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Will the Seventh Amendment Survive ADR?

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WILL THE SEVENTH AMENDMENT SURVIVE ADR?

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I. INTRODUCTION

Another cycle of procedural innovation has begun. Under the label of Alternative Dispute Resolution (ADR) and with a fresh spirit of reform it will change civil procedure by increasing the alternatives to adversarial litigation. Jury trial inevitably seems to mean adversarial procedure, and the seventh amendment preserves a right to jury trial for federal court resolution of "suits at common law."[1] What effect will the seventh amendment and ADR have on each other? Will the seventh amendment preserve civil jury trial for a litigant who wants to resolve a common law dispute in that adversarial manner? Should it do so? Will ADR produce a change in the interpretation of the seventh amendment?

The ADR label sweeps broadly and yet may include every new procedural proposal, but certain ideas represent the core concept.[2] Within the past few years there have been growing complaints that the United States has experienced an explosion of litigation and regulatory disputes that have seriously overloaded the courts and proven to be a very costly method of conflict resolu-

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> 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.

U.S. CONST. amend. VII.

2. For general information about Alternative Dispute Resolution see CENTER FOR PUBLIC RESOURCES, CORPORATE DISPUTE MANAGEMENT 1982; A.B.A. Special Committee on Alternative Dispute Resolution, CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES (1983); J. MARKS, E. JOHNSON, & P. SZANTON, DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION (1984); 1 CENTER FOR PUBLIC RESOURCES, WORKING TAXONOMY OF ALTERNATIVE LEGAL PROCESSES: PTS I-IV, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Nos. 5, 8, 11, 12 (May, Aug., Nov., Dec. 1983); Green, *Getting Out of Court—Private Resolution of Civil Disputes*, 28 BOSTON B.J. 11 (1984); *see also Alternative Dispute Resolution in the Law Curriculum*, 34 J. LEGAL EDUC. 229 (1984).

tion.[3] Along with the complaints came the diagnosis that overattention to adversarial litigation had blinded lawyers and their clients to the advantages of other methods of dispute resolution.

The original focus of ADR was educating parties to recognize their self-interest in avoiding adversarial litigation, so many ADR ideas and procedures are either voluntary efforts of a single party or depend on the mutual agreement of all parties. These include dispute avoidance, dispute management, creative forms of voluntary settlement, the mini-trial, consensual reference to a private judge, contractual or voluntary arbitration, and mediation. The substantial merit of each of these ideas may have been overlooked in the past because of a focus on formal litigation and the ADR movement may increase the extent they are used, but voluntary usage of these kinds of ADR procedures does not create any serious seventh amendment issue.

The attractiveness of ADR is not limited to parties pursuing their self-interest. Judges faced with growing dockets and legislators seeking ways to reduce the cost of providing dispute resolution are also attracted by the promise of more civil dispute resolution without an increase in federal judicial resources. ADR could be supported by federal creation and subsidy of an ADR facility for parties to use without having to create their own procedure. Broader usage of ADR can be encouraged by educating parties about alternatives to civil litigation and suggesting they try to resolve the dispute in a nonadversarial manner. Where the parties are free to choose between the ADR procedure or court litigation, there is again no seventh amendment issue even if there is federal support and encouragement for the ADR procedure.[4]

A seventh amendment issue could arise when education, encouragement, or facilitation are replaced by requirement, and a party previously entitled to a jury trial in federal court is forced to accept a substitute. Such substitutes to a traditional federal court jury trial that fit under the ADR label might include involuntary arbitration,[5] mandatory settlement procedures,[6] summary trials,[7]

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3. *See, e.g.*, Bell, *Crisis in the Courts: Proposals for Change*, 31 VAND. L. REV. 3 (1978); BURGER, *Isn't there a Better Way?*, 68 A.B.A. J. 274 (1982); Breger, *The Justice Conundrum*, 28 VILL. L. REV. 923 (1983). As the literature developed, the early one-sided diagnosis of an overly adversarial society and the uniform condemnation of adversarial dispute resolution has been examined in greater depth. *E.g.*, D. TRUBEK, J. GROSSMAN, W. FELSTINER, H. KRITZER & A. SARAT, CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT (1983); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Galanter, *Reading the Landscape of Disputes*, 31 UCLA L. REV. 4 (1983); Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983). Even if analytical studies demonstrate that there is not an excessive level of adversarial litigation, the ADR movement appears to have enough strength that it will not be untracked by factual research.

4. There may be an article III issue if the federal ADR facility looks too much like a court. *See infra* text accompanying notes 49-60; *see also* Schor v. Commodity Futures Trading Comm'n, 740 F.2d 1262, 1268-77 (D.C. Cir. 1984).

5. *See* D. HENSLER, A. LIPSON & E. ROLPH, JUDICIAL ARBITRATION IN CALI-

and new tribunals outside the article III courts.[6] In past rounds of reform, many new procedures have been created or adapted as part of new substantive law, without taking much of the traditional litigation from the courts. The threat to jury trial was not as apparent and perhaps not as major. The ADR movement's hallmark is an implicit challenge to justify formal litigation of every dispute, even those traditionally tried in court. This approach could produce a major impact on the seventh amendment.

The seventh amendment problem is not within the ADR procedures themselves, but rather in how ADR is integrated into the total system of formal dispute resolution. Proponents of ADR may not intend to destroy federal civil jury trial, but ADR could be a serious threat to the seventh amendment if alternative procedures supplant civil jury trial and leave the constitutional language as a hollow shell. On the other hand, substantial use of ADR would not necessarily threaten seventh amendment values if jury trial remains available; instead, ADR procedures in routine litigation might protect the role of the civil jury in nonroutine litigation. Current seventh amendment doctrine does not provide a complete framework for analyzing the serious issues raised by ADR. This article attempts to forecast and analyze the important effects, risks, or benefits of ADR for the seventh amendment. As a result there are more questions and tentative suggestions than firm conclusions.

II. FRAMING THE SEVENTH AMENDMENT ISSUE

The fundamental principle of the seventh amendment is citizen participation in government by jury service. Yet, there is substantial room for ADR procedures. The Constitution does not require that parties have a dispute, that they resolve it with a publicly supported procedure, that they resolve it in an adversarial manner, or that they use a federal forum. Even for formal civil dispute resolution, the image of the solemn courtroom with a presiding judge

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FORNIA (1981); E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Center rev. ed. 1983); E. ROLPH, INTRODUCING COURT-ANNEXED ARBITRATION (1984); Levin, *Court-Annexed Arbitration*, 16 U. MICH. J.L. REF. 537 (1983); Nejelski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787 (1983).

6. *See, generally* J. CECIL & B. MEIERHOEFER, REPORT ON THE MEDIATION PROGRAM IN THE EASTERN DISTRICT OF MICHIGAN (1983); K. TEGLAND, MEDIATION IN THE WESTERN DISTRICT OF WASHINGTON (1984); Cooley, *Could Settlement Masters Help Reduce the Cost of Litigation and the Workload of Federal Courts?*, 68 JUDICATURE 59 (1984).

7. *See infra* notes 86-87 and accompanying text.

8. *See, e.g.*, DEP'T OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS 7-11 (1977); Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 285-86 (1978).

and a jury of peers is no longer the dominant model. Since civil dispute resolution at the federal level is already divided among a host of procedures in addition to jury trial, ADR will only increase the variety of options.

Whether any particular ADR procedure violates the seventh amendment language or undercuts the constitutional concept, and how it might do so, is not always immediately apparent. The constitutional language is sparse, the historical precedent is limited, policy choices quickly become paramount, and the implications of initial reforms may be unclear. The history of the seventh amendment indicates the framers' memory of the revolutionary experience when jury nullification was used to defeat royal efforts to enforce trade acts.[9] It is clear the supporters of the seventh amendment wanted something more than accurate or efficient fact-finding from the civil jury, but the framers' theory was not well-developed and the potential conflict between jury nullification and due process was not addressed.[10] The jury's role has changed as the relevance of the original intent has receded, but even after two centuries the definition of the proper role of the jury is still an open issue. Some of the policy issues must be addressed in the evaluation of ADR; if they are not, they may be resolved by default as ADR is implemented.

When comparing jury trial and ADR, various reasons explain why an ADR procedure may appear more appropriate than trial for a particular dispute. Some disputes may seem of lesser consequence and deserve only a minor amount of resources to resolve. Some may require specialized knowledge and appear most efficiently resolved by an expert. Some resolutions may be more stable if reached cooperatively. Finally, some resolutions may appear more fair to the parties if resolved in a nonadversarial manner. The attraction of ADR comes from specialization, with each dispute theoretically channeled to an optimal procedure.

Civil jury trial presents a clear contrast with the specialization of ADR. In small cases jury trial costs more than the amount in dispute. In complicated cases definition and explanation of the issues requires substantial time and effort. The jury is too unwieldy and temporary to mediate in an ongoing relationship. The jury's inability to create an independent result limits it to selecting between adversarial positions. In contrast to the specialization of ADR, civil jury trial, with a judge, counsel, and adversarial parties, can be best described as dispute resolution by a generalist.

The disadvantages of jury trial are highlighted by the contrast with ADR specialization, while the advantages may not be immediately apparent. The seventh amendment guarantee of civil jury trial established constitutional protection for policy reasons that are broader than whether the jury is better,

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9. Kirst, *Administrative Penalties and the Civil Jury*, 126 U. PA. L. REV. 1281, 1320-1328 (1978). *See generally* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

10. Kirst, *The Jury's Historic Domain and Complex Cases*, 58 WASH. L. REV. 1, 17-20 (1982).

more efficient, or less expensive than an alternative in a particular case. The advantages claimed for civil jury trial include: it maintains flexibility in the substantive law; it provides an unbiased hearing for a party with a nontraditional idea; it minimizes the appearance of official indifference or corruption; it brings a fresh perspective and sees the individual character of each case; it acts as the conscience of the community; it is a better fact finder; it understands emotions better; it can better assess damages; it educates citizens about government; and it is a symbol of democracy.[11]

The common feature of all the asserted advantages of jury trial is that none is very important all the time, but some are important much of the time and any of them could be very important in a particular case. The framers of the seventh amendment wanted most federal court litigation resolved by jury trial, even though that meant that in many, or even most, trials the jury's role would be unremarkable, of some value but not often critically significant. The added expense, delay, inconvenience, or occasional wrong verdict were an acceptable price for the political value of citizen participation. Now almost two centuries after the ratification debates, bench trials in federal court outnumber jury trials and other federal forums resolve a tremendous volume of disputes.[12]

There may be no formal policy definition of the proper extent of jury trial, but modern practice suggests a working consensus that jury trial should resolve only a small percentage of disputes, although the narrow niche reserved for the civil jury should be protected by the Constitution. However, this consensus is fragile and uncertain and ADR will test the limits and strength of the consensus. How can we avoid confusing the jury's current or conventional role with the constitutional mandate? Is it possible to develop a stable constitutional doctrine, or is Congressional discretion the only practical way to enforce this constitutional provision?

I think it would be a mistake to expect to find clear answers from the traditional historical test. For most seventh amendment issues, the Supreme Court has determined the extent of the constitutional guarantee by application of an historical test based on the practice in existence in 1791 when the Bill of

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11. *See generally* C. JOINER, CIVIL JUSTICE AND THE JURY (1962); R. SIMON, THE JURY SYSTEM IN AMERICA (1975); Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954); Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150 (1952); Green, *Juries and Justice—The Jury's Role in Personal Injury Cases*, 1962 U. ILL. L.F. 152; Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47 (1977); Kirst, *supra* note 10, at 26-32; Nejelski, *The Jeffersonian-Hamiltonian Duality: A Framework for Understanding Reforms in the Administration of Justice*, 64 JUDICATURE 450 (1981); Renfrew, *The Vital Role of the Jury*, 3 LITIGATION, Winter 1976, at 5; Summers, *Some Merits of Civil Jury Trials*, 39 TUL. L. REV. 3 (1964).

12. In the twelve months ending June 30, 1984 there were 5,555 jury trials and 6,525 nonjury trials in the federal courts. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, Table C4 (1984).

Rights was adopted.[13] Within the court system the historical test has been workable, even though occasionally rough at the edges. The law-equity test has served to define the right to jury trial in actions that did not exist in 1791.[14] But there the only choice, assuming an actual trial, is between adversarial jury trial and adversarial bench trial, procedures of the same order of magnitude[15]. The historical test can be applied by analogy to evaluate a new trial procedure that did not exist in 1791.[16] The dispute is still in court, so it is only necessary to evaluate the impact of the new procedures on the roles of judge and jury. With ADR the issue is more complex because the alternative is not even a court, but can be a procedure of a different order of magnitude. The recent debate over the complexity issue demonstrates the futility of historical research to find an answer on an issue such as ADR that is so far removed from English practice in 1791. The historical test will simply evaporate under the pressure if expected to prove whether an ADR procedure had a 1791 analog.

The historical test suggests that the answer to a modern problem can simply be "found" in the past, an approach that conceals the broadly political nature of the problem. The real value of the historical approach is not in the narrow analogies it may supply, but in the reminder that there were complex and inconsistent reasons for adoption of the amendment, reasons that still produce substantial disagreement on the underlying policy issues. What is the role of the jury? What is the purpose of civil dispute resolution? Resolution of disputes is not an adequate description of the purpose, because the method may be as important as the result. Accurate resolution of all disputes is an unrealistically narrow goal; finding what happened is only one step in the process of resolving a dispute. The goal is not to resolve disputes at minimal dollar cost; that overemphasizes measurable costs and ignores the benefits and other costs that may be difficult to quantify.

If the effect of ADR involves too many policy choices for a mechanical historical test, the initial response might be to create a new test. A better approach is to begin with a more open-ended policy analysis, not to first create a test in hopes it will address the policy concerns. Whether any approach can protect the civil jury role from ADR, or whether there should be an articulated test, depends in part on the answers to the question asked in the next section. It may appear improper to suggest that constitutional doctrine should follow pragmatic concerns, but in fact the current interpretation of the seventh amendment is heavily influenced by judicial perceptions of the value and ability of the civil jury.

The comparison between jury trial and ADR must be tempered by the

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13. *See* Wolfram, *supra* note 9, at 639-44.

14. Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974).

15. Kirst, *supra* note 10, at 12-26.

16. *Id.* at 4-10.

caution that the proponents of ADR have the advantage of all reformers. The theoretical successes of ADR do not have to be discounted by the real problems of practical administration. A cadre of dispute resolvers can be assumed to be more capable and less expensive than the current body of federal judges. The array of ADR procedures can be called a blessing, with the simplifying assumption there will be an effective procedure for channelling each dispute to the correct type of procedure. The possible loss of prestige and authority of the current federal courts can be ignored, while the long-term public acceptance of the new forum can be taken for granted. The value of public participation in civil litigation can be assumed to be de minimis and ignored. The seemingly inevitable routinization of most procedural reforms in a bureaucracy can be left for the next generation of reform. The availability of voluntary professional time or litigant ability to pay the full cost of dispute resolution can be presumed, minimizing any governmental obligation to provide dispute resolution as an essential public service. In contrast, the success of jury trial may be hard to quantify while the costs and problems are easily illustrated.

III. When is Jury Trial Better Than ADR?

A. *Illustrations from McDonald v. City of West Branch*

The working hypotheses that support this article are that there is a distinction between cases best suited for jury trial and cases for which jury trial is less necessary, that seventh amendment doctrine should be influenced, although not controlled, by that distinction, that it is possible to develop a practical definition of the distinction, and that the long run viability of the amendment will be better preserved by a political approach than by an attempt to follow an historical test. These hypotheses about constitutional policy cannot necessarily be proven or disproven, certainly not by citation of precedent, but their validity can be tested by analogy and illustration.

A recent example that helps illustrate where jury trial might be superior is the Supreme Court's recent opinion in *McDonald v. City of West Branch*.[17] As framed by the Court, the question in *McDonald* was whether a federal court hearing a section 1983 action may accord preclusive effect to an unappealed arbitration award that found no factual basis for the complaint. No statute obligated the courts to give preclusive effect, so the issue was a policy choice between litigation in court and collective bargaining arbitration, a type of ADR procedure. The Court concluded that there should be no preclusive effect, because that would "undermine the statute's efficacy in protecting federal rights."[18] In a later opinion the Court summarized the holding of *McDonald*,— "civil rights actions . . . belong in court,"[19] even if not necessarily in a

17. 104 S. Ct. 1799 (1984).
18. *Id.* at 1803.
19. Burnett v. Grattan, 104 S. Ct. 2924, 2930 (1984).

federal court.

