Civil Jury Trial: The Case for Reasoned Iconoclasm

Mary Kay Kane
The seventh amendment to the United States Constitution has ensured that the jury trial will be a permanent part of American civil litigation\(^1\) by providing:

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 a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

This deceptively precise language, however, does not state with any exactness when and why juries must be employed.\(^2\) It has been left to

\(^1\) Perhaps it should be no surprise that the jury continues to flourish. As described by one commentator, the jury "is one of the most durable and stubborn of all human institutions. The clans and tribes where it originated have dissolved into unrecorded history and are long forgotten. Kingdoms and world empires arose and vanished but the jury held on." Pope, The Jury, 39 Texas L. Rev. 426, 448 (1961) [hereinafter cited as Pope]. A nonexplanation for this phenomenon is offered by Judge Frank: "The point is that the jury, once popular thanks to its efficacy as a protection against oppression, has become embedded in our customs, our traditions. And matters traditional are likely to be regarded as inherent rights." J. Frank, Courts on Trial 139 (1973) [hereinafter cited as Frank]. Professor Moore comments: "The jury is like rock music. Classical theory frowns; the masses applaud. And in a democracy the felt need of the masses has a claim upon the law." 5 J. Moore, Federal Practice ¶ 38.02[1] at 15 (2d ed. 1974) [hereinafter cited as Moore].

\(^2\) The purposes and functions of the civil jury ostensibly are many. Judge Jerome Frank lists and then refutes, the following five: 1) juries are better fact finders; 2) juries can nullify harsh or arbitrary laws; 3) juries protect citizens against overbearing, incompetent and perhaps corrupt judges; 4) participation on juries is a means of educating the public about the government; and 5) juries permit popular participation in government. Frank, supra note 1, at 126-37. In addition, it has been suggested that juries perform the necessary role of alleviating latent conflicts between the litigants
the courts, and ultimately to the Supreme Court, to define the scope of civil jury trial rights.

The traditional method of determining whether a litigant has the right to a jury trial in federal court is the "historical approach." Under this traditional approach, the Supreme Court has inquired whether the particular case in question would have been tried at law or in equity in 1791, the year in which the seventh amendment was ratified. Although the historical approach may be justified under a literal and restrictive interpretation of the seventh amendment, it has been criticized as unrealistic, as it results in a "distribution of responsibility based on an historical division largely motivated by factors now irrelevant." Thus, commentators have advocated a modernization of the historical test which would take into account the disappearance of conditions that in the 18th century required the protection of the vox populi in civil matters. According to this view, the common law jury's function was very specifically to protect citizens from unfair trials, and if a jury would not protect people from unfair trials, then its use would be dysfunctional. The seventh amendment in such cases should not require trial by jury. Thus, this "functional approach" focuses on whether the judge is in a better position than the jury to decide a particular case in a fashion comporting with notions of fair and efficient justice; the benefits of a jury would be preserved for those cases in which they could best bear fruit and would be eliminated for others in which the disadvantages outweighed the benefits.

The debate over the propriety of a functional jury trial test has raged for several years, and an evaluation of it is due. The Supreme

(society) and the judge (judiciary) and thus must be preserved. Wolf, Trial by Jury: A Sociological Analysis, 1966 Wis. L. Rev. 820. See also Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1055 (1964).


5. The functional approach does not necessitate the complete and potentially unconstitutional abandonment of historical inquiry, or the restriction of jury trial in all cases. Shapiro & Coquillette, supra note 4, at 447, suggest that when faced with a jury trial problem, the court should make some historical inquiry, but then should ask itself whether factors exist that favor jury trial even if history does not compel it. On the other hand, a functional approach might result in fewer jury trials in complex areas, such as trademarks, antitrust, securities law, fraud, and perhaps even some personal injury or wrongful death cases arising out of mass disasters. See Ross v. Bernhard, 396 U.S. 531, 545 n.5 (1970) (Stewart, J., dissenting).
Court has sufficiently outlined the scope of seventh amendment rights to allow lawyers and academicians to assess the current viability of a functional approach. In particular, the Supreme Court in 1974 upheld a defendant's right to demand a jury trial in two cases, *Curtis v. Loether* and *Pernell v. Southall Realty*, notwithstanding some legislative evidence that trial by jury was not desired by Congress and might even have resulted in undermining the policies of the statutes involved. These cases would appear to be perfect paradigms for analyzing the power of Congress and the courts to determine jury rights in light of the jury's ability to fulfill its historic role of dispensing justice.

This article will attempt to reconcile the functional test with the various pronouncements of the Supreme Court on the scope of the seventh amendment. It will demonstrate that, prior to the *Loether* and *Pernell* decisions, the Supreme Court was indeed retreating from a rigid historical test toward a more functional approach and that neither *Loether* nor *Pernell* need necessarily spell the end of a flexible and functional seventh amendment doctrine. Finally, this article will suggest an analytical basis for utilizing scientific evidence to determine whether juries are in fact serving in their historical capacity as guardians of justice.

**General History of Constitutional Jury Rights**

Historically, the right to a jury trial in the federal courts depended

6. 415 U.S. 189 (1974). Although the plaintiff remained the same throughout the litigation, the case will be referred to by the defendant's name, Loether, throughout this article. The plaintiff married between the appellate and Supreme Court decisions and her married name, Curtis, was substituted for her maiden name, Rogers. *Id.* at 191 n.3.


8. The states have been free to implement their own concepts of civil jury trial. See note 19 *infra*. Most states have constitutional jury trial provisions similar to the federal guarantee. However, by judicial construction or by statute, these state provisions have been applied in varying ways. For a complete discussion of the states that abide by a law-equity dichotomy, see Note, *The Right to Jury Trial Under Merged Procedures*, 65 HARV. L. REV. 453 (1952).

Some of the state jury trial provisions differ from the federal constitution. See, e.g., MASS. CONST. art. 15; N.C. CONST. art. 1, § 25; VA. CONST. art. 1, § 11. Nonetheless, they uniformly have been interpreted in the same fashion as the federal guarantee and civil jury trial rights are deemed to be those which existed at the time their respective constitutions were adopted. *See In re Opinion of the Justices*, 237 Mass. 591, 130 N.E. 685 (1921); Bothwell v. Boston Elevated Ry., 215 Mass. 467, 102 N.E. 665 (1913); Groves v. Ware, 182 N.C. 553, 109 S.E. 568 (1921); Chowan & S.R.R. v. Parker, 105 N.C. 184, 11 S.E. 328 (1890); Bowman v. Virginia State Entomologist, 128 Va. 351, 103 S.E. 141 (1920).

Four states do not have explicit constitutional provisions for civil jury trial. Article
upon the interpretation given to the words "suits at common law." This phrase from the seventh amendment contemplates the minimum of situations in which the right to a jury trial cannot be abrogated. A jury trial can, of course, be granted in actions which were not suits at common law, but a jury trial cannot be denied where the action must be so classified.

The federal courts have turned to English history to determine whether actions were suits at common law. Although the wisdom of 2, section twenty-three of the Colorado Constitution guarantees the right to trial by jury only in criminal prosecutions, and it mentions civil juries only to provide that they may consist of less than twelve persons. Such rights are determined by Coto. R. Civ. Pro. 38, as well as other statutory enactments. Similarly, in Louisiana the right to jury trial in civil cases has been held to rest with the state legislature. City Bank v. Banks, 1 La. Ann. 418 (1842). Article one, section ten of the Utah Constitution also explicitly provides for jury trial only in criminal prosecutions. Nonetheless, some courts have assumed a constitutional right in civil actions based on section 78-21-1 of the Utah Code of Civil Procedure. See Degnan, Right to Civil Jury Trial in Utah: Constitution and Statute, 8 Utah L. Rev. 97 (1962). Similarly in Wyoming, which also has no constitutional provisions for civil jury trials, the Wyoming Supreme Court has assumed the existence of a constitutional right. See First Nat'l Bank v. Foster, 9 Wyo. 157, 61 P. 466 (1900).

9. One commentator has suggested several methods that could have occurred to the constitutional convention delegates during the ratification debates as alternative methods of deciding when jury trials were required. See Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 711-12 (1973).

10. The seventh amendment does not purport to establish maximal jury trial rights and thus does not provide in itself any guarantee of a right to a nonjury trial. See Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959); Hurwitz v. Hurwitz, 136 F.2d 796 (D.C. Cir. 1943); Note, The Right to a Nonjury Trial, 74 Harv. L. Rev. 1176 (1961). Indeed, it is well established that the Congress can enact a statutory right of jury trial broader than the seventh amendment. See, e.g., Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963) (Jones Act); Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 459 (1851) (Great Lakes Act).

In a similar vein, there is a right to trial by jury in equity cases in Georgia, Tennessee and Texas. See Van Hecke, Trial by Jury in Equity Cases, 31 N.C.L. Rev. 157 (1953). Jury trial is available in equity cases even though states have constitutional guarantees similar to the federal provision, providing that the right to trial by jury shall remain inviolate. Ga. Const. art. VI, § 16(1); Tenn. Const. art. 1, § 6; Texas Const. art. 1, § 15, art. V, § 10. Tennessee is noteworthy because it maintains separate law and equity courts. Texas, on the other hand, has a civil law history, so distinctions between law and equity for jury trial or any other purposes make little sense.


this approach has been questioned, it is clear from the weight of precedent that the search for the right to a jury trial in a civil case must begin with an analysis of English common law at the time the seventh amendment was adopted. Stated simply, rights or remedies not enforceable at law at that time do not require a jury trial, whereas the right adheres when rights or remedies are so enforceable. Unfortu-

12. See McCoid, supra note 4, at 1-2. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2302 at 16, 17 (1971) [hereinafter cited as Wright & Miller].

