AN EXAMINATION OF THE DUE PROCESS AND COMPLEX EXCEPTIONS TO THE SEVENTH AMENDMENT: A CONSTITUTIONAL APPROACH TO THE RIGHT TO JURY TRIAL IN COMPLEX CIVIL LITIGATION

I. INTRODUCTION [1]

Recent federal court decisions have sought to limit the scope of the right to trial by jury in complex civil litigation.[2] Critics assert that juries are incapable of understanding the issues or the evidence involved in complicated suits and, therefore, cannot decide such cases rationally, in accordance with the facts and the applicable rules of law.[3] Although the extent of the jury's difficulty with such actions is not clear, the existence of the problem of jury comprehension in complex litigation is indisputable.[4]

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1. The scope of this comment is limited to the federal court system.

2. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 631 F.2d 1069 (3d Cir. 1980) (where circumstances in which the jury could not understand the issues or evidence presented in a complex antitrust suit, litigants' rights to due process would be violated if the case were tried to a jury); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 66 (S.D.N.Y. 1976) (the jury's inability to understand complex actions renders the legal remedies inadequate. Equity can, therefore, take jurisdiction over the suit. In equity, there is no right to trial by jury. *See* notes 11-13 and accompanying text *infra*. *Contra*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 926-30 (E.D. Pa. 1979) (no valid constitutional grounds on which to restrict scope of seventh amendment); *In re* Financial Sec. Litigation, 609 F.2d 411 (9th Cir. 1979).

3. Note, *The Seventh Amendment and Complex Civil Litigation: The Demise of the Complexity Exception and the Search for a Viable Due Process Alternative*, 50 MISS. L.J. 572, 573 (1979) [hereinafter cited as *The Seventh Amendment and Complex Civil Litigation*]. This inability has been attributed to the jurors' unfamiliarity with the issues, their inability to comprehend the evidence, and their inability, individually and as a group, to digest the large volume of evidence normally present in complex civil litigation. Bernstein v. Universal Pictures, Inc., 79 F.R.D. at 64 & 70; Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 784-85 (1978) [hereinafter cited as *The Right to an Incompetent Jury*].

4. This point is illustrated by the judge's interrogation of the juror in a trial involving issues related to the monopolization of markets in the computer industry:

The Court: . . . Do you know what demand substitutability is, [Juror A]?

Juror [A]: Well, I would like to kind of look into that.

The Court: Okay. And how about the barriers to entry, [Juror B]?

Juror [B]: I would have to read about it.

The Court: And how about F.T.P., [Juror C]?

Juror [C]: That's fixed term plan.

The Court: And you understand the ramifications of that, do you think?

The current wave of criticism has produced novel propositions for the removal of the jury from complex civil litigation.[5] Some commentators have interpreted footnote 10 in the Supreme Court's decision in *Ross v. Bernard* [6] as a valid constitutional basis for considering the "practical abilities and limitations of juries" [7] in weighing a motion for jury trial.[8] The seventh amendment, however, contains absolutely no language in support of the notion that the right to a jury

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Juror [C]: Yes, your honor.

. . . .

The Court: All right. And how about reverse engineering? [Reverse engineering is a method of copying a competitor's product.]

Juror [C]: That's when you would take a product and you would alter it in a, or modify it for your own purpose; that is, you would reverse its function and use it in your own method.

The Court: And [Juror D], what is software?

Juror [D]: It's software.

The Court: Well, what is software?

Juror [D]: That's the paper software.

The Court: What's the hardware?

Juror [D]: That's the wires and hardware.

The Court: And what is—do you know what an interface is? [An interface is the connection between a computer and an auxiliary piece of equipment.]

Juror [D]: Yes.

The Court: What's that?

Juror [D]: The interface is the—I am not good in English, your honor.

The Court: No, that's all right.

Juror [D]: But it's the interface, you know.

The Court: Can you give me an example of that?

Juror [D]: Well, if you take a blivet, turn it off one thing and drop it down, it's an interface change; right?

Note, *The Right to Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898, 908 n.60 (1979) [hereinafter cited as *The Right to Jury Trial in Complex Civil Litigation*].

5. There is no generally accepted definition of complexity that clearly distinguishes complex actions from simple ones. In the cases denying motions for jury trial, however, the following dimensions of litigation were given as an indication of the level of complexity involved in those actions. In an action brought for the monopolization of markets in the computer industry, the court expected to hear from 87 witnesses and admit 2,300 exhibits into evidence in the course of a five month trial. A previous trial of the same dispute produced a transcript 19,000 pages in length. ILC Peripherals Leasing Corp. v. International Business Machines Corp., 458 F. Supp. 423, 444 (N.D. Cal. 1978).

In a securities fraud case, a court noted that resolution of the dispute would require an examination of the defendant's accounting record for a period of five years and that the disposition of more than one billion dollars rested on the outcome of the trial. *In re* Boise Cascades Sec. Litigation, 420 F. Supp. 99, 103 (W.D. Wash. 1976).

Finally, in an antitrust class action, the court noted that there could be as many as 1,100 plaintiffs, all of whom had to prove injury separately. Also, there was a large number of defendants and consequently a wide variety of defensive positions. Bernstein v. Universal Pictures, Inc., 79 F.R.D. at 62-64.

6. 396 U.S. 531 (1970).

7. *Id.* at 538 in n.10.

8. *See, e.g.*, Ropski, *Constitutional and Procedural Aspects of the Use of Juries*

trial applies to less than all civil actions at common law.[9] Therefore, proponents of restricting the jury's role in complex civil litigation [10] have developed two arguments, based on *Ross* footnote 10, to exempt complicated suits from the dictates of the seventh amendment: (1) the complexity, and (2) the due process exceptions to the right to trial by jury. This note will examine the constitutionality of these two proposed restrictions on the scope of the seventh amendment, assess the empirical support for the criticism of the jury's role in complex civil litigation, and examine alternative measures available to remedy the perceived difficulties with complex jury trials.

A. *The Traditional Interpretation of the Seventh Amendment*

1. The Historical Test

The seventh amendment to the Constitution reads:

> 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 provision has been traditionally interpreted to guarantee jury trials for legal actions but not for suits brought in equity.[11] At common law, legal actions were tried to juries.[12] Therefore, to decide whether a litigant is entitled to a jury trial of his case, the court must decide whether the nature of the asserted claim is legal or equitable. If legal, there is a constitutional right to a jury trial. If it is equitable, no such right adheres. This determination is called the

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in Patent Litigation, 58 J. Pos. 609, 614-15 (1976) (*Ross* articulates an approach to determining the availability of a jury trial by balancing social policy concerns against the right to trial by jury); Note, *The Right to an Incompetent Jury, supra* note 3, at 795-96 (*Ross* footnote 10 was intended to stimulate judicial consideration of the merits of the jury system which, given a complex case and the difficulty of historical inquiry, make the outcome of that inquiry less significant); Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm*, 28 HASTINGS L.J. 1, 2 (1976) [hereinafter referred to as Kane] interprets *Ross* footnote 10 as proposing a functional test to replace historical considerations which are no longer considered relevant.

9. *See* note 12 and accompanying text *infra*.

10. *See, e.g.*, note 3 *supra*.

11. James, *The Right to Jury Trial in Civil Actions*, 72 YALE L.J. 655, 655 (1965) [hereinafter cited as James].

12. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 639-40 (1973) [hereinafter cited as Wolfram].

historical test, and it is the established method for resolving questions involving the availability of trial by jury in federal court.[13]

It is important to note that the determination of the legal or equitable nature of a claim is made with respect to English, not American common law.[14] This rule was first articulated in 1812 [15] and, although the grounds upon which it rests are not clear,[16] there seems to have been no judicial departure from it.[17] Thus, traditional English practice governs the right to jury trial in federal court. If an English law court would have empanelled a jury to hear a particular case in 1791, that case is guaranteed a jury trial under the seventh amendment.[18] If English courts would have adjudicated the claim at a bench trial in equity, no jury trial is required for that case by the Constitution.

2. The Law/Equity Distinction

Although the historical test itself is relatively simple, its application to a specific action may be somewhat more difficult. Assessing the legal or equitable nature of a claim on the basis of the traditional practice in 1791 assumes that there was a coherent and discernable pattern to the English disposition of such cases.[19]

In addition, the legal/equitable distinction is not well defined, and there seems to be no line which traditionally divides the jurisdiction of the two courts.[20] It is possible, however, to describe the rela-

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13. *Id.*

14. United States v. Wonson, 28 F. Cas. 745, 759 (C.C.D. Mass. 1812) (No. 16,750); Wolfram, *supra* note 12, at 640.

15. *Id.*

16. *See* Wolfram, *supra* note 12, at 640. There is nothing inherent in either the seventh amendment or the historical test that requires that the determination of the legal or equitable nature of issues be made on the basis of English common law. Justice Story, in *United States v. Wonson*, noted the diversity in the states' practices governing jury trials at that time, and appeared to choose English common law as the basis for the determination in federal court because it was "the grand reservoir of all our jurisprudence." 28 F. Cas. at 750. *See also* Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 318 (1966) [hereinafter cited as Henderson]. This is not, however, a compelling reason to base the historical test on English common law, because the relationship between law and equity in England was changing at the time the seventh amendment was adopted. Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 449 (1971) [hereinafter cited as Shapiro & Coquillette].

17. Wolfram, *supra* note 12, at 641.

18. Dimick v. Scheidt, 293 U.S. 474, 476 (1935).

19. *See* James, *supra* note 11, at 657-58; Shapiro & Coquillette, *supra* note 16, 449-51.

20. There seems to be no definition of either law or equity which is useful as a general guide to classifying actions without reference to their historical context. *See generally* 5 MOORE'S FEDERAL PRACTICE ¶ 38.11[5] and [6] (2d ed. 1948) [hereinafter

tionship between the common law and equity courts in general terms. The English common law courts operated with a rigid procedural code. The jurisdiction of the law courts, for example, was quite limited. Admission to court could be obtained only through the purchase of a writ from the king. Each writ contained a formula for a civil action. The writ system as a whole defined the exclusive list of wrongs for which legal relief was available. If a person had been wronged in a manner that did not correspond to any of the writs' formulae, the law provided no remedy.[21] If a prospective plaintiff's claim fit more than one formula, he was required to choose between them. This choice was irrevocable and a plaintiff could lose at trial if he selected an improper writ.[22] Furthermore, common law pleading rules directed litigants to develop a single factual or legal issue and pleadings had to conform to the chosen writ; pleading in the alternative was not allowed.[23]

The rigidity of the common law made it possible that a person with a just claim could not obtain relief or, in some cases, had no grounds on which to sue. Equity courts arose to remedy these injustices.[24] Wrongs not cognizable in the law courts could be heard and remedied in equity.[25] Because its procedural system was more flexible than that of the law courts, equity was able to provide more appropriate forms of relief than those available at common law.[26]

Although slow to adopt new procedural devices, common law courts did occasionally incorporate innovations developed in equity [27]. As this occurred, exclusive equitable jurisdiction shrank.[28] Equity, however, could also hear actions usually con-

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cited as 5 MOORE] listing actions traditionally tried in law and equity, respectively.

Although law and equity were separate entities in federal court, they were never tried in separate courts. There were separate rules of procedure for cases in law and equity, but they were adjudicated in the same court. This organization of federal court was in place from the enactment of the seventh amendment until the adoption of the Federal Rules of Civil Procedure. 5 MOORE, *supra* note 20, ¶ 38.03.

