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The Constitutionality of a Complexity Exception to the Seventh Amendment

Joseph A. Miron Jr.

THE CONSTITUTIONALITY OF A COMPLEXITY EXCEPTION TO THE SEVENTH AMENDMENT

JOSEPH A. MIRON, JR.*

I. INTRODUCTION

The notion of a complexity exception to the Seventh Amendment of the Constitution has generated much controversy.[1] By invoking a complexity exception, a court can withhold issues from the jury because of their legal or factual complexity and decide the issues itself.[2] In essence, courts use a complexity exception to foster accurate verdicts.[3]

Proponents and opponents of the complexity exception continue to debate its constitutionality.[4] Several authors have concluded that a

* J.D. Candidate Chicago-Kent College of Law, 1999; M.B.A., Finance, DePaul University; B.A., Finance, Michigan State University. I wish to thank Patrick Cotter for his guidance and insight during the research and writing of this note. His assistance and direction throughout were invaluable.

1. There have been numerous articles written in both law reviews and journals on this topic. *E.g.*, Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Maxwell M. Blecher & Candace E. Carlo, *Toward More Effective Handling of Complex Antitrust Cases*, 1980 UTAH L. REV. 727; Maxwell M. Blecher & Howard F. Daniels, *In Defense of Juries in Complex Antitrust Litigation*, 1 REV. LITIG. 47 (1980); James S. Campbell & Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965 (1980); Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980); Patrick Lynch, *The Case for Striking Jury Demands in Complex Antitrust Litigation*, 1 REV. LITIG. 3 (1980); Daniel H. Margolis & Evan M. Slavitt, *The Case Against Trial by Jury in Complex Civil Litigation*, LITIG., Fall 1980, at 19; Jeffrey Oakes, *The Right to Strike the Jury Trial Demand in Complex Litigation*, 34 U. MIAMI L. REV. 243 (1980).

2. *See infra* Part III.A.

3. *See generally infra* note 5 (collecting articles supporting the theory of a complexity exception).

4. Scholars also debate whether the complexity exception is wise from a *policy* perspective. *Compare* Lynch, *supra* note 1, at 3 ("The jury is as inappropriate to some antitrust cases today as the wild west gunfighter is to modern Abilene."), *with* Lisa S. Meyer, *Taking the "Complexity" Out of Complex Litigation: Preserving the Constitutional Right to a Civil Jury Trial*, 28 VAL. U. L. REV. 337, 372 (1993) ("[J]udges and litigants can and must manage cases in a way in which jurors are afforded all necessary assistance to understand and decide complex cases."). Two commentators reported that "a growing number of legal scholars think the [jury] reforms would make for more reliable, accurate verdicts." Tamar Jacoby & Tim Padgett, *Waking Up the Jury Box*, NEWSWEEK, Aug. 7, 1989, at 51. Additionally, Judge Posner made some interesting remarks in Litigation Magazine. *See* Jeffrey Cole, *Economics of Law: An Interview with Judge Posner*, 22 LITIG., Fall 1995, at 66-67. Judge Posner stated that he would be in favor of a complexity exception in certain "complex commercial cases." *Id.* at 66. To justify this opinion, he stated that, "it's unfair really to put people through the task of trying to understand a subject which people of higher education and intellectual attainment spend a lifetime studying with imperfect understanding." *Id.* at 67. Given Judge Posner's affection for efficiency theories, his

complexity exception is constitutional,[5] while others argue the opposite case.[6] This note argues that it is, and finds support for the complexity exception not only in the traditional historical constitutional analysis, but also in the the Supreme Court's opinion in *Markman v. Westview Instruments, Inc.*[7] Using this recent decision from the Court, in combination with prior case law and the ideology present in English common law, this note investigates the constitutionality of the compexity exception and concludes that a complexity exception *is* constitutional.[8]

The original Constitution lacked provisions for fundamental rights and so did not provide for the right to a jury trial in civil actions. This deficiency was one of the chief factors in the push for the Bill of Rights.[9] The Federalists and the Anti-Federalists differed over whether the right to a jury trial in civil actions should be constitutional. The Anti-Federalists favored codifying this right in the federal compact because of the absence of fundamental rights.[10] Their arguments won the day, and in 1791 the Seventh Amendment was enacted, providing for a civil jury trial for "suits at common law."[11] One of the questions[12] that has arisen regarding the meaning of the deceptively

opinions could be biased because bench trials may result in more efficient adjudication, even if for the sole reason that twelve fewer people are involved. However, Judge Posner's opinions are, at a minimum, predictive of the decision that would result if a complexity exception was proposed under the right circumstances in the Seventh Circuit.

5. For articles proposing that there is a complexity exception to the Seventh Amendment, see Campbell & Le Poidevin, *supra* note 1, at 965-66; Devlin, *supra* note 1, at 107; Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial,* 53 OHIO ST. L.J. 1005, 1007 (1992); Lynch, *supra* note 1, at 3; Margolis & Slavitt, *supra* note 1, at 19; Oakes, *supra* note 1, at 243; Joseph C. Wilkinson, Jr. et al., *A Bicentennial Transition: Modern Alternatives to Seventh Amendment Jury Trial in Complex Cases*, 37 U. KAN. L. REV. 61, 63, 66 (1988).

6. For articles proposing that there is no complexity exception to the Seventh Amendment, see Arnold, *supra* note 1, at 830; Blecher & Carlo, *supra* note 1, at 744; Blecher & Daniels, *supra* note 1, at 48; James L. Flannery, Note, *Complex Civil Litigation: Reconciling the Demands of Due Process with the Right to Trial by Jury*, 42 U. PITT. L. REV. 693, 694 (1981); Meyer, *supra* note 4, at 341.

7. 517 U.S. 370 (1996).

8. A finding of constitutionality should not be interpreted as a vote supporting actual use of the exception. A finding of constitutionality means only that the complexity exception is an option available to the courts. Another available burden on the Seventh Amendment right approved by the Court is jury size. The Court has held that downsizing the jury fifty percent from twelve members to six members is not a violation of the Seventh Amendment. *See* Colgrove v. Battin, 413 U.S. 149, 160 (1973). The Court stated that the protection provided was the right to trial by jury, "rather than the various incidents of trial by jury." *Id.* at 155-56.

9. *See* Klein, *supra* note 5, at 1017.

10. *See* Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 16 (1993).

11. U.S. CONST. amend. VII.

12. For additional issues related to the Seventh Amendment, see *infra* Part II.

simple phrase "suits at common law"[13] is whether the Seventh Amendment properly admits an exception to the right to a jury where the facts are highly complex; i.e., a "complexity exception."

The question of the constitutionality of a complexity exception hinges on whether the ideology of the common law of England in 1791 warrants such an exception[14] because the Supreme Court interprets the Seventh Amendment as providing for a jury trial in situations where eighteenth century English common law did so.[15] This note summarizes authority indicating that the theory of a complexity exception was adopted and accepted in the English system of common law prior to 1791. Because the Seventh Amendment is guided by English common law, and because complex cases were often withheld from juries in English common law, the complexity exception to the Seventh Amendment is constitutional. The fact that the courts have not chosen to invoke this power until recently does not cast doubt on the constitutionality of the theory.[16] Courts have begun to realize that a mechanistic approach to interpreting the Seventh Amendment is no longer effective. In other words, granting or not granting a jury trial based on a static list considers the form but not the substance of English common law, to which courts ought to turn in reading the Seventh Amendment. *Markman* signifies the Supreme Court's willingness to recognize this perspective.

Before presenting the reasoning behind the finding of constitutionality for a complexity exception, this note first provides some necessary background information. In Part II, the note discusses the history and development of the Seventh Amendment, focusing particularly on the notion of a complexity exception. In Part III, the note traces the complexity exception from its existence in English common law to its current use and explains characteristics of a case that may cause a court to invoke a complexity exception, including some of the arguments for and against its present day application. This part also argues that the complexity exception to the Seventh Amendment is constitutional because it is consistent with the operation of English common law prior to 1791. Finally, in Part IV, the note argues that the Supreme Court has adopted the theory of a complexity exception through its decisions in *Ross v. Bernhard* and, more recently,

13. U.S. CONST. amend. VII.

14. *See* articles cited *supra* note 1.

15. *See infra* Part II.B and accompanying notes.

16. As this note will show, the complexity exception debate had its origin in 1970, in *Ross v. Bernhard*, 396 U.S. 531 (1970).

Markman v. Westview Instruments, Inc. Part IV also highlights an alternative argument for the constitutionality of a complexity exception to the Seventh Amendment based on the Fifth Amendment's Due Process Clause.

II. HISTORY OF THE SEVENTH AMENDMENT

A. Basis in English Common Law and History Surrounding the Enactment of the Seventh Amendment

Several scholars have identified the English monarchy's attempts to weaken the power of juries in early colonial America as one of the driving forces behind the Declaration of Independence,[17] which protests the lack of "the benefits of trial by jury."[18] The records of the Federal Constitutional Convention at Philadelphia in 1787 indicate that the Constitution's framers discussed civil jury trials only on September 12 and September 15.[19] It is likely that the original Constitution does not provide for a right to civil jury trial because "[t]he Representatives of the people," as James Madison explained, "may be safely trusted in this matter."[20] In any case, the authors sent the Constitution to the Continental Congress on September 17, 1787, without any reference to civil jury trials.[21]

To address this omission, the Continental Congress introduced the Seventh Amendment in 1789 as part of the Bill of Rights; it became law on December 15, 1791. The Amendment states:

> 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.[22]

As the language illustrates, the provision only applies to "suits at common law."[23] In addition, Congress used the ambiguous word "preserved" instead of a more precise term, such as "guaranteed."[24] The

17. *See, e.g.*, Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 595-96 (1993).

18. THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776).

19. *See* Landsman, *supra* note 17, at 597-98 (citing Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 293 (1966)).

20. Henderson, *supra* note 19, at 293 (citing James Madison, DEBATES IN THE FEDERAL CONVENTION OF 1787 (1937)).

21. *See* Henderson, *supra* note 19, at 295.

22. U.S. CONST. amend. VII.

23. *Id.*

24. *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 460 (1977) ("The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases.").

available commentary accompanying the enactment of the Amendment sheds light on this word choice. It appears the fluid state of the right to a jury trial at the time prompted the selection of the vaguer term.[25] The term "preserved" also suggests that the framers meant to recognize an existing right, not create a new one.[26]

Before the thirteen colonies ratified the Constitution, they all had already instituted some form of civil jury trials, typically in a Bill of Rights.[27] Differences in the way the states codified the right to a civil jury trial made it unclear exactly what right was "preserved" by the Seventh Amendment.[28] Hence, early American judges turned to English common law for guidance in interpreting the Seventh Amendment.[29] This interpretive practice is an important building block for fully understanding the Seventh Amendment. After the adoption of the Articles of Confederation, and before the adoption of the Constitution, no consistent operation of civil juries existed in the thirteen colonies.[30] Alexander Hamilton commented on the differences in jury practices between the states.[31] "In this State," he observed, "our judicial establishments resemble . . . those of Great Britain. We have courts of common law, . . . a court of admiralty, and a court of chancery."[32] Hamilton went on to explain the differences between the states concerning the availability of a civil jury trial, focusing on states that had a court of chancery and the types of cases heard there.[33]

25. For an in-depth analysis of the confusing history of the Seventh Amendment, see generally Henderson, *supra* note 19; Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

26. *See* Landsman, *supra* note 17, at 600.

27. *See, e.g.*, Wolfram, *supra* note 25, at 655 (quoting L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY–LEGACY OF SUPPRESSION 281 (1960)).

28. The difficulty arises because there was not a universal practice that could be "preserved."

29. *See, e.g.*, United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750); *see also* THE FEDERALIST NO. 83, at 523-25 (Alexander Hamilton) (Henry Cabot Lodge ed., 1904) ("The great difference between the limits of the jury trial in different States is not generally understood; . . . [T]here is a material diversity . . . in the extent of the institution of trial by jury in civil cases, in the several States; . . . no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States . . . ."); Henderson, *supra* note 19, at 294-95 (explaining that the lack of any guarantee of jury trial in civil cases was due to Federalist beliefs "that because of the great diversity of state civil practice no single formula could satisfy everyone"); Klein, *supra* note 5, at 1022 (same).

30. *See* Henderson, *supra* note 19, at 299 (noting the "power of the civil jury and the extent of judicial control over its verdicts varied enormously and unsystematically from state to state"); Klein, *supra* note 5, at 1010 (same).

31. *See* THE FEDERALIST NO. 83, at 523-26 (Alexander Hamilton) (Henry Cabot Lodge ed., 1904).

32. *Id.* at 524.

33. *See id.* at 524-26.

This confusing patchwork of state civil jury trial doctrine would yield two developments in the Supreme Court's Seventh Amendment jurispridence. First, as we shall see below, the Supreme Court was forced to reason from the only consistent body of law available: English common law. Second, the Supreme Court has declined to incorporate the Seventh Amendment into the Fourteenth and apply it to the states.[34] This latter development has had minimal effect, however, because most states have enacted statutes providing from some from of jury trial in civil cases.[35]

B. Early Interpretation—The Courts' Development of the "Mechanistic Approach"

Prior to 1970, the interpretation of the Seventh Amendment was straightforward. In fact, in the period shortly after its enactment, the courts interpreted the Seventh Amendment broadly. If there was any question, judges recognized a right to a jury trial.[36] Given the political culture at the time, this policy is understandable. America had just gone through the revolution, fueled in part by the English refusing to guarantee the right to a jury trial.[37] The seminal American case interpreting the Seventh Amendment is *United States v. Wonson*.[38] In *Wonson*, the defendant was accused of violating the Embargo Supplementary Act of 1808.[39] Justice Story ruled that a jury trial should be granted if one would have been granted under similar conditions by English common law.[40] According to Justice Story, the phrase "common law" in the Seventh Amendment is "[b]eyond all question . . . not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence."[41]

34. *See* Pearson v. Yewdall, 95 U.S. 294, 296 (1877) (citing Edwards v. Elliott, 88 U.S. 532, 557 (1874)). The Court has "consistently refused to rule that preservation of civil jury trial is an essential element of ordered liberty required of the states by the due process clause of the [F]ourteenth [A]mendment." *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1085 (3d Cir. 1980).

35. *See, e.g.*, CAL. CONST. art. I, § 16; IL. CONST. art. I, § 13; MICH. CONST. art. I, § 14; *see also* Paul B. Weiss, Comment, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 CATH. U. L. REV. 737, 748 (1989).

36. *See, e.g.*, United States v. Wonson, 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

37. *See, e.g.*, Roger W. Kirst, *The Jury's Historic Domain in Complex Cases*, 58 WASH. L. REV. 1, 17-18 (1982).

38. 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

39. *See id.* at 745.

40. *See id.* at 750.

41. *Id.*

With that, Justice Story laid the foundation for the "historic approach" for determining whether the right to a jury trial exists.[42] Given the nature of the determination, this note will refer to this approach as the "mechanistic approach": if the right to a civil jury trial existed at common law, it must exist under the Seventh Amendment. As one commentator stated, "[n]o federal case decided after *Wonson* seems to have challenged this sweeping proclamation; perhaps later judges have hesitated to appear to be the kind of intractable person that would require Mr. Justice Story to elaborate on the obvious."[43] Given the circumstances, Justice Story was left little choice but to conclude that "common law" referred to the common law of England. "Federalist 83, with which Justice Story was familiar, made clear that if 'common law' was read as a reference to American practice, then it provided no guideline at all. Each of the thirteen states had its own corpus of common law rules."[44]

Interpretation of the Seventh Amendment has developed further since *Wonson*. In the seminal case of *Thompson v. Utah*,[45] the Court fixed 1791 as the year of reference to English common law for deciding whether a jury trial should be granted.[46] At the time of *Thompson*, in 1898, the federal courts were still split between courts of law and courts of equity.[47] Therefore, the line of cases after *Thompson* focused on applying the mechanistic approach to differing fact patterns, "particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, . . . issues of law are to be resolved by the court and issues of fact are to be determined by the jury . . . ."[48]

Initially, the mechanistic approach was an efficient method for interpreting and applying the Seventh Amendment. For a time, no significant growth in the types of actions encountered took place; hence, judges had little difficulty comparing the instant action to those tried in English common law prior to 1791. The relevant English com-

42. *See* Markman v. Westview Instruments, Inc., 571 U.S. 370, 376 (1996) (quoting Wolfram, *supra* note 25, at 640-43); Kirst, *supra* note 37, at 12; Georgiana G. Rodiger, Note, *Has the Right to a Jury Trial as Guaranteed Under the Seventh Amendment Become Outdated in Complex Civil Litigation?*, 8 PEPP. L. REV. 189, 191-92 (1980).

43. Wolfram, *supra* note 25, at 641.

44. Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1020 (1994).

45. 170 U.S. 343 (1898), *overruled by* Collins v. Youngblood, 497 U.S. 37 (1990).

46. *See id.* at 350.

47. *See, e.g., id.*

48. Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

mon law was contemporary and thus familiar to them, making comparison and application less difficult than it is for a judge today.

More recently, when Congress adopted the Federal Rules of Civil Procedure in 1938, the district courts of law and equity merged in the federal system,[49] although the right to a jury trial at common law remained undisturbed in the rules themselves.[50] If the same court heard both legal and equitable issues and decided the equity issues first, however, the adjudication of the equity issues might collaterally estop a jury from retrying those issues. In the landmark case of *Beacon Theatres, Inc. v. Westover*,[51] the Supreme Court held that trying the equitable claims first imposed an injunction on the legal claims, which effectively denied the right to a jury trial.[52] The Court, therefore, ordered a jury trial on all issues in the case.[53]

Comparing the instant action to eighteenth century actions under English common law is an increasingly difficult one for courts to undertake. Today the boundaries between cases involving law and those involving equity are unclear.[54] English reports before the nineteenth century are incomplete and unreliable.[55] Moreover, courts today face radically different legal issues than they did in the eighteenth century. For example, the antitrust laws enacted since 1791 are among the most complex legal theories in history. These laws are often involved in cases where a complexity exception is proposed.[56] The substantive law in a typical antitrust case may incorporate several legal theories in one section, hardly a comparable situation to an eighteenth century case.[57]

49. *See* FED. R. CIV. P. 2.

50. *See* FED. R. CIV. P. 38; *see also* Beanunit Mills, Inc. v. Eday Fabric Sales Corp., 124 F.2d 563, 565-66 (2d Cir. 1942); 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2301, at 14 (3d ed. 1995).

51. 359 U.S. 500 (1959).

52. *See id.* at 506-07. The Court restricted this ruling, however, in *Katchen v. Landy*, 382 U.S. 323 (1966). In *Katchen*, the Court stated that *Beacon Theatres* was meant to be a general rule and that a court was not bound by this rule. *See id.* at 338-40. Subsequently, the Court restricted *Katchen* to apply to administrative proceedings only. *See* Curtis v. Loether, 415 U.S. 189, 194-95 (1974).