The Court's description of McDonald's section 1983 claim concentrated on factors that supported access to the courts: an arbitrator may be a nonlawyer without expertise in resolving complex legal issues, the arbitrator has limited authority to enforce public law, the employee's access to the forum is not guaranteed because access is controlled by the union, and arbitral fact-finding is not equivalent to judicial fact-finding. On the other hand, the Court did not hold that access to court would always assure a new opportunity to relitigate the issues. Many employment grievances, whether framed as collective bargaining violations or section 1983 claims, are factual disputes without complex legal issues, where the employee is allowed sufficient access to the forum and given procedural fairness under a bargaining agreement which is not inconsistent with the civil right statutes. In short, because many of these disputes involve routine matters, such as the reason the employee was discharged, the complaining employee should not be permitted to have a full scale relitigation of the arbitrated issues.

In *McDonald* the Court expressly stopped short of deciding what effect the trial judge should give the arbitration decision, remanding to the Sixth Circuit with no mention of the actual procedure used in the *McDonald* trial and only a footnote explanation that the weight given the arbitration decision must be determined in the court's discretion.[20] At the original *McDonald* trial, the evidence included the arbitration decision along with evidence by both sides about whether the arbitration hearing had been an adequate forum.[21] This procedure made the weight to be given the arbitration decision an issue of fact for the jury. The Sixth Circuit decision held that the weight given the arbitration decision was an issue of law by requiring full preclusive effect.[22] In remanding to the Sixth Circuit the Supreme Court gave no guidance on whether the weight given the arbitration decision was an issue of fact or an issue of law, or if some combination of the two, how the issues should be identified and decided. There is a constitutional right to a jury trial in a section 1983 action for damages, but only if there is a disputed issue of fact.[23] The judges could still restrict the jury's role by treating the weight to be given an arbitration award as an issue of law or by allowing the jury to decide only a narrower factual issue.[24]

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20. *McDonald*, 104 S. Ct. at 1804 n.13.

21. Brief for Petitioner at 6, *McDonald*, 104 S. Ct. 1799 (1984).

22. 709 F.2d 1505 (6th Cir. 1983). The opinion was unpublished, but is included in the Petition for Certiorari, Appendix A, *McDonald*, 104 S. Ct. 1799 (1984).

23. *See* Hildebrand v. Board of Trustees, 607 F.2d 705, 709 (6th Cir. 1979); Duchesne v. Sugarman, 566 F.2d 817, 829 (2d Cir. 1977); Drone v. Hutto, 565 F.2d 543, 544 (8th Cir. 1977).

24. The court also postponed reaching that issue in *Dean Witter Reynolds, Inc. v. Byrd*, 105 S. Ct. 1238, 1243-44 (1985). Subsequently, one court affirmed a prior arbitration decision precluding a RICO claim. Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360-62 (11th Cir. 1985).

The broader issue of *McDonald* on remand is relevant to the comparison of ADR and jury trial. Is there some way to establish final resolution of a substantial percentage of cases outside the courts, while still allowing certain litigants to have access to the courts? Access to the courts could allow jury trial of the facts, and jury trial may be the best resolution if the case presents a novel approach, or it requires findings of intent or motive, or an evaluation of emotional issues, or it involves an issue of community standards. As *McDonald* illustrates, the Court has only partially examined the optimal relationship between the courts and other dispute resolution procedures.[25]

B. *Resolution of Nonroutine Disputes*

For descriptive convenience, the cases most appropriate for jury trial might be labelled nonroutine, with those where jury trial is less essential labelled routine. The distinction between routine and nonroutine litigation does not have to be analytically rigorous; the immediate goal is to illustrate and discuss the issues that ADR creates for the seventh amendment, rather than create a mechanical test. The use of only two labels should not suggest that all cases can be classified into only one of two categories; in fact, the two labels represent polar positions on a continuous distribution. The distinction is useful for developing seventh amendment doctrine because there is some precedent to rely on for guidance. The same factors that make a case nonroutine and appropriate for jury trial have been considered by judges for centuries in defining the relative power of judge and jury. Whether an issue should be one of fact or law, how much the jury's fact-finding should be constrained or left independent, how much evidence should be required to defeat summary judgment or directed verdict, or when a new trial should be ordered on the weight of the evidence all involve the issue of the jury's role.

An area of litigation that illustrates the distinction between routine and nonroutine cases is the asbestos litigation.[26] Asbestos litigation became a major burden on some court dockets because the parties did not make sufficient use of alternatives to trial. Recently, the potential for use of ADR procedures has been recognized and ADR techniques have been formally established. From one perspective, asbestos litigation is routine product liability litigation and injured plaintiffs and defending companies should be able to settle a large percentage of the cases without trial. In practice, settlements did not occur at

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25. *See* Kirst, *supra* note 10, at 32-36.

26. *See* J. KAKALIK, P. EBENER, W. FELSTINER & M. SHANLEY, COSTS OF ASBESTOS LITIGATION (1983); J. KAKALIK, P. EBENER, W. FELSTINER, G. HAGGSTROM & M. SHANLEY, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES (1984); NAT'L CENTER FOR STATE COURTS, JUDICIAL ADMINISTRATION WORKING GROUP ON ASBESTOS LITIGATION, FINAL REPORT WITH RECOMMENDATIONS (1984); T. WILLGING, ASBESTOS CASE MANAGEMENT: PRETRIAL AND TRIAL PROCEDURES ( ); Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 152-71 (1984).

the typical rate in asbestos cases because of unusual uncertainty caused by the very long time between exposure to the product and visible injury and the fact that the defect was not in just an occasional product but in the whole output of the industry. Early asbestos cases were nonroutine and only after some were tried could the parties and courts develop the legal theories, learn jury reactions to the liability evidence, see how juries would evaluate and compensate various disabilities, and see whether trial and appellate judges would accept, reject, or modify the jury verdicts.

The burden of asbestos cases in certain courts highlighted the fact that the information from the early cases did not produce an increasing number of settlements. The formal ADR procedures which have now been established for asbestos cases may handle a large percentage of the remaining cases.[27] Even if they don't, they will be valuable if they are the impetus to less formal settlements. This does not mean that all the remaining cases should be resolved with an ADR procedure. Although many of the remaining cases may be routine, with liability and damage issues fairly predictable by both sides within a range where settlement is possible, some will still be nonroutine, either on damages or liability, because all the issues are not yet settled.[28] A major problem is the lack of a precise classification scheme to determine which cases really should be resolved by jury trial.

Another illustration of the difficulty in identifying which cases should be resolved by a jury is the issue of damage assessment, often said to be uniquely within the competence of the jury. The issue is complicated because often assessing damages is a routine matter, but any one of several reasons may make an otherwise routine case novel and nonroutine. What should be the general level of damages; for example, how much should a plaintiff receive for loss of a limb? Even ignoring inflation, a century ago the award for loss of enjoyment and reduced function would have been a fraction of current awards. Individual loss had to be endured, medical science offered little rehabilitative support, and there was little collective responsibility. Today, the loss presents a greater contrast because medical science can do more and there is a stronger sense of collective responsibility. Jury verdicts reflect society's views of the general level. This is one area where each jury verdict makes a small contribution, but no individual verdict is critically important; therefore, a jury verdict in every routine case is not essential. Jury verdicts in only a small percentage of all cases are sufficient to establish the general level of damages because those verdicts give litigants information about a range within which they can settle most cases.

In evaluating a particular plaintiff's case there are two questions—a factual question of the extent of injury and a comparative question relating this plaintiff to others in a similar situation. On the factual question, the jury can be valuable in evaluating the close cases; whether disability or pain prevents

27. *See* ALTERNATIVES TO THE HIGH COST OF LITIGATION, Mar. 1985, at 1.
28. *Cf.* Green, *supra* note 25, at 215-24.

employment or seriously decreases the enjoyment of life depends on a notion of how much a person should struggle with adversity before being considered "deserving" of compensation or assistance. The comparative issue is usually masked by other issues, but the jury seems generally less adept at handling the comparative assessment.[29] A jury is given little guidance on assessing general damages and not allowed to know how similar cases have been handled by other juries. Instead, the federal courts use indirect alternatives, such as remittitur or a new trial for inadequate damages. The indirect control makes many cases routine because the parties know a verdict outside the established range will not stand; therefore, the routine cases are more likely to settle because the parties' settlement ranges will overlap. The hard, nonroutine cases where the parties strongly disagree on how the jury will evaluate the opposing contentions can only be resolved by a jury verdict.