It is to be observed that the allocation of business between common law and equity courts in the eighteenth century seldom depended on the right to jury trial. Indeed, some commentators have noted that, rather than the availability of a right to jury trial influencing persons to sue at law, litigants chose to sue in equity because of defects in the jury trial system. 3 W. Blackstone, Commentaries on the Laws of England *382-85 (juries locally prejudiced). There was a decline in jury popularity in the fifteenth century due to "complaints that juries were packed, bribed, intimidated, partial and difficult to obtain within any reasonable space of time." T. Plucknett, A Concise History of the Common Law 169 (4th ed. 1948).

13. It is interesting to note that were American courts to refer to present English law, civil jury trial would be available as a matter of right only in cases for libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, and to defendants in fraud actions. Administration of Justice Act of 1933, 23 & 24 Geo. 5, c. 36, § 6.

The reasons for the decline of jury trial in England appears to be a desire for greater certainty in outcome. This is not to say that the jury is viewed as any less an instrument of justice than when it was first instituted, but that the jury's ability to move towards the aequum et bonum is outweighed by the increased predictability of judge trials. See Devlin, supra note 11, at 146-57. See also Ward v. James, 1 All E.R. 563 (C.A. 1965).

Jury trial has also fallen into disfavor during the twentieth century in Switzerland, Germany, France, and Scotland. Frank, supra note 1, at 109.

14. "By common law, they 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; or where, as in admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit." Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830) (Story, J).


The denial of jury trial has been upheld in various suits dealing with other equitable matters. Guthrie Nat'l Bank v. Guthrie, 173 U.S. 528 (1899) (claims against municipal corporation having no legal obligation); Barton v. Barbour, 104 U.S. 126 (1881) (action against receiver); Shields v. Thomas, 59 U.S. (18 How.) 253 (1855) (settlement of an estate). Cf. Ex parte Quirin, 317 U.S. 1 (1942). A good collection of cases held to be equitable can be found in Moore, supra note 1, ¶ 38.11[6], at 121-27.


nately, this proposition, though technically accurate, has proven too simple an answer to all the questions which have arisen, particularly in the context of modern litigation. Consequently, the Supreme Court has attempted on several occasions to clarify seventh amendment rights in modern contexts.

By and large, the trend in the Court has been to expand the scope of the constitutional guarantee and to find a right to jury trial in doubtful cases. The major exceptions have been the Court's refusal to apply the seventh amendment to the states through the fourteenth amendment and its approval of six member and nonunanimous

17. Apparently the trend prior to 1936 was not to expand the number and types of cases in which jury trial rights were afforded. See, e.g., James, Trial by Jury and the New Federal Rules of Procedure, 45 YALE L.J. 1022, 1026 (1936). After 1936 the pendulum swung in the opposite direction. Levin, Equitable Clean-Up and the Jury: A Suggested Orientation, 100 U. Pa. L. Rev. 320 (1951).


20. See Colgrove v. Battin, 413 U.S. 149 (1973). The decision relied heavily on the Court's earlier holding that the six member jury in a state prosecution did not violate the sixth amendment. Williams v. Florida, 399 U.S. 78 (1970). Whether six member juries may be employed in federal criminal prosecutions has not yet been decided. An important feature of these cases is the approach taken by the Court: "The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial." Id. at 99-100.

The number twelve appears to have been fixed during the reign of Henry II during the twelfth century. Thayer, The Jury and Its Development, 5 Harv. L. Rev. 249, 295 (1892). Why that number was chosen is unclear. Pope, supra note 1, at 435. One commentator, perhaps with tongue in cheek, offers the following explanation: "It is clear that what was wanted was a number that was large enough to create a formidable body of opinion in favor of the side that won; and doubtless the reason for having twelve instead of ten, eleven or thirteen was much the same as gives twelve pennies to the shilling and which exhibits an early English abhorrence of the decimal system." Devlin, supra note 11, at 8. Thus, it is not surprising that the Supreme Court found no compelling reason to require a twelve member jury. The Court's analysis of that question has been criticized. See, e.g., Zeisel, . . . And Then There Were None: The Dimunition of the Federal Jury, 38 U. Chi. L. Rev. 710 (1971).
juries. Thus, it is not without some justification that two commentators have concluded, "[A]ny close question—and sometimes one that is not so close—is resolved in favor of the jury trial right without serious analysis of history, precedent, or policy." The Court's decisions concerning jury rights since the merger of law and equity in the federal system in 1938 illustrate this philosophy, as well as a tendency to abandon a purely historical approach.

Jury Trial and Multiple Claims

The first chink in the armor of the strictly historical test came in the landmark case of Beacon Theatres, Inc v. Westover. In that case, Fox had sued Beacon for a declaratory judgment that its exclusive "first-run" movie contracts were not in violation of the Sherman and Clayton Antitrust Acts and for a preliminary injunction to prevent Beacon from bringing an antitrust suit against it until the ongoing action was completed. Beacon asserted a compulsory antitrust counterclaim for treble damages and demanded its right to a jury trial on that claim. It argued that there was a common issue to the claim and counterclaim and that to try the original claim first to the judge would result in denying Beacon its jury trial rights, as the common issue would then be decided without

21. It has long been supposed that a unanimous verdict is an essential feature of the right to jury trial. American Publishing Co. v. Fisher, 166 U.S. 464 (1897). The historic reason for that requirement was unclear. See W. Forsyth, History of Trial by Jury 239 (1852); Pope, supra note 1, at 436. However, in 1972 the Supreme Court ruled in two cases that the states were not bound by the sixth and fourteenth amendments to require unanimity in state criminal prosecutions. Apodaca v. Oregon, 406 U.S. 356 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). Although these cases are not controlling in the civil area, it has been argued that "the requirement of unanimity is so much more important in criminal cases than in civil cases that it would be quite anomalous to find that the Constitution imposes the requirement in the latter cases but not in the former." Wright & Miller, supra note 12, § 2492, at 482. Nonetheless, unanimity may still be required in federal cases since the courts may be reluctant to allow the alteration of the jury process by both the six member jury and the nonunanimous verdict simultaneously. But cf. N.Y.R. Civ. Prac. §§ 4104, 4113(a).

22. Shapiro & Coquillette, supra note 4, at 442.

23. It is no accident that problems as to when jury trial is required proliferated in the federal courts after the distinction between actions at law and suits in equity was abolished in 1938. See Fed. R. Civ. P. 2. Prior to that time, jury trial questions could be decided easily because the existence of the right depended on the court in which the action was brought. Under the new federal civil rules, actions combining legal and equitable claims and defenses were permissible, and it was unclear how jury trial rights were affected. See Fed. R. Civ. P. 8(e), 18(a). See generally Note, The Effect of the Merger of Law and Equity on the Right of the Jury Trial in Federal Courts, 36 Geo. L.J. 666 (1948).

recourse to a jury. The court of appeals ruled that Fox had made a valid claim for equitable relief and noted that under the equitable clean-up doctrine, ancient courts of equity could retain jurisdiction over and dispose of equitable claims even though, in so doing, legal issues also were decided. Therefore, it felt justified in ordering that Fox's equitable claims be heard by the trial judge first, even though that determination would bind the jury, and Beacon's right to a jury determination of the facts would be seriously debilitated.

The Supreme Court, in an opinion by Mr. Justice Black, disagreed and, in doing so, abandoned the traditional approach to determining jury trial rights on the basis of a characterization of the entire lawsuit as either equitable or legal. Justice Black criticized the court of appeals for relying on the clean-up doctrine to decide the case. The basic requirements for equitable relief, inadequacy of remedy and irreparable harm, were practical terms, he said. "As such their existence today must be determined, not by precedents decided under discarded procedures, but in light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules." Since in the federal courts equity had only acted where legal remedies were inadequate, Justice Black reasoned, the expansion of adequate legal remedies worked to narrow the scope of equity. The same federal court was empowered to hear equitable and legal claims simultaneously, and the old rule of equity no longer made any sense. Therefore, the equitable jurisdiction had to give way. Fox could defend itself adequately at law against Beacon's counterclaim, and all issues common to the equitable claim and the legal claim would be tried first to a jury. Stated more generally, this holding makes it clear that when the current legal remedy is adequate, a court can assume that equity would abandon jurisdiction to the extent issues can be decided at law, and to that extent a jury trial must be provided on demand.

25. For a description of the equitable clean-up doctrine, see D. Dobbs, Remedies § 2.7 (1973); Levin, Equitable Clean-up and the Jury: A Suggested Orientation, 100 U. Pa. L. Rev. 320 (1951).
27. Conversely, in some instances it still may be appropriate to try the equitable issues first, as when doing so could decide the entire controversy where deciding the legal issues first would not produce the same results. See, e.g., Holiday Inns of America, Inc. v. Lussi, 42 F.R.D. 27 (N.D.N.Y. 1967).
28. See McCoid, supra note 4, at 1; Rothstein, Beacon Theatres and the Constitutional Right to Jury Trial, 51 A.B.A.J. 1145 (1965); Shapiro & Coquillette, supra note 4,
These principles were reenforced and further extended in the subsequent opinion of *Dairy Queen, Inc. v. Wood*,\(^{29}\) also authored by Mr. Justice Black. That case involved a failure to make payments pursuant to a trademark licensing agreement. The plaintiff sought temporary and permanent injunctions against defendant’s use of the trademark, an accounting to determine what was owing under the contract, and an injunction pending the accounting to prevent the defendant from collecting receipts. The defendant filed an answer, including an antitrust counterclaim, and demanded a jury trial.

