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United States v. Tull: The Right to Jury Trial Under the Clean Water Act-The Jury is Still Out

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I. INTRODUCTION

Trial by jury is an integral feature of the American judicial system,[1] providing a legal structure in which citizens actively participate in the process of adjudication.[2] By community participation, the jury makes "fair" the stringency of certain decisions[3] and provides a significant civic experience for the citizen.[4] More importantly, however, the jury is a key feature in the separation of powers[5] doctrine because

1. The civil jury's function is to apply the facts (as presented in evidence during the trial) of a particular case to the law (as the judge expresses the law in his instructions to the jury), in order to reach a decision regarding the defendant's liability. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation,* 128 U. PA. L. REV. 829, 833-36 (1980).

2. Popular participation in the administration of justice contributes to the characteristically high regard Americans have for the law. A. DE TOCQUEVILLE, *Trial by Jury in the United States as a Political Institution,* in DEMOCRACY IN AMERICA 291-97 (J. Bradley ed. 1966) (1st ed. Paris 1835), *cited in* R. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY 6-7 (1980).

3. Zeisel, *The American Jury,* in THE AMERICAN JURY SYSTEM FINAL REPORT 65, 67 (1977).

4. *Id.* at 66.

5. The influence of the seventh amendment on the federal Constitution makes the jury an essential factor in the structure of the process that the Constitution provides. Byrd v. Blue Ridge Rural Elec. Co-Op, 356 U.S. 525 (1958). In this state workman's compensation suit brought in the federal courts under diversity jurisdiction, the district court denied the injured worker a jury trial. The Supreme Court held that the strong federal interest in preserving the jury system precluded application of a state rule denying jury trial. The Court explicitly reached this result even though, under the *Erie* doctrine, federal courts must respect the definition of rights created by the state courts in diversity actions. *Id.* at 535-36.

it provides a popular check on the three branches of government.

The framers of the Constitution allocated power among the legislative, executive, and judicial branches, diffusing this power through a system of checks and balances. Although the framers, by granting life tenure and protected salaries to judges,[6] intended to make the judiciary the most independent of the three branches,[7] there is a popularly perceived danger that the legislative and executive branches may unduly influence the judiciary.[8] For example, a sense of subservience may coerce judges to rule in favor of the views of the president who appointed them. Similarly, majoritarian outrage may compel judges to decide cases in a way oppressive to discrete minorities.[9] This is of particular concern when the government brings suit to enforce a legislative enactment. One of the primary reasons for establishing the jury system in the constitutional scheme was to offset this possible oppression by the judiciary.[10] The jury in such an instance acts as the only check (other than the extraordinary measure of impeachment) on a potentially oppressive judiciary. The jury functions as a fourth branch of government (traditionally the role assigned to the press[11]), preventing potential abuses and diffusing the judge's possible reluctance to take an unpopular position by reaching a verdict different from that which the judge might be willing to reach. The jury restores community values to the inherently arbitrary process of decision making.[12] The framers conceived the jury as fulfilling just such a

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6. U.S. CONST. art. III.

7. THE FEDERALIST No. 78, at 394 (A. Hamilton) (G. Wills ed. 1982).

8. *See generally* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653-71 (1973).

9. Although given life tenure, federal judges are clearly open to political pressure from the executive branch (troublesome because of the close relationship and potential for psychological subservience) and from so-called "public opinion" (the tyranny of the majority, which so concerned the framers in setting up the democratic system of government). The antifederalists brought home this point during the ratification debates. *See* Wolfram, *supra* note 8, at 695. During the journalistic battle between federalists and antifederalists, Judge Bryan (an antifederalist) wrote that government appointed judges will have

> a bias toward those of their own rank and dignity; for it is not to be expected, that the *few* should be attentive to the rights of the *many*. This therefore preserves in the hands of the people, that share which they ought to have in the administration of justice, and prevents the encroachments of the more powerful and wealthy citizens.

Id. at 695-96 (quoting Bryan, *Letters of Centinell II*, Freemans J., Oct. 24, 1787).

10. *Id.* at 653-71.

11. Our constitutional structure explicitly guarantees freedom of the press in order to act as "an additional check on the three official branches." Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631, 634 (1975).

12. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 58 (1977).

function in both criminal and civil trials.[13] Moreover, the history of the jury suggests this as its main function:[14] the framers designed the jury system to provide an important bulwark against the possibility of government oppression.[15]

The Constitution protects the right to a jury trial through the seventh amendment, which guarantees the right in civil cases.[16] Because the seventh amendment applies only to suits at common law, however, equitable actions are deemed outside its scope.[17] Accordingly, courts deny a jury trial when the suit is characterized as equitable.

A tattered remnant of English common law, the law and equity distinction makes little sense today. It was originally a jurisdictional distinction, which the merger of the courts of law and equity has now rendered moot.[18] The scope of the common law has changed radically over time[19] and the once rigid "forms of action" have long since disappeared. Legislatures have added new causes of action and expanded the law in unprecedented ways.[20]

The law and equity distinction is especially troubling in the environmental area, where the courts have categorized entire statutes, such as the Clean Water Act (FWPCA), as equitable.[21] The FWPCA

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13. B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983-1167 (1971).

14. *Id.* at 3-16. The struggle to empower the jury and limit the incursions of the Crown through the judiciary has been exemplified in statutory form through the Magna Carta and succeeding predecessors to the American Bill of Rights. One of these predecessors was the English Bill of Rights of 1689. *See id.* at 3.

15. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (Rehnquist, J., dissenting). Using the courts to perpetuate government tyranny was a significant cause of the American revolution. Patriots denounced the English governors' use of vice-admiralty courts for trial of criminal and civil matters as an illegitimate method of circumventing the right to jury trials. *See* Wolfram, *supra* note 8, at 653-56 & n.47.

16. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

17. The seventh amendment embraces all suits that are not of equity or admiralty jurisdiction. Insurance Co. v. Comstock, 83 U.S. (16 Wall.) 258, 269 (1873).

18. Equity courts had jurisdiction only when there was no recourse in the King's courts. Because the rigid forms of action precluded litigation of many grievances, the equity courts developed as an independent, parallel judiciary with their own jurisprudence. C. LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY 146-47, 166, 218-23 (1962).

19. "[T]he common law adopts itself by a perpetual process of growth to the perpetual roll of the tide of circumstances as society advances." W. EARLE, MEMORANDUM ON THE LAW RELATING TO THE UNITED STATES (1869), *quoted in* Danzig, Hadley v. Baxendale: *A Study in the Industrialization of the Law,* 4 J. LEGAL STUD. 249, 252 n.10 (1975).

20. For example, the Age Discrimination Act created new legal rights and remedies, enforceable in an action for damages. 29 U.S.C. § 621 (1982); *see* Quinn v. Bowmar Publishing Co., 445 F. Supp. 780 (D. Md. 1978).

21. For example, the Supreme Court held "the scheme [of the FWPCA] as a whole contemplates the exercise of discretion and balancing of equities . . . ." Weinberger v. Romero-Barcelo, 456 U.S. 305, 316 (1981) (holding that because the FWPCA permitted the exercise of

does not include a private right of action; the government prosecutes all cases. When the government initiates suits, the potential for government abuse increases, and thus the role of the jury becomes even more critical. Nonetheless, by deeming FWPCA actions to be "equitable in nature," the judiciary effectively has denied defendants their right to a jury trial. Such a characterization of the FWPCA appears highly arbitrary.

The Supreme Court will confront this issue in *United States v. Tull*.[22] In *Tull*, the trial court found, and the Fourth Circuit affirmed, that there is no right to a jury trial under the FWPCA.[23] This result is questionable at best. The Fourth Circuit improperly applied tests that the Supreme Court had previously enunciated for determining the right to a jury trial.[24] The Supreme Court of the United States, having granted certiorari,[25] will soon review the reasoning and result of the Fourth Circuit and will have the opportunity to determine conclusively whether a defendant is entitled to a jury trial in an action by the United States to recover a statutory penalty under the FWPCA.

This Note disputes the Fourth Circuit's reasoning and conclusion on the jury trial question in *Tull* and suggests a more appropriate analytic framework to resolve the question. Part II discusses the factual background and the Fourth Circuit's "analysis" in *Tull*. Part III examines the tests available to the Fourth Circuit in assessing the right to jury trial for statutory civil penalties actions. It argues that *Tull* confirmed a recent and troubling erosion of established principles that courts used to determine a defendant's right to a jury trial in suits

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a court's equitable discretion, the issuance of an injunction was not mandatory). Similarly, a district court stated "there is no right to a trial by jury in an action brought by the United States pursuant to the Clean Water Act, even in those cases wherein the government seeks the imposition of a civil penalty." United States v. Ferro Corp., 627 F. Supp. 508, 510 (M.D. La. 1986).

The courts have also construed the Superfund Act, 42 U.S.C. §§ 9601-57 (1982), as precluding the right to jury trial. "The Court does not agree with [the defendant's] characterization of the United States suit against it as being legal rather than equitable." United States v. Reilly Tar & Chem. Corp., 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,897 (D. Minn. 1983) (holding that the defendant, in a suit the government brought under the Superfund Act, was not entitled to a jury trial). "The Seventh Amendment does not provide a right to a jury trial 'if viewed historically the issue would have been tried in the courts of equity . . . .' Judge Wright's Seventh Amendment analysis of the CERCLA Statutory Scheme followed the unanimous decisions of other courts faced with the same issue." Maryland Casualty Co. v. Armco, Inc., 643 F. Supp. 430, 432 (D. Md. 1986) (citation omitted).

22. 769 F.2d 182 (4th Cir. 1985), *cert. granted*, 106 S. Ct. 2244 (1986). For a discussion of the facts, see *infra* Section II(A).

23. United States v. Tull, 615 F. Supp. 610 (E.D. Va. 1983), *aff'd*, 769 F.2d 182 (4th Cir. 1985), *cert. granted*, 106 S. Ct. 2244 (1986).

24. *See infra* Section III.

25. 106 S. Ct. 2244 (1986).

asserting a statutory cause of action. Part IV proposes that the Fourth Circuit's analysis in *Tull* is poorly reasoned and merely conclusory. Further, it argues that the Fourth Circuit inexplicably failed to apply the Supreme Court's enunciated tests and concludes that if it had properly applied these tests, the court would have reached a different conclusion. Part V suggests a purposive analysis test for determining seventh amendment rights when the government initiates statutory civil penalties actions. Finally, Part VI concludes that the Supreme Court should reverse the judgment below and use the case as a vehicle for reaffirming the constitutional role and function of the jury as an institution established to protect citizens from arbitrary or oppressive government actions.

II. *United States v. Tull*

A. *Factual Background*

In 1976, Edward Tull, an experienced real estate developer, planned to develop three properties on Chincoteague Island off the coast of Virginia. To avoid problems with the United States Army Corps of Engineers (the Corps),[26] Tull retained a civil engineer and an attorney to advise him whether his plan to fill certain ditches on his property would encroach on "wetlands" or "navigable waters" subject to the Corps's jurisdiction. They assured him that the ditches were not protected wetlands because they were located above the mean high water mark.[27] Tull requested and obtained an inspection by Corps officials. He modified his plans to avoid the only two encroachments that the Corps had identified.

Tull proceeded to develop the sites over the next five years in accordance with the advice his civil engineer and attorney gave him. Throughout that period, the Corps maintained surveillance both on the ground and by aerial observation and photography. At no time did the Corps advise him that his work had encroached upon "wetlands" or other "navigable waters" over which the Corps asserted jurisdiction. By mid-1981, Tull had substantially completed the three developments and had sold most of the developed lots to third parties. At that point, the Corps, on behalf of the United States, filed suit against Tull. The complaint alleged that Tull had filled "wetlands" that constituted protected areas within the meaning of section 301(a) of the Clean Water Act, without first obtaining the statutorily

26. The Corps had twice before sued Tull, apparently claiming that prior developments had encroached on wetlands and other navigable waters. United States v. Tull, No. 75-319-N (E.D. Va. Nov. 12, 1975); United States v. Tull, No. 73-304 (E.D. Va. Mar. 21, 1974).

27. *Tull*, 769 F.2d at 186.

required permits. The Corps later amended the complaint to add an allegation that Tull had also filled a shallow channel that had been navigable within the meaning of the Act. The complaint sought injunctive relief as well as civil penalties in the amount of $10,000 per day per violation (a potential liability of $22,890,000). The court early recognized that injunctive relief was inappropriate with respect to the property that Tull had sold and the government did not thereafter seek significant injunctive relief.[28]

Tull argued four defenses. First, Tull claimed that the Corps had exceeded its powers under the Act by defining navigable waters to include adjacent wetlands beyond the mean high water mark supporting vegetation typically found in saturated areas. Moreover, Tull claimed that applying such a definition under the statute constituted a taking without just compensation within the meaning of the fifth amendment.[29] Additionally, Tull asserted that the government was equitably estopped by the action and inaction of the Corps before and

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28. The Corps sought injunctive relief only for the 6,000 square foot parcel of land still remaining in Tull's possession. *Tull*, 615 F. Supp. at 627.

29. Statutory interpretation that has the effect of narrowing constitutional rights requires a "searching judicial inquiry." United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). The judicial restriction of seventh amendment rights by interpreting the FWPCA as equitable, and thereby precluding jury trials under the Act, is such a constriction. This equitable categorization gambit deprives such defendants of their civil liberties. Such a deprivation is particularly crucial where the effect is to deny the defendants full use of their property (wetlands regulation precludes use of property so defined), to relieve them of their property (civil fines are levied under the statute), as well as to take away their constitutional right to jury trial.

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1971).

The Sixth Circuit examined the impact of a novel wetlands definition in United States v. Riverside Bayview Homes, 729 F.2d 391 (6th Cir. 1984). There, the court determined that a narrow interpretation of a regulation that defined the term "wetlands" was necessary in order "to avoid serious questions concerning the validity of the definition itself under the Act." *Id.* at 397. The court pointed out that the statute itself makes no reference to " 'lands' or 'wetlands' or flooded areas at all." *Id.* Furthermore, the court noted a

> very real taking problem with the exercise of such apparently unbounded jurisdiction by the Corps, a problem we avoid by construing the regulation containing the amended wetlands definition as limited to lands such as swamps, marshes, and bogs that are so frequently flooded by waters from adjacent streams and seas subject to the jurisdiction of the Corps that it is not unreasonable to classify them as lands which frequently underlie the "waters of the United States."

Id. at 398.

throughout the development of the property.[30]

Tull's final defense bore directly upon his claim that he was entitled to have a jury determine his liability. Tull claimed that at the time he filled the ditches, the lands were not wetlands within the meaning of the FWPCA, even within the expanded definition the Corps had adopted. In order to find for the government, the trial court would have had to find as a matter of law that the land in question was "wetlands" within the meaning of the Act. Such a conclusion, however, would only be appropriate after the fact finder specifically determined that the land possessed certain characteristics that the courts have deemed indicative of wetlands under the statute. Those characteristics include soil and vegetation types.[31] Both sides presented conflicting testimony concerning the capacity of the affected lands to support a prevalence of vegetation adapted for life in saturated soil conditions, and whether that capacity had been destroyed prior to 1976. Because the experts' testimony so vastly differed, the district court appointed its own expert to examine the lands, as well as conducted a viewing of the filled areas.[32] Tull argued that he ought to have been allowed to submit this factual and credibility dispute to a jury, rather than to the court. Finally, Tull claimed that the equities of the case in any event made the imposition of substantial civil penalties inappropriate, and that the amount, if any, was also a matter for the jury to determine.