The argument for a jury role in resolving nonroutine cases is buttressed by experience with procedures designed to exclude completely the chance for jury trial. Worker compensation procedures are a classic example. The basic approach was a tradeoff of fixed compensation amounts for employer liability without the common law defenses, adjudicated in an alternative forum outside the courts. In recent decades, the lag in compensation levels under mandatory ceilings led to increased efforts to find an alternative source of adequate compensation. One fruitful source was the growing area of product liability litigation, which brought employment accident litigation back into the courts. Access to courts and juries, expanded theories of liability, and increased damage awards had a visible effect in the product liability insurance crisis of the 1970's. The "crisis" was in part a reflection of changed attitudes about the level of protection from product injuries our society thought was proper for employees and consumers. There is a continuum of possible levels of protection, from suffering in silence to full compensation and rehabilitation. The change was not the problem; the problem was the speed of the change, a speed partially due to worker compensation procedures that applied outmoded standards. The political process did not keep worker compensation procedures in line with contemporary standards, and the jury input that could have done so was excluded. The same scenario may be repeated in medical malpractice litigation, as statutory maximum limits on damages create pressure to avoid them where they are clearly inadequate.[30] This pressure to change can get stronger over time and eventually bring changes that appear radical because they occur so quickly after the artificial limits are avoided.

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29. A recent study provides quantitative evidence of unequal treatment in jury damage awards. A. CHIN & M. PETERSON, DEEP POCKETS, EMPTY POCKETS, WHO WINS IN COOK COUNTY JURY TRIALS (Rand 1985).

30. *See*, Fein v. Permanente Medical Group, 106 S. Ct. 214 (1985) (White, J., dissenting from dismissal of appeal) (arguing Court should determine constitutionality of damage limitation in medical malpractice cases).

C. *The Complexity Problem*

If the civil jury's most important political role is the resolution of nonroutine disputes, should jury trial be available for complex disputes? There is strong pressure to eliminate the civil jury from complex litigation,[31] possibly by replacing it with a formal ADR procedure.

Complexity of a factual dispute does not necessarily mean the jury will be unable to resolve it or that ADR will be a better procedure. A jury of six or twelve members of the lay public could probably never succeed if presented with a complex factual issue, given no assistance, and told to create a solution. If that were the task the only solution would be the expertise that could be built into an ADR procedure. However, that is not the task. The jury is given assistance from the legal rules which reduce an entire dispute into certain issues, from the judge who narrows the case to those issues where the evidence is in dispute, and from the lawyers and witnesses who explain the parties' contentions.

The jury is not creating a solution, nor finding what happened. The jury is selecting from the competing scenarios or hypotheses advanced by the parties and deciding which is the most correct explanation.[32] The jury may often make the decision on the basis of collateral factors instead of a total understanding of the dispute, by selecting the explanation that makes the most sense, accounts for more of the known variables. or is best explained by its proponent. The jury verdict is much like the informed decision of a patient consenting to major surgery—the patient may understand little of the medical detail, and certainly could not perform the surgery, but can understand the critical issues of need, risk, and probable success.

In both complex and ordinary litigation, the jury may well perform its proper role even though there is great uncertainty about all the facts. The surgery analogy also illustrates the problems of uncertainty and the relative cost of reducing the uncertainty. In many surgery cases there is uncertainty about the prognosis absent the surgery, the risk of the surgery, and the success of the surgery. Some of that information cannot be made more certain, and other information, such as the prognosis without surgery, can be obtained only at an excessive price, delaying the surgery until it is too late. In the same way, confidence in a jury verdict, or a decision in any dispute resolution, may be reduced by uncertainty about the true facts because the cost of obtaining them exceeds their value or they are no longer obtainable. Knowing more detail does not necessarily mean a better grasp of the issues in dispute; sometimes the best approach is what can be inelegantly described as an educated guess.[33] Where

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31. See the various materials cited in Kirst, *supra* note 10, at 1-2 nn. 2-6.

32. *See* Wessel, *Comment*, in LAW AND SCIENCE IN COLLABORATION 245, 247-48 (J. Nyhart & M. Carrow eds. 1983); Leigh, *A Theory of Jury Trial Advocacy*, 1984 UTAH L. REV. 763, 788-93.

33. *See generally* Wexler, *Expert and Lay Participation in Decision Making*, in

all that can be presented at trial is inconclusive evidence requiring evaluation, the jury's group evaluation of human nature may be the procedure that will create the strongest confidence in the accuracy of the outcome.

D. *Implications for Seventh Amendment Doctrine*

Why should the constitutional protection guaranteeing civil jury trial for all common law actions be weakened by conceding that the jury's role is most appropriate in nonroutine cases, but perhaps less necessary or unnecessary in routine cases? Will that approach to seventh amendment interpretation produce a constitutional doctrine that will preserve the meaning and spirit of the amendment? Will it instead simply allow the courts and Congress to sidestep the amendment and abolish civil jury trial without the trouble of repeal? Although this is a serious risk, there is good reason to consider this approach. Even though litigants actually insist on a jury trial in only a fraction of cases, one ADR theme is that there are still too many jury trials. Some new ADR procedures will have a coercive feature to force use of the alternative and restrict use of jury trial.

Any requirement that litigants use a formal ADR procedure instead of a common law action in court will have to be integrated into seventh amendment doctrine under some niche that justifies the denial of jury trial. Under current doctrine the two niches most likely to be explored are the exception for administrative litigation and the allowance of preliminary procedures as a precondition to a jury trial. The consistent feature of administrative litigation is the absence of a jury or any procedure by which the nonroutine cases can reach a jury. In contrast, preliminary procedures such as court-annexed arbitration could contain a path for nonroutine cases to eventually reach a jury. Even if ADR is only another variation in persistent efforts to weaken or destroy the right to jury trial,[34] it may be better to adapt to the least onerous alternative of mandatory preliminary procedures to avoid a complete loss of jury trial through administrative resolution. The next two sections will consider the administrative and preliminary procedure methods of implementing ADR and explore how they differ in the implications of ADR for the seventh amendment.

IV. VULNERABILITY? ADMINISTRATIVE RESOLUTION

Administrative resolution can be seen as part of the problem, but some proponents will also see it as a method of implementing the ADR cure. Administrative resolution can be as destructively adversarial as the courtroom

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XVI NOMOS, PARTICIPATION IN POLITICS 186 (J. Pennock & J. Chapman eds. 1975); *see also* Newman, *Re-Thinking Fairness: Perspectives on the Litigation Process*, 40 Record of the Assn. of the Bar of the City of New York (1985), *reprinted as revised at* 94 YALE L. J. 1643 (1985).

34. *See* Rheingold, *Plastic Justice*, LITIGATION, Spring 1984, at 3.

litigation which gave birth to ADR, but it does offer maximum freedom to create new procedures to implement various ADR proposals. Unfortunately, administrative resolution is one area where the seventh amendment is particularly vulnerable and jury trial can most easily be completely supplanted by a nonjury alternative.

Could Congress implement ADR by creating an administrative Dispute Resolution Center, provide within it a variety of dispute resolution procedures other than jury trial, and transfer all common law litigation from the federal courts to the administrative Center?[35] The administrative Center procedures would have to comply with the due process requirements of the fifth amendment, but the central issue here is whether the loss of any chance for a jury trial would violate the seventh amendment. The courts have always held that the seventh amendment does not directly apply to an administrative agency,[36] so existing doctrine would not require such an administrative Center to use jury trial, even though the effect would be a denial of jury trial. However, the seventh amendment does indirectly limit Congressional power to assign dispute resolution to such an administrative Center, for at least two policy reasons that are rarely discussed.

The first reason the seventh amendment indirectly limits administrative jurisdiction comes from the need to maintain the amendment as a viable constitutional provision. If there were no limits on administrative jurisdiction and if jury trial were required only in a court, then Congressional transfer of all common law litigation to administrative resolution would leave the seventh amendment a hollow shell. That would seem too clearly to violate the original intent; it would appear too similar to the British creation of nonjury admiralty jurisdiction in the colonies[37] and it would too strongly emphasize the complete absence of express constitutional authority for administrative resolution.

The second reason for an indirect limit is derived from the use of judicial review of administrative action to satisfy article III and legitimate the administrative resolution.[38] Even if the seventh amendment were inapplicable during the administrative stage of the procedure, it could be interpreted to apply to all levels and all functions of the federal courts. This interpretation would require jury trial of disputed fact issues at the judicial review stage. That would complicate or eliminate judicial review on the basis of the administrative record, as well as burden the courts of appeals with jury trials. Restricting ad-

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35. This is only a slight variation on the "multidoor courthouse" concept that has been much discussed. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 130-33 (1976); *see* Ray, *Creating the Courthouse of Tomorrow Today*, 69 A.B.A. J. 170 (1984).

36. "[In] an administrative agency . . . facts are not found by juries." Atlas Roofing v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 460 (1977).

37. *See supra* note 9 and accompanying text.

38. *See* Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L. J. 197, 220-28.

ministrative resolution within seventh amendment limits permits the judicial review without a jury trial.

A related issue that is difficult to separate from the seventh amendment issue is the extent to which article III limits the exercise of judicial power by non-article III adjudicators.[39] Article III issues have been very prominent recently, with major litigation challenging the power of both bankruptcy judges[40] and federal magistrates.[41] The article III and seventh amendment issues are different, because article III can be satisfied in many cases by judicial review in an article III court of the action of the non-article III forum.[42] Since article III judicial review is typically by judges sitting without a jury, article III limits do not necessarily protect the seventh amendment right. The issues are related, because if article III requires *de novo* litigation in district court, the seventh amendment may require jury trial as well. As a result many of the same arguments and precedents apply to both issues and interact in a manner not yet clearly defined.

The seventh amendment issue was not prominent during the expansion of the administrative process, even though the Revolutionary experience with admiralty jurisdiction framed the basic issue of the jurisdiction of nonjury tribunals. It did not appear that litigation was being diverted from the jury because differences between the agencies and the English common law courts appeared substantial. Early administrative action appeared closer to an extension of functions of the executive or legislative branches. When an agency did adjudicate private disputes, other issues appeared to be more important[43] and many coercive agency powers required a *de novo* action in district court for enforcement.[44] The seventh amendment issue as a limit on administrative jurisdiction was not directly addressed by the Supreme Court until 1977.

In *Atlas Roofing v. Occupational Safety and Health Review Commission*[45] the Supreme Court upheld the constitutionality of the OSHA procedure

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39. *Id.* at 204-08.

40. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

41. Pacemaker Diagnostic Clinic v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 100 (1984); *see* Note, *Federal Magistrates and the Principles of Article III*, 97 HARV. L. REV. 1947 (1984).

42. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76-87 (1982) (Brennan, J., plurality opinion).

43. *E.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (seventh amendment issue discussed only briefly at the end of an extensive opinion on congressional power to regulate the area).

44. *See* Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, in 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896 (1973).

45. 430 U.S. 442 (1977). I have reviewed the *Atlas* opinion at length in Kirst, *supra* note 9.

against a seventh amendment challenge. In *Atlas* the Court for the first time tried to define the seventh amendment limits on administrative adjudication, creating a test from a mixed collection of earlier article III and seventh amendment cases. The test stated by the Court was that nonjury administrative adjudication was permitted "in cases in which 'public rights' are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact. . . ."[46] The "public rights" category was based on language from a nineteenth century opinion, but the language had only been used descriptively in the prior opinion.[47] Prior to *Atlas* the Court had not articulated the "public rights" exception to the seventh amendment, and the precedents that were available offered little guidance in defining the limits of the category.

The extent of congressional power to create new procedures under the "public rights" administrative exception depends upon the limits the Court will eventually define; at the moment there are only a few indications, and they are inconsistent. Pre-*Atlas* dictum indicated very few seventh amendment limits on administrative adjudication, more recent dictum suggests the Justices' indecision about whether to limit the "public rights" test to the *Atlas* formulation, and lower court opinions show that court of appeals judges are willing to further expand the test beyond the *Atlas* formulation.

The holding in *Atlas* was foreshadowed three years earlier by dictum in two opinions that suggested that "statutory rights" could be assigned to administrative adjudication.[48] "Statutory rights" were not defined, but appeared to include any dispute within the district courts' federal question subject matter jurisdiction. The dispute in *Atlas* arose under a federal statute, and so involved statutory rights, but the action was also being pursued on behalf of the United States by a federal agency. The holding of *Atlas* appeared to create a two part test of public rights, requiring both a valid federal substantive statute and the federal government as a party in its sovereign capacity. However, the *Atlas* opinion did not indicate whether the "public rights" test replaced and limited the "statutory rights" test, or was only one subset of the broader test.

The *Atlas* precedent reappeared in the *Northern Pipeline*[49] opinions in which the Court ruled on the constitutional objections to the jurisdiction of bankruptcy judges and debated the extent of Congressional power to create legislative courts or adjuncts to article III courts.[50] There was no majority

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46. *Id.* at 450.

47. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

48. Pernell v. Southall Realty, 416 U.S. 363, 383 (1974); Curtis v. Loether, 415 U.S. 189, 194 (1974).

49. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

50. This was somewhat surprising as bankruptcy jurisdiction was solely an arti-

opinion in *Northern Pipeline*, so implications of how the Court views *Atlas* must be based on the plurality opinion of Justice Brennan and the dissenting opinion of Justice White.[51]

Justice Brennan's opinion[52] offers limited solace that the public rights exception will be narrowly construed. The narrowest interpretation came in part III of the opinion, in the discussion of whether the legislative court doctrine could be constrained by "three tidy exceptions", one of which was the "public rights" exception. In part III Justice Brennan described the test narrowly as covering "only" disputes between the government and persons subject to its authority, for a matter of public rights "must at a minimum" arise between the government and others, and the presence of the United States as a proper party "is a necessary but not sufficient means of distinguishing."[53] Justice Brennan covered much of the same ground as *Atlas*, cited the *Atlas* opinion, and in part III treated the "public rights" exception for article I courts the same as the seventh amendment exception. That interpretation gives some content to the seventh amendment exception, even if it inadequately addresses the specific issue of jury trial.[54]

However, in part IV of his opinion Justice Brennan interpreted *Atlas* even more broadly. In discussing whether the bankruptcy court could be considered an adjunct of an Article III court, he stressed that the "substantial discretion"[55] of Congress to prescribe the manner of adjudication did not necessarily permit Congress to use an Article I court to adjudicate all disputes arising under federal statutes. But soon the theme was repeated with more emphasis on the absence of a constitutional limit: "[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to provide that per-

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cle III issue and not a seventh amendment issue. *Atlas* had been expressly limited by the Court to the seventh amendment issue when it granted certiorari only on the seventh amendment issue, although the petition for certiorari had raised the article III issue as well. 424 U.S. 964 (1976). It does show the interrelationship of the issues, even if the *Northern Pipeline* opinions still leave the seventh amendment limits unclear.

51. Justice Rehnquist's concurrence avoided the issue of the scope of the *Atlas* test, but framed the issue well: "I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night, as Justice White apparently believes them to be." 458 U.S. at 91.

52. *Id.* at 52.

53. *Id.* at 67-69 & n.23.

54. An example of the danger of tying the seventh amendment test to the article III test is provided by the argument for increased authority for United States Magistrates. *See* Burnett, *Constitutionality of Consent Trials Before United States Magistrates—Pending Cases May Be a Potent Dynamic Force for Restructuring the Federal Judiciary*, 31 FED. B. NEWS & J. 27, 31-33. If the tests are the same, increased jurisdiction for magistrates would translate into a corresponding decrease in the right to jury trial.

55. 458 U.S. at 80.

sons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right."[56] Justice Brennan then concluded the bankruptcy court was more than an adjunct to an Article III court, in part because the bankruptcy court was authorized to conduct jury trials. One implication is that Congressional discretion is broad enough to permit administrative resolution of all statutory rights, as long as the administrative agency does not look too much like a court, an interpretation that gives little weight to seventh amendment policies.

Justice White's dissent[57] argued that there were no fixed Constitutional limits on what Congress could assign to article I courts. As his opinion progressed, Justice White gave the civil jury ever decreasing protection from Congressional action. Justice White started with a narrow definition: "public rights—controversies between the government and private parties,"[58] argued for a more expansive interpretation: "virtually all the areas in which Congress is authorized to act,"[59] and then argued for no restraint at all: it "depend[s] on the will of Congress and the reasons Congress offers . . . ."[60]

The *Northern Pipeline* opinions show the Court's internal disagreement over whether to state a verbal formula that will give Congress some flexibility to create new procedures and adjudicative bodies, and how to do so without opening the door so wide that there is no restraint at all. In recent opinions the courts of appeals have relied on *Atlas* to uphold statutes in which Congress has provided for administrative adjudication between private parties. This indicates the *Atlas* test—that the government be a party in its sovereign capacity in the administrative proceeding—has not yet succeeded in stabilizing this area.

The first procedure to be challenged was the administrative reparations proceedings under the Commodity Futures Trading Commission Act.[61] A complainant, typically an aggrieved patron, may file a complaint with the Commission alleging a violation of the Act by a registered commodity professional. After a hearing the Commission can order that the respondent pay damages; the further procedure for appeal and enforcement is analogous to *Atlas*. The only appeal is a nonjury review in the Court of Appeals, but enforcement of a damage award is by the district court without retrial of the award. The first element of the *Atlas* test is satisfied since the federal statute is a valid exercise of Congressional power; the second element is not because the government only provides a forum and is not in any sense a party. Never-

56. *Id.* at 83.
57. *Id.* at 92.
58. *Id.* at 103
59. *Id.* at 104.
60. *Id.* at 108.
61. Commodity Futures Trading Commission Act of 1974, P.L. 93-463, sec. 106, 88 Stat. 1389, 1393-95, *codified at* 7 U.S.C. 18 (1982).

theless the denial of jury trial has been upheld under the *Atlas* rationale.[62]

Another procedure which has often been challenged is the arbitration of a withdrawing employer's obligation to a multi-employer pension fund under the Multiemployer Pension Plan Amendments Act.[63] The arbitration is not contractual but imposed by the statute. Again the cause of action arises under a valid federal statute but the government is not a party. The courts of appeals considering the issue have uniformly held that *Atlas* permits nonjury resolution of this "public rights" issue.[64]

Examination of the federal district court statistics shows how vulnerable the seventh amendment is to a broad "public rights" exception for administrative resolution. Two-fifths of civil jury trials are in federal question litigation between private parties.[65] Under a broad interpretation of the "public rights" exception all of these could be transferred to a nonjury administrative forum, with only judicial review on the record to satisfy Article III requirements. The larger number of jury trials in diversity cases is equally at risk, even though the state-created rights in diversity cases appear to be what the Court considers the core category of common law actions.[66] Elimination or restriction of diversity jurisdiction is always possible, and the risk would increase if diversity cases become the only civil litigation requiring jury trial. Alternatively, enactment of proposals such as federal product liability legislation would create the kind of federal statutory rights that could be assigned to a nonjury administra-

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62. Myron v. Hauser, 673 F.2d 994 (8th Cir. 1982); *see* Markham, *The Seventh Amendment and CFTC Reparations Proceedings*, 68 IOWA L. REV. 87 (1982).

63. Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, § 104, 94 Stat. 1208, 1239-40 *codified at* 29 U.S.C. 1401 (1982).

64. Keith Fulton & Sons v. New England Teamsters, 741 F.2d 451, 458-59 (1st Cir. 1984); Terson Co. v. Bakery Drivers Local 194, 739 F.2d 118, 121 (3d Cir. 1984); Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502, 1511 (D.C. Cir. 1984); Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843, 854-55 (2d Cir. 1984); Peick v. Pension Benefit Guaranty Corp., 724 F.2d 1247, 1277 (7th Cir. 1983); Republic Indus. v. Teamsters Joint Council No. 83, 718 F.2d 628, 642 (4th Cir. 1983). The Supreme Court has noted the issue but has not decided it. *See* Pension Benefit Guaranty Corp. v. Gray & Co., 104 S. Ct. 2709, 2717 n.7 (1984).

65. For the twelve months ended June 30, 1984 there were 5,555 jury trials in the following categories in federal district courts.

United States Cases	157
Federal Question	2,209
Diversity	3,144
Local Jurisdiction	45

ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U. S. COURTS, Table C4, (1984).

66. *Cf.* Redish, *supra* note 35, at 208-09 (in *Northern Pipeline*, Justice Brennan considered that such suits, being at the core of the federal judicial power, must be heard by an article III court).

tive forum under a broad interpretation of the "public rights" exception.[67]

Congressional efforts to restructure the bankruptcy courts to comply with the *Northern Pipeline* opinion demonstrate how difficult it is to bring an already existing procedure into compliance when a different constitutional requirement is articulated. The current uncertainty about the "public rights" exception creates the risk Congress will exceed the intended limits of *Atlas* before the Court can draw clearer boundaries, forcing the Court to either acquiesce or risk procedural chaos.[68] The greatest risk to seventh amendment policy is that migration of the docket to administrative resolution will leave the constitutional protection an empty promise. It is unlikely administrative resolution will be abandoned, or even substantially altered,[69] but the vulnerability of the seventh amendment policy should produce more careful consideration of the effect of that method of implementing ADR.

V. Redefined Role? Diversion to a Preliminary Procedure

Disputing parties can always reach a voluntary settlement or agree to an alternative procedure for resolving a dispute and avoid litigation. That does not mean they will because they may lack a sufficient incentive, even though the expense of litigation and threat of an adverse verdict will often make litigation less attractive. The burden and incentive may be unequal, or the parties may incorrectly perceive their self-interest, or the private gain from litigation may be much more compelling than the societal cost. Is there some way to direct parties who only need a limited or less formal type of dispute resolution into such a procedure, while still making jury trial available for those times the jury will play its important role? Mandatory processing through a preliminary procedure before there can be a jury trial might accomplish that, especially if a large percentage of cases could be resolved without the jury trial.

The preliminary procedures to which a dispute is diverted may be attractive for different reasons. Some may be as adversarial as litigation but may reduce public expense if many diverted disputes can be decided without using judicial resources and only a few require resolution in the courtroom. Other

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67. *See* 1 K. Davis, Administrative Law Treatise 189 (2d ed. 1978); *cf.* P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, The Federal Courts and the Federal System 399-400 (2d ed. 1973).

68. One recent proposal that would expand the application of the *Atlas* test is the pending immigration reform bill. *See* Immigration Reform and Control Act of 1985, S. 1200, 99th Cong., 1st Sess., § 121 (d)-(f), *reprinted at* 131 Cong. Rec. 11750, 11753-54 (1985) (as passed by the Senate).

69. There may yet come a time to consider seriously how to incorporate jury trial directly into judicial review of administrative action, providing a jury trial in a district or appellate court where a factual dispute is the key issue in an adminiatrative proceeding that is a substitute for a common law action. Jury trial in an appellate court is not impossible; even the Supreme Court has held jury trials, Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1795), and an issue could be referred for a jury trial.

procedures may remove or dampen some of the adversarial pressure. Various preliminary procedures already in use include: court annexed arbitration, court annexed mediation, screening panels, settlement incentives, and the summary jury trial.[70] Current seventh amendment doctrine may be vulnerable in this area as well, but less so than for ADR implemented under the administrative exception. A new concept— that jury trial is not an initial adjudication but analogous to an appeal from an earlier resolution—may soon develop in federal litigation. The long run implications of that change are not clear, but the seventh amendment policy might be as well or better protected.

The constitutional limits on preliminary diversion are not well-defined because the Supreme Court has considered the issue only once, almost a century ago in *Capital Traction Company v. Hof*.[71] The issue in that case was whether a party could be forced to try a case to a jury before a justice of the peace, with a right to a trial *de novo* on appeal before a judge and jury. The Court held that the justice of the peace jury was not a jury in the constitutional sense because the justice of the peace did not have the power of a common law judge to control and direct the jury, and because a *de novo* trial on appeal was not permitted by the seventh amendment. The jury before the justice of the peace was considered a preliminary procedure to what would be the constitutional jury trial in the Supreme Court of the District of Columbia if either party chose to appeal. Having established which jury trial satisfied the seventh amendment, the Court considered whether the requirement of a first trial before the justice of the peace and the posting of an appeal bond in order to get a constitutional jury trial was permitted under the amendment. The Court held that Congress has "considerable discretion" to require the preliminary step "within reasonable bounds" as long as the right of trial by jury was not "unreasonably obstructed."[72] Since *Capital Traction* there has been little refinement of the broad standard of reasonableness.