Following his approach in *Beacon Theatres*, Mr. Justice Black again established that historical rules should be applied in light of modern procedure. He found that the availability of a master under the federal rules\(^{30}\) usually provided an adequate legal replacement for the equitable remedy of an accounting, so that the accounting claim should now be deemed an action at law, requiring a trial by jury.

Further, the Court tolled the death knell for the equitable clean-up doctrine. That doctrine, a remnant of the days when the equity and law courts were separate entities, was no longer tenable under the modern rules allowing both equitable and legal issues to be presented in the same case. Thus, reasoned Justice Black:

*Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury . . . . The sole question [to be decided] is whether the action now pending before the District Court contains legal issues.\(^{31}\)

*Dairy Queen*, then, was firm precedent for the proposition that the parties did not lose their seventh amendment rights when legal and equitable issues were mixed; whatever doubts were left by *Beacon Theatres* on this score completely evaporated.\(^{32}\)

The Issue Test

The last case decided by the Supreme Court concerning the effect of the merger of law and equity on the right to jury trial is *Ross v. Bernhard*.\(^{33}\) That case involved the question whether there was a right

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31. 369 U.S. at 473.

32. The right to a jury trial in *Beacon Theatres* had derived from an implied congressional intent that antitrust matters be tried to a jury. Thus, there had been some doubt whether *Beacon Theatres* was, strictly speaking, a seventh amendment case.

to jury trial on the corporate claim in a shareholder derivative suit under the Investment Company Act of 1940. Although corporations were allowed to sue at common law to enforce their own rights and could demand a jury trial, the ability of a stockholder to bring a derivative action on behalf of the corporation was confined to equity. Both the issue of whether a derivative suit was proper and the underlying corporate claim were tried by the chancery court. The Supreme Court, however, upheld the right to trial by jury. Mr. Justice White, writing for the majority, rested his decision first on an interpretation of *Beacon Theatres* and *Dairy Queen* as holding that jury trial questions depend upon "the nature of the issue to be tried rather than the character of the overall action," and second on his view of the derivative suit as divisible into two units: an equitable issue concerning the standing of the stockholder plaintiff and the legal issues inherent in the corporate claim.

The most noteworthy aspect of *Ross* is the Court's continued flexible approach of reassessing history. In addition, the adoption of the issue test represents a significant expansion in judicial discretion in deciding jury questions, since, as indicated by the dissent, "there are, for the most part, no such things as inherently 'legal issues' or inherently 'equitable issues.' There are only factual issues, and 'like chameleons [they] take their color from surrounding circumstances.'"

34. *Id.* at 538.

35. In a strong dissent, Justice Stewart, joined by Justice Harlan and Chief Justice Berger, argued that there was no joinder of legal and equitable claims, since derivative suits historically were tried entirely in equity. Therefore, he argued, *Beacon Theatres* and *Dairy Queen* were inapposite; those cases involved the joinder of claims that would have been tried separately in 1791. 396 U.S. at 543. For similar arguments, see Comment, *From Beacon Theatres to Dairy Queen to Ross: The Seventh Amendment, The Federal Rules and a Receding Law-Equity Dichotomy*, 48 J. URBAN L. 459, 503 (1971).

36. It has been suggested that *Ross* effectively breaks with the historical approach to jury trial questions, requiring in future cases "[o]nly two rather simple inquiries: 1) whether the issues pertaining to legal relief can be untangled from the equitable issues; 2) whether merger makes it practicable to try the former to a jury." *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 172, 175 (1970). This interpretation seems too broad, however. Clearly the Supreme Court is not yet ready to abandon history. Moreover, the Court may not be able to ignore the historical division between law and equity given the present wording of the seventh amendment. *See Note*, *Ross v. Bernhard: The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112, 122 (1971). The Court's reference to and use of history in two recent opinions emphasizes this fact. Curtis v. Loether, 415 U.S. 189 (1974); Pernell v. Southall Realty, 416 U.S. 363 (1974). *See notes 73-107 & accompanying text infra.*

37. 396 U.S. at 550.
This decreased emphasis on purely historical solutions is particularly apparent in a cryptic footnote to the majority opinion:

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. 38

Perhaps most important in this quotation is the reference to "the practical abilities and limitations of juries." The seventh amendment itself makes no mention of factors other than history that should be considered. Policy considerations or practical concerns were never openly considered in prior Supreme Court jury decisions, except in the cases upholding the six member jury, 39 and in those instances the Court had first concluded that the Constitution did not mandate the manner in which the jury must operate. Thus, assuming this language can be taken seriously, the use of the issue test (a more vague, and hence more flexible, means of deciding seventh amendment questions) and the injection of policy considerations into this inquiry appear to represent a movement toward a truly functional jury trial test. Thus, Ross remains as a further, and arguably much more radical, extension of the trend begun by Beacon Theatres.

The difficulty with this interpretation is that, without exception, all of the Supreme Court's pronouncements occurred in contexts enlarging the right to jury trial, not diminishing it. Thus, since the seventh amendment provides only for minimal, not maximal, jury trial rights, the Court was not severely hampered by constitutional restrictions when it continued to adopt tests expanding those rights. In doing so, the Court never addressed the question of whether the right to jury trial could be constitutionally restricted by a test including nonhistoric factors.

In summary, seventh amendment questions have been addressed by the Supreme Court in an increasingly flexible, pragmatic manner. The trend, at least since the merger of law and equity in the federal system, has been to refer to history to decide jury issues and also to take into account modern changes which have rendered moot the reasons for which a jury trial may have been denied in 1791. In addition, factors other than historical analogy have been used for the first time. In this way, the Court has indicated that a functional jury trial test may be per-

38. 396 U.S. at 538 n.10.
39. See cases cited note 20 supra.
missible and, further, that evidence relevant to the "practical abilities and limitations" of juries may be considered.

Jury Trial and the Congress

Central to any discussion of functional jury trial concepts is an exploration of the congressional power to provide for a statutory cause of action that dispenses with trial by jury, even though the remedy or the underlying claim for relief could be considered analogous to an historic common law action. This in effect entails consideration of whether Congress can declare an action "equitable" or "non-legal" for jury trial purposes. Indeed, in many ways this legislative power is the most important seventh amendment issue for the future. The growing complexity of modern life has in general necessitated resort to statutory remedies in preference to the slower, more haphazard development of the common law. The effectiveness of some statutory remedies will obviously be severely curtailed if litigants can insist upon a jury trial. Thus, the adoption of a functional approach to seventh amendment questions may be essential to many federal statutory schemes; in its absence, the seventh amendment may prove to be not so much a provision to protect against governmental oppression as a tool of abuse, serving to obstruct justice.

Whether the functional approach is possible in the statutory context depends upon the acceptance of two propositions: first, that pure policy considerations are factors properly considered in seventh amendment inquiries; and second, that congressional statements of policy are relevant in determining the outcome of these inquiries. The previously discussed line of decisions culminating in Ross v. Bernhard provides sufficient authority for the injection of policy factors into questions of jury trial rights. It is the second proposition with which we will now concern ourselves.

40. Although Congress may provide a statutory remedy, the Supreme Court has the sole authority to determine whether the seventh amendment requires that a jury trial be available to those who exercise the remedy. Thus, congressional findings on jury inadequacy would be relevant to, but never binding upon the Court's determination. However, this does not mean that the courts could not benefit from congressional consideration of the abilities and limitations of the jury in specific contexts. See, e.g., Chilton v. National Cash Register Co., 370 F. Supp. 660 (S.D. Ohio 1974). Indeed, one student note has suggested that the Court should defer to the congressional findings by applying a rational basis test, arguing that the ability to investigate the question thoroughly places Congress in a better position to make a determination. Note, Congressional Provision for Nonjury Trial Under the Seventh Amendment, 83 Yale L.J. 401, 416 (1973).
In adjudicating statutory causes of action for which Congress has failed to provide expressly for trial by jury, federal courts generally have tended to presume that Congress implicitly provided for the right or relied on the presence of the constitutional guarantee to supply it. For example, there are, in suits under the antitrust laws and the Federal Employers' Liability Act, references by the Supreme Court to the

41. In general, the state courts appear to apply the same test as the federal courts to statutory actions. But see Brown, Administrative Commissions and the Judicial Power, 19 MINN. L. REV. 261, 264 (1935). A few examples follow.

In California, jury trial is guaranteed by constitution and statute. CAL. CONST. art. I, § 16; CAL. CODE CIV. PROC. § 592 (West 1976). The test for jury trial is whether the "gist of the action" is legal. People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 299, 231 P.2d 832, 843 (1951). Thus in One 1941 Chevrolet Coupe the California Supreme Court held that a jury trial was required in a forfeiture proceeding under the California Health and Safety Code, because "[a]s early as 1301, a case involving forfeiture of a ship and goods for piracy was tried by a jury." Id. at 291, 231 P.2d at 838. The court specifically rejected arguments that actions under the code were outside the constitutional guarantee because the forfeiture statute was enacted after the constitution was adopted, holding that jury trial is not limited to those types of cases which existed at that time, but is extended to cases of like nature. Id. at 300, 231 P.2d at 844. See Grossblatt v. Wright, 108 Cal. App. 2d 475, 239 P.2d 19 (1951) (action under the Housing and Rent Act of 1947).

Minnesota also has a constitutional right to jury trial. MINN. CONST. art. I, § 4. The jury test for statutory proceedings in Minnesota is whether jury trial was guaranteed in a similar type proceeding under the laws of the territory when the constitution was adopted. See, e.g., Hawley v. Wallace, 137 Minn. 183, 163 N.W. 127 (1917) (action to contest election); Peters v. City of Duluth, 119 Minn. 96, 137 N.W. 390 (1912) (action to register a land title); Yanish v. Pioneer Fuel Co., 64 Minn. 175, 66 N.W. 198 (1896) (insolvency proceeding); Board of County Comm'rs v. Morrison, 22 Minn. 178 (1875) (action for overdue property taxes).