53. *See Beacon Theatres*, 359 U.S. at 508.

54. *See* Henderson, *supra* note 19, at 293-95.

55. *See* Arnold, *supra* note 1, at 840-46.

56. *See, e.g., In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1073 (3d Cir. 1980).

57. For an example of the difficulty of modern antitrust law, peruse 15 U.S.C. § 72 (1994). Now imagine applying these concepts to over 2,000 exhibits, over 20 million documents, and over one-hundred thousand pages of deposition testimony, as well as a trial period in excess of two years. *See, e.g.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 895 (E.D. Pa. 1979).

Thus, recent decisions are increasingly critical of the mechanistic approach. This criticism comes largely in response to the strained analyses by judges trying desperately to hammer a modern action into an action known to the common law of England prior to 1791.[58] Another criticism of the mechanistic approach is its shortsightedness. It looks only at a static list of actions in which a jury trial was granted and does not consider the underlying rationale in those actions.[59] Therefore, some modern courts have finally begun to alter the mechanistic approach in interpreting the Seventh Amendment.[60] These courts recognize that a more appropriate manner of interpreting the Seventh Amendment is to apply the rationale underlying the granting of a jury trial in England, not just to look at causes of action on a predetermined list.

In summary, the history and interpretation of the Seventh Amendment is a crucial building block in the discussion of a complexity exception because the question of the existence and the constitutionality of the complexity exception hinges on whether the ideology of the common law of England in 1791 warrants such an exception. The Supreme Court therefore interprets the Seventh Amendment as providing for a jury trial in situations where eighteenth century English common law did so. This test requires the court to decide whether an issue more closely resembles an eighteenth century legal or equitable action, and then to decide whether the relief sought in the action is legal or equitable in nature.[61] Of these two considerations, the type of relief sought is more important because it represents the essence of the cause of action.[62] If the plaintiff asks for money damages, the action is typically legal, and if the plaintiff is asking the court to order the defendant to do something, the action is typically equitable.[63]

58. *See* Chauffers, Teamsters and Helpers Local No. 391 v. Terry, 494 U.S. 558, 574 (1990) (Brennan, J., concurring); cases cited *infra* notes 183-85.

59. *See Teamsters*, 494 U.S. at 574 (Brennan, J., concurring).

60. *See, e.g.*, Markman v. Westview Instruments, Inc., 517 U.S. 370, 388 (1996) (holding that "functional considerations" should be considered in the granting of a jury trial); Ross v. Bernhard, 396 U.S. 531, 538 (1970) (stating that the "practical abilities and limitations of juries" should be considered in the decision to grant a jury trial).

61. *See, e.g.*, Wooddell v. International Bhd. of Elec. Workers Local 71, 502 U.S. 93, 97 (1991) (citing Tull v. United States, 481 U.S. 412, 417-18 (1987)); *see* Krist, *supra* note 37, at 12-13. Since the merger of the equity and legal courts in 1938, when the Federal Rules of Civil Procedure were enacted, a comparison of the pending action to eighteenth century actions has become less important. *See* Flannery, *supra* note 6, at 696-97. This is because both of these types of actions are now tried in the same forum. As indicated here, however, the importance of the type of relief sought continues to be a determinative factor.

62. *See Wooddell*, 502 U.S. at 97 (quoting *Teamsters*, 494 U.S. at 565).

63. *See* Joel B. Harris & Lenore Liberman, *Can the Jury Survive the Complex Antitrust Case?*, 24 N.Y.L. SCH. L. REV. 611, 627 (1979).

Given the history and interpretation of the Seventh Amendment, this note will now proceed to discuss the theory and development of the complexity exception within this framework.

III. The Historical Foundation of a Complexity Exception

A. *Existence of a Complexity Exception in English Common Law*

1. Historical foundation in England

The English common law in 1791 allowed the Chancellor to withhold complex cases from the jury.[64] In these cases, the Chancellor assumed the role of judge and jury and tried both the factual and legal issues.[65] He exercised this power whenever he concluded that a case involved issues beyond the understanding of the jury.[66] While this criterion for judging complexity may be simplistic, the pertinent fact is that the principle of removing complex cases from a jury was accepted in English common law, and therefore should be part of the Seventh Amendment today.

The right to a jury trial in English civil cases, while practically nonexistent today,[67] was originally guaranteed by the Magna Carta, signed by King John on June 15, 1215.[68] By 1791, the English legal system was divided into the Court of Chancery (presided over by the Chancellor and also referred to as the Court of Equity) and the Courts of Common Law.[69] There were three courts of "common law": the King's Bench, the Common Pleas, and the Exchequer.[70] The judicial procedures and operational characteristics of these courts differed. Most importantly for this discussion, actions pursued in the Courts of Common Law used juries, while the Court of Chancery did not.[71] The type of remedy sought determined which court would hear a civil case. An action for damages was typically legal and thus heard

64. *See infra* Part III.A.2. *Compare* Arnold, *supra* note 1, at 848 (finding no "evidence of an eighteenth-century American or English belief that complexity was a ground for the exercise of equitable jurisdiction"), *with* Campbell & Le Poidevin, *supra* note 1, at 974 n.45 ("[G]ranting [as much as Professor Arnold does] concedes the argument. If equity had concurrent jurisdiction of complex cases, thus giving the chancellor the discretion to bring them into the court of chancery, . . . then the litigation . . . was removed from the scope of the seventh amendment.").

65. *See* Devlin, *supra* note 1, at 50.

66. *See id.* at 65-107.

67. *See id.* at 106.

68. *See* Arnold, *supra* note 10, at 13.

69. *See* Rodiger, *supra* note 42, at 193.

70. *See* Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 MICH. L. REV. 1571, 1572 (1983).

71. *See* Rodiger, *supra* note 42, at 193. Further, the operation of the Courts of Law were considered "very dilatory, inconvenient, and unsatisfactory." *Id.* at 193 n.24 (citing 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 442, at 416 (9th ed. 1866)).

in the Courts of Common Law, while an action seeking to compel the defendant to do something was typically equitable and heard in the Court of Chancery.[72]

There were other ways to get into the Court of Chancery. For example, if a party was not satisfied with a decision received from a Court of Law, he could petition the Chancellor to intervene by means of the Court of Chancery.[73] When this practice originated, no definite rules regulated the Chancellor's intervention.[74] It is clear, however, that the Chancellor had the final say over which cases would be heard in the Courts of Common Law and which cases would be heard in the Court of Chancery. As noted by Maitland:

> In James I's day occurred the great quarrel between Lord Chancellor Ellesmere and Chief Justice Coke which finally decided that the Court of Chancery was to have the upper hand over the courts of law. If the Chancery was to carry out its maxims about trust and fraud it was essential that it should have a power to prevent men from going into the courts of law and to prevent men from putting in execution the judgments that they had obtained in courts of law. . . . King James had now a wished-for opportunity of appearing as supreme over all his judges, and all his courts, and acting on the advice of Bacon and other great lawyers he issued a decree in favor of the Chancery. From this time forward the Chancery had the upper hand. It did not claim to be superior to the courts of law, but it *could prevent men from going to those courts*, whereas those courts could not prevent men from going to it.[75]

The Chancellor interfered with cases scheduled for the Courts of Common Law, removing them to the Court of Chancery, when one of several situations arose. The first type of removal occurred when an individual seeking relief felt that the common law had not provided justice.[76] In this situation, the party seeking relief had to petition the Chancellor, who could grant her case a hearing in the Court of Chancery.[77] The second type of removal involved cases where the common law recognized that a wrong had occurred but lacked the power to levy a just remedy.[78] In these instances, the Chancellor could assume jurisdiction over the case or the party seeking relief could petition the Chancellor.[79] The third type of removal occurred when the Chancel-

72. *See* Harris & Liberman, *supra* note 63, at 627.
73. *See* Devlin, *supra* note 1, at 59-60.
74. *See* Devlin, *supra* note 70, at 1572.
75. Devlin, *supra* note 1, at 49-50 (emphasis added).
76. *See* Devlin, *supra* note 70, at 1572.
77. *See id.*
78. *See id.*
79. *See id.*

lor judged that the Courts of Common Law were being misused as "an instrument of injustice."[80] In these situations, the Chancellor had sole discretion to assume jurisdiction over the case.[81]

Finally, the Chancellor could prevent a case from being heard in the law courts and assume jurisdiction over it based on its complexity.[82] The Chancellor would interfere with a case in the Courts of Common Law whenever, in his opinion, the details of the case were beyond the jury's understanding. This last instance forms the basis for arguing that the idea of a complexity exception was accepted in English common law, thereby incorporating it into current Seventh Amendment analysis.

2. English case law supporting the theory of a complexity exception

Because of the radical differences between the issues confronted in the legal system today and those encountered in 1791, it is not possible, in a literal sense, to compare them systematically. Therefore, it is necessary to take the analysis a step deeper and identify the common theme, or philosophical basis, in the situations where a trial by jury was denied. The next step is to identify the factual circumstances in those situations in which a jury trial was not granted. This analysis reveals that the decision to remove a case from the Courts of Common Law and therefore from trial by jury was within the sole discretion of the Chancellor.