The reported federal court opinions that have considered the constitutionality of a diversion program have considered a program set up to reduce docket congestion.[73] The resulting emphasis on immediate need obscured longer term issues, and most studies of effectiveness of diversion programs have not considered the long-term effect on the availability of civil jury trial.[74] For seventh amendment doctrine and policy, ordinary counting of the number of cases resolved off the docket and those that return to the regular docket cannot be the only measure of success. If the diverted cases are routine and usual, perhaps most or all could be resolved by diversion without undercutting

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70. *See infra* note 86 and accompanying text.

71. 174 U.S. 1 (1899).

72. *Id.* at 44-45.

73. *E.g.*, New England Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712 (E.D. Pa. 1983); Kimbrough v. Holiday Inn, 478 F. Supp. 566 (E.D. Pa. 1979).

74. *E.g.*, J. ADLER, D. HENSLER, & C. NELSON, SIMPLE JUSTICE, HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM (1983).

the seventh amendment policy. If the diverted cases are nonroutine or unusual, a low percentage returning to the regular docket for trial would indicate a serious risk to seventh amendment policy.

Some distinctions assist in defining or describing an "unreasonable obstruction" on the right to jury trial. First, preliminary procedures may be required for either predictive or substantive reasons.[75] Predictive steps try to educate the parties on what would most likely happen in an actual jury trial. The assumption is that the predictive step is required to bring the parties' expectations into the mutual settlement range; while, without it they will not settle because they or their lawyers lack information, or cannot objectively evaluate the case. In contrast, substantive steps do not try to predict what a jury is likely to do, but rather try to substitute a different outcome. Sometimes the substantive effect is openly stated, other times it is not acknowledged. At the moment it is enough to recognize the possibility without arguing whether it is proper; this is simply another theme in the centuries old argument about whether the proper role of the jury is broader than mechanical fact-finding.

Second, there are two ways of looking at the succession of possible procedures, as either settlement in most cases followed by resolution at trial of those not settled, or resolution of most cases by the preliminary ADR procedure followed by resolution of the balance by trial.[76] The traditional view has been that there is only one actual dispute resolution, that which takes place at the actual trial; any pretrial settlement is not a resolution but some kind of subsidiary step. Perhaps it is more accurate to consider any procedure a dispute resolution procedure if it achieves a result in some disputes even if there is no announced winner and some cases eventually go on to trial. Certainly the verdict in a courtroom trial is a resolution, even though in some cases the litigation continues on appeal.

If the preliminary ADR procedure is seen as one form of resolution, then in the later jury trial of those cases where trial is demanded the jury is providing a second decision by resolving again a dispute which has been resolved at least once before. The difference between the predictive and substantive steps becomes most apparent in the amount of coercion required to force parties to use the preliminary procedure and the level of sanctions required to force the parties to accept the initial result and not demand a trial.

A predictive step which appears accurate because it has a good track record of forecasting actual verdicts will require little coercion to get substantial use by all parties. On the other hand, an apparently inaccurate predictive step will be avoided if possible because it will not provide useful information. A

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75. *See generally* Abraham, *Alternatives to the Tort System for the Nonmedical Professions: Can They Do the Job?*, 1981 B.Y.U. L. REV. 57, 74-84.

76. *See generally* THE ROLE OF COURTS IN AMERICAN SOCIETY: FINAL REPORT OF THE COUNCIL ON THE ROLE OF COURTS 81-94 (J. Lieberman ed. 1984); Murray, *Guideposts for an Institutional Framework of Consensual Dispute Processing*, 1984 MO. J. OF DISPUTE RESOLUTION 45, 47-49.

substantive step will be strongly resisted by the party it appears to disfavor. A predictive step which is perceived as relatively accurate will lead to a substantial percentage of final settlements even without a corresponding sanction for demanding trial. A party's own additional costs from a trial will be enough to compel settlement when it appears likely the final result will not be significantly different from the prediction. Substantive steps perceived as inaccurately predicting a jury verdict will add less to the parties' information and be less likely to bring the parties into a settlement range. Therefore, a significant sanction will have to be imposed, particularly on the party whom the procedure disfavors, to encourage resolution by settlement and discourage that party from trying for a better result from the jury.

In contrast to administrative resolution, preliminary procedures may be less of a seventh amendment threat, because there is still the chance that the case will get to the jury. The predictive procedure presents the least threat, because the success of the predictive procedure is measured by the accuracy of the predictions when tested by actual trial. The pattern of verdicts will educate both the parties and the predictor on the accuracy of the predictions. The substantive procedure is more of a threat; it works only if a higher cost for jury trial or an increased risk of failure discourages the disfavored party from trying to avoid the result by winning a better verdict from the jury.[77] The higher cost might be an increased filing fee, payment of the costs of the preliminary procedure, or liability for substantial costs if the appealing party does not improve its position in the jury trial. Reducing the chance the jury will return a more favorable verdict has usually been accomplished by allowing evidentiary use of the results of the preliminary procedure[78] or manipulating the burden of proof required to upset the preliminary resolution.[79]

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77. Diversion plans vary in the price of a *de novo* jury trial, such as payment of the arbitrator's compensation in cases of compulsory arbitration of civil cases, PA. R. CIV. PROC. 1308 (1984), deposit of the record costs accrued in the arbitration of medical malpractice cases, PA. R. CIV. PROC. 1804 (1984), deposit of a cost bond of $2000 by the losing plaintiff to pursue a medical malpractice action, MASS. GEN. L. ANN., ch. 231, § 60B (West 1985), possible liability for opponent's attorney's fees, W.D. WASH. LOCAL CIV. R. (g)(12) (1981), or liability for actual costs at trial. Rhea v. Massey-Ferguson, Inc., 767 F.2d 266 (6th Cir. 1985).

78. The federal courts have found no seventh amendment violation in admitting the report of a medical malpractice panel. *E.g.*, Seoane v. Ortho Pharmaceuticals, Inc., 660 F.2d 146, 148-49 (5th Cir. 1981). *See also*, DiAntonio v. Northampton-Accomack Memorial Hosp., 628 F.2d 287, 290-91 (4th Cir. 1980) (federal policy on jury trial procedure does not outweigh state interest in medical malpractice procedure).

79. Presumptions are one method of manipulating the burden of proof, and creation of a rebuttable presumption as the result of a prior proceeding does not violate the seventh amendment. Meeker v. Lehigh Valley Ry. Co., 236 U.S. 412, 430 (1915).

The issues raised by giving the preliminary procedure some effect, but not completely foreclosing relitigation of all issues, are the same as those left unresolved by the Court in *McDonald*. *See* text accompanying notes 20-23, *supra*.

Actually classifying a particular procedure as predictive or substantive is more difficult than describing the categories, but the distinction can be helpful in evaluating reform proposals. The medical malpractice disputes of the 1970's illustrate that some procedural reforms may simply be a cover for attempts to change the substantive law. Legislative motives are often mixed and indeterminate, and the same sanction can both discourage frivolous appeals from a predictive procedure and coerce acceptance of a less acceptable result from a substantive procedure. The debate over the pending proposal to amend Federal Rule 68 illustrates the difficulty of resolving these issues. Rule 68 is an informally structured ADR variant which attempts to establish a procedure for resolving cases that should settle and not be tried, by imposing sanctions on parties who unreasonably refuse to settle. Rule 68 could operate alone, or in conjunction with more formal ADR procedures such as court annexed arbitration or minitrials, with the sanction imposed on a party who refused to accept the resolution of the ADR procedure.

As first proposed, amended Rule 68 attempted to define the sanction issue fairly mechanically, measuring reasonableness of demanding trial by whether the judgment was more favorable than the settlement offer, and making the sanction automatic unless found by the court to be unjustified.[80] Initial objections that the first proposal too strongly denied some litigants access to court[81] led to its withdrawal. In the 1984 draft, all the mechanical tests were replaced by a provision for judicial determination of whether the demand for trial was unreasonable and the amount of any sanction. The 1984 draft had a list of six circumstances to be considered in determining whether an offer was unreasonably rejected and a list of four factors to take into account in deciding the sanction to be imposed.[82] Both the proposed rule and the comments ignore the the standard of appellate review, leaving an open question whether the district courts or the courts of appeal will shape the actual application of the rule.

The Rule 68 proposal certainly will generate a new round of debate and controversy on many issues beyond the seventh amendment issue [83] but there is clearly a potential effect on the seventh amendment. Proposed Rule 68 would add a potent, qualitatively different tool to the arsenal of procedures available to the trial judge to deny a litigant a jury trial. Pleading decisions, summary judgment, directed verdict, and judgment notwithstanding the ver-

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80. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U. S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (1983), *reprinted at* 98 F.R.D. 339, 361-67 (1983).

81. *See, e.g.*, Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 COLUM. L. REV. 719 (1984).

82. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, (1984), *reprinted at* 102 F.R.D. 425, 432-37 (1984).

83. *See* Marek v. Chesny, 105 S. Ct. 3012, 3019, 3027-35 (1985) (Brennan, Marshall, Blackmun, JJ., dissenting) (arguing curent Rule 68 should not apply to attorney fees in civil rights litigation).

dict, all can keep a litigant from getting or keeping a jury verdict, but only where the record shows there is no issue of fact for the jury. A new trial can overturn a jury's factfinding, but only where the proof is so weak the verdict is against the great weight of the evidence; therefore, there will still be a second jury verdict. Under proposed Rule 68 sanctions for demanding trial and "unreasonably" refusing to settle can be imposed, or potential sanctions threatened, even if there is an issue for the jury, even if there is strong evidence, and even if the party obtains a favorable verdict supported by the evidence.

The extent to which the sanction denies the constitutional right to jury trial, or the extent to which the demand for a jury trial should result in sanctions, would depend upon the individual discretion of each judge and the individual judge's belief in the strength of the historical policy supporting the seventh amendment.[84] Even for those areas of seventh amendment doctrine where policy choices are controlled only weakly by history and precedent, such as the administrative proceeding exception or the law-equity analysis of a novel modern cause of action, the current doctrine is defined in appellate opinions and relatively stable. The undefined judicial discretion to limit the seventh amendment right in proposed Rule 68 does not appear to be an essential ingredient for implementing ADR through diversion. The proposed discretion is simply a reflection of an attempt to avoid a complex problem because of the difficulty of precise definition.

If the price of a jury trial is too important to be left to individual judicial discretion, what alternative approaches would best assure the right to jury trial is not "unreasonably obstructed" by an excessive price? The price for demanding trial could be a fixed amount or a price measured by the cost of the preliminary procedure. Any cost above the normal filing fee appears to discriminate against poorer litigants and litigants with nonmonetary claims who may be pursuing nonroutine claims that ought to be heard by a jury. The language of the seventh amendment may be sparse, but pricing the jury trial beyond the reach of most litigants would certainly violate the spirit of the amendment. If the price of jury trial is measured by the actual cost of the preliminary procedure or some average cost, it would be both relatively constant and more likely to be reasonable, especially since the full value of the ADR procedure depends on curtailing its cost. There might be some unnecessary jury trials, but it is better to accept some overinclusion by trying a few cases where the premium procedure is wasted in order to avoid the loss of citizen participation which would result from underinclusion.

A completely different, or perhaps complementary approach, would reduce the attraction of the jury trial by increasing the chance it will not improve the result. This could be done by adjusting the burden of proof as a

84. An omen of the future practice is *Kothe v. Smith*, 771 F.2d 667 (2d. Cir. 1985), where the court reversed a $2,480 sanction imposed by the trial court on a defendant who was "dilatory" in making a settlement offer.

result of the preliminary resolution without informing the jury of the result. It could also be done by informing the jury of the first resolution and requiring that it be followed unless shown incorrect, by a preponderance or more. This procedural approach is neither novel nor unguided by precedent. Judges for centuries have allocated the burden of proof, reallocated it with devices such as presumptions, and taken over an issue entirely by calling it a question of law. This procedural approach has the advantage of not directly pricing any case out of jury trial so nonroutine claims could reach the jury.

The limited precedent on current preliminary procedures has found no violation of the seventh amendment from any procedure that allowed a litigant to have a jury trial after the preliminary procedure. The limits of reasonable restrictions on jury trial have not been reached, and remain vague, but in the long run the potential impact on the seventh amendment appears less serious for this manner of implementing ADR.

VI. Future Issues

The most uncertain implication of the ADR movement is the long term effect it might have on the seventh amendment. ADR could supplant the civil jury if administrative resolution became the model. In the alternative, the jury might become a second level rather than first level dispute resolution procedure if diversion to the preliminary procedures became the model. The differing implications of each model for the civil jury are rooted in differing assumptions about the extent to which seventh amendment interpretation is a political issue.

The administrative model exception is an offshoot of the classification side of the historical test, a relative of the law-equity historical test. The application of the test depends on finding an historical analogy to answer a modern problem. Once the analogy is found and the absence of the civil jury justified there is little reason to reexamine the historical tea leaves. A major problem with this categorical approach is that the litigation appropriate for jury trial cannot be pigeonholed according to neat historical distinctions.

The doctrine defining when preliminary procedures can be required has less formal development, but the acceptance of reasonable limits on access to the jury is analogous to the process of defining the relative roles of judge and jury. Those roles are never frozen, but can vary over time as trial and appellate judges reconsider the role of the jury. Whether the price of demanding a jury trial following a preliminary ADR procedure is monetary or a change in the burden of proof, the effect of that price is more obvious than the price for administrative resolution. The price of a jury trial is open to change to adjust the proportion of cases reaching the jury. Of equal importance, the diversion to preliminary procedures is a procedural rather than a categorical approach. It permits any kind of case to be heard by the jury where one party believes it is a nonroutine dispute, and better integrates the various procedures as com-

plementary and not necessarily competitive.[85]

Even if all ADR is implemented through preliminary procedures with a reasonable price for litigants who demand a jury trial, the ADR threat would not disappear. There is some minimal level of usage necessary to keep jury trial viable. Before increased use of ADR and decreased use of jury trial makes the civil jury appear an expensive anachronism there is good reason to continue efforts to make civil jury trial more efficient and useful. One possibility is to incorporate some lessons of ADR directly into jury trial, so an improved civil jury system could better compete with alternatives in the market for dispute resolution procedures.

One immediate possibility for incorporating ADR into the civil jury is suggested by the experiments with the summary jury trial.[86] The summary jury trial procedure uses a nonbinding, half-day "trial" to a six member lay panel. Counsel summarize the evidence without live witnesses and make their arguments. The resulting verdict often provides a basis for settlement.[87] This preliminary procedure is a relatively inexpensive predictive preliminary step; any party can demand an actual jury trial but most do not.

The apparent success of the summary jury trial procedure suggests that jury trials are overused to decide routine issues, such as the amount of damages in an ordinary injury case. The public cost and litigant cost may be greatly reduced with the summary jury trial, but there is duplication in those cases where a full trial results. Is there an intermediate position, allowing a substantially shortened period for trial as the one and only jury trial required by the seventh amendment? The leisurely pace of the typical trial would be abandoned, critical issues would have to be highlighted and side issues ignored, and trial practice would require different skills in effective communication, but there would still be the ability to get the citizen participation in the business of the courts.[88]

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85. Bedlin & Nejelski, *Unsettling issues about settling civil litigation*, 68 JUDICATURE 9, 29 (1984); Nejelski & Ray, *Alternatives to Court and Trial*, in THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 263-65, 272-75 (F. Klein ed., 6th ed. 1981).

86. M. JACOUBOVITCH & C. MOORE, SUMMARY JURY TRIALS IN THE NORTHERN DISTRICT OF OHIO (Federal Judicial Center 1982); Lambros, *The Summary Jury Trial*, 103 F.R.D. 461 (1985); Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 53-54 (1980); Comment, *Recent Developments-Procedure: Summary Jury Trials in United States District Court, Western District of Oklahoma*, 37 OKLA. L. REV. 214, 218 (1984); *Special Supplement on Alternate Dispute Resolution in Court*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Oct. 1984, at 4-13. The United States Judicial Conference has endorsed experimental use of summary jury trials. *Judicial Conference Moves on Wide-Ranging Agenda at Fall Meeting*,THE THIRD BRANCH, Nov. 1984, at 3.

87. M. JACOUBOVITCH & C. MOORE, *supra* note 86, at 7-9.

88. *See* Kirst, *How to Find a Role for the Civil Jury in Modern Litigation*, ___ JUDICATURE ___ (forthcoming 1986); *see generally* Rosenberg, Rient & Rowe,

The status quo will not remain stable, and the actual or apparent efficiency or inefficiency of jury trial will affect the scope of jury trial. The next step appears to be further exploration of how the lessons of ADR can be used to make jury trial more efficient. This step would make the ADR movement a valuable experience for protecting seventh amendment policy.

Expenses: The Roadblock to Justice, JUDGES J., Summer 1981, at 16, 46.