions to quiet title or remove a cloud from title, traditionally available in Equity, will be tried by a judge.

While Lynch and Bourne note several situations in which legal and equitable claims were joined, and in which the jury right after merger might be more protected than before merger, the marginal difference seems small. In the first situation, Lynch and Bourne criticize Equity for taking jurisdiction of the whole case on the ground that immediate equitable relief was indicated. However, even

1184. See Beacon, 359 U.S. at 508; Lynch & Bourne, supra note 3, at 330-31; Bourne & Lynch, supra note 5, at 61.
1185. See Bourne & Lynch, supra note 5, at 52 (stating that the jury right should not turn on “in what court the relief would have been sought in a bifurcated system of courts”).
1186. See id. at 51-53; see also id. at 36-37. But cf. id. at 19 (stating that it is only “possible” that Maryland considers cases involving land titles as basically legal and, therefore, triable to a jury). In their book, Bourne and Lynch say only that “Maryland has shown a distinct preference for adjudicating title to land at law.” Lynch & Bourne, supra note 3, at 312.
1187. See Bourne & Lynch, supra note 5, at 51.
1188. See id. at 69.
1189. See id. at 51.
1190. See id. at 51-52 (discussing Smith v. Shiebeck, 180 Md. 412, 24 A.2d 795 (1942)).
before merger, provisional equitable relief was available under Maryland Rules BF40 to 43\(^{1191}\) as ancillary relief in an action at Law.\(^{1192}\) In the second situation, Lynch and Bourne criticized Equity for taking jurisdiction on the ground that equitable relief was "primary" and legal relief was only "subsidiary."\(^{1193}\) They concede, however, that any jury right in the case was only hypothetical under the circumstances,\(^{1194}\) and they later note that it was unclear whether or not injunctive relief under Maryland Rules BF40 to 43 was limited to "ancillary" (or subsidiary) injunctive claims in relation to more substantial (or primary) legal claims.\(^{1195}\) In the third situation, Lynch and Bourne suggest that the jury right may be a limit on Equity's clean-up of damages claims.\(^{1196}\) However, they concede that any jury right in the case was only hypothetical under the circumstances,\(^{1197}\) and they are later ambivalent on whether or not the merger of Law and Equity changed Equity's clean-up jurisdiction.\(^{1198}\)

Lynch and Bourne mention no federal authority regarding the right to jury trial in cases involving land title, although some appears persuasive. By characterizing an action as an equitable one to quiet title, rather than as a legal one involving title,\(^{1199}\) Lynch and Bourne allow the constitutional jury right to be violated by the trial judge holding that there is no right to jury trial at all.\(^{1200}\) In doing so, and in light of modern procedural developments, they overlook a number of ways to preserve the jury right in cases involving land title. First, a judge may "see through" a plaintiff's equitable suit, styled as one to quiet title, and conclude that it was really a legal action of ejectment or trespass.\(^{1201}\) Problems of mis-characterization

\(^{1191}\) See supra note 174.

\(^{1192}\) See Corkran v. Zoning Comm'r, 41 Md. App. 437, 397 A.2d 262 (1979); cf. Bourne & Lynch, supra note 5, at 61 (noting that an interlocutory injunction is available under Md. Rule BB70(c) in a jury trial).

\(^{1193}\) See Bourne & Lynch, supra note 5, at 52 (discussing Waring v. National Sav. & Trust Co., 138 Md. 367, 114 A. 57 (1921)).

\(^{1194}\) See id. at 52.

\(^{1195}\) See id. at 56.

\(^{1196}\) See id. (discussing Gibula v. Sause, 173 Md. 87, 194 A. 826 (1937)).

\(^{1197}\) See id. at 53.

\(^{1198}\) See id. at 53-55 (clean-up in reformation or rescission cases is undermined); id. at 60-61 (clean-up in injunction cases is undermined); cf. id. at 61-62 (clean-up in specific performance cases is not undermined). See generally infra notes 1274-75 and accompanying text.

\(^{1199}\) See supra notes 1187-89 and accompanying text.

\(^{1200}\) See Bourne & Lynch, supra note 5, at 51.

\(^{1201}\) Cf. Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (holding a complaint for
seem almost encouraged by the breadth of the quiet title statute, which makes the proceeding available “when [the plaintiff’s] title to the property is denied or disputed, or when any other person claims of record or otherwise, to own the property, or any part of it, or hold any lien encumbrance on it.”1202 Moreover, the statutory term “title” and the related term “possession” are legal conclusions often based on the application of elaborate legal requirements1203 or complex factual situations.1204 Second, Lynch and Bourne note that the right to jury trial would exist if, as might be expected1205 in a suit to quiet title, the defendant counterclaimed1206 for ejectment or trespass.1207 For the reasons stated above,1208 title may often be at issue and, thus, the legal counterclaim would be available. Third, the declaratory judgment may be considered as an adequate remedy at Law for trying title that in many cases limits the jurisdiction of Equity.1209 Fourth, the revised Maryland Rules permit a determination

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1203. See East Wash. Ry. v. Brooke, 244 Md. 287, 294, 223 A.2d 599, 603-04 (1966) (actual, hostile, open, notorious, exclusive, under claim of title or ownership, and continuous and uninterrupted for 20 years).
1204. See id.
1205. See, e.g., Bourne & Lynch, supra note 5, at 65 n.414, 69-70 (discussing cases).
1207. See Bourne & Lynch, supra note 5, at 70. The revised Maryland Rules permit the joinder of a legal counterclaim to an equitable claim (and an equitable counterclaim to a legal claim). See Md. Rule 2-301, -303(c) (merger of Law and Equity); Md. Rule 2-302, -331(a) (joinder of counterclaims).
1208. See supra notes 1202-04 and accompanying text.
1209. See generally Beacon, 359 U.S. at 504, 506-09. Bourne and Lynch note the use of the declaratory judgment in title cases. See Bourne & Lynch, supra note 5, at 37 n.236, 51-52, 70 n.445; see also Edwin Borchart, Declaratory Judgments 741-58 (2d ed. 1941); cf. Md. Code Ann., Cts. & Jud. Proc. § 3-406 (1995) (deeds and land patents). But see id. § 3-409(b) (providing special statutory remedy, perhaps such as a statutory action to quiet title, is to be followed rather than a declaratory judgment proceeding); cf. McCoy v. Johnson, 70 Md. 490, 17 A. 387 (1889), discussed in Bourne & Lynch, supra note 5, at 51 (stating that statutory equitable remedy in title cases violates the constitutional right to jury trial).

The declaratory judgment is an adequate remedy at Law. First, the declaratory judgment is adequate. It is available on an expedited basis. See Md. Code Ann., Cts. & Jud. Proc. § 3-409(e) (1995). It may be supplemented by
of the jury right on an "issue-by-issue" basis, rather than on an "action" basis. Thus, even if the judge grants an injunction, a jury may determine the factual issues underlying title. Fifth, Lynch and Bourne suggest that the need for immediate relief may preclude the jury right in a case involving title to land. However, as developed above, provisional injunctive relief is available in a case tried by jury.

Thus, Lynch and Bourne's approximation of pre-merger approach, their reluctance to even mention (much less accept) persuasive federal authority, and their overlooking of ways to preserve the jury right, all exemplify their generally restrictive approach to the right to jury trial in cases involving title to land.

3. Rescission and Restitution Based upon Fraud

Lynch and Bourne take a mixed approach to the jury right in cases involving rescission and restitution based on fraud. Before the merger of Law and Equity, Equity would rescind or reform a contract for fraud or mistake and then award restitution (damages) under its clean-up powers. Lynch and Bourne conclude that after merger, restitution should be triable by a jury and tried by the jury first if an earlier grant of equitable relief might otherwise foreclose the award of damages. Thus, in part they take a protective approach to the jury right. However, Lynch and Bourne also take preliminary injunctive relief. See supra note 1184 and accompanying text. It may also be supplemented by additional relief, such as a final injunction. See Md. Code Ann., Cts. & Jud. Proc. § 3-412 (1995). Second, the declaratory judgment may be considered a remedy at Law because declaratory relief is itself legal. See supra notes 1164-68 and accompanying text. It may be considered a legal remedy also because the underlying issues of title are legal. See supra note 1163 and accompanying text. The equitable suit to quiet title is available only where no adequate remedy at Law exists. See Bourne & Lynch, supra note 5, at 51, 53.

Adjudication of land titles may be "inherently legal." See supra note 1163 and accompanying text; cf. Bourne & Lynch, supra note 5, at 48 & n.307 (providing slander of title in a patent infringement case and mental incapacity of a party in a contract rescission action are inherently legal). Legal issues may be tried by a jury before equitable issues are tried by a judge. See supra note 1179.

See supra note 1190 and accompanying text.

See supra note 1184 and accompanying text.

See Bourne & Lynch, supra note 5, at 53-54.

See id. at 55.

See id.
an approximation of pre-merger approach in such cases. They predict that Maryland courts will characterize the claims of fraud and mistake in such cases as "essentially equitable." 1217 They also conclude that the remedies of rescission (and reformation) in such cases are "purely equitable." 1218

Lynch and Bourne do not mention federal authority about the jury right in cases involving rescission and restitution based on fraud. Some persuasive federal authority supports the part of their approach that is protective of the jury right. Their assumption that equitable restitution is essentially legal 1219 is analogous to the holding of Dairy Queen, Inc. v. Wood, 1220 that damages were an adequate remedy at law for an equitable accounting. The idea that restitution should be tried by the jury first if an earlier grant of equitable relief might otherwise foreclose the award of damages is consistent with Beacon. 1221 As developed below, persuasive federal authority supports an even more protective approach. 1222

In a number of ways, Lynch and Bourne may allow the constitutional jury right to be violated in cases involving rescission or reformation and restitution based on fraud or mistake. In doing so, they downplay or overlook ways to preserve the jury right in light of modern procedural developments.

First, Lynch and Bourne suggest that fraud, at least where damages are sought, is a common-law action triable by a jury. 1223 Similarly, reformation can be viewed as an interpretation of a contract, a common-law action triable by a jury. 1224 Second, Lynch and Bourne

1217. See id. at 54. They reach this conclusion after making a suggestion to the contrary. See id. at 55.
1218. See id. at 55. Again, they reach this conclusion after making a suggestion to the contrary. See id. at 54.
1219. See id. at 54-55.
1222. See infra notes 1223-30 and accompanying text.
1223. See Bourne & Lynch, supra note 5, at 53, 54. But see Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (assuming that fraud was triable by jury, even where fraud was joined with a claim for rescission).
1224. See Bourne & Lynch, supra note 5, at 53; cf. Dairy Queen, 369 U.S. at 477 (holding a claim for an accounting was considered to be really one for damages on a debt). Dobbs says that this so-called "reformation at law" may not suffice where third persons are involved. See 1 DAN B. DOBBS, LAW OF REMEDIES § 4.3(7) (1993). But see Md. Rule 2-212 to 231 (permitting joinder of parties).
suggest that rescission, and presumably reformation, may be seen as essentially declaratory judgments defining the contract and its enforceability, which are inverted actions at Law triable by a jury. Third, in another context they suggest that there may be an adequate remedy at Law for rescission and restitution—the action for money had and received. Fourth, in two other contexts, Lynch and Bourne suggest that an equitable claim might be met with a legal counterclaim and that the legal counterclaim may provide the plaintiff with an adequate remedy at Law, a defense to the counterclaim, triable by jury. Thus, in a case where the plaintiff asks for rescission and restitution based on fraud, the defendant may counterclaim for damages for breach of contract, and the plaintiff’s defense to that counterclaim may establish that the contract is unenforceable. However, Lynch and Bourne forsake these four suggestions in favor of their prediction that Maryland courts will characterize claims of fraud and mistake as “essentially equitable” and will characterize remedies of rescission and reformation as “purely equitable.” One suspects they do so because of their approximation of pre-merger approach. Fifth, as Lynch and Bourne recognize in other contexts, the revised Maryland Rules permit a determination of the jury right on an “issue-by-issue” basis, rather than on an “action” basis. Thus, even if the judge determines whether rescission or reformation is appropriate, a jury may determine the factual issues underlying the fraud or contract claims, as well as the damages remedies.

1226. See Bourne & Lynch, supra note 5, at 54.
1227. See id. at 53. Dobbs says that this so-called “rescission at law” is available only where plaintiff offers to make defendant whole and that “rescission at law” may not suffice where third persons are involved or where plaintiff wants recovery of unique property. 1 Dobbs, supra note 1224, § 4.3(6).
1228. See Bourne & Lynch, supra note 5, at 68-70.
1229. See id. at 70.
1230. See Beacon, 359 U.S. at 508 (a legal counterclaim was given priority over an equitable claim).
1231. See supra note 1217 and accompanying text.
1232. See supra note 1218 and accompanying text.
1233. See supra note 1210 and accompanying text.
1234. See supra notes 1178-79 and accompanying text.
In these five ways, Lynch and Bourne may allow the constitutional jury right to be violated by the trial judge holding that there is no right to jury trial at all on certain issues. In another way, they may allow the right to be violated by delay. The trial of fraud and mistake by the judge before the trial of damages by the jury, even where the earlier judicial determination does not foreclose the later jury determination, may violate the jury right because of the postponement of the trial of the legal issues.

Thus, Lynch and Bourne’s approximation of pre-merger approach, their reluctance to accept persuasive federal authority, and their overlooking of ways to preserve the jury right, all exemplify their generally restrictive approach to the right to jury trial in cases involving rescission and restitution based on fraud.

4. Suits to Enjoin Interference with a Business Relationship and for Damages

Lynch and Bourne take an approximation of the pre-merger approach, which happens to be a protective one similar to Beacon, in suits to enjoin interference with a business relationship, such as for nuisance, continuing trespass, wrongful discharge, or disparagement of business and property rights, and for damages. That is, the damages claim would be heard first by a jury. The judge would then issue injunctive relief based on the jury verdict. That approach is consistent with the practice before the merger of Law and Equity. Under former Maryland Rule BF40, ancillary injunctive relief was permitted at Law. Any delay that trial by jury might cause could be alleviated by the judge ordering interlocutory injunctive relief.

1235. See supra notes 1144-46 and accompanying text.
1236. Bourne and Lynch say their result is “obtained under established Maryland principles.” Bourne & Lynch, supra note 5, at 61.
1237. See id.
1238. See id. at 60-61.
1239. See id. at 56.
1240. See id. at 61.
1241. See supra note 174.
1242. See Bourne & Lynch, supra note 5, at 55-56, 61. Here, Bourne and Lynch may be slightly more protective of the jury than was pre-merger practice. They would have the damages claim heard first by the judge, before injunctive relief was issued by the judge, even if the equitable claim was more substantial than the legal claim. It was not clear that the equitable claim in that context was “ancillary” within the meaning of Md. RULE BF40. See id. at 56.
1243. See id. at 61. But cf. infra note 1255 and accompanying text (prior restraint
Lynch and Bourne are reluctant to accept persuasive federal authority, such as the *Beacon* line of cases, in suits to enjoin interference with a business relationship and for damages. As developed above, Lynch and Bourne’s approach is based on “established Maryland principles” which provide “a result similar to that in *Beacon*.”

Lynch and Bourne’s reluctance is apparent in three ways. First, Lynch and Bourne fully develop Maryland pre-merger practice under former Maryland Rule BF40 as a basis for their approach. Second, Lynch and Bourne are generally unwilling to extend the policy of Maryland Rule BF40 to forms of equitable relief other than injunction, such as rescission or specific performance. Third, they survey the practice of other states and note that while “some states have taken a position similar to *Beacon*,” “many state courts” have rejected *Beacon*.

Lynch and Bourne’s approximation of pre-merger approach in suits to enjoin interference with a business relationship and for damages is generally protective of the constitutional jury right. However, by characterizing relief as injunctive and, therefore, equitable, Lynch and Bourne may allow the constitutional jury right to be violated by the trial judge holding that there is no right to jury trial at all as to that remedy. In doing so, they overlook several ways, in light of modern procedural developments, to preserve the jury right.

First, there may be a number of adequate remedies at Law, triable by jury, which should be issued instead of an injunction. The declaratory judgment may be adequate in a suit to enjoin in-

1244. *Id.* at 56, 61.
1245. Much of this reluctance is set forth in an introductory section. *See id.* at 55-60.
1246. *See id.* at 55-56, 61.
1247. *See id.* at 55-56 n.360, 56; *see also id.* at 61-62.
1248. *Id.* at 56.
1249. *Id.* at 57. Bourne & Lynch, however, do criticize the waiver and discretionary approaches taken by the state courts which have rejected *Beacon*.
1250. As developed above, the inadequate remedy at Law requirement for equitable jurisdiction in Maryland may be as dynamic as that in the federal courts under *Beacon*. *See supra* note 1176.
1251. The declaratory judgment may be a legal remedy triable by a jury. *See supra* notes 1168-82 and accompanying text.
1252. In addition to the tort of interference with a business relationship, Bourne and Lynch mention claims of nuisance, continuing trespass, wrongful dis-
terference with a business relationship, particularly where the
defendant is a public official or other responsible corporate enti-
ty. Indeed, an injunction against interference with a business re-
lationship by false and malicious statements about plaintiff's busi-
ness, as Lynch and Bourne assume, may well be prohibited by the First and Fourteenth Amendments' prior restraint doctrine.

