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COMMENTS

The Right to Strike the Jury Trial Demand in Complex Litigation

JEFFREY OAKES*

During the last forty years, the increasing complexity of problems in the law and the merger of law and equity have created difficulties for federal judges trying to develop an analytical framework for determining the scope of the seventh amendment right to jury trial in complex litigation. The issue arises when, due to the jury's inability to comprehend the facts and therefore, to perform adequately its factfinding function, the seventh amendment comes into conflict with the constitutional guarantee of due process. The author suggests three separate methods of analysis, historical, functional and constitutional, and explains how these analyses permit a judge constitutionally to strike the jury in complex litigation.

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I. INTRODUCTION

Since 1791, when the seventh amendment¹ was included in the Bill of Rights, the complexion of litigation in federal courts has been

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1. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

drastically altered. Undoubtedly, one of the most significant changes was the merger of law and equity into a single court upon the promulgation of the Federal Rules of Civil Procedure.² The increased complexity of the law that resulted from technological, social and legislative developments, combined with the merger of law and equity, has created difficult analytical problems for judges attempting to determine the scope of the seventh amendment right to trial by jury. The analysis is particularly troublesome in the context of complex litigation where the subject matter may be beyond the comprehension of an average juror. The purpose of this article is to demonstrate that the jury trial demand may be denied in complex cases on both historical and constitutional grounds.

Prior to merger, courts resorted to an historical inquiry to determine whether litigants were entitled to trial by jury in civil cases. The traditional test, labelled the static historical test, required a judge to ask whether the action was heard at law or in equity by English courts in 1791. In the former case, trial by jury was deemed constitutionally mandated; if the answer was unclear, the courts would analogize to the closest historical counterpart.³ The development of the static historical test is discussed in part IV of this article.

After merger, the Supreme Court developed a more flexible analytical framework adapted to changed procedure and societal needs. This analysis, referred to herein as a functional analysis, examines the factfinding capabilities of the jury in light of modern procedures. The functional analysis emanates from the third prong of the test that the Supreme Court introduced in a footnote of *Ross v. Bernhard*⁴ for determining whether an issue is legal or equitable: "[T]he 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries."⁵

2. Congress authorized the Supreme Court to promulgate rules of procedure for the federal courts by passing the Rules Enabling Act, Pub. L. No. 415, 73 Stat. 651 (1934). The Federal Rules of Civil Procedure were the result. For an example of a procedure instituted upon the promulgation of the Federal Rules of Civil Procedure that converted an equitable into a legal action, see Fed. R. Civ. P. 53(b), concerning the appointment of special masters.

3. If this static historical interpretation of the seventh amendment were applied in an antitrust case, for instance, a jury would always be required because actions for damages were historically on the legal side of the court. See note 81 *infra*.

Alexander Hamilton pointed out the dangers of a static historical test during the debates over the adoption of the seventh amendment, recommending that any jury trial guaranty be capable of adaptation to a changing society. See note 97 and accompanying text *infra*.

4. 396 U.S. 531, 538 n.10 (1970).

5. *Id.*

A functional analysis takes into account the jury's role as factfinder and considers whether the jurors are capable of performing that task. The *Ross* test does not, however, obviate the need to consider historical materials; indeed, the first two prongs mandate such an inquiry. A functional historical analysis is explored in parts II and III of this article. The functional historical test requires examination not only of causes of action traditionally heard at law or in equity in 1791, but also of the jury's factfinding function as it developed in England and Colonial America. If a judge concludes that a contemporary jury would be unable to perform its factfinding function in a manner consistent with the goals of truth and fairness the jury system was intended to promote,⁶ the judge can strike the jury without violating the spirit of the seventh amendment.

Some courts have apparently relied solely on the third factor of the *Ross* test to deny jury trials even though historical practice dictated that a jury trial was warranted.⁷ In essence, these courts interpreted *Ross* as holding that a judge has discretion to determine when the inability of the jury to reach an intelligent decision would render the remedy at law inadequate and permit the judge to try the case in equity. The decisions leading to *Ross* and to the post-*Ross* cases in which the jury was struck are discussed in parts V through VII.

The functional analysis used by those courts also raises important due process issues. If the jury is unable to perform its factfinding function competently in a complex case, it seems doubtful that

6. The advantages the jury system was thought to offer were pointed out by Mr. Justice Hunt in *Sioux City & P. Ry. v. Stout*, 84 U.S. (17 Wall.) 657 (1873):

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

Id. at 664.

In *Sioux City*, a defendant railroad, on appeal from an adverse judgment in a tort suit, had asserted that since the facts were undisputed, the question of negligence was one of law to be passed on by the court, rather than by a jury. Justice Story's response was the above-quoted statement. While perhaps his observations rang true in 1873, there has been a considerable increase in the complexity of litigation since that time, which raises the question whether twelve men could today draw "wiser and safer conclusions . . . than [could] a single judge." *Id.* See pt. II § D *infra*.

7. Traditionally, a plaintiff could invoke equitable jurisdiction where the remedy at law was inadequate. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478-79 (1962).

the decision the jurors reach will be either fair or rational. Yet, due process requires an impartial adjudicator capable of assessing the facts. Thus, there is an apparent conflict between the right to trial by jury and the right to a fair trial. In part VII it will be argued that this aspect of the jury trial problem was recognized by the *Ross* court and that the *Ross* test is therefore of constitutional dimensions. A judge using a due process standard should be able to deny a demand for jury trial in a complex case even where historical practice would have required trial by jury.

A. *The Factual Context*

The case of *ILC Peripherals Leasing Corp. v. IBM Corp.*,⁸ presided over by Judge Conti, provides a striking example of the factual context in which the jury trial problem arises.⁹ Judge Conti was assigned to try a law suit filed by a competitor of the largest computer manufacturer in the world. The competitor alleged that the giant corporation had monopolized, or was attempting to monopolize, the computer industry. The judge recognized that the issues involved in such antitrust litigation would require jurors to master both advanced computer technology and sophisticated financial principles. Moreover, he expected the trial to last for several months. Despite the complexity of the issues and the length of trial time predicted, Judge Conti exhibited his strong commitment to the institution of the jury trial by refusing to grant defendant's motion to strike the jury.

The trial, in fact, lasted for five months and consumed ninety-six trial days. The parties called eighty-seven witnesses whose testimony filled more than 19,000 pages of transcript. More than 2,300 exhibits were admitted into evidence. Upon completion of the trial, after deliberating for nineteen days, the jury found itself hopelessly deadlocked, and Judge Conti was forced to declare a mistrial.

Judge Conti concluded that, although the jurors had been conscientious and diligent, they were simply unequipped to decide a case involving "technical and financial questions of the highest order."¹⁰ The difficulties that the jury encountered in grasping the

8. 458 F. Supp. 423 (N.D. Cal. 1978).

9. The question of complexity has generally arisen in antitrust and securities cases. These types of cases tend to be highly technical and of such size that the trials last for several months. See, e.g., *id.* (antitrust; five month trial); *SCM Corp. v. Xerox Corp.*, 463 F. Supp. 983 (D. Conn. 1978) (antitrust; fourteen month trial); *In re United States Financial Sec. Litigation*, 75 F.R.D. 702 (S.D. Cal. 1977) (securities trial estimated to last two years or more).

10. 458 F. Supp. at 447.

expert testimony presented during the trial became apparent when, in response to the judge's inquiry as to whether this type of case should be tried to a jury, the foreman replied, "If you can find a jury that's both a computer technician, a lawyer, an economist, knows all about that stuff, yes, I think you could have a qualified jury, but we don't know anything about that."¹¹

In addition to the jury's difficulty in understanding the case, other problems are inherent in a decision to permit a jury trial in such a complex case. Most obvious is the difficulty encountered when attempting to assemble a group of jurors who are free to sit in a trial estimated to last ten months. In the *IBM* case, 175 prospective jurors were called; after excuses were heard, only twenty-nine candidates remained from which to select fourteen jurors. The majority of jurors selected were over fifty years of age, and only one had even a limited technical education. Rather than representing a true cross section of the community, this group represented the much smaller class of people who could spend ten months empanelled on a jury: housewives, unemployed persons and retired citizens. Understandably, the individuals selected from this group had trouble applying concepts like "cross elasticity of supply and demand," "market share," "market power," "reverse engineering," "product interface manipulation," "discriminatory pricing," and "barriers to entry."¹²

Another problem is the burden such a case imposes upon the judicial system: *IBM* occupied the court and its staff exclusively for seven months, the court had to go off the new case load assignment for that period of time, and jury expenses amounted to \$32,000. Naturally, this investment of time and expense was completely wasted when the court was required to declare a mistrial.¹³ Given the eventual mistrial and Judge Conti's subsequent recommendation that plaintiff's demand for a jury trial be stricken in the event of a remand, a significant question is raised: Would it be possible to formulate a constitutional and historical basis for denying the jury trial demand prior to trial?

B. *Defining the Issues*

The factual context of *IBM* raises a number of important issues that must be decided before the jury trial request can be denied in

11. *Id.*

12. *Id.* at 448.

13. *Id.*

complex civil litigation.¹⁴ As noted above, the traditional (static) historical test required that all those issues that would have been heard in a court of law rather than in equity at the time of the adoption of the seventh amendment, be tried before a jury. Since money damages (historically a legal remedy) are normally requested in all private antitrust suits, the static historical test presents a problem to a judge sitting on a complex antitrust case. Faced with that test, Judge Conti apparently had no options when the jury trial motion was presented to him; he could not have struck the jury trial demand and still remained faithful to the seventh amendment.

With the benefit of hindsight, however, Judge Conti realized that the trial was too complex for a jury to handle. This raises two principal questions. First, is there another standard by which Judge Conti could have exercised his discretion before trial to rule that the suit was beyond the capabilities of the jury and still have remained true to the seventh amendment? Second, what goals was Judge Conti seeking to foster by permitting the jury to hear and decide the *IBM* case and can these goals be reconciled with a decision to strike the jury before trial? These are the two issues which I propose to resolve in this article.

Before addressing the problem in detail, however, it is essential that some definition of complex litigation be offered. It is not enough to say that when the jury fails to serve its function as a reasoned decisionmaker, the litigation is complex.¹⁵ Complex litigation must involve more than a complicated factual pattern.¹⁶ Generally, those courts that have struck the jury trial demand have also found a combination of these factors:¹⁷ large quantities of informa-

14. See Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979). The conclusions reached by the author are essentially the same as those reached here. There are, however, several differences in the reasoning employed to reach these conclusions. This comment places more emphasis on the development of a historical test to support the decision to deny a jury trial request. Also, the third prong of the *Ross* test, standing alone, may not provide an adequate justification for denying a jury demand, as that author suggests. *Id.* at 906. An historical perspective and a more fully developed due process argument are essential to providing a sound rationale for striking the jury in complex litigation.

15. The conception [of complex litigation] draws heavily on the model of jury deliberation . . . , according to which the jury reaches a verdict by deduction and inference from the facts in evidence. In the abstract, a case is too complex for a jury when it prevents the jury from functioning in this fashion; that is, when it leaves the jurors unable either to comprehend the facts in evidence or to reason from them to a verdict.
Id. at 898 (footnote omitted).

16. The Supreme Court has stated that complicated facts alone do not provide a reason for denying a jury trial. *Curriden v. Middleton*, 232 U.S. 633, 636 (1914); *United States v. Bitter Root Dev. Co.*, 200 U.S. 451, 472-73 (1906).

17. See text accompanying notes 239-50 *infra*.

tion to absorb,¹⁸ highly technical issues,¹⁹ large numbers of plaintiffs and defendants,²⁰ various laws to apply to the facts,²¹ and an anticipated lengthy trial time.²² Given a mode of analysis that utilizes these criteria as practical guidelines, there should be little fear that the judge's discretion to deny a demand for jury trial could be abused.

II. DEVELOPMENT OF THE JURY TRIAL SYSTEM IN ENGLAND

The seventh amendment to the Constitution of the United States guarantees that: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."²³ The language of the amendment has, however, created numerous analytical problems regarding the scope of the right to trial by jury.

Traditionally, courts interpreted the phrases "suits at common law" and "shall be preserved" as guaranteeing trial by jury only in those actions that existed at English common law in 1791 when the seventh amendment was adopted.²⁴ In examining historical materials, however, the inquiry should not be limited to ascertaining which actions were tried at law in 1791, but should also be directed at discovering what functions and purposes the jury fulfilled in the English legal system at that time. Although a comprehensive historical description of the development of the jury system in England is beyond the scope of this article,²⁵ that historical data which sheds

18. See, e.g., *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *In re United States Financial Sec. Litigation* 75 F.R.D. 702 (S.D. Cal. 1977); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99 (W.D. Wash. 1976).

19. See, e.g., *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978) (complex and difficult economic concepts); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978) (accounting and procedural complexities).

20. *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978) (400 to 900 class members suing 11 defendants, alleging antitrust violations relating to over 1000 contracts; defendants filed counterclaims and claims in setoff); *In re United States Financial Sec. Litigation*, 75 F.R.D. 702 (S.D. Cal. 1977) (18 cases, involving five plaintiff classes and 100 defendants, consolidated for trial).

21. See, e.g., note 19 *supra*.

22. See, e.g., *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *In re United States Financial Sec. Litigation*, 75 F.R.D. 702 (S.D. Cal. 1977); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99 (W.D. Wash. 1976).

23. U.S. CONST. amend. VII.

24. See *Galloway v. United States*, 319 U.S. 372, 388 (1942); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830); notes 129-43 and accompanying text *infra*.

25. A few British historians and others have produced such comprehensive studies. See

light on the questions posed above will be analyzed.

Commentators on the development of the jury thought that it advanced certain cherished ideals. Although they recognized that it had certain defects, both Blackstone and Holdsworth thought the jury system was invaluable. Holdsworth, for instance, recognized that a common jury²⁶ might "have neither the desire nor the capacity to weigh the evidence, or to arrive at a conclusion upon the facts in issue,"²⁷ but, despite this major shortcoming, argued that the jury made five significant contributions to the legal system and society.

First, since juries were not bound by precedent as were judges, the jury could decide hard cases equitably without worrying about the possibility of making bad law. Second, the jury was thought to preserve the dignity of the bench; when the judge's role was limited to that of advising the jury, the judge could take a more judicial attitude, and "no odium [could] attach to him whatever . . . the verdict of the jury."²⁸ Third, "[t]he jury itself [was] educated by the part which it [was] required to take in the administration of justice. The jury system [taught] the members of the jury to cultivate a judicial habit of mind."²⁹ It instilled in them a respect for law and order and reenforced their notions of duty to society by including them in the governmental process. Fourth, the jury system tended to make the law more intelligible by providing an interface with the realities of daily life.³⁰ Fifth, and finally, the jury brought to the inside, technical world of the common law system an outside

4 W. BLACKSTONE, COMMENTARIES *447-504 (Tucker ed. 1803); 3 E. COKE, FIRST INSTITUTE OF THE LAWS OF ENGLAND *447-504 (J. Thomas ed. 1836); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 298-350 (7th rev. ed. 1956); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (2d ed. 1898); Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 295, 357 (1892).

26. For a discussion of the distinction between a common jury and a special jury, see notes 61-73 and accompanying text *infra*.

27. 1 W. HOLDSWORTH, *supra* note 25, at 347-48.

28. *Id.* at 348.

29. *Id.*

30. Holdsworth wrote that a clever man, constructing theories in order to decide analogous cases, will be interested,

not in the dry task of deciding the case before the court, but rather in the construction of new theories, the reconciliation of conflicting cases, the demolition or criticism of older views. The result is a series of carefully constructed, and periodically considered rules, which merely retard the attainment of a conclusion without assisting in its formation. . . . Rules which are so refined that they bear but a small relation to the world of sense will sooner or later be swept away. . . . The jury system has for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense.

Id. at 349 (citation omitted).

sense, an "outside animation," that no single individual could possess.³¹

Blackstone, whose praise of the jury system was lavish, considered it a distinctive feature of the British Constitution.

[T]he trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And, if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to criminal cases! . . . [I]t is the most transcendant privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals.³²

Blackstone also eulogized the metamorphosis of the jury into a fact-finder and extolled its development as a shield from partiality and injustice.³³

The belief shared by Holdsworth and Blackstone that the jury system fosters desirable goals³⁴ was accepted during the American Colonial period and still persists today.³⁵ In some instances, the theories of those commentators remain viable; however, they must be considered in light of certain underlying assumptions and in the context of the time in which they were formed.