New York follows an approach similar to Minnesota, freezing the right to jury trial as of the adoption of its constitution in 1894. N.Y. CONST. art. I, § 2. See generally, 4 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE §§ 4101.06-08. Thus in actions under statutes enacted after the constitution it is necessary to do some historical research to determine how they would have been treated at that time. See, e.g., Sporza v. German Sav. Bank, 192 N.Y. 8, 84 N.E. 406 (1908); Malone v. St. Peter's & Paul's Church, 172 N.Y. 269, 64 N.E. 961 (1902).


In Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961), an action to collect delinquent taxes, Judge Friendly reasoned that in order to declare that there was no right to a jury trial under the tax statutes, there must be a clear indication that the Congress intended that there be no jury trial.

43. Trial by jury "is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade ...." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959).

essential part played by jury trials in these statutory schemes, even though the relevant statutes themselves do not provide for or refer to trial by jury.

In the absence of a basis for presuming a congressional intent to provide for trial by jury, the court must decide whether the seventh amendment mandates a jury trial. The vast majority of liability statutes merely codify existing common law rights. As a consequence, most statutory actions produce the same analytical problems discussed in the previous section, and the courts generally attempt to find an analogous 18th century counterpart to the new action in order to determine if the constitutional guarantee is applicable. In most cases, this produces few difficulties. For instance, in actions under the patent, securi-


45. The question of statutory jury rights is decided largely by the language used by the Congress. Illustratively, it has been held that there is a right to jury trial in an action to recover allegedly illegal estate tax assessments, since the implementing legislation refers to “a suit at law.” Wickwire v. Reinecke, 275 U.S. 101 (1927). More generally, actions for tax refunds are entitled to jury trial under 28 U.S.C. § 2402 (1970), specifically providing for jury trial in actions against the federal government. On the other hand, it was held that there was no right to a jury trial in an action to enforce three internal revenue subpoenas under the tax code since the statute referred only to “adjudication of the issues by the United States District Court.” Kennedy v. Rubin, 254 F. Supp. 190, 194 (N.D. Ill. 1966). A full discussion of constitutional jury trial rights in tax cases brought by the government is provided in Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961).

46. A problem in finding implicit jury trial rights arguably could arise because some statutes provide explicitly for jury trial, and others are silent on the question, creating the negative implication that no jury trial was intended. However, the courts have not been so restrictive. Several federal statutes set out explicit jury trial rights. See Moore, supra note 1, at § 38.12. Implicit rights have easily been found in other statutes. See notes 43-44 supra.

47. See Simmons v. Textile Workers Local 713, 350 F.2d 1012, 1018 (4th Cir. 1965).

48. At times, however, the use of an historical test in the statutory field has caused some problems, as analogies may be far from perfect. The courts often have strained to find a right to jury trial and confusion has resulted. Condemnation suits provide a good illustration. The power of eminent domain was exclusively statutory in England and each statute condemning certain property set out whether a jury trial on the issue of damages was to be provided. Beatty v. United States, 203 F. 620, 624-25 (4th Cir. 1913). If a citizen wanted to claim that the Crown had invaded his right, he proceeded in the Chancery Court. Thus, it has been held that the seventh amendment is not applicable in such cases. Welch v. TVA, 108 F.2d 95 (6th Cir.), cert. denied, 309 U.S. 688 (1939). However, an early Supreme Court decision held that because the jury had always assessed damages at common law, and a condemnation suit is much like the action in trespass, there is a right to a jury trial in those suits. See, e.g., Chappell v. United States, 160 U.S. 499 (1896).

49. Patent infringement suits frequently seek both damages and an injunction
ties, and trademark laws, the Naturalization Act of 1906, and the Selective Training and Service Act, the courts have found a constitutional right to jury trial depending upon whether damages were sought or whether injunctive or restitutionary relief was demanded. In suits seeking statutory penalties, courts have defined the right being asserted as one which at common law would have been treated as an action on a debt with jury trial required.

There are a few key instances, however, when Congress has clearly expressed a preference for nonjury trial. We must turn to the Supreme Court's attempts to reconcile the seventh amendment with these congressional determinations to avoid jury trial to see just how much leeway there is for a functional approach to jury trial in the area of statutory rights.

Statutory Proceedings


51. Since damages were sought, a jury request was granted in Holiday Inns of America, Inc. v. Lussi, 42 F.R.D. 27 (N.D.N.Y. 1967). The following cases sought injunctive relief and jury trial demands were denied accordingly. Sheila's Shine Prods., Inc. v. Sheila Shine, Inc., 486 F.2d 114 (5th Cir. 1973); Kimberly-Clark Corp. v. Kleenize Chem. Corp., 194 F. Supp. 876 (N.D. Ga. 1961).

Some trademark cases have held that when the suit seeks injunctive relief and an accounting for profits, no jury trial is necessary. They distinguish Dairy Queen on the ground that that suit was essentially one for breach of contract, a typical common law action, whereas trademark suits were traditionally equitable in character, with the accounting treated as incidental relief. See, e.g., Coca-Cola Co. v. Cahill, 330 F. Supp. 354 (W.D. Okla. 1971); Coca-Cola Co. v. Wright, 55 F.R.D. 11 (W.D. Tenn. 1971).


55. 301 U.S. 1 (1937).

conclusive on review and to issue orders concerning challenged labor practices. The Court, in an opinion by Mr. Chief Justice Hughes, overruled the defendant’s seventh amendment objections, stating: “the instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding.” Thus it appears that the Congress has the power to define some causes of action as outside the scope of the seventh amendment by providing for their enforcement through a “statutory proceeding.”

But what constitutes a statutory proceeding? An examination of cases after Jones & Laughlin provides few, if any, insights. A few

57. 301 U.S. at 48-49.
58. State courts also often deny jury trial by denominting the action a “special proceeding,” indicating that it is outside the respective state constitutional jury trial guarantees. Unfortunately, the state decisions define the term no more specifically than do the federal opinions. However, a brief recitation of some of the holdings will illustrate the types of cases that have been denied jury trial on those grounds.

The most commonly recognized special proceeding at the state level is probate. See, e.g., In re Dolbeer's Estate, 153 Cal. 652, 96 P. 266 (1908). See also cases cited note 70 infra.

Arbitration proceedings also have been held outside the scope of a state constitution on the ground that they are a preliminary procedure, not “an action.” Motor Vehicle Accident Indem. Corp. v. Stein, 23 App. Div. 526, 255 N.Y.S.2d 483 (1965); accord, In re Andolina, 23 App. Div. 2d 958, 259 N.Y.S.2d 938 (1965). Arbitration, however, was not historically tried at law; indeed, it was not a judicial proceeding.

An early California case held that an action to determine the amount due as compensation for the condemnation of private property was not an action at law. Koppikus v. State Capitol Comm'r's, 16 Cal. 248 (1860). This case is particularly interesting in light of the federal condemnation cases to the contrary. See cases cited note 48 supra.

One early Minnesota case held that although actions challenging the state's authority to tax would require a jury trial, tax proceedings to determine how much tax should have been assessed would not because they were “summary proceedings” and must be so for administrative reasons. Board of County Comm'r's v. Morrison, 22 Minn. 178, 183 (1875).

A similar finding of administrative need for summary proceedings was made in criminal actions based on the violation of municipal ordinances and nonjury trial consequently was upheld. City of St. Paul v. Robinson, 129 Minn. 383, 152 N.W. 777 (1915); City of Mankato v. Arnold, 36 Minn. 62, 30 N.W. 305 (1886).

59. An argument can be made for interpreting Jones & Laughlin as drawing a distinction for seventh amendment purposes between suits brought to vindicate a public right, as opposed to a private one, with a civil jury trial provided only for the latter. See Note, The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964, 37 U. Chi. L. Rev. 167 (1969). Although it appears promising at first glance, this test would be very difficult to apply, particularly in light of Supreme Court decisions upholding the right to jury trial under other federal statutes, such as the antitrust and patent laws. See cases cited notes 43-44, 49 supra. The only distinction between those cases and Jones & Laughlin may be that the latter was brought by the government rather than a private
courts interpreted the Supreme Court's language broadly, holding proceedings under labor statutes generally to be outside the scope of the constitutional guarantee.\textsuperscript{60} The majority of courts limited the case to its facts or ignored it, applying the same historical analysis utilized in other actions.\textsuperscript{61} A closer look at the facts of \textit{Jones & Laughlin} provides some enlightenment.

The proceedings in that case took place before the National Labor Relations Board, and the question before the Court was essentially whether the factual findings of that body should be retried by a jury. Therefore, Chief Justice Hughes may simply have been defining the right to jury trial with respect to proceedings before an administrative agency. The decision may reflect only the Court's belief that the jury trial guarantee does not pose a problem in the field of administrative law\textsuperscript{62} and that the decision of Congress to resort to administrative remedies was appropriate, at least in the labor field.

As a matter of policy this conclusion seems sound. At least in part, the administrative process is designed to allow a specialized group of experts to deal with complex problems not easily comprehended by citizen. But if a statute vests a cause of action arising from the same activities in both the government and any injured individual, there seems no rational way to treat them differently for jury trial purposes. Walker, \textit{Title VII: Complaint and Enforcement Procedures and Relief and Remedies}, 7 B.C. IND. & COM. L. REV. 495, 522-23 (1966). \textit{See also} Rogers v. Loether, 467 F.2d 1110, 1121 n.37 (7th Cir. 1972), \textit{aff'd sub nom.} Curtis v. Loether, 415 U.S. 189 (1974).