21. See N. FIELD, B. KAPLAN & K. CLERMONT, CIVIL PROCEDURE 268-69 (4th ed. 1978) [hereinafter cited as FIELD].

22. *See* MAITLAND & MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 99-101 (2d ed. 1978).

23. *See* FIELD, *supra* note 21, at 311-15.

24. *See* Comment, *The Right to a Non-Jury Trial*, 74 HARV. L. REV. 1176, 1179-80 (1961) [hereinafter cited as *The Right to a Non-Jury Trial*]. *See* James, *supra* note 11, at 661-62; FIELD, *supra* note 21, at 319-29.

25. *See The Right to a Non-Jury Trial*, *supra* note 24, at 1179-80.

26. *Id.*

27. *Id.* at 1182-83.

28. *Id.* The relationship between the law and equity courts was not always friendly. The courts sometimes competed for jurisdiction over particular matters. *See* Shapiro & Coquillette, *supra* note 16, at 450-52.

sidered within legal jurisdiction.[29] This mutual encroachment continued without any loss of function by either the law or equity courts. As a result, there was no real exchange of jurisdiction in the jurisdictions of the two court systems but rather a considerable degree of overlap.[30] It is, therefore, extremely difficult to fix the boundary between law and equity at any given point in time. Nevertheless, the strict application of the historical test requires that courts designate actions as either wholly legal or equitable for the purpose of evaluating the right of a litigant to trial by jury.[31]

B. *Seventh Amendment Interpretation After the Merger of Law and Equity (1938)*

The merger of legal and equitable jurisdiction enabled federal courts to resolve both types of issues simultaneously.[32] Although this development removed most of the importance from the law and equity dichotomy, the distinction between these two legal systems retained its significance in the historical test for determining the proper mode of trial.[33] This test, however, was itself premised on the historical separation of and interaction between law and equity courts. In pre-merger cases involving both legal and equitable claims, for example, equity courts could have taken jurisdiction over the entire action, thereby foreclosing the litigants' access to a jury trial on the legal issues.[34] In this case, the historical test would determine a party's right to a jury trial on the basis of whether the legal claim was presented as a

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29. The clean-up doctrine allowed courts of equity to take jurisdiction over legal claims presented in conjunction with equitable suits, FIELD, *supra* note 21, at 345-46. This allowed the litigants to obtain complete relief in a single action. *Id.*; 5 MOORE, *supra* note 20, ¶ 38.11[6]. Thus, until the adoption of the federal rules, an equity court could deprive a litigant of a jury trial of a legal issue by exercising its discretion to clean-up all the issues between the parties. *Id.*; *see* notes 41-62 *infra* (discussion of *Beacon Theatres*).

30. James, *supra* note 11, at 659. The seventh amendment, however, limited the growth of equity jurisdiction in America. Because it guarantees that, at a minimum, the right to trial by jury as it was then known will be preserved, the seventh amendment restricts the growth of equity jurisdiction from encompassing actions tried to a jury in 1791. Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1855).

31. *See* notes 28-29 *supra*.

32. *See* McCoid, *Procedural Reform and the Right to Jury Trial: A Study of* Beacon Theatres v. Westover, 116 U. PA. L. REV. 1, 15-16 (1967) [hereinafter cited as McCoid].

33. *See* James, *supra* note 11, at 663.

34. The chancellor had discretion to decide whether to take jurisdiction over the legal issues presented to him. *See* note 29 *supra*.

Defendants in equitable suits were deemed to have waived their right to a jury trial if they asserted a legal counterclaim rather than simply bringing a separate legal action. Similarly, plaintiffs who elected to try legal issues in addition to their claims in equity were held to have elected to have all disputes resolved by the equity court and thereby waived their seventh amendment rights.

separate suit or joined with an equitable claim. Such a test made very little sense in a court system which combined law and equity in a unitary civil action,[35] and, it became clear that the historical test required modification.[36]

Continued application of the historical test in the merged federal court system could have resulted in unconstitutional restrictions on the scope of the right to a jury trial. For example, if a defendant was compelled to raise a legal counterclaim to an otherwise equitable action,[37] he could lose the right to try that claim to a jury. If the court exercised its traditional power to hear all the issues between the parties, the historical test would determine that the defendant had no right to have a jury hear his claim. At common law, the defendant would have had a choice of either trying his case as a counterclaim in equity or bringing a separate legal action, which would have been tried to jury. Therefore, if a party chose to plead a legal claim in equity, he was held to have waived his right to a jury trial. In a merged court system, however, a litigant does not have this choice because there is only one court in which to try his claim. Thus, the result dictated by the historical test is that there is no jury trial available for such a litigant in modern federal court, although a jury would have been available at common law.[38] Such a result can hardly be said to preserve the right to trial by jury at common law and, therefore, seems to be in opposition to both the seventh amendment and the expressed intention of the drafters of the Federal Rules of Civil Procedure.[39]

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35. *See* Note, Ross v. Bernard, *The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112, 114 (1971) [hereinafter cited as *The Uncertain Future*]; 5 MOORE, *supra* note 20, ¶ 38.11[3]; FED. R. CIV. P. 1 & 2.

36. 5 MOORE, *supra* note 20, ¶ 38.11[8.-2].

37. With certain exceptions, the federal rules require that all counterclaims against the present opponent arising from the events forming the basis of the opponent's claim be pled in the same action. FED. R. CIV. P. 13(a) omitted counterclaims within this rule may be pled subsequently only with the permission of the court. FED. R. CIV. P. 13(f). In addition, other Federal Rules of Civil Procedure requiring or permitting joinder of persons and claims, counterclaims, and amended or supplemental pleadings make it more likely that legal and equitable issues will be tried simultaneously. *See, e.g.*, FED. R. CIV. P. 15, 18(a) & (b), 19, 20, 22. Whenever this occurred, it was possible for the litigant bringing the legal claim to lose the right to try it to a jury through collateral estoppel, *res judicata*, or as suggested, an application of the clean-up doctrine. *See* notes 28-30 and accompanying text *supra*.

38. *See* notes 33-37 and accompanying text, *supra*.

39. *See* FED. R. CIV. P. 38(a).

Some commentators have cited the historical test as the cause of the dilemma. *See, e.g., The Uncertain Future*, *supra* note 35, at 114; 5 MOORE, *supra* note 20, ¶ 38.11 [8.2]. Others, however, blame merger itself. James, *supra* note 11, at 663; McCoid, *supra* note 32, at 15. The latter view probably makes more sense. Merger was itself a departure from history. The point, however, is not whether the historical test or merger caused the difficulty, but only that the two were utterly incompatible.

The Supreme Court first addressed the issue of seventh amendment right to jury trial after the merger of law and equity in *Beacon Theatres v. Westover*.[40] This case involved an action seeking a declaratory judgment that contracts giving plaintiff, Fox, the exclusive right to show certain motion pictures in its general area were not in restraint of trade within the meaning of the antitrust laws. Fox also claimed that Beacon had threatened to sue for damages under the antitrust laws and had thereby hurt him in his negotiations for film contracts. In addition to the declaratory judgment, Fox requested an injunction barring Beacon from filing an antitrust suit against him.[41] Beacon denied plaintiff's assertions, filed a counterclaim for treble damages for restraint of trade caused by Fox's exclusive run contracts and moved for trial by jury.[42]

The district court denied defendant's jury trial motion and ruled that the issues involved in plaintiff's action for declaratory judgment should be tried before the allegations contained in Beacon's counterclaim. The district court, in effect, foreclosed defendant's access to jury trial since the suit for declaratory judgment and the counterclaim contained common issues of fact. Once settled, Beacon could not relitigate those issues.[43] Because the district court considered plaintiff's claim equitable,[44] its findings of fact with respect to plaintiff's allegations would be imposed in the adjudication of the counterclaim. Beacon requested that the court of appeals issue a writ of mandamus ordering the district court to grant its jury trial motion. The appellate court refused, finding, on the pleadings, that Fox had requested equitable relief. The court invoked the clean-up doctrine, which allowed premerger equity courts to take jurisdiction over all issues in a dispute, even if some of those issues were legal in character. The appellate court ruled that the district court had acted within its discretion in denying Beacon's motion for jury trial.[45]

On appeal, the Supreme Court reversed, noting that the Declaratory Judgment Act contained no limitation on the right to trial by jury and that had Beacon brought the antitrust claim first, it would have been entitled to a jury trial. The Court concluded that Beacon could not be denied a right to a jury trial simply because plaintiff had acted

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40. 359 U.S. 500 (1959).
41. *Id.* at 501-03.
42. *Id.*
43. *Id.* at 504. The Court stated that relitigation would be barred by either collateral estoppel or *res judicata*.
44. The district court considered both the declaratory judgment and the injunction equitable relief. *Id.* at 505.
45. *Id.* at 505-06.

first in suing for declaratory judgment.[46] The Court did not expressly invalidate the postmerger application of the clean-up doctrine, but observed that equity courts historically had been able to obtain jurisdiction over legal issues only when the legal remedies were inadequate. The Court stated that the adequacy of legal remedies had to be evaluated with reference to contemporary legal procedures and remedies, the Federal Rules of Civil Procedure, and the Declaratory Judgment Act.[47] In effect, the Court held that modern court rules could affect the line between law and equity and, therefore, the scope of the right to jury trial.

The Court noted that, in a merged court system, all issues, legal and equitable, could be settled in a single action. There was, therefore, no reason not to try the legal issues first in order to afford the litigants an opportunity for jury trial. The Court also noted that a bench trial gave Fox no greater protection, but only compelled Beacon to forego a jury trial on the legal issues.[48] In addition, the Court noted that equitable jurisdiction, and thus trial judges' discretion to deny jury trial motions, was necessarily diminished by the presence of new remedies and modern, flexible legal procedure.[49]

The dissent viewed the grant of a jury trial of Beacon's counterclaim as a significant departure from the historical approach. Justice Stewart, writing for the minority, reasoned that a declaratory judgment was a new remedy, neither legal nor equitable, that had been imposed on the historic structure of the law, but was not designed to alter the structure.[50] The majority had, in the dissenters' view, used this neutral remedial device to expand the right to jury trial in derogation of the traditional power of the equity courts to take jurisdiction over legal issues presented in the course of equitable actions.[51] The dissent read both the seventh amendment and the federal rules to prohibit the restriction of equitable jurisdiction.[52]

The dissent's reading of the seventh amendment interpreted the language therein to prohibit any change from the common law incidence of jury trials. In effect, this interpretation enshrines the divi-

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46. *Id.* at 505.
47. *Id.* at 506-07.
48. *Id.* at 508.
49. *Id.* at 509. The Court made this statement specifically to give notice to lower court judges that the clean-up doctrine was no longer to be considered routinely available. Equitable issues could still be tried ahead of legal claims in derogation of a jury trial, but only in most unusual circumstances. *Id.* at 510-11.
50. 359 U.S. at 514-15 (Stewart, J., dissenting).
51. *Id.* at 516-18. Thus, the dissent found that the trial judge had acted within his discretion in denying Beacon's motion for jury trial.
52. *Id.* at 519.

sion of legal and equitable jurisdiction in 1791 as the exclusive constitutional delineation of jury matters, and therefore allows neither expansion nor contraction of the right to jury trial.[53]

The majority's reading of the seventh amendment is very different. The Court read the preservation language in the seventh amendment as establishing only the constitutionally required minimum regarding availability of a jury trial.[54] The finding that the inadequacy of the legal remedy had to be evaluated with respect to modern legal procedure,[55] and the observation that there was no constitutional guarantee for a bench trial makes it clear that the majority believed that the right to a jury trial could be expanded consistently with the seventh amendment.[56]

The Court's willingness to expand the right to a jury trial is based not only on its reading of the seventh amendment, but also on the fact that there is no constitutional guarantee of a non-jury trial.[57] This argument has been the constitutional premise for upholding legislation expanding the right to a jury trial to include areas not within the seventh amendment.[58] There is no reason, therefore, absent the *Beacon* dissent's restrictive reading of the seventh amendment, to view a diminution in the traditional scope of equity jurisdiction as inconsistent with the preservation of the common law right to trial by jury.