Blackstone assumed that the jury was the best investigator of truth³⁶ and that a litigant would be judged by a jury of his equals.³⁷

31. *Id.* at 350.

32. 4 W. BLACKSTONE, *supra* note 25, at *379 (emphasis added).

33. [T]herefore a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial

Id. at *380.

34. For example, the five contributions described by Holdsworth, *see* notes 28-31 and accompanying text *supra*, all tended to promote the goal of legitimizing the judicial institution. This was achieved because the jury system Holdsworth described was geared to temper the application of unyielding legal concepts with the communal sense of equity and justice. Consequently, it was assumed that the particular litigants, and eventually the society as a whole would be more willing to accept the decisions of the judicial tribunal. W. HOLDSWORTH, *supra* note 25, at 348-50. Moreover, the jury system was thought to promote the goal of protecting individual liberties. *See* notes 32-33 and accompanying text *supra*.

35. *See* J. FRANK, COURTS ON TRIAL 108-09 (1949). Professor Frank, however, attacks the traditional belief that the jury system is essential to individual liberty and democracy. *Id.* at 108-45.

36. *See* note 33 *supra*. Blackstone also wrote, "[W]e cannot but admire, how scrupulously delicate, and how impartially just the law of England approves itself, in the constitution and frame of a tribunal, thus excellently contrived for the test and investigation of truth" 4 W. BLACKSTONE, *supra* note 25, at *365.

37. *See* text accompanying note 32 *supra*.

Holdsworth assumed that a litigant would be more content with the measure of justice meted out by a jury than by the judge.³⁸ When those men glorified the jury system, however, it is improbable that they had anticipated the possibility of jurors facing protracted anti-trust litigation involving giant corporations or federal agencies arguing complex market theory. It is suggested here that, in such situations, jurors are not necessarily the best investigators of truth. Furthermore, it can no longer be assumed that the rights of the parties will be affected only by the unanimous consent of twelve of their *equals*. Thus, Holdsworth's assumption that litigants will always be more content with a jury verdict is also subject to doubt. These last points will be clarified in the following discussion of the development of the jury system in England.

A. *Early Stages of Development: Empanelling the Jury*

Originally, jurors were selected from the area where people were most likely to be familiar with the case. In fact, jurors were often witnesses of the particular act in question.³⁹ This procedure was apparently thought to guarantee not only truthfulness but also fairness to the parties.⁴⁰ Blackstone, at this stage of the jury's development, admired how the system was adopted and framed "for the investigation of truth."⁴¹

The jury was assembled when the court awarded the sheriff a writ⁴² commanding him to

cause to come here on such a day, twelve free and lawful men, *liberos et legales homines*, of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A, nor the aforesaid B, to recognize the truth of the issue between the said parties.⁴³

Once the jurors had been notified, the date of trial was set.⁴⁴ Because

38. See note 34 *supra*.

39. W. HOLDSWORTH, *supra* note 25, at 333.

40. It was so essential to have some neighbors on the jury, that if the *visne* appeared on the record to be wrong, there were grounds for a mistrial, for motions to arrest the judgment or for reversing it by error. This caused serious problems as parties made trivial objections to the *visne* to challenge a just verdict. Eventually, it was necessary for parliament to step in with various statutes to remedy these problems. The 4 & 5 Ann., c. 16 directed "that every *venire facias* shall be awarded from the body of the county in which the action is triable." 3 E. COKE, *supra* note 25, at *465 n.8.

41. 4 W. BLACKSTONE, *supra* note 25, at *355.

42. The writ was called a writ of *venire facias* ("that you may cause to come").

43. 4 W. BLACKSTONE, *supra* note 25, at *352 (footnote omitted).

44. *Id.* at *352-53.

their failure to appear would result in default, a compulsory process was awarded against the jurors,⁴⁵ commanding the sheriff to present their bodies or take their land as a pledge until they fulfilled their duties.⁴⁶

Jurors had to meet certain criteria before they could serve. They had to reside in the vicinage because their familiarity with the facts was considered indispensable to providing the fairest forum.⁴⁷ If, however, a "fair and impartial" jury could not be obtained in the vicinage, a change of venue could be ordered⁴⁸ to protect the defendant's right to a trial by impartial jurors.⁴⁹ Jurors had to be free men, indifferent to the cause they were to try, and lawful men, neither outlawed nor infamous. Coke described the most desirable juror as follows:

First, he ought to be dwelling most near to the place where the question is moved.

Secondly, he ought to be most sufficient both for understanding, and competency of estate.

Thirdly, he ought to be least suspicious, that is, to be indifferent as he stands unsworn: and then he is accounted in law *liber et legalis homo*⁵⁰

If these safeguards failed, the final insurer of the sought-after impartiality and fairness was the method of challenging a proposed

45. In the Court of Common Pleas, it was a writ of *habeas corpora juratarum* ("that you have the bodies of the jurors"); in the King's Bench, a *distringas* ("that you distrain", which meant to take a pledge of property until the juror performed his obligation).

46. Blackstone believed the procedures followed in pretrial stages of litigation rendered trial by jury superior to "any other method of trial in the world." The person returning the jurors was of "fortune and consequence" and therefore was less likely to commit errors. He was also bound by oath faithfully to execute his duty. The trial occurred several weeks after the panel was returned to the court on the original *venire*, thus permitting the parties to receive notice of the jurors. Since the trial was held in the county where the witnesses and jurors lived, the parties saved travel expenses. Finally, the judges were strangers to the county, which removed partiality, and were equally trained, which ensured uniformity of judgment. 4 W. BLACKSTONE, *supra* note 25, at *354-56.

47. Coke wrote "if issue was taken on the fact alleged, it might be tried by a jury of the visne or neighborhood, which our ancestors conceived to be more likely to be qualified to investigate and discover the truth, then persons living at a distance from the scene of the transaction." *Id.* at 465.

48. W. HYATT, *HYATT ON TRIALS* 424 (1924); see 4 W. BLACKSTONE, *supra* note 25, at *349-50. Coke wrote:

Wherein the most general rule is, that every trial shall be out of that town, parish, or hamlet, or place known out of the town, . . . within which the matter of fact issuable is alleged, which is most certain and nearest thereunto, the inhabitants whereof may have the better and more certain knowledge of the fact.

3 E. COKE, *supra* note 25, at *464-65 (footnote omitted).

49. See 3 E. COKE, *supra* note 25, at *464-70.

50. *Id.* at *460 (footnotes omitted).

jury or juror. The challenge to the array was an exception to the entire panel. Such an objection could be raised on the grounds of partiality or default by the sheriff or his under officer who arrayed the panel.⁵¹ Challenges to the poll were challenges of individual jurors and were broken into four categories. Blackstone accepted the categories as they were originally described by Coke,⁵² who listed them as follows: first, for respect of honor;⁵³ second, for want or default;⁵⁴ third, for affection or partiality;⁵⁵ fourth, for crime delict.⁵⁶ The causes for removal were generally consistent with the goal of attaining an impartial panel capable of finding the truth. The first category of challenges, which prevented a lord from sitting on the jury of a commoner and vice versa, permitted the parties to obtain a jury actually composed of their peers. The second category imposed the requirement of ownership of land in the vicinage; the amount of the freehold estate required depended upon the amount in controversy.⁵⁷ From these challenges, one could infer that the system was geared to guarantee that the jurors had both primary knowledge and understanding of the particular dispute. Thus, all of the procedures for empanelling the jury were aimed at ensuring that no man would "be affected either in his property, his liberty, or his

51. See 4 W. BLACKSTONE, *supra* note 25, at *359; 3 E. COKE, *supra* note 25, at *469-73.

52. See 4 W. BLACKSTONE, *supra* note 25, at *361.

53. *Propter honoris respectum*. The common law divided the people of England into lords of parliament and the commons of the realm. The former included barons, viscounts, earls, marquesses and dukes. The latter included knights, esquires, gentlemen, citizens, yeomen and burgesses. Anyone who came to be judged could only be judged by his peers. For example, if any of the yeomen were to be tried, a baron could not be empanelled. 3 E. COKE, *supra* note 25, at *475.

This historical fact highlights a significant assumption underlying the common law method of ascertaining the truth: it was believed that only a peer could judge the actions of a member of his class because only he would be able to understand the issues that arose.

54. *Propter defectum*. In order to serve on a jury, one had to be a free man and a property holder who was not alien-born. The freehold owned had to be situated in the county where the cause of action arose. *Id.* at *475-76.

55. *Propter affectum*.

[T]he law presumeth that one kinsman doth favour another before a stranger . . . and how far remote soever he is of Kindred, yet the challenge is good. And if the plaintiff challenge a juror for kindred to the defendant, it is no counter-plea to say that he is of Kindred also to the plaintiff, though he be in a nearer degree; for the words of the *venire facias* forbiddeth the juror to be of Kindred to either party.

Id. at *477. Coke offers numerous examples of proper challenges under *propter affectum*.

56. *Propter delictum*. If the juror was attainted or convicted of treason, or felony, or for any offense to life or member, or in attain for a false verdict, or for perjury as a witness, or in a conspiracy at the suit of the king, he could not serve as a member of the jury. Other wrongdoings could also prevent service. See *Id.* at *481-82.

57. *Id.* at *476.

person, but by the unanimous consent of twelve of his neighbours and equals."⁵⁸

B. *Transition of the Jury from Witness to Factfinder*

Only gradually did English jurors cease to be witnesses and become judges of fact.⁵⁹ Legal historians Pollock and Maitland attributed the transition of the jury from witness to factfinder to three elements found in the ancient jury trial system: the arbitral, the communal and the quasi-judicial elements.⁶⁰ The arbitral element was most evident in the composition of the juries from the sixteenth through the eighteenth centuries, and is particularly noteworthy for the purposes of this discussion. It is closely associated with the special jury, which seems to have been used with great frequency⁶¹ during this period. Though the special jury was not actually an arbitrator, its verdict was considered a mode of proof since both parties "put themselves" upon the jury, consenting to be bound by the outcome.⁶²

Even as early as the mid-fourteenth century, a special jury had been required in particular types of cases. During the reign of Edward III, he issued the "Ordinance of the Staples," which granted jurisdiction of disputes over staples to mayors and constables. Those disputes were to be ruled by the law-merchant and not by the common law.⁶³ A second ordinance of Edward III required, in the case of an ordinary dispute, that if both parties were aliens, the cause was to be tried by aliens; if denizens, tried by denizens; and if one party was an alien and the other a denizen, then the "inquest was to be composed of half and half."⁶⁴ Both ordinances are examples of the arbitral element in an extremely early period.

The concern that the jury represent, in its composition, the interest of both litigants was also evident in the mid-seventeenth century.⁶⁵ In some instances, depending on the nature of the case,

58. See text accompanying note 32 *supra* (emphasis added).

59. 1 W. HOLDSWORTH, *supra* note 25, at 332.

60. 2 F. POLLOCK & F. MAITLAND, *supra* note 25, at 623.

61. See Thayer, *supra* note 25, at 300.

62. 2 F. POLLOCK & F. MAITLAND, *supra* note 25, at 623.

63. 27 Edw. III, st. 2, c. 8 (1353).

64. 28 Edw. III, st. 2, c. 13 (1354). Thayer states that the jury of the "half tongue," "*de medietatem linguae*," was founded on considerations of policy and fair dealing, rather than a wish to provide a well-informed jury. Thayer, *supra* note 25, at 300 n.1. While there may have been no wish to provide a well-informed jury, one could infer that a merchant jury of the same alienage as the litigant would be better prepared to try such a case and therefore would be better informed, though perhaps not of the particular facts in the case. At the least, it can be said that such juries were established to offer fairer dealings between litigants.

65. 2 F. POLLOCK & F. MAITLAND, *supra* note 25, at 632 n.3. Pollock and Maitland cite

juries were composed of experts and men of particular trades.⁶⁶ For example, mercantile disputes were heard by juries composed of merchants familiar with commercial law.⁶⁷ Thayer suggested that the use of the special jury was a natural result of the principle "that those were to be summoned who could best tell the *veritatem rei*."⁶⁸

Blackstone reported that special juries were originally introduced in trials at bar,⁶⁹ "when the causes were of too great nicety for the discussion of ordinary freeholders. . . ."⁷⁰ By statute either party was entitled, upon motion, to have a special jury for the trial of any issue at bar or at assizes.⁷¹ The moving litigant was required to pay the extraordinary expense unless the judge would certify that the cause required a special jury.⁷² Read together, Blackstone and the statute indicate that actions held at bar, which were generally of great importance or difficulty,⁷³ were usually not heard by a common jury, but by a special jury with expertise in the area of dispute. From this, one can infer that the English system recognized that certain disputes were beyond the understanding of the common jury. In those cases, the jury system was retained through the calling of a special jury, thus protecting notions of fairness and impartiality and upholding the idea that a jury should understand the dispute.

two particular cases for support of their arbitral position. First, the Bishop of Ely and Abbot of St. Edmund were tried by a jury of eighteen knights, six chosen by each litigant, while the remaining six were chosen by two other men. Second, Edward I, in his Carta Mercatoria, granted a foreign merchant the right to have six foreign merchants on his jury. The historians conclude from this that the jury, when taken as a whole, should be impartial "while its component parts should in some sort represent the interest of both litigants." *Id.*

66. In London, jurors of cooks and fishmongers sat in trials when one of them was accused of selling bad food. See Thayer, *supra* note 25, at 300.

67. Thayer quoted one case from the King's Bench in 1645-46:

The court was moved that a jury of merchants might be retained to try an issue between two merchants, touching merchants' affairs, and it was granted, because it was conceived they might have better knowledge of the matters in difference which were to be tried than others could who were not of that profession (Lilly's Pract. Reg. ii 154).

Id.

68. *Id.*

69. Black's Law Dictionary defines "trial at bar" as "[a] species of trial now seldom resorted to except in cases where the matter in dispute is one of great importance and difficulty. It takes place before all the judges at the bar of the court in which the action is brought." BLACK'S LAW DICTIONARY 1676 (rev. 4th ed. 1968).

70. 2 W. BLACKSTONE, *supra* note 25, at *357. During this period, it appears that although special juries could be used at bar without consent of the parties, at nisi prius consent was required before a special jury would be returned. Thayer, *supra* note 25, at 301.

71. See 3 Geo. II, c. 25, s xv-xxii (1730). If the motion were granted, then jurors were chosen only from those with the requisite special qualifications.

72. See 3 Geo. II, c. 18 (1751). The statute was designed to prevent the abusive use of the special jury.

73. See note 69 *supra*.

The special jury, combined with the methods of jury selection described above, guaranteed the parties an impartial and an *informed* adjudicator of fact.

The points made here bear repetition. Developments in the evolution of the jury system were functionally related to its purposes: providing the best method for discovering the truth about a dispute and offering a fair forum. This functional relation is perhaps best typified by the frequent use of a special jury. Methods of assembling and challenging jurors ensured not only impartiality, but also a panel of jurors who were frequently of the same profession and always of the same peer group as the litigants. The system guaranteed a jury with a better understanding of the particular cause, regardless of the difficulty or complexity of the dispute.

C. *Suits in Equity*

As pointed out in the beginning of this section, the earliest interpretations of the seventh amendment focused on the distinction between suits at common law and suits in equity.⁷⁴ Complete understanding of the language of the seventh amendment, however, requires further analysis.

In addition to examining the purpose of the jury in the English courts of law, one must examine its role in equity, that is, the relationship between the jury and the English Court of Chancery when the seventh amendment was adopted. It should be noted at the outset, however, that legal scholars disagree about the practices and authority of Chancery in the eighteenth century, as well as about the significance of equitable procedures in relation to interpretation of the jury trial guaranty.⁷⁵

For example, two respected legal historians have argued that practice in equity in 1791 was in a state of transition; that the authority of the Lord Chancellor to decide questions of fact had not been clearly established as a proper exercise of his discretion⁷⁶ and that, consequently, he generally, if not invariably, submitted disputed factual issues to common law juries for resolution.⁷⁷ The proponents of this theory suggested that two inferences could be drawn

74. See note 24 and accompanying text *supra*.

75. The leading debators are Harold Chesnin and Geoffrey Hazard, on one side, and John Langbein, on the other. Compare Chesnin & Hazard, *Chancery Procedures and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 YALE L.J. 999 (1974) with Langbein, *Fact Finding in the English Court of Chancery: A Rebuttal*, 83 YALE L.J. 1620 (1974).