\textsuperscript{60} A case under the Railway Labor Act is Brady v. Trans World Airlines, Inc., 196 F. Supp. 504 (D. Del. 1961). \textit{See also} Nedd v. Thomas, 316 F. Supp. 74 (M.D. Pa. 1970). One case under the Labor Management Reporting and Disclosure Act also held that there was no right to a jury trial under that statute. McGraw v. United Ass'n of Plumbers, 341 F.2d 705 (6th Cir. 1965). This case was subsequently repudiated in several suits under the same statute. \textit{See} cases cited note 61 \textit{infra}.

\textsuperscript{61} Jury trial has been allowed under the Labor Management Reporting and Disclosure Act. \textit{E.g.}, International Bhd. of Boiler makers v. Braswell, 388 F.2d 193 (5th Cir. 1968), \textit{cert. denied}, 391 U.S. 935 (1968); Simmons v. Textile Workers Local 713, 350 F.2d 12 (4th Cir. 1965); Paley v. Greenberg, 318 F. Supp. 1366 (S.D.N.Y. 1970). However, jury trial has been denied under the act when equitable relief has been sought. Iron Workers Local 92 v. Norris, 383 F.2d 735 (5th Cir. 1967); Wirtz v. Painters Local 21, 211 F. Supp. 253 (E.D. Pa. 1962). Jury trial has been upheld under the Fair Labor Standards Act. \textit{E.g.}, Olearchick v. American Steel Foundries, 73 F. Supp. 273 (W.D. Pa. 1947). In Martin v. Detroit Marine Terminals, Inc., 189 F. Supp. 579 (E.D. Mich. 1960), the court upheld the provision in the Portal-to-Portal Act that the defense of good faith must be tried to the court on the ground that jury trial questions are decided on the basis of the issue involved, and there was no clear right to trial of all issues of good faith at common law.

the layman. To interject the jury into that system would seriously impair its utility, as well as impede its effectiveness. In addition to these policy considerations, it can be argued that an administrative remedy typically has been provided whenever resort to the courts was inadequate. Viewed in this light, the administrative proceeding is much like the suit in equity, designed for situations in which the common law does not function well, and is thus outside the scope of the seventh amendment.

Specialized Courts

The next case in which the Supreme Court addressed the question of congressional power to provide for nonjury trial was Katchen v. Landy, which involved the question whether a bankruptcy court could summarily order the surrender of voidable preferences. The creditor had filed his claim in the bankruptcy court, and the trustee had counterclaimed to recover an alleged voidable preference. If the creditor had not filed a claim, the only way for the trustee to recover the preference would have been to sue in state or federal court in which the defendant would have had a right to a jury trial. The Court upheld the summary proceeding.

Mr. Justice White did note that the bankruptcy court is established by statute pursuant to article I, section 8. Thus, it is a legislative court, not an article III court, and arguably may not be subject to the seventh amendment. However, Justice White refused to rest his decision on

63. In one case, a statute provided that when an importer challenged a duty valuation an appraiser would be appointed to set the price and his decision would be final. The Court upheld the law against a challenge on seventh amendment grounds, stating, "No government could collect its revenues or perform its necessary functions, if the system contended for by the plaintiffs were to prevail." Auffmordt v. Hedden, 137 U.S. 310, 323 (1890).


67. 382 U.S. at 336.

In a Tucker Act case, the Court held that the Congress could dispense with jury trial in actions under the act brought before the Court of Claims since that court is a legislative court established under article I and since the sovereign had the right to attach conditions to its consent to be sued. United States v. Sherwood, 312 U.S. 584 (1941). See generally Moore, supra note 1, at ¶ 38.08 [1]-[2].

Historically bankruptcy always has been treated as a specialized proceeding not available at law. See generally Radin, The Nature of Bankruptcy, 89 U. Pa. L. Rev. 1 (1940).
that ground. Rather, he reviewed the background of the Bankruptcy Act and found that its purpose was to secure the quick administration of the bankrupt's estate. Even though there was no express reference in the statute to the summary treatments of preferences, he argued that the bankruptcy courts characteristically proceeded summarily, that the "Congress has often left the exact scope of summary proceedings in bankruptcy undefined," and that the question had to be determined "after due consideration of the structure and purpose of the Bankruptcy Act as a whole, as well as the particular provisions of the Act brought in question." In this way, the Court upheld the power of the Congress to establish a detailed statutory scheme for handling bankruptcy cases, to set up a specialized court to hear those cases, and to provide that summary adjudication of those matters was both necessary and proper.

The Court's decisions in Jones & Laughlin and Katchen, deferring to legislative attempts to eliminate juries in certain cases in which it was deemed necessary, mark the apex of the functional test in statutory actions. Neither case appeared to pose any serious difficulty to the Court, perhaps because neither involved claims having any close common law analog. Thus, it remained unclear just how far Congress could go in providing for nonjury trial. Read broadly, the Court's decisions appeared to uphold the legislature's power to provide for

68. 382 U.S. 323, at 328.
69. Id.

Because probate matters are treated by specialized courts, they have been held outside the scope of various state constitutions. See In re Leary's Estate, 175 Misc. 254, 23 N.Y.S.2d 13 (1940). See also In re Littman, 15 Misc. 2d 430, 182 N.Y.S.2d 90 (1958). Thus, divorce actions and incompetency hearings, typically brought in specialized tribunals, have been held outside the state constitutional guarantee. Cassidy v. Sullivan, 64 Cal. 266, 28 P. 234 (1883) (divorce); People v. Willey, 128 Cal. App. 2d 148, 275 P.2d 522 (1954); In re Bundy, 44 Cal. App. 466, 186 P. 811 (1920); People ex rel. Lederer v. Johnston, 18 App. Div. 2d 737, 235 N.Y.S.2d 513 (1962); People ex rel. Powers v. Johnston, 17 App. Div. 2d 872, 233 N.Y.S.2d 302 (1962). These holdings are not surprising since historically probate matters were handled by the ecclesiastical rather than the law courts. What is more interesting, however, is that in both California and New York, there are statutory provisions for jury trial in certain types of actions in specialized tribunals, even though no such right existed in English law. See Cal. Prob. Code §§ 371, 382, 928, 1081, 1230 (West 1956); N.Y. Survt. Ct. Proc. Act § 502 (McKinney 1967); N.Y. Mental Hygiene Law § 106(5) (McKinney 1971).

nonjury proceedings when it was necessary to do so. Read narrowly, actions before specialized courts or boards might be deemed outside the scope of the seventh amendment only if there was sufficient justification for their altered character.\textsuperscript{72}

**Non-Jury Trial in Federal District Court**

*Curtis v. Loether,*\textsuperscript{73} which came before the Court in 1974, presented the set of facts to test the Court's commitment to a more flexible jury standard in the federal district courts. *Loether* arose in the Eastern District of Wisconsin. The plaintiff, a black woman, brought suit under Title VIII, section 3612, of the 1968 Civil Rights Act\textsuperscript{74} claiming that defendants discriminated against her in violation of the statute by refusing, on account of her race, to rent her an apartment. She sought injunctive relief, compensatory and punitive damages, and attorney's fees. Subsequently, the injunction claim was dropped,\textsuperscript{75} and the trial involved only the monetary claims. The defendants requested a jury trial on those issues. In a short opinion, the district court denied the request on the ground that a jury trial was not required either by the Constitution or by statute.\textsuperscript{76} The rationale for the district court's decision is important to consider to better understand its rejection by the Supreme Court.

In essence the trial court's decision was based on three findings. First, the court ruled that under the rationale of *Jones & Laughlin*, the cause of action was statutory, "invoking the equity powers of the court, by which the court may award compensatory and punitive money damages as an integral part of the final decree so that complete relief may be had."\textsuperscript{77} Second, it found that Congress, by referring to "the court"\textsuperscript{78} as
the grantor of relief, intended the judge to be the sole arbiter of cases under the statute. \(^7\) Third, the court found precedent for its decision to deny a jury trial in analogous cases \(^8\) brought under Title VII of the Civil Rights Act of 1964 \(^1\) for employment discrimination.

The district court opinion, then, appears to present a functional jury analysis much like the one suggested earlier: the court looked to the statute, found evidence that nonjury trial was preferred by Congress, agreed that nonjury trial was the appropriate method of proceeding, and, relying on *Jones & Laughlin*, denied the request for a jury. However, this conclusion went far beyond the Supreme Court's earlier decisions, first, because the Civil Rights Act provided for enforcement in the normal article III courts and second, because one of the remedies provided, damages, was historically legal. Thus, this decision upheld most clearly the power of Congress to implement a functional jury test in statutory actions.

The Seventh Circuit reversed in a comprehensively researched, scholarly opinion by Judge Stevens, \(^8\) and the Supreme Court affirmed the court of appeals in an unanimous opinion by Mr. Justice Marshall. \(^8\) Following Judge Stevens, Justice Marshall avoided the question of statutory intent; because the seventh amendment required a jury trial, the statute, which was ambiguous on the issue, was construed to avoid any question of unconstitutionality. \(^8\) The Supreme Court then ruled that upholding a right to jury trial was justified as a matter of history. Affirming that statutory causes of action are within the scope of the

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79. 312 F. Supp. at 1010. Earlier decisions under the same statute held that the act provided for an essentially equitable remedy and that compensatory damages were simply a part of that remedy. Marr v. Rife, 363 F. Supp. 1362 (S.D. Ohio 1973). They also held that the statutory language placing the award of punitive damages within the court's discretion and limiting such an award to $1,000 indicated that the statutory relief was equitable in character. Cauley v. Smith, 347 F. Supp. 114 (E.D. Va. 1972). *But see* Kelly v. Armbrust, 351 F. Supp. 869 (D.N.D. 1972); Kastner v. Brackett, 326 F. Supp. 1151 (D. Nev. 1971).


82. Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972).

Judge Stevens's opinion presents a very detailed historical analysis and is worth reading.


84. *Id.* at 191-92 & n.6.
seventh amendment, the Court found that the action was one to enforce "legal rights" in that it was analogous to a tort action for damages. Title VII cases denying trial on the issue of back pay were distinguished on the ground that courts in these cases treated back pay as "an integral part of an equitable remedy," and the decision whether to award it was left to the trial court's discretion. Finally, the Court noted that the petitioner's policy arguments for denying the seventh amendment claim—jury delay and possible prejudice—were "insufficient to overcome the clear command of the Seventh Amendment."

As should be clear from even this brief recital, Loether serves only to increase the confusion surrounding the congressional power to provide for nonjury trials when the jury may be dysfunctional. The Court declined to give extended consideration to any statutory intent or legislative desire to avoid jury prejudice, commenting, "[I]t is clear that the Seventh Amendment entitles either party to demand a jury trial in an action for damages in the federal court under § 812." On the other hand, the Court was careful to point out the sparsity and ambiguity of the legislative history. Later, the Court asserted, "We are not oblivious to the force of petitioner's policy arguments." Yet the policy argument of jury prejudice was ruled "insufficient to overcome the clear command of the Seventh Amendment."

While the Court's position on the issue of congressional power to modify the historical approach to civil jury trial rights is ambivalent, certain other language strongly suggests that the functional approach has survived the decision in Loether:

But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.

This language implies that the Court did consider but rejected argu-

85. Id. at 197.
86. The Court did not note that the provision for punitive damages in the instant statute contained the same characteristics as the back pay provision. See Cauley v. Smith, 347 F. Supp. 114 (E.D. Va. 1972). Rather, the Court treated both statutory damage provisions under Title VIII simultaneously. Thus the question remains whether claims for punitive damages are entitled to a jury trial.
87. 415 U.S. at 198.
88. Id. at 192.
89. Id. at 191.
90. Id.
91. Id.
92. Id. at 195 (emphasis added).
ments that Congress intended to dispense with juries or that the functional limitations of juries militated against their use in civil rights cases. Such an interpretation of the Court's treatment of congressional intent seems most sound and reconciles Loether with those earlier decisions in which Congress had expressed clear and compelling reasons for treating actions under the National Labor Relations Act and the Bankruptcy Act as outside the scope of the seventh amendment.

Another possible explanation of the Court's decision is that consideration of practical factors can be used to expand jury trial rights but never to contract them. This interpretation, however, is quite unsatisfactory. It is true in a manner of speaking that there are no constitutional barriers to expanding jury trial rights; use of a functional test to justify the Court's expansion of such rights poses few problems. However, to acknowledge that a more difficult constitutional problem is posed when policy considerations would result in narrowing the scope of the seventh amendment should not prevent all movement in that direction. It merely suggests that we must proceed cautiously. The Court, at least from the time of Beacon Theatres, has taken great care to explain that the law-equity distinction in 1791 existed in large measure because the legal remedy was inadequate. Changes in modern procedure removing various deficiencies also did away with the need for the intervention of the equity court, so that jury trial might now be required in cases which historically had been tried in equity. Conversely, if factors demonstrate that the current legal remedy is inadequate, then, using this flexible interpretation of history, the case should be deemed within the equitable jurisdiction of the court.

Some further clarification of the Supreme Court's position can be gleaned from its decision in Pernell v. Southall Realty, a jury trial decision rendered shortly after Loether. In Pernell the Supreme Court considered whether a jury trial was required in a landlord's action for

93. Other interpretations of Loether might be: a desire to avoid the difficult problem of defining the scope of congressional power in light of the seventh amendment; that jury prejudice is not to be considered a practical limitation of the jury; that congressional findings on that factor are irrelevant; or that the pragmatic factors referred to in Ross v. Bernhard are to be used to justify expanding but not contracting civil jury trial rights.

94. Mr. Justice Marshall distinguished Katchen and Jones & Laughlin on the ground that they involved legislative schemes that relied on enforcement through administrative proceedings or specialized courts, rather than by the normal civil action. 415 U.S. at 194-95. Thus, the fact that nonjury trial was upheld in those cases did not compel a similar result in Loether.

95. See text accompanying notes 24-39 supra.

the summary recovery of possession of real property under the District of Columbia Code.\textsuperscript{97} An earlier statute governing those suits had contained an explicit jury trial provision,\textsuperscript{98} but amendments made by the Court Reform and Criminal Procedure Act of 1970\textsuperscript{99} repealed that provision placing nothing in its stead. Thus, at least by negative implication, the Court had definite evidence of a congressional desire to dispense with jury trials in those cases, and, indeed, the Court in \textit{Pernell} felt that it was not possible to find a statutory right to jury trial under those circumstances.\textsuperscript{100} Nevertheless, it held that the seventh amendment required a jury trial regardless of the desires of Congress. Short shrift was given to arguments that juries would delay and clog the courts in these cases, contrary to the express purpose of the 1970 act, and the Court employed an historical analysis to reach its decision.

In some ways, \textit{Pernell} casts further gloom on the prospect of a functional jury trial test because of the Court's refusal, once again, to deal with the effect of jury trials on the adequacy of the remedy. But still, Congress in \textit{Pernell} did not expressly dispense with trial by jury for this statutory cause of action. It is possible to read both \textit{Pernell} and \textit{Loether} as requiring an express congressional intent to proscribe jury trials and clear findings that the remedy would be made inadequate if a jury trial were required.

\textbf{Summary}

In summary, the following observations can be made about the scope of congressional power in the jury trial area. If Congress wants to provide for summary proceedings in areas traditionally tried at law, it must do so explicitly and with clearly expressed, well-documented reasons why a jury trial has become an inadequate procedure. Congress cannot simply provide that a statutory cause of action which historically would have required a jury trial\textsuperscript{101} must now be tried to

\textsuperscript{97} D.C. CODE ANN. § 16-1501 (1970).
\textsuperscript{100} 416 U.S. at 366.
\textsuperscript{101} One exception to the rule that the Congress must provide for jury trial in all actions "at common law" appears in the Insular Cases. The Supreme Court held that in actions brought in territories that were previously civil law jurisdictions, the Congress could provide that the federal courts sitting therein should attempt to preserve the local law even if some aspect of that law provided for proceedings before a judge in certain cases that at common law would have been tried to a jury. \textit{See}, e.g., Perez v. Fernandez, 202 U.S. 80 (1906). This exception is strictly limited to those facts, however, and represents a deference to the preferences of a people for whom jury trial was not
the court. To hold otherwise would allow the Congress to subvert the policy and principle of the seventh amendment. For the same reasons, Congress cannot abrogate the jury trial guarantee by passing a statute simply referring what were historically common law suits, such as negligence cases, to an administrative board. The indigenous and a desire to allow territories to preserve some of their heritage, making their attachments to the United States as free from burden as possible. Under this reasoning, sixth amendment criminal jury trial rights also have been held inapplicable. Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904).


Two authors have presented evidence to the effect that in 1791 Chancery did not actually exercise authority to decide fact issues, but rather referred those questions to the law courts or special juries so that, were the constitutional language applied literally, jury trials would adhere in almost all cases; thus, Congress could not proscribe jury trials even in suits not historically brought "at common law." Chesnin & Hazard, Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791, 83 YALE L.J. 999 (1974). They further argue, however, that a rigid interpretation is probably unjustified, as well as undesirable, and that the seventh amendment is better viewed as a compromise of the jury system then existing so that the congressional power to provide for nonjury trial should not be so limited. The validity of Chesnin's and Hazard's finding has been disputed. Langbein, Fact Finding in the English Court of Chancery: A Rebuttal, 83 YALE L.J. 1620 (1974).

103. Judge Wisdom has declared that "[t]he encroachments on the civil jury occasioned by classification of cases as outside of the 'Suits at common law' category has been exceeded only by encroachments brought about by total abolition of the civil jury." Melancon v. McKeithen, 345 F. Supp. 1025, 1041 (E.D. La. 1972), aff'd sub nom. Hill v. McKeithen, 409 U.S. 943 (1972) (per curiam), and Davis v. Edwards, 409 U.S. 1098 (1973) (per curiam).

104. The history of workmen's compensation laws in New York is illustrative of the problems that may be faced by a legislature attempting to withdraw a formerly common law cause of action from the scope of the jury trial guarantee. In 1910 New York passed a workmen's compensation law, article 14-A of the Labor Law of 1909, L. 1910, ch. 674, establishing a scheme to provide for automatic recovery from employers for occupational injury unless an employee was found guilty of wilful or gross misconduct. This statute essentially eliminated the fellow servant, assumption of risk and contributory negligence rules that had been part of the common law cause of action. The statute was challenged, inter alia, as a deprivation of the state constitutional right to a jury trial on the question of the amount the employer should pay when his liability was fixed. Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (Ct. App. 1911). In 1913, a constitutional amendment was adopted stating that nothing in the constitution should be construed to limit the powers of the legislature to provide for workmen's compensation and to make it the exclusive remedy for work related injuries. N.Y. CONST., art. 1, § 19 (1894) (renumbered § 18, Nov. 8, 1938).

Similar problems have arisen when states have adopted only partial no fault plans, retaining some aspects of the former tort remedy. Thus, for example, the Illinois Supreme Court struck down such a plan because, among other things, it violated the right to jury trial. Grace v. Howlett, 51 Ill. App. 2d 478, 283 N.E.2d 474 (1972), noted in 8 GONZAGA L. REV. 146 (1972).
Jones & Laughlin case, although it does protect the right of the legislature to establish administrative proceedings, does not go so far. There must be some compelling reason why the problem needs to be handled administratively rather than in the courts; some finding must be made that trial by jury provides an inadequate remedy.

Exceptions to these general rules appear only in certain well-defined circumstances. For example, if the character of the action is drastically altered so that it no longer resembles its common law counterpart, such as in statutes providing for worker's compensation and no fault insurance, a jury trial may not be required. Legislation providing for administrative determinations of common law matters also has been upheld during time of emergency as an appropriate exercise of war powers by Congress. This too is necessarily a very limited


A federal workmen's compensation act appears in the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-50 (1970 & Supp. IV, 1974). The constitutionality of the statute was upheld in Crowell v. Benson, 285 U.S. 22, 45 (1932), the Court noting that there were no jury trial problems because the transformed cause of action previously existed in admiralty, rather than at common law. The United States Court of Appeals for the District of Columbia later upheld the statute on the broader ground that the Congress had the power to create a substitute right unknown at common law and could abolish the traditional right in so doing because "[t]he object . . . is to protect society from pauperism by preserving the home and family, and thus performing a duty for which governments are formed." Rowlette v. Rothstein Dental Labs., Inc., 63 F.2d 150, 152 (D.C. Cir.), cert. denied, 289 U.S. 736 (1933). Accord, Scrinko v. Reading Co., 117 F. Supp. 603, 609-10 (D.N.J. 1954).

Similarly, some states have upheld the state legislature's power to abrogate the former tort remedy for the worker as a legitimate exercise of state police power. E.g., Grand Trunk W. Ry. v. Industrial Comm'n, 291 Ill. App. 167, 125 N.E. 748 (1920); Branch v. Indemnity Ins. Co. of N. Am., 156 Md. 482, 144 A. 696 (1929); In re Opinion of the Justices, 309 Mass. 562, 35 N.E.2d 1 (1941); State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 P. 1101 (1911).

Some early cases noted that the jury trial question arose only in the context of the employer's rights since workmen's compensation acts at that time sometimes provided that the employee had a choice whether to proceed in the courts, in which case a jury would be available, or before the board. E.g., Hunter v. Colfax Consol. Coal Co., 175 Iowa 245, 154 N.W. 1037 (1916); Leon's Case, 239 Mass. 1, 131 N.E. 196 (1921).

106. A total no fault insurance system is designed to provide compensation to auto accident victims without having to wait to determine fault. It alters the traditional tort remedy by abolishing relief for pain and suffering. Thus, it is argued, by providing a new substitute remedy, which may be deemed equitable, it withdraws the action from the scope of the jury trial guarantee. See, e.g., Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974); R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim 491-93 (1965); Hart, The Constitutionality of the New York State Comprehensive Automobile Insurance Reparations Act, 43 Fordham L. Rev. 379, 385-86 (1974).

exception. Only when the statute creates what appears to be a novel cause of action unknown in 18th century England, or one that was not within the jurisdiction of the law court, does it seem totally within the discretion of the Congress to decide how that action is to be tried.

As these cases upholding administrative proceedings illustrate, *Beacon Theatres'* reliance on the adequacy of the current legal remedy, taken with the Supreme Court's reference in *Ross* to the practical limitations of jury trial, should permit Congress to require nonjury trial for a cause of action which it deems equitable. Under *Jones & Laughlin*, Congress is only required to find that trial by jury provides an inadequate means for resolving certain types of disputes. In doing so, Congress would be creating a remedy outside the jurisdiction of the historic law courts. The Supreme Court did not explicitly reject this approach in either *Loether* or *Pernell*; it merely, quite properly, placed a very heavy burden of proof on those desiring to overcome the constitutional presumption for jury trial.

The Functional Test: A Prognosis

Effect of Loether on the Lower Courts

We need not merely hypothesize about the effect of *Loether* in civil rights and other actions. A recent case under section 1983 of Title 42 of the United States Code,108 *Van Ermen v. Schmidt*,109 indicates that the trial courts have learned their lesson well. The plaintiff in *Van Ermen* brought suit in federal court challenging several state prison regulations preventing inmates from having access to law books. He sought both injunctive relief and damages. Prior to *Loether*, several other suits had been brought under the same statute, and courts generally had held that there was no right to jury trial.110 Although some of these cases involved employment discrimination seeking back pay and thus rested on findings that such relief was equitable,111 others generat-

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108. Section 1983 permits suits against state officials who violate a plaintiff's civil rights. The section dates from the Civil Rights Act of 1871.
ed broader holdings.\textsuperscript{112} Thus, there was clear authority on which the \textit{Van Ermen} court could have rested a decision that the seventh amendment was not applicable. Indeed, the Supreme Court in \textit{Loether}\textsuperscript{113} explicitly refrained from ruling on the extent to which Congress could impinge upon the seventh amendment under its power to enforce the thirteenth and fourteenth amendments,\textsuperscript{114} and that argument thus remained viable.

Nevertheless, the \textit{Van Ermen} court upheld the demand for jury trial. Perhaps this result is not very surprising in light of the separate and distinct claim for monetary relief that was presented.\textsuperscript{115} Far more important, \textit{Van Ermen} assumed that \textit{Loether} had refused comment (and therefore was neutral) on the \textit{Ross} footnote that permitted functional jury limitations to affect the scope of the seventh amendment; \textit{Van Ermen} also assumed that the \textit{Loether} rejection of jury prejudice meant only that Congress intended, not that the seventh amendment demanded, trial by jury for civil rights actions.\textsuperscript{116} The \textit{Ross} reference to practical jury limitations was held to embrace only jury competence to handle complex issues, and without specific guidance from the Supreme Court, the \textit{Van Ermen} court refused to make jury prejudice a seventh amendment limitation.\textsuperscript{117}

Although \textit{Van Ermen} suggests the beleaguered functional approach is still alive, it illustrates quite starkly the possible broad effect of the \textit{Loether} decision in the civil rights field,\textsuperscript{118} as well as in other


\textsuperscript{114} In \textit{Jones v. Wittenberg}, prisoners in a county jail brought suit claiming cruel and unusual punishment and unequal protection and seeking injunctive relief and punitive damages. 330 F. Supp. 707 (N.D. Ohio 1971), aff'd on other grounds sub nom. \textit{Jones v. Metzger}, 456 F.2d 854 (6th Cir. 1972). The court held that civil rights suits are basically equitable, but noted that within that circuit it had been held that questions of punitive damages were to be fixed by a jury. \textit{Id.} at 721, citing National Union Elec. Corp. v. Wilson, 434 F.2d 986 (6th Cir. 1970). However, the court ultimately refused to reconcile these contrary propositions on the ground that damages were not warranted in the instant case.

\textsuperscript{115} 415 U.S. 189, 198 n.15.


\textsuperscript{117} In another prisoner suit prior to \textit{Loether} in which only damages were sought, the court granted a jury trial on the ground that the action was analogous to a common law suit in tort. \textit{Cook v. Cox}, 357 F. Supp. 120 (E.D. Va. 1973).

\textsuperscript{118} An excellent discussion of the effect of the Supreme Court's recent jury trial
statutory contexts. And the Van Ermen court probably was correct in deferring to the Supreme Court’s reluctance to narrow the scope of the seventh amendment on the basis of an unsubstantiated concern that a jury could undermine the purpose and policy of the statute.

With that approach in mind, whether future employment discrimination cases seeking back pay also will be affected is open to question. Although the Supreme Court properly declined to express any view as to the propriety of decisions that had refused jury trial under other civil rights statutes, the approach and philosophy of the Court in dealing with the Title VIII suits necessarily will affect similar decisions under other titles. A brief examination of some of those cases illustrates this point.

The courts appear to have relied on three basic grounds to support their findings that a jury trial is not required in the employment discrimination suits. First, Title VII presents a comprehensive equitable scheme for dealing with discrimination, which was unknown at common law, and back pay is only a small but necessary part of that remedial scheme. Back pay also has been held to be equitable decisions on employment discrimination cases is provided in Comment, Jury Trial in Employment Discrimination Cases—Constitutionally Mandated? 53 Texas L. Rev. 483 (1975).


because, although a money judgment does result, it is unlike typical damage relief since it is easily calculable\textsuperscript{124} and, by statute, is discretionary with the court.\textsuperscript{125} Second, it has been held that the statutory language indicates that the court is to try all issues.\textsuperscript{126} Third, it has been argued that juries are inadequate to deal with the issues raised in these cases. Jury verdicts cannot insure the uniformity of decision important to implement the policies behind the statute,\textsuperscript{127} as the issues are complex, technical and beyond the competence of juries.\textsuperscript{128} Additionally, there is a substantial danger of jury prejudice and a danger of delay when the need for timely relief is compelling.\textsuperscript{129}

Although the \textit{Loether} Court did not specifically reject any of these arguments, in dictum it refused to adopt the Seventh Circuit's characterization of the employment discrimination cases as "equitable."\textsuperscript{130} This may be some indication of disapproval of that finding. The \textit{Loether} Court's rejection of the policy considerations favoring nonjury trial in housing discrimination suits\textsuperscript{131} may indicate the Court's reluctance to accept such arguments in other contexts, at least without further evidence of their validity.


\textsuperscript{127} Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1264 (1971) [hereinafter cited as \textit{Employment Discrimination}].

\textsuperscript{128} "Unequal opportunity in job classifications and in promotions, the establishment of new seniority lists, dealing with historically segregated departments, the equalization of pay in separate job classifications but comparable work—in all of this a jury is at best ill-equipped to make determinations of so sophisticated issues involving so complicated computations." Hayes v. Seaboard Coast Line R.R., 46 F.R.D. 49, 53 (S.D. Ga. 1968); accord, \textit{Employment Discrimination}, supra note 127, at 1264.

\textsuperscript{129} \textit{Employment Discrimination}, supra note 127, at 1264-65.

\textsuperscript{130} 415 U.S. at 197.

\textsuperscript{131} \textit{Id.} at 198. But see text accompanying notes 87-90 \textit{supra}. 
Interestingly, in at least three Title VII cases decided since Loether, the courts have denied jury trials on issues of back pay, relying on their characterization of the relief as a form of restitution and of the legislation as an equitable scheme to foster a particular policy. However, the courts have never faced seriously the question whether Congress was justified in deciding that only equitable remedies would be appropriate. Also, they appear to have ignored the Loether Court's determination that at least part of the legislative civil rights scheme involves legal remedies. These failures are particularly critical in light of the Supreme Court's apparent reluctance to adopt a statutory policy approach for denying jury trial in Title VIII actions. Nonetheless, the Title VII cases provide some hope that a functional jury trial test, based on a congressional decision to require judge trials, has not been ruled out.

Problems of Proving Jury Inadequacy

The ability of the legislature, as well as lawyers, to make a compelling argument for nonjury trial would be greatly enhanced if more detailed data on the jury were available. It is somewhat surprising that in our science oriented society so little is currently known about the actual functions of the jury, the tasks at which it is most adept, and when it is least effective. We can find pages of rhetoric on the question, but few helpful facts. The most detailed, complete attempt to study the judge and jury roles was made by the Chicago Jury Project over a decade ago; unfortunately, their published findings center on the criminal jury, not the civil jury. Nonetheless, that project, by its very existence, indi-
icates that useful and needed facts about the civil jury can be gleaned by similar methods. Other studies gathering comparative data on the difference between twelve and six member juries also point the way.\textsuperscript{137}

Just when or how the jury is to be proved inadequate is beyond the scope of this article. However, I will suggest a few factors which might be studied simply to demonstrate the types of findings that could be considered. Probably the two most obvious factors are possible jury prejudice and jury inadequacy in certain types of highly complex litigation.\textsuperscript{138} Unfortunately, both of these are very difficult to ascertain. Perhaps the only way to do so would be to gather statistics that would tend to establish a presumption of prejudice or inadequacy. Illustratively, Congress, in enacting civil rights legislation, could consider how many suits under similar statutes have been tried to a jury, which party demanded the jury, and whether any claims of discrimination were upheld. Perhaps no discernible pattern would emerge, in which case a right to jury trial should be accorded. On the other hand, if it evolved that in virtually all civil rights cases of a certain kind juries were demanded by defendants who later won, whereas the results were not so predictable in judge-tried cases, this evidence might be considered adequate for Congress to provide for trial by the court.

Delay and uniformity of jury verdicts would be subjects more conducive to study. If the time required to process a jury case is found to be substantially greater because of the longer court dockets in jury actions and Congress has concluded that the remedy or enforcement of a particular statute must be swift to be effective, then such findings could provide support for dispensation of jury trials. Similarly, if uniformity of regulation is especially important in order to foster a particular policy, then the court and the legislature might take into


\textsuperscript{138} There has long been a debate about the use of the so-called "blue ribbon" jury composed of experts, rather than community members chosen at random, to deal with certain types of cases. See generally Baker, In Defense of the "Blue Ribbon" Jury, 35 Iowa L. Rev. 409 (1950). The question instead should be: why the jury at all? Historically certain cases, such as accountings, were tried in equity because they were deemed too complicated for the then unsophisticated, illiterate jury members. Dairy Queen suggests that jury incompetence has been lessened in many fields and it is true that illiteracy may no longer be a jury problem. Dairy Queen, Inc. v. Woods, 369 U.S. 469 (1962). Nonetheless, litigation also has become more technical and complex and a study should be made of the level of complexity at which the jury ceases to function effectively.
consideration evidence that jury verdicts in the area, or in similar fields, have been haphazard and nonuniform.

Needless to say, the above suggestions are merely broad outlines for possible approaches. Indeed, their very vagueness points out the extreme difficulties in designing reliable methods to test jury competency. But the search for more data on jury limitations must begin somewhere. The question whether juries should be used in any or all cases persists, but without more pragmatic, useful data to answer it, the courts will continue to fall back on familiar and easily distortable history in order to define what appears to be an infinitely expansible concept of a legal claim.

Conclusion

In 1830, Mr. Justice Story enunciated a frequently quoted proposition regarding civil jury trial:

The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.¹³⁹

One hundred and forty-four years later the Supreme Court in Curtis v. Loether faithfully adhered to that principle. While there may have been ample justification for Mr. Justice Story to extol the civil jury when he did, developments since then at the least require a reevaluation of that mode of trial.

The trend in modern civil procedure has been away from rigid, formalistic tests toward more flexible, pragmatic approaches. In general, the Supreme Court seems to have approved of this trend, even in the face of constitutional challenges. Thus, in the field of personal jurisdiction, the Court established the "minimum contacts"¹⁴⁰ test to replace historical principles of territoriality,¹⁴¹ which rested on strict notions of state sovereignty. Similarly, it has been held that judgments in class actions¹⁴² and other representative suits¹⁴³ are binding on absent members if attempts have been made to notify them, despite due process objections that each individual must be given a day in court. In neither of these examples were constitutional concerns abandoned. Rather, the

¹⁴¹ Pennoyer v. Neff, 95 U.S. 714 (1877).
Court interpreted due process broadly in keeping with the needs of modern day litigants and courts.

The language and purpose of the seventh amendment does not prevent the Supreme Court from adopting a functional, nonhistorical approach both to expand and to contract the right to a civil jury trial. The right to a civil jury symbolizes, among other things, notions of fair trial. The decision whether an action falls within the language of the constitutional guarantee may depend upon whether jury trial provides an adequate legal remedy. Thus, if the seventh amendment is read as a rigid historical rule, it not only may be dysfunctional, but in some instances it actually may pose a threat to justice.

For a period of time the Supreme Court appeared to be moving toward this conclusion. After more than 150 years of reliance upon pre-1791 history, the Court, in *Beacon Theatres, Inc. v. Westover*, considered how an English court would treat a claim in light of changed circumstances and more adequate legal remedies. The Court was hesitant at first, attributing the jury trial right in antitrust cases to the intent of Congress rather than to the dictates of the Constitution. However, in *Dairy Queen v. Woods* the preference for jury trial was squarely grounded in the seventh amendment. Finally, in *Ross v. Bernhard*, the Court modified the *Beacon Theatres* test of looking at the claims being asserted, stating that the right to jury trial depended on the issues involved. This development was particularly confusing because it offered no logical stopping place. The attempt to label issues as legal rather than equitable was not even as fruitful as an historical inquiry and in time became hopeless.

*Ross* did seem to offer in one footnote a guide to the future. There were, after all, some predicates for judgment. One was history; another was assessments of the practical limitations upon the functions of juries. The Court in *NLRB v. Jones & Laughlin* and *Katchen v. Landy* seemed inclined to consider issues such as the complexity of the subject matter and the need for speedy adjudications as justification for congressional abandonment of trial by jury in deference to new administrative remedies and specialized courts. *Curtis v. Loether* and *Pernell v. Southall Realty* might have been seen as paradigm cases, inviting the Court to utilize this functional approach in order to restrict jury trial rights in the federal courts for the first time. Instead, the Supreme Court expressed a preference for jury trial so powerful that possible congressional indications to the contrary were barely explored, although they existed. Moreover, the Court entirely overlooked the *Ross* reference to possible
limitations upon juries, summarily rejecting arguments about jury prejudice. Did the Court reject a functional interpretation of the seventh amendment, one that would have balanced evenly the concerns involved, and if so, why? We can only guess at the answer to that question. However, it appears from the facts in both Loether and Pernell that neither the Congress nor the parties presented any facts to support the claim of jury inadequacy. In addition, Congress had not expressly proscribed trial by jury. Thus, the absence of sufficient evidence may have deterred the Court from experimenting with a functional test to restrict the scope of jury trial rights.

Can there be a case, or a statutory action, in which a jury is denied upon a showing that Congress has expressed a reasonable preference for nonjury trial or that the jury is ill-suited to the litigation whereas the judge is not? Such a result has not yet occurred, except perhaps in the lower court decisions in the employment discrimination cases, which the Supreme Court seems almost to disapprove in Loether. However, it does seem that a truly functional approach could be adopted, and that the Court's reference in Ross to the practical limitations of the jury is not dead, but only slumbering. The task for the future is to develop sufficiently reliable data on which the legislature and the courts can rely in order to overcome the constitutional presumption for trial by jury.

144. One explanation for the Court's adherence to jury trial in Curtis v. Loether could be that the jury, even if its decisions were subject to severe racial prejudice, actually was fulfilling its historic role insofar as it reflected community attitudes at odds with the law as it exists on the books. In this sense, the jury would be serving as an escape route for substantive law deemed out of step with social reality. See Frank, supra note 1, at 127. However, this rationale must fail in circumstances like those in Loether, where it is decided that local prejudice is itself the problem and legislation enforced by the courts is necessary to root out that prejudice. To hold otherwise would prevent any and all schemes to curb prejudice that is deemed unconstitutional—a ridiculous and intolerable state of affairs.