The district court, however, denied Tull's demand for a jury trial. The court ruled that the remedies that the Act authorized were equitable in nature, even the imposition of civil penalties. During the course of an extensive bench trial, the judge threatened Tull with severe penalties if he failed to settle and if the judge found Tull had violated the Act.[33] The judge ruled for the government on all legal and factual issues[34] and assessed penalties amounting to $325,000. The court of appeals affirmed. Tull petitioned the Supreme Court to

30. Tull argued that in filling his ditches, he followed directions that the Corps had given him, and that "the Corps stood by and watched in silence until the government brought suit in 1981." *Tull*, 769 F.2d at 187.

31. As noted previously, the statute itself does not define wetlands. *See supra* note 28 (discussion of wetlands definition). The administrative definition includes areas which are inundated or saturated with ground water so that the prevalent vegetation is that typical of swamps, marshes, and bogs. 33 C.F.R. § 323.2(c) (1984); *see also Tull*, 769 F.2d at 184.

32. *See Tull*, 769 F.2d at 185. Counsel for both parties, as well as the court, used experts to establish the type of soil present at the site, a factual issue that would lay the predicate for the legal determination of whether the areas in question could be defined as wetlands. *Tull*, 615 F. Supp. at 610.

33. Brief for the Petitioner at 13-14, United States v. Tull, 106 S. Ct. 2244 (1986) (No. 85-1259).

34. The district court concluded that there was sufficient evidence to determine that the

consider both the jury trial issue and the equitable estoppel issue. The Court, however, granted certiorari only on the jury trial issue.[35]

B. *The Reasoning*

The Fourth Circuit based its denial of a right to jury trial on three propositions, all of which are unsound.[36] First, the court noted that the FWPCA confers equitable power (that is, the statute is not "at common law") and thus does not fall within the scope of the seventh amendment.[37] Second, the court concluded that the penalties exacted under the FWPCA are not remedies "at law."[38] Third, the court found that even if civil penalties are generally categorized as legal remedies, because the Clean Water Act provides a "package" of legal and equitable remedies, they lose their legal nature.[39]

Although the *Tull* court acknowledged that the proper test for applying the seventh amendment is whether the action is "in the nature of an action existing at common law when the [seventh] amendment was adopted,"[40] it did not analyze the statutory civil penalty actions at issue in *Tull* under this test. Additionally, the court rejected Tull's argument that seventh amendment rights inhere to suits brought by the government for civil penalties finding that the "Supreme Court has left open the question whether . . . the seventh amendment has no application to government litigation at all."[41] Thus, the court implied that the seventh amendment may be precluded in all suits brought by the government.

This is the full extent of the Fourth Circuit's analysis.[42] Not only

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filled areas were wetlands and that the canal "was navigable in fact" prior to Tull's development. *Tull*, 769 F.2d at 185.

35. 106 S. Ct. 2244 (1986).

36. Even divining these points from the court's opinion took extraordinary effort because the court confused these issues in a manner calculated to defy rationality. *Tull*, 769 F.2d at 186-87.

37. The court summarily rejected the defendant's argument that the right to jury trial attached to statutory civil penalties actions, and questioned whether the seventh amendment applied "to government litigation at all." *Id.* at 186-87.

38. The civil penalties were found to be "within the court's discretion; the government is not suing to collect a penalty analogous to a remedy at law, but is asking the district court to exercise statutorily conferred equitable power in determining the amount of the fine." *Id.* at 187.

39. *Id.*

40. *Id.* at 186.

41. *Id.* at 187

42. The district judge sitting with the Fourth Circuit vehemently dissented, pointing out that not only did the circumstances of *Tull* fit all the elements of equitable estoppel, but the court in its unreasoned opinion neglected clear precedent on the right to jury trial issue. *Id.* at 188-94. According to the dissent, the majority misinterpreted the scope of the right to jury trial under the seventh amendment. "It is the equity judge's discretion whose borders are

is its analysis incomplete and conclusory, but its reasoning has further clouded an already murky area of the law. Moreover, the court's opinion failed to address the underlying problems inherent in the law and equity distinction. Perhaps most significantly, the court compounded its errors by its complete failure to correctly apply the law that the Supreme Court had earlier enunciated.[43]

III. TESTS TO DETERMINE THE RIGHT TO JURY TRIAL UNDER THE SEVENTH AMENDMENT

The Supreme Court of the United States has created a set of historical tests to determine when the right to jury trial inheres in civil cases. These tests include the historical analysis to which the *Tull* court merely alluded and subsequent variations of the test as the Court set forth in *Beacon Theatres v. Westover*,[44] *Dairy Queen v. Wood*,[45] *Ross v. Bernhard*,[46] and *Curtis v. Loether*.[47] Finally, there is an even more compelling test—the purposive analysis test[48]—which best clarifies the analysis needed to resolve the jury trial issue. This section examines these tests for the purpose of setting up a framework of factors to use in testing the validity of the *Tull* court's opinion.

The courts have consistently applied the historical test, which Justice Story first established in *United States v. Wonson*.[49] This test asks whether the rights and remedies being litigated would have been afforded a jury trial in 1791.[50] The difficulty with this analysis, however, is that the line between law and equity has never been distinct. Cases characterized as equitable in one locale were often characterized as legal in another.[51] Furthermore, before the merger of law and equity, it was commonly recognized that the common law was not

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limited by the right to a jury trial, and not the reverse as the majority would have it." *Id.* at 192-94.

43. *See infra* Section IV.

44. 359 U.S. 500 (1959).

45. 369 U.S. 469 (1962).

46. 396 U.S. 531 (1970).

47. 415 U.S. 189 (1974).

48. This test, which Justice (now Chief Justice) Rehnquist created in his dissent in Parklane Hosiery Co. v. Shore, has not achieved universal recognition. 439 U.S. 322 (1979) (Rehnquist, J., dissenting). It is, nonetheless, the most worthwhile test to resolve this issue because it examines the purposes of the right to jury trial within specific factual contexts.

49. 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

50. *See id.* at 750.

51. *See* Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 101-04 (1980). In fact, one commentator cited the high degree of variance among the states in granting jury trials in civil cases as one reason the framers did not establish such a right in the original draft of the Constitution. See B. SCHWARTZ, *supra* note 13, at 473.

intractable, but responsive to varying conditions.[52] Equity, on the other hand, was available only if there was no adequate remedy at law.

The question of whether a claim was legal or equitable was originally jurisdictional; courts of law and courts of equity were separate until the merger of law and equity in 1938. Because the merger of the courts of law and equity rendered the jurisdictional issue moot, the courts now focus solely on the remedy in making the law and equity distinction. Even assuming federal statutes were not "at common law," the mixture of remedies under statutes such as the FWPCA (injunctive and monetary relief), makes such an assessment problematic.[53] The Supreme Court, however, has enunciated standards modeled after the historical approach of *Wonson*, that it has employed in making this distinction.

The Supreme Court's seminal post-merger confrontation with the jury trial issue came in *Beacon Theatres v. Westover*.[54] *Beacon Theatres* involved an antitrust controversy. The owner of a theater, holding exclusive rights to show "first run" films in a designated area for a specified period of time, sued for a declaration that such an arrangement did not violate the antitrust laws. The theater owner also asked for an injunction pending resolution of the litigation to prevent his competitor from instituting any action against him under the antitrust laws. The competitor filed an answer, a counterclaim against the theater owner, and a cross claim against a film distributor who had intervened. The competitor asked for treble damages and charged antitrust law violations. The district court rejected the competitor's demand for a jury trial of the factual issues involved because

52. Dimick v. Schiedt, 293 U.S. 474 (1935).

53. The statute provides for civil actions as follows:

> **Civil Actions**. The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under section (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.
>
> . . . .
>
> **Civil penalties**. Any person who violates sections 1311, 1312, 1316, 1317, 1318, 1328 or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

33 U.S.C. § 1319(b), (d) (1982).

54. 359 U.S. 500 (1959).

it deemed the issues raised "equitable" rather than "legal." The competitor then filed a petition in the Ninth Circuit for a writ of mandamus directing the district court to vacate its order. The Ninth Circuit denied the petition and the plaintiff petitioned the Supreme Court for a writ of certiorari.[55]

Modifying the *Wonson* historical test, which looked to the character of the entire case, the Supreme Court focused on the legal or equitable nature of each issue.[56] The Court found that *Beacon Theatres* involved *both* legal *and* equitable issues. In such a case, the Court held that a court must afford a jury trial on any legal issues.[57]

Although the Court ostensibly applied an historical test in *Beacon Theatres*, its analysis nevertheless represented a striking departure from history. It extended the law and equity distinction to statutory remedies despite the Court's earlier position that all statutory actions were at law.[58] The effect of the *Beacon Theatres* decision was to retain the distinction between jury and nonjury issues despite the substantial procedural reform that the merger of law and equity had accomplished. *Beacon Theatres* does not purport, however, to demonstrate how to distinguish between legal and equitable issues.

The Court's subsequent use of the historical test in *Dairy Queen v. Wood*[59] also failed to identify a fundamental boundary between law and equity. The Court simply placed a gloss on the historical test by

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55. *Id.* at 501.

56. The opinion describes the purpose of the merger of law and equity under the Federal Rules of Civil Procedure as being to effect substantial procedural reform while *retaining* the distinction between jury and nonjury issues. Thus, it is now necessary to determine whether the substantive rights being litigated are jury or nonjury issues. Although it would appear that such a distinction could as plausibly be factual/legal, in practice, courts base their assessment of the right to jury trial on equitable/legal distinctions. Courts generally accomplish this by examining whether the remedy sought would be available at law before the merger of law and equity. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). In a different factual context, the Court made the equitable/legal distinction by determining that, because actions for recovery of property were traditionally at law, such an action brought under the District of Columbia Code required a jury trial. Pernell v. Southall Realty, 416 U.S. 363 (1974). The Court also focused on the nature of the issues involved in defining whether there was a right to jury trial. *See id.* at 364. Because the statutory provisions of the FWPCA contain both legal (monetary relief) and equitable (injunctive relief) issues, under the precedent of *Beacon Theatres* and *Pernell*, courts must afford a jury trial for the legal issues.

57. Although *Beacon Theatres* explicitly required common issues of fact to be tried first to a jury, the Court later retreated from that position in Katchen v. Landy, 382 U.S. 323 (1966). In *Katchen*, the Court held that *Beacon Theatres* was no more than a general prudential rule and that a bankruptcy court could try equitable issues prior to the legal claims. The effect of the Court's decision was to collaterally estop adjudication of factual issues, which would have been tried to a jury if tried first. However, the Court limited *Katchen* to administrative adjudications in Curtis v. Loether, 415 U.S. 189, 197 (1974).

58. Dimick v. Schiedt, 293 U.S. 474 (1935).

59. 369 U.S. 469 (1962).

shifting the focus from issues to remedies. *Dairy Queen* presented an action for breach of a written trademark licensing agreement. The plaintiffs sought temporary and permanent injunctions to restrain the defendant from using the trademark or collecting money from stores in the territory carrying the trademark. The defendant raised affirmative counterclaims under antitrust and contract law. The trial court denied the plaintiff's demand for a jury on the alternative bases of the action being "purely equitable" or the legal issues being "incidental" to the equitable issues.[60] Finding that the claims, in effect, amounted to a request for a money judgment, the Supreme Court reversed. The Supreme Court held that when a litigant seeks a money judgment, the claim is "unquestionably legal."[61] The Court stated:

> At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury—that based upon the view that the right to trial by jury may be lost as to legal issues where those issues are characterized as "incidental" to equitable issues—for our previous decisions make it plain that no such rule may be applied in the federal courts.[62]

Thus, when both legal and equitable issues are presented in a single case, the court must submit the legal issues to a jury upon a litigant's assertion of his right.[63] The *Dairy Queen* test requires that a request for a money judgment, however phrased, automatically entitles a claimant to a trial by jury.

In *Ross v. Bernhard*,[64] the Supreme Court developed a test that synthesized the *Wonson*, *Beacon Theatres*, and *Dairy Queen* branches of the historical analysis. At issue in *Ross* was the right to a jury trial in a shareholder derivative suit where the shareholders contended that the directors of a corporation had converted corporate assets and mismanaged corporate funds. The Court held that the right to a jury in derivative actions attaches to those issues that would have entitled the corporation to a jury if it had sued in its own right.[65] The *Ross* Court determined that when both equitable and legal claims are before a court, the right to a jury trial depends on 1) the custom before the merger of law and equity; 2) the nature of the remedy sought; and 3) the practical abilities and limitations of juries.[66]

The Supreme Court created the *Ross* test in an effort to clarify a

60. *Id.* at 470.
61. *See id.* at 477.
62. *Id.* at 470.
63. *Id.*
64. 396 U.S. 531 (1970).
65. *Id.* at 532-33.
66. *Id.* at 538 n.10.

troubled area of jurisprudence.[67] The test, however, like its predecessors, provides little guidance. The first and second prongs merely combine the historical test of *Wonson* and *Beacon* with the remedy inquiry of *Dairy Queen*. Yet, all of these tests fail to confront the fundamental question: what *is* the distinction between law and equity?[68]

Furthermore, the third prong of the *Ross* test, the practical abilities and limitations of juries, also fails to address this question. This prong provides an exception to the jury trial in cases with complex accounting problems, traditionally handled by the courts of equity.[69] Like the historical analysis, however, the third prong works on the level of characterization without offering guidelines as to how a court is to decide what constitutes equity.

Following *Ross*, the Supreme Court broached the right to jury trial in the context of *statutory* rights. Applying the *Ross* test in *Curtis v. Loether*,[70] the Court held that when Congress provides for the enforcement of statutory rights in ordinary civil actions in the federal courts, and when there is no functional justification[71] for denying seventh amendment rights, a jury trial must be available if the action involves rights and remedies typically enforceable at law.[72] *Curtis*, however, illustrated the inadequacy of the *Ross* test as a solution to the right to jury trial issue by failing to elucidate *which* rights and remedies are typically enforceable at law. Furthermore, *Curtis* posed new questions regarding the existence of a functional justification for denying the constitutional right to jury trial. Does presentation of complex factual issues in a statutory action compel the abridgement of seventh amendment rights? *Curtis* suggested it might.[73] By leaving that question unanswered, *Curtis*, while ostensibly clarifying the issues, managed only to further muddy the waters.

The historical tests of *Beacon Theatres*, *Dairy Queen*, and *Ross* fail to provide adequate guidance to make the distinction between law and equity. There is, however, another vision recognized in the case law which is more compelling. This test circumvents the law and equity issue by examining the need for a jury in the context of the

67. *See* Wolfram, *supra* note 8, at 643-44.

68. *See supra* notes 49-52 and accompanying text.

69. *See* Arnold, *supra* note 1.

70. 415 U.S. 189 (1974).

71. The third prong of the *Ross* test would preclude a jury trial when the court determines that a jury would be incapable of making a determination due to the complexity of the issues involved. *Ross*, 396 U.S. at 538 n.10.

72. Curtis v. Loether, 415 U.S. 189, 195 (1974).

73. *Id.*

separation of powers. Justice Rehnquist's vigorous dissent in *Parklane Hosiery Co. v. Shore*[74] best illustrates this vision.

In *Parklane Hosiery*, a stockholder brought a derivative suit under the Securities and Exchange Act of 1934[75] demanding monetary relief for an allegedly false and misleading proxy statement. The defendant requested a jury trial for issues common to the legal and equitable claims. Before the litigation commenced, the Securities and Exchange Commission issued an injunction against the defendants for essentially the same statements at issue in the stockholder derivative suit. The plaintiffs moved for summary judgment, contending that collateral estoppel prevented relitigation of the common factual issues. The district court denied the motion because it felt such an offensive use of collateral estoppel would violate the defendants' seventh amendment rights.

The Supreme Court affirmed the Second Circuit's reversal of the district court[76] and thus precluded the defendants from relitigating the factual issues of the material falsity and misleading nature of the proxy statement. The defendants argued that if the Court permitted factual issues to be tried first in an equitable proceeding (such as the injunction action the Securities and Exchange Commission brought), the equitable determination would have collateral estoppel effect in subsequent legal actions. Such a use of collateral estoppel violates the defendants' seventh amendment rights because it precludes a jury determination of the factual issues. The majority quickly dismissed this argument because "[a]t common law, a litigant was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity."[77] Furthermore, procedural changes in the use of collateral estoppel since 1791 do not affect seventh amendment rights.[78]

In a well reasoned dissent, Justice (now Chief Justice) Rehnquist argued that an historical analysis would have resulted in a jury trial for the claim that the proxy statement was misleading. Fraud was historically an action at common law. When the majority proclaimed the unavailability of the action for a misleading proxy statement under the Securities Exchange Act at common law, Justice Rehnquist objected:

[The majority's analysis is] tantamount to saying that since a party

74. 439 U.S. 322, 339 (1979) (Rehnquist, J., dissenting).
75. 15 U.S.C. § 78 (1982).
76. *Parklane Hosiery*, 439 U.S. at 337.
77. *Id.* at 333.
78. *Id.* at 337.

> would not be entitled to a jury trial if he brought an equitable action, there is no persuasive reason why he should receive a jury trial on virtually the same issues if instead he chooses to bring a lawsuit in the nature of a legal action.[79]

Justice Rehnquist's dissent correctly pointed out that the *Parklane* Court failed to assess the nature of the issues involved. Had it done so, the majority would have of necessity concluded that an action for fraud was in the nature of a legal action. Instead it categorically defined the action as equitable.[80]

Proposing an alternate vision of the law and equity distinction, Justice Rehnquist argued that a court should apply the historical analysis purposively to further the policies underlying the seventh amendment—prevention of oppression by the government or the judiciary. A court should not deny such an important constitutional right, he argued, merely because the judiciary deems a jury trial inappropriate.[81] Thus, according to Justice Rehnquist's dissent, a correct historical analysis of the nature of a claim demands not only a determination of whether there would have been a legal claim in 1791, but also whether a jury is required to effectuate the *purposes* of the seventh amendment.[82]

IV. APPLICATION OF THE ENUNCIATED TESTS: A FURTHER LOOK AT *Tull*

The *Tull* court completely failed to address the precedents of *Wonson*, *Beacon Theatres*, and their progeny.[83] If one applies the available tests to the three premises of *Tull*, the inadequacy of its opinion becomes apparent. The *Tull* court failed to correctly apply any of the enunciated tests in reaching its conclusion. The premises upon which the *Tull* court based its opinion and its conclusion denying the right to jury trial are thus open to grave doubt.

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79. *Id.* at 348.

80. *See id.* at 337.

81. As Justice Rehnquist pointed out:

> The Seventh Amendment requires that a party's right to jury trial which existed at common law be "preserved" from incursions by the government or the judiciary. Whether this Court believes that use of a jury trial in a particular instance is necessary, or fair or repetitive is simply irrelevant. If that view is "rigid," it is the Constitution which commands that rigidity. To hold otherwise is to rewrite the Seventh Amendment so that a party is guaranteed a jury trial in civil cases unless this Court thinks a jury trial would be inappropriate.

Id. at 348 (Rehnquist, J., dissenting).

82. In dissent, Justice Rehnquist proposed a purposive historical analysis in light of the aims of the framers to "keep the administration of law in accord with the wishes and feelings of the community." *Id.* at 344.

83. *See supra* notes 44-72 and accompanying text.

A. *The First Premise: The FWPCA as an Equitable Statute*

The court's first premise was that the FWPCA confers only equitable power. Under the historical test, this is simply incorrect. Although statutes may create rights unheard of at common law,[84] jurists have historically viewed statutes as *expanding* the scope of the law. Early Supreme Court opinions explicitly accorded the right to jury trial in statutory penalties cases.[85] Unless there was an explicit statutory grant, equity had no jurisdiction to enforce statutory penalties.[86] Not only is the FWPCA itself silent in this regard, but the legislative history does not even *suggest* that Congress contemplated precluding jury trials. The FWPCA does, however, mandate litigation in the federal courts.[87] According to case law, Congress's choice of forum is dispositive of the issue, and requires a jury trial be provided on demand.

Atlas Roofing Co. v. Occupational Safety & Health Review Commission[88] makes this point. In *Atlas Roofing*, the agency found that two employers had violated the Occupational Safety and Health Act (OSHA).[89] The employers sought judicial review in the federal courts asserting that the Act violated their seventh amendment rights by deeming administrative fact findings conclusive. The Court held that Congress was not required to commit new statutory causes of action to the federal courts and determined that congressional assignment of OSHA adjudication to an administrative agency was dispositive in precluding the right to jury trial. Under *Atlas Roofing*, then, an administrative agency may adjudicate rights which would, if tried in a federal court, necessitate trial by jury. Where Congress provides for the enforcement of statutory rights in an ordinary civil action in the federal courts, however, a jury trial must be available if the action involves rights and remedies typically enforceable at law.[90] While Congress assuredly may create a new cause of action enforceable by a juryless administrative agency without violating seventh amendment

84. The reasoning of the majority in *Parklane Hosiery* could arguably preclude jury trials for new statutory rights. The *Tull* court, however, did not address this issue. Furthermore, the *Parkland Hosiery* majority opinion is misinformed. *See supra* notes 74-77 and accompanying text.

85. For example, in Ash Sheep Co. v. United States, the Court explicitly held that "equity never aids the collection of statutory penalties." 252 U.S. 159, 170 (1920); *see also* Hepner v. United States, 213 U.S. 103 (1909); Stevens v. Gladding & Proud, 60 U.S. (19 How.) 64 (1856).

86. Stevens v. Gladding & Proud, 60 U.S. (19 How.) 64 (1856) (holding that equity has no jurisdiction to enforce statutory penalties without a specific statutory grant).

87. *See* 33 U.S.C. §§ 1251-1376 (1982).

88. 430 U.S. 442 (1977).

89. 29 U.S.C. § 651 (1982).

90. *Atlas Roofing*, 430 U.S. at 455.

rights,[91] it must do so explicitly. If Congress commits the enforcement of statutes and the imposition of fines to the judiciary, a jury trial must be available.[92]

B. *The Second Premise: The Equitable Nature of the Remedies*

The second *Tull* assumption, that the civil penalties assessed under the statutory provisions were not "legal" remedies, is equally problematic. The statute itself does not address the equitable or legal nature of the remedies provided.[93] Nevertheless, Congress provided a system of government permits, injunctive and monetary relief, and criminal penalties. The statute thus includes both legal and equitable remedies. Because legal issues (monetary relief) and equitable issues (injunctive relief) coexist under the FWPCA, *Beacon Theatres*[94] mandates a jury trial for the legal issues.[95] The *Tull* court disregarded the clear command of *Beacon Theatres*, however, and claimed that the availability of both legal and equitable relief in the statute precluded trial by jury. The *Tull* court reached this conclusion without any mention of *Beacon Theatres*, and without advancing any reasons why that case did not apply to the facts of *Tull*.

The *Tull* court also disregarded the enunciated test of *Dairy Queen*.[96] That test requires that a court afford a jury trial to a claimant seeking a money judgment, however alleged. Yet the *Tull* court declared that civil penalties under the FWPCA were not "analogous to a remedy at law."[97] A demand for civil penalties, however, is a request for a money judgment, and must, therefore, under the force of *Dairy Queen*, be afforded a jury trial.

The *Tull* court similarly disregarded the *Ross* test and did not examine its three prongs. It failed to examine the custom of the courts in dealing with civil penalties before the merger of law and equity. It failed to examine the nature of the remedy sought, merely concluding that the remedy was "equitable." The court also failed to examine the practical abilities and limitations of juries. Although the

91. *See id.* at 461.

92. *Id.*

93. The purpose of the 1972 amendments to the FWPCA was to "establish a comprehensive long-range policy for the elimination of water pollution." S. REP. NO. 414, 92d Cong., 2d Sess. 95 (1971). The objective of the FWPCA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waterways." 33 U.S.C. § 1251(a) (1982).

94. Beacon Theatres v. Westover, 359 U.S. 500 (1959).

95. *But see supra* note 57 (discussing the *Katchen* analysis of this issue).

96. Dairy Queen v. Wood, 369 U.S. 469 (1962).

97. United States v. Tull, 769 F.2d 182, 187 (4th Cir. 1985), *cert. granted*, 106 S. Ct. 2244 (1986).

three prongs of the *Ross* test have inherent problems,[98] the *Tull* court should at least have addressed those factors.

Moreover, had the court applied the *Ross* test, it would necessarily have reached a different conclusion. The custom of the courts before the merger of law and equity was to grant jurisdiction to equity only where there was no remedy at common law.[99] The nature of the civil penalties remedy under the FWPCA is monetary relief. Civil penalties, as monetary relief, were traditionally available at law.[100] The availability of such legal relief would have precluded equitable relief. Furthermore, the practical abilities and limitations of juries, the third prong of the *Ross* test, would not have prevented a jury trial in *Tull*, because the case presented no issues more complex than those arising in many tort actions for which courts traditionally afford juries.[101]

Not only did the *Tull* court completely disregard *Beacon Theatres*, *Dairy Queen*, and *Ross*, but it also ignored the holding of *Curtis*. Applying the *Ross* test, the Supreme Court held in *Curtis* that when Congress grants jurisdiction to the federal courts, rather than to administrative agencies, a court must inquire as to the nature of the remedy and afford a jury if it determines that the action involves rights and remedies typically enforceable at law.[102] This holding may have dictated a different outcome in *Tull* because Congress expressly provided for federal court jurisdiction over FWPCA litigation. Thus, the court should have determined the nature of the remedy sought before rejecting the defendant's request for a jury trial. In fact, the FWPCA conferred a remedy typically enforceable at law, a money judgment for civil penalties. This determination is, however, admittedly problematic because the distinction between law and equity has always been hazy and the *Tull* court arguably could have offered justification for either classification.[103] The flaw in the court's analysis is not that it interpreted the *Curtis*[104] holding incorrectly, the flaw is

98. The first two prongs of the *Ross* test involve a difficult distinction between law and equity. The third prong, which precludes juries in complex factual situations, is highly controversial, and may be unconstitutional. *See, e.g.*, Arnold, *supra* note 1.

99. Dairy Queen v. Wood, 369 U.S. 469, 478 (1962).

100. United States v. Regan, 232 U.S. 37 (1914).

101. In *Tull*, the fact finder had to determine whether the composition of the soil and vegetation indicated that the soil was saturated with ground water or periodically inundated by tidal waters. *See supra* notes 30-31 and accompanying text.

102. Curtis v. Loether, 415 U.S. 189, 194 (1974).

103. *See supra* notes 50-53 and accompanying text; *see also infra* notes 128-30 and accompanying text.

104. 415 U.S. at 189.

that it made *no* attempt to apply the *Curtis* test at all.[105] The Supreme Court tests explicitly demand an examination of the nature of the remedial issues involved. The *Tull* court's conclusory opinion lacked such an examination.

C. *The Third Premise: A "Package" of Remedies Makes Such Relief Equitable*

Not only did the *Tull* court ignore established tests, but it also never examined the question of whether a statutory scheme allowing civil penalties, government permits, and court injunctions authorizes legal relief. Thus, the court never made the proper inquiry to determine whether the FWPCA entitles the defendant to demand a jury trial. The *Tull* court merely asserted that the monetary relief the government requested was equitable because it was part of "a 'package' of remedies, one part of the package affecting assessment of the others."[106] The court contended that even if the monetary relief could be characterized as damages, the defendant would not be afforded a jury trial because such relief was merely *incidental* to the injunctive relief, and "equity courts traditionally granted such monetary relief."[107]

This conclusion is in conflict with the express holding of *Dairy Queen*.[108] Moreover, while monetary relief under the FWPCA may not constitute traditional legal damages,[109] damages are not the only monetary relief available at law. For example, in *United States v. J.B. Williams Co.*,[110] the court considered both civil penalties and forfeitures to be *legal* remedies. In assessing the availability of jury trial for Federal Trade Commission violations, the court held that

> [t]here can be no doubt that in general "there is a right of jury trial when the United States sues . . . to collect a penalty, even though the statute is silent on the right of jury trial."
>
> Many cases, arising under a broad range of other civil penalty and forfeiture provisions, have reached the same conclusion. In

105. Although the *Tull* court cited *Curtis*, it did so only in a cursory way, and completely failed to discuss the test. *Tull*, 769 F.2d at 187.

106. *Id.* To clarify the fallacy: In the context of *Tull*, the damage had been done. Apart from a mandatory injunction (impossible because the land had already been sold) or restitution award, equitable relief was not possible. The government elected instead to seek the legal remedy, civil penalties. United States v. Tull, 615 F. Supp. 610, 612 (E.D. Va. 1983).

107. *See Tull*, 769 F.2d at 187.

108. 369 U.S. at 479-80.

109. Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982) (holding that monetary relief in the form of civil penalties is not necessarily characterized as damages but may be equitable in nature).

110. 498 F.2d 414 (2d Cir. 1974).

> The Sarah, 8 Wheat. 391, 21 U.S. 391, 5 L.Ed. 644 (1823), the Court held that when goods were seized on land, a statutory libel of information entitled the defendant to a jury trial. The Court has consistently held since then that forfeitures occurring on land are civil actions at law, entitling the parties to a jury unless it was waived. Similarly, actions for statutory penalties have been held to entail a right to jury trial, even though the statute is silent, both where the amount of the penalty was fixed and where it was subject to the discretion of the court.[111]

Thus, courts have traditionally found civil penalties to be "at law."

The Clean Water Act contains provisions for injunctive relief,[112] as well as five separate civil penalty provisions.[113] Under the Court's analysis in *J.B. Williams*, this statute offers a mixture of equitable and legal remedies. Under *Beacon Theatres* and *J.B. Williams*, a statutory scheme that includes traditionally equitable relief (injunctions) does not preclude jury trial for the legal claims.[114] Rather, it affirms a litigant's right to try the legal claims before a jury.[115]

The *Tull* court, however, did not claim that the case involved mixed issues of law and equity. It merely asserted that the "government is not suing to collect a penalty analogous to a remedy at law."[116] In light of early Supreme Court cases,[117] which equated statutory penalties with remedies at law, the court's characterization was incorrect.[118] Equitable remedies are available only if there are no adequate remedies at law.[119] In *Dairy Queen*, the Supreme Court noted that removing the inadequacy of a remedy at law by statute decreases the scope of equitable remedies.[120] Under *Atlas Roofing*, if Congress creates a new statutory remedy, a court will presume, if the action is

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111. *See id.* at 422-23 (citations and footnotes omitted).

112. 33 U.S.C. § 1319(b) (1982).

113. 33 U.S.C. §§ 1319, 1321, 1322, 1344, 1415 (1982).

114. *See supra* text accompanying notes 60-63.

115. Beacon Theatres v. Westover, 359 U.S. 500 (1959); United States v. J.B. Williams Co., 498 F.2d 414 (2d Cir. 1974).

116. United States v. Tull, 769 F.2d 182, 187 (4th Cir. 1985), *cert. granted*, 106 S. Ct. 2244 (1986).

117. *See, e.g.*, Ash Sheep Co. v. United States, 252 U.S. 159 (1920); United States v. Regan, 232 U.S. 37 (1914); Hepner v. United States, 213 U.S. 103 (1909); Stevens v. Gladding & Proud, 60 U.S. (19 How.) 64 (1856).

118. Of course, there is always an exception to the rule that statutory remedies entitle a claimant to a jury. By explicitly committing adjudication to an administrative agency, Congress may, in effect, deprive a litigant of his right to demand a jury trial. *See supra* text accompanying notes 88-93.

119. Dairy Queen v. Wood, 369 U.S. 469, 470 (1962).

120. *Id.* at 478 n.19.

committed to the federal courts, that the remedy is legal in nature.[121] Furthermore, civil penalties smack of punitive damages, which are always afforded a jury trial.[122] Finally, even if courts historically categorized civil penalties as equitable, and the evidence indicates that this was not the case,[123] there is no longer a reason to do so. The merger of the courts of law and equity makes the historical categorization meaningless.[124]

V. A NEW VISION: THE FUNCTIONAL ANALYSIS

The historical test examines whether the rights or remedies at issue would have been litigated in the courts of law or equity in 1791. This analysis is problematic because it provides little guidance to courts in making the determination of what causes of action would have been at law or equity in 1791, and is therefore indeterminate.

The distinction between law and equity originated in the separate genesis of the King's courts and the chancery courts in medieval England.[125] Because of the highly formalistic nature of the forms of action at common law, it was necessary to provide a forum for grievances that did not fit neatly within the rigid confines of the forms of action.[126] Because the courts of equity evolved as a safety valve for a stringent judicial system, availability of a remedy at law precluded equity jurisdiction. The equity courts developed as an independent, parallel judiciary within the English judicial system, with their own jurisprudence; independent of that of the King's Bench, but available only when there was no cause of action at common law.[127]

By the late eighteenth century, when the framers ratified the Bill of Rights, the courts at equity clearly had jurisdiction over certain categories of claims. These were generally claims requesting that the defendant "do" something (requests for injunctive relief or specific performance)[128] as opposed to those requiring that the defendant

121. Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442, 450 & n.7 (1977); Curtis v. Loether, 415 U.S. 189, 194-95 (1974).

122. Wojciak v. Northern Packaging Corp., 310 N.W.2d 675 (Minn. 1985); Cieslewicz v. Mutual Serv. Casualty Ins. Co., 84 Wis. 2d 91, 267 N.W.2d 595 (1978).

123. *See infra* note 137 and accompanying text.

124. *See infra* text accompanying notes 141-43.

125. *See* F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 123-37 (1908).

126. *Id.*

127. *Id.*

128. For cases categorizing injunction as an equitable remedy, see Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978); International Word Processors v. Power Dry, Inc., 593 F. Supp. 710 (D.S.C. 1984); Donovan v. Home Lighting, Inc., 536 F. Supp. 604 (D. Colo. 1982); *see also* Lulling v. Barnaby's Family Furs, Inc., 87 F.R.D. 720 (D. Wis. 1980) (Specific performance is an equitable remedy.).

"pay" something.[129] Unfortunately, the distinction between "doing" and "paying" is in itself confusing and subjective. This confusion often resulted in courts arbitrarily categorizing similar claims differently.[130]

The case law demonstrates this arbitrary categorization. Courts characterize claims requesting damages as legal. Damages are monetary relief, but not all monetary relief is necessarily categorized as damages. Sometimes, in what appear to be similar circumstances, a court may consider the monetary relief to be in the nature of specific performance or restitution, and therefore equitable.[131] For example, courts have deemed back pay awards under Title VII[132] restitutionary (equitable),[133] whereas courts have categorized back pay awards under the Age Discrimination Act[134] as damages (legal).[135] The statutory language of the Superfund Act[136] provides for both "damages," which the courts assess as legal, and "cost recovery," which they categorize as either legal or equitable. Historically, courts viewed civil penalties as actions in debt, which were legal in nature.[137] Modern statutory civil penalties provisions have been categorized as either legal,[138] equitable,[139] or both.[140]

The jurisdictional merger of the courts of law and equity has made the distinction between law and equity—originally based solely on jurisdictional criteria—an anachronism.[141] Further, it is a dangerous anachronism, threatening the separation of powers structure that the framers of our Constitution envisioned. Permitting the courts to make ad hoc, subjective characterizations of claims as either equitable or legal gives the courts the power to supercede the seventh amend-

129. *See, e.g.*, Smith v. Wade, 461 U.S. 30 (1982) (recovery of monetary relief under 42 U.S.C. § 1983 categorized as damages).

130. Chesnin & Hazard, *Chancery Procedure and the Seventh Amendment*, 83 YALE L.J. 999, 1001-10 (1974).

131. *See, e.g.*, RESTATEMENT OF RESTITUTION § 115 (1937).

132. 42 U.S.C. § 2000 (1982).

133. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (Back pay is an equitable remedy.).

134. 29 U.S.C. § 621 (1982).

135. *See* Lorillard, Inc. v. Pons, 434 U.S. 575 (1978) (right to jury trial pertains to "back pay" litigation under the Age Discrimination Act); Chilton v. National Cash Register Co., 370 F. Supp. 660 (S.D. Ohio 1974) (same).

136. 42 U.S.C. §§ 9601-9657 (1982).

137. United States v. Regan, 232 U.S. 37 (1914).

138. United States v. J.B. Williams Co., 498 F.2d 414 (2d Cir. 1974).

139. United States v. Ferro Corp., 627 F. Supp. 508 (M.D. La. 1986).

140. *See, e.g.*, United States v. Mottolo, 605 F. Supp. 898 (D.N.H. 1985) (The fact that the provision for damages and the provision for cost recovery relief appear in separate clauses in the Superfund Act means that Congress intended to provide both legal and equitable relief.).

141. *See supra* note 18 and accompanying text.

ment right to jury trial. This, in effect, enables the courts to obviate juries, which exist in part to check the power of the courts themselves.

In *Tull*, the court, without discussion of Supreme Court precedent, narrowed the availability of the constitutionally provided right to jury trial. *Tull* is dangerous inasmuch as other courts may rely on this unreasoned opinion to further encroach on this constitutional right. For example, while agreeing that the nature of the issue before the court determines the availability of the right to jury trial, the Eleventh Circuit recently cited *Tull*[142] for the proposition that all actions under the Clean Water Act are equitable, and thus, triable solely to the court.[143] The court enunciated this overbroad and unsound rule without analysis. Moreover, because Congress did not create administrative agency jurisdiction over the FWPCA, all issues arising under the statute are presumptively triable to a jury.[144] *Tull*, however, has become precedent for judicial disregard of constitutionally mandated checks and balances, and confirms the recent trend[145] eroding the place of the jury trial in the system of separation of powers.

The static interpretation of the phrase, "the right to jury trial shall be preserved," as meaning only the right as it existed in 1791, is irrational under our present merged system. A saner analysis would discard the law and equity distinction and directly assess the merits of the jury trial for a particular claim in light of the purpose of the jury in our constitutional democracy.[146] That is not to say that courts should afford all litigants juries on demand. Rather, instead of attempting to categorically determine what actions would have been at law or equity in 1791, the courts should extend seventh amendment rights when seventh amendment interests are at stake.

This is the thrust of the test that Justice Rehnquist outlined in his dissent in *Parklane Hosiery*.[147] The court should apply the historical analysis purposively to prevent oppression by the government or the judiciary and to implement separation of powers. In *Tull*, the sovereign sued a private citizen under the FWPCA, a legislative act. The trial judge threatened the defendant with steep penalties if the parties

142. In *M.C.C. of Florida*, the remedy sought was money damages, not for restitution of expenses incurred, but for future environmental projects. Nonetheless, the court cited *Tull* as precluding the right to trial by jury. United States v. M.C.C. of Florida, Inc., 772 F.2d 1501, 1507 n.3 (11th Cir. 1985).

143. *See id.* at 1503.

144. Curtis v. Loether, 415 U.S. 189 (1974); United States v. J.B. Williams Co., 498 F.2d 414 (2d Cir. 1974).

145. *See supra* note 21 and accompanying text.

146. *See supra* notes 8-16 and accompanying text.

147. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

did not settle. This is the paradigmatic situation that most concerned the framers in setting up the constitutional system. Thus, had the *Tull* court applied the functional analysis, it would have had to grant a jury trial to preserve the integrity of the separation of powers doctrine.

History clearly demonstrates that the *Tull* situation fell within the framers' contemplated concerns. Prior to the signing of the Magna Carta, civil discontent over oppressive judicial practices, principally in the collection of amercements, had threatened to erupt in civil war.[148] By signing the Magna Carta, King John formally established the jury system in medieval England.

A similar conflict over oppressive judicial/executive practices occurred in the American colonies. Deprivation of the right to jury trial by assigning cases arising in the colonies to the vice-admiralty courts was a significant cause of the American Revolution.[149] The Declaration of Independence enumerated this grievance as a reason for the break with England, and the right to jury trials is specifically guaranteed in the sixth amendment for criminal trials and the seventh amendment for civil trials. The lack of provisions for civil jury trials in the Constitution was a significant factor in the demand for a Bill of Rights in the Constitution.[150]

The framers ratified the seventh amendment in the face of severe disagreements between the federalists and antifederalists.[151] Whereas the federalists believed that it was unnecessary to expressly provide for civil jury trials because the structure of the government itself suggested such a system,[152] the antifederalists insisted that such guarantees must be explicitly enumerated to prevent government oppression.[153] The arguments the antifederalists advanced for including the right to jury trial in the Bill of Rights included "the protection of debtor defendants; the frustration of unwise legislation; the overturning of the practices of courts of vice-admiralty; the vindication of the interests of private citizens in litigation with the government; and the protection of litigants against overbearing and oppressive judges."[154] On this subject, the antifederalists won; the framers explicitly included the right to civil jury trial in the Bill of Rights as

148. B. SCHWARTZ, *supra* note 13, at 3-16.

149. *See* Wolfram, *supra* note 8, at 653.

150. *See* B. SCHWARTZ, *supra* note 13, at 435-623.

151. *Id.*

152. THE FEDERALIST NO. 83, at 60 (A. Hamilton) (G. Wills ed. 1982).

153. B. SCHWARTZ, *supra* note 13, at 3-46.

154. Wolfram, *supra* note 8, at 670-71.

the seventh amendment.[155]

Suits brought by the sovereign are precisely the kind of adjudication that most need the jury's moderating influence. Categorizing cases as outside the scope of the common law presents the same kind of judicial disregard for civil liberties which, when used by the English governors, precipitated the American Revolution.[156] The framers specifically included the right to civil jury trial in the Bill of Rights in order to prevent this type of government tyranny and to implement the separation of powers fundamental to our system of government.[157]

VI. CONCLUSION

The Supreme Court should reverse the Fourth Circuit's opinion in *Tull* for two reasons. First, the historical analysis does not yield the *Tull* court's result. Historically, courts perceived statutes as expanding the jurisdiction of the common law, not the jurisdiction of equity courts.[158] In addition, equity jurisdiction applies only when there is not an adequate remedy at law.[159] In *Tull*, the government sought civil penalties; penalties are a money judgment and therefore an adequate remedy at law.[160] Moreover, Congress assigned the initial adjudication under FWCPA to the federal courts, rather than to an administrative agency, a result which demands the right to jury trial in this context.[161] Finally, preclusion of a jury trial where the remedies the government sought included mixed equitable and legal issues is plainly wrong. The well-settled law of *Beacon Theatres*, *Dairy Queen*, and *Curtis* demonstrates the opposite. *Tull* is, therefore, not only a poorly reasoned opinion, but reaches an incorrect result.

The Court should also reverse *Tull* to implement more fully the separation of powers fundamental to our constitutional scheme. *Tull* presents the quintessential situation that the framers contemplated in ratifying the seventh amendment.[162] *Tull* involved the protection of a "debtor" defendant because at the time of the ratification of the Constitution, courts viewed the collection of civil penalties as an action in debt.[163] Further, the government sued under the FWPCA; legislative

155. *Id.* at 672.

156. *Id.* at 654.

157. *See generally* Wolfram, *supra* note 8.

158. *See supra* notes 85-86 and accompanying text.

159. Dairy Queen v. Wood, 369 U.S. 469, 471 (1962).

160. No matter how a court construes a complaint, a claim for money damages is legal in nature. *See id.* at 477.

161. *See supra* notes 70-71, 88-92 and accompanying text.

162. *See supra* notes 8-15 and accompanying text.

163. *See* F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 52 (1976).

actions also concerned the framers because legislation may be passed that is unwise, and possibly unconstitutional.[164] The judiciary may not be able, either because it does not wish to or because it does not view frustration of legislation as its role, to provide the strict scrutiny the Constitution requires. The jury provides that function when the judiciary cannot.[165]

The deprivation of the right to jury trial by assigning cases to the courts of vice-admiralty was one of the prime causes of the American Revolution.[166] That practice is analogous to current judicial encroachment upon this right through use of the law and equity distinction, which the Fourth Circuit exemplified in *Tull*. The framers' concern with fairly protecting the interests of private citizens in litigation against the government also inheres in *Tull*. The circumstances of *Tull* demonstrate an obvious need for protection against overbearing and oppressive judges: the district court judge pressured Tull to settle before completion of the litigation and threatened him with stiff penalties if he failed to settle.[167] Because the framers intended the seventh amendment to protect the people from such judicial/executive oppression, the jury's role in governance should be implemented and preserved. The jury's role must be preserved, not in the static sense of pickling in the historic brine of 1791, but preserved in the dynamic sense of implemented, cherished, and enabled.

Courts consistently have denied the right to jury trial in the area of environmental law.[168] Courts routinely categorize cases under the FWPCA as equitable despite the lack of any indication that Congress intended such a result. There is no private right of action under the FWPCA, so only the government may bring suit. This possibility of the executive abusing its authority in collusion with the judiciary was

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164. *See* Wolfram, *supra* note 8, at 664 & n.69.

165. Where the political processes that would ordinarily correct unwise legislation adversely affect minority groups, the judicial system must be relied upon to correct it. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

166. *See* Wolfram, *supra* note 8, at 654-56.

167. Brief for the Petitioner at 14, United States v. Tull, 106 S. Ct. 2244 (1986) (No. 85-1259).

168. *See, e.g.*, Maryland Casualty Co. v. Armco, Inc., 645 F. Supp. 430 (D. Md. 1986); United States v. Dickerson, 640 F. Supp. 448 (D. Md. 1986); United States v. Mottolo, 605 F. Supp. 898 (D.N.H. 1985); United States v. Reilly Tar & Chem. Corp., 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,897 (D. Minn. 1983). There is no provision denying trial by jury in the FWPCA, nor is there language that might imply equitable jurisdiction. Courts originally categorized FWPCA cases, as well as cases brought under its predecessor, the Rivers and Harbors Act, 33 U.S.C. § 401 (1982), as equitable because the government was attempting to recoup funds it had expended in cleaning up oil spills or removing sunken vessels. *See, e.g.*, Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967).

precisely the situation which concerned the framers and generated the seventh amendment.

Courts must carefully scrutinize any curtailment of seventh amendment rights. Characterization of the FWPCA as entirely equitable, despite the presence of monetary remedies, precludes the exercise of constitutional rights in another area of environmental law. Because courts consistently cite FWPCA cases as precedent in burgeoning litigation under the Superfund Act, courts inappropriately preclude seventh amendment rights under the Superfund Act as well.[169] Routine and superficial analysis, in effect, has removed much of environmental litigation, often involving important fact sensitivity, and necessitating implementation of community values, from the protective scope of the seventh amendment solely on the basis of groundless categorization.

The right to trial by jury is an "important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."[170] Despite the perceived importance of this right, courts have gradually eroded it to a mere procedural question, and routinely deny this right in civil cases. The seventh amendment appears in the Bill of Rights—the people of this nation have never repealed it. For the judiciary sua sponte to abridge the scope of this fundamental right represents a grievous overreaching of judicial power. The framers never saw fit to grant the judiciary the unilateral power to repeal or otherwise eviscerate the seventh amendment. Such an abuse of power flouts one of the primary concerns of the framers of the Constitution:[171] the maintenance of the separation of powers structure. The right to jury trial must be preserved in spite of any implicitly perceived expense, inefficiency, or inadequacy, precisely because it is a fundamental aspect of American government.

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169. 42 U.S.C. § 1261 (1982); *see supra* note 21.

170. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

171. *See* Wolfram, *supra* note 8.

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