76. Chesnin & Hazard, *supra* note 75, at 1019.

77. *Id.* at 999.

from their findings. First, they hypothesized that the phrase "suits at common law" was intended to cover *all* cases in which a jury was normally used in the English legal system in 1791, regardless of whether the trial was at law or in equity. Alternatively, they speculated that the provision was a compromise: the use of juries in suits at common law was to be guaranteed; the use of juries in equity was left in question, but not foreclosed.⁷⁸

Those conclusions drew a prompt and persuasive rebuttal. Another leading scholar contended that the Court of Chancery did indeed have and exercise factfinding power⁷⁹ and that, even when the court chose to delegate that function to the jury, it did so not because it lacked authority, but because it was overworked.⁸⁰

The unresolved debate over the use of the jury by the Court of Chancery makes it clear that history sometimes provides only ambiguous clues to be used in interpreting the seventh amendment. The historical distinctions between modes of proof available and types of relief granted in equity and at law⁸¹ provide equally few

78. *Id.* at 1020-21.

79. Langbein, *supra* note 75, at 1620. Langbein discusses a long line of cases demonstrating the exercise of factfinding power by Chancery prior to 1791. He distinguished the cases cited by Chesnin and Hazard by showing that they were merely examples of actions over which Chancery lacked subject matter jurisdiction, rather than cases in which it lacked authority to resolve factual disputes. *Id.* at 1620-28. Langbein was alarmed by the Chesnin-Hazard thesis because of its "potential for mischief in our courts." *Id.* at 1620. He thought their conclusions implied that the seventh amendment might require federal courts sitting in equity to submit factual issues to a jury. *Id.* Langbein advocates fewer, not more, jury trials. *Id.* at 1630.

80. *Id.* at 1630.

81. Law and equity had concurrent jurisdiction over many subjects. See 4 W. BLACKSTONE, *supra* note 25, at *430-31; 1 W. HOLDSWORTH, *supra* note 25, at 449, 451-52. They differed, however, in their modes of proof, the manner in which trials were conducted and the relief available. For example, in the case of proof, when the facts rested only in the knowledge of the parties, the suit was heard in equity, because only equity could apply itself to the consciences of the parties and purge them upon oath regarding the truth of a matter. 4 W. BLACKSTONE, *supra* note 25, at *436. Procedurally, only a jury could determine facts if the case were at law, but a judge determined facts if it were in equity. *But see* notes 75-80 and accompanying text *supra*.

In addition, only equity could provide certain remedies, due either to the inflexibility of the common law or the lack of proper procedures at law. For instance, the Chancellor interfered in cases when the rigidity of law made enforcement of a strict legal right contrary to equity. Fraud, forgery and duress are excellent examples of actions courts at law could not consider. The Chancery could also issue an injunction against the enforcement of any judgment at law that would lead to injustice. See 1 W. HOLDSWORTH, *supra* note 25, at 457.

Suits in contract provide another example of a situation in which legal remedies were inadequate. The common law only slowly developed a theory of contract law which would allow enforcement of simple contracts. Even after the middle of the fourteenth century, when the common law courts began to develop an adequate theory, they still offered relief only in the form of damages. To obtain specific performance, it was still necessary to bring an action in equity. *Id.* at 455-56.

guidelines because many of them have been lost in the evolution of modern procedure, and a party may now enter a single court to obtain both legal and equitable relief.⁸²

Consideration of the underlying reasons for trying a suit in equity rather than at law is much more useful than simplistic historical categorization of actions. If the law courts were unable to resolve a dispute satisfactorily, due to defects in pleading or procedure, inflexibility, lack of authority to provide the desired relief⁸³ or inability to deal with the intricacies of the case,⁸⁴ then equity was to provide an adequate remedy. For example, the remedy at law was always considered inadequate when disposition of a case depended upon unraveling extremely complex financial relationships between the parties. The action required an accounting of monies owed, and actions of this type were always heard in equity because juries were assumed incapable of untangling such complicated matters.⁸⁵

D. Analysis

This overview of the development of the English legal system was intended to demonstrate that it is not sufficient merely to interpret the language of the seventh amendment as a automatic guarantee of a jury trial in all suits for damages. One must also look at history in order to discern what function the jury served, and what function equity served, in 1791. Although the jurors of that time may have heard cases of some complexity in which damages were sought, members of those juries were selected in such a way as to

82. Under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (1976), for instance, jury trial is available in cases where legal issues are involved, but relief is primarily equitable in nature.

83. [T]he procedure of the court enabled the Chancellor to give remedies in cases in which the common law either could not act at all, or could not act with effect. The Chancellor by means of the writ of subpoena and his power to commit for contempt exercised strict control over the persons of all parties to a suit. He could order them to act in any way he saw fit in order to secure justice. Thus he could examine them; and, in aid of proceedings either in his own court or in the courts of common law, could enforce the discovery of documents in their possession.

W. HOLDSWORTH, *supra* note 25, at 458 (footnotes omitted).

84. See note 85 and accompanying text *infra*.

85. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478-79 (1962). An action for an accounting seems, at first blush, closely analogous to a modern antitrust suit, which frequently involves complicated business matters. Because the remedy for violation of the antitrust laws is treble damages, however, such suits also resemble actions at law. Thus, if the jury trial request in an antitrust action is to be denied, it must be denied on a more adequate basis than that of an overly-simplified analogy to the historical accounting. See notes 262-64 and accompanying text *infra*; Note, *Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury*, 20 B.C.L. Rev. 511, 528 (1979).

ensure that they could understand the issues and thus serve their function as factfinders. In extremely complex cases, the matters were simply taken away from the jury and sent to equity.

History demonstrates that the common law jury thus performed its factfinding function in a manner consistent with its purpose of promoting the notions of fairness and due process. Therefore, a judge who concludes that a jury in a complex case is not able to perform its factfinding function, as defined by the historical context, would necessarily have to conclude also that the remedy at law is inadequate. Hence, by applying a functional historical test, he would be able to deny the motion for jury trial without violating the spirit of the seventh amendment.

III. THE TRANSPLANTING OF THE JURY SYSTEM TO AMERICA

A. *The Adoption of the Seventh Amendment*

Provisions for jury trials in early colonial charters⁸⁶ and subsequent state constitutions⁸⁷ attested to the popularity of the jury as an institution at the time the federal constitution was proposed. Nevertheless, at the Constitutional Convention, the delegates rejected the civil jury trial provision without a dissenting vote.⁸⁸ A few commentators have attempted to interpret the deceptively simple language of the seventh amendment in light of what is known about the ensuing ratification debates.⁸⁹ Those commentators have focused on two questions in their historical analyses: (1) In which types of cases did the framers intend for jurors to sit and why was their presence considered necessary? (2) In jury trials, what role did the framers intend the jurors to play in deciding the outcome?⁹⁰

86. See 2 KENT'S COMMENTARIES 2 (14th ed. J. Gould 1896) (commenting on the 1692 charters of Plymouth and Massachusetts Colonies). A representative charter provision from 1677 read: "That the tryals of all causes, civil and criminal, shall be heard and decided by the virdict or judgment of twelve honest men of the neighbourhood, only to be summoned and presented by the sheriff of that division. . . ." 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 129 (1971).

87. *Parklane Hosiery Co. v. Shore*, 99 S. Ct. 645, 656 (1979) (Rehnquist, J., dissenting); Maryland Declaration of Rights, *reprinted in* 1 B. SCHWARTZ, *supra* note 86, at 280; North Carolina Declaration of Rights, *id.* at 287; Pennsylvania Declaration of Rights, *id.* at 265.

88. 1 B. SCHWARTZ, *supra* note 86, at 438.

89. Two authors have uncovered most of the historical data in this area: Edith Henderson and Charles Wolfram. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973). See also, *Parklane Hosiery Co. v. Shore*, 99 S. Ct. 645, 655-64 (1979) (Rehnquist, J., dissenting).

90. See Wolfram, *supra* note 89, at 710.

Unfortunately, as the following discussion is meant to demonstrate, history provides no dispositive answer to these questions.

The drafters of the proposed constitution claimed that a jury trial guaranty in civil cases was excluded because of the difficulty in arriving at a particular clause that would satisfy all of the states, which at that time had varying jury practices.⁹¹ The Federalists⁹² argued somewhat ingenuously that a detailed provision would be "inappropriate in a document of first principles,"⁹³ but a vague, general provision would not reconcile the variant practices.⁹⁴ Thus, it was deemed best to leave the problem to the legislature for future regulation.⁹⁵

The Federalists did not oppose the jury trial itself; they objected to the inclusion of a specific guaranty in the Constitution.⁹⁶ Hamilton, in Federalist No. 83,⁹⁷ argued that if a jury trial provision were finally added, it should be written so that its meaning could evolve over time.

[T]he changes which are continually happening in the affairs of society, may render a different mode of determining questions of property, preferable in many cases, in which that mode of trial now prevails. For my own part, I acknowledge myself to be convinced that, even in this state, it might be advantageously extended to some cases to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men, that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these states as in Great Britian, afford a strong presumption that its former extent has been found inconvenient; and give

91. For background on these practices, see Henderson, *supra* note 89, at 299-332.

92. The Federalists supported the adoption of the Constitution as it was written when it emerged from the Constitutional convention.

93. Wolfram, *supra* note 89, at 666.

94. *Id.*

95. One Federalist argued, "[I]t appears to me it was infinitely better, rather than endanger everything by attempting too much, to leave this complicated business of detail to the regulation of the future Legislature, where it can be adjusted coolly and at ease, and upon full and exact information." 1 B. SCHWARTZ, *supra* note 86, at 454.

96. See *id.* at 455. Federalist James Iredell of North Carolina, a prominent attorney later appointed to the Supreme Court, answered the objections by George Mason, author of the Virginia Declaration of Rights and leader of the fight for a federal bill of rights, as follows:

It is in the power of the Parliament, if they dare to exercise it, to abolish the trial by jury altogether. But woe be to the man who should dare to attempt it. It would undoubtedly produce an insurrection, that would hurl every tyrant to the ground who attempted to destroy that great and just favorite of the English nation. We certainly shall be always sure of this guard at least upon any such act of folly or insanity in our representative.

Id.

97. THE FEDERALIST NO. 83 (A. Hamilton) (J. Cooke ed. 1961).

room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing, to fix the salutary point at which the operation of the institution ought to stop; and this is with me a strong argument for leaving the matter to the discretion of the legislature.⁹⁸

The exclusion of the jury trial provision, as well as the lack of a bill of rights, spurred Anti-Federalist opposition to the Constitution.⁹⁹ The objections of the Anti-Federalists did not go unnoticed. In order to muster majority support at the ratifying conventions, the Federalists had to promise that certain provisions recommended by the states would be added immediately after adoption of the Constitution; among the provisions promised was one providing the right to a jury trial in civil cases.¹⁰⁰

Edith Henderson, in her study of the debates, suggests that the Anti-Federalists based their desire for a jury trial guaranty on "nothing more specific than the general proposition that civil juries were a good thing."¹⁰¹ She argues that, considering the diversity of procedures employed in the states, one should not view the amendment as an attempt to codify a rigid form of jury practice. After discussing the procedural devices available at that time by which questions of the sufficiency of the evidence could be taken from the jury and reserved for the court's consideration, she writes that "it seems both unnecessary and undesirable to read that amendment as imposing any but the most general limitations on the Court's power to make . . . procedural changes" in the interests of efficiency.¹⁰² Thus, the power of the judge to grant summary judgments, judgments n.o.v. and new trials does not necessarily reduce the power of civil juries to such an extent that the use of those procedures violates the seventh amendment. "The whole thrust of the

98. *Id.* at 573. Hamilton was addressing the foreseeable limitations on the jury trial. Even in the late eighteenth century he could perceive instances in which a jury would be the inappropriate factfinder. He expressed concern about freezing the right in a particular provision. Hamilton's concern was justified, for the Supreme Court later used the static historical analysis to freeze the amendment. Of course, the Court subsequently modified the jury trial guaranty to adapt it to modern procedures, but the change generally resulted only in an expansion of the right to jury trial. Perhaps Hamilton would agree that complex litigation should never be heard by a jury. Perhaps the Court's refashioning of the traditional historical test in *Ross v. Bernhard*, 396 U.S. 531 (1970), is an adoption of Hamilton's perspective toward the jury trial right. See notes 163-69 and accompanying text *infra*.

99. See Wolfram, *supra* note 89, at 662.

100. Henderson, *supra* note 89, at 298.

101. *Id.* at 292.

102. *Id.* at 337. The Supreme Court generally has followed this interpretation of the amendment. *Id.* at 336.

history of jury practice," she writes, "both before and after 1790, has been toward rationality of decision and economy of motion in the courtroom."¹⁰³

Although Henderson's analysis implies that existing procedural devices limiting the role of the jury in civil cases define the outer boundaries of permissible modifications under the seventh amendment, her reasoning could conceivably be expanded to allow modification even of the jury's factfinding role where, due to the jurors' inability to understand the facts, their decisions would be irrational and would undermine the efficacy of the judicial method of dispute settlement.

Professor Wolfram, on the other hand, argues that historical materials evidence specific reasons advanced by proponents of the seventh amendment¹⁰⁴ for the inclusion of a jury trial guaranty: the frustration of unwise legislation; the overturning of the practices of courts of vice-admiralty; the vindication of the interests of private citizens in government litigation; and, the protection of litigants against overbearing and oppressive judges.¹⁰⁵ Most importantly, he asserts that juries were intentionally thrust into cases in order to effect a result different from the decision of an honest judge sitting without a jury. Supporters of the amendment meant for juries sitting in civil cases to act as a "check on what the popular mind might regard as legislative as well as judicial excesses."¹⁰⁶

103. *Id.* at 336-37.

104. Wolfram, *supra* note 89, at 670-71. For instance, Patrick Henry, a representative spokesman of the Anti-Federalists, based his plea on a strong emotional attachment to an institution which had developed in England to curtail governmental oppression.

Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off. They may call any thing rebellion, and deprive you of a fair trial by an impartial jury of your neighbors. Has not your mother country magnanimously preserved this noble privilege upwards of a thousand years? Did she relinquish a jury of the vicinage because there was a possibility of resistance to oppression? She has been magnanimous enough to resist every attempt to take away this privilege.

2 B. SCHWARTZ, *supra* note 86, at 810.

105. Wolfram, *supra* note 89, at 670-71. Wolfram sets out a caveat indicating the methodological constraints one faces when studying this subject and relying on history. First, the original understanding can be perceived only imperfectly, particularly with the absence of records of debate. Second, "no decent theory of constitutional thought or adjudication can afford to give totally controlling weight to the product of historical method alone. The risks of inaccuracy inherent in historical work are too great." *Id.* at 652.

106. *Id.* at 653. Wolfram concludes:

The inconveniences of jury trial were accepted precisely because in important instances, through its ability to disregard substantive rules of law, the jury would reach a result that the judge either could not or would not reach. Those who favored the civil jury were not misguided tinkerers with procedural devices; they were, for the day, libertarians who avowed that important areas of protection for

Wolfram also asserts that the history of the political settlement achieved between Federalists and Anti-Federalists suggests that the term "common law" was intended to refer to a process of legal development, rather than a changeless state of the law. Therefore, according to Wolfram, the seventh amendment should be read as referring to the common law process of adjudication and lawmaking that was recognized in England and is recognized in the United States as flexible and changing. Wolfram terms this a "dynamic" reading of the seventh amendment.¹⁰⁷ He maintains that this approach is most consistent with the "traditions of principled constitutionalism" the Supreme Court has used to interpret other Bill of Rights guaranties.¹⁰⁸ The static historical test, however, not only makes the right to jury trial dependent upon reference to the laws of England, but also limits interpretation of the amendment to a 1791 reading.¹⁰⁹ After extensive investigation, Wolfram concludes:

[T]he division between law and equity is not maintainable on any category of differences that can support even a pragmatically based constitutional distinction between the two. The only jurisprudential support for the varying command of the Constitution with respect to law and equity cases thus is reduced to the historical accident that in 1791 some kinds of cases were, for reasons that had nothing or at least little to do with the mode of adjudication, triable in courts that had no juries.¹¹⁰

Using this interpretation of the historical material as his basic premise, Wolfram suggests a "functional" approach to the interpretation of the seventh amendment.¹¹¹ Applying his "functional" approach, a court would first analyze the "reasons" given by the Anti-Federalists for the necessity of a constitutionally guaranteed right to jury trial. It would then grant a jury in all civil cases unless a litigant could demonstrate "either that the threats the jury was to meet in 1791 are today insufficiently important to require the constitutional solution of mandatory jury trial or that the jury in fact . . . no longer performs, the function ascribed to it by the origina-

litigants in general, and for debtors in particular, would be placed in grave danger unless it were required that juries sit in civil cases.

Id. at 671-72 (footnote omitted). It is interesting to note that Wolfram's conclusions parallel the five advantages of the jury system stated by Holdsworth. See notes 28-31 and accompanying text *supra*.

107. Wolfram, *supra* note 89, at 745.

108. *Id.* at 731.

109. *Id.* at 641-42.

110. *Id.* at 731 (footnote omitted).

111. *Id.* at 718.

tors of the seventh amendment."¹¹²

Courts have generally abandoned the static historical test, recognizing that historical categorization alone is an inadequate test of the scope of the right to jury trial. Therefore, Wolfram appears to have ample support for his dynamic interpretation. Wolfram's "functional" approach, however, does not result in the contraction of the jury trial right in complex litigation that is advocated in this article. Wolfram writes:

The dynamic approach to the seventh amendment would therefore reject the notion that the guarantee of jury trial should be determined by reference to matters of trial convenience or the relative "difficulty" of the legal or factual issues in the case. To the contrary, the alleged difficulty of issues in a case might argue more strongly than otherwise for the intervention of a jury, for this would permit some form of public scrutiny of the proceedings in order to assure that the "justice" of the case is not permitted to be lost in the maze.¹¹³

It is conceded that Wolfram might be correct in his assertion that the Anti-Federalists had specific reasons for requiring a jury in civil trials. It is also conceded that a jury might be necessary to protect litigants from governmental oppression by infusing into the judicial decision communal concepts of justice and fairness. The problem with Wolfram's "functional" analysis is that it fails to take into account the jury's most important historical function—factfinding.

Thus, while the concerns of the Anti-Federalists might still be valid considerations, they must be viewed in the context of the jury's factfinding abilities. It is unlikely that a jury incapable of understanding the facts in a complex case would be equipped to interject equities into the case in the nonarbitrary fashion mandated both by the traditional notions of due process and the functional historical test advocated in this section.

B. Development of the Jury System During the Colonial Period

Wolfram asserts that the static historical test is flawed because it only incorporates the practices of English common law.¹¹⁴ This appears to be correct, and the functional historical test thus includes consideration of the development of the American jury system in the years following the adoption of the amendment.

112. *Id.* at 672 n.88.

113. *Id.* at 746-47.

114. *Id.* at 720-22.

During the first thirty years of the new republic, the legal profession rose "from its chaotic condition of around 1790 to a position of political and intellectual domination" in the 1830's.¹¹⁵ This domination was made possible primarily by the unification of legal and commercial interest during that period.¹¹⁶

By 1880, the mainstay of commercial practice was marine insurance litigation between merchants and insurance companies.¹¹⁷ The most significant outgrowth of this practice was the development of three procedural devices used to restrict the scope of the jury's role in deciding cases.¹¹⁸ This section will focus on these procedural changes and their effect on the jury's function. Many of the conclusions reached herein are premised on information found in Morton J. Horwitz' *The Transformation of American Law*.¹¹⁹

One of the major procedural changes made during the last years of the eighteenth century was the expansion by American lawyers of the "special case" or "case reserved." The device was designed to avoid the effective intervention of a jury by submitting points of law directly to the judge. This procedure enabled judges to develop a body of common law from what originally had been merchant custom.¹²⁰

A second important procedural change was the expansion of the practice of awarding new trials when juries reached verdicts contrary to the weight of the evidence. This practice had been viewed suspiciously by the revolutionary generation, but became popular by the nineteenth century. In fact, the practice was eventually expanded to allow reversal of jury verdicts contrary to the weight of the evidence, which significantly increased the judge's "arsenal" of devices by which to control the jury. This change in policy, for which there was no apparent precedent, was first used in commercial cases.¹²¹

115. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 140 (1977) (quoting P. MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 109 (1965)).

116. *Id.* at 140.

117. *Id.* at 141.

118. *Id.* at 141-42.

119. *Id.* I recognize that reliance on secondary sources would be insufficient if I were writing a strictly historical piece, but it is not necessary for the purposes of this paper to delve more deeply into primary historical sources. Nonetheless, Horwitz' explanations of the relationship between legal and commercial interests and the resultant procedural changes are particularly relevant to this article because some of the most complex litigation of the colonial period arose out of commercial transactions.

120. In New York, this procedure supplanted traditional practice, while in Massachusetts, cases submitted to its Supreme Judicial Court generally proceeded from an agreed statement of facts. *Id.* at 142.

121. *Id.*

The third procedural change restricting the power of the jury was the advancement by the bar of the view that there was a sharp distinction between law and fact. Jurists at the end of the eighteenth century believed that the jury was the proper judge of both law and fact.¹²² By the 1800's, however, a judge's instruction on the law became mandatory to a jury, rather than advisory, in several important commercial jurisdictions.¹²³ Horwitz concludes: "These procedural changes made possible a vast ideological transformation in the attitude of American jurists toward commercial law. The subjugation of juries was necessary not only to control particular verdicts but also to develop a uniform and predictable body of judge-made commercial rules."¹²⁴

To summarize, these procedural modifications increased the role of the judiciary in commercial affairs because they facilitated the development of uniform, judge-made commercial laws. Accordingly, the use and availability of extralegal forms of dispute settlement diminished.¹²⁵

During this period, jurists also witnessed the rapid demise of the "struck" or special jury, which had been a favorite of colonial merchants.¹²⁶ Throughout the colonial period, until about 1800, this device ensured that merchants would be used as jurors in deciding mercantile causes. Around that time, the New York Legislature

122. The reader should recall that one of the reasons the authors of the Constitution were unable to settle on a specific provision for the civil jury trial was that methods for allocating between judge and jury the responsibility for deciding questions of law and of fact were different in the various states. See Henderson, *supra* note 89, at 299.

123. M. Horwitz, *supra* note 115, at 143.

124. *Id.* It is apparent that judges thought that allowing jurors to decide cases where they were unable to understand the intricacies of commercial law or the factual evidence put before them would not have permitted the development of a body of law that had uniformity and predictability. Horwitz reports that "the influence of Lord Mansfield's conception of a 'general jurisprudence' of commercial law became overwhelming in America after 1790." *Id.*

125. The use of arbitration was widespread among commercial interests during the colonial period when it was unregulated by courts. It fell into disfavor, however, at the end of the eighteenth century, because courts no longer considered its determinations binding. *Id.* at 145-55.

Horwitz attributes the change in attitude of judges and merchants toward commercial arbitration to several factors. First, the legal profession had become determined to oppose antilegalism among merchants. Second, the mercantile classes which had previously found colonial legal rules hostile to their interests now found that common law judges were prepared to overturn anticommercial legal concepts. Third, the development of a split in commercial interests converted a largely self-regulating merchant group into one that was made dependent upon formal legal machinery to regulate its factions. "Thus, one might loosely describe the process as one of accommodation by which merchants were induced to submit to formal legal regulation in return for a major transformation of substantive legal rules governing commercial disputes." *Id.* at 154.

126. *Id.* at 155. See notes 64-72 and accompanying text *supra*.

passed a statute denying the struck jury as a matter of right. Although the statute did not completely prohibit the use of struck juries, Horwitz found no reports of cases submitted to a struck jury after 1807.¹²⁷ Horwitz' study indicates that, due to disintegration of the mercantile class, merchant jurors no longer provided uniform rules of practice; therefore, commercial law began to fall within the exclusive province of the judiciary.¹²⁸

Horwitz' findings tie together several important points that should be considered in light of the preceding discussions on the development of the jury system in England and the seventh amendment's inclusion in the Bill of Rights. First, the colonists' use of the struck jury was a carryover from the right to a special jury in common law suits in England. The special jury served two functions in the colonial period: Its use allowed merchants to participate in the creation of laws by which they would be governed and provided a competent factfinder. When circumstances changed, and it became clear that the judiciary was better equipped to develop a body of commercial law that ensured more predictable and impartial results, the special jury's role in developing the law was phased out.

Horwitz' data offers a judge faced with complex litigation two historical reasons to deny a motion for jury trial. First, Horwitz suggests that the colonists originally accepted the English notion that the special jury was an essential element of the right to jury trial in commercial litigation. The special jury in both countries served the function of providing an impartial adjudicator with sophistication and understanding of commercial problems. Those commercial cases are, in many respects, analogous to today's complex litigation suits. Thus, if the purpose of the jury system was to find the truth, and if historically that purpose could be attained

127. M. HORWITZ, *supra* note 115, at 156.

128. *Id.* at 158. The incorporation of marine insurance companies was a departure from the traditional self-insurance plans of the New York commercial community. The result was that accepted rules of insurance law came under attack and the interests of the commercial class and the insurance community diverged. Merchants found that the anticorporate bias of the regular jury was more to their advantage than a special jury of merchants. In addition, the judiciary began to recognize that special juries of merchants were not conducting their factfinding in an impartial fashion. See *Barnewell v. Church*, 1 Cai. R. 217 (N.Y. 1803), quoted in M. HORWITZ, *supra* note 115, at 156-57, in which the verdict of a merchant jury was overridden. Judge Radcliff wrote: "The circumstance that here was a struck jury is not of decisive weight in favor of the verdict, especially as it is founded on a point against which, as a ground of defence, it is known considerable prejudice exists." 1 Cai. R., at 243.

Although removal of the special jury did not result in complete elimination of a jury, the actions of the New York court are consistent with the functional analysis and with the due process model advocated here. When the special jury no longer served its historical function as an impartial adjudicator, it was abandoned by the court and the legislature.

only by using a special jury in commercial cases, then unless such a jury can be assembled today in complex litigation, the jury trial can no longer serve its purpose.

Second, when the special jury ceased to perform its function as an impartial factfinder, it was abandoned in the United States. Moreover, despite the revolutionary fervor that resulted in the inclusion of the seventh amendment in the Bill of Rights, the colonial judiciary sharply curtailed the jury's role in commercial litigation in order to develop a uniform body of law. Although this judicial activity did not eliminate the jury entirely, a court today could arguably conclude, on the basis of a similar functional approach, that a modern jury unable to perform its historical function (as an impartial adjudicator capable of understanding the facts) may constitutionally be removed from complex litigation.

IV. THE EARLY CASE LAW

Prior to the merger of law and equity, the courts' approach to interpreting the seventh amendment was relatively simple. To determine whether a right to jury trial was guaranteed, a judge would ask whether the suit was heard at common law in 1791. This approach is called the static historical test; it was created by Mr. Justice Story's definition of the phrase "common law" in the landmark decision of *Parsons v. Bedford*.¹²⁹

By common law, [framers of the seventh amendment] meant what the constitution denominated in the third article "law;" not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those, where equitable rights alone were recognized, and equitable remedies were administered In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.¹³⁰

Except for one refinement made toward the end of the nineteenth century, this definition was strictly adhered to until the merger of law and equity. After examining the historical evidence, the Supreme Court, in *Capital Traction Co. v. Hof*,¹³¹ concluded that the framers "had in view the rules of the common law of England, and not the rules of that law as modified by local statute or

129. 28 U.S. (3 Pet.) 433 (1830).

130. *Id.* at 446.

131. 174 U.S. 1 (1898).

usage in any of the States."¹³²

Mr. Justice Van Devanter embedded this refined static historical test firmly into legal doctrine by his opinion in *Baltimore & Carolina Line v. Redman*.¹³³ The language in that opinion reiterated the belief that the right of trial by jury was that which existed under English common law at the time of the amendment's adoption. Mr. Justice Van Devanter further froze interpretation by adding that the amendment not only protected the right to jury trial, but also disclosed a purpose to protect it from impairment due to expansion of the judge's power to reexamine the jury's findings of fact or any other change in the common law distinction between findings of law and findings of fact.¹³⁴

The static historical test did not, however, bind the federal courts to the exact procedural incidents of jury trial at common law in 1791. This conclusion was reached in *Galloway v. United States*,¹³⁵ a post-merger decision, but one which did not involve the complicated problems that merger created.¹³⁶ The petitioner in *Galloway* had alleged that the directed verdict deprived him of his seventh amendment right to jury trial. The Court found that many procedural practices had been in a state of flux and had not reached any precise or final form in 1791.¹³⁷ The Court recognized "the uncertainty and the variety of conclusion which follows from an effort at purely historical accuracy;"¹³⁸ nevertheless, it held "that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions."¹³⁹

The Court also applied the static historical test to delimit the scope of the right to a jury in a statutory proceeding. In *NLRB v. Jones & Laughlin Steel Corp.*,¹⁴⁰ the National Labor Relations Board had ordered the reinstatement of some employees and directed that they be paid for the time lost by the discharge. The corporation appealed the Board's decision, claiming, *inter alia*, that the back pay award was equivalent to a money judgment and therefore it was entitled to a jury trial on that issue. The Court upheld

132. *Id.* at 8.

133. 295 U.S. 654 (1935).

134. *Id.* at 657.

135. 319 U.S. 372 (1943).

136. See notes 144-78 and accompanying text *infra*.

137. 319 U.S. 372, 391 (1943).

138. *Id.* at 392.

139. *Id.*

140. 301 U.S. 1 (1937).

the Board, finding no right to jury trial existed where the recovery of money damages was merely an incident of equitable relief. The Court reasoned that unless the proceeding was in the nature of a suit at common law in 1791, the amendment did not guarantee a trial by jury. Because payment of back wages and reinstatement were statutorily prescribed remedies, and an action to recover those remedies was unknown at common law, the Court found no violation of the corporation's seventh amendment rights.¹⁴¹

This brief summary of the leading cases in which the static historical test was applied demonstrates how the earliest interpretations of the seventh amendment effectively limited substantive rights to only those rights which had been conceived of in 1791. The inconsistencies inherent in this interpretation are obvious. For instance, an administrative body could order a private employer to pay huge sums of money to his employees, characteristically legal relief, yet the employer would have no right to a jury trial because such proceedings did not exist in 1791.¹⁴²

Even though courts eventually departed from the static historical test, the next section demonstrates that they did not abandon historical analysis altogether.¹⁴³ It is because of the continuing vitality of historical analysis that the preceding sections of this article were devoted to developing a proper historical test. That test, unlike the static test, takes into account not only the types of cases in which the jury actually participated in 1791, but also the function served by the jury in those cases.

V. THE POST-MERGER CASES

The merger of law and equity removed many former jurisdic-

141. *Id.* at 48-49.

142. See *Katchen v. Landy*, 382 U.S. 323 (1966). This suit involved alleged voidable preferences under the Bankruptcy Act. Examining congressional intent, the Court concluded that the jury trial claim was not applicable where there was a specific statutory scheme providing for the prompt trial of disputed claims without a jury. *Id.* at 338-40.

Such was not the case with statutory remedies enforced by the court rather than by administrative agencies. See *Fleitman v. Welsbach Street Lighting Co.*, 240 U.S. 27 (1916). This three page Holmes opinion is the basis for rights to jury trial under the Sherman Act. Without examining legislative intent, Holmes concluded "that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law." *Id.* at 29. See also *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). Black, citing *Fleitman*, there held that the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition, rather than monopoly, the rule of trade. *Id.* at 504.

143. See notes 145-47 and accompanying text *infra*. The *Ross* Court incorporates historical analysis as the first prong of its test.

tional limitations created by differences in procedures and remedies,¹⁴⁴ but distinctions between the two systems remained important when litigants demanded jury trials in suits combining legal and equitable claims. The merged procedures created numerous analytical problems for courts attempting to apply a static historical test to determine whether an action was legal or equitable for jury trial purposes. As a result, the Supreme Court, in several important decisions,¹⁴⁵ abandoned that test and developed a more functional analysis.¹⁴⁶

The first decision moving toward a functional analysis was Mr. Justice Black's opinion in *Beacon Theatres, Inc. v. Westover*.¹⁴⁷ Fox, the operator of a movie theatre, had negotiated contracts with movie distributors which granted him the exclusive right to show "first run" pictures within his competitive area and provided for "clearance," a period of time during which competing theatres could not exhibit the same pictures. After building a drive-in theatre eleven miles away, Beacon notified Fox that it considered the contracts overt violations of the antitrust laws. Fox sought an injunction that would prevent Beacon from instituting threatening treble damage actions against him and a declaration that the clearances were reasonable and not violative of the antitrust laws. Beacon counterclaimed, asserting that the clearances were unreasonable for lack of substantial competition¹⁴⁸ between the two theatres, and sought treble damages from Fox for conspiring to restrain trade and monopolize first-run pictures.

The district court viewed the issues raised by the complaint as essentially equitable and directed that Fox's claim for injunctive relief be tried to the court prior to a jury determination of the antitrust violations. Because the competition issue common to both claims would necessarily be determined in the equitable trial, Beacon would be collaterally estopped from relitigating that issue in the

144. See generally F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 356-59 (2d ed. 1977). James argues that formerly, the rational allocation of issues between jurisdictions was often dictated by a factor other than jury trial. For example, a chancellor facing witness credibility problems could send the issue to a law court and jury to evaluate demeanor evidence. Similarly, where an accounting required the testimony of business associates, it was conducted in equity to overcome their incompetency to testify at law. "[J]ury trial (or court trial) was often merely the tail of the dog under a system where you had to take the whole dog." *Id.* at 358.

145. See *Ross v. Bernhard*, 396 U.S. 531 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

146. The Court has continued to use a more traditional historical test when confronted with statutorily created rights. See notes 179-213 and accompanying text *infra*.

147. 359 U.S. 500 (1959).

148. Significant precedents indicated that there should be no clearances between theatres not in substantial competition. See *id.* at 502 n.1.

jury trial of its treble damage claim. Despite this result, the court of appeals upheld, under the clean-up doctrine, the district court's discretion as to sequence of trial.¹⁴⁹

The Supreme Court reversed, holding that even if Fox had properly invoked equitable jurisdiction, the district court was required to preserve Beacon's constitutional right to trial by jury of all the issues in the antitrust controversy. The Court stated that the district court's exercise of its discretion to try equitable claims prior to legal ones should have been based on the traditional grounds for granting equitable relief: a showing of irreparable harm and inadequacy of legal remedy. Mr. Justice Black opined that these were practical tests, to be determined in light of remedies made available by the Declaratory Judgment Act¹⁵⁰ and the Federal Rules of Civil Procedure.¹⁵¹ Expansion of legal remedies necessarily reduced the need to invoke equitable jurisdiction.¹⁵² If the new procedures would not fully protect an equity plaintiff from irreparable harm during the jury trial, then the order of trial would be discretionary. The Court did not believe Fox had presented such a case. "[O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."¹⁵³

149. *Id.* at 505. The clean-up doctrine is an equitable doctrine that allows a court of equity which has obtained jurisdiction over a portion of a controversy to proceed to determine the entire controversy and award complete relief, regardless of whether legal rights are involved. For a description of the equitable clean-up doctrine, see D. DOBBS, *REMEDIES* § 2.7 (1973); 1 J. POMEROY, *EQUITY JURISPRUDENCE* §§ 181-83, 231-42 (5th ed. 1941); Levin, *Equitable Clean-up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951).

150. 28 U.S.C. §§ 2201-2202 (1958).

151. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 507 (1959). Mr. Justice Black continued:

[T]he justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because subsequently a legal remedy becomes available, must be re-evaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action.

Id. at 509 (footnote omitted).

152. *Id.* at 509. See McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1 (1967). McCoid argues that by permitting an inverted and accelerated adjudication of Beacon's right to legal relief, the declaratory judgment was a legal remedy made available through procedural reform which eliminated the necessity for equitable intervention. Such reasoning

alters the jury trial result reached on the basis of a purely historical inquiry, even where merger is not a consideration. It cements the view that *Beacon* requires the right to jury trial to be measured in the light of procedural reform. And it opens to inquiry whether other procedural reform may not affect right to jury trial.

Id. at 6-7.

153. 359 U.S. 500, 510-11 (1959) (footnote omitted).

It is important to note that the expansion in *Beacon* of the right to jury trial signified a striking recession from historical precedent because it allowed the jury to decide cases it could not have heard in 1791, since there were no similar procedures available at law at that time. The Court, considering the jury's capabilities as a factfinder in light of these new procedures, could perceive no reason to deny a jury determination of the issues in *Beacon*.

The commentators generally agreed¹⁵⁴ that *Beacon* was a departure from the static historical test,¹⁵⁵ and they enthusiastically accepted the departure as an expansion of the right to jury trial.¹⁵⁶ It is doubtful, however, that they would have been so generally receptive to a suggestion that the same functional analysis could also be used to contract the right to a jury.¹⁵⁷

The Court moved further from the static historical test in *Dairy Queen, Inc. v. Wood*.¹⁵⁸ In that case, a trademark owner alleged breach in the payment of a licensing contract and infringement due to defendant licensee's continuing use of the trademark after notice of cancellation. In light of defendant's continuing infringement and unstable financial condition, plaintiff alleged the threat of irreparable injury for which he had no adequate remedy at law. The plaintiff pled for injunctive relief and an accounting, both remedies historically heard only in equity.

Mr. Justice Black, writing for four members of the Court, recharacterized the accounting claim as a legal claim for a money judgment. He refused to permit the constitutional right to jury trial "to depend upon the choice of words used in the pleadings."¹⁵⁹

As in *Beacon*, the availability of equitable relief in *Dairy Queen* depended upon the absence of an adequate legal remedy. Consequently, in this case involving a contract action cognizable at law, the plaintiff would not be entitled to an equitable accounting absent a showing that the accounts between the parties were of such a complicated nature that only a court of equity could unravel them. Mr. Justice Black noted that the burden of such a showing would

154. See McCoid, *supra* note 152, at 6; Note, *Congressional Provision for Nonjury Trial under the Seventh Amendment*, 83 YALE L.J. 401, 408 (1973).

155. See F. JAMES, CIVIL PROCEDURE 347 (1st ed. 1965). James argues for an elastic construction of the historical test by the courts in order to accommodate further shifts similar to those continually taking place in the period of history when the seventh amendment was adopted.

156. See McCoid, *supra* note 152, at 24.

157. Some commentators did make that suggestion. See, e.g., Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm*, 28 HASTINGS L.J. 1, 2 n.5 (1976).

158. 369 U.S. 469 (1962).

159. *Id.* at 478.

rarely be met in view of the court's power under federal rule 53(b) to appoint a master to assist the jury in handling exceptionally complicated legal issues.¹⁶⁰

Consistent with his functional analysis in *Beacon*, Mr. Justice Black stated that the use of a master to assist in accounting situations was a procedural change affecting the right to jury trial. Though an accounting was traditionally an equitable remedy, if a master could enable the jury to unravel the complexities of an accounting, the remedy at law would no longer be inadequate, and a jury trial should be granted.¹⁶¹ In other words, procedural reform made the jury an adequate factfinder and thus the remedy at law was adequate. *Dairy Queen* is important not only for this departure from the static historical test, but also for the exception it carves out of its jury trial mandate. Though Mr. Justice Black believed that only in rare circumstances would legal issues be too complicated for a jury to handle with the aid of a master, he conceded that the possibility might exist. This "*Dairy Queen* exception" effectively conceded that in such circumstances, the practical abilities and limitations of juries must be considered in a functional analysis, foreshadowing the third prong of the jury trial test formulated in *Ross v. Bernard*.¹⁶²

The Supreme Court's decision in *Ross* represents the furthest move from a historical test toward a pure functional analysis of the right to jury trial. The *Ross* plaintiffs, stockholders in a closed end investment company, brought a shareholders' derivative action against the company's directors and investment brokers, claiming damages for injury sustained due to the payment of allegedly excessive brokerage commissions. Although a shareholders' suit on behalf of the corporation historically could be brought only in equity,¹⁶³ the Court refused to apply the static historical analysis or to view the suit as a unitary, equitable cause of action.

Pointing out the dual nature of the derivative action, the majority separated the shareholders' initial claim to speak for the corporation, from the merits of the corporation's claim, which would have

160. *Id.* FED. R. CIV. P. 53(b) provides:

A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

161. See McCoid, *supra* note 152, at 8-9; Comment, *The Seventh Amendment—A Return to Fundamentals*, 10 URB. L. ANN. 313, 315 n.14 (1975).

162. 396 U.S. 531 (1970). See notes 163-67 and accompanying text *infra*.

163. See *Ross v. Bernhard*, 396 U.S. 531, 544 n.4 (1970) (Stewart, J., dissenting).

been tried to a jury had the corporation sued in its own right. Rather than attempt to characterize the overall action, the Court held that the "Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."¹⁶⁴

Ross was a dramatic departure from *Beacon and Dairy Queen*, which had involved a combination of historically separable suits, one in law and one in equity.¹⁶⁵ In those cases, the order of the proceedings may have been changed, but the nature of the suits remained the same. As Mr. Justice Stewart pointed out in his dissent, the *Ross* suit was not a combination of legal and equitable claims:

Since, as the court concedes, a shareholder's derivative suit could be brought only in equity, it would seem to me to follow by the most elementary logic that in such suits there is no constitutional right to a trial by jury. Today the Court tosses aside history, logic, and over 100 years of firm precedent to hold that the plaintiff in a shareholder's derivative suit does indeed have a constitutional right to a trial by jury. This holding has a questionable basis in policy and no basis whatever in the Constitution.¹⁶⁶

Nevertheless, after separating the two claims, the majority laid out three factors (the *Ross* test) for determining whether an issue was legal, rather than equitable.

As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.¹⁶⁷

It is the third factor in the *Ross* test that is of particular significance. Besides diminishing the importance of the static historical test, the Court recognized that a jury's limitations could be sufficient to send a legal remedy into equity. It is the third factor that the courts have relied on to deny the jury trial demand in complex

164. *Id.* at 538 (footnote omitted).

165. *Id.* at 549 (Stewart, J., dissenting).

166. *Id.* at 544-45 (footnotes omitted). Stewart included the following footnote: Certainly there is no consensus among commentators on the desirability of jury trials in civil actions generally. Particularly where the issues in the case are complex—as they are likely to be in a derivative suit—much can be said for allowing the court discretion to try the case itself. See discussion in 5 J. Moore, Federal Practice ¶ 38.02[1].

Id. at 545 n.5.

167. *Id.* at 538 n.10.

litigation.¹⁶⁸

In *Parklane Hosiery Co. v. Shore*,¹⁶⁹ the Supreme Court demonstrated that, in addition to expanding the right to jury trial because of post-merger procedural changes, it would rely upon post-merger modifications of procedural doctrines to deny a request for jury trial. The Court there concluded that a private plaintiff could use an SEC judgment returned in a prior equitable action to estop the relitigation of the same issues before a jury in a subsequent legal action. Petitioner *Parklane* had argued that because the scope of the seventh amendment must be determined by reference to the common law as it existed in 1791, and since the common law permitted collateral estoppel only where there was mutuality of parties,¹⁷⁰ collateral estoppel could not constitutionally be applied to deny the right to jury trial absent such mutuality.¹⁷¹

After deciding the threshold issue regarding offensive use of collateral estoppel,¹⁷² the Court considered whether such use would violate *Parklane's* right to jury trial. Writing for the majority of eight Justices, Mr. Justice Stewart¹⁷³ noted that the Courts in both *Beacon Theatres* and *Katchen v. Landy*¹⁷⁴ had recognized that an equitable determination could have a collateral estoppel effect in a subsequent legal action.¹⁷⁵ Observing that procedural devices devel-

168. See notes 238-69 and accompanying text *infra*.

169. 439 U.S. 322 (1979).

170. The doctrine of mutuality of parties directed that neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment. *Id.* at 326-27. See *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313 (1971); *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942).

171. 439 U.S. at 335-36.

172. Collateral estoppel is used "offensively" when "a plaintiff [seeks] to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." "Defensive" use occurs when a plaintiff is "estopped from asserting a claim [which he] had previously litigated and lost against another defendant." *Id.* at 329. The *Parklane* Court abandoned the mutuality doctrine and held that permission to use collateral estoppel offensively was within the trial court's discretion, to be denied in cases where a plaintiff could easily have joined the defendant in the earlier action or where its use would be unfair to a defendant for other reasons. *Id.* at 331.

The Court apparently ignored the potential effect of its decision on the incentive structure of litigants in SEC enforcement actions. *Parklane* greatly enhances the SEC's ability to coerce settlements: litigants will be fearful that unless they settle, factual determinations will be used against them in subsequent private actions.

173. Mr. Justice Stewart's authorship of the majority opinion is particularly interesting, considering his dissents in the cases expanding the jury trial right. To observe how he pruned *Beacon* to a "general prudential rule," see note 175 *infra*.

174. 382 U.S. 323 (1966). See notes 194-98 and accompanying text *infra*.

175. 439 U.S. at 334-35. Mr. Justice Stewart opined that *Beacon* enunciated no more than a general prudential rule which guided the trial court's limited discretion as to sequence

oped subsequent to 1791 had diminished the historic domain of the civil jury trial, the Court cited *Galloway v. United States*¹⁷⁶ for support in its holding that judgment in a prior equitable action could be used to stop relitigation of the same issues in a legal action:

The law of collateral estoppel, like the law in other procedural areas defining the scope of the jury's function, has evolved since 1791. Under the rationale of the *Galloway* case, these developments are not repugnant to the Seventh Amendment simply for the reason that they did not exist in 1791. Thus if, as we have held, the law of collateral estoppel forecloses the petitioners from relitigating the factual issues determined against them in the SEC action, nothing in the Seventh Amendment dictates a different result, even though because of lack of mutuality there would have been no collateral estoppel in 1791.¹⁷⁷

The Court in *Parklane*, as it had in previous cases, modified the seventh amendment right in light of procedural changes in the law. It is clear that the seventh amendment should not be frozen into a static historical position. The particular significance of *Parklane* is its indication of the Court's willingness to contract as well as expand the jury trial right.

Just as prescribed in the functional historical approach advocated in this article, the *Parklane* Court looked to the jury's function as factfinder. Because all common issues of fact had been resolved in the previous SEC litigation, no factfinding function remained to be performed; thus, there was no need for a jury, and the Court's refusal to allow relitigation of the issues before a jury did not result in a denial of the right to jury trial.¹⁷⁸

VI. STATUTORY CASES

Many of the most recent Supreme Court cases involving the right to jury trial have arisen in the context of statutorily created rights. In those cases, the Supreme Court has not only employed a historical test, but has looked at congressional intent to determine

of trial in combined legal and equitable claims in order to preserve the right to jury trial from the collateral estoppel effect of a prior equitable judgment.

176. 319 U.S. 372 (1943); see notes 135-39 and accompanying text *supra*.

177. 439 U.S. at 337 (footnote omitted).

178. This reading of *Parklane* emanates from Mr. Justice Stewart's hypothetical discussion, *id.* at 335-36, to the effect that the doctrine of collateral estoppel precludes further factfinding by any factfinder, be it judge or jury. Thus, Mr. Justice Stewart characterizes the difference between trial by jury and trial to the court as "neutral." *Id.* at 332 n.19. Mr. Justice Rehnquist dissented, arguing that trial by jury could lead to different results than trial by judge. Rehnquist did not advocate rigid adherence to 1791 procedures; he merely opposed procedural changes which would diminish the right to jury trial. *Id.* at 345-46.

the litigants' jury trial rights. These cases do not, however, necessarily represent a departure from the Court's development of a functional analysis or any particular movement away from the *Ross* test.¹⁷⁹ The decisions, as the following discussion indicates, should not be interpreted as signifying that the Court abandoned the functional analysis for determining the right to jury trial.

In *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*¹⁸⁰ and *Katchen v. Landy*,¹⁸¹ the Supreme Court focused on the intent of Congress in setting up special tribunals to decide cases arising under particular statutes with no provisions for jury trials. In both cases, the Court upheld the lower court's denial of a request for jury trial based on its perception of congressional intent. The Court's rationale was that the use of the jury would interfere with the functioning of the tribunal charged with enforcing the statutory scheme. Arguably, the Court was considering the jury's role as a factfinder and relying on a functional analysis rather than a traditional historical test. A lay jury would be unable, the Court believed, to provide either the expert¹⁸² or summary¹⁸³ resolu-

179. Many lower federal courts have adopted the *Ross* test as a basis for analyzing the litigant's rights to jury trial in statutory actions. The opinions in those cases deal primarily with the first two prongs of that test. Most of the courts considered only briefly the practical limitations on jurors' abilities as factfinders. See, e.g., *Pons v. Lorillard*, 549 F.2d 950 (4th Cir. 1977) (jury trial granted in an action arising under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976)), *aff'd*, 434 U.S. 575 (1978); *Minnis v. UAW*, 531 F.2d 850 (8th Cir. 1975) (action for breach of union's duty of fair representation analogized to action on a contract and not beyond a jury's ability to decide); *Mosely v. National Fin. Co.*, 440 F. Supp. 621 (M.D.N.C. 1977) (jury granted in action arising under Truth-in-Lending Act); *Wehr v. Borroughs Corp.*, 438 F. Supp. 1052 (E.D. Pa. 1977); *General Tire & Rubber Co. v. Watson-Bowman Assocs.*, 74 F.R.D. 139 (D. Del. 1977) (jury denied in patent infringement case); *Mission Bay Campland, Inc. v. Sumner Fin. Corp.*, 72 F.R.D. 464 (M.D. Fla. 1976) (held issue of fraudulent transfer of assets for the jury to determine); *Cleverly v. Western Elec. Co.*, 69 F.R.D. 348 (1975).

In a few cases, however, courts have analyzed in detail the litigant's rights to a jury trial under the third, (functional) prong of the *Ross* test. See, e.g., *Jones v. Orenstein*, 73 F.R.D. 604 (S.D.N.Y. 1977) (jury granted in securities case because did not anticipate unreasonably lengthy trial; no evidence court would be a superior factfinder); *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99 (W.D. Wash. 1976) (jury denied due to complexity of evidence and existence of varying legal standards to be applied to numerous parties).

180. 430 U.S. 442 (1977).

181. 382 U.S. 323 (1965).

182. The administrative agency involved in *Atlas Roofing* was intended to provide expert resolution of factual issues by specialists in the area. 430 U.S. 442, 456 (1977). The *Atlas Roofing* Court cited *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and *Block v. Hirsch*, 256 U.S. 135 (1921), as authority for the proposition that the purpose of an administrative agency is to provide an expert tribunal to resolve issues of fact which a lay jury could not grasp quickly enough to decide in a reasonable time. The Court believed that a lay jury would simply slow down the decisionmaking process by requiring lengthy explanation of points the expert administrators already understood. 430 U.S. at 456. See *Curtis v. Loether*, 415 U.S. 189, 194 n.8 (1974).

183. A bankruptcy court allowed bankruptcy trustees to dispose summarily of the complicated affairs of bankrupts' estates. See *Katchen v. Landy*, 382 U.S. 323, 326-27 (1965).

tion of factual issues the Court considered necessary to effect congressional intent.

In *Atlas Roofing*, petitioners in two companion cases had received orders to abate worksite hazards and notices of proposed penalties from the Secretary of Labor. Inspectors from the Department of Labor had discovered violations of the Occupational Safety and Health Act¹⁸⁴ standards. In one of the two cases, the Secretary imposed a \$7,500 penalty which the petitioner contested. The Act did not provide for a jury trial at any stage of the proceedings.¹⁸⁵ On appeal to the Court of Appeals for the Third Circuit,¹⁸⁶ petitioner asserted that the Act violated his seventh amendment rights. The majority nonetheless upheld the order,¹⁸⁷ although one dissenting judge believed the petitioner's contention was correct.¹⁸⁸ In the companion case, the Court of Appeals for the Fifth Circuit also upheld the penalty and the abatement order.¹⁸⁹

The Supreme Court affirmed the decisions of both circuits. It held that the government did not violate the seventh amendment by collecting civil penalties in administrative proceedings so long as the government was enforcing "public rights."¹⁹⁰ The Court cited

184. 29 U.S.C. §§ 651-678 (1976).

185. Under the Occupational Safety and Health Act, inspectors representing the Secretary of Labor have the authority to conduct reasonable safety inspections of workplaces. *See id.* § 657(a) (1976). An inspector who discovers a violation of safety regulations may issue the employer a citation ordering the employer to abate the hazard. The inspector may also fix a civil penalty of as much as \$10,000 for certain violations. *Id.* §§ 659(a), 666(a)-(c), 666(j). An employer may contest the penalty only by notifying the Secretary. An administrative law judge will then hold an evidentiary hearing. The full OSHA Review Commission may review the findings. Either party may appeal the Commission's decision to an appropriate federal court. *Id.* §§ 659, 660(a). Under *id.* § 660(a), "[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive."

186. *Frank Frey Jr., Inc. v. Occupational Safety & Health Review Comm'r*, 519 F.2d 1200 (3d Cir. 1975), *aff'd sub. nom. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'r*, 430 U.S. 442 (1977).

187. *Id.* at 1219.

188. *Id.* at 1221-23. The dissent argued that to allow Congress unlimited authority to delegate any subject it wished to an administrative agency would render the seventh amendment meaningless. It was believed that the majority's rationale would always allow an administrative agency to deny a jury trial because any such agency could be deemed a special "equitable" tribunal. *Id.* at 1222. *See note 203 infra.*

189. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'r*, 518 F.2d 990, 1011 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

190. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'r*, 430 U.S. at 450 (1977). The Court limited its holding to cases involving the enforcement of "public rights" as opposed to "private rights." A private right is a right to enforce an obligation due an individual or a private group. A public right, on the other hand, is a right of the government to enforce an obligation due it. *Id.* at 450.

precedent¹⁹¹ to the effect that jury trials were incompatible with the procedures of an administrative agency and thus used a functional analysis as one of its grounds for denying petitioner a jury trial.

The Court, in denying the request for jury trial in *Atlas Roofing*, also used a modified functional historical analysis. It pointed out that factfinding "was never the exclusive province of the jury under either the English or American legal systems at the time of the adoption of the Seventh Amendment; and the question whether a fact would be found by a jury turned to a considerable degree on the nature of the forum in which a litigant found himself."¹⁹² This premise led the Court to conclude that Congress could set up specialized tribunals to enforce statutory rights as long as such tribunals could more adequately resolve the issues than could a jury.¹⁹³ The Court implied that one could consider administrative proceedings equitable in nature, because Congress set up such agencies to compensate for procedural inadequacies in courts of law.

The Court's approach in *Katchen v. Landy*¹⁹⁴ was somewhat different, though it also led the Court to deny a jury trial request.

The *Atlas Roofing* Court seems to have derived this distinction from the case of *Murray's Lessee v. Hoboken Land Co.*, 59 U.S. (18 How.) 272 (1856). In *Murray's Lessee*, the Supreme Court upheld the constitutionality of a summary procedure for collecting tax debts owed the federal government. Under this procedure, executive officers could attach property in the possession of a Collector of Customs without going to a court at any time.

The Court in *Murray's Lessee* admitted that such procedure would be subject to due process and separation of powers objections if a private litigant could use it to collect a debt. The Court, however, asserted that summary proceedings to collect debts owed the Crown were usual under English common law. *Id.* at 278. Because the definition of "due process" came from English common law, a summary proceeding similar to English proceedings to collect debts owed the government would comply with due process. The Court also believed the existence of English precedent countered the separation of powers argument. It held, therefore, that if Congress did not wish to use the courts to enforce public rights, it had the power to delegate the enforcement of those rights to an executive official and authorize him to use summary procedures. *Id.* at 284. If Congress chose to use an executive official to enforce a public right, that official's findings of fact would be conclusive in any judicial review of the legal issues which arose in the administrative proceeding. *Id.* at 285.

The Court in *Atlas Roofing* did not offer any policy reasons or constitutional theory to support the distinction between "public" and "private" rights in modern administrative proceedings. Nor did it indicate whether the sole criterion for distinguishing actions involving public rights would be the identity of the plaintiff. It did not fully answer the reservations expressed in the dissent from the Third Circuit decision. See note 188 *supra*.

191. *E.g.*, *Block v. Hirsch*, 256 U.S. 135 (1921); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); see note 182 *supra*.

192. 430 U.S. at 458. The Court cited several cases to support this proposition. Among them were *Kohl v. United States*, 91 U.S. 367, 375-76 (1876) (condemnation suits could be tried without a jury) and *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830) (existence of right to a jury trial depends on the forum in which the litigant brings suit).

193. 430 U.S. at 460-61.

194. 382 U.S. 323 (1965).

The issue in *Katchen* was whether a bankruptcy court had summary jurisdiction to order the surrender of voidable preferences asserted and proved by the trustee in response to a claim filed by the creditor who had received the preferences. The creditor asserted on appeal that he was entitled to a jury trial on the issue of the value of the preference. The Court rejected that contention on several grounds. First, the Court recognized that a primary purpose of the bankruptcy laws was to secure the prompt settlement of bankrupt estates without the burden of trials attended by unnecessary delay. Congress chose summary disposition to effectuate that purpose and to avoid the slower and more expensive processes of a plenary suit.¹⁹⁵ Second, the Court held that the Bankruptcy Act¹⁹⁶ converted a creditor's legal claim into an equitable claim. Because proceedings of bankruptcy courts were inherently proceedings in equity, there was no seventh amendment right to a jury trial.

The Court admitted that incidental questions frequently arose in the course of bankruptcy proceedings which raised purely legal issues. Nevertheless, the bankruptcy court, acting as an equity court, could deal with those issues. This conclusion may seem inconsistent with the holdings in *Beacon* and *Dairy Queen*, but the Court distinguished those decisions. It admitted that those decisions held that all legal issues were to be tried to the jury unless the litigants waived their jury trial rights, but "[i]n neither *Beacon Theatres* nor *Dairy Queen* was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury."¹⁹⁷ Thus, the existence of a strong congressional predisposition toward summary disposition of bankruptcy cases, combined with the historical argument that all issues in an equitable action could be tried to the judge, outweighed the value of having a jury in this case.¹⁹⁸

In the Court's most recent statutory decision, *Lorillard v. Pons*,¹⁹⁹ it was able to avoid the constitutional cases altogether and

195. *Id.* at 328-29. A "plenary suit" under the bankruptcy laws is the procedure the trustee must use to recover property the bankrupt had transferred to a preferred creditor before bankruptcy. Under 11 U.S.C. § 96(a)(8)(c) (1968), the bankruptcy courts and state courts have concurrent jurisdiction of such a suit. A plenary suit regularly involves elaborate procedural mechanisms such as trial by jury. See *id.* at 331; *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932) (suits to recover preferences traditionally suits at law, not bankruptcy, and were triable to a jury).

196. Bankruptcy Act, ch. 541, 30 Stat. 544 (1898) (current version at 11 U.S.C. §§ 101-1501 (1978)).

197. *Katchen v. Landy*, 382 U.S. 323, 339 (1965).

198. *Id.* at 339-40.

199. 434 U.S. 575 (1978).

rely solely on statutory construction to resolve the jury trial problem. The plaintiff filed a private civil action to recover lost wages under the Age Discrimination in Employment Act of 1967 (ADEA).²⁰⁰ Congress had expressed its intent in ADEA to model the procedures in private actions under that statute after the procedures in private actions under the Fair Labor Standards Act (FLSA).²⁰¹ Previous judicial decisions had established a right to jury trial in FLSA actions; therefore, the Court presumed Congress had intended to make ADEA actions triable by juries as a matter of right.²⁰²

The three cases discussed above demonstrate the degree to which congressional intent can influence the court in its decisions about the scope of the right to jury trial.²⁰³ The following cases involve situations in which Congress did not indicate the proper procedure under the statute, either expressly or by implication.

*Curtis v. Loether*²⁰⁴ involved a suit brought under a provision of Title VIII of the Civil Rights Act,²⁰⁵ which gave victims of housing discrimination a federal right of action. The issue was whether, upon demand of one of the parties, the Civil Rights Act or the seventh amendment required a jury trial in an action brought under the Act for damages and injunctive relief.²⁰⁶ The Court found the sparse legislative history too ambiguous to decide the issue, so it

200. 29 U.S.C. §§ 621-634 (1976).

201. The Court's examination of the enforcement scheme uncovered an intent that the statute "be enforced in accordance with the 'powers, remedies, and procedures' of the FLSA." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (quoting 29 U.S.C. § 626(b)) (emphasis by the Court).

202. *Id.* at 585.

203. A question arises, but is not answered here, as to the power of Congress simply to amend the statutes in the antitrust area to abolish juries altogether by providing special tribunals to adjudicate such actions.

The dissent in the Third Circuit opinion in *Frank Frey Jr., Inc.* (affirmed by the Supreme Court in *Atlas Roofing*) suggested that such a measure would render the seventh amendment meaningless. See note 188 *supra*. So far, the Supreme Court has read into the federal statutes an implied intent to provide for jury trials because Congress chose to have the statute enforced in article III courts. Even those judges who have struck juries in antitrust cases for functional reasons have not argued that a jury is incapable of deciding fairly in most antitrust cases; the functional test requires only that the judge strike the jury in a *particular case* which is beyond the capabilities of the jury. Should Congress decide, however, that antitrust actions necessitate factual determinations by expert administrative agencies acting without the benefit of a jury, there are cases which indicate Congress has almost plenary authority to relegate the jury's factfinding function exclusively to such agencies. See, e.g., *Block v. Hirsch*, 256 U.S. 135 (1921); *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320 (1909). Cf. *Murray's Lessee v. Hoboken Land Co.* 59 U.S. (18 How.) 272 (1856) (limits congressional authority to delegate power to administrative agencies).

204. 415 U.S. 189 (1974).

205. 42 U.S.C. §§ 3601-3631 (1970).

206. 415 U.S. at 190.

relied instead on an historical analysis, and concluded that "[t]he Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."²⁰⁷

The Court thought it clear that action under section 812 of the Act²⁰⁸ was analogous to various actions at common law, such as defamation, and that the statutory rights were therefore "legal" rights.²⁰⁹ It did not, however, go so far as to hold that any award of monetary relief was necessarily "legal" relief. Therefore, although in this instance the Court used a more traditional historical analysis, the case does not support an argument that the Court meant to abandon the use of functional analysis altogether.²¹⁰

Just two months after deciding *Curtis*, the Court, in *Pernell v. Southall Realty*,²¹¹ faced the question whether the seventh amendment guaranteed the right to trial by jury in suits to recover possession of real property. In *Pernell*, the cause of action also arose under a congressional statute in which Congress had not clearly expressed its intent. The Court examined the historical development of the action of ejectment, an action that normally went to a jury. It concluded that the statute created rights and remedies similar to those of ejectment. This conclusion made the plaintiff's cause of action a "legal" one. The Court therefore granted the defendant's demand for a jury trial. The issue, the Court perceived, was not whether the statute had a close equivalent in England in 1791, but whether it set up rights and remedies analogous to those traditionally enforced in actions at law.²¹²

The Court's return to a more traditional historical analysis, as

207. *Id.* at 194.

208. 42 U.S.C. § 3612 (1970).

209. 415 U.S. at 195-96.

210. *See id.* at 195. The Court stated that when Congress has provided for enforcement of "legal" rights in civil actions in courts of general jurisdiction, and when there is "no functional reason" to deny a jury, then a litigant has a right to a jury trial. This seems to indicate that the Court would be willing to deny a litigant a trial by jury if there were an obvious functional reason for doing so. Thus, the Court has not rejected the functional test altogether, even for statutory cases. *See generally* Comment, *supra* note 161, at 313.

The author of the Comment argues that the *Ross* test was the broadest extension of functional analysis to jury trial rights. The author contends, however, by using both *Curtis* and *Pernell v. Southall Realty*, 416 U.S. 363 (1974), that the Supreme Court has preferred the historical test to the three-prong *Ross* test. Comment, *supra* note 161, at 314-15. The commentators disagree. *See Kane, supra* note 157, at 28-29 (1976). Kane did not find that the *Curtis* holding altered the scope of the functional approach, but she admitted that it had a broad effect in the area of civil rights and possibly in other statutory actions.

211. 416 U.S. 363 (1974).

212. *Id.* at 374-75.

in *Curtis* and *Pernell*, appears to have been limited to cases in which the action arose under a statute and congressional intent to grant or deny trial by jury was unclear. In those cases, if the action was unheard of at common law, the Court could not apply a static historical test and still grant a jury trial. The Court instead used history to draw an analogy between the statutory action and its closest common law counterpart. If the statutory actions were similar to those traditionally tried by a jury, there was no reason not to permit a jury to act as the factfinder. It is likely that a court applying the *Ross* test would reach the same result because the first two prongs of *Ross* require consideration of pre-merger custom and of the remedy sought.²¹³

VII. THE RECENT CASES

Since late 1976, four courts have struck a jury trial demand due to the complexity of the litigation. In all four cases the judges relied on the *Ross* test, particularly the third prong, to deny the jury trial demand. Moreover, in two other recent decisions, the judge reconsidered performance of the jury after trial. In those cases, the judge recommended that, in the event of remand for a new trial, the new trial should be held without a jury. In this section, the factual settings in these cases are described in some detail in order to demonstrate how the *Ross* test has been applied. The historical analysis developed earlier in this article will be applied in order to demonstrate that a lay jury cannot serve its traditional function in the context of complex litigation. Additionally, before the cases are discussed in detail, the due process considerations alluded to in those cases and throughout this article will be more fully developed.

A. Due Process Considerations

The Supreme Court has generally adopted a two-step analysis for deciding due process cases. The threshold issue is whether there has been a grievous loss of liberty or property.²¹⁴ After this determination is made, the Court decides what process was due. In complex civil litigation, the threshold requirement will usually be met, since the litigants stand to lose considerable sums of money in damages.

213. See notes 238-71 and accompanying text *infra* for examples of cases in which the Court struck the jury after applying a functional analysis.

214. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In *Morrissey*, the Court first decided that loss of liberty was a grievous loss and thus protected by the fourteenth amendment. The Court then set forth minimal due process requirements for the parole violation procedures. See note 220 and accompanying text *infra*.

Thus, the only question to be answered is what process is due.

Two lines of cases are relevant to this inquiry: the cases following *Morrissey v. Brewer*,²¹⁵ in which the Supreme Court, as part of minimal due process, required that parolees be accorded hearings before "neutral and detached" hearing bodies (impartial adjudicators),²¹⁶ and the cases following *Fuentes v. Shevin*,²¹⁷ in which the Court held due process rights were violated if an individual was deprived of property by documents signed by someone other than an officer of the court. In other words, due process requires an impartial adjudicator who is capable of making an intelligent decision on the available facts. Given that arbitrary decisions violate the due process clause, the argument advanced here is that arbitrary decisions may result when a jury sits on a case it is incapable of understanding, and that the decision of such a jury would violate the due process clause.

In *Morrissey*, the Court considered whether the due process clause of the fourteenth amendment mandated that a state afford an individual some opportunity to be heard prior to revoking that individual's parole. Concluding that there was a liberty interest to protect, the Court proceeded to determine what process was due the parolee. Since the liberty interest was only conditional,²¹⁸ a full criminal hearing was deemed unnecessary. Due process, however, did require that after arrest, "the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case."²¹⁹ An individual's supervising parole officer could not revoke parole. Parole could only be revoked if the minimum requirements of due process were met, and one of those requirements was "a 'neutral and detached' hearing body such as a traditional parole board."²²⁰

215. 408 U.S. 471 (1972).

216. See *id.*; *Wolff v. McDonnell*, 418 U.S. 539 (1973); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

217. 407 U.S. 67 (1972); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1974); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1973).

218. The state has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional anti-social acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

408 U.S. at 483.

219. *Id.* at 485.

220. *Id.* at 489. The other five requirements were as follows:

In *Gagnon v. Scarpelli*,²²¹ the Court extended the holding in *Morrissey* to cover probation revocation proceedings,²²² and in *Wolff v. McDonnell*,²²³ the Court held that proceedings to award or deny a prisoner "good time" credits were also subject to scrutiny under the due process clause.²²⁴

The Court considered a different aspect of due process in the line of cases beginning with *Fuentes v. Shevin*.²²⁵ In *Fuentes*, the Court addressed the constitutionality of the Florida and Pennsylvania statutes permitting issuance of *ex parte* writs authorizing seizure of a person's possessions.²²⁶ The writ could be obtained in Florida by any person who posted bond and claimed a right to the property. Even less was required under the Pennsylvania statute. Notice of repossession was not required in either state, nor did there exist an opportunity to challenge the seizure at a prior hearing. In this particular case, Mrs. Fuentes' property had been confiscated under a Florida writ of replevin.

The Florida procedures merely required the reposessor to fill in the blanks of the appropriate form and submit them to the clerk of the small claims court, who then signed and stamped the writ. The issue before the Court was whether procedural due process required an opportunity for a hearing prior to the state authorizing its agents to seize the property.²²⁷ The Court concluded that the right to notice and a hearing was required at a time when the deprivation could still be prevented.

In a subsequent decision, *Mitchell v. W.T. Grant Co.*,²²⁸ the *Fuentes* holding was limited and explained. In *Grant*, the Court

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . . ; (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id.

221. 411 U.S. 778 (1973).

222. The principal issue in *Gagnon* was whether a probationer was entitled to counsel at a probation revocation hearing. The Court determined that counsel should be appointed on a case-by-case basis. *Id.* at 779, 790.

223. 418 U.S. 539 (1973).

224. Prisoners in Nebraska could build up "good time" credits that could be taken away if they were found guilty of serious misconduct. The determination of whether such conduct had occurred was deemed sufficiently critical for the Court to require minimal due process, including a hearing before an impartial adjudicator.

225. 407 U.S. 67 (1972).

226. *Id.* at 73-76 nn.6 & 7.

227. *Id.* at 80.

228. 416 U.S. 600 (1973).

considered a sequestration statute²²⁹ under which the seizure of property was permitted by *ex parte* application, but only after a judge of the city court gave approval. Upholding the statute, the Court found that "[t]he nature of the issues at stake minimizes the risk that the writ will be wrongfully issued by a judge."²³⁰ It distinguished *Fuentes* as follows:

Those statutes permitted the secured installment seller to repossess the goods sold, without notice or hearing and without judicial order or supervision, but with the help of the sheriff operating under a writ issued by the court clerk at the behest of the seller. Because carried out without notice or opportunity for hearing and without judicial participation, this kind of seizure was held violative of the Due Process Clause.²³¹

Fuentes and *W.T. Grant* may be read together as holding that due process requires a member of the judicial system capable of understanding the factual matters to take an active role before any repossession occurs, and that absent a capable factfinder to oversee the procedure, the taking of property is a denial of due process. *North Georgia Finishing, Inc. v. Di-Chem*²³² confirms that judges can be distinguished from other members of the judicial system, such as clerks or jurors, on the basis of their superior capabilities as factfinders.

Di-Chem involved a Georgia garnishment statute under which a plaintiff or his attorney could file an affidavit before the officer authorized to issue an attachment or before the clerk of any court of record where the garnishment was being filed.²³³ The Court held that the process in the Georgia statute was vulnerable for the same reasons as the statute in *Fuentes*: "[A] bank account, surely a form of property, was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing"²³⁴ The only difference between the facts in *Di-Chem* and *W.T. Grant* is that in the latter, the writ was issued by a judge as opposed to by a clerk.²³⁵

229. LA. CODE CIV. PRO. ANN. art. 3501 (West 1960).

230. 416 U.S. at 609-10. The Court also stated: "The issue at this stage of the proceeding concerns possession pending trial and turns on the existence of the debt These are . . . matters that lend themselves to documentary proof" *Id.* at 609.

231. *Id.* at 615.

232. 419 U.S. 601 (1974).

233. See GA. CODE ANN. §§ 46-101, -102, -401 (1974) (repealed 1976).

234. 419 U.S. at 606 (emphasis added).

235. *Id.* at 607. One of the arguments made by respondent was that *Fuentes* and *W.T. Grant* dealt only with due process to protect consumers, while *Di-Chem* dealt with its applica-

These two lines of cases indicate that minimal requirements of due process, including an impartial adjudicator and an adjudicator capable of understanding the factual setting, are necessary to avoid arbitrary decisions.²³⁶ If such procedures are required to protect even conditional liberty interests and small amounts of property, certainly a case in which substantial amounts of money could be reallocated should necessitate the same procedures. In a jury trial, the judge's role is limited to monitoring the trial and instructing the jury on the law. If the seventh amendment is read as mandating a jury in every complex case, the litigant forced to try his case before a jury is denied due process: The jury is incapable of, and the judge is foreclosed from, acting as a reasoned decisionmaker. If the third factor in the *Ross* test was intended to recognize the same considerations of fairness reflected in the minimal due process requirements, as one of the cases suggests,²³⁷ then deprivation of due process should provide adequate grounds to strike the jury. Even if the due process requirements do not elevate the *Ross* test to constitutional dimensions, in certain complex cases, if the seventh amendment is read as mandating a jury in those cases, the due process clause will stand directly in conflict with the seventh amendment.

The due process clause and the seventh amendment should promote the same goal: providing a fair forum for the litigant. It has generally been assumed that trial by jury will offer the protections of a fair hearing; however, if the jury trial does not offer such protections, it is suggested that due process considerations should outweigh the right to jury trial.

B. *Striking the Jury*

The jury system has been under attack as incapable of handling the problems inherent in complex litigation, particularly in antitrust and securities cases.²³⁸ Judges, despite their loyalty to the jury system, have begun to recognize these problems and to grant motions to strike the jury. For instance, Judge Brieant of the Southern District of New York struck a jury trial demand in *Bernstein v. Universal Pictures, Inc.*²³⁹

tion in a commercial setting. The Court rejected this distinction, pointing out that the probability of irreparable injury to a corporation deprived of bank accounts was sufficient to warrant the application of procedures necessary to guard against initial error. *Id.* at 608.

236. "[T]he [due process] requirement is intended . . . to secure the citizen against any arbitrary deprivation of his rights . . ." *Dent v. West Virginia*, 129 U.S. 114, 124 (1888).

237. See note 264 and accompanying text *infra*.

238. See Shaffer, *Those Complex Antitrust Cases*, Wall St. J., Aug. 29, 1978, at 16, col.

4.

239. 79 F.R.D. 59 (1978).

The original plaintiffs in *Bernstein*, a class of lyricists and music composers, had complained that defendants had conspired to restrain trade by depriving them of their copyrights to music and lyrics written for motion pictures and television shows. At the time the opinion was written, sixty-five plaintiffs and eleven defendants, represented by seven major law firms, remained in the case.

The action was to be certified as a class action, but the exact size of the class was unknown; the defendants claimed there were 400 members and the plaintiffs claimed 900.²⁴⁰ Because each class member would have to prove his own damages under each contract made with each defendant, the size of the class was an important consideration in the decision to strike the jury trial demand:

In essence, as the defendants have aptly phrased it, resolution of this case as to the named plaintiffs alone will require more than a thousand "mini-trials" to determine for each contract entered into by each named plaintiff what percentage of the performance fee he might have been able to command from defendants but for the alleged antitrust conspiracy. This in turn will depend on a determination in the nature of a value judgment as to that individual's bargaining position at the stage of his career at which each disputed contract was negotiated.²⁴¹

The plaintiffs planned to call numerous witnesses, had pre-marked 550 exhibits and had prepared 2500 pages of accountants' worksheets in order to facilitate proof of damages. The defendants asserted numerous defenses, including laches, estoppel, plaintiffs' equal fault, and the "labor exemption" to the antitrust laws.²⁴² The defendants had also served notice that they would call 100 witnesses and had premarked 650 exhibits for introduction. Seventy depositions had been taken, thirteen interrogatories served, and eight requests for admissions made and answered. To further complicate matters, some defendants counterclaimed and claimed setoffs against the plaintiffs. Four months was the estimated minimum time required for trial—a conservative estimate considering the problems of maintaining a full day of trial for five days each week.

*In re United States Financial Securities Litigation*²⁴³ was an

240. *Id.* at 62.

241. *Id.*

242. Union activities relating to matters such as wages and hours are exempt from antitrust legislation. If the plaintiffs had been treated as a union rather than as independent contractors, the dispute would have been brought under the jurisdiction of the NLRB. See *Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976 (2d Cir. 1975).

243. 75 F.R.D. 702 (S.D. Cal. 1977). Judge Turrentine's striking of the jury was subsequently reversed in *In re United States Financial Sec. Litigation*, 609 F.2d 411 (9th Cir. 1979).

equally complicated case. United States Financial (USF) was involved in large real estate developments from coast to coast and was engaged in all aspects of development: construction and design of various structures, financing of real estate projects and, through its subsidiaries, acting as agent in the issuance of title insurance policies. USF had four and one-half million shares of stock and debentures worth \$35,000,000 registered with the SEC and traded on the New York Stock Exchange. In 1973 USF collapsed, filing for protection under Chapter XI of the Bankruptcy Act before converting to Chapter X.²⁴⁴

Eighteen private lawsuits and an SEC action were before the court at the time a jury trial motion was considered. The motion was denied. Five class actions relating to various purchases of stock and debentures during different time periods had been certified. The primary issue was USF's liability under both federal and state securities laws and under counts for common law fraud. Besides these substantive claims, issues were raised relating to conspiracy, aiding and abetting and the controlling person doctrine.

More specifically, the 20 or so individual defendants and the 80-odd corporate or partnership defendants [were] accused of eleven different violations of Section 10(b), five violations of Section 13(a), and violations of other sections of the Securities Exchange Act of 1934. The defendants were also said to have violated Sections 11, 12(2) and 17 of the Securities Act of 1933. In addition, common law counts based on negligence, gross negligence, and malpractice [were] found in many of the complaints.²⁴⁵

The subject matter of the litigation included separate offerings of USF securities and was complicated not only by the number of parties asserting claims, but also by cross-claims filed by many of the defendants. Complex and intricate accounting principles were at the heart of the litigation. During the three years preceding trial, various parties had taken depositions, and the transcripts from those depositions filled 150,000 pages. Upwards of 5,000,000 documents were available for discovery. The court expressed trepidation

The court rejected a complexity exception to the seventh amendment and refused to read the *Ross* footnote as establishing a new interpretation of the seventh amendment.

244. Since Chapter XI is mainly concerned with speedy composition of debts, it does not contain the reorganization machinery of Chapter X. Chapter XI proceedings result in arrangements with unsecured debtors. Under Chapter X, security holders can be included in the plan of reorganization. See *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434 (1940); 11 U.S.C. §§ 10-11 (current version in scattered sections of 11 U.S.C.A. (1979)).

245. 75 F.R.D. at 706.

regarding the introduction of a "significant fraction" of those documents, estimating that a total of 100,000 pages of documentary evidence would be presented.²⁴⁶ The potential magnitude of the jury's task was evidenced by a comparison to related state cases, which involved many of the same parties on a smaller scale. After nearly three months of trial, twenty of fifty-five witnesses had testified, thirteen of twenty-four plaintiffs had testified and the defendants had not even begun to present their case.

The court also struck the jury trial demand in *In re Boise Cascade Securities Litigation*.²⁴⁷ That case involved the acquisition of West Tacoma Newsprint Co. (Newsprint) by Boise Cascade Corporation (Boise) in 1969. Stockholders in Newsprint had received Boise shares listed on the New York Stock Exchange at a market value of seventy-five dollars. In 1971 and 1972, Boise had been forced to write down its assets, which caused the price of its shares to drop to twelve dollars. As a result, three civil suits were filed along with additional suits arising out of a similar merger of another corporation with Boise. In 1973, the Judicial Panel on Multi-District Litigation consolidated these actions for pretrial purposes. Another civil complaint, containing similar allegations, was filed in 1974.²⁴⁸

The court estimated that, at the time of its opinion, the attorneys involved had expended over 50,000 lawyer man-hours and that an excess of 900,000 documents had been produced. Because of the complexity of the evidence, the court of appeals expected the trier of fact to have difficulty handling questions of materiality, discount reserves with respect to land sales, valuation of assets and other unique and difficult accounting concepts. The court also expressed concern about possible prejudice resulting from Boise's settlement of the related state lawsuits.²⁴⁹

246. Judge Turrentine wrote:

The time and effort necessary to read and understand 100,000 pages comes a little into focus when one realizes that such a quantity of paper forms a stack over forty feet high (as high as a three-story building)

The magnitude of the task for the factfinder is partially outlined by the pretrial memorandum of the Steering Committee of Plaintiff's Counsel

This document is 806 pages long, not counting the 18 page table of contents

Id. at 707.

247. 420 F. Supp. 99 (N.D. Wash. 1976).

248. Plaintiffs alleged violations of §§ 12(2) and 17(a) of the Securities Act of 1933 and §§ 10(b) and 13(a) of the Securities Exchange Act of 1934, as well as violations of Rule 10b-5. For a general discussion of these actions, see *id.* at 101.