Second, even if the declaratory judgment or other remedy at Law is not adequate, it may be that the jury may determine part or all of the claim to injunctive relief. Professor Owen Fiss has explored this idea. Because of the interdependence between rights charge, and disparagement of business and property rights. The declaratory judgment or other legal remedies may also be adequate for those claims. The other legal remedies which offer specific relief, similar to an injunction, include replevin and ejectment. See Bourne & Lynch, supra note 5, at 37-38, 51, 69-70. It also includes mandamus. See Md. Code Ann., Cts. & Jud. Proc. §§ 3-8A-01, -02 (1995); Md. Rule 15-701. See generally Robert Allen Sedler, Equitable Relief, But Not Equity, 15 J. Legal Educ. 293, 295 n.12 (1963).


1254. See Bourne & Lynch, supra note 5, at 60.


1256. Bourne and Lynch assume that final injunctive relief would be issued by a judge, not a jury. See Bourne & Lynch, supra note 5, at 61; see also id. at 28 (stating that an injunction, rescission, restitution, cancellation, and foreclosure are purely equitable remedies in federal courts). But cf. id. at 38-44, 75-76 (arguing that equitable discovery, accounting, and multiplicity may be supplanted by adequate remedies at Law). See generally id. at 39 (stating that injunction, constructive trust, cancellation, rescission, and accounting are remedies unavailable at Law); id. at 55 & n.357 (arguing that an injunction, setting aside judgments procured by fraud, constructive trust, and rescission are purely equitable relief); id. at 76 (arguing that rescission, cancellation, and specific performance are within the particular remedial competence of Equity).

1257. See Fiss, supra note 719, at 50-58. Interestingly, Fiss explored the idea in the context of extending the right to an injunction, not the right to a jury trial. He concluded that the injunction should be made more readily available as a remedy. If the right to a jury trial was a hindrance to that goal because of the traditional distinction between Law and Equity, Fiss believed that the right to jury trial should be extended to injunctions. See id. After all, it was a historical accident that Law and Equity developed independently. See id. at
and remedies, a determination by a jury that a right has been violated is also a determination, to some extent, about what the remedy should be.\textsuperscript{1258} Indeed, even the terms of an injunction might be determined by a jury if there was a full evidentiary presentation on the remedy, including expert testimony and explanatory judicial instructions.\textsuperscript{1259} However, both federal\textsuperscript{1260} and Maryland\textsuperscript{1261} courts have assumed without analysis that the issuance of an injunction would be for the judge, not the jury.

Thus, Lynch and Bourne's approximation of pre-merger approach, their reluctance to accept persuasive federal authority, and their overlooking of ways to preserve the jury right, all exemplify to some extent their generally restrictive approach to the right to jury trial in suits to enjoin interference with a business relationship and for damages.

5. Suits Joining Claims for Specific Performance and Damages

Generally, Lynch and Bourne take an approximation of pre-merger approach to suits joining claims for specific performance and damages.\textsuperscript{1262} Before the merger of Law and Equity, specific performance was a basis for equitable jurisdiction, and Equity would

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\textsuperscript{50-51.} The Law courts did issue remedies like injunctions—quia timet, estrepemment, and prohibition writs—and, but for historical accident, could have issued injunctions. \textit{See id.} at 45, 51. \textit{But cf.} Bourne \& Lynch, \textit{supra} note 5, at 55-56, 61 (stating that ancillary injunctive relief at Law developed in Maryland).

While sympathizing with Fiss's analysis, I disagree with his goal: extending the right to an injunction, rather than extending the right to a jury trial. \textit{Cf. supra} notes 77-92, 96 and accompanying text (arguing that there is a constitutional right to trial by a jury, not to courts of Equity or to trial by a judge).

\textsuperscript{1258.} \textit{See} Fiss, \textit{supra} note 719, at 55-56.
\textsuperscript{1259.} \textit{See id.} at 56. However, Fiss did not believe that the jury would ever determine part or all of the injunction because of the weakness of the constitutional preference for the civil jury. \textit{See id.} at 51, 56. I do not share this perception of the weakness of the preference for the civil jury right, either in the U.S. \textit{Const.} or in the Md. \textit{Const.} \textit{See supra} notes 46-67 and accompanying text (text); \textit{supra} notes 103-35 and accompanying text (history); \textit{supra} notes 164-299 and accompanying text (doctrine).
\textsuperscript{1262.} The damages are those sought either for specific performance or for incidental losses for wrongful detention. \textit{See} Bourne \& Lynch, \textit{supra} note 5, at 61.
award damages even if specific performance was denied. Lynch and Bourne conclude that after merger this equitable clean-up of damages should not change. However, they would make exceptions, permitting jury trial either where there was no strong likelihood that the specific performance remedy would issue, or where the damages were not likely to be merely incidental. These exceptions, being discretionary with the judge, are not very protective of the jury right.

Lynch and Bourne expressly reject persuasive federal authority, the *Beacon* line of cases, which would generally require a jury in suits joining claims for specific performance and damages. They reject *Beacon* for three reasons. First, the only substantial damages available would be as an alternative if the claim for specific performance failed. Second, damages for wrongful detention would be only incidental and would be dwarfed by the value of performance. Third, specific performance involves "factors uniquely within the province of the chancellor," matters which are not for a jury.

In a number of ways, Lynch and Bourne may allow the constitutional jury right to be violated in suits joining claims for specific performance and damages. By allowing Equity clean-up damages, by characterizing legal issues as "incidental" to equitable issues, and by characterizing relief as specific performance and, therefore, equitable, Lynch and Bourne would allow the constitutional jury right to be violated by the trial judge holding that there is no right to jury trial at all of some or all issues in a case. In doing so, they overlook some ways, in light of modern procedural developments, to preserve the jury right. First, as Lynch and Bourne recognize in other

1263. See id. at 62.
1264. See id. But see infra note 1275.
1265. See Bourne & Lynch, supra note 5, at 62.
1266. See id.
1267. See also infra notes 1272-81 and accompanying text.
1268. See Bourne & Lynch, supra note 5, at 61-62. Indeed, they call the requirement of jury trial in such cases "ridiculous." See id. at 62.
1269. See id. at 62. But cf. infra notes 1272-75 and accompanying text.
1270. See Bourne & Lynch, supra note 5, at 62. But cf. infra note 1276 and accompanying text.
1271. Bourne & Lynch, supra note 5, at 62. But cf. supra notes 959-1103 and accompanying text (criticizing Bourne and Lynch's suggestion that Equity is superior to Law as a mode of trial because a judge has expertise that a jury does not have, because the decision-making process of the judge is better than the decision-making process of the jury, or because of other reasons).
contexts, the revised Maryland Rules permit a determination of the jury right on an “issue-by-issue” basis, rather than on an “action” basis. Thus, even if a judge determines whether specific performance is appropriate, a jury may determine the factual issues in the contract claim (underlying both the alternative or incidental remedy of damages at Law and specific performance in Equity) and the damages remedy. Lynch and Bourne concede in several other contexts, although not in this one, that the justification for Equity’s clean-up jurisdiction is eliminated by the merger of Law and Equity. Second, non-frivolous legal issues should be triable by the jury, even if they are characterized as “incidental” equitable issues. Third, as developed above, the inadequate remedy at Law requirement for equitable jurisdiction in Maryland may be as dynamic as that in the federal courts under Beacon. There might be a number of adequate remedies at Law, triable by jury, which should issue instead of specific performance. Replevin may be an adequate remedy at Law where a plaintiff claims specific perform-

1272. See Bourne and Lynch, supra note 6, at 6, 45, 72.
1273. See supra notes 1164-68 and accompanying text.
1274. See Bourne & Lynch, supra note 5, at 62 (discussing clean-up of damages after specific performance); see also id. at 75-77 (discussing judge’s discretion clean-up damages after specific performance).
1275. See id. at 52 (declaratory judgment voiding a deed after enforcement of a lien); id. at 54-55 (damages after rescission of a contract); see also id. at 72-75 (damages in class actions, intervention, interpleader, subrogation, and receivership); cf. id. at 75-77 (judge’s discretion to clean-up damages after rescission, cancellation, accounting, and multiplicity). But see id. at 63-64 (clean-up of tort damages after divorce-related claims).

In another context, Bourne and Lynch suggest that former Md. RULE BF40 may serve as a “model” for jury trial in cases joining legal and equitable claims. See Bourne & Lynch, supra note 5, at 55. They also suggest that the “policy” of that rule might extend to non-injunctive equitable relief, such as specific performance. See id. at 55-56 & n.360. A case decided after Bourne and Lynch’s article approves of this approach, at least where a defendant raises breach of contract as a defense or counterclaim. See Higgins v. Barnes, 310 Md. 532, 535 & n.1, 551, 530 A.2d 724, 724 & n. 1, 725, 733-34 (1987); cf. Ross v. Bernhard, 396 U.S. 531 (1970) (discussing shareholder’s derivative action bifurcated with equitable issues tried by the judge and legal issues tried by the jury).

1276. See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470-73 (1962), discussed in Bourne & Lynch, supra note 5, at 23-25. This conclusion was approved, after Bourne and Lynch’s article, by Higgins, 310 Md. at 545, 530 A.2d at 730; see also id. at 548-49, 530 A.2d at 732.
1277. See supra note 1176 and accompanying text.
ancence of a contract for personal property.\textsuperscript{1278} Ejectment may be an adequate remedy at Law where a plaintiff claims specific performance of a contract for real property.\textsuperscript{1279} Generally, the declaratory judgment\textsuperscript{1280} may be an adequate remedy at Law.\textsuperscript{1281}

Thus, Lynch and Bourne’s approximation of pre-merger approach, their reluctance to accept persuasive federal authority, and their overlooking of ways to preserve the jury right, all exemplify a generally restrictive approach to the right to jury trial in suits joining claims for specific performance and damages.

6. Suits Joining Divorce-Related Claims with Actions at Law\textsuperscript{1282}

Lynch and Bourne attempt an approximation of pre-merger approach to suits joining divorce-related claims (limited divorce\textsuperscript{1283} or absolute divorce\textsuperscript{1284} and property disposition\textsuperscript{1285}) with legal claims (assault and battery\textsuperscript{1286} or conversion\textsuperscript{1287}) for damages. As developed below, however, their approach is less protective than an actual approximation of pre-merger approach. Before the merger of Law and Equity, the equitable divorce-related claims and the legal claims would have been heard in separate proceedings—the equitable claims by a judge and the legal claims by a jury.\textsuperscript{1288} After merger, as-

\begin{itemize}
\item 1278. See Bourne & Lynch, supra note 5, at 37-38. See generally McClintock, supra note 741, at 107.
\item 1279. See Bourne & Lynch, supra note 5, at 51, 69-70. See generally McClintock, supra note 741, at 106.
\item 1280. The declaratory judgment may be a legal remedy triable by a jury. See supra notes 1161-68 and accompanying text.
\item 1281. See generally Borchard, supra note 1209, at 551-54. Specific performance may not even be available to enforce a contract to provide personal services. See McClintock, supra note 741, at 164-65.
\item 1282. The relationship among status (e.g., divorce), declarations of rights or obligations arising from status (e.g., alimony, child support, and division of property), enforcement of declarations of status, rights, or obligations (e.g., injunction and contempt), and catch-all or peripheral tort claims (e.g., sexual abuse, battery, and intentional infliction of emotional distress) are considered in another context—the judicially-created domestic relations exception to the diversity jurisdiction of the federal courts in Ankenbrandt v. Richards, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring).
\item 1283. See Bourne & Lynch, supra note 5, at 62-63.
\item 1284. See id. at 64.
\item 1285. See id.
\item 1286. See id. at 63-64.
\item 1287. See id. at 64.
\item 1288. See id. at 63. See generally id. at 11, 29, 34, 44-45. There was a good deal of doubt about whether “divorce courts” had any more than the limited powers of ecclesiastical courts in England. See Kapneck v. Kapneck, 31 Md. App. 410,
suming the equitable divorce-related claims and the legal claims are heard together, Lynch and Bourne would give less protection to the jury right. They conclude that the judge should hear the divorce-related claims first and imply that the judge should then clean-up the legal claims for ordinary damages. Lynch and Bourne would have the legal claims tried separately by a jury only if punitive damages were demanded.

Lynch and Bourne generally reject the *Beacon* line of cases, which would require the legal claims to be tried by the jury before the divorce-related claims are tried by the judge. They reject *Beacon* because they believe the decision is an affront to the legislative grant of divorce jurisdiction to Equity and the need for expeditious trial.

Lynch and Bourne would allow the constitutional jury right to be violated in suits joining divorce-related claims with actions at Law. If Equity cleaned-up the legal claims, there would be no jury trial at all as to those issues. Lynch and Bourne overlook some ways, in light of modern procedural developments, to preserve the jury

356 A.2d 572 (1976). However, the legislature rejected *Kapneck* and expressly gave “divorce courts” all the powers of courts of Equity. See 1977 Md. Laws ch. 221 (preamble) (codified as amended at Md. Code Ann., Fam. Law § 1-203(a) (1991)). See also Winston v. Winston, 290 Md. 641, 431 A.2d 1330 (1981) (holding that “divorce courts” had power to enforce divorce-related orders by injunction for more than a century pursuant to generally applicable MARYLAND RULES). The powers of courts of Equity, expressly recognized by the legislature in 1977, presumably would include equitable clean-up of legal damages. See Bourne & Lynch, supra note 5, at 13-15, 29, 45 & n.292, 46-47, 52-54, 56-57, 60, 75-78. To date, however, there are no reported cases so holding. See id. at 63.

1289. *But cf.* 1993 Md. Laws ch. 198, § 2 (Family Division, authorized by the legislature to be established in each circuit court where feasible, is not assigned tort matters).

1290. See Bourne & Lynch, *supra* note 5, at 63-64. Punitive damages were not within the traditional scope of Equity jurisdiction. See id. at 33-34, 56 n.365, 61, 63-64.

1291. *But cf. id.* at 64 n.408 (citing *Katchen v. Landy*, 382 U.S. 323 (1966)) (authorizing equitable clean-up of legal claims in bankruptcy to effectuate the congressional scheme for expedition)).

1292. See id. at 63-64.

1293. See id. However, there is no statutory command for expeditious treatment of divorce-related claims. *Cf. id.* at 64 & n.408 (Lynch and Bourne’s citation to a statute, after a sentence containing the expeditious trial proposition, is apparently a citation for the other proposition—“the legislative determination that equity should determine ownership of marital personal property”).
right.\textsuperscript{1294} First, any need for expeditious trial should not preclude the jury right in light of the availability of provisional injunctive relief.\textsuperscript{1295} Second, as Lynch and Bourne recognize in other contexts, the revised \textit{Maryland Rules} permit a determination of the jury right on an "issue-by-issue" basis, rather than on an "action" basis.\textsuperscript{1296} Thus, even if a judge determines the divorce-related claims, a jury may determine the legal claims.\textsuperscript{1297} If the divorce-related claims and the legal claims are heard side-by-side, the jury determination should precede the judge's determination in order to avoid any preclusive effect of earlier judge-tried issues on later jury-tried issues.\textsuperscript{1298}

Thus, Lynch and Bourne's attempted approximation of pre-merger approach, their reluctance to accept persuasive federal authority, and their overlooking of ways to preserve the jury right, all exemplify their generally restrictive approach to the right to jury trial in suits joining divorce-related claims with actions at Law.

7. Suit to Foreclose a Mechanic's Lien and a Counterclaim for Breach of Contract

Lynch and Bourne also take an approximation of pre-merger approach\textsuperscript{1299} to the jury right in suits joining a claim to foreclose a mechanic's lien and a counterclaim for breach of contract. Before


\textsuperscript{1295} See \textit{supra} note 1184 and accompanying text.

\textsuperscript{1296} See \textit{Bourne \\& Lynch, supra} note 6, at 6, 45, 72.

\textsuperscript{1297} \textit{Cf. supra} note 1290 and accompanying text (punitive damages tried separately by a jury). Lynch and Bourne concede in several other contexts that the justification for Equity's clean-up jurisdiction is eliminated by the merger of Law and Equity. See \textit{supra} note 1275 and accompanying text. Jury trial of legal claims before judge trial of divorce-related claims would hardly be an affront to the legislature because the legislature likely neither considered that divorce-related claims would be combined with claims triable by a jury, nor intended that the jury right would be precluded in such cases. See \textit{Bourne \\& Lynch, supra} note 5, at 63. If the equitable divorce-related claims and the legal claims are not heard together, the divorce court should stay its trial until the legal claims are tried in the other court. See \textit{Md. Code Ann., Cts. \\& Jud. Proc.} § 6-104(a) (1995).

\textsuperscript{1298} See \textit{supra} note 1275 and accompanying text.

\textsuperscript{1299} Bourne \\& Lynch, saying they are "attentive[] to established Maryland principles," resort to the traditional scope of equity. \textit{Bourne \\& Lynch, supra} note 5, at 69.
merger of Law and Equity, the claim to enforce a mechanic’s lien would have been brought in Equity which likely would have cleaned-up the legal counterclaim for damages for breach of contract. Lynch and Bourne conclude that the same approach should generally be taken after merger.

Lynch and Bourne reject Beacon, which would require issues common to both the mechanic’s lien and contract damages to be heard first by a jury. They reject Beacon as “rigid,” less “sensible” than their own approach, and inconsistent with or frustrating the policy of the legislature for prompt adjudication of the lien.

Lynch and Bourne would allow the constitutional jury right to be violated in a suit to foreclose a mechanic’s lien and a counterclaim for breach of contract. If Equity cleaned-up the legal counterclaim, there would be no jury trial at all as to that counterclaim. Lynch and Bourne may overlook some ways, in light of modern procedural developments, to preserve the jury right.

First, the statutory provision for expeditious trial should not preclude the jury right in view of the availability of provisional injunctive relief. Second, as Lynch and Bourne recognize in other

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1300. See id. But see id. at 64 n.412 (citing Brown, supra note 85, at 472, for doubting that Equity would entertain a legal counterclaim). See generally id. at 64-65.

1301. See Bourne & Lynch, supra note 5, at 69. Bourne and Lynch would give the judge discretion to order a separate jury trial of contract damages if the counterclaim exceeded the amount of the lien claim. See id. This discretion existed in some situations before merger. See id. at 34-35 (Equity’s reference of issues of fact to Law); id. at 72-73 (Equity’s transfer of issues of fact to Law).

1302. See id. at 68.

1303. See id. at 69. In a footnote, Bourne and Lynch analogize the clean-up jurisdiction of the court, presumably to assure prompt adjudication, to “the summary equitable jurisdiction which federal bankruptcy courts may exercise over claims asserted in bankruptcy proceedings in furtherance of the congressional purpose of expeditious adjudication.” Id. at 69 n.473; cf. id. at 35 n.226 (citing Katchen v. Landy, 382 U.S. 323, 329-30 (1966), for the proposition that bankruptcy proceedings have been historically characterized as equitable). However, in a case decided after the Bourne and Lynch article, the Supreme Court made it clear that the bankruptcy courts are courts of Equity, not because they proceed in summary fashion, but because they have “actual or constructive possession’ of the bankruptcy estate.” Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 57 (1989) (citing Katchen, 382 U.S. at 327). Delay and expense considerations are not enough to overcome the right to jury trial under the Seventh Amendment. See id. at 63, 64 n.18.

1304. See supra note 1184 and accompanying text.
contexts, the revised Maryland Rules permit a determination of the jury right on an "issue-by-issue" basis, rather than on an "action" basis.\textsuperscript{1305} Thus, even if a judge determines whether the mechanic's lien should be enforced, a jury may determine the factual issues in the contract claim (underlying both the supplier's right to payment and the owner's right to performance) and the counterclaim for damages.\textsuperscript{1306} The jury determination of the contract claims should be heard before the judge determines the establishment of the lien in order to avoid any preclusive effect of earlier judge-tried issues on later jury-tried issues.\textsuperscript{1307} Third, equitable jurisdiction over the lien enforcement claim may be denied because there is an adequate remedy at Law.

In developing the historical right to jury trial in Maryland, Lynch and Bourne discuss the case of Richardson v. Stillinger.\textsuperscript{1308} There, the plaintiff was denied equitable jurisdiction to enforce a statutory vendor's lien because he had an adequate remedy at Law, an action on the note.\textsuperscript{1309} The conclusion of Richardson may have even more force today because of state and federal constitutional developments. Lynch and Bourne note that Richardson, preserving the jury right, was reached under the original Maryland Constitution's jury trial provision, which was regarded as subject to restriction by the legislature,\textsuperscript{1310} not under the current provision, which is designed to protect the jury right from encroachment by the legislature.\textsuperscript{1311} Doctrinally, the adequate remedy at Law principle is probably more protective of the jury right after Beacon and Higgins than it ever has been.\textsuperscript{1312}

A federal constitutional development, that of procedural due process, has eroded the utility of the mechanic's lien.\textsuperscript{1313} While a

\textsuperscript{1305} See supra note 1210 and accompanying text.
\textsuperscript{1306} Cf Bourne & Lynch, supra note 5, at 69 (jury trial at the chancellor's discretion). Lynch and Bourne concede, in several other contexts, that the justification for Equity's clean-up jurisdiction is eliminated by the merger of Law and Equity. See supra note 1275 and accompanying text.
\textsuperscript{1307} See supra notes 1140-42 and accompanying text.
\textsuperscript{1308} 12 G. & J. 477 (1842), discussed in Bourne & Lynch, supra note 5, at 29-30.
\textsuperscript{1309} The action would be one for damages. See Richardson, 12 G. & J. at 481-84.
\textsuperscript{1310} See Bourne & Lynch, supra note 5, at 30 & n.192.
\textsuperscript{1311} See id. at 32 & n.210. But see id. at 33 n.210 (discussing Capron v. Devries, 83 Md. 220, 34 A. 251 (1896)).
\textsuperscript{1312} See supra notes 704-71 and accompanying text.
supplier of construction materials or labor.\footnote{1314} is still permitted a remedy against the improved property itself, the lien no longer attaches automatically without the filing and proof of a claim, and the lien no longer relates back for priority purposes to the commencement of construction.\footnote{1315} Thus, an action by a supplier on a contract with the property owner for money damages, triable of right by a jury, may well provide an adequate remedy at Law.\footnote{1316} A judgment

\footnote{1314} Bourne and Lynch assume that it is the contractor that is the supplier of construction materials or labor. See Bourne \& Lynch, supra note 5, at 68-69. The contractor has not only a remedy against the improved property itself, but a cause of action on the contract against the owner. Even if the supplier is a subcontractor, it may have a cause of action against the owner on one or more of several theories.

First, the owner may be liable in negligence for having paid the contractor without taking precautions to see that suppliers are paid. See Diener v. Cubbage, 259 Md. 555, 563-64, 270 A.2d 471, 476 (1970). That negligence would be underscored by the statute that requires the supplier to give notice to the owner, see Md. Code Ann., Real Prop. § 9-104(a) (1996), and by the owner's right under the statute to withhold the amount claimed by a supplier from payments due the contractor, see id. § 9-104(f).

Second, the owner may be liable to the subcontractor on a contract implied in law. See generally Restatement (Second) of Contracts § 4 (1981). Under the mechanic's lien statute, the owner may be liable to pay the debt of the contractor to the subcontractor. See generally Md. Code Ann., Real Prop. §§ 9-101 to 113 (1996). But cf. Kees v. Kerney, 5 Md. 419, 421-22 (1854) (providing the law creates no contract between owner and subcontractor).

Third, the subcontractor may be a third-party creditor or intended beneficiary implied in law by the contract between the owner and the contractor. See generally Restatement (Second) of Contracts § 302(1) cmt. (d), illus.12 (1984). But see id. § 302, illus.19. The mechanic's lien statute provides for payment to suppliers by the owner, either directly or indirectly through the contractor, for supplies and labor provided for the construction project by the contractor's suppliers. See Md. Code Ann., Real Prop. § 9-104(f) (1996).


\footnote{1316} See Mervin L. Blades \& Son, Inc. v. Lighthouse Sound Marina & Country
creditor's remedies after an action at Law are generally as adequate as the remedies of a supplier who established a mechanic's lien.

The Law judgment also may constitute a lien and may be enforced by sale of property. In certain respects, the Law judgment may be superior to the mechanic's lien, while in other respects, the mechanic's lien may be superior. To the extent the supplier's remedy at Law is adequate, the supplier's claim should be triable by a jury.

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1317. See Md. Rule 2-621.
1320. For example, the filing of a mechanic's lien proceeding may immediately affect title to the owner's property under the doctrine of lis pendens. See generally Janice Gregg Levy, Comment, Lis Pendens and Procedural Due Process: A Closer Look After Connecticut v. Doehr, 51 Md. L. Rev. 1054 (1992). The Law action has no affect on the property until recording of the judgment. See Md. Rule 2-621. The elements for establishing a mechanic's lien are relatively simple and the defenses few. See Md. Code Ann., Real Prop. § 9-105(a) (1996). The elements and defenses related to the Law action may be more complicated. The mechanic's lien statute, unlike the ordinary Law action, provides for expedited proceedings. See Md. Code Ann., Real Prop. § 9-106(a)(1), (a)(3), (b)(3)(vi) (1996). The mechanic's lien statute, unlike a Law action, provides for interim payments to a supplier by the owner. See id. § 9-104(f). The mechanic's lien once established, automatically attaches to the real property. See id. § 9-106(b) (1996); cf. id. § 9-107 (regarding the filing requirement for part of land located in another county). The Law judgment constitutes a lien on real property only if recorded and indexed. See Md. Rule 2-621.
1321. Cf. Dairy Queen Inc. v. Wood, 369 U.S. 469, 477 (1962) (providing that a claim for an accounting that was recast as a claim for a debt on a contract or for trademark infringement would still have adequate remedies at Law).
Fourth, because of the advantages of a Law action, a supplier may join a claim for contract damages with a claim to establish a mechanic’s lien.\textsuperscript{1322} Since equitable relief became available as ancillary relief in an action at Law,\textsuperscript{1323} a suit joining the two claims might be considered a dual action—a determination of the parties’ respective rights and responsibilities on the contract\textsuperscript{1324} or, in tort,\textsuperscript{1325} with liability and damages triable first by a jury, and then the establishment of the lien triable by the judge.\textsuperscript{1326} This approach was taken in a case decided after publication of Lynch and Bourne’s article, \textit{Kahle v. McDonough Builders, Inc.}\textsuperscript{1327}

\textit{But cf.} Richard v. Stillinger, 12 G. & J. 326, 484 (1842) (dismissing a claim on a vendor’s lien where there was an adequate remedy at Law).


\textsuperscript{1323} See supra note 174 and accompanying text.

\textsuperscript{1324} The claim and counterclaim may raise many of the same issues. Cf. Bourne & Lynch, supra note 5, at 70 (providing claim to quiet title and counterclaim for ejectment or trespass to raise the common issue of title).

\textsuperscript{1325} See supra note 1314 (discussing Diener v. Cubbage, 259 Md. 555, 270 A.2d 471 (1970)).

\textsuperscript{1326} A mechanic’s lien, a form of non-injunctive equitable relief, was probably not available as ancillary relief in an action at Law. See Bourne & Lynch, supra note 5, at 55-56 n.360. However, a mechanic’s lien might, nonetheless, be considered within the policy of former Md. Rule BF40. See Bourne & Lynch, supra note 5, at 56.


In their book, Bourne and Lynch state that Kahle held that the claim foreclosing a mechanic’s lien could be tried ahead of a breach of contract counterclaim. See Bourne & Lynch, supra note 5, at 331 n.197. In Kahle, there were no common factual issues in the mechanic’s lien claim and the contract counterclaim. See Kahle, 85 Md. App. at 151, 582 A.2d at 562. Thus, an earlier judicial determination of the mechanic’s lien would have no preclusive effect on the jury-tried contract counterclaim. However, the earlier judicial determination might delay trial of the legal issues and might, therefore, be a violation of the jury right, as suggested by Beacon. See supra notes 1145-47 and accompanying text.

Unlike Bourne and Lynch, I do not believe that Kahle held that the mechanic’s lien claim could be tried ahead of a breach of contract counterclaim. Kahle was a joint jury and bench trial. See Kahle, 85 Md. App. at 143, 582 A.2d at 558 (noting that the judge heard the mechanic’s lien claim at the same time the jury heard the contract counterclaim); cf. id. at 154, 582 A.2d at 563 (“first” of two reasons for the judge hearing another claim for
Fifth, the declaratory judgment action may be an adequate remedy at Law, triable by a jury, in place of an equitable suit to establish a mechanic's lien.

Thus, Lynch and Bourne's approximation of pre-merger approach, their rejection of persuasive federal authority, and their overlooking of ways to preserve the jury right, all exemplify their generally restrictive approach to the right to jury trial in a suit to foreclose a mechanic's lien and a counterclaim for breach of contract.

8. Actions Involving Claims to Quiet Title and Legal Counterclaims

Nominally, Lynch and Bourne take a protective approach to the jury right in actions involving a claim to quiet title and a legal counterclaim for ejectment or trespass. Lynch and Bourne say that Maryland courts have expressed a strong preference for adjudicating land titles at Law, based in part on a desire to preserve the jury right. Because the counterclaim raises the issue of title, a legal matter triable by a jury, the plaintiff has an adequate remedy at Law, the defense to the counterclaim. This legal issue should be tried first by the jury. Any additional equitable relief can later be ordered by the judge.

However, Lynch and Bourne's approach to such actions is really more of an approximation of pre-merger approach. That is, after the merger of Law and Equity, claims of ejectment and trespass, traditionally available at Law, will be triable by a jury; actions to quiet title or remove a cloud from title, traditionally available in Equity where there was no adequate remedy at Law, will be tried by a breach of fiduciary duty with the mechanic's lien claim).

1328. The declaratory judgment may be a legal remedy triable by a jury. See supra notes 1161-68 and accompanying text.


1330. See Bourne & Lynch, supra note 5, at 70; see also supra notes 1185-1213 and accompanying text.

1331. See Bourne & Lynch, supra note 5, at 70.
judge. Lynch and Bourne fail to address existing federal authority involving the right to jury trial in an action involving a claim to quiet title and a legal counterclaim. Federal authority is, however, quite persuasive in this area.

Lynch and Bourne may overlook some ways, in light of modern procedural developments, to preserve the jury right in an action involving a claim to quiet title and a legal counterclaim. First, Lynch and Bourne conclude that a claim for immediate injunctive relief in such an action may be enough, based on pre-merger precedents, to preclude the jury right. Thus, Lynch and Bourne might eliminate the jury entirely. However, as they also suggest, the need for immediate relief should not preclude a jury in an action involving a legal counterclaim. Provisional injunctive relief may be granted pending trial of the land title by a jury.

Second, Lynch and Bourne conclude that after trial of the ejectment or trespass counterclaim by the jury, the trial judge may order additional equitable relief quieting title or removing a cloud from title. Lynch and Bourne, therefore, might eliminate the jury right as to that additional relief. The declaratory judgment, however, may be an adequate remedy at Law, triable by a jury in place of that additional equitable relief.

Third, Lynch and Bourne conclude that if the legal counterclaim to the equitable claim to quiet title was not for ejectment or trespass and did not raise the issue of title, the order of trial would not be significant. There would be no common issues, and an earlier judge trial of the claim to quiet title would have no preclusive effect on a later jury trial of the legal counterclaim. Thus, Lynch and Bourne would allow the jury right to be violated by de-

1332. See id. at 51, 70; see also id. at 70 n.441; id. at 70 n.442 (citing McCoy v. Johnson, 70 Md. 490, 17 A. 387 (1889)). But cf. id. at 52 (after merger, "Maryland precedents" may be limited by the right to jury trial, regardless of whether suit would have been brought in Law or in Equity before merger).

1333. See id. at 37, 52.

1334. See supra note 1190 and accompanying text.

1335. See supra note 1184 and accompanying text.

1336. See Bourne & Lynch, supra note 5, at 70.

1337. See supra note 1209 and accompanying text; see also Waring v. National Sav. Trust Co., 138 Md. 367, 114 A. 57 (1921), discussed in Bourne & Lynch, supra note 5, at 52.

1338. Again, the declaratory judgment may be an adequate remedy at Law, triable by a jury, in place of the claim to quiet title. See supra note 1209 and accompanying text.

1339. See Bourne & Lynch, supra note 5, at 70.
lay. As we have seen, persuasive federal authority may prohibit the postponement, not just the preclusion, of a jury trial by earlier trial by the judge.\textsuperscript{1340} If the legal counterclaim and equitable claim are not tried together, the legal counterclaim should be tried before the equitable claim.

Thus, Lynch and Bourne's apparent approximation of pre-merger approach, their reluctance to even mention (much less accept) persuasive federal authority, as well as their overlooking of ways to preserve the jury right, exemplify their generally restrictive approach to the right to jury trial in actions involving a claim to quiet title and a legal counterclaim.

9. Suits Involving a Claim for Accounting and a Claim for a Legal Remedy

Nominally, Lynch and Bourne also take a protective approach to the jury right in suits involving a claim for an accounting and a claim for a legal remedy.\textsuperscript{1341} Using a hypothetical based on the facts of \textit{Johnson \& Higgins v. Simpson, Inc.},\textsuperscript{1342} they conclude that an employee's claim for contractual benefits, met by the employer's counterclaim for an accounting, should be tried by a jury. Thus, they reach the same result as the federal case, \textit{Dairy Queen, Inc. v. Wood}.\textsuperscript{1343} However, I believe this approach to such suits is more an approximation of pre-merger approach.\textsuperscript{1344} Even before merger of Law and Equity, discovery was an adequate remedy at Law for an accounting in many situations,\textsuperscript{1345} with a jury trial on the legal claim.\textsuperscript{1346} However, Lynch and Bourne suggest that in some situa-

\footnotesize{
1340. \textit{See supra} notes 1142-44 and accompanying text.
1341. Bourne and Lynch discuss this situation in terms of a legal claim for contract damages and a counterclaim for an accounting. \textit{See Bourne \& Lynch, supra} note 5, at 71. However, their logic would also cover the converse situation: a claim for an accounting and a counterclaim for legal relief. \textit{See id.} at 71, 75-76.
1342. 165 Md. 83, 166 A. 617 (1933), \textit{discussed in} Bourne \& Lynch, \textit{supra} note 5, at 70-71.
1344. There is doubt about whether a Law court would entertain a counterclaim for an accounting before the merger of Law and Equity. \textit{See generally} Bourne \& Lynch, \textit{supra} note 5, at 64. However, the jury trial issue would arise if an accounting was sought in a separate suit and then Equity sought to enjoin the action at Law. \textit{See id.} at 71.
1345. \textit{See id.} at 71 \& n.450 (citing \textit{Johnson v. Bugle Coat Apron \& Linen Serv.}, 191 Md. 268, 60 A.2d 686 (1948)).
1346. \textit{See} Bourne \& Lynch, \textit{supra} note 5, at 70-71 (discussing \textit{Johnson \& Higgins}).
}
tions the remedy at Law may be inadequate; therefore, an equitable accounting may be needed. Lynch and Bourne identify three factors that may justify equitable jurisdiction—a fiduciary or confidential relationship between the parties, an ongoing relationship that raises the possibility of a multiplicity of actions, and where an accounting is sought against the party in possession of the accounts. Thus, Lynch and Bourne used the *Beacon* and *Dairy Queen*

Bourne and Lynch are ambivalent about whether the right to jury trial was the basis for the holding in *Johnson & Higgins*. Compare Bourne & Lynch, supra note 5, at 31 (stating the court of appeals "did not decide whether assumption of equitable jurisdiction over what was essentially a defense to a legal action would unconstitutionally infringe the equity defendant's right to trial by jury"), with id. at 71 (stating the court of appeals "held that accounting was not appropriate, partly because the party seeking the accounting controlled the records and partly because adjudication of the issues common to both actions . . . would preclude the company's [sic] right to trial by jury in the action at law").

1347. See id. at 31, 71.

1348. See id. at 38-42. But cf. id. at 39-40 (providing discovery may be an adequate remedy at Law where no other grounds of equitable jurisdiction is asserted).

1349. See id. at 42-44. But see id. at 31, 38, 44 (stating that multiplicity, as a basis for equitable jurisdiction, has been rendered obsolete by modern joinder rules).

1350. See id. at 42-43. But cf. id. at 43 (providing that discovery may be an adequate remedy at Law).

Interestingly, Bourne and Lynch take a comparatively narrow view of equitable accounting before merger, but a comparatively broad view of equitable accounting after merger. Historically, according to commentary, Equity had jurisdiction of an accounting, regardless of whether there was an adequate remedy at Law, where there was a trust or fiduciary relationship. See, e.g., McClintock, supra note 741, §§ 200-01. There was support for this view in Maryland law. See, e.g., Legum v. Campbell, 149 Md. 148, 131 A. 147 (1925). However, Bourne and Lynch state that the relationship was not enough. There must also have been a need for discovery of the accounts kept by the trustee or fiduciary. See Bourne & Lynch, supra note 5, at 39-40, 42-43. According to commentary, Equity also had jurisdiction of an accounting, even absent such a relationship, where the accounts were complicated, making the remedy at Law inadequate. See, e.g., McClintock, supra note 741, at §§ 200, 202; see also Bourne & Lynch, supra note 5, at 24, 42 n.266 (discussing *Dairy Queen*). However, Bourne and Lynch state that resorting to an accounting would rarely have been appropriate where the accounts were complex. See Bourne & Lynch, supra note 5, at 42 & n.267; cf. id. at 31 n.195 (discussing whether accounts were sufficiently complex to give Equity jurisdiction). After merger, however, Bourne and Lynch suggest that equitable accounting may be broader in Maryland than equitable accounting is in the federal courts. See id. at 75-76; see also id. at 25 n.148. But cf. id. at 71 (stating that Maryland courts would reach the same result as the *Dairy Queen* Court did in a hypothetical based on *Johnson & Higgins*).
decisions as points of comparison, not as persuasive authority. 1351

Lynch and Bourne may overlook some ways, in light of modern procedural developments, to preserve the jury right in suits involving a claim for an accounting and a claim for a legal remedy. Their approximation of pre-merger approach is protective of the jury right in their hypothetical based on the facts of Johnson & Higgins. 1352 If the facts were different, however, their approach would likely not be protective of the jury right. It is in those different hypotheticals that Lynch and Bourne may overlook ways to preserve the jury right.

In those situations where Lynch and Bourne find no adequate remedy at Law for an accounting, they would try those claims by the judge. 1353 Thus, Lynch and Bourne might eliminate the jury as to the accounting claim. If the accounting claim were tried by the judge before trying the contract claim by the jury, the jury might be precluded from determining common facts underlying the contract claim. 1354 If the accounting claim were tried by the judge, who used Equity's clean-up to try the legal claims as well, 1355 the jury might be eliminated entirely. Yet, as the persuasive Dairy Queen case held, those situations should be tried by the jury because there is an adequate remedy at Law. 1356

In some cases the claim for accounting may be, as in Dairy Queen, just a "choice of words used in the pleadings" to cover for a claim of damages and thereby avoid trial by jury. 1357 In those cases,

1351. See Bourne & Lynch, supra note 5, at 71. Bourne and Lynch also refer to Maryland cases and state that the judge has a choice between Law or Equity. In addition, they state that the choice is governed by the adequate remedy at Law standard. Bourne and Lynch conclude that their analysis of the hypothetical based on the facts of Johnson & Higgins reaches "the same result as in Dairy Queen." Id.

1352. See supra notes 1342-43 and accompanying text.

1353. See supra notes 1348-50 and accompanying text.

1354. Cf. Bourne & Lynch, supra note 5, at 69 (actions involving a suit to foreclose a mechanic's lien and a counterclaim for breach of contract). But cf. id. at 70 (discussing actions involving a claim to quiet title and legal counterclaims).

1355. See id. at 71 ("Maryland has permitted equity to preclude the right to trial by jury when there is an adequate remedy at law . . . ."); see also id. at 34, 75-76 (opining that Equity, once it exercised jurisdiction on a claim for an accounting, could clean-up legal claims). But see id. at 54-55 (stating that the justification for Equity's clean-up jurisdiction was eliminated by the merger of Law and Equity).


the jury should try the so-called claim for accounting, as well as the
claim for a legal remedy. In other cases, Lynch and Bourne are less
likely than are the federal courts to find an adequate remedy at
Law for an accounting. Generally, they are more likely to use the
adequate remedy at Law doctrine to expand, rather than contract,
Equity jurisdiction.\textsuperscript{1358} Specifically, while Lynch and Bourne do men­
tion that discovery may be an adequate remedy at Law for an equi­
table accounting,\textsuperscript{1359} they do not mention other possible adequate remedies at Law for an accounting.\textsuperscript{1360} In addition, Lynch and
Bourne suggest that after merger, equitable accounting may be
broader in Maryland than in the federal courts.\textsuperscript{1361} Second, in
Lynch and Bourne’s hypothetical, the employer counterclaimed for
an accounting. In the \textit{Johnson \& Higgins} case itself, the employer al­
leged that the employee had embezzled money and that the con­
tract should be rescinded. Elsewhere, Lynch and Bourne have char­
acterized rescission as “purely equitable” and fraud, as a basis for
such relief, as “essentially equitable.”\textsuperscript{1362} They would try those claims
by the judge, thereby eliminating the jury.\textsuperscript{1363} However, the charac­
terization of those claims as rescission based on fraud, no less than
as an accounting, would violate the jury right.\textsuperscript{1364} In both of these
situations, Maryland practice should conform with federal practice
and preserve the jury right.\textsuperscript{1365}

Thus, Lynch and Bourne’s approach exemplifies their generally
restrictive approach to the right to jury trial in suits involving a
claim for an accounting and a claim for a legal remedy.

10. Actions in Which Adjudication of Equitable Issues is a Prereq­
uisite to Adjudication of Claims Triable by Jury

In considering actions in which adjudication of equitable issues
is a prerequisite to adjudication of claims triable by jury, Lynch and
Bourne distinguish between actions in which the equitable issue is a

\textsuperscript{1358} See \textit{supra} notes 704-87 and accompanying text.

\textsuperscript{1359} See \textit{Bourne \& Lynch, supra} note 5, at 39-40, 43, 71.

\textsuperscript{1360} See \textit{supra} note 1350.

\textsuperscript{1361} See \textit{supra} note 1350.

\textsuperscript{1362} See \textit{supra} note 1355-56 and accompanying text (possible preclusion or clean­
up).

\textsuperscript{1363} See \textit{infra} notes 1469-83 and accompanying text.
narrow procedural determination and actions in which the equitable relief is more substantial. The following analysis follows that distinction.

a. Narrow Equitable Procedural Determinations

Lynch and Bourne classify the narrow equitable procedural determinations as "historically equitable actions which are essentially joinder devices." They include in this category class action, interpleader, shareholders' derivative suit, intervention, subrogation, receivership, and assignment. Lynch and Bourne take an approximation of pre-merger approach to actions involving legal claims in any one of these historically equitable actions. In other words, they are guided by "traditional practices" which provided for Equity's reference of factual issues to Law for trial by jury, to transfer from Equity to Law of factual questions, and which, by court decision or by court rule, permitted jury trial of legal claims brought by persons holding power under certain equitable doctrines. In these situations, Lynch and Bourne would generally continue to have the trial judge resolve the equitable issues first and then have the jury hear the legal claims.

Lynch and Bourne refer favorably to the federal precedent of Ross v. Bernhard, a case in the Beacon line. The Ross Court held that the legal claims in a shareholders' derivative suit, traditionally an equitable proceeding, were triable of right by a jury. However, Lynch and Bourne rely on the earlier Maryland case of Allender v. Gingham as much as on Ross.

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1366. See Bourne & Lynch, supra note 5, at 72-77.
1367. Id. at 73.
1368. See id. at 72-73, 76.
1369. See id. at 73; see also id. at 75 ("Maryland's courts"); id. at 76 ("Maryland cases" and "Maryland practice"); id. at 77 ("established Maryland procedure").
1370. See id. at 34-35, 72.
1371. See id. at 72-73.
1372. See Allender v. Gingham, 170 Md. 156, 183 A. 610 (1936) (holding that a liquidating bank is not entitled to maintain a suit in equity to enforce stockholder liability).
1374. See Bourne & Lynch, supra note 5, at 73, 74-75. But cf. id. at 74 (limited jury right of legal claims in interpleader).
1376. 170 Md. 156, 183 A. 610 (1936).
Lynch and Bourne may overlook ways, in light of modern procedural developments, to preserve the jury right in actions involving legal claims in these historically equitable procedural actions. First, Lynch and Bourne would have some equitable procedural issues in these actions heard first by the judge, eliminating jury trial of those issues. Yet, as Lynch and Bourne recognize, some of these historically equitable procedural actions, such as class action and intervention, were brought into Law from Equity even before merger. Thus, issues of fact as to these equitable procedures in an action at Law might be triable by a jury.

Second, Lynch and Bourne do not consider whether there might be an adequate remedy at Law, triable by a jury, for these historically equitable procedural actions. For example, the declaratory judgment might be an alternative to interpleader or actions relating to subrogation or assignment. As noted above, the declaratory judgment may be triable by a jury.

Third, in any event, if there is an issue common to the equitable procedure and the legal claim, that issue should be heard first by the jury. This would avoid a loss of the jury right through an earlier determination of the issue, as an equitable one, by the judge.

1377. Compare Bourne & Lynch, supra note 5, at 74-75 (both cases cited), with id. at 75 (only Allender cited), and id. at 76 (only Ross cited).
1378. Cf. Ross, 396 U.S. at 539 (stating that historically equitable procedural actions might have been borrowed from Equity by Law).
1379. See Bourne & Lynch, supra note 5, at 73; see also id. at 36 (discovery); id. at 45 n.291 (liberal joinder); cf. id. at 55-60 (injunction as ancillary remedy at Law, but triable under equitable principles to the judge).
1380. Cf. id. at 47-50 (discussing jury right in a declaratory judgment, a remedy unknown at common law but now within the concurrent jurisdiction of Law and Equity).
1381. See Borchard, supra note 1209, at 363-65.
1382. See id. at 544-45.
1383. See id. at 580-81.
1384. See supra notes 1176-82 and accompanying text.
1385. See Higgins v. Barnes, 310 Md. 532, 540-41, 545, 551, 530 A.2d 724, 728, 730, 733 (1987). Higgins was decided after the Bourne and Lynch article and they discussed it at length in Lynch & Bourne, supra note 3, at 327-37. See generally, e.g., Hashem v. Taheri, 82 Md. App. 269, 571 A.2d 837 (1990). Hashem was also decided after Bourne and Lynch’s article, and they noted it in Lynch & Bourne, supra note 3, at 336 n.222. In Hashem, the issue of whether the plaintiff was a shareholder of the corporation in a shareholders’ derivative suit was held to be triable of right by a jury because it was essential to plaintiff’s legal claims, as well as to the preliminary equitable issue of whether he had standing to sue for the corporation. See Hashem, 82 Md.
Fourth, Lynch and Bourne lump interpleader with the other historically equitable procedural actions in which legal claims are subject to jury trial under Ross and Allender.\footnote{1386} Yet, Lynch and Bourne make an exception, limiting the jury right in interpleader, because the "policy" of the former rule,\footnote{1387} which provided for trial by jury only when demanded by the defendant, could be construed as continued in the revised rule.\footnote{1388} However, commentaries on the revised rule take an approach much more protective of the jury right, one consistent with Ross and Allender.\footnote{1389}

Thus, Lynch and Bourne's approximation of pre-merger approach, their somewhat reluctant acceptance of persuasive federal authority, and their overlooking of ways to preserve the jury right, all exemplify their generally restrictive approach to the right to jury trial in actions involving legal claims in historically equitable procedural actions.

b. More Substantial Equitable Relief

Lynch and Bourne include reformation, cancellation, rescission, specific performance of contracts,\footnote{1390} and accounting\footnote{1391} in the category of more substantial equitable relief. Lynch and Bourne take an approximation of pre-merger approach to actions involving legal claims in one of these historically equitable actions. In other words, "Maryland cases"\footnote{1392} provided for Equity's clean-up of legal

\footnotetext{1386}{See Bourne & Lynch, supra note 5, at 72-73, 76.}  
\footnotetext{1387}{See Md. Rule BU73 (1977) (repealed 1984).}  
\footnotetext{1388}{See Md. Rule 2-221(c); see also, Bourne & Lynch, supra note 5, at 74. Thus, Bourne and Lynch appear to permit court rules to limit the constitutional jury right. But cf. infra notes 1585-95 and accompanying text (providing that interpleader rules extend the constitutional jury right).}  
\footnotetext{1389}{See Commentary on the New Maryland Rules of Civil Procedure, 43 Md. L. Rev. 669, 735 (1984) ("[I]nterpleader does not abridge any preexisting right to a jury trial on an underlying action."). Niemeier & Schuett, supra note 1, at 136, states generally that practice under the rule will be similar to practice under the federal rule. Specifically, while there would not be a right to jury trial of a historically equitable order of interpleader, see id. at 137, 140, there would be a jury right by all the parties of legal claims and defenses (e.g., contract and fraud) in either a "pure" interpleader action or in an action in the nature of interpleader. See id. at 138-40; see also infra notes 1576-95 and accompanying text.}  
\footnotetext{1390}{See Bourne & Lynch, supra note 5, at 72, 75-76.}  
\footnotetext{1391}{See id. at 75-76.}  
\footnotetext{1392}{Id. at 76; cf. id. at 75 ("many cases"); id. at 76 ("lines of authority" and "Maryland practice"); id. at 77 ("established long ago" and "established Maryland practice").}
claims in these historically equitable actions. Lynch and Bourne would have a jury trial of the legal claims, after determination of the equitable remedy, only at the trial judge's discretion.

Lynch and Bourne distinguish federal authority, at least Ross v. Bernhard, as limited to cases where narrow equitable procedural determinations must be made. They do not consider other federal authorities that may bear on the jury right in cases where more substantial equitable relief is sought, although they suggest they are departing from "federal post-merger practice." Lynch and Bourne may overlook ways, in light of modern procedural developments, to preserve the jury right in actions involving legal claims in cases where more substantial equitable relief is sought. First, before the merger of Law and Equity, Equity's clean-up jurisdiction was justified by avoiding the cost, delay, and inconvenience of duplicate proceedings in Law and Equity. After merger, those justifications no longer exist to preclude the jury right. Second, developed above, there may be adequate remedies at Law, triable by a jury, for these more substantial equitable remedies.

1393. See id. at 75-77.
1394. See id. at 77. Bourne and Lynch's discussion of this point appears to contain an inadvertent error. Before the sentence in question, Bourne and Lynch note the broad sweep of Equity powers and conclude that those powers would not likely be reevaluated. After the sentence in question, Bourne and Lynch note that, traditionally, once equitable jurisdiction has attached, it would clean-up any legal claims, regardless of the availability of a remedy at Law. The sentence with the addition of the bracketed word, which I believe corrects the error, follows: "It seems that such a re-evaluation would [not] preclude the chancellor from deciding the entire case once equitable jurisdiction has attached." Id. at 77.
1396. See Bourne & Lynch, supra note 5, at 76-77. See generally supra notes 1368-89 and accompanying text.
1398. Bourne & Lynch, supra note 5, at 77.
1399. See id. at 54-55, 76.
1400. See id. at 54-55.
1401. See supra note 1224 and accompanying text ("reformation at Law" may be adequate for reformation); supra notes 1225-26 and accompanying text (declaratory judgment may be adequate for rescission and, presumably, reformation); supra note 1281 and accompanying text (specific performance); supra note 1227 and accompanying text (an action for money had and received may be adequate for rescission and restitution); supra note 1278 and accompanying text (replevin may be adequate for specific performance of a con-
Third, even if there are no adequate remedies at Law, Lynch and Bourne might require specific findings by the trial judge that there are strong grounds for believing that the equitable remedies will issue and that the adjudication of equitable claims is a prerequisite for adjudication of the legal claims.\textsuperscript{1402} Those findings may be necessary to protect the jury right in cases where the equitable claims are not prerequisites, but are supplementary to,\textsuperscript{1403} alternatives to,\textsuperscript{1404} or characterizations of\textsuperscript{1405} the legal claims. Fourth, even if the equitable claims are prerequisites to the legal claims, preserving the jury right may first require trial of any factual issues common to the equitable and legal claims by the jury.\textsuperscript{1406} Lynch and Bourne recognize this in one context.\textsuperscript{1407} If necessary, perhaps provisional injunctive relief could be granted pending trial.\textsuperscript{1408}

\textsuperscript{1402} \textit{Cf.} Bourne \& Lynch, \textit{supra} note 5, at 62 (suits joining claims for specific performance of a contract for real property); \textit{supra} note 1279 and accompanying text (ejectment may be adequate for specific performance of a contract for real property); \textit{supra} note 1360 and accompanying text (the common-law common counts of money lent, money paid, money had and received, or account stated may be adequate for accounting). In addition, the adequate legal remedies may become available with a defendant's counterclaims. \textit{Cf. supra} note 1331 and accompanying text (action to quiet title with a counterclaim for ejectment or trespass); \textit{supra} notes 1341-42 and accompanying text (claim for accounting and counterclaim for damages). \textit{See generally} Beacon, 359 U.S. at 506-07, 509.

\textsuperscript{1403} \textit{Cf.} Bourne \& Lynch, \textit{supra} note 5, at 62 (suits joining claims for specific performance and damages). Bourne and Lynch's hypothetical, based on \textit{Damazo v. Wahby}, 269 Md. 252, 305 A.2d 138 (1973), illustrates the need for these findings. \textit{See} Bourne \& Lynch, \textit{supra} note 5, at 76-77. The authors hypothesize that a plaintiff seeks both the equitable remedy of setting aside a fraudulent conveyance and the legal remedy of money damages. \textit{See id.} Bourne and Lynch assume that the trial judge, after determining that the fraudulent conveyance could not be set aside, would likely clean-up the damages claim. Thus, the jury right would be side-stepped in a case where the equitable remedy was neither actually issued nor a prerequisite to the legal claim.

\textsuperscript{1404} \textit{Cf. id.} at 62 (discussing suits to enjoin interference with a business relationship and for damages).

\textsuperscript{1405} \textit{Cf. supra} note 1357 and accompanying text (discussing specific performance, if chattels are unique, and damages, if they are not).

\textsuperscript{1406} \textit{See supra} notes 1136-39 and accompanying text.

\textsuperscript{1407} \textit{See} Bourne \& Lynch, \textit{supra} note 5, at 55 (rescission and damages).

\textsuperscript{1408} \textit{See supra} note 1184 and accompanying text. \textit{But cf.} Bourne \& Lynch, \textit{supra} note 5, at 55-56 (ancillary injunction at Law may not include non-injunctive equitable relief).
Thus, Lynch and Bourne’s approximation of pre-merger approach, their reluctance to accept persuasive federal authority, and their overlooking of ways to preserve the jury right, all exemplify their generally restrictive approach to the right to jury trial in actions involving legal claims in cases where more substantial equitable relief is sought.

B. The Book

This Article now turns to Lynch and Bourne’s book, written in 1993, almost a decade after the merger of Law and Equity in Maryland. Significantly, the book came after the decision of the Court of Appeals of Maryland in *Higgins v. Barnes*, which adopted the *Beacon* protective approach to the constitutional right to jury trial. However, even after *Higgins*, Lynch and Bourne fall back on their approximation of pre-merger approach. They are like the professor who vows to end future classes promptly when students remark upon the lateness of the hour, but who then continues to hold classes overtime.

Again, this Article considers in detail three characteristics of Lynch and Bourne’s approach to problem situations. First, they usually try to approximate the way the jury right was applied before the merger of Law and Equity. Second, if they accept recent, post-merger Maryland precedent and persuasive federal authority, it is only reluctantly. Third, they often overlook ways to preserve the jury right in light of modern procedural developments. Thus, their approximation of pre-merger approach is generally restrictive of the jury right.

Professors Lynch and Bourne’s book examines in some depth the right to jury trial in nine problem situations. Four of those situations, which are not considered in depth here, deal with the jury right independently of the distinction between Law and Equity. Those situations are the right to jury trial after default, in ap-

1409. See *LYNCH & BOURNE*, supra note 3.
1410. See id. (discussing Higgins v. Barnes, 310 Md. 532, 530 A.2d 724 (1987)).
1411. See id. at 541-51, 530 A.2d at 729-33.
1412. See supra note 1132 and accompanying text.
1413. While approximating pre-merger, Bourne and Lynch, as detailed above, largely ignore the constitutional aspect of the jury right, see supra note 1130 and accompanying text, and also abandon their own principled discretionary theory, see supra note 1131 and accompanying text.
peals of administrative agency orders in the circuit courts,1415 in suits against the government,1416 and in contempt cases.1417 The other five situations, which are considered in some depth here, do relate to

However, as they note elsewhere in their book, Md. RULE 2-613 contemplates a two-step process—an order of default, entered after the defendant's failure to plead, and a default judgment, entered after a determination of liability and relief. See Lynch & Bourne, supra note 3, at 604-09. As Bourne and Lynch recognize, this problem situation, in view of earlier precedents, raises a substantial constitutional jury right question. See id. at 309.

1415. See Lynch & Bourne, supra note 3, at 320-24. As Bourne and Lynch recognize, this situation may raise a substantial constitutional jury right question in view of an earlier Maryland precedent, State v. Rutherford, 145 Md. 363, 125 A. 725 (1924), (discussed in Lynch & Bourne, supra note 3, at 321-22). See also Lynch & Bourne, supra note 3, at 323 (discussing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) (analogous federal case); cf. supra notes 340-45 and accompanying text (stating that, by analogy, the Sixth Amendment right to jury trial in criminal cases may apply in administrative proceedings, such as those adjudicating "public" rights, Lynch & Bourne, supra note 3, at 323, which are substitutes for criminal proceedings).

The legislature's power to preclude trial by jury is not supported by the authors' authority. See Capron v. Devries, 83 Md. 220, 34 A. 251 (1896); see also supra notes 792-837 and accompanying text.

1416. See Lynch & Bourne, supra note 3, at 324. While Bourne and Lynch do not mention it, there is a substantial debate over the constitutional right to jury trial in suits against the federal government. Compare Lehman v. Nakshian, 453 U.S. 156, 162 n.9 (1981) (holding that there is no constitutional jury right in an action against the United States), with Doe v. American Nat'l Red Cross, 847 F. Supp. 643, 646 (W.D. Wis. 1994) (holding there is a jury right in an action against a federal agency having authority to "sue and be sued"), and Carlson v. Green, 446 U.S. 14, 22 (1980) (dictum) (stating that there is a jury right in action against federal official). See generally, Jason Weedon, Note, Historically Immune Defendants and the Seventh Amendment, 74 Tex. L. Rev. 655 (1996). The debate will eventually be joined in suits against the state.

1417. As Lynch and Bourne recognize, if the contempt sanction is really a criminal one, this situation may raise a substantial constitutional jury right question. See id. at 325 & n.163 (imprisonment for more than six months); United Mine Workers v. Bagwell, 512 U.S. 821 (1994) (holding serious fines for contempt require a criminal jury trial); see also supra notes 342-45 and accompanying text. Bagwell suggests that another constitutional defect with the contempt power is that it fuses legislative, executive, and judicial powers in the judge. See United Mine Workers, 512 U.S. at 831. In contempt cases, it seems that a jury is most needed. See supra notes 384, 386, 390 and accompanying text. See generally Ronald L. Goldfarb, The Contempt Power 293 (1963) (coercive civil contempt abused by a party seeking indefinite imprisonment of an opponent). For an example of a long period of confinement in a coercive civil contempt case, see Kate Shatzkin, Bouknight Case Tests Limits of Contempt: Missing Child's Jailed Mother Refuses To Talk for 7 Years, The Sun (Balt.), Feb. 12, 1995, at F1.
the distinction between Law and Equity. Those situations are as follows: (1) the right to jury trial in newly created causes of action; (2) the right to jury trial in three situations in which legal and equitable claims or issues are combined—actions in which a historically legal claim is joined with a historically equitable claim for which there is no adequate remedy at Law, actions in which a historically legal claim is joined with some preliminary equitable procedural matter, and equitable actions of accounting; and (3) the right to jury trial in declaratory judgment actions.

1. Newly-Created Causes of Action

Lynch and Bourne nominally take a strict historical approach to whether new causes of action, created by the legislature or the courts, are legal or equitable. In other words, if the new causes of action are analogous to rights and remedies at common law existing in 1776, the date of the first constitutional jury right in Maryland, those new causes are triable by a jury; if the new causes of action are analogous to equitable rights and remedies existing in 1776, the new causes are not triable by a jury. However, Lynch and Bourne actually take a different approach to whether new causes of action are legal or equitable. First, Lynch and Bourne state that in most cases “the question of whether an action is triable by jury may be resolved by looking to see whether before merger such action was adjudicated in courts of law or in courts of equity.” Second, Lynch and Bourne’s nominal, strict historical approach relies on one case, Pennsylvania ex rel. Warren v. Warren, a case which cited no Maryland precedent for that point and whose approach has not been followed in any subsequent, reported Maryland case. Third, Lynch and Bourne make it clear that the legislature and the courts are free to assign causes of action to Law or Equity. Thus, Lynch and Bourne essentially take an approximation of pre-merger approach to whether new causes of action are legal or equitable.

Lynch and Bourne refer favorably to the federal precedents of

1418. Here, Bourne & Lynch, by using analogies, depart from their avowed strict historical approach. See supra notes 506-632 and accompanying text.
1419. See LYNCH & BOURNE, supra note 3, at 312-15.
1420. Id. at 312 (emphasis added); see also id. at 318.
1421. 204 Md. 476, 105 A.2d 488 (1954); see supra notes 536, 546 and accompanying text.
1422. See LYNCH & BOURNE, supra note 3, at 316-18.
The Right to Trial by Jury

Curtis v. Loether, Tull v. United States, and Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, all cases in the Beacon line. Those cases held that the jury right in new causes of action depended on historical analogies to legal rights and remedies existing in 1791, the time the Seventh Amendment was adopted. However, Lynch and Bourne rely as much on the earlier Maryland case, Warren, as on the federal precedents. Lynch and Bourne do note that Higgins cited Tull with approval.

Lynch and Bourne overlook several ways to preserve the jury right in the trial of new causes of action. First, Lynch and Bourne's cut-and-dried use of the categories of Law and Equity does not recognize a pitfall for the jury right. A party may characterize a new cause of action in equitable rather than legal terms to avoid trial by jury. This pitfall is most apparent where a party claims rights analogous to equitable rights or remedies analogous to equitable remedies that Law has "borrowed" from Equity. In order to preserve the jury right, the courts should "see-through" the characterization of legal rights and remedies in equitable terms. Second, another pitfall in the use of the categories of Law and Equity is that a party may claim new rights and remedies that are analogous to those existing in both Law and Equity. Because the constitutional right is a jury trial, not a judge trial, the courts should prefer the

1427. See id. at 315. Bourne and Lynch also cite two other Maryland cases for support. See id. at n.75 (citing Impala Platinum, Ltd. v. Impala Sales (U.S.A.) Inc., 283 Md. 296, 389 A.2d 889 (1978), and Fink v. Pohlman, 85 Md. App. 106, 582 A.2d 539 (1990)).
1429. Bourne and Lynch discuss this problem in another situation. See Lynch & Bourne, supra note 3, at 332-33 (discussing Dairy Queen (claim for money judgment cast in terms of an accounting)).
1430. Fraud is one example. In a footnote, Bourne and Lynch, do recognize the possibility of an adequate remedy at Law. See id. at 316 n.82. See generally McClintock, supra note 741, at 5.
1431. In a footnote, Bourne and Lynch recognize the possibility of discovery in an action at Law. See Lynch & Bourne, supra note 3, at 319 n.124.
1433. See supra notes 86-95 and accompanying text.
legal, rather than equitable, rights and remedies.\footnote{434} Third, as detailed above, Lynch and Bourne say that the legislature and the courts are free to assign new causes of action to Law or Equity.\footnote{435} However, as developed above, the legislature and the courts are limited in doing so by the constitutional jury right.\footnote{436}

Thus, Lynch and Bourne's essential approximation of pre-merger approach, their reluctant acceptance of persuasive federal authority, and their overlooking of ways to preserve the jury right, all exemplify their generally restrictive approach to the right to jury trial in newly-created causes of action.

2. Actions in Which Legal and Equitable Claims or Issues are Combined

Lynch and Bourne, in considering actions in which legal and equitable claims or issues are combined, distinguish among three situations as follows: (1) actions in which a historically legal claim is joined with a historically equitable claim for which there is no adequate remedy at Law, (2) actions in which a historically legal claim is joined with some preliminary equitable procedural matter, (3) and equitable actions of accounting.\footnote{437} Those distinctions are used here.

a. Actions in Which a Historically Legal Claim is Joined with a Historically Equitable Claim

In their book, Lynch and Bourne consider actions in which a legal claim is joined with an equitable claim as one situation.\footnote{438} However, in their earlier article, they treated these actions as seven situations: three where a plaintiff claims legal and equitable relief simultaneously, three where legal claims are met by equitable counterclaims (or vice versa), and one where adjudication of a substantial equitable issue is a prerequisite to adjudication of a legal issue.\footnote{439}

\footnote{434. See Chauffeurs, Teamsters & Helpers Local No. 391, 494 U.S. at 580 (Brennan, J., concurring) ("tie-breaker" in favor of jury trial).}
\footnote{435. See supra note 1422 and accompanying text.}
\footnote{436. See supra notes 788-866 and accompanying text.}
\footnote{437. See Lynch & Bourne, supra note 3, at 326-37.}
\footnote{438. See id. at 326-35, 337.}
\footnote{439. See Bourne & Lynch, supra note 5, at 2, 55-77. However, in this last situation they distinguish between actions in which the equitable issue is a narrow procedural determination and actions in which equitable relief is more substantive. See supra note 1366 and accompanying text.}
Because of *Higgins*, Lynch and Bourne generally follow the federal *Beacon* line of cases in taking a protective approach to the jury right.\footnote{1440} In other words, where legal and equitable claims are joined and involve common facts, those facts are triable of right first by a jury.\footnote{1441} In generally following the federal, protective approach and in treating all actions joining legal claims with equitable claims under one heading, Lynch and Bourne depart from the discussion in their article. In their article, as developed above, Lynch and Bourne took an approximation of pre-merger approach,\footnote{1442} which was applied in the seven specific situations. Interestingly, in their book, Lynch and Bourne depart from that approach without comment.\footnote{1443}

While Lynch and Bourne generally accept the recent, post-merger Maryland precedent of *Higgins* and the persuasive federal authority of *Beacon*, they seem to do so reluctantly. This reluctance is apparent in three ways. First, in their general discussion, Lynch and Bourne take a narrow view of the endorsement by *Higgins* of the *Beacon* line of cases.\footnote{1444} Second, the authors predict that *Beacon* and its progeny will be accepted in Maryland,\footnote{1445} rather than recognize that they already have been accepted in Maryland.\footnote{1446} Third, they quote two portions of the *Beacon* dissent with approval.\footnote{1447}

Although Lynch and Bourne generally take a protective approach to the jury right in actions in which a legal claim is joined with an equitable claim, they overlook several ways to preserve the

\footnote{1440. See *LINCH & BOURNE*, supra note 3, at 327-28, 331, 335, 337.}
\footnote{1441. See id. at 328, 331.}
\footnote{1442. See supra notes 1236, 1262, 1283-87, 1299, 1332, 1344, 1367-74, 1390-93 and accompanying text.}
\footnote{1443. In their book, Bourne and Lynch seem to accept not just a narrow reading of *Beacon* (jury trial of legal issues in a case including the plaintiff's equitable claim and the defendant's legal counterclaim), but *Beacon*, its progeny, and their implications. See *LINCH & BOURNE*, supra note 3, at 328, 335, 337.}
\footnote{1444. See id. at 331, 334-35. But see id. at 328, 335, 337.}
\footnote{1445. See id. at 335, 337.}
\footnote{1446. See supra notes 192-205 and accompanying text.}
\footnote{1447. See *LINCH & BOURNE*, supra note 3, at 329 n.188, 330 n.191.}
jury right in such actions. First, as already noted above in discussing Lynch and Bourne's article, there may be adequate remedies at Law, triable by a jury, for these equitable claims. Second, the authors may have overlooked the significance of one aspect of Higgins. They note that Higgins pointed out that the legal issue of breach of contract was raised as well by the defendant's answer to the plaintiff's claim to specific performance of a contract, as it was by the defendant's counterclaim for damages on the contract. However, Lynch and Bourne miss the significance of that point in Higgins. If a plaintiff claims an equitable remedy for violation of a tort or contract duty, the defendant's answer denying the duty may raise a legal issue triable by a jury, even without a counterclaim. Thus, there may be a right to jury trial where only an equitable remedy is requested if the underlying claim is a legal one in which facts are contested. Third, Lynch and Bourne conclude that the jury right is in danger only where there is a factual overlap in the legal and equitable claims so that a determination of equitable issues by the judge would preclude the right to later jury trial of common legal issues. However, Beacon suggests that there may be a violation of the jury right if there is a delay of trial of a legal claim by the jury by the earlier trial of an equitable claim by the judge, even where there is no preclusion.

Thus, while Lynch and Bourne generally accept the protective federal approach, their reluctance in doing so and their overlooking of ways to preserve the jury right both exemplify their generally restrictive approach to the right to jury trial in actions in which a historically legal claim is joined with a historically equitable claim.

1448. Where the equitable claim is made as a pretext to avoid the jury right, the adequate remedy at Law may be apparent. See, e.g. Dairy Queen v. Wood, 369 U.S. 469 (1962). See generally supra note 1358 and accompanying text.
1450. Cf. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504, 506-09 (1959) (right to jury trial on the plaintiff's claim for declaratory judgment that it was not in violation of antitrust laws).
1451. See Lynch & Bourne, supra note 3, at 331.
1452. See supra notes 1144-46 and accompanying text. It may be that dividing a trial between the judge and jury is inefficient, as well as a delay.
Professors Lynch and Bourne consider historically legal claims joined with some preliminary equitable procedural matter, which they treated as a problem situation in their earlier article,\(^{1453}\) again in their book.\(^{1454}\) While Lynch and Bourne mention only the preliminary equitable procedural matters of preliminary injunction, class action certification, and the shareholders' right to sue on behalf of the corporation in a shareholders' derivative action,\(^{1455}\) this category is probably much broader.\(^{1456}\)

Because of Higgins, Lynch and Bourne follow the federal Beacon line of cases, particularly Ross v. Bernhard,\(^{1457}\) in taking a protective approach to the jury right. In other words, after the judge has resolved the preliminary equitable procedural matter, the jury may decide legal claims.\(^{1458}\)

While Lynch and Bourne generally accept the recent, post-merger Maryland precedent of Higgins and the persuasive federal authority of Ross, they do so reluctantly. This reluctance is apparent in three ways. First, it has already been noted that in their general discussion Lynch and Bourne take a narrow view of the degree to which Higgins accepted Beacon and its progeny.\(^{1459}\) Second, the authors quote the Ross dissent with approval.\(^{1460}\) Third, they implicitly criticize the recent Maryland case of Hashem v. Taheri.\(^{1461}\)

As already developed above in discussing their article, Lynch and Bourne overlook a number of ways to preserve the jury right in actions where historically legal claims are joined with some preliminary equitable procedural matter.\(^{1462}\)

Thus, while Lynch and Bourne generally follow the protective federal approach, their reluctance in doing so and their overlook-

\(^{1453}\) See supra notes 1367-1408 and accompanying text.
\(^{1454}\) See Lynch & Bourne, supra note 3, at 335-36; see also id. at 333-34 (discussing Ross v. Bernhard, 396 U.S. 531 (1970)).
\(^{1455}\) See id. at 333-36.
\(^{1456}\) See Bourne & Lynch, supra note 5, at 72-76. See generally supra notes 1368-89 and accompanying text.
\(^{1458}\) See Lynch & Bourne, supra note 3, at 336.
\(^{1459}\) See supra note 1446 and accompanying text.
\(^{1460}\) See Lynch & Bourne, supra note 3, at 333 n.209, 334 & n.212.
\(^{1461}\) 82 Md. App. 269, 571 A.2d 837 (1990), discussed in Lynch & Bourne, supra note 3, at 336 n.222.
\(^{1462}\) See supra notes 1378-89.
ing of ways to preserve the jury right both exemplify their generally restrictive approach to the right to jury trial in actions where historically legal claims are joined with some preliminary equitable procedural matter.

c. Equitable Accounting Actions

Lynch and Bourne consider equitable accountings, which they treated as a problem situation in their earlier article,\textsuperscript{1463} again in their book.\textsuperscript{1464} Lynch and Bourne expressly take an approximation of pre-merger approach to equitable accountings. That is, if an equitable accounting alone is sought in a suit after merger of Law and Equity, there is no right to jury trial because there was no such right before merger.\textsuperscript{1465} Lynch and Bourne suggest an exception to this approach where a party, in order to avoid jury trial, characterizes an essentially legal action, such as contract damages, as an equitable accounting.\textsuperscript{1466}

In general, Lynch and Bourne reject federal authority, the \textit{Dairy Queen} case, even though they state that it was cited sympathetically in \textit{Higgins}.\textsuperscript{1467} The \textit{Dairy Queen} Court held that the availability of masters under Federal Rule 53 to assist juries with complicated accounts enhanced the adequacy of legal remedies and eroded the equitable nature of accountings.\textsuperscript{1468} Lynch and Bourne say that the counterpart of Federal Rule 53, Maryland Rule 2-543 (Auditors), “does not contemplate the use of auditors to assist juries.”\textsuperscript{1469} Thus, they say that Maryland and federal practice diverge with respect to the jury right in equitable accountings.\textsuperscript{1470} However, in one respect Lynch and Bourne accept federal authority. As noted above, they accept the admonition of \textit{Dairy Queen} that the jury right should not be sidestepped by allowing a party to characterize an essentially legal action, such as contract damages, as an equitable accounting.\textsuperscript{1471}

\textsuperscript{1463} See supra notes 1341-65 and accompanying text (suits involving a claim for an accounting and a counterclaim for a legal remedy, or vice versa).
\textsuperscript{1464} See \textit{LYNCH} \& \textit{BOURNE}, supra note 3, at 318-19, 336-37; see also id. at 332-33 (discussing \textit{Dairy Queen}, Inc. v. Wood, 369 U.S. 469 (1962)).
\textsuperscript{1465} See \textit{LYNCH} \& \textit{BOURNE}, supra note 3, at 318-19; see also id. at 337.
\textsuperscript{1466} See \textit{LYNCH} \& \textit{BOURNE}, supra note 3, at 335.
\textsuperscript{1467} See \textit{LYNCH} \& \textit{BOURNE}, supra note 3, at 335.
\textsuperscript{1468} See \textit{LYNCH} \& \textit{BOURNE}, supra note 3, at 335 n.216.
\textsuperscript{1469} \textit{Id.} at 337; see also \textit{id.} at 335 n.216.
\textsuperscript{1470} See \textit{id.} at 335 n.216, 336; see also \textit{id.} at 337.
\textsuperscript{1471} See supra note 1466 and accompanying text.
As detailed above, in discussing their article, Lynch and Bourne overlook a number of ways to preserve the jury right in equitable accounting actions. Further, they restrict the jury right another way in their book. Lynch and Bourne conclude that equitable accounting has greater viability in Maryland than in federal courts because Maryland Rule 2-543 (Auditors), unlike Federal Rule 53 (Masters), does not permit assistance to the jury in complicated accountings. Respectfully, Lynch and Bourne may be wrong about that. Maryland Rule 2-543 may permit auditors to assist juries in complicated accountings, and Maryland practice should be as protective of the jury right as federal practice. Maryland Rule 2-543 (Auditors), unlike Maryland Rule 2-541(b)(2) (Masters) and Maryland Rule 2-542(b) (Examiners), does not expressly provide that auditors shall only be used for matters “not triable of right before a jury.” By negative implication, Maryland Rule 2-543 would permit use of an auditor in a jury trial. While the notes to Rule 2-543 list former Rule 595 (Auditor), applicable only in Equity, as a source, the former rules also included Rule 525 (Auditor—Action Involving Account) applicable at Law as well as in Equity.

The principal commentary on the Maryland Rules provides that “any type of matter, whether legal or equitable in nature,” relating to an account, may be referred to an auditor. Traditionally, auditors have been able to present matters as evidence to juries. More broadly, even Maryland Rule 2-541 (Masters) may contemplate masters being used in jury trials. Maryland Rule 2-541(b)(2), permit-

1472. See supra notes 1357-65 and accompanying text. In their book, Bourne and Lynch discuss one way to preserve the jury right in equitable accounting actions—by re-characterizing, as the Dairy Queen Court did, an equitable accounting as a legal action for contract damages. See supra note 1466 and accompanying text.

1473. See supra note 1469 and accompanying text.


1478. However, the “Appendix: Tables of Comparable Rules” to the MARYLAND RULES does not list Md. Rule 2-543 or any other revised rule as having been derived from former Md. Rule 525 (1983) (repealed 1984).

1479. NIEMEYER & SCHUETT, supra note 1, at 432.

ting reference to a master of any "matter or issue not triable of right before a jury," may simply be a truism, protecting the constitutional jury right. In other words, the master may hear issues not jury triable or may make non-binding recommendations to the jury on issues. Permitting auditors to assist juries in complicated accountings also may be suggested by the Higgins case, which generally cited Dairy Queen with approval, and which notes Maryland courts' traditional reliance on federal courts' interpretations of analogous rules as persuasive authority.

Thus, Lynch and Bourne's approximation of pre-merger approach, their reluctance to accept recent, post-merger Maryland precedent and persuasive federal authority, and their overlooking of ways to preserve the jury right all exemplify their generally restrictive approach to the right to jury trial in equitable accountings.

3. Declaratory Judgments

Lynch and Bourne consider the declaratory judgment action, which they treated as a problem situation in their earlier article, again in their book. While Lynch and Bourne nominally endorse what they call the federal "basic nature of the issue" approach, their approach is more akin to an approximation of pre-merger approach. Lynch and Bourne state the basic nature of the issue approach as the general rule in federal courts. That is, the claims or other issues underlying the declaratory remedy are examined, and a jury trial is provided for claims or other issues of a legal nature, not for those of an equitable nature.

However, Lynch and Bourne make two exceptions to the general rule. The first is for the "inverted" suit in which the declaratory judgment plaintiff may be suing on what would otherwise be a defense to a claim that the declaratory judgment defendant might

1481. Cf. Niemeyer & Schuett, supra note 1, at 424-25 (stating that Md. Rule 2-541 does not limit masters to Equity, but "the court may not refer any matters to a master that are within the province of a jury to decide"; the master acts "subject to constitutional limitations").
1483. See id. at 542-43, 530 A.2d at 729.
1484. See supra notes 1150-84 and accompanying text.
1486. Id. at 338.
1487. See id.
1488. See supra notes 1161-62 and accompanying text.
raise. Lynch and Bourne suggest that because the declaratory judgment plaintiff's remedy often resembles the equitable remedy of cancellation of a contract, there may be no right to jury trial. This exception may swallow the rule, particularly if the jury right would also be denied because the declaratory judgment plaintiff's remedy might resemble other equitable remedies, such as injunction, specific performance, reformation, or constructive trust.

Thus, in this first exception, Lynch and Bourne suggest that the "basic nature of the issue" may be the available remedy, often equitable, if there were no declaratory judgment, rather than the "basic nature of the issue" being the underlying claim, often legal. This first exception is an approximation of pre-merger approach, which seems contrary to both the Beacon line of cases and the Higgins decision. In Simler v. Conner, a Beacon line case, a lower court held that a declaratory judgment action was basically an equitable claim for cancellation of a contract and, thus, was not triable by a jury. The Supreme Court reversed, holding that the underlying contract action was a traditionally legal matter triable by a jury.

The second exception to the general rule that the right to jury trial depends upon the "basic nature of the issue" is for cases where "legal-type relief would not be possible at the time a declaratory judgment action is filed . . ." In Lynch and Bourne's hands, this

1489. See Lynch & Bourne, supra note 3, at 337; see also Bourne & Lynch, supra note 5, at 48 ("reverse" bill or claim, "defensive" use of the declaratory judgment, "inverted" suit); Beacon Theatres, Inc., v. Westover, 359 U.S. 500, 515 (1959) (Stewart, J., dissenting) ("juxtaposition of parties"); id. at 515 n.7 ("[t]ransposition of parties").

1490. See Lynch & Bourne, supra note 3, at 337-38; see also id. at 319 & n.129.

1491. See id. at 319.

1492. See id. at 319, 337-38.

1493. See generally supra notes 1150-54 and accompanying text.


1495. See Simler v. Conner, 295 F.2d 534 (10th Cir. 1961).

1496. See Simler v. Conner, 372 U.S. 221 (1963) (per curiam), discussed in Lynch & Bourne, supra note 3, at 338 n.231 (relying on Simler as primary authority for the general rule that the right to jury trial depends upon the "basic nature of the issue").

1497. See Higgins v. Barnes, 310 Md. 532, 535 n.1, 530 A.2d 724, 725 n.1 (1987); see also id. at 551-53, 530 A.2d at 733-34.

1498. Lynch & Bourne, supra note 3, at 338.
exception may also swallow the rule. For example, legal relief might not be possible because a claim for damages is not yet ripe or because the case is one of inverted parties, and "there was no suit pending" on the declaratory judgment defendant's claim.

The breadth of this second exception is underscored by several things. First, Lynch and Bourne cite as authority for the exception their earlier article, which more clearly took an approximation of pre-merger approach. Second, the authors use of the phrase "in keeping with the traditional distinctions between law and equity" betrays their sympathies, generally, for an approximation of pre-merger approach. Third, one of the federal cases Lynch and Bourne cite for their general rule, the basic nature of the issue approach, may illustrate this exception to the rule as well. In Simler v. Conner, a declaratory judgment action by a client to determine the amount of a reasonable fee owed to his attorney under a written contract was held to be a traditional common-law issue triable by a jury. Yet, absent that holding, the case might have been seen as one where legal relief would not be possible at the time the declaratory judgment action was filed, either because the case was one of inverted parties and the defendant lawyer's claim was not yet pending or because the lawyer's claim for damages was not yet ripe in view of the ethical constraints on lawyers suing their clients for fees.


1500. That is, the declaratory judgment plaintiff's claim for declaratory relief is what otherwise would be a defense to a claim that the declaratory judgment defendant might raise.

1501. Lynch & Bourne, supra note 3, at 338 (discussing Candimat); cf. supra note 1490 and accompanying text (inverted suit considered as suit for equitable cancellation).


1503. See Bourne & Lynch, supra note 5, at 47, 50. See generally supra notes 1150-54 and accompanying text.

1504. Lynch & Bourne, supra note 3, at 338.


1506. See id. at 221-23.

1507. See Model Code of Professional Responsibility EC 2-23 (1969); Canons of Professional Ethics Canon 14 (1908).
Lynch and Bourne only reluctantly accept post-merger Maryland precedent and persuasive federal authority about the right to jury trial in declaratory judgment actions. That reluctance is apparent in several ways. First, Lynch and Bourne do not even mention Beacon in connection with the declaratory judgment action as a problem situation.\(^{1508}\) Second, in their general discussion, Lynch and Bourne continue their criticism of Beacon, although that criticism is not as pointed as the criticism in their earlier article.\(^{1509}\) Specifically, they criticize Beacon for holding that the declaratory judgment act may provide an adequate remedy at Law, triable by a jury.\(^{1510}\) Yet, as noted above, that holding seems consistent with Maryland law.\(^{1511}\) Moreover, Lynch and Bourne concede that the protective Beacon approach to the jury right will likely be fully accepted in Maryland.\(^{1512}\) Third, Lynch and Bourne do not mention that Higgins cites part of the Beacon discussion of the declaratory judgment with approval.\(^{1513}\) As already detailed above, Lynch and Bourne overlook a number of ways, in light of modern procedural developments, to preserve the jury right in declaratory judgment actions.\(^{1514}\)

Thus, Lynch and Bourne's approximation of pre-merger approach, their reluctant acceptance of recent, post-merger Maryland precedent and persuasive federal authority, and their overlooking of ways to preserve the jury right all exemplify their generally restrictive approach to the right to jury trial in declaratory judgment actions.

V. PRESERVING MARYLAND'S PROTECTIVE APPROACH TO THE JURY TRIAL RIGHT

To return to the analogy of the college instructor, the foundation for a course should be its description in the school catalog, not the course instructor's bold new ideas or past practice. Lynch and Bourne propose a principled discretionary theory to the right to

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1508. Cf. Lynch & Bourne, supra note 3, at 329-31, 334-35 (discussing Beacon in connection with the problem situation of actions in which legal and equitable claims or issues are combined).
1509. See supra notes 1155-73 and accompanying text.
1510. See Lynch & Bourne, supra note 3, at 330, 331.
1511. See supra note 1176.
1512. See Lynch & Bourne, supra note 3, at 334-35; cf. supra notes 192-203 and accompanying text (noting Beacon and its progeny already have been accepted in Maryland).
1514. See supra notes 1174-84 and accompanying text.
jury trial in civil cases. However, in analyzing whether the jury right applies in various situations, they ordinarily use an approximation of pre-merger approach. To the contrary, the Maryland Constitution should be the basis for determining the right to jury trial, and the constitution requires a protective approach to the jury right. This protective approach is better than other approaches to the jury right. Maryland's protective approach generally follows the federal approach in theory and in practice, but Maryland's approach may be even more protective.

How then may Maryland's jury right be "inviolably preserved" and not just "pickled"? How may Maryland's jury right be part of a constitution that is "living," applicable to new circumstances, as well as "written," limiting the branches of government?

Maryland's protective approach may be preserved in a number of ways: by Maryland's legislature and people through constitutional amendment, by the legislature through statute, and by the courts through cases and court rules.

1515. See supra notes 10-13, 453-1124 and accompanying text.
1516. See supra notes 14, 1125-1514 and accompanying text.
1517. See supra notes 16-452 and accompanying text.
1518. See supra notes 231-299 and accompanying text.
1519. See supra note 198 and accompanying text.
1520. See supra notes 199-205 and accompanying text.
1521. See supra notes 223-30 and accompanying text.
1522. See supra notes 6, 57-63 and accompanying text.
1523. See supra notes 26-30 and accompanying text.
1524. See supra notes 16-25 and accompanying text.
1525. The jury right in Maryland could be affected by developments on the national level. Amendments to the United States Constitution, pursuant to Article V, might extend the federal jury right to state courts. Compare U.S. CONST. amend. VII (jury right, which was held not applicable to the states, in e.g., Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931)), with U.S. CONST. art. I, § 10 (guarantee of other rights, applicable to the states, against bills of attainder, ex post facto laws, and laws impairing the obligation of contracts). Congressional legislation might extend the federal jury right to state courts. See Dice v. Akron, C. & Y. R.R. Co., 342 U.S. 359 (1952) (Commerce Clause legislation, the Federal Employers' Liability Act); Daniel J. Leffell, Note, Congressional Power to Enforce Due Process Rights, 80 COLUM. L. REV. 1265, 1281-82, nn.101, 102 (1980) (hypothetical legislation under § 5 of the Fourteenth Amendment). The Supreme Court might decide that the Seventh Amendment should be applied to the states. See supra notes 353-54 and accompanying text.
1526. Maryland's executive would appear to have only a limited role in these processes. See Md. CONST. art. XIV, § 1 (discussing governor's publication of proposed amendment and governor's proclamation that an amendment was
Maryland's protective approach to the jury right may be preserved by the legislature and people through constitutional amendment, pursuant to Article XIV of the Maryland Constitution. In the past, the jury right has been received as part of the English common law in the first Maryland Constitution, put beyond reach of the legislature in the 1851 Constitution and extended in that constitution to eminent domain cases and appeals to the circuit courts from the judgments of justices of the peace.

Maryland's protective approach to the jury right may be preserved by the legislature through statute. Indeed, the legislature may extend the jury right beyond that guaranteed by the Maryland Constitution. The legislature has plenary powers, except where limited by the Maryland Constitution. The legislature's powers under the Maryland Constitution expressly include the power to pass laws necessary and proper for carrying into execution the powers vested by the constitution in any department of government. One of those departments is the judiciary. The legislature's power to make laws for the judiciary, such as extending the right to trial by

adopted by voters); id. § 2 (discussing legislation taking the sense of the people regarding the call of a constitutional convention and legislation calling such a convention, which is presumably subject to the governor's approval or veto under Md. Const. art. II, § 17); id. (governor's approval or veto of ordinary legislation); see also id. Decl. of Rights art. 8 (separation of legislative, executive, and judicial powers). But cf. id. art. II, §§ 1, 9 (governor's execution of laws); id. §§ 10-14 (governor's appointment of officers); id. § 16 (governor's convening of legislature on extraordinary occasions).

1527. See supra note 107 and accompanying text.
1528. See supra notes 113-17 and accompanying text.
1529. See supra note 119 and accompanying text.
1530. See supra note 120 and accompanying text.
1531. See Lynch & Bourne, supra note 3, at 317 n.106; see also Bourne & Lynch, supra note 5, at 36 n.229 (citing Union Passenger Ry. v. Mayor of Baltimore, 71 Md. 238, 241, 17 A. 933, 934 (1889), for the proposition that the legislature may give Law courts jurisdiction of matters traditionally heard in Equity (semble)). This legislative power is generally recognized. See Md. Rule 2-511(a) (preserving the right of trial by jury as guaranteed by the Md. Const. "or as provided by law"); cf. Fed. R. Civ. P. 38(a) (federal "right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States").
1533. See Md. Const. art. III, § 56.
1534. See id. art. IV.
jury, apparently is not generally limited by any provision of the Maryland Constitution. As already noted, there is no constitutional right to trial by judge.\textsuperscript{1535} The separation of powers\textsuperscript{1536} is no limitation because the power to make procedural law for the judiciary is a power that is expressly shared by the legislature and the judiciary.\textsuperscript{1537} This legislative power to extend the jury right has been exercised on a number of occasions.\textsuperscript{1538}

Maryland's protective approach to the jury right may be preserved by the courts through decisions in cases.\textsuperscript{1539} Indeed, the scope of the constitutional jury right is a question to be determined by the courts.\textsuperscript{1540}

Maryland's protective approach to the jury right may also be preserved by the courts through rule-making.\textsuperscript{1541} The courts by rule

\textsuperscript{1535} See supra note 86-95 and accompanying text.
\textsuperscript{1536} See Md. Const., Decl. of Rights art. 8.
\textsuperscript{1537} See id. art. IV, § 18(a); Funger v. Mayor of Somerset, 244 Md. 141, 149-51, 223 A.2d 168, 172-73 (1966); Institute of Judicial Administration, Survey of the Judicial System of Maryland 53-56 (1967); cf. The Federalist No. 83 (Alexander Hamilton) ("A power to constitute courts is a power to prescribe the mode of trial: and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or let it alone.").
\textsuperscript{1539} See supra notes 164-65, 170-78, 184-205 and accompanying text. But cf. supra notes 179-83 and accompanying text (some unfavorable interpretations before the merger of Law and Equity).
\textsuperscript{1540} See Knee v. Baltimore City Passenger Ry., 87 Md. 623, 624, 40 A. 890, 891 (1898).
\textsuperscript{1541} See Bourne & Lynch, supra note 5, at 73-74 & n.465 (citing Md. Rule BU73 (1977) (repealed 1996), and revised Md. Rule 2-221(c) (the limited right to jury trial in interpleader)). But cf. id. at 35 n.221 (citing Md. Rule 517 (1977) (repealed 1984) (abolition of Equity's reference to Law for a jury trial)).
may extend the jury right beyond that guaranteed by the Maryland Constitution. The courts' powers under the Maryland Constitution expressly include that of making rules of "practice and procedure."\textsuperscript{1542} The legislature, which has the power to pass laws necessary and proper for carrying into execution the powers vested by the constitution in any department,\textsuperscript{1543} has declared that the courts' power to make rules governing "practice and procedure" shall be "liberally construed"\textsuperscript{1544} and that practice and procedure include (without limitation) "trials" and "unification of practice and procedure in actions at law and suits in equity, so as to secure one form of civil action and procedure for both."\textsuperscript{1545} Indeed, court rules have been characterized as "legislative" in nature.\textsuperscript{1546} Presumably, if the legislature can extend the right to jury trial beyond its constitutional scope,\textsuperscript{1547} so may the courts, acting pursuant to their constitu-

\textsuperscript{1542} See Md. Const. art. IV, § 18(a); cf. U.S. Const. art. III (providing no express power of federal courts to make rules of practice and procedure); McCulloch v. Maryland, 7 U.S. (4 Wheat.) 316, 406-11 (1819) (stating that branches of government have incidental or implied powers related to expressly enumerated powers); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825); Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941) (providing that the federal courts' rule-making authority is delegated by Congress).

\textsuperscript{1543} See Md. Const. art. III, § 56.

\textsuperscript{1544} Md. Code Ann., Cts. & Jud. Proc. § 1-201(a) (1995) provides:

The power of the Court of Appeals to make rules and regulations to govern the practice and procedure and judicial administration in that court and in the other courts of the State shall be liberally construed. Without intending to limit the comprehensive application of the term "practice and procedure," the term includes the forms of process; writs; pleadings; motions; parties; depositions; discovery; trials; judgments; new trials; provisional and final remedies; appeals; unification of practice and procedure in actions at law and suits in equity, so as to secure one form of civil action and procedure for both; and regulation of the form and method of taking and the admissibility of evidence in all cases, including criminal cases.

\textit{Id.}

\textsuperscript{1545} \textit{Id.}

\textsuperscript{1546} See Ginnavan v. Silverstone, 246 Md. 500, 504-05, 229 A.2d 124, 126 (1967). The rules are to be interpreted in the same manner as statutes. See Pappas v. Pappas, 287 Md. 455, 465, 413 A.2d 549, 553 (1980); see also Md. Rule 1-201(c); cf. County Fed. Sav. & Loan Ass'n v. Equitable Sav. & Loan Ass'n, 261 Md. 246, 252-53, 274 A.2d 363, 367 (1971) (stating a rule prevails over a conflicting prior statute).

\textsuperscript{1547} See supra notes 1531-38 and accompanying text.
Two questions have been raised about the courts' power to extend the right to trial by jury beyond its constitutional scope. One question is whether the courts, whose power relates to "practice and procedure," have power to modify the right to jury trial, which may be a substantive matter. Thus, one case has stated that "the rules of procedure may not abridge, enlarge or modify the substantive rights of a litigant."1549

There are a number of possible affirmative answers to this first question. Unlike the federal rule-makers, who are expressly prohibited from making rules which "abridge, enlarge or modify any substantive right,"1550 the state rule-makers are not prohibited by consti-

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1548. The courts' power in this respect apparently is not generally limited by any provision of the Md. CONST. Cf. supra note 1535-37 (noting that the legislature's power to expand the jury right is not generally limited by any provision of the Md. CONST.). The constitution may require extension of the right to jury trial beyond its original scope. See infra note 1574 and accompanying text.

1549. Mercantile-Safe Deposit & Trust Co. v. Slater, 227 Md. 459, 467, 177 A.2d 520, 524 (1962) (dictum); see also Md. RULE B11 Committee Note (1977) (repealed 1993) ("The question of the right to trial by jury is substantive rather than procedural. However, the Committee believes it desirable that Rule B11 be included in order to make it clear to the reader that the question of the right to trial by jury has not been overlooked."); see also Explanatory Notes of the Reporter (Second Report) on the General Rules of Practice and Procedure, Md. ANN. CODE, app. B, at 2107 (Cum. Supp. 1947) ("The proposed [joinder] rules do not create a substantive right. Such rules relate only to matters of procedure and not substantive rights."); Kenneth C. Proctor, Maryland Rules of Practice and Procedure: Brief History—Pending and Projected Changes, 9 MD. BJ. 24, 26 (Dec. 1976) ("[In reviewing the Maryland Code, the Rules] Committee had to determine what was substance and what was practice and procedure. The test applied was—'Provisions answering the question "What is the right and its extent?" are substantive; provisions answering the question "How is the right enforced?" are procedural.' "); cf. Md. RULE 2-301 committee note (providing that "this Rule [one form of action] . . . does not affect the right to jury trial"); NIEMEYER & SCHUETT, supra note 1, at 155; Commentary, supra note 1389, at 742-43 (providing that the rules neither abridge nor enlarge the right to trial by jury).


(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further
tution\textsuperscript{1551} or statute\textsuperscript{1552} from enlarging substantive rights. Thus, although there is some authority to the contrary,\textsuperscript{1553} court rules may extend the allegedly substantive right to jury trial.

Even if the courts' rule-making power over procedural matters implicitly bars their power over substantive matters, the distinction is not always clear. The rule-making power may include "matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."\textsuperscript{1554}

The right to jury trial may be rationally classified as procedural\textsuperscript{1555} or substantive.\textsuperscript{1556} Thus, court rules may extend the right to jury trial, which may lie in the uncertain area between substance and procedure.

Of course, the right to jury trial may be classified as clearly procedural. As noted above, the legislature has granted the courts power to make rules regarding "trials" (jury trial is one mode of trial) and unify "practice and procedure in actions at law and suits in equity, so as to secure one form of civil action and procedure for both."\textsuperscript{1557} Moreover, the legislature has provided that the rule-making power be "liberally construed."\textsuperscript{1558} Of course, the rules force or effect after such rules have taken effect.

\textit{Id.}

\textsuperscript{1551} See Md. Const., art. IV, § 18(a). Article IV provides:

The Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations adopted by the Court of Appeals or otherwise by law.

\textit{Id.}


\textsuperscript{1553} See supra note 1549 and accompanying text.

\textsuperscript{1554} Hanna v. Plumer, 380 U.S. 460, 472 (1965). The Supreme Court held that the manner of service of process in a federal diversity case was governed by the \textit{Federal Rules}. See \textit{id}. The federal rule-makers are expressly prohibited from enlarging substantive rights. See \textit{id}. at 471-73. A \textit{fortiori}, the state rule-makers, who are not expressly prohibited from enlarging substantive rights, see \textit{supra} notes 1551-1552 and accompanying text, may have power over matters in the uncertain area between substance and procedure.

\textsuperscript{1555} See \textit{supra} note 1545 and accompanying text.

\textsuperscript{1556} See \textit{supra} note 1549 and accompanying text.

\textsuperscript{1557} \textit{Supra} note 1544.

\textsuperscript{1558} See \textit{supra} note 1544 and accompanying text.
themselves provide for election, withdrawal of election, and waiver of the right to jury trial,\textsuperscript{1559} for preservation of the right, a jury of six persons, and no advisory verdict by a jury;\textsuperscript{1560} moreover, the rules provide for jury challenges.\textsuperscript{1561} Federal practice also supports the conclusion that the right to jury trial in this context is procedural and, thus, may be extended by court rules.\textsuperscript{1562}

Even if the right to jury trial is classified as substantive, court procedural rules may extend the right. As noted above, state rule-makers have not been expressly prohibited from extending the jury right.\textsuperscript{1563} State procedural rules govern a number of areas which might be characterized as substantive. One commentator notes that the rules, based on express or implied constitutional authority, include topics such as admission to the bar, attorney discipline, code of professional responsibility, judicial discipline, judicial code of ethics, client security fund, attorney's fees, and evidence.\textsuperscript{1564} Other provisions of the rules relate to res judicata\textsuperscript{1565} and privileges from discovery.\textsuperscript{1566} Thus, court rules may extend the right to jury trial even if it is substantive.

\begin{itemize}
\item \textsuperscript{1559} See MD. RULE 2-325.
\item \textsuperscript{1560} See MD. RULE 2-511.
\item \textsuperscript{1561} See MD. RULE 2-512.
\item \textsuperscript{1562} The Rules Enabling Act, 28 U.S.C. § 2072 (1984), formerly provided that "[s]uch rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." Cf. supra note 1550 (current version of the Act). The Act formerly mentioned "substantive right" and "the right of trial by jury" in separate phrases, as though they were distinct. The Act also formerly provided that the "rules shall not abridge, enlarge or modify" any substantive right, but provided that the rules shall "preserve" the right to trial by jury. In the vertical choice of law context under the regime of \textit{Erie R.R. v. Tompkins}, 304 U.S. 64 (1938), the Supreme Court has suggested that the right to jury trial is procedural, not substantive. See Byrd v. Blue Ridge Rural Elec. Coop. Inc., 356 U.S. 525 (1958); cf. Simler v. Conner, 372 U.S. 221 (1963) (holding the application of federal law was compelled by the Seventh Amendment). The \textit{Federal Rules} deal with a number of aspects of the right to jury trial. See \textit{Fed. R. Civ. P.} 38-39, 48.
\item \textsuperscript{1563} See supra notes 1551-52 and accompanying text. But cf. supra note 1549 and accompanying text (stating the rules may not enlarge substantive rights).
\item \textsuperscript{1564} See DONNA J. PUGH ET AL., \textit{JUDICIAL RULEMAKING} 107-08 (1984).
\item \textsuperscript{1565} See MD. RULE 2-231(i) (class action); MD. RULE 2-332(c) (plaintiff's failure to claim against impleaded third person); MD. RULE 2-306(c) (voluntary dismissal); MD. RULE 2-507(f) (certain involuntary dismissals).
\item \textsuperscript{1566} See MD. RULE 2-402(c), (e) (trial preparation materials and experts).
\end{itemize}
The second question is whether the courts should extend the right to trial by jury beyond its constitutional scope. Lynch and Bourne are ambivalent on this point, apparently torn between rights,\(^{1567}\) democracy,\(^{1568}\) and results\(^{1569}\) arguments favoring jury trial and suitability,\(^{1570}\) efficiency,\(^{1571}\) and delay\(^{1572}\) arguments opposing jury trial. Thus, at one point they state: "It does not appear that the Maryland courts would extend the right to trial by jury to actions which did not exist at the time of the adoption of the Constitution.\(^{1573}\) However, their article recognizes that the right to jury trial must be extended to preserve it in the face of various procedural developments.\(^{1574}\)

In addition, in a later discussion of the right to jury trial of legal issues in historically equitable joinder devices, Lynch and Bourne conclude that the Maryland Rules have extended the right to jury trial. The extension was implicit in the case of the former rules which provided that intervention and class actions might be used at Law, as well as in Equity.\(^{1575}\) The extension was explicit in the case of the former interpleader rule, which permitted the jury right to be demanded by other claimants where the stakeholder itself asserted a claim to the property.\(^{1576}\)

Lynch and Bourne's ambivalence is most pointed in their discussion of the revised interpleader rule. On the one hand, they

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1567. See, e.g., Bourne & Lynch, supra note 5, at 59-60.
1568. See id. at 49 n.311.
1569. See id. at 3.
1570. See id. at 27 n.162, 60.
1571. See, e.g., id. at 60.
1572. See, e.g., id. at 63.
1573. Id. at 36. However, the article cites for that proposition a case which described the constitutional right to trial by jury. See id. (citing Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc., 283 Md. 296, 320, 389 A.2d 887, 901 (1978) ("The constitutional guarantee of a trial by jury extends only to the type of cases in which the right of a trial by jury existed at the time of the adoption of the Constitution." (quoting Pennsylvania ex rel. Warren, 204 Md. 467, 474, 105 A.2d 488, 491 (1954))).
1574. See id. at 16, 23, 47 (federal courts); id. at 29-30, 34, 38, 44, 50, 55, 73 (state courts); see also NIEMEYER & SCHUETT, supra note 1, at 204.
1575. See Bourne & Lynch, supra note 5, at 73 (citing MD. RULE 208, 209 (1977) (repealed 1984)). The article also referred to assignment and subrogation in that connection. See Bourne & Lynch, supra note 5, at 73 (citing MD. RULE 240, 243 (1977) (repealed 1984)). However, the rules relating to those matters were based on earlier statutes, 1924 Md. Laws ch. 551 (repealed 1957), and 1830 Md. Laws ch. 165 (repealed 1957).
conclude that there was traditionally no right to jury trial in interpleader, that the former rule provided no general, but only a limited, right to jury trial and that the revised rules could be construed as continuing only that limited right. On the other hand, Lynch and Bourne conclude that the revised rules and Maryland practice may permit or even require trial of legal issues by a jury in traditional equitable proceedings including interpleader.

With regard to this second question, whether the courts should extend the jury right beyond its constitutional scope, the Maryland Rules themselves supply a number of answers. Apparently, only two rules by themselves extend the jury right beyond its constitutional scope—Maryland Rule 2-221(c) and Maryland Rule 10-205(b). Those two rules are good case studies, illustrating the purposes for extending the right to jury trial by court rule.

Although the interpleader jury trial provision, Maryland Rule 2-221(c), is rather opaque, several purposes may be seen in its allowance of a right to jury trial. Traditionally, equitable interpleader ("pure" interpleader) was available only at the request of a party having no claim to the property, that is, a mere stakeholder. The former Maryland Rules also made interpleader (an action "in the nature of" interpleader) available at the request of a stakeholder who had a claim to the property. Those rules gave the other claimants a right to demand a jury trial as to the issues raised by the stakeholder’s claim to the property. Presumably, the stakeholder

1577. See id. at 73-74 & n.465.
1578. See id. at 74 n.465.
1579. See id. at 74.
1580. See id. at 72-73, 74-75.
1581. See id. at 73, 76.
1582. Other rules, by making certain equitable devices available at law, implicitly extended the right to trial by jury. See supra note 1575 and accompanying text. Many of those rules did not themselves extend the right, but they were based on earlier statutes. See id; see also Md. Rule BF40-43 (1977) (repealed 1984).
1583. See Bourne & Lynch, supra note 5, at 74 n.465; see also Md. Rule BU71(c) editor’s note, Md. Rule BU72(b) editor’s note (1977) (repealed 1996).
1585. Md. Rule BU73 (1977) (repealed 1996) provided:
   If the original plaintiff asserts a claim to the property deposited in court or a claim adverse to a defendant, the court shall upon request by a defendant for trial by jury filed not later than fifteen days after the passage of the decree of interpleader, either
   (a) transfer the action to a law court pursuant to Rule 515
waived any right to jury trial by initiating the equitable interpleader action.\textsuperscript{1586} Although the former interpleader jury rule contains no explanatory note,\textsuperscript{1587} the rule-makers apparently extended the jury right to actions "in the nature of"\textsuperscript{1588} interpleader in order to preserve the right in the face of expanding Equity jurisdiction over those actions.\textsuperscript{1589}

The present interpleader jury provision, Maryland Rule 2-221(c), provides: "A demand for jury trial as to those issues that are triable of right by a jury shall be filed not later than 15 days after the entry of the order of interpleader or such other time as the court may specify in the order of interpleader."\textsuperscript{1590} The rule does not appear to provide for a right to jury trial; the rule only appears to provide for the timing of the demand for jury trial.

However, commentators have concluded that the rule does extend the right to jury trial. Lynch and Bourne believe that the rule, like the former rule,\textsuperscript{1591} should be construed to extend the jury right only to the other claimants as to the issues raised by the stakeholder's claim to the property in an action "in the nature of" interpleader.\textsuperscript{1592} Other commentators believe that the rule also extends the right to jury trial to claimants as to common-law issues among the claimants themselves in "pure" interpleader cases, stakeholders as to common-law issues raised by their claims to property in actions "in the nature of" interpleader, and claimants as to common-law issues among the claimants themselves in actions "in the nature of" interpleader.\textsuperscript{1593} There is some support for this broader view of the

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(Transfer of Action From Law to Equity and Vice Versa); or
(b) order that the claim asserted by the plaintiff be tried separately in a law court pursuant to Rule 501 (Separate Issue or Claim) and Rule 515 (Transfer of Action From Law to Equity and Vice Versa), and the court may make such further order relating to the sequence of the trial of the interpleader action and the issue to be tried before a jury as justice may require.
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\textit{Id.}

\textsuperscript{1586} See Bourne & Lynch, supra note 5, at 73-74 n.465.
\textsuperscript{1587} Cf. Md. RULE BU71(c) explanatory note (1977) (repealed 1996) (providing verification that there is no collusion between the plaintiff and any defendant is a safeguard against efforts to avoid trial by jury).
\textsuperscript{1588} See infra note 1593 and accompanying text.
\textsuperscript{1589} See infra note 1593 and accompanying text.
\textsuperscript{1590} See supra note 1585 and accompanying text.
\textsuperscript{1591} See supra note 1585 and accompanying text.
\textsuperscript{1592} See supra note 1585 and accompanying text.
\textsuperscript{1593} See supra note 1585 and accompanying text.
right to jury trial in the rule’s source reference to federal practice,¹⁵⁹⁴ which takes a broader view.¹⁵⁹⁵

Another commentary suggests that the interpleader jury provision was added in part to call attention to the right to jury trial, which otherwise might be overlooked.¹⁵⁹⁶ Thus, the apparent purpose of this first rule, the interpleader jury trial provision, was to extend, or at least to preserve, the jury right in the face of expanding Equity jurisdiction over actions “in the nature of” interpleader.

The second case study illustrating the purposes for extending the right to jury trial by court rule is the guardianship jury trial provision. While the current provision, Maryland Rule 10-205(b), has only a modest right to jury trial, the former provision, Maryland Rule R77(b)(1),¹⁵⁹⁷ significantly extended the right to jury trial. The purposes of the former rule were stated by the rule’s draftsmen.¹⁵⁹⁸

The current guardianship provisions of the Maryland Rules provide for the adjudication of a person’s disability,¹⁵⁹⁹ the appointment of a guardian of the person,¹⁶⁰⁰ and the termination of the guardianship on the ground that the disability has ceased.¹⁶⁰¹ The rules provide for trial by jury of the existence of the disability¹⁶⁰² when the person is incapacitated because of “mental disability, disease,

¹⁵⁹⁴. See Md. Rule 2-221. Source reference states that Md. Rule 2-221(a), describing the right to interpleader, is derived from Fed. R. Civ. P. 22(1) as well as from the former Maryland Rules. Although only the source reference to Md. Rule 2-221(a) refers to the Federal Rules, two commentators conclude that “the remainder of the rule adopts a practice that is sufficiently similar to the federal practice that the federal cases will be useful for interpretative guidelines.” Niemeyer & Schuett, supra note 1, at 136. Of course, a source reference is not part of the rules. See Md. Rule 1-201(c). However, the source reference was adopted by the court of appeals. See 11:9 Md. Reg. S-21 (April 27, 1984).


¹⁵⁹⁶. See Commentary, supra note 1389, at 735; see also Minutes of Rules Committee, 15 (Md. May 11-12, 1979) (comments of Mr. Sykes); Minutes of Style Subcommittee of Rules Committee, 3 (Md. Jan. 23, 1980); cf. Md. Rule B11 committee note (1977) (repealed 1993) (providing that the right to jury trial was included in rules regarding appeals from administrative agencies in order to make clear that the right had not been overlooked), quoted in supra note 1549.


¹⁵⁹⁸. See infra note 1616 and accompanying text.

¹⁵⁹⁹. See Md. Rule 10-205(b).

¹⁶⁰⁰. See id. 10-108(a).

¹⁶⁰¹. See id. 10-209(c).

¹⁶⁰². See id. 10-205(b).
habitual drunkenness, or addiction to drugs . . . .” 1603 The other matters—the appointment of a guardian and the cessation of the disability—are to be determined by a judge. 1604

The former guardianship provisions of the Maryland Rules had a significantly broader right to jury trial. Those rules provided for jury trial of the incapacities mentioned in the current rules plus incapacities from physical disability, senility, or other mental weakness. 1605 The former rules also provided for a right to jury trial on the cessation of the disability. 1606

The former guardianship provisions of the Maryland Rules significantly extended the right to jury trial. Before those rules, a right to jury trial existed in the case of adjudications of some disabilities, but not others. A statutory right to jury trial existed in adjudications of both mental disability 1607 and its cessation. 1608 A statutory right to jury trial existed in adjudications of habitual drunkenness or addiction to drugs. 1609 Apparently, there was neither a statutory provision for adjudication of cessation of disability from habitual drunkenness or addiction to drugs nor a statutory right to jury trial in such proceedings.

While statutes provide for adjudications of physical disability, senility or other mental weakness, and disease, 1610 such adjudications are to be made by a court of Equity, 1611 not by a jury. As noted above, the former guardianship rules provided for a right to jury trial in adjudications of all such disabilities and their cessation. 1612 The right was not provided for by statute; statutory rights have either been repealed 1613 or they never existed. There is also some authority that such adjudications, being special proceedings, not com-

1603. Id. 10-103(b).
1604. See id. 10-108(a), -209(c).
1611. See id. § 13-704.
1612. See supra notes 1605-06 and accompanying text.
mon-law actions, are not within the constitutional guarantee of a jury trial. Apparently, the draftsmen of an earlier version of Title 10 justified extending the right to jury trial by court rule as a part of a general codification of disability procedures. The draftsmen stated:

In the interest of simplification and standardization of procedure these rules purport to pull together all statutory provisions relating to incompetency, whether arising from actual mental disability (the traditional non compos mentis) or from other causes rendering a person incompetent to care for himself or his affairs, such as infancy, habitual drunkenness or narcotic addiction. The jurisdiction of the equity courts over such persons and their affairs is basically the same, and the problem is fundamentally alike in every case. The result, however, marks a substantial change in procedure in many instances, in the interest of standardization and also in the interest of due process. The result is intended to fit into the pattern approved by the Court of Appeals in Matter of Easton, 214 Md. 176, 133 A. (2d) 441.  

1614. See In re Easton, 214 Md. 176, 189-91, 133 A.2d 441, 449-50 (1957). For the following reasons, Easton may not be good authority for the broad proposition stated in the text. First, that case dealt with a lunacy adjudication involving a guardian of property, where there was no statutory right to jury trial, not a guardian of the person, where there was a statutory right to jury trial. The distinction continued in R77(b)(1) (1995) (repealed 1996). The distinction is continued in the current guardianship rules. See Md. Rule 10-205 (b); see also id. 10-103(b). Second, Easton appeared to recognize that there was a traditional right to jury trial of adjudications of lunacy involving a guardian of the person. See Easton, 214 Md. 176, 180, 133 A.2d 441, 444. But see Beck v. Beck, 236 Md. 261, 265, 203 A.2d 900, 902 (1964). That traditional right should be received or preserved under Md. Const., Decl. of Rights arts. 5, 23. There appeared to be no such traditional right to jury trial in disability cases not involving lunacy. Third, even if lunacy guardianship proceedings were in Equity, where there was no constitutional right to a jury trial, concurrent jurisdiction may have existed as to certain lunacy proceedings in common-law courts, where there was such a right. See Tomlinson v. Devore, 1 Gill 345, 348-49 (1843).

1615. Md. Rule R70(b) explanatory note (1963) (repealed 1996). The justification for extending the right to jury trial was apparent, not express, because the note spoke of procedure in general terms only. It did not expressly mention the right to jury trial. At the time of the note, the former rules extended the jury right beyond its statutory scope, only to adjudications of cessation of habitual drunkenness or addiction to drugs. See id. R70(b), R77(b)(1)(1963) (revised 1970). Later, the former guardianship rules extended the jury right
The extension of the right to jury trial by court rule served the purposes of standardization and due process. Standardization was served because the jury trial is the uniform method for determining the existence and cessation of a disability where guardianship of the person was sought.1616

Due process1617 was served in two ways by the rule’s extension of the right to jury trial. First, the jury trial is an aspect of procedural fairness that has been recognized since the Magna Carta.1618 Second, due process limits discrimination against those similarly situated.1619 In other words, if some persons were accorded jury trials in to adjudications of physical disability, senility or other mental weakness, and disease, and to their cessation. See id. R70(b), R77(b)(1)(1970) (repealed 1996). Presumably, the justification for the further extension of the jury right is the same as the justification for the extension of the right by the draftsmen of the note. While notes to the rules are not part of the rules, see id. 1-201(e), the notes were adopted by the court of appeals as a part of a report and are an aid to interpretation of the rules. See generally Alexander v. Tingle, 181 Md. 464, 468, 30 A.2d 737, 739 (1943).

1616. But cf. Md. Rule 10-205(a) (providing no jury right exists in guardianship proceedings relating to minors); id. 10-304 (providing no jury right exists in adjudications of disability where the appointment of a guardian for property only is sought). In some disability cases, where the right to jury trial exists, it may be waived, either by the disabled person, or by that person’s attorney. See id. 10-205(b). Also, even in cases tried by a jury, the court will itself determine some issues. See supra note 1604 and accompanying text.

1617. Of course, the current guardianship rules promote due process in a number of ways unrelated to the right to jury trial. See, e.g., Md. Rule 10-105, -203 (specifying requirements of notice); id. 10-205 (establishing hearing procedures).

1618. See Magna Carta ch. 39 (pairing “judgment of his peers,” which came to mean jury trial, with “law of the land,” which came to mean due process, as limitations on sovereign power); SCHWARTZ, supra note 72, at 6-7; Md. Const., Decl. of Rights art. 24. Compare McKeiver v. Pennsylvania, 403 U.S. 528, 543-50 (1971) (holding that there is no right to jury trial, as an element of due process, in juvenile delinquency proceedings), with Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1294-95 (1974) (stating that whether the right to jury trial, as an element of due process, exists in commitment proceedings has not yet been determined). But cf. Bringe v. Collins, 274 Md. 338, 344-45, 335 A.2d 670, 674-75 (1975) (holding that the Seventh Amendment right to jury trial is not made applicable against the states by the Due Process Clause of the Fourteenth Amendment).

disability proceedings, so should others. The former guardianship jury trial provision, therefore, extended the jury right in order to serve the purposes of standardization and due process.

Accordingly, Maryland's protective approach to the right to jury trial may be preserved in a number of ways: by the legislature and people through constitutional amendment, by the legislature through statute, and by the courts through cases and court rules.

VI. CONCLUSION

The merger of Law and Equity in Maryland in 1984 called for a re-evaluation of the constitutional right to trial by jury under the new procedures. Lynch and Bourne, in a 1984 law review article and in a 1993 book chapter, re-evaluate the right. I believe that Lynch and Bourne try to "pickle," not preserve, the jury right. Both their principled discretionary theory and their applied approximation of pre-merger approach restrict the jury right. Both their theory and their application largely ignore the crucial constitutional aspect of the jury right. Instead, both their theory, by leaving the jury right generally to the discretion of judges, and their application, by deferring largely to pre-merger judicial precedents, overemphasize the judicial role in determining whether there is to be a jury trial. Lynch and Bourne apparently restrict the jury right because they believe it is inefficient and inferior as a mode of trial. I have criticized those reasons for restricting the jury right, both on their own terms and for being contrary to the Maryland Constitution.

Rhetorically, I believe Lynch and Bourne have picked expediency (the "efficiency" of trial to judge) over law (the constitutional right to trial by jury). I believe they have approved rule by elites (judges exercising their discretion and applying pre-merger judicial

1620. See supra note 1615 and accompanying text. But cf. Dorsey v. Solomon, 435 F. Supp. 725, 734-35 (D. Md. 1977) (finding that equal protection was not violated, even though jury trial was granted in guardianship proceedings, but was not granted in proceedings to confine persons acquitted of crimes because of insanity), modified, 604 F.2d 271 (4th Cir. 1979).
1621. See supra notes 10-13, 475-1124 and accompanying text.
1622. See supra notes 1125-1514 and accompanying text.
1623. See supra notes 15-452 and accompanying text. But see supra notes 7-9 and accompanying text.
1624. See supra notes 867-954 and accompanying text.
1625. See supra notes 956-1124 and accompanying text.
1626. See supra notes 971-1139 and accompanying text.
1627. See supra notes 920-955, and accompanying text.
precedents) rather than democratic government (one limited by the constitutional check of a jury drawn from the people).

To "preserve" the jury right, Maryland should follow the federal protective approach under the *Beacon* line of cases,\(^\text{1628}\) as it has in the *Higgins* line of cases.\(^\text{1629}\) Of course, through constitutional amendment,\(^\text{1630}\) constitutional interpretation,\(^\text{1631}\) legislative act,\(^\text{1632}\) and court rule,\(^\text{1633}\) Maryland's approach to the jury right has been even more protective than the federal approach.

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1628. *See supra* notes 189-205 and accompanying text.
1629. *See supra* notes 194, 197 and accompanying text.
1630. *See supra* notes 1527-1530 and accompanying text.
1631. *See supra* notes 223-27, 1539-1540 and accompanying text.
1632. *See supra* notes 1531-1538 and accompanying text.
1633. *See supra* notes 1541-48 and accompanying text.