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53. *Id.* at 518-19.

54. *Id.* at 510. McCoid, *supra* note 33, at 13-14.

55. *See* note 48 *supra*. Although some writers view this facet of the Court's opinion as a significant departure from history, *see The Right to Jury Trial in Complex Civil Litigation*, *supra* note 4, at 901-02, the Court had traditionally viewed seventh amendment interpretation in the context of contemporary civil procedure. *See, e.g.*, Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830) (this case held that the right to trial by jury extended to the adjudication of all legal rights, not only to the common law forms of action). The *Beacon* decision is important because it made clear that this traditional approach to determine the adequacy of legal remedies continued post-merger, when legal and equitable remedies were available concurrently.

56. *See also* Curtis v. Loether, 415 U.S. 189, 195-96 (1974) (seventh amendment applies to the adjudication of all legal rights); Colgrove v. Batton, 413 U.S. 149, 152-53, 155-56 (1973) (seventh amendment was adopted to preserve the institution of jury trial, not particular procedural incidents of it). 359 U.S. at 510. There is considerable support in the literature for this reading. *See, e.g.*, McCoid, *supra* note 33, at 14 n.87; Kane, *supra* note 8, at 4; Wolfram, *supra* note 12, at 734-35 (the seventh amendment should not be read to require the preservation of the right to jury trial as it existed in 1791 because the text of that amendment provides only for the preservation of the right to a jury trial, with no reference to any specific procedures). Fitzgerald v. United States Lines Co., 374 U.S. 16, 20 (1963).

57. *Id.* at 20-21; Hurwitz v. Hurwitz, 136 F.2d 796, 798-99 (D.C. Cir. 1943). *See The Right to a Non-Jury Trial*, *supra* note 25, at 1176.

58. 359 U.S. 509-10. *See* Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 459-60 (1851); 5 MOORE, *supra* note 20, ¶ 38.11[4].

It seems clear that an expanded right to trial by jury, which may be described as containing the common law right, may also be deemed to preserve it.

The precise extent to which *Beacon* modified the historical test was not completely clear at the time the court ruled. On its facts, *Beacon* was limited to those cases in which equitable jurisdiction had been obtained by virtue of the inadequacy of a legal remedy, and would not apply to claims over which equity traditionally had original jurisdiction.[59] The Court's discussion of the availability of a jury trial for all legal actions in a merged court system, however, described the general subordination of equitable claims in ordering issues for trial.[60] This ambiguity was left for clarification by later cases.[61]

In *Dairy Queen v. Wood*,[62] the Court began to resolve this ambiguity. *Dairy Queen* involved an action for accounting brought by the owners of the Dairy Queen trademark to determine the amount of money due them as a result of the defendant's breach of the contract between the parties which governed defendant's use of the trademark.[63] Petitioner claimed that there was a considerable sum owed it under the terms of the contract, and that defendant's continued use of the trademark could cause irreparable financial injury.[64] Dairy Queen requested, therefore, that the Court issue temporary and permanent injunctions prohibiting defendant's future use of the trademark, an accounting and judgment for the exact amount owed to the plaintiff by the defendant, and an injunction prohibiting the collection of funds generated through use of the trademark pending the results of the accounting.[65] Defendant adopted several defenses in response to Dairy Queen's allegations,[66] and moved for a trial by jury.[67]

The district court struck defendant's motion for jury trial at Dairy Queen's request, holding that the action brought was either entirely equitable, or involved legal issues which were merely incidental to the equitable claims.[68] This court ruled that, in either case, there was no right to jury trial.[69] Without writing an opinion, the court of

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59. A number of articles have argued that the *Beacon* doctrine was so limited. *See, e.g.*, McCoid, *supra* note 33, at 12-13 (arguing that *Beacon* would not apply to an equitable action for breach of trust). *See* Kane, *supra* note 8, at 8; Wolfram, *supra* note 12, at 737.

60. 359 U.S. at 508.

61. *See* note 49 and accompanying text *supra*.

62. 369 U.S. 469 (1962).

63. *Id.* at 475.

64. *Id.*

65. *Id.*

66. Defendants argued that: (1) the parties had an oral agreement which modified their original contract in such a way that there had been, in fact, no material breach; (2) laches and estoppel should be invoked against Dairy Queen because it had not pursued its claims expeditiously. *Id.* at 475-76.

67. *Id.* at 476.

68. 309 U.S. at 470.

69. *Id.*

appeals refused to grant defendant a writ of mandamus, thus vacating the district court order.[70]

On appeal, the Supreme Court reversed, noting that the rule in federal court, both before and after the merger of law and equity, was that all legal issues, incidental or not, were to be tried to a jury.[71] The Court reasoned, therefore, that petitioner, the defendant below, was entitled to a jury trial of any legal issue in the suit, and proceeded to consider whether such an issue had, in fact, been presented.[72]

Petitioner argued that a request for a money judgment presented a legal claim, notwithstanding the fact that its claim arose in the context of an equitable accounting action.[73] The Court agreed, finding that, whether Dairy Queen's action was best described as a contract action or an action for trademark infringement, "it would be difficult to conceive of an action of a more traditionally legal character." [74] The Court gave virtually no weight to Dairy Queen's characterization of its complaint as an equitable action,[75] observing that accounting actions were traditionally heard in equity only when legal remedies were inadequate.[76] The Court, relying on *Beacon*, noted that the expansion of legal remedies embodied in the Federal Rules of Civil Procedure made the burden of showing legal remedies inadequate quite heavy. It was the opinion of the Court that Dairy Queen had not met this burden satisfactorily.[77] Therefore, the Court reversed the court of appeals, finding that petitioner was entitled to trial by jury.[78] In effect, *Dairy Queen* significantly expanded the *Beacon* doctrine.

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70. *Id.*

71. 369 U.S. at 470-73. The majority relied on *Beacon* to establish the post-merger rule that "when legal and equitable issues are presented in the same case," there is no justification for denying a jury trial of the legal issues. Thus, *Dairy Queen* broadens the *Beacon* doctrine in two ways: (1) The Court placed no limitation on the types of equitable claims which were to be subordinated; and (2) the *Dairy Queen* Court applied the *Beacon* rule in a case in which there was only a single action for recovery. Unlike *Beacon*, the defendants in *Dairy Queen* did not assert a counterclaim or defense which would have constituted a separate action at common law.

72. *Id.* at 475.

73. *Id.* at 476.

74. *Id.* at 477.

75. *Id.* at 477-78. The Court held that the determination of whether a claim was legal or equitable could not be based on the form of the pleading in which it was presented. *Id.* Justice Harlan argued that in order for an accounting complaint to be considered equitable, the "substantive claim" embodied therein must be (1) the type over which equity had sole original jurisdiction, or (2) so complicated that it could be resolved only by an equity court. Dairy Queen's allegations, in his opinion, fulfilled neither requirement. *Id.* at 480 (Harlan, J., concurring).

76. *Id.* at 478. *See* note 26 and accompanying text *supra*.

77. *Id.* at 478-79.

78. *Id.* at 479-80.

In *Beacon*, separate legal and equitable claims were joined in a common action. Both claims could have supported independent suits.[79] *Dairy Queen*, however, involved only one claim for relief, and the dispute revolved around the question of whether the issues contained in the complaint were legal or equitable in character.[80] No such inquiry was made by the *Beacon* Court. Therefore, *Dairy Queen* embodies a change in the Court's interpretation to the seventh amendment. Rather than determining the availability of a jury trial on the basis of the nature of the action, as it had in *Beacon*, the Court now focused attention on the character of the issues contained in the claim.[81] This change in focus displays the Court's willingness to evaluate the availability of a jury trial on the basis of modern procedure, rather than on a purely historical basis. Under *Dairy Queen*, the procedural form in which the action was presented to the Court became irrelevant. Regardless of whether the action was traditionally within the original jurisdiction of the equity court, if the claim presents issues that are substantively legal, it must be tried by a jury.[82]

This shift in emphasis requires courts to analyze the basic nature of the issues presented in the pleadings in relation to modern legal procedure. Before exercising equitable jurisdiction and thereby denying access to a jury trial, courts must insure that the issues are, in fact, equitable and not merely pleaded in the language traditionally associated with equity.[83] This too is a departure from history. At common law, litigants' pleadings had to be phrased with some precision to insure that the desired court would take jurisdiction over the suit.[84] After *Dairy Queen*, the wording of the pleadings became relatively unimportant because the Court's attention to the nature of the

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79. 359 U.S. at 506-08.

80. 369 U.S. at 473. Respondents presented several defenses, but no separable counterclaims. *See* note 67 and accompanying text *supra*.

81. *Id.* at 472-73. *See* Kane, *supra* note 8, at 10; *The Right to Jury Trial in Complex Civil Litigation*, *supra* note 4, at 901, 912. (The *Dairy Queen* Court used a nature of the issues approach to determine the right to jury trial, even when those issues were litigated in the context of a purely equitable action.)

82. 369 U.S. at 477-78. *Accord*, 5 MOORE, *supra* note 20, ¶ 38.11[8.2] (*Dairy Queen* requires the trial of legal issues to a jury, regardless of the history of the action in which they are presented. Therefore, this approach, provides a basis for examining a trial court's rationale for asserting equitable jurisdiction).

83. *Id.*

84. The most obvious example of this requirement was the writ system at commonlaw, in which the law court could hear only those actions pled in strict conformity with a limited number of royal writs, essentially the formulae for wrongs for which there was legal relief. *See* notes 21-24 and accompanying text *supra*. Litigants who wished their claim adjudicated in an equity court had to plead that they had no remedy at common law in order to induce the chancellor to take jurisdiction over the suit. *See* FIELD, *supra* note 21, at 322-23.

issues serves notice that the availability of a jury trial may no longer be determined on the basis of the parties' choice of words.[85]

The Court again used an analysis based on the nature of the issues in *Ross v. Bernard.*[86] The plaintiffs in *Ross* were shareholders who brought a derivative suit against some of their corporations' directors and members of the corporation's brokerage firm, alleging that the firm had extracted unreasonably large fees from the corporation, thereby converting corporate assets to their personal use.[87] Plaintiffs asserted that corporate directors had aided this conversion and were liable to the corporation for breach of trust, intentional misfeasance, and negligence.[88] The plaintiffs requested an accounting to determine the amount of money owed to the corporation as a result of the defendants' activities and moved for trial by jury.[89]

The district court granted plaintiffs' motion, noting that, while a derivative suit was usually considered an equitable action, the equitable component consisted entirely of giving stockholders standing to sue on the corporation's claim.[90] The substantive claim alleging harm to the corporation could be legal or equitable, and it was the nature of the claim, not the fact that stockholders attained standing through equity, that determined the availability of trial by jury.[91] Because it found the underlying corporate claim to have a legal character, the district court approved the jury trial request, but permitted an interlocutory appeal of its action.[92] The court of appeals reversed, holding that derivative suits were entirely equitable and no right to trial by jury was available in such actions.[93]

The Supreme Court reversed the appellate court and reinstated the district court's ruling.[94] The Court noted that the history of derivative suits showed that they had developed as an equitable response to the refusal of the common law courts to give relief to stockholders of corporations who were hurt by the actions of their man-

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85. 369 U.S. at 477-78.
86. 396 U.S. 531 (1970).
87. *Id.* at 531-32. A derivative action is a suit brought by shareholders of a corporation to redress a wrong done to the corporation when management or the controlling interests of the corporation will not allow it to sue in its own right. WRIGHT, LAW OF FEDERAL COURTS 358 (3d ed. 1976) [hereinafter referred to as WRIGHT].
88. 396 U.S. at 532.
89. *Id.* The defendants' position was not discussed.
90. *Id.*
91. The district court stated that the availability of a jury trial in a derivative suit should follow the result of the determination of whether the corporation would have been entitled to such a trial had it sued on its own behalf. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

agers.[95] The Court observed that one prerequisite for maintaining such a suit was a valid claim on which the corporation could have sued in its own right.[96] Thus, the Supreme Court agreed with the trial judge's finding that derivative suits had a dual nature. Although stockholders' standing was obtained through equity, the underlying corporate claim could be either legal or equitable.[97] The Court ruled that, because the seventh amendment applied to all legal rights and not only the forms of action at common law, the corporation's claim, if legal, could be tried to a jury.[98] The Court noted that, although pre-merger equity had been able to resolve all issues presented in a derivative suit in federal court, *Beacon Theatres* required that all legal issues be tried to a jury in modern federal court.[99] Because of the expansion of available legal remedies under the Federal Rules of Civil Procedure, the Court reasoned that there was no longer any need to have equity resolve the legal issues presented in a derivative action.[100]

In its discussion of the right to jury trial for legal issues, the *Ross* Court articulated a test for distinguishing legal and equitable issues. In footnote 10 of its opinion, the *Ross* majority wrote:

> 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 possible abstruse historical inquiry, is obviously the most difficult to ap-

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95. *Id.* at 532-35. It should be noted that derivative actions were not only available to redress corporate harm done by managers, but by third parties as well. Comment, *The Right to a Jury Trial in a Stockholder's Derivative Action*, 72 YALE L.J. 725, 729-30 (1965) [hereinafter referred to as *The Right to a Jury Trial*].

96. 396 U.S. at 538-39.

97. *Id.*

98. *Id.*

99. *Id.* This portion of the Court's opinion has drawn considerable criticism. Several commentators have asserted that as a matter of history, the Court's dual nature analysis of derivative actions is untenable. *See, e.g.*, Note, *Jury Trial in a Stockholders' Derivative Suit*, 65 NW. U. L. REV. 697, 700 (1970) (the dual nature approach to the derivative suit ignores its equitable origins. The derivative suit was first used against corporate directors to vindicate shareholders' rights); *The Right to a Jury Trial, supra* note 95, at 730. There were at least some cases at English common law which regarded derivative actions as the enforcement of management's fiduciary duties to the stockholders. Since the dual nature approach makes clear that the issues of standing and corporate harm are analytically separate, they were tried as a unit to the common law equity courts. *The Uncertain Future, supra* note 35, at 118-19; *The Right to Jury Trial in Complex Civil Litigation, supra* note 4, at 901.

100. 396 U.S. at 538-40.

ply. See James, *Right to a Jury Trial in Civil Actions*, 72 Yale L. J. 655 (1962).[101]

Although the first two elements comprise the traditional criteria of the historical test, albeit applied to the nature of issues, not overall actions,[102] the third element, which delineated jury competence as a factor properly considered in determining the legal or equitable character of an issue, was essentially new.[103]

The dissent found that there had been no historic recognition of the dual nature of derivative actions, but argued that such actions were, in fact, direct actions by stockholders to recover for fiduciaries' misconduct.[104] Because these actions were, in the dissent's view, entirely equitable, no right to jury adhered.[105] Justice Stewart, author of a similar dissent in *Beacon Theatres*, argued that the majority had expanded the right to trial by jury in a way inconsistent with the seventh amendment which, in his view, directed only the preservation, not the expansion, of the scope of jury trial.[106] In addition, the dissent maintained that the majority's holding was not supported by *Beacon Theatres*, because that case had involved the joinder of separately triable claims, not the dissection of an historically unified cause of action.[107]

The majority's "dual nature" analysis, regardless of its historical validity, showed the Court's continued commitment to the evaluation of the motions for jury trial on the basis of the legal or equitable nature of the issues. In effect, the Court ignored the possibility that the equitable component in derivative actions was anything more than a device to allow shareholders to prosecute a corporate claim and, therefore, purely procedural. Although the Court could be said to have done the same sort of thing in *Dairy Queen*, it found only that plaintiff's pleadings amounted to the use of equitable language to assert a legal claim. This ruling was made on the basis of the particular facts at issue in *Dairy Queen*.[108] However, the *Ross* Court did not make an examination of the particular facts involved, but ruled that

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101. *Id.* at 538 n.10.

102. *See* notes 25-28 and accompanying text *supra*.

103. There had been suggestions in the literature, however, that such consideration was warranted. *See, e.g.*, *The Right to a Non-Jury Trial*, *supra* note 24, at 1189 (suggests that a relative judge-jury competence test be used to determine the frequency of jury trials in post-merger federal court).

104. 396 U.S. at 545 (Stewart, J., dissenting); *see* note 68 and accompanying text *supra*.

105. *Id.* at 547-48.

106. *Id.* at 543-45 (Stewart, J., dissenting).

107. *Id.* at 549-50.

108. 369 U.S. at 476-78.

equitable jurisdiction in all derivative actions did not extend past the issue of plaintiff's standing. The broad sweep of the *Ross* majority opinion should have been more fully grounded in historical and factual analyses. If the derivative action is best understood historically as a unitary action in equity, a variant of an action for breach of trust, as the *Ross* dissent maintained, then *Dairy Queen* stands for the proposition that there should be no jury trial therein unless a legal issue is presented. The majority's opinion did not present a thorough historical discussion, but merely noted that derivative actions had a dual nature, and that any legal issue embodied must be tried to a jury.[109]

Past cases had required that there be historical precedent for such division or that there be a legal issue present. The Court, however, having failed to deal completely with the history of the derivative suit, also failed to analyze the facts adequately. The majority found that the plaintiff had presented legal issues in the underlying substantive claim, because plaintiff had alleged breach of contract and negligence.[110] The Court noted, but failed to consider, that the plaintiff had also alleged breaches of fiduciary duty.[111] Thus, the Court refused to look behind the wording of the pleadings as it had in *Dairy Queen*, when such an examination could have lead to a finding that there were no legal issues and no right to jury trial. It is impossible that the allegations the Court describes as legal could have been best described as breaches of a fiduciary duty and, therefore, equitable. However, the Court's approach admits no such possibility. It could be this lack of thorough, even-handed analysis that prompted the dissent to assert that the majority's decision was motivated by pro-jury prejudice.[112]

The *Ross* test for distinguishing legal from equitable issues was articulated, therefore, in a decision expanding the right to trial by jury. It should be noted, however, that the Supreme Court did not use this test in coming to its decision.[113] This is, in fact, an inconsistency between the test and the rationale actually used by the *Ross* Court. The first element of the test, which directs consideration of the pre-merger custom, received virtually no consideration. The Court noted that the pre-merger custom with respect to derivative suits was changed by the new procedural rules and *Beacon*

109. 396 U.S. at 534-35.
110. *Id.* at 542.
111. *Id.*
112. *Id.* at 551 (Stewart, J., dissenting).
113. *See* notes 94-100 and accompanying text *supra*.

Theatres.[114] There seems to have been no pre-merger consideration of the corporation's claim as separated from the issue of standing. Although such consideration in *Ross* is an historical departure consistent with *Beacon Theatres* and *Dairy Queen*, there was, in fact, no pre-merger custom with respect to the corporation's claim as a separate legal issue.[115] These claims would have been heard only in a unitary derivative action tried historically entirely in equity.[116]

The same observation applies to the second element of the *Ross* test, which requires consideration of the type of relief requested. Because there was no separate trial of the corporation's claim at common law, the only relief granted in derivative actions would have been equitable in nature.[117] In this respect, the Court followed rationale consistent with *Beacon Theatres* and *Dairy Queen*, but proposed a test quite similar to the strict historical test.

Element three of the *Ross* test, which states that the "practical abilities and limitations of juries" are properly considered in determining the legal or equitable nature of an issue, has been proposed as a constitutional basis for restricting the seventh amendment to the limits of jury competence.[118] Several commentators read the third element of the *Ross* test to provide a balancing of historical and pragmatic considerations in weighing motions for jury trial. This view would, presumably, allow an issue considered legal at common law to be tried without a jury if it was presented in a factual or procedural context that placed it beyond the competence of the jury.

Although this reading of the third element of the *Ross* test is certainly plausible, it is by no means clear that the Court intended it to be used to limit the right to a jury trial. *Ross* is an undeniably pro-jury decision which represents the Court's willingness to expand the jury right in a manner not entirely consistent with prior cases.[119] In addition, jury competence is a factor which is most easily understood in the context of a particular action taken as a whole. It is a specific fact

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114. 396 U.S. at 538.
115. *See* note 68 and accompanying text *supra*.
116. *See* note 115 *supra*.
117. *See* note 115 *supra*.
118. *See, e.g., The Right to an Incompetent Jury*, *supra* note 3, at 797 ("The third part of the *Ross* footnote [that part stating that jury competence was properly considered in deciding whether to grant a jury trial motion] appears at first reading to be the ideal authority for restricting the right to a civil jury. A protracted commercial action appears to be the most likely candidate for a case that is beyond the 'practical abilities and limitations of juries.' " *The Seventh Amendment and Complex Civil Litigation*, *supra* note 3, at 588-59 (the third element in *Ross* is a factor that must be weighed in addition to determining whether the issue is legal or equitable).
119. *See* notes 75-80 and accompanying text *supra*.

pattern, the amount of evidence, the number of parties, and claims that distinguish simple from complex suits and not, for example, the intrinsic nature of antitrust suits *per se*. Moreover, the entire post-merger line of cases focuses on the legal or equitable nature of the issues as determined by the historical test, and de-emphasizes the procedural context in which those issues are presented.[120] Thus, to the extent that the third element of the *Ross* test allows consideration of jury competence beyond that of common law, it is at odds with both the historical test and the cases on which it purports to rely. All these factors limit the potential use of the *Ross* test as a constitutional basis for limiting the seventh amendment. Nevertheless, in two situations the *Ross* test has been used in precisely this way: (1) the complexity exception,[121] and (2) the due process exception.[122]

1. The Complexity Exception

The proponents of the complexity exception claim that complicated legal actions fall within the traditional scope of equity jurisdiction.[123] Because the adequacy of a legal remedy has been traditionally evaluated, in part, with respect to the procedural limitations of the law courts,[124] equity could obtain jurisdiction over an action in which the law court's procedural rules worked some injustice, even if monetary compensation for the alleged wrong constituted an adequate remedy.[125] The complexity exception asserts that the jury is an inadequate aspect of legal procedure in complex cases.[126]

In effect, this exception posits the third element of the *Ross* test as a basis for invoking equity jurisdiction.[127] When a case is so complex

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120. *See* notes 14-18, 40-49 and accompanying text *supra*.

121. *See, e.g.*, Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978); ILC Peripherals Leasing corp. v. International Business Machines Corp., 458 F. Supp. 423 (N.D. Cal. 1978).

122. *See, e.g., In re* Boise Cascades Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 631 F.2d 1069 (3d Cir. 1980).

123. *See, e.g.*, 79 F.R.D. at 66; 458 F. Supp. at 445.

124. *See The Right to Jury Trial in Complex Civil Litigation, supra* note 4, at 905.

125. 1 J. POMEROY, EQUITY JURISPRUDENCE §§ 186(a) & 189 (5th ed. 1941) [hereinafter cited as 1 POMEROY].

126. The complexity exception, by definition, is an attempt to prevent jury trial, but it is difficult to understand what aspect of jury function is inadequate when a jury has not yet heard the case. The assertion of jury inadequacy is at the heart of the complexity exception, but only one case has made any attempt to base its assessment of jury inadequacy on actual jury performance. *See* 458 F. Supp. 444-47.

127. *See* note 126 *supra*; 458 F. Supp. at 446-47 (*Ross* test, element three, provides a basis for rebutting the historical conclusion and trying complicated legal actions in equity).

that it exceeds "the practical abilities and limitations of juries," [128] the procedural limitations of a legal action allow equity to hear the suit to prevent injustice.[129] Thus, all legal actions are to be given a jury trial, except when the action is so complex that a jury would not be competent to hear it.

The principal case articulating the complexity exception is *Berstein v. Universal Pictures, Inc.*[130] *Berstein* was an antitrust class action brought by a group of composers and lyricists alleging that the defendants had conspired to restrain trade in order to achieve a monopoly.[131] The scope of the litigation was immense. The seventy-one named plaintiffs represented a class whose exact size was unknown but had been estimated as being as large as 1,100.[132] There were sixteen named defendants who took a variety of positions in response to plaintiffs' claims.[133] Because each plaintiff had to prove injury separately, the trial would necessarily involve volumes of evidence.[134] The estimated trial length was four months.[135]

On its own initiative, the district court considered whether the size and complexity of the suit placed it beyond the capability of a jury.[136] The court began its discussion by noting that, although the scope of legal remedies had been expanded by the adoption of the Federal Rules of Civil Procedure, *Beacon Theatres* left open the possibility that equity could still take jurisdiction over legal actions in some circumstances.[137] The court used the *Ross* test to determine whether the case before it was such an action.[138]

The court noted that the first two elements of the *Ross* test dictated a jury trial. The pre-merger custom was to try antitrust cases to a jury and plaintiffs had requested relief historically available in actions at law.[139] The third element of the test, however, was considered dispositive by the court. The court declared that the third element of the *Ross* test described a portion of equity's traditional jurisdiction, and cases which would have otherwise been considered legal, came within the scope of that jurisdiction when, for whatever reason, they

128. 396 U.S. at 531, 538 n.10.
129. *See* notes 24-27 and accompanying text *supra*.
130. 79 F.R.D. 59 (S.D.N.Y. 1978).
131. *Id.* at 61. Plaintiffs alleged that defendants were involved with seven separate conspiracies. *Id.*
132. *Id.* at 62.
133. *Id.* at 63-64.
134. *Id.*
135. *Id.*
136. *Id.* at 61.
137. *Id.* at 65-66; *see also* 359 U.S. at 510-11.
138. 79 F.R.D. at 66.
139. *Id.* at 66-67.

exceeded a jury's competence.[140] The court found that the size and complexity of the action before it were beyond any jury's understanding and, therefore, struck the motion for jury trial.[141]

ILC Peripherals v. International Business Machines [142] is another complex suit in which the court invoked the complexity exception to strike a motion for jury trial. Relying entirely on the elements of the *Ross* test, the court held that the complex monopolization suit before it was properly within the scope of equitable jurisdiction.[143] In the court's opinion, the *Ross* test allowed the result of the historical test to be rebutted whenever an action involved technical or specialized issues, and was beyond a jury's capacities.[144] It should be noted that the court in *ILC Peripherals* had a track record to help it decide whether the case in fact exceeded a jury's competence. An earlier jury trial of the same dispute had ended in a mistrial after nineteen days of deliberation.[145]

The courts which argue that the third element of the *Ross* test describes a traditional, independent source of equity jurisdiction over complex actions rely on the common law distribution of accounting cases between the law and equity courts.[146] There was a common law writ for accounting, called an action of account-render,[147] but it had a most limited scope. It could not be used for any transactions involving land but only for money, and it could only be used against guardi-

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140. *Id.*

141. *Id.* at 70-71.

142. 458 F. Supp. 423 (N.D. Cal. 1978). This was a suit brought for the alleged monopolization of certain markets in the computer industry. The plaintiff charged that defendant had engaged in marketing practices and made changes in his product line that constituted violations of antitrust laws. *Id.* at 426, 444. The defendants answered that the plaintiff's injuries were caused by its own poor management. *Id.* In the court's opinion, the resolution of these issues required an understanding of computer technology and advanced financing concepts. *Id.* Furthermore, the trial was expected to take five months, involving the introduction of 2,300 exhibits into evidence and the testimony of 87 witnesses. *Id.*

143. *Id.* at 445.

144. *Id.* at 446-47.

145. *Id.* at 426, 447.

146. *See, e.g.*, 79 F.R.D. at 66 (relying on Kirby v. Lake Shore & Mich. S. R.R., 120 U.S. 130 (1886), an accounting case, to establish the proposition that jury competence was a factor traditionally used to define equity jurisdiction); 458 F. Supp. 445-46 (relying on *Kirby* and another accounting case to support the validity of the *Ross* test, element three, as a general restriction on the jury trial of complex cases).

An accounting suit was available to settle a number of competing claims to the same subject matter. It could be used to settle claims to a common fund or determine the amount due from every member of a group subject to a common liability. *See* 1 POMEROY, *supra* note 125, § 186(a). Suits for an accounting could also be brought to determine the amounts owed under the terms of business transactions. *See, e.g.*, 120 U.S. at 131.

147. 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 459 (7th Ed. 1956) [hereinafter cited as 1 HOLDSWORTH].

ans, bailiffs, receivers, and merchants.[148] The limitations of this writ spawned a competing action in equity.[149] This was not, however, a case in which equity took jurisdiction over an action for which the legal remedy was inadequate. The equitable accounting action was based on trust principles and was, therefore, entirely equitable.[150]

In addition to creating a competing action for accounting, the equity courts could and did take jurisdiction over legal accounting actions to prevent injustice.[151] In addition to those described above, the legal accounting action had other problems associated with it. Common law pleading rules required that every disputed item in the accounts of the parties had to be separately pleaded and answered.[152] Because a defective pleading could result in a non-suit,[153] there was always a possibility that a litigant with a just claim could lose at trial as the result of a procedural error.[154] This was precisely the sort of injustice equity could prevent. It is not surprising, therefore, that equity was traditionally the preferred forum for accounting suits.[155]

The benefit of bringing an equitable accounting action was that, in equity, the disputed account could be referred to a master, an officer of the court, who organized the issues presented for trial thereby facilitating the court's resolution.[156] One commentator has stated that disputed accounts, as well as other complex matters in equity, were always referred to masters.[157]

Although the advantages of bringing an accounting suit in equity are clear, it is not clear that the disadvantages and injustices accompanying such actions at common law were due to jury incompetence. Juries may not have been able to understand complicated accounts as they were presented in the law courts. That lack of understanding, however, is as equally attributable to the cumbersome methods of presentation as it is attributable to the jury's lack of capability. This distinction is quite important. *Beacon Theatres* states explicitly that the adequacy of legal remedy should be determined by

148. *Id.* at 426 n.1, 426-28.
149. *Id.*
150. *Id.* at 426 n.8.
151. Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 68 (1980) [hereinafter cited as Devlin].
152. *Id.* at 65-66; MAITLAND, EQUITY 6-7 (2d ed. 1936) (the principle that every fact had to be argued to the jury made the adjudication of account disputes at common law extremely cumbersome).
153. *See* FIELD, *supra* note 21, at 331-35.
154. *See, e.g., id.* at 268-69.
155. *See* 1 HOLDSWORTH, *supra* note 147, at 458.
156. *See* Devlin, *supra* note 151, at 59, 67.
157. *Id.* at 59.

reference to modern procedural rules.[158] Thus, if equity took jurisdiction over actions of account-render because the legal procedure produced injustice, the fact that there were fewer jury trials of complex accounting suits in the past is irrelevant in the determination of the modern scope of the right to trial by jury.[159] If, however, equity removed accounting actions from law courts because of real or perceived jury incompetence, such actions are probably not currently entitled to a jury trial. *Beacon Theatres* expands the right to jury trial only to the extent that new legal remedies permit more adequate relief than that historically available at common law. It does not permit jury trials in cases where legal jurisdiction, by its very nature, produces injustice.

The historical evidence of the basis for equitable removal of legal accounting actions is inconclusive. Although there is some evidence that jury competence was considered in the distribution of complex accounting suits,[160] the general weight of the historical record is that the advisability of jury trials was not an important factor in the allocation of suits between law and equity.[161]

Even if the historical record clearly showed that complex actions of account-render had been removed to equity due to jury incompetence, it could provide only a limited basis for equity jurisdiction of general complexity cases. Equity had jurisdiction over matters other than accounts, based on its own positive attributes rather than on any defect in the law courts.[162] In such cases, equity had jurisdiction re-

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158. 359 U.S. at 507.

159. *Id.* at 509 (the rationale for allowing equity to take jurisdiction over legal issues must be re-examined given the expansion of modern legal procedure).

160. *See, e.g.*, James, *supra* note 11, at 663; Devlin, *supra* note 151; *but see* Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation*, U. PA. L. REV. 829, 847 (1980); Radial Lip Machines, Inc. v. International Carbide Corp., 76 F.R.D. 224, 228 (N.D. Ill. 1977) (there is no jury competence argument to be made with respect to accounting suits, because juries never tried accounts at common law, but only the issue of whether a party should be forced to submit to an audit).

161. *See* James, *supra* note 11, at 661 ("At no time was the line dividing law and equity the product of a rational choice between issues which were better suited to court or to jury trial"); *id.* at 662 ("[j]ury trial was only the tail of the dog under a system in which you had to take the whole dog"); Shapiro & Coquillette, *supra* note 16, at 455-56 (jury trial was not considered important in distinguishing law from equity); *see generally The Right to a Non-Jury Trial*, *supra* note 4, at 1176, 1179-81 (the reasons why equity developed without a jury are unclear, but the following factors may have been partially responsible: (1) equity began as an agency of the king, and thus was subject to virtually no popular control; (2) in the daily disposition of cases, there was no concern over formulating another forum for litigation, only with remedying the inadequacies of the law courts).

162. One writer has classified five separate heads of equity jurisdiction: (1) the recognition, protection and development of trusts; (2) the enforcement of contracts through specific performance; (3) the disposition of cases in which the enforcement of

gardless of the action's complexity. It seems that any complexity-based source of equity jurisdiction at common law, if present at all, was limited to legal accounting actions, and, as an exception to the seventh amendment, is properly limited to the modern counterpart of those actions.[163]

In addition, when an accounting for a fixed sum was involved, a litigant could obtain either a writ for account-render or for debt.[164] The law courts had jurisdiction over the latter action, and jury trial would have been available.[165] Strictly speaking, therefore, the proposed complexity exception at common law applied only to complex legal accounting suits in which the amount at stake was undetermined.

Several problems arise in applying this limited complexity exception to the right of a trial by jury in modern federal court. Complexity, whether present due to the particular facts, the number of parties or claims, or some other procedural aspect of the case, is a characteristic of the action as a whole.[166] The Supreme Court, however, has clearly adopted a nature of the issues approach as the basis for determining the availability of jury trial.[167] In addition, that determination has traditionally been governed by the legal or equitable character of the issues, not their simplicity or lack thereof. It is clear that the Court does not consider factual complexity proper grounds

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the legal right was unfair or inequitable (such as legal obligations obtained through fraud, duress, or mistake); (4) the ability to tailor relief specifically for the parties actually wronged; and (5) its superiority in handling complicated accounts as compared with law. 1 HOLDSWORTH, *supra* note 147, at 454-59.

163. Proponents of the complexity exception have attempted to broaden its base of support, but with little success. Other actions used as examples of equity jurisdiction based on complexity and the incompetence of the jury are (1) the alleged plagiarism of a law book accomplished, in part, through the translation of quotations in Latin and French; (2) the question of which of two closely related mental conditions accurately described plaintiff's state of mind; (3) the validity of a deed; and (4) the question of whether a breach of trust had occurred. Devlin, *supra* note 152, at 75-77. None of these examples adds any weight to the notion that equity courts removed complex issues from the jury's consideration. The first two issues are not complex, but require specialized knowledge for their resolution. Thus, they stand only as historical precedent for the proposition that expert testimony has traditionally been required to help juries decide issues involving specialized knowledge. The third example is an issue of law, not properly within the purview of the jury at any time, regardless of its complexity. The last example involves the litigation of a purely equitable right, which would also not have been tried to a jury regardless of complexity. FIELD, *supra* note 21, at 330.

164. 1 HOLDSWORTH, *supra* note 147, at 428.

165. 5 MOORE, *supra* note 20, ¶ 38.11[5].

166. *See, e.g.*, Bernstein v. Universal Pictures, Inc., 79 F.R.D. at 70 (court found the size and complexity of the litigation as a whole beyond the competence of any jury); ILP Peripherals Leasing Corp. v. International Business Machines Corp., 458 F. Supp. at 444 (court found that the facts before it presented issues requiring advanced and specialized knowledge).

167. *See* notes 71-72 and accompanying text *supra*.

for invoking equitable jurisdiction.[168] The legal or equitable character of an issue is unaffected by the nature of the fact pattern, or procedural form in which it is presented. Essentially, the complexity exception is a test premised on the nature of the action as a whole, a basis for determination which has been rejected by the Court's post-merger cases interpreting the seventh amendment.[169] In addition, the exception proposes that the test for jury trial matters be made on the basis of complexity, which, if historically present at all, was of limited scope.[170]

These arguments formed the basis of the holding in *In re Financial Securities Litigation*,[171] in which the Court of Appeals for the Ninth Circuit reversed the lower court's action striking a jury trial in a securities fraud action.[172] The district court found that the suit was so complex that it was beyond the jury's capability.[173] Having found that the legal remedies were inadequate, the court ruled that the suit had to be tried in equity, without a jury.[174]

The court of appeals unequivocably rejected the complexity exception. Relying on *Ross*, the court stated that the right to a jury trial was properly determined by the nature of the issues for trial,

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168. United States v. Bitter Root Dev. Co., 200 U.S. 451 (1906); Curriden v. Middleton, 232 U.S. 633 (1914) (complicated fact patterns do not constitute valid grounds for imposing equitable jurisdiction).

169. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477-78 (1962). *See* note 81 and accompanying text *supra*.

170. *See* notes 147-157 *supra*. It may be argued that *Beacon Theatres* and the cases flowing therefrom have departed from history in the adoption of the nature of the issues test and the consequent expansion of the jury right. It may seem unfair to hold critics of the jury to strict historical accuracy when the post-merger growth of the jury trial has partially occurred by non-historical means. This asymmetrical historical approach, however, is compelled by the nature of the seventh amendment guarantee. Expansion of the right to jury trial is in no way regulated by the seventh amendment. It does, however, regulate the possible contraction of the right to jury trial, directing that its common law incidence be preserved. Because there is no complementary right to non-jury trial, *see* Beacon Theatres v. Westover, 359 U.S. at 510; *The Right to a Non-Jury Trial*, *supra* note 25, at 1176, a strict historical standard is imposed on those seeking to contract the jury right, notwithstanding that no such standard restricts that right's expansion. Shields v. Thomas, 59 U.S. 253, 262 (1855) (equity may not grow in such a way as to encroach on the common law right to jury trial); Dimick v. Sheidt, 293 U.S. 474, 486 (1935) (any restriction of the right to trial by jury must be closely scrutinized). *See* note 30 and accompanying text, *supra*.

171. 609 F.2d 411 (9th Cir. 1979).

172. *Id.* at 413. Plaintiffs were the purchasers of equitable and debt securities of the defendant corporation. The defendant's accounting practices had been under investigation by the SEC, which suspended trading in the defendant's stock. With 4,500,000 shares outstanding, defendant declared bankruptcy. Plaintiffs sued, alleging that defendants had been negligent, violated federal securities laws, and had committed fraud. *Id.* at 413-16.

173. *Id.* at 416.

174. *Id.*

rather than the overall character of the action.[175] Here the issues presented were legal, and therefore entitled to be tried to a jury trial.[176] Arguments for invoking equitable jurisdiction based on the suit's complexity were irrelevant because it was the legal or equitable nature of the issues that determined the right to jury trial.[177]

The court also stated that the third element of the *Ross* test could not constitute a new method for determining the availability of jury trial. In the court's view, 200 years of the historical test could not be undone by a footnote.[178] The court noted that the *Ross* test was contrary to seventh amendment practice, because the right to a jury trial had never depended upon the jury's capabilities.[179] To date, no other circuits have ruled on the validity of the complexity exception. It seems clear, however, that because the complexity exception is inconsistent with both legal history and the Supreme Court's post-merger interpretation of the seventh amendment, it rests on perilously shakey ground.

2. The Due Process Exception

The due process exception is another proposal to limit the scope of the seventh amendment and thereby remove the jury from complex civil trials. Proponents of this approach assert that juries can decide only complicated cases in an arbitrary manner.[180] Since due process requires a rational process in the resolution of disputes, they assert that the fifth amendment requires that motions for a jury trial in complex cases be denied.

The Third Circuit adopted this rationale in denying a motion for jury trial in *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*,[181] an antitrust action brought against a group of Japanese electronic manufacturers.[182] Plaintiff's motion for a jury trial was granted by the district court, but the appellate court reversed, ruling

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175. *Id.* at 422.
176. *Id.* at 423-24.
177. *Id.*
178. *Id.* at 424-25.
179. *Id.* at 426. *But see* note 160 *supra.*
180. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 631 F.2d 1069 (3rd Cir. 1980); *The Right to an Incompetent Jury*, *supra* note 3, at 798 ("The Supreme Court could construe the fifth amendment as a limit on the seventh [and thereby] recognize that there exist circumstances in which trial by jury can constitute a denial of due process."); *The Seventh Amendment and Complex Civil Litigation*, *supra* note 3, at 600-03 (conducting litigation before an uncomprehending jury violates due process).
181. 631 F.2d at 1084.
182. *Id.* at 1071-75.

that, in complex litigation, due process "interests" predominated over the seventh amendment right to a trial by jury.[183] In the court's view, the third element of the *Ross* test was a valid, constitutional basis for the limitation on the scope of the seventh amendment based on jury incompetence.[184] The court accepted the defendants' argument that due process guaranteed a rational fact-finder and that juries could not decide complex cases in such a manner.[185] The action could, therefore, be heard only at a bench trial.[186] The appellate court resolved the conflict between the fifth and seventh amendments by balancing the interests that each protects, and concluded that, in complex trials, due process concerns are more important than the right to a trial by jury.[187]

The due process exception appears to place the fifth and seventh amendments in direct conflict, thereby creating a thorny problem in constitutional interpretation. As the *Matsushita* court noted, there is no precedent for finding that the fifth amendment overrides the seventh.[188] There seems to be no basis in the constitutional text for

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183. *Id.* at 1086.

184. *Id.*

185. *Id.* at 1087.

186. *Id.* The defendants' motion to strike the jury trial demand was made pretrial. It is, therefore, difficult to identify what aspect of the jury's performance was so arbitrary and irrational as to violate due process. *See also* notes 190-94 and accompanying text *infra.*

Although *Matsushita* was the first case to articulate the due process exception, it was not the first case to deny a jury trial in a complex suit on similar grounds. In *In re* Boise Cascades Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976), the district court struck plaintiffs' motion for a jury trial of a securities fraud action, ruling that it would be unfair to try a case of great complexity to a jury. *Id.* at 104-05.

187. 631 F.2d at 1084-87. The dissent noted that the majority could have decided the case on much narrower grounds, such as whether the federal rules permitting joinder and consolidation of separate actions so complicated an action as to require "that the constitutional right to a jury trial must yield." There was no need, in the minority's view, to decide the more general case of whether any single claim could be so complex as to require a bench trial. *Id.* at 1091-93. The dissent did not, however, discuss the constitutionality of the federal joinder and consolidation in cases where their operation rendered actions too complex to be tried to a jury. It seems that, under such circumstances, the rules would violate both the fifth and seventh amendments in such situations. *See* notes 192-96 *infra.*

188. *Id.* at 1084. One article has, however, proposed that, because the Supreme Court has refused to incorporate the seventh amendment through the fourteenth amendment, the right to a jury trial is not as "intrinsically important" as the due process guarantee. *See The Seventh Amendment and Complex Civil Litigation, supra* note 2, at 615. This approach is open to criticism. The most that can be said as a result of the Court's failure to incorporate the seventh amendment is that the right to a jury trial is not implicit in due process. Palco v. Connecticut, 302 U.S. 319, 325 (1937). Given the long history of bench trials in equity courts, this conclusion was inescapable. The argument that, because jury trials are not required by due process, the right to them is somehow less important than due process assumes the conclusion it seeks to prove.

Another writer has argued that due process concerns should supercede the right

finding any guarantee enumerated in the bill of rights superior to any other.

Matsushita is the only case which has denied a motion for a jury trial in explicit reliance on fifth amendment grounds. The due process exception, therefore, remains largely undefined. Although it is clear that the court maintained that the jury's performance in complex actions violated the fifth amendment, the offending aspects of jury function were never specified in its opinion.[189] Part of this problem is attributable to the use of the due process argument in pretrial proceedings. It is most difficult to find any deprivation due to jury incompetence before the jury hears and decides the case. Thus, no due process violation is clearly present. In general, however, it is fair to say that the due process exception is predicated on the assumption that, without its imposition, the jury's resolution in complex suits would be unfair, irrational, and unjust. This assumption is not true in all contexts, because there are already many procedural safeguards to limit the potential harm due to juries' irrationality and the due process exception with the constitutional problems it generates is unnecessary to insure fair and rational decisions.

Directed verdicts, for example, exist specifically to eliminate the possibility that cases will be decided in ways inconsistent with the facts or applicable rules of law.[190] The standard for granting directed verdicts mandates that the case be taken from the jury when there can be only one reasonable verdict.

The right to a jury trial embodies the idea that a jury should be prevented from reaching a verdict based on speculation or emotion.[191] The court's power to grant a directed verdict does not infringe on the litigants' right to a trial by jury.[192] Before the jury may decide a case, there must be an issue of fact and a basis for a reasonable inference on which the jury can find facts rationally.[193] In cases where a directed verdict is available, therefore, rational decision-making required by

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to jury trial because due process is "the central premise of our legal system." *See The Right to an Incompetent Jury*, *supra* note 3, at 798. This centrality, if present at all, is totally unexpressed in the constitutional text.

189. Zenith Radio Corp. v. Matsushita Elec. Indus. Corp., 478 F. Supp. 889, 938 (1979).

190. Brady v. Southern Ry. Co., 320 U.S. 476, 479-80 (1943); Herron v. Southern Pac. Co., 283 U.S. 91, 95-96 (1931); 5 MOORE, *supra* note 20, ¶ 50.02[1].

191. Galloway v. United States, 319 U.S. 372, 395 (1943); Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 504 (1956); *see* note 190 *supra*.

192. 319 U.S. at 389-90 (seventh amendment does not prohibit directed verdicts).

193. 5 MOORE, *supra* note 20, ¶ 50.02[1].

the fifth amendment [194] is in no way inconsistent with the right to a jury trial as guaranteed by the seventh amendment.

The decision to grant or deny a directed verdict rests with the trial judge.[195] Moreover, there is considerable support for the notion that the court has the duty to grant a directed verdict when warranted by the evidence.[196] If the court fails in this duty and the jury decides a case against the weight of the evidence, the injustice is caused by an error of law, because there were no issues which the jury could properly consider.[197] Jury competence is essentially irrelevant in these cases. Regardless of how well the jury deliberated, those deliberations should not have been allowed. Thus, there need never be an irrational verdict in federal court. Litigants are entitled to a directed verdict in actions where only one reasonable verdict is possible, and when judges improperly deny directed verdicts, their action is appealable error.[198]

Although directed verdicts serve to provide protection from irrational jury action in some cases, it is clear that relatively few complex cases will be among them. As the number of parties and claims increase and the amount of evidence grows, it presumably becomes more difficult to say that the evidence points clearly to the grant of a directed verdict. There will be many cases in which the evidence provides a rational basis for a verdict for either party.[199] In these cases, the nature of the violation which the due process exception seeks to remedy remains totally undefined. Thus, one author has argued for the due process exception in terms of balancing potential fifth amendment violations against the right to a trial by jury.[200] This concept sheds no light on the nature of the purported due process violation and contains the additional vice of abrogating one constitutional right to lessen the potential for violation of another. In addition, the cases, deciding both for and against the due process exception, do

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194. Due process prohibits arbitrary deprivations by the government. *See, e.g.*, Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819); Hurtado v. California, 110 U.S. 516, 527 (1884); Twinning v. New Jersey, 211 U.S. 78, 101 (1908); Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972).

195. The question of whether there is an issue of fact for the jury is a preliminary question of law for the court. *See* note 14 *supra*.

196. *See, e.g.*, Chicago, Rock Island & Pac. R.R. Co. v. Houston, 95 U.S. 697, 703 (1877); Herron v. Southern Pac. Co., 283 U.S. 91, 95-96 (1931) (judge governs the trial and is responsible for seeing that it is properly conducted. This responsibility includes granting directed verdicts when necessary); Wilkerson v. McCarthy, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring).

197. 95 U.S. at 703.

198. Galloway v. United States, 319 U.S. 372, 395-96 (1943).

199. 5 MOORE, *supra* note 5, ¶ 50.02[1].

200. *See The Right to an Incompetent Jury*, *supra* note 3, at 798.

not indicate which aspect of jury function allegedly violates due process.[201]

It is not likely that a jury trial of a complex case would, by itself, constitute a denial of due process. There is no deprivation at trial until a verdict is rendered, and, if a reasonable basis for that verdict is present, there is no apparent insufficiency of process. It is simply rash to assume that the jury will ignore the facts and the court's instructions and render its decision at random.[202] In addition, there are procedural devices to control juries if such behavior is anticipated.[203] In cases in which directed verdicts could not have been granted, a litigant who lost at trial could not appeal on the grounds that the presence of the jury had denied him due process. There is no objective basis on which to distinguish cases in which a party might view the jury's verdict as irrational and those in which the jury has simply but rationally decided against him. Due process of law does not mean that disputes may only be resolved in an error-free system of justice. Juries may make mistakes, but that possibility does not violate the litigant's constitutional rights.[204]

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201. *See, e.g., In re* Financial Sec. Litigation, 609 F.2d 411, 427 (9th Cir. 1979) (the allegation was that trying the case to the jury would violate the fifth amendment); 631 F.2d at 1084–85 (jury trials of complex actions would "under some circumstances" violate due process).

202. Wilkerson v. McCarthy, 336 U.S. 53, 62–68 (1949); Aikens v. Wisconsin, 195 U.S. 194, 206 (1904) ("[C]ourts should not assume that juries will fall short of doing their constitutional duty.").

203. *See* notes 239–240 and accompanying text *infra*.

204. Chicago Life Ins. Co. v. Sherry, 244 U.S. 25 (1917).

> Whenever a wrong judgment is entered against a defendant his property is taken when it should not have been, but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights.

245 U.S. at 30; Tracy v. Ginzberg, 205 U.S. 170, 177–78 (1907); Worchester County Trust Co. v. Riley, 302 U.S. 292, 298–99 (1937). Note that this concept of due process allows litigation without violating any party's constitutional rights. Under the due process exception to the right to jury trial, however, one party's guarantee of due process requires the violation of its opponent's seventh amendment right to jury trial. This view, in effect, reads the Constitution to mandate its violation. *See generally* Long Island Water Supply Co. v. Brooklyn, 106 U.S. 685 (1897).

> [T]here is no denial of due process in making the findings of fact by the trier of fact, whether commissioners or a jury, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted by the triers in their appraisal, or other errors in their proceedings.

166 U.S. at 695; Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (due process requires only an opportunity to be heard); Wilson v. North Carolina, 169 U.S. 586, 596 (1898) (due process is violated only when there is "such a plain and substantive departure from the fundamental principles upon which out government is based.").

Perhaps the indefiniteness in the due process exception as presently articulated will be remedied in future decisions.[205] Some theory at due process violation is needed that could not be remedied by a directed verdict and that would be more than an attempt to overturn a loss at trial. Without such a theory, the due process exception is, in effect, only the expression of the litigants' distaste for complex jury trials, not a valid constitutional restriction on the right to trial by jury.

3. The Jury in Complex Civil Litigation: How Bad Is It?

Regardless of the constitutional status of the due process and complexity exceptions to the seventh amendment, it is important to determine whether the removal of juries from complex civil litigation is required as a matter of public policy. Because the right to jury trial could be restricted by constitutional amendment, if in no other way such an investigation is not rendered moot by a finding that a particular argument is invalid. There is no justification for the restriction of the right to a jury trial on any rationale unless there is a factual record that clearly demonstrates the need for reform.

Such a record does not exist at present. In 1934, one commentator stated that "individual opinion [was] the major weapon of attack or defense of the jury." [206] The same criticism can be applied, nearly fifty years later, to the proponents of both the complexity and due process exceptions. Only one case of those denying jury trials on the basis of either rationale supported its decision with any objective evidence showing the action beyond the capacity of a jury.[207] To date, there is no comprehensive data on which to assess the competence of the civil jury in cases of increasing complexity.[208]

The available data is mixed and cannot be read as empirical support for the notion that juries cannot try complex actions competently. In a recent study of modern jury behavior, researchers found that, in general, juries do understand the facts and decide cases in accordance with the evidence presented to them in *both* simple and complex cases.[209] Juries deliberated longer and returned for additional

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205. A considerable portion of the ambiguity in the definition of the due process exception is attributable to the fact that, like the complexity exception, it can only be used before trial.

206. Clark & Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 YALE L. J. 867, 867-68 (1934).

207. *See* 458 F. Supp. at 426, 444.

208. Erlanger, *Jury Research in America—Its Past and Future*, 4 L. & SOC. REV. 345, 347, 349-50 (1970); *The Right to a Jury Trial in Complex Civil Litigation*, *supra* note 3, at 898.

209. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 149-50 (1971) [hereinafter cited as KALVEN & ZEISEL]. Although this study's findings were based exclusively on crimi-

instruction more often in difficult cases.[210] In addition, the study noted that the nature of jury deliberation increases the probability that juries perform competently. It is not necessary that all jurors understand or remember the facts or law with which they must work. It is the collective understanding of the jury that is important in assessing its competence, and if only one juror understands the factual and legal framework, his communication with other jurors can assure the understanding of the jury as a whole.[211]

The importance of the jury's collective understanding and perception has been questioned. Juries are prone to take a preliminary vote immediately upon the start of their deliberations.[212] The party who receives the majority of this vote also wins judgment in ninety percent of all jury cases.[213] Thus, the collective understanding of a jury seems responsible for changing relatively few minds once the jury retires.

Any investigation of jury competence requires the consideration of trial judges' opinions. Because they are exposed to juries so frequently, judges are certainly the most experienced jury observers.[214] In a survey of state trial judges published in 1960, eighty-eight percent of the responses indicated satisfaction with the jury system.[215] Yet this result does not constitute a judicial endorsement of

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nal trials, the results seem to be generally applicable because there is no discernable difference between criminal and civil complexity. This study used judicial behavior as the standard against which it measured jury behavior by comparing the judge's hypothetical verdict against that actually found by the jury. The authors maintains that, if juries had no understanding of the case and thus decided it irrationally, the frequency of agreement between the judge's and jury's verdicts should be approximately 50%, a matter of chance. Their survey, however, revealed an agreement rate of 75%, which indicates that juries do, in fact, decide cases rationally. *Id.* at 46. An earlier study by the one of the two authors produced an 80% agreement in civil actions. Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1064 (1964) [hereinafter cited as Kalven].

210. KALVEN & ZEISEL, *supra* note 209, at 155. The study relied on the judges' opinion in classifying cases as difficult or easy. *Id.*

211. *Id.* at 151. This study properly identifies the jury as a whole, rather than individual jurors, as the proper target for investigation. Studies finding that percentages of jurors failed to grasp legal concepts, therefore, fail to have much significance in evaluating the performance of juries as units. *See, e.g.*, Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUD. 478, 480-81 (1976) (study found, among other things, that only 50% of the jurors understood the presumption of innocence in criminal actions).

212. Erlanger, *Jury Research in America—Its Past & Future*, 4 L. & SOC. REV. 345, 347 (1970) [hereinafter cited as Erlanger]; Kleuorick & Rochschild, *A Model of the Jury Decision Process*, 8 J. LEGAL STUD. 141, 143-44 (1979).

213. *Id.*

214. Note, *With Love in Their Hearts But Reform on Their Minds: How Trial Judges View the Civil Jury*, 4 COLUM. J. L. & SOC. PROB. 178, 182 (1968).

215. *Id.* at 183. Although the sample of judges was not scientifically selected, the study did survey judges from a wide geographic area. *Id.*

jury competence. The judges supported the jury system because, in their opinion, it inspired public confidence in the judicial system and helped incorporate community standards in the process of dispute resolution.[216] Although over half of the judges thought that juries decided cases by irrational means,[217] the studies comparing actual jury verdicts to hypothetical decisions from the bench, show that judges do not routinely attribute disagreements to jury incompetence.[218] One federal judge has written that, in his opinion, the jury's presence actually improves fact-finding by requiring both counsel and judges to "streamline, clarify, and teach." [219] Another judge has blamed jury confusion on the lack of clarity in the law and the inability of lawyers and judges to present complex facts and legal concepts to juries clearly, rather than on any deficit in jury comprehension.[220]

This observation is supported by one actual juror's experience. Although he observed no serious difficulty in his jury's capacity to understand the evidence,[221] he felt that the jurors had been "kept intentionally ignorant of the law," [222] and were unsure of the proper extent to which their deliberations should go.[223] This juror thought that the other jurors generally used good judgment and considered evidence in accordance with their instructions, but he also noted that, as deliberations continued, there was a "gathering push" toward a decision.[224]

There are no conclusions to be drawn from these studies. The difference in methods and types of cases studied makes it impossible to

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216. *Id.* at 186-87.

217. *Id.* at 189. In addition, 43% of the judges believed the juries reached their verdicts by "improper compromise," and 17% thought that juries did not follow the law. *Id.*

218. KALVEN & ZEISEL, *supra* note 209, at 152-53 (author of the study attributed the discrepancy to the jury's desire to do equity, not its incompetence); Kalven, *supra* note 209, at 1064.

219. 478 F. Supp. at 955.

220. L. Joiner, Judge's Comment, in THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 151, 154-55 (Simon ed. 1975) [hereinafter cited as Joiner]. The author sits on the federal bench in the eastern district of Michigan.

221. Schott, *Trial by Jury: Reflections of a Juror*, 13 TRIAL No. 5, 56 (1977) [hereinafter cited as Schott]. The author was empaneled as a juror in a trial in which the issue was the validity of a tax assessment scheme under a state constitution. *Id.* at 56. The jury's instruction required it to consider 27 special issues. *Id.* at 59.

222. *Id.*

223. The author also stated that he felt overly restricted by the judge's repeated reminder that the jury was only a factfinder. *Id.* Some commentators, however, have suggested that jury deliberations can be improved by restricting the process by which a verdict is reached. *See, e.g.*, Strawn, *Reaching a Verdict—Step-By-Step*, 60 JUD. 383, 385-87 (1977). This writer proposes that juries be given detailed instructions, a list of the proper steps in the specified order required to properly decide an issue of fact. *Id.*

224. Schott, note 221 *supra*.

compare the various results in any meaningful way. In addition, it is fair to say that none of these studies dealt with cases of the complexity discussed elsewhere in this note.[225]

The lack of empirical evaluation of the civil jury's competence must be remedied if any restrictions on the right to jury trial are to be based firmly on fact. The right to a trial by jury is not simply a policy that may be changed whenever it is perceived as inadequate. It is constitutionally guaranteed. If that guarantee is to be removed or abridged, the very least that should be required is that the jury be clearly shown to cause some injustice and that a preferable alternative is available.

C. *Alternatives and Solutions*

This note does not argue that there are no difficulties with the civil jury's performance in complex civil litigation. It is clear that there are problems which may very well preclude the optimal functioning of juries in such trials.[226] Nevertheless, it is pointless to argue for the removal of the jury from such trials on any rationale unless the judicial system has something better to offer.

The obvious alternative is a bench trial. There is, however, no reason to conclude that judges are necessarily better fact-finders than juries in complex litigation.[227] Although critics of the jury point to several advantages of bench trials as compared with jury trials,[228] the advantages would not necessarily contribute to better decisions in complex cases. It is not clear, for example, that access to a daily transcript of litigation in which discovery alone lasted for nine years [229] would clarify issues and therefore lead to better judicial fact-finding. One commentator, having stated that judges were no more capable of deciding cases involving huge amounts of evidence than juries, has questioned whether such disputes are judicially resolvable at all.[230]

In cases requiring specialized knowledge of scientific or financial matters, there is no reason to assume any special judicial expertise,[231]

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225. *See* note 6 *supra*.

226. *See, e.g.*, note 4 *supra*.

227. 478 F. Supp. at 934-35; Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 53-54 (1977) [hereinafter cited as Higginbotham].

228. *See, e.g., In re* Boise Cascades Sec. Litigation, 420 F. Supp. 99, 104-05 (W.D. Wash. 1976) (courts can try complex suits better than juries because of prior experience in such trials, access to daily transcripts, reporter's notes, and to evidence which can be thoroughly examined).

229. 478 F. Supp. at 897.

230. Higginbotham, *supra* note 227, at 54.

231. *Id.* at 53-54; 478 F. Supp. at 934-35.

and it may, in fact, be advisable to grant jury trials. Some writers, noting that evidentiary rules are not usually observed rigidly in bench trials,[232] argue that the presence of juries forces counsel to organize and present complicated matters more clearly, thus contributing to better decision-making.[233]

There are a number of procedural devices within the federal rules of civil procedure and evidence, which can help to improve the performance of the jury in complex litigation. In cases involving complex issues or a large volume of evidence, courts may ask litigants to summarize documents in a form more easily understood than the original.[234] Complex issues may also be referred to special masters under the Federal Rules of Civil Procedure.[235] This procedure does not encroach on the jury's role as fact-finder, because the magistrate's findings are presented as expert testimony, not a judicial determination of fact.[236]

Special verdicts require the jury to answer specific questions in addition to rendering their general verdict.[237] The answers to these questions can illuminate the quality of the jury's deliberations and protect litigants from judgments based on incorrect assumptions or findings of fact.[238]

There are also some procedural devices which may be used to increase the efficiency of the jury not directly connected with its deliberations. A motion *in limine*, for example, allows the pretrial adjudication of evidentiary objections and requests for orders restricting opposing counsel from asking prejudicial questions.[239] Such an action not only spares the jury from having to sit through the resolution of these matters at trial, but also eliminates the confusion and prejudice accompanying any evidence which is ultimately stricken.[240] One federal judge has sought to maintain the jurors' attentiveness by periodically leading them in calisthenics.[241] None of these procedural devices is a panacea for the problems of the jury in complex civil litigation. They are offered only as illustrations of the

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232. Higginbotham, *supra* note 227, at 54.
233. *Id.*
234. FED. R. EVID. 1006.
235. FED. R. CIV. P. 53(b); Note, *Jury Trials in Complex Litigation*, 53 ST. JOHN'S L. REV. 751, 760 (1979) [hereinafter cited as *Jury Trials*] (summarizing the procedural devices available to expedite jury consideration of complex matters).
236. *Id.*
237. FED. R. CIV. P. 49; *Jury Trials*, *supra* note 235, at 759.
238. *Jury Trials*, *supra* note 235, at 759.
239. P. CORBOY, LAWYERS PERSPECTIVE–FROM THE BAR IN THE JURY SYSTEM IN AMERICA: A CRITICAL OVERVIEW 189 (T. Simon ed. 1975).
240. *Id.*
241. *See* Joiner, *supra* note 220, at 153.

proposition that the creative use of procedure can be an aid to the jury's understanding of difficult matters.

Special juries have been proposed as a device to expedite complex civil trials.[242] Special jurors are chosen for qualifications that enhance their ability to understand the substance of the litigation which they are empaneled to try.[243] Because the special jury has an extremely long common law history,[244] it is unlikely to be challenged on seventh amendment grounds.[245] The decisions rendered by special juries have long been acknowledged as superior to those of lay juries,[246] and have been used in the United States.[247]

Finally, access to jury trials in complex cases has, in many instances, been granted by the legislature, not mandated by the Constitution.[248] In antitrust suits, for example, jury trials are available only when a private party sues for treble damages.[249] If Congress amended a particular statute to eliminate a private cause of action for damages, and substituted an equitable form of relief, a jury trial of suits brought under that statute would no longer be an issue.[250] In matters of public rights, Congress may delegate enforcement to administrative agencies which may find facts without a jury and without violating the seventh amendment.[251]

III. CONCLUSION

The jury may, in fact, have difficulty coping with the rigors of complex civil litigation, but the nature and extent of the problem has not been determined at present. Empirical study of the jury's per-

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242. *See, e.g., The Case for Special Juries in Complex Civil Litigation*, 89 YALE L. J. 1185 (1980) (recommends amendment of the Federal Jury Selection & Service Act of 1968, 28 U.S.C. §§ 1861-1875 (1976), to allow special juries) [hereinafter cited as *Special Juries*]; Thatcher, *Why Not the Special Jury*, 31 MINN. L. REV. 232, 260 (1946) [hereinafter cited as Thatcher] (recommends the use of special juries in commercial litigation).

243. *See The Right to Jury Trial in Complex Civil Litigation*, *supra* note 4, at 915; Thatcher, *supra* note 242, at 237.

244. *Special Juries*, *supra* note 242, at 1163-66; Thatcher, *supra* note 242, at 234-39.

245. *Id.*

246. Thatcher, *supra* note 242, at 239-40.

247. *Id.* at 254 (in Arkansas—for litigation relating to securities and banking; in Virginia—for cases of exceptional complexity or importance; in New York—for cases of public interest).

248. Higginbotham, *supra* note 227, at 54.

249. 5 MOORE, *supra* note 20, at ¶ 38.37. The Supreme Court has ruled that the seventh amendment applies to all legal rights granted by the statute if enforceable in an action for damages. Curtis v. Loether, 415 U.S. 189, 194 (1974).

250. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1936); 415 U.S. at 194-95.

251. *See, e.g.*, Katchen v. Landy, 382 U.S. 323 (1965).

formance in complex actions is required before there is a convincing objective basis for removing the jury from complicated litigation.

Regardless of the underlying factual record, however, neither the complexity nor the due process exceptions are promising approaches to the contraction of the right to a jury trial. The complexity exception has only a narrow historical foundation, and its application in federal court can be accomplished only in derogation of the rationale underlying the Supreme Court's post-merger interpretation of the seventh amendment. The due process exception is far too nebulous at present to constitute an adequate rationale for restricting the seventh amendment's scope.

These arguments do not necessarily exhaust the potential inherent in the third element of the *Ross* test for removing the jury from complex litigation. Any argument based on the *Ross* test, however, must be consistent with the nature of the issues approach, the Supreme Court's approach to a jury trial in the merged federal court system, and the seventh amendment. Before the constitutional guarantee of jury trials is restricted in any way, those seeking that restriction must establish a firm basis in fact and proceed in a manner consistent with the Constitution.

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