249. The related lawsuits were settled for \$50,000,000. Two issues in *Boise* were whether the jury would consider the settlements as admissions of liability, and, if so, whether the jurors would speculate that liability is tantamount to proof of fraud. 420 F. Supp. at 103. If

The court in *SEC v. Associated Minerals, Inc.*²⁵⁰ also struck the jury after applying the *Ross* test, but the factual context of the decision is less clear in that case than in the cases already discussed. Plaintiffs in *Associated Minerals* had alleged that defendants, by participating in a fraudulent scheme, obtained \$640,000 from public investors through the promotion and sale of individual interests in West Virginia oil and gas wells. Defendants did not register their interests with the SEC. The plaintiffs asked for injunctive relief, an accounting of all investor proceeds and disgorgement of all monies illegally received.

Although all four courts that upheld denial of the jury trial request prior to trial could only speculate as to the jury's limitations, they all pointed to similar factors to justify their decisions—complexity of subject matter, length of trial time and a huge volume of evidence. In two other cases, *ILC Peripherals Leasing Corp. v. IBM*²⁵¹ and *SCM Corp. v. Xerox*,²⁵² the litigants tried the case to a jury, despite the presence of these factors.

The *IBM* case, a private antitrust suit, was discussed in the introduction.²⁵³ The reader will recall that at the conclusion of the trial, the judge recommended that the case be tried without a jury on remand. In the *Xerox* case, the judge modified standard procedures to assist the jury. In a trial that lasted fourteen months, the jurors were provided guidelines and transcripts, were instructed on the law at the beginning of the trial as well as at the end, and were permitted to take notes. In addition, the court submitted a large number of interrogatories to the jury in an effort to simplify its task.²⁵⁴ Despite these precautions, the judge was unsatisfied with the jury's performance and suggested to the court of appeals that any additional factfinding be done by the court without a jury. The court supported its recommendation by citing the cases already

the jurors did view settlement as an admission of liability, plaintiffs would have leverage to force defendants to settle.

250. 75 F.R.D. 724 (E.D. Mich. 1977).

251. 458 F. Supp. 423 (N.D. Cal. 1978).

252. 463 F. Supp. 983 (D. Conn. 1978).

253. See notes 8-22 and accompanying text *supra*.

254. The court explained its reasons:

First, the sheer volume and complexity of the evidence necessitated focusing the jury's attention on specific issues to be sure that orderly decision-making occurred. Second, the use of numerous interrogatories seemed to offer some prospect of minimizing the risk of retrial. That objective assumed special importance in this case because of the extraordinary length of the trial and the presence of numerous novel or at least unsettled issues of law.

463 F. Supp. at 988 (footnote omitted).

described in this section.²⁵⁵

IBM and *Xerox* are presented at this point to demonstrate that the courts in *Bernstein*, *USF*, *Boise Cascade* and *Associated Minerals* were justified in their predictions about the jury's limitations in complex cases. The following discussion is intended to explain the rationale used by those courts that struck the jury even before trial began. The *USF* court cited English precedent for the proposition that English judges had believed only a judge could render a fair decision in complex cases, particularly when the case involved complicated documents.²⁵⁶ After discussing *Beacon*, *Dairy Queen*, *Ross* and *Boise Cascade*, the court established the following guidelines for deciding whether a case should be considered in equity: (1) a complexity of accounting not amenable to jury solution or explanation by a special master; (2) a jury incapable of understanding and rationally deciding the issues; and (3) an unusually long trial that would make it difficult for jurors to function efficiently throughout.²⁵⁷ Applying these guidelines to the instant factual situation, the judge concluded that the case fell within the court's equity jurisdiction.

In the first category, the judge said "it is no more than common sense for the law to recognize that modern juries are not capable of providing an adequate remedy to those litigants whose disputes involve accounting of complicated commercial transactions"²⁵⁸ Because the court believed that a jury would be unable to untangle and comprehend the *USF* accounts, it brought the case within the *Dairy Queen* exception by concluding that the use of a special master was not feasible.²⁵⁹ Applying the second guideline, the judge concluded that the jury could neither comprehend

255. *Id.* at 1021 n.53.

256. *In re United States Financial Sec. Litigation*, 75 F.R.D. 702, 708-09 (S.D. Cal. 1977).

257. First, although mere complexity is not enough, complicated accounting problems are not generally amenable to jury solution. Although such problems often arise only during the damages portion of a trial, they sometimes are present during the liability portion as well. Also, given the comments in *Dairy Queen* regarding special masters, only a case in which such a special master could not assist the jury meaningfully may be subject to removal from the province of the jury because of complex accounts.

Second, the jury members must be capable of understanding and of dealing rationally with the issues of the case.

And third, an unusually long trial may make extraordinary demands upon a jury which would make it difficult for the jurors to function effectively throughout the trial.

Id. at 711.

258. *Id.* at 712.

259. *See id.* at 713.

nor rationally deal with the untangling of various legal theories involved in a large number of cases tried simultaneously. Finally, the judge thought it likely that the trial would last two years. Included within jury "limitations" were problems of jury selection; the court could not ask a juror to give up his job for two years. This was considered "beyond the practical limitations of the human beings who would be asked to serve."²⁶⁰

When Judge Brieant applied the *Ross* test in *Bernstein*, he concluded on the basis of the first two prongs that the action should remain at law. The pre-merger custom for trying a treble damage action was to try the case to a jury, and while much of the relief sought in *Bernstein* could have been deemed equitable, plaintiff also sought legal—monetary—damages, which could not properly have been considered equitable restitution.²⁶¹ Nevertheless, Judge Brieant denied the jury trial request on the basis of the third prong of *Ross*.

Although the *Ross* Court had not cited authority to support the third prong of its test, Judge Brieant characterized it as a mere restatement of the court's traditional equitable powers, for which he cited both English and American precedent. He relied heavily on accounting cases, as did the court in *United States Financial*, to support his position that the Supreme Court had recognized that complex cases were beyond the capabilities of the jury.²⁶²

There are two problems with reliance on accounting cases to make that argument. First, accounting was historically an equitable action and these were legal actions. Second, although there were accounting complexities in the cases, the plaintiffs were seeking money damages, historically a legal remedy.²⁶³ The courts would

260. *Id.* at 714.

261. *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 66-67 (1978).

262. *See id.* at 67-68; *In re United States Financial Sec. Litigation*, 75 F.R.D. 702, 709 (S.D. Cal. 1977). Both courts cited *Kirby v. Lake Shore & Mich. S. R.R.* 120 U.S. 130, 134 (1887), a pre-merger case, and the following passage:

The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion Justice could not be done except by employing the methods of investigation peculiar to courts of equity.

Id.

263. Mr. Justice Black, in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962), a post-merger decision, noted another problem with the use of accounting cases as precedent for this notion. The use of the special master under Federal Rule of Civil Procedure 53 had reduced to rare occasions the necessity of resorting to equity. Judge Brieant recognized this, but

have been on more solid ground had they used the accounting cases to support the proposition that historically, remedies at law were considered inadequate when the complexity of the case prevented the jury from performing as a capable and fair factfinder. In other words, the complexity of accounting cases so severely handicapped the jury in its efforts to discover the facts that trial by jury did not give the impression of fairness to both parties. The court in *Boise Cascade* alluded to this argument:

The procedural safeguards inherent in our legal system provide the impression and fact of fairness to the litigants and society. This is necessary in order to assure obedience to judgments and resort to the legal system as the only sanctioned means of settling disputes in a complex civilized society

Central to the fairness which must attend the resolution of a civil action is an impartial and capable factfinder. . . . [A]t some point, it must be recognized that the complexity of a case may exceed the ability of a jury to decide the facts in an informed and capable manner. When that occurs, the question arises as to whether the right and necessity of fairness is defeated by relegating factfinding to a body not qualified to determine the facts. The third part of the analysis in footnote 10 to the majority opinion in *Ross v. Bernhard* . . . directly recognizes this.²⁶⁴

It should be pointed out that in *Bernstein*, Judge Brieant did not hold that all complex cases were beyond the competence of the jury. After examining the cases discussed above, he concluded that the particular case before him was beyond the practical abilities and limitations of the jury, and that consequently he could strike the jury. To support his conclusion, he argued that a minimum trial calendar of four months would make it "impossible to empanel a representative jury in this case whose verdict would enjoy the appearance of fairness" and added that the size and complexity of the case placed it "*as a whole* beyond the ability and competence of any jury to understand and decide with rationality."²⁶⁵

Jury selection was a critical problem in *Boise Cascade*. Because of the extended trial time (four to six months), it would have been

discounted the value of the master's explanation of accounting problems when there were larger problems of proof of injury and damages remaining. Proof of those issues required extensive testimony about separate contracts, which was unsuitable for submission to a master. See Note, *supra* note 14, at 904-11. The author of that note does not rest her rationale entirely on the accounting cases and the adequacy of the remedy available at law.

264. 420 F. Supp. at 104.

265. *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 70 (S.D.N.Y. 1978) (emphasis in original).

impossible to attract a cross section of the community to serve; prospective jurors who feared they would imperil their employment by a long absence would be excused, leaving a jury composed mainly of the unemployed. The court was concerned about the diminished appearance of fairness when a suit arising in a commercial setting and involving millions of dollars in potential damages would be heard by jurors with no relevant business experience. Despite this limitation and the other concerns discussed above, the court said it would not remove the case from the jury unless trial to the court was superior.²⁶⁶ The court then concluded that it was superior because it was better equipped to determine the facts fairly. It based this conclusion on its previous experience with complex commercial matters and its access to tools unsuited for use by a jury. Among those tools were:

review of daily transcripts; admission of depositions into evidence instead of reading relevant portions aloud; review of selected portions of testimony from the reporter's notes and flexibility in scheduling trial activities. In addition, the Court is able to study exhibits in depth and carry on colloquies with witnesses, expert and non-expert alike, in an orderly and systematic manner. Of course, this is in addition to the Court's knowledge of the litigation resulting from its review of the record since the cases were filed.²⁶⁷

The *Boise Cascade* court thus recognized the historical function of the jury as it developed in England as well as the tension between the seventh amendment and the due process clause. As the jury system developed, special juries and jurors from the local community had been used so that the adjudicators would be familiar with the facts. This was thought to guarantee performance of the factfinding function impartially, truthfully and fairly.²⁶⁸ If the modern jury is unable to perform in such a manner because a case is too complex, as was the situation in *Boise Cascade*, then the remedy at law is inadequate. Striking the jury in that case would be consistent with a functional historical analysis as well as with the due process clause. The *Boise Cascade* court, reflecting on the due process considerations developed throughout this article, suggested that the Supreme Court had recognized the due process notions of fairness and impartiality in its *Ross* test. Even if this suggestion is wrong, the *Boise Cascade* court at least acknowledged that the use of the

266. *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99, 104 (N.D. Wash. 1976).

267. *Id.* at 105.

268. See notes 51 & 67-72 and accompanying text *supra*.

jury in complex cases raises a due process issue.²⁶⁹

The discussion of these cases was intended to demonstrate that a functional analysis can be applied to deny a jury trial demand in a particular case consistent with both the seventh amendment and the due process clause. The *Bernstein*, *USF* and *Boise Cascade* courts subsumed the *Dairy Queen* exception into the third factor of the *Ross* test. Although the judges analyzed the jury trial issue within a historical framework, they were essentially applying a functional historical analysis, rather than the traditional historical result test. The functional historical analysis has been the appropriate analysis since the static historical test became outmoded after merger. This analysis is consistent with the Supreme Court's prior reasoning in the area even though in those cases that reasoning was used to contract the scope of the right to trial by jury.

A proper historical analysis must include an examination of the jury's function in 1791. When a jury cannot fulfill its historical function, then a suit at law does not provide adequate relief, and the court's equitable power to try the case without a jury may be invoked. These three courts explicitly recognized the validity of this argument, and the *Ross* Court implicitly recognized it in the first two prongs of its test. Moreover, the *Bernstein* decision suggests that the inability of the jury to act as a factfinder is sufficient grounds to deny a jury trial demand, even if analysis under the first two prongs of *Ross* leads to the conclusion that the action is one at law.

Furthermore, this discussion was intended to show that the *Ross* test is one of constitutional dimensions. In other words, the *Ross* test is an accommodation of the seventh amendment to due process guarantees. If a court employs a functional analysis and finds that a particular jury will be unable to reach an intelligent decision in a particular complex case, then it must recognize that any decision reached by that jury will necessarily be arbitrary and will violate the due process clause.

VIII. CONCLUSION

The question posed at the beginning of this article (whether Judge Conti could have struck the jury trial demand prior to trial) can now be given an affirmative answer.²⁷⁰ On the basis of either the functional historical test or a functional analysis taking into account due process considerations, a jury can be denied when requested in

269. *In re Boise Cascade Sec. Litigation*, 420 F. Supp. 99, 104-05 (N.D. Wash. 1976).

270. See text accompanying notes 8-22 *supra*.

complex litigation. Judge Conti, rather than first granting a jury trial to uphold the right to trial by jury and later recommending that there be no jury should the case be remanded,²⁷¹ should have concluded on the basis of his experience that the right to a jury trial was not constitutionally mandated in cases as complex as *IBM*. When the court applied the functional test, which considers the jury as a factfinder, the court's own findings clearly indicated the case was beyond the capabilities of the jurors to understand. Therefore, it was evident that the jury was incapable of performing as an impartial and sophisticated factfinder consistent with its historical function and the notions of fairness that accompanied the development of the jury trial and existed in 1791. Moreover, the use of the jury violated due process. The jury could not be an impartial adjudicator or avoid making an arbitrary decision when it could not comprehend the facts. Thus, Judge Conti should have concluded that a jury trial was improper in this case.

Because of the importance of the jury as an institution, the decision to strike the jury must, of course, be handled on a case-by-case basis, with due consideration given to modifying procedures in an effort to preserve the right to trial by jury. In order to preserve the right, such modifications would have to increase the jurors' capabilities as factfinders, but thus far the alternatives suggested are problematic.

One suggestion has been to assemble a jury of experts in the subject of the litigation. While such a jury appears to be at odds with the notion that a jury should be selected from a fair cross section of the community,²⁷² historical materials reveal that such a jury would be consistent with the practice in 1791.²⁷³ It seems unlikely, however, that experts would be willing or able to give four to fourteen months to participate as jurors in a complex suit.

A second alternative would be to alter the usual procedures of regular jury practice to ease the jurors' problems with remembering the facts and comprehending the issues in a complex suit. This was attempted in *SCM Corp. v. Xerox Corp.*²⁷⁴ The law was explained at the beginning and conclusion of trial, jurors were allowed to take notes, special interrogatories were utilized to focus the attention of the jurors, and the jury was allowed to retire with exhibits, transcripts, copies of the judge's instructions and copies of the closing

271. *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. at 448.

272. See 28 U.S.C. § 1861 (1976). Cf. *United States v. Butera*, 420 F.2d 564, 568-69 (1st Cir. 1970) (criminal case).

273. See notes 67-72 and accompanying text *supra*.

274. See notes 252-54 and accompanying text *supra*.

arguments. Despite this assistance, the court was not satisfied with the results and recommended that the jury be struck on remand. Though one case cannot provide sufficient evidence on which to base any conclusive determinations, it seems unlikely that lay people with no technical, economic or business background could be educated during the course of a trial to the extent that they could fully comprehend such matters and make a reasoned decision.²⁷⁵

In complex cases, where no effective procedural modifications are available to improve the jury's ability to comprehend the case, the court is a superior fact finder. As the judge in *Boise Cascade* indicated,²⁷⁶ the court already has tools which aid it in the factfinding process. In addition, as the number of complex cases increases, the members of the judiciary will further develop their skills as fact finders. It is already apparent that a majority of the complex suits will be filed in large commercial centers like New York and California.²⁷⁷ Consequently, experienced judges in those areas will be able to handle complex litigation with enhanced expertise and at lower costs to the litigants and to the judicial system.

A jury cannot properly perform its function as a fair factfinder in complex litigation beyond its comprehension. On the basis of the historical functional test, the functional analysis of the *Ross* test and the considerations of due process raised by the jury's limitations, the judge has an obligation to grant a motion to strike the jury when he deems the case too complex for the jury's comprehension. Failure to strike the jury under these circumstances is a deprivation of due process.

275. In an article which suggests that judicial management rather than curtailment of the right to jury trial is the solution in complex cases, the author admits that "employment of the procedural methods suggested in the preceding paragraphs will entail the expenditure of considerable judicial energy" Note, *supra* note 85, at 537.

276. See note 267 and accompanying text *supra*.

277. *E.g.*, *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423 (N.D. Cal. 1978); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *In re United States Financial Sec. Litigation*, 75 F.R.D. 702 (S.D. Cal. 1977).