The involvement of complex or extensive written evidence was perhaps the most common scenario in which the Chancellor would assume jurisdiction over a case on complexity grounds. Two cases that illustrate this point are *Clench v. Tomley*,[83] decided in 1603, and *Gyles v. Wilcox*,[84] decided in 1740. *Clench*, a civil case for possession of personal property, was tried in the Court of Chancery, contrary to the

80. *Id.* at 1572-73 (quoting J. MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY, at 102-03 (1st ed. London 1780)).

81. *See id.*

82. *See infra* Part IV.A.

83. 21 Eng. Rep. 13 (Ch. 1603). This note reports the case name as it appears in the English Reports. However, "documents in the Public Record Office in London show that the defendant's name was Clench and the plaintiff's name was Towneley, rather than the reported 'Tomley.'" Campbell & Le Poidevin, *supra* note 1, at 966 n.5. Although this note will cite the case by its now infamous name, Campbell and Le Poidevin cite the case as "Towneley v. Clench."

84. 26 Eng. Rep. 489 (Ch. 1740), *cited in* Barrett E. Pope, *Non-Jury Trial of Civil Litigation: Justifying a Complexity Exception to the Seventh Amendment*, 15 U. RICH. L. REV. 897, 914 (1981).

pleading of the defendant, who requested trial by jury.[85] In removing the case, the Chancellor stated that the average juror was not adept enough to read the complex documents, which accounted for the majority of the evidence central to the case.[86] The Chancellor referred to the issue as one "to be discerned by books and deeds, of which the Court was better able to judge than a jury of ploughmen."[87]

In *Gyles*, the plaintiff sought an injunction to stay the printing of an allegedly plagiarized book.[88] The Chancellor found the facts in *Gyles* too complex for a "common jury" because of the extensive reading that would be required.[89] Unlike today, jurors of the time were commonly illiterate. Therefore, in cases requiring extensive reading of any kind, whether or not the material itself was complex, the Chancellor would take it upon himself to decide both the legal and factual matters. The Chancellor's statement in *Gyles* typifies this argument:

> The court is not under an indispensable obligation to send all facts to a jury, but may refer them to a master, to state them, where it is a question of nicety and difficulty, and *more fit for men of learning to inquire into, than a common jury.* The House of Lords very often, in matters of account which are extremely perplexed and intricate, refer it to two merchants named by the parties, to consider the case, and report their opinions upon it, rather than leave it to a jury.[90]

Wedderburn v. Pickering,[91] decided in 1879, is another example of a court denying a jury trial due to complex written evidence, although it was heard after 1791. *Wedderburn* involved a dispute over the ownership of real property.[92] The Chancellor commented on his discretion to remove a complex case from a jury:

> I do not forget that this common law right, if I may so call it, ought not to be taken away by mere caprice, but only when *there is some reason why the case cannot be conveniently tried before a jury.* . . . 'This rule was framed expressly to meet cases which would, under the old system, have been tried in the Chancery Division, and which might be considered, by reason of involving a mixture of law and fact, *or from great complexity*, or otherwise, not capable of being conveniently tried before a jury.'[93]

85. *See Clench*, 21 Eng. Rep. at 13.
86. *See id.*
87. *Id.*
88. *See* 26 Eng. Rep. at 489.
89. *Id.* at 490-91.
90. *Id.* (emphasis added).
91. 13 Ch. D. 769 (1879), *cited in* Rodiger, *supra* note 42, at 194.
92. *See id.* at 769.
93. *Id.* at 771 (emphasis added) (quoting Clarke v. Cookson, 2 Ch. D. 746 (1876)).

In denying a jury trial, the Chancellor explained, "I think that this action is one which cannot be conveniently tried before a jury. It is a conveyancing action. . . . [T]he ownership of this site is entirely a question of title, and depends upon the construction of certain deeds."[94] While *Wedderburn* might be discounted to a certain extent because it was decided after 1791,[95] the Chancellor based his decision on his understanding of *pre*-1791 cases of "great complexity" and "cases that would, under the old system have been, tried in the Chancery Division."[96] It is clear that the Chancellor believed that complex cases should be, and always had been, within the realm of the Court of Chancery.

In addition to extensive written evidence, complex legal theories also caused for the Chancellor to withhold issues from the jury. *Gartside v. Isherwood*,[97] decided in 1783, has both characteristics. *Gartside* involved an action to nullify executed leases obtained by the defendants through "fraud and imposition."[98] The complexity in this case arose because the leases had been obtained from a deceased person of weak intellect upon inadequate consideration.[99] In referring to the role of the jury, the Chancellor stated that only "neat matter[s] of fact" should be left to them.[100] With regard to more complicated issues, "[i]t will, therefore, be improper to direct the issues in the manner mentioned by the defendants, . . . for this will leave all the circumstances of the case to be decided upon by the jury, and will put it upon them to exercise the peculiar jurisdiction of a [C]ourt of [E]quity."[101] Apparently, the Chancellor referred to whether the contract was supported by fair and valuable considerations, which required the jury to make a legal conclusion regarding the competency level of the plaintiff.[102]

Welles v. Middleton,[103] decided in 1784, and *Blad v. Bamfield*,[104] decided in 1674, also both fall into this category. *Welles* involved for-

94. *Id.*
95. *Wedderburn* still provides persuasive authority for two reasons. First, the Chancellor made no indication that he was establishing new law with his decision. *See generally id.* at 771-72. Second, as indicated, the Chancellor states that cases of "great complexity" would have been tried in Chancery (i.e. no jury). *See id* at 771.
96. 13 Ch. D. at 771.
97. 28 Eng. Rep. 1297 (Ch. 1783), *cited in* Devlin, *supra* note 1, at 73.
98. *Id.* at 1297.
99. *See id.*
100. *Id.* at 1300.
101. *Id.*
102. *See id.*
103. 29 Eng. Rep. 1086 (Ch. 1784), *cited in* Devlin, *supra* note 1, at 73.
104. 36 Eng. Rep. 992 (Ch. 1674), *cited in* Wilkinson et al., *supra* note 5, at 72.

gery, fraud, and misrepresentation alleged against an attorney by his client.[105] The Chancellor decided that the case hinged on a determination of the legal state of mind of the plaintiff.[106] Because of the subtle but technical "shades"[107] of mental capacity, the Chancellor concluded that, "[i]f the question was whether his understanding was so depraved that he was incapable of executing a deed, that would be a proper question for a jury."[108] But the Chancellor stated further that "an issue to be taken on so uncertain a subject seems to me to bring very little light or information to the court: it would be impossible for a jury to mark the shades of his incapacity by any possible endorsement."[109] This decision assumes that a jury could discern competence from incompetence, but that distinguishing technicalities of mental capacity was beyond the "practical abilities and limitations of juries."[110]

Blad involved a difficult and political set of facts. Blad, who was Danish, seized the property of Bamfield, who was English, in Iceland, under supposed written permission from the King of Denmark.[111] Bamfield claimed that the letters granting permission were invalid because of a treaty between the English and the Danish.[112] The Chancellor, in response to Bamfield's request for a jury trial, considered it "monstrous and absurd" that a "common jury should try whether the *English* have a right to trade in *Iceland.*"[113] Clearly the Chancellor felt that an issue such as that involved in *Blad* was too complicated for a common jury.

The Chancellor also often prevented the Courts of Law from hearing a case involving an action for account.[114] In an account, both parties claimed that the other party owed them monies for either work

105. *See Welles*, 29 Eng. Rep. at 1086.
106. *See id.* at 1089.
107. *Id.* at 1090.
108. *Id.*
109. *Id.*
110. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).
111. *See* Blad v. Bamfield, 36 Eng. Rep. 992, 993 (Ch. 1674), *cited in* Wilkinson et al., *supra* note 5, at 72.
112. *See id.*
113. *Id.* at 993. Support for withholding political issues from the jury is also found in a quote from Hamilton:

> I feel a deep and deliberate conviction that there are many cases in which the trial by jury is an ineligible one. I think it so particularly in cases which concern the public peace with foreign nations—that is, in most cases where the question turns wholly on the laws of nations. . . . Juries cannot be supposed competent to investigations that require a thorough knowledge of the laws and usages of nations.

THE FEDERALIST NO. 83, at 526 (Alexander Hamilton) (Henry Cabot Lodge ed., 1904).
114. *See* Devlin, *supra* note 1, at 65; Wilkinson et al., *supra* note 5, at 72-73.

performed or debt owed.[115] These actions were often complex because of difficult contract theories intertwined with the action. For example, in construction cases, the situation was often "complicated by disputes over disallowances and deductions made by the architect or engineer."[116] *Duke of Marlborough v. Strong*,[117] decided in 1721, is an example of one such dispute. The Chancellor prevented the case from being heard in the Courts of Law because an account of this type was too complex for a jury.[118]

In summary, under English common law in 1791, the Chancellor would prevent a jury trial in the Courts of Law whenever a case possessed characteristics that were beyond the understanding of a jury: the involvement of extensive written materials, the existence of complex legal theories, and actions for account, which typically involved both extensive written materials as well as complex legal theories.

B. Colonial Adoption and Use of the Complexity Exception

While the English common law is the "black-letter" law for determining when the Seventh Amendment provides for a jury trial, other sources exist for discerning the purposes of the Amendment. The operation of early American law reveals how early American jurists interpreted the English common law. By examining the actions in early American law regarding the granting of jury trials, we can discern whether a complexity exception was consistent with the interpretation of the English common law at that time.[119] Of course, the best evidence of the framers' opinion of a complexity exception would be language about such an exception in the Seventh Amendment or its legislative history.[120] Because no such evidence is forthcoming, one must turn to other sources for clues.

115. *See* Devlin, *supra* note 1, at 65.

116. *Id.* at 68.

117. 1 Eng. Rep. 496 (H.L. 1721), *cited in* Devlin, *supra* note 1, at 68 n.92.

118. *See id.* at 496-98; *see also* Devlin, *supra* note 1, at 68 n.92 ("This case is cited as an early example of court of equity decreeing an account in a case which did not fall within one of the regular categories.").

119. Colonial law will not be examined in depth here, partially because of the extremely segmented state of the legal system at the time, *see supra* Part II.A., and partially because analysis of this type is only persuasive. However, specific language in early colonial cases is helpful in interpreting the English common law, after which colonial law was modeled.

120. Scholars agree that no definitive answer is available through the records generated from that time period. *See, e.g.*, Henderson, *supra* note 19, at 291-92; Wolfram, *supra* note 25, at 639.

One of the most prominent lawmakers of the time was Alexander Hamilton.[121] In the national debate over the ratification of the Constitution, the Federalists asked Hamilton to respond to the concerns of Anti-Federalists that the Constitution did not provide for a guarantee of trial by jury in civil cases.[122] Hamilton, in Federalist Paper No. 83, described how complex cases were treated in English common law before the enactment of the Seventh Amendment.[123] Hamilton observed that "extraordinary" cases were tried before the Chancellor in equity, and should, therefore, be so treated in American law.[124] Hamilton also noted that the circumstances of cases heard in the courts of equity are often "intricate . . . [and] incompatible with the genius of trials by jury."[125] Moreover, "the litigations usual in chancery frequently comprehend a long train in minute and independent particulars."[126] Therefore, Hamilton concluded, "[t]he nature of a court of equity . . . will tend gradually to . . . undermine the trial by jury, by introducing questions too complicated for a decision in that mode."[127] Hamilton apparently believed that English law provided a way to remove complex cases from the jury, and that such a procedure benefitted the legal system as a whole.[128]

There was no generally established practice in colonial law regarding the situations in which a jury trial was granted. As noted above, all thirteen colonies had instituted some, but not a common, form of trial by jury. In Federalist No. 83, Hamilton observed "[t]he great difference between the limits of the jury trial in different States."[129] Modern scholarship bears this out. For instance, in one of

121. In addition to THE FEDERALIST NO. 83, (Alexander Hamilton), Hamilton also authored the majority of other Federalist Papers. *See, e.g.*, THE FEDERALIST NOS. 1, 6, 7, 81 (Alexander Hamilton).

122. *See* Landsman, *supra* note 17, at 598.

123. *See* THE FEDERALIST NO. 83, at 523-26 (Alexander Hamilton) (Henry Cabot Lodge ed., 1904).

124. *See id.* at 527.

125. *Id.*

126. *Id.* at 528.

127. *Id.*

128. The significance of these statements is that, regardless of anyone's opinion concerning the merits of a complexity exception, it is constitutional if it was a part of English common law prior to 1791. Of course, it does not directly follow that the right will be exercised. The legislature could very well provide for a jury trial in all civil cases, even those that are complex. It does, however, mean one simple thing—it is an option. Hamilton elaborates upon his view further by stating, "But I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases." THE FEDERALIST NO. 83, at 521 (Alexander Hamilton) (Henry Cabot Lodge ed., 1904).

129. *Id.* at 523. Hamilton stated further that:

> The great difference between the limits of the jury trial in different States is not generally understood . . . . In this State, our judicial establishments resemble, more nearly

the most comprehensive articles to date written on the Seventh Amendment, Edith Henderson shows that "the power of the civil jury and the extent of judicial control over its verdicts varied enormously and unsystematically from state to state."[130] In addition, a comprehensive review of available case law during this period would not provide a definitive picture of the operation of colonial law because of the limited amount of extant documents. Ms. Henderson notes that "[b]ecause there are only scattered volumes of legal records and practitioners' notes in print for the whole period before 1790, it is not now possible to trace the growth of the divergence[ ]" in differing states' practices with regard to jury trials in civil cases.[131]

While the records of colonial cases are incomplete and not very abundant, one early American case deserves recognition. *President of the Farmer's Bank v. Polk*,[132] decided in federal district court in 1821, involved a case that called for an accounting. Referring to the facts of the case, the court remarked that

> [t]hese transactions are so complicated, so long and intricate, that it is impossible for a jury to examine them with accuracy. They will require time, assiduous attention and minute investigation, and are involved in so much confusion and difficulty that no other tribunal . . . can afford the plaintiff a remedy.[133]

Given the court's use of the term "accuracy," the logical concern of the court was the "practical abilities and limitations of juries."[134]

> than in any other, those of Great Britain. We have courts of common law, courts of probates (analogous in certain matters to the spiritual courts in England), a court of admiralty, and a court of chancery. In the courts of common law only, the trial by jury prevails, and this with some exceptions. In all the others a single judge presides, and proceeds in general either according to the course of the canon or civil law, without the aid of a jury. In New Jersey, there is a court of chancery which proceeds like ours, but neither courts of admiralty nor of probates, in the sense in which these last are established with us. In that State the courts of common law have the cognizance of those causes which with us are determinable in the courts of admiralty and of probates, and of course the jury trial is more extensive in New Jersey than in New York. In Pennsylvania, this is perhaps still more the case, for there is no court of chancery in that State, and its common-law courts have equity jurisdiction.

Id. at 523-24.

130. Henderson, *supra* note 19, at 299. Further, as stated by one scholar, "In light of the variety of cases in which juries never were used in the Massachusetts Colony, it is not surprising that in 1787 a Massachusetts Federalist observed that 'out of three or four hundred actions at a court not more than ten are decided by jury.'" Campbell & Le Poidevin, *supra* note 1, at 969 n.17.

131. Henderson, *supra* note 19, at 299-300.

132. 1 Del. Ch. 167, 167-68 (1821), *cited in* Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 Nw. U. L. Rev. 190, 201 (1990).

133. *Id.* at 175-76.

134. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).

C. *Characteristics Considered by Courts in Invoking a Complexity Exception*

The majority of complex and lengthy trials are the product of the Federal Rules of Civil Procedure, which allow for joinder of cases.[135] By encouraging the joinder and the consolidation of lawsuits, the Federal Rules make these cases more complex than they otherwise would be. Of course, joinder does not make the issues any more difficult. However, the Rules do result in (1) many more parties taking part in one case than would otherwise be present, and (2) a corresponding increase in the number of legal rules that come into play.[136]

For the modern courts that have adopted the theory of a complexity exception, their decision to invoke the exception arises when "[a] suit is too complex for a jury."[137] A case is considered "too complex" when "circumstances render the jury unable to decide in a proper manner."[138] Three characteristics of a case assist the court in the determination of whether it is "too complex" for a jury trial: (1) the operative details and nature of the trial, (2) the nature of the evidence to be proposed at trial, and (3) the difficulty of the substantive law to be applied to this evidence.

For the first characteristic, courts typically consider the number of parties, probable length of the trial, and amount of evidence and corresponding exhibits to be introduced into the record.[139] The number of parties is relevant because of the added complexity associated with a trial consisting of numerous claims, counterclaims, and cross-claims.[140] In these trials, jurors—who, unlike judges, have little experience in deciphering large quantities of legal facts—have a difficult time reaching a well-reasoned decision.[141] The trial length is important because, in today's society, cases may last years, which puts an inordinate burden on jurors.[142]

For the second characteristic, courts determine whether the average juror can reasonably or realistically understand the sophisticated

135. *See e.g.*, FED. R. CIV. P. 18 (joinder of claims); FED. R. CIV. P. 19 (joinder of parties necessary for adjudication); FED. R. CIV. P. 20 (permissive joinder of parties); FED. R. CIV. P. 22 (interpleader).

136. See *infra* notes 220-21 and accompanying text for an example of how these factors are exhibited as the result of joinder of cases.

137. *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1079 (3d Cir. 1980).

138. *Id.*

139. *See id.*; *see also* ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 444 (N.D. Cal. 1978), *aff'd sub nom.* Memorex v. IBM, 636 F.2d 1188 (9th Cir. 1980).

140. *See supra* notes 135-36 and accompanying text.

141. *See ILC Peripherals*, 458 F. Supp. at 448.

142. *See infra* notes 219-31 and accompanying text.

evidence presented in the case.[143] Opponents of a complexity exception point out that, while the evidence may be complex, the counsel's task, as an officer of the court, is to make it understandable to the average juror.[144] This argument, however, misses the point of why a complexity exception exists. In a complex case, presenting the issues in an "understandable" way may involve glossing over many of the intricacies and result in an inaccurate picture of the facts.[145] This raises one of the essential questions regarding the complexity exception—is it possible to make all relevant concepts sufficiently intelligible to an average jury? As noted earlier, the common law of England apparently did not think so, because the Chancellor often assumed jurisdiction over cases he considered too complex for a jury.

For the third characteristic, courts examine how difficult it may be for jurors to apply the substantive law to the facts presented at trial.[146] This category reprises the previous two. The complexity of the law in certain cases makes it unfair to subject a party to the decision of jurors who might not fully understand the testimony and evidence presented to them. This factor lends itself to the argument that the Seventh Amendment entails some sort of due process consideration.[147]

D. Current Arguments For and Against a Complexity Exception

Given the foregoing understanding of "complexity," proponents of the complexity exception advance the following arguments to support their claim that courts should classify complex cases under equity jurisdiction, which does not require trial by jury. "Equity jurisdiction" refers to the types of cases in English common law that typically fell within the jurisdiction of the Court of Chancery. Proponents of the

143. *See ILC Peripherals*, 458 F. Supp. at 444, 446-47 (concluding that jurors, confronted with a trial in which more than 2,000 exhibits would be introduced, were unable to competently reach a decision where "technical and financial questions of the highest order" were involved).

144. *See generally* sources cited *supra* note 6 (collecting articles arguing against a complexity exception to the Seventh Amendment).

145. This is the underlying assumption and argument advanced by proponents of the Third Circuit's ruling in *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1084 (3d Cir. 1980) (holding that the due process clause of the Fifth Amendment outweighed the right to a jury trial provided for under the Seventh Amendment).

146. *See id.* at 1085.

147. *See generally* sources cited *supra* note 5 (collecting articles arguing for a complexity exception to the Seventh Amendment). The due process argument is discussed *infra* Part IV.B. For now, it is sufficient to note that proponents of this theory explain that some situations result in a conflict between the Fifth and Seventh Amendments (i.e., Fifth Amendment guaranteeing due process, which may be jeopardized if the jury does not fully understand the substantive law, and the Seventh Amendment guaranteeing trial by jury). *See In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d at 1084.

complexity exception first argue that, in 1791, the Court of Chancery had general jurisdiction over cases that did not fit neatly into actions that could be heard in the Courts of Common Law.[148] In other words, even if courts apply a mechanistic interpretation of the Seventh Amendment, any cases not finding matches in English common law should be denied a jury trial. Second, proponents point out that the Chancellor had the power to determine which cases were suited for jury trial, and he determined that complex cases should be heard in the Court of Chancery.[149] This practice in English common law establishes a precedent for the constitutionality of a complexity exception. Third, as will be discussed in Part IV, proponents argue that footnote ten in *Ross v. Bernhard*[150] indicates that the Court has opened the door for a complexity exception to the Seventh Amendment.[151]

Opponents of a complexity exception present three reasons for refusing to interpret *Ross* as justifying a restriction on the Seventh Amendment. First, they argue that there is no precedent from the Supreme Court to support such an interpretation.[152] Second, they point out that it would be unusual for the Supreme Court to change constitutional law in a footnote.[153] Finally, because the Court ultimately concluded in *Ross* that all the issues were jury issues, opponents to the complexity exception claim that this case made no inroads toward identifying what type of issues can be withheld from the jury.[154]

The leading case rejecting the idea of a complexity exception is *In re Financial Services Litigation*,[155] a case heard in the Ninth Circuit. Eighteen separate cases were consolidated to be heard at trial, and this complexity caused the district court to deny the right to a jury trial.[156] The district court did so in reliance on the verbiage in foot-

148. *See* Devlin, *supra* note 1, at 52.

149. *See In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d at 1080-83.

150. 396 U.S. 531, 538 (1970).

151. *See generally* sources cited *supra* note 5 (collecting articles arguing for a complexity exception to the Seventh Amendment).

152. Only one Supreme Court case, however, is required to establish binding precedent. Further, while *Markman* is the Court's first visit of this issue since *Ross*, the Third Circuit has concluded that there is a complexity exception to the Seventh Amendment, see *infra* Part IV.B, as well as various district courts, see *infra* notes 183-85 and accompanying text.

153. *See, e.g.*, Martin H. Redish, *The Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 Nw. U. L. REV. 486, 525-26 (1975).

154. *See generally supra* note 5 (citing articles proposing that there is no complexity exception to the Seventh Amendment).

155. 609 F.2d 411 (9th Cir. 1979).

156. *See In re* United States Fin. Sec. Litig., 75 F.R.D. 702, 714 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979). For more details on the consolidation, see *In re* United States Fin. Sec.

note ten in *Ross*,[157] specifically, that the issues in the case were so complex that they were beyond the "practical abilities and limitations of the jury."[158] On appeal, the Ninth Circuit reversed the ruling of the district court, giving little deference to the footnote in *Ross*.[159] The court stated that it was "doubtful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote."[160]

IV. THE COMPLEXITY EXCEPTION AND THE SUPREME COURT

This note argues that the Supreme Court has opened the door to a complexity exception to the Seventh Amendment with its reasoning in *Ross v. Bernard*[161] and, more recently, *Markman v. Westview Instruments, Inc.*[162] The above review of English common law prior to 1791, combined with the Court's opinions in *Ross* and *Markman*, indicate that a complexity exception to the Seventh Amendment is constitutional. This part describes the foundation for a complexity exeption in the landmark Supreme Court cases of *Ross v. Bernhard* and *Markman v. Westview Instruments, Inc.* This section also presents an alternative argument for the constitutionality of complexity exception—the Seventh Amendment's incorporation of the Due Process Clause of the Fifth Amendment.

A. The Supreme Court's Adoption of the Complexity Exception

The Supreme Court has not mentioned a complexity exception to the Seventh Amendment explicitly.[163] However, *Ross* and *Markman* confuse the previously settled law. In fact, footnote ten in *Ross* is given credit for originating the complexity exception.[164] In that foot-

Litig., 385 F. Supp. 586, 587-88 (J.P.M.L. 1974); *In re* United States Fin. Sec. Litig., 375 F. Supp. 1403, 1403-04 (J.P.M.L. 1974).

157. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).

158. *In re* United States Fin. Sec. Litig., 75 F.R.D. 702, 710-13 (S.D. Cal. 1977) (citing *Ross*), *rev'd*, 609 F.2d 411 (9th Cir. 1979).

159. 609 F.2d at 411.

160. *Id.* at 425.

161. 396 U.S. 531 (1970).

162. 517 U.S. 370 (1996).

163. The Court has only on rare occasion given an opinion on what specifically is preserved to the jury. However, the Court has often accepted cases involving procedural questions regarding the Seventh Amendment. *See* Alexander v. Virginia, 413 U.S. 836, 836 (1973) (holding that trial by jury is not constitutionally required in state civil proceedings); American Publ'g Co. v. Fisher, 166 U.S. 464, 465 (1897) (addressing requirement of unanimity of verdict); Baylis v. Travellers' Ins. Co., 113 U.S. 316, 320-21 (1885) (stating that questions of fact must be submitted to jury).

164. *See generally* sources cited *supra* note 5 (collecting sources in favor of a complexity exception).

note, the Supreme Court recounted the criteria of the mechanistic approach for determining whether a case is "legal" or "equitable," but added a third, previously unrecognized in Supreme Court case law: the "practical abilities and limitations of juries."[165] Many believe this language gives credence to a complexity exception.

Justice Souter added support to the complexity exception in *Markman* when he enumerated "functional considerations" for district courts to use in determining whether to grant a jury trial in a patent case.[166] As these "functional considerations" have no relation to the type of action (the typical factor considered), *Markman* supports the existence of a complexity exception to the Seventh Amendment.

1. *Ross v. Bernhard*

In *Ross*, the plaintiffs brought a derivative action against the directors of a corporation.[167] Although the circumstances would not normally justify a jury trial, the Court found that, "[t]he Seventh Amendment question depends upon the nature of the issue to be tried rather than the character of the overall action" and ordered a jury trial.[168] The dicta of the Court in *Ross*, however, has overshadowed the outcome of the case. Specifically, the Court described a three-prong test used to distinguish "legal" issues from "equitable" issues: "[a]s our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, *the practical abilities and limitations of juries*."[169] These last seven words spawned the entire complexity exception debate.[170]

Subsequent to *Ross*, the Supreme Court rarely accepted cases interpreting the Seventh Amendment on jury trial grounds, instead focusing on other aspects of the Amendment. Two cases subsequent to

165. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).

166. *Markman*, 517 U.S. at 388.

167. *See Ross*, 396 U.S. at 531.

168. *Id.* at 538.

169. *Id.* at 538 n.10 (emphasis added).

170. The Court has had several occasions to either clarify its point or deny the existence of a complexity exception. The fact that it has not leaves open the possibility that the Court supports the theory. Further, as Part III.A. indicates, the English common law supported the ideology of a complexity exception to the Seventh Amendment. *See* Devlin, *supra* note 1, at 107 ("[T]he practical abilities and limitations of juries would have been . . . in the mind of a Chancellor in 1791. Further, if in any particular case he had thought the 'practical abilities' not up to the complexities of the case, he would . . . stop the suit at common law.").

Ross addressing the right to jury trial were *Pernell v. South Realty*[171] and *Curtis v. Loether*.[172] In neither did the Court mention the "practical abilities and limitations of juries." This seems reasonable because the Court did not, on either occasion, deem the issues presented overly complex. Since *Pernell* and *Curtis*, the Court has remained relatively quiet concerning Seventh Amendment interpretation.[173] Although *Markman* is the next Supreme Court decision on point, there have been several intervening lower court opinions addressing this issue. These decisions formed the backdrop against which the Court in *Markman* wrote its decision.[174]

Of the four significant district court cases, three have interpreted the Seventh Amendment as containing a complexity exception.[175] *In re Boise Cascade Securities Litigation* is representative. There the court described a point where "the complexity of a case may exceed the ability of a jury to decide the facts in an informed and capable manner."[176] Based on the rationale that the case was too complex for the jury, the court denied the plaintiff the right to a jury trial.[177] Moreover, a number of courts have ruled that the case before them was not so complex as to justify circumvention of the Seventh Amendment,[178] although their reasoning seems to assume that a complexity exception exists.

171. 416 U.S. 363, 363 (1974).

172. 415 U.S. 189, 190 (1974).

173. *See* Tull v. United States, 481 U.S. 412, 414 (1987); Miller v. Fenton, 474 U.S. 104, 105-06 (1985); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 324 (1978). Seventh Amendment issues were addressed in all three of these cases, but never with regard to complexity issues.

174. This backdrop provides persuasive evidence that the Court, at a minimum, does not strongly disagree with a complexity exception. If it did, *Markman* was an opportunity to express its opinion. While silence is no basis for precedent, the "functional considerations" enumerated in *Markman* are, as this note explains, operationally similar to a complexity exception.

175. The three district court cases finding a complexity exception to the Seventh Amendment are Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 66 (S.D.N.Y. 1978) (involving an antitrust class action suit); ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 447 (N.D. Cal. 1978), *aff'd sub nom.* Memorex v. IBM, 636 F.2d 1188 (9th Cir. 1980) (involving antitrust suit); *In re* Boise Cascade Sec. Litig., 420 F. Supp. 99, 103 (W.D. Wash. 1976) (involving securities litigation). The sole district court case to not find a complexity exception was Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224, 227 (N.D. Ill. 1977) (involving intellectual property suit).

176. *In re Boise Sec. Litig.*, 420 F. Supp. at 104.

177. *See id.*

178. *E.g.*, Cotten v. Witco Chem. Corp., 651 F.2d 274, 276 (5th Cir. 1981). Proponents of a complexity exception have pointed to the language used in these opinions as support for their view. For instance, in one case, the court stated that "maybe some facts are so difficult for laymen to determine that they can be withdrawn from the jury." Soderbeck v. Burnett County, 752 F.2d 285, 289 (7th Cir. 1985). One reason a court would make such a statement and not acknowledge the existence of a complexity exception is if it felt there was not sufficient precedent to support any other decision.

2. *Markman v. Westview Instruments, Inc.*

Markman v. Westview Instruments, Inc.[179] provides evidence that the Supreme Court is willing to recognize a complexity exception to the Seventh Amendment. In *Markman*, the Supreme Court affirmed, in a unanimous decision written by Justice Souter, the Federal Circuit's decision that the interpretation of a patent's construction is not an issue for the jury.[180]

The main question in *Markman* was whether the construction of a patent, which describes the patentee's rights against infringement, is a matter of law for the judge to determine or properly falls to a jury under the Seventh Amendment guarantee.[181] The more specific question in *Markman* was whether the invention of a system capable of "monitor[ing] and report[ing] the status, location, and movement of clothing in a dry-cleaning establishment" covered physical inventory as well as cash inventory.[182]

At trial in the district court, the jury found infringement of the patent, determining that the patent referred to both physical and cash inventory.[183] The district court then granted the defendant's motion for judgment as a matter of law, holding that the patent referred to physical inventory only.[184] The Federal Circuit affirmed, holding that, "in a case tried to a jury, the court has the power and the obligation to construe as a matter of law the meaning of language used in the patent claim."[185]

Before the Supreme Court, Markman claimed that the district court's action violated his Seventh Amendment right to a jury trial. While not explicitly recognizing the existence of a complexity exception, Justice Souter enumerated "functional considerations" that district courts should weigh to determine whether a particular issue is subject to the Seventh Amendment's guarantee.[186] A court should consider these "functional considerations" in addition to the tradi-

179. 517 U.S. 370 (1996).

180. *See id.* at 372.

181. *See id.*

182. *Id.* at 374-75.

183. *See* Markman v. Westview Instruments, Inc., 772 F. Supp. 1535, 1536 (E.D. Pa. 1991), *aff'd*, 52 F.3d 967 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996).

184. *See id.* at 1536-37.

185. *Markman*, 52 F.3d at 979. The Court of Appeals for the Federal Circuit has jurisdiction over all patent case appeals from the district courts.

186. *Markman*, 517 U.S. at 388; *accord* Miller v. Fenton, 474 U.S. 104, 114 (1985) (holding that when there is no clear answer to the Seventh Amendment question, "administration of justice" allows courts to weigh strengths of judges against those of juries).

tional mechanistic approach that otherwise applies.[187] They are irrelevant to the legal versus equitable distinction. For example, the Court listed the superior ability of judges to comprehend legal documents as support for their position.[188] This reasoning by the Court was clearly aimed at determining whether the judge was in a better position to decide the issues of fact than the jury, not whether the action was legal or equitable in nature. Based on the Court's reasoning, *Markman* supports the existence and application of a complexity exception.

In the first section of the opinion, Justice Souter reviewed the constitutional grant to Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[189] In short, the grant is in return for the patent holder allowing the public to benefit from the invention.[190] Justice Souter analyzed the Seventh Amendment question in section two of the opinion, noting that the determination of whether there is a right to a jury trial depends, first, on the mechanistic approach.[191] The Court found it well grounded in eighteenth century English practice that a right to a jury trial existed in a patent infringement case.[192] However, the Court was unable to conclude the same on the issue of patent construction.[193] Therefore, the Court concluded that "the best hope lies in comparing the modern practice to earlier ones whose allocation to court or jury we do know."[194] Contrary to Markman's claim, the Court found no evidence that juries must have interpreted a patent's construction in order to reach a verdict: "[t]here is no more reason to infer that juries supplied plenary interpretation of written instruments in patent litigation than in other cases implicating the meaning of documentary terms, and we do know that in other kinds of cases during this period judges, not juries, ordinarily construed written documents."[195]

Finding no clear answer through an analysis of common law, the Court next reviewed the relevant case law.[196] The Court cited *Winans*

187. *Markman*, 517 U.S. at 388.
188. *See id.*
189. U.S. CONST. art. I, § 8, cl. 8.
190. *See Markman*, 517 U.S. at 390.
191. *See id.* at 376. The Court refers to this methodology as the "historical test." However, for purposes of consistency, this note will refer to the concept as the "mechanistic approach."
192. *See id* at 377.
193. *See id.*
194. *Id.* at 378. One can infer from the Court's tone that they are tiring of trying to find similarity between modern day actions and those known to the common law prior to 1791.
195. *Id.* at 381-82.
196. *See id.* at 384.

v. Denmead[197] as evidence that a patent's construction was an issue for the judge, not the jury.[198] The Court next distinguished two cases relied on by Markman on the grounds that the issue left for the jury to decide involved "product identification," as opposed to patent construction.[199] As further support, the Court cited treatises by Walker and Robinson.[200] Both treatises argued that patent construction was an issue for the court to decide, not the jury.[201]

In the next section, Justice Souter stated that "[w]here history and precedent provide no clear answers, *functional considerations* also play their part in the choice between judge and jury to define terms of art."[202] This point in the Court's opinion suggests the Court's dissatisfaction with the mechanistic approach. The "functional considerations" are evidently the Court's way of considering other facets of the English common law that had been ignored. Justice Souter likened his reasoning to a previous case, where the Court stated that when an issue "falls somewhere between a pristine legal standard and a simple historical fact, the fact/law discrimination at times has turned on a determination that, as a matter of the sound administration of justice, *one judicial actor is better positioned than another to decide the issue in question.*"[203] Justice Souter concluded that "judges, not juries, are the better suited to find the acquired meaning of patent terms."[204] He then pointed to judges' extensive training and experience with written documents, concluding that the "judge, from his training and discipline, is more likely to give a proper interpretation to such instruments than a jury [and is], therefore, more likely to be right, in performing such a duty, than a jury can be expected to be."[205] This

197. 56 U.S. 330 (1853).

198. *See Markman*, 517 U.S. at 384.

199. *Id.* at 386.

200. *See id.* at 387 (citing A. WALKER, PATENT LAWS § 75, at 68 (3d ed. 1895)); *id.* at 388 (citing W. ROBINSON, LAW OF PATENTS § 732, at 481-83 (1890)).

201. *See id.* at 387-88.

202. *Id.* at 388 (emphasis added). Upon examination of the arguments in Souter's opinion, it becomes obvious that the "rule" used is not restricted, or unique in any way, to patent cases. Therefore, the holding in *Markman* will likely instigate counsel to push courts to decide some issues where there is no eighteenth century analogue to the instant case. Also, if the attention generated by a mere footnote in *Ross* hinting of the possibility of a complexity exception is any indication, an entire opinion discussing the topic in particularity, concluding as it does, will generate even more.

203. *Markman*, 517 U.S. at 388 (emphasis added) (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)).

204. *Id.*

205. *Id.* at 388-89 (quoting Parker v. Hulme, 18 F. Cas. 1138, 1140 (C.C.E.D. Pa. 1849) (No. 10,740)).

statement reflects the Supreme Court's support for a complexity exception to the Seventh Amendment.[206]

Justice Souter's opinion reveals that the Court created no new doctrine in *Markman*. On the contrary, the Court's enumeration of the "functional considerations" arose from a more thorough analysis of the English common law, in which these types of considerations were often taken into account. Of course, the Court first attempted to handle the case using the traditional mechanistic approach. Realizing, however, that comparing the action to those tried under English common law before 1791 was extremely difficult and subjective, the Court listed certain functional considerations that had not been used by the Court to date. Further, the underlying rationale behind the Court's description of the functional considerations is very similar to the rationale underlying the complexity exception. Therefore, *Markman* is just the most recent step in the evolution of Seventh Amendment interpretation.

Proponents of a complexity exception are striving to accomplish a relevant and important goal. Almost universally, proponents do not want civil jury trials abolished, but rather seek a narrow application of a complexity exception.[207] Most proponents of a complexity exception think parties to litigation should have access to a judicial procedure capable of achieving justice when a jury trial would be unlikely to do so.[208] The Supreme Court's recent decision in *Markman* high-

206. One outcome seems probable in the arena of intellectual property cases in the wake of *Markman*. Specifically, because the only issue in many patent suits is the dispute as to the interpretation of the patent, the holding in *Markman* will almost certainly result in more judgments by the court, sitting without a jury. "As many as 90 percent of these cases will be decided on a motion for summary judgment." Victoria Slind-Flor, *Ruling Boosts Judges' Role in Patents*, NAT'L L.J., May 6, 1996, at B1 (quoting Jack C. Goldstein, a former head of the American Bar Association's intellectual property law section). Others have proclaimed that even if construction is not one of the dispositive issues, parties will be more inclined to settle given the courts' interpretation of the patent. *See* Steven D. Glazer & Steven J. Rizzi, *Markman: The Supreme Court Takes Aim at Patent Juries*, J. PROPRIETARY RTS., May 1996, at 4.

Another portion of the Court's holding that has not yet received as much attention, possibly overshadowed by the primary holding, is the Court's ruling regarding credibility issues. The Court stated that the inconsistent expert testimony created credibility issues that were inherently for the jury to decide. *See Markman*, 517 U.S. at 389-90. However, the Court stated further that situations when the construction may turn on contradictory expert evidence will be in the minority, and in such cases, "[t]he decisionmaker . . . construing the patent is in the better position to ascertain whether an expert's proposed definition fully comports with the specification and claims . . . ." *Id.* The result of this argument is that a court could decide issues of fact, namely the credibility of witnesses. Opponents' concerns of the slippery-slope might have a sounder argument against the Court's argument here, rather than on strictly construing the Seventh Amendment.

207. *See* articles cited *supra* note 5 (articles arguing for a complexity exception to the Seventh Amendment).

208. *See id.*

lights one possible scenario to accomplish this goal. Specifically, in *Markman*, the Court did not withhold the entire case from the jury.[209] Instead, the Court broke down the issues and allocated them between the judge and jury, based on who was better able to decide them; in other words, by taking the complexity of the issues in the case into account.[210]

B. The Seventh Amendment and Due Process

In addition to the theory of a complexity exception based on English common law, there is also a second theory for a complexity exception based on the Due Process Clause of the Fifth Amendment.[211] The rationale for this argument is one of fundamental fairness. If a jury decides complex issues that are beyond its competence, the parties will not receive due process of law.

The Third Circuit adopted this approach in *In re Japanese Electronic Products Antitrust Litigation*,[212] decided in 1980. This case resulted from the joinder by the district court of two cases.[213] The first involved a suit by the National Union Electrical Corporation against numerous Japanese television manufacturers.[214] The plaintiff in the

209. *See Markman*, 517 U.S. at 387-88.

210. The end result was that while the jury was left with the responsibility for determining whether an infringement was present, the court would provide the jury with its interpretation of the patent's terms. *See id.*

211. The Fifth Amendment to the United States Constitution provides that, "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

212. 631 F.2d 1069 (3d Cir. 1980).

213. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 892 n.3, n.4 (E.D. Pa. 1979) (citing the two cases as *Zenith Radio Corp. v. Matsushita Elec. Indus.*, No. 74-2451 (E.D. Pa., filed Sept. 20, 1974) and *National Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, No. 1706-70 (D.N.J., filed Dec. 21, 1970), *vacated sub nom. In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980)). Subsequently, these two cases were consolidated for pretrial proceedings in the Eastern District of Pennsylvania. *See id.* (citing *In re Japanese Elec. Prods. Antitrust Litig.*, 388 F. Supp. 565 (J.P.M.D.L. 1975)).

214. The ten principal defendants in the *National* and *Zenith* cases are Mitsubishi Corporation, Matsushita Electric Industrial Co., Toshiba Corporation, Hitachi, Ltd., Sharp Corporation, Mitsubishi Electric Corporation, Sanyo Electric Co., and Sony Corporation, all Japanese consumer electronic products manufacturers, and two American companies, Motorola, Inc. and Sears, Roebuck & Co. *See Zenith*, 478 F. Supp. at 893. Sony Corporation and its subsidiary Sony Corporation of America are only defendants in the *National* case. *See id.* at 893 n.6. The other seven principal Japanese defendants are named in both cases, as are eight of their subsidiaries: Matsushita Electric Corporation of America, Toshiba America, Inc., Hitachi Sales Corporation of Japan, Hitachi Sales Corporation of America, Sharp Electronics Corporation, Sanyo Electric, Inc., Sanyo Electric Trading, Inc., and Mitsubishi International Corporation. *See id.* The parties named only in the *Zenith* case are Sears, Roebuck & Co., Motorola, Inc., Mitsubishi Electric Corporation, Sanyo Manufacturing Co., Matsushita Electronics Corporation, Matsushita Electric Trading Co., and Quasar Electronics Corporation. *See id.* The plaintiffs also named, as co-conspirators, approximately 100 other entities with global operations, both American and Japanese. *See id.* at 893.

second case was Zenith Radio Corporation, who was also suing the same defendants as National, plus an additional seven companies.[215] Zenith, a domestic manufacturer, had initiated a lawsuit against Japanese television manufacturers for violations of the antitrust and international trade laws.[216] The plaintiffs also alleged conspiracies that violated §§ 1 and 2 of the Sherman Antitrust Act,[217] as well as § 73 of the Wilson Tariff Act.[218]

The plaintiffs demanded a jury trial.[219] Fourteen of the defendants objected to this on the grounds that the case raised issues too complex for a jury to decide.[220] The defendants acknowledged that a jury trial was normally granted in suits under the antitrust and antidumping laws, but they claimed that their case involved issues too complicated for a jury.[221] For example, part of the defense to be raised at trial involved foreign currency fluctuations and complicated marketing maneuvers, all of which affected the pricing models used in the establishment of prices for their merchandise.[222] The defendants also argued that proper resolution of the conspiracy claims required familiarity with the business environment and marketing conditions in Japan, and application of factual findings to thousands of transactions.[223] Finally, the defendants maintained that underlying the aforementioned burdens to the jury would be complex issues involving predatory intent.[224] The district court noted that the trial might last more than one year, and that millions of documents would be introduced at trial, not to mention the depositions that exceeded one hundred thousand pages.[225] In spite of this, the district court granted a jury trial, stating it could not find any authority for acknowledging a complexity exception to the Seventh Amendment.[226]

215. *See id.*

216. *See id.* at 893-94. The domestic manufacturers claimed that the Japanese defendants were price gauging to gain an unfair advantage in the U.S. television market. The domestic manufacturers also claim that the Japanese defendants subsequently sold merchandise at prices which violated the Antidumping Act of 1916, 15 U.S.C. § 72 (1994). *See Zenith*, 478 F. Supp. at 894.

217. 15 U.S.C. §§ 1, 2 (1994).

218. *Id.* § 8.

219. *See Zenith*, 478 F. Supp. at 896.

220. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1073 (3d Cir. 1980).

221. *See id.* at 1073-75.

222. *See id.* at 1074.

223. *See id.*

224. *See id.* at 1074-75.

225. *See id.* at 1073.

226. *See Zenith*, 478 F. Supp. 889, 942 (E.D. Pa. 1979).

The Court of Appeals for the Third Circuit reversed.[227] The approach used by the Third Circuit to justify a complexity exception differed from the one suggested in either *Ross* or *Markman*. The court's analysis centered around the Fifth Amendment's Due Process Clause. The court recognized that if the complexity of the legal issues interfered with the jury's understanding of the evidence or the relevant legal rules, the Seventh Amendment guarantee to trial by jury was not applicable.[228] In so doing, the court ruled that a "suit is too complex for a jury when circumstances render the jury unable to decide in a proper manner."[229]

The court defined complexity to be "any set of circumstances which singly or in combination render a jury unable to decide in the foregoing rational manner."[230] Specifically, the court laid out criteria in an effort to provide an objective basis to guide district court judges in their determination of when it would be unreasonable to expect a jury to understand a case. One of the considerations established by the court was the overall size of the suit, including the amount of evidence to be introduced, the time required for the trial, and the number and difficulty of legal issues.[231] Another was the difficulty of the legal bases of the case.[232] Although the court made mention of footnote ten in *Ross*, it did not hinge its decision on the rationale advanced there.[233] In addition, the court proclaimed that "[a] jury that cannot understand the evidence and the legal rules to be applied provides no reliable safeguard against erroneous decisions."[234] The court stated that "[t]he primary value promoted by due process in factfinding procedures is 'to minimize the risk of erroneous decisions.'"[235] Finally, the court held "the most reasonable accommodation between the requirements of the [F]ifth and [S]eventh [A]mendments to be a denial of jury trial when a jury will not be able to perform its task of rational decisionmaking with a reasonable understanding of the evidence and the relevant legal standards."[236]

227. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1093 (3d Cir. 1980).
228. *See id.* at 1084-86.
229. *Id.* at 1079.
230. *Id.*
231. *See id.* at 1088.
232. *See id.* at 1088-89.
233. *See id.* at 1079-80.
234. *Id.* at 1084.
235. *Id.* (quoting Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 13 (1979)).
236. *Id.* at 1086.

V. CONCLUSION

The theory of a complexity exception is consistent with the operation of English common law prior to 1791, and therefore a constitutional exercise of the courts' power under the Seventh Amendment. Part II of this note established that the Seventh Amendment grants the right to a civil jury trial in accordance with the operation of English common law. Specifically, under the Seventh Amendment, a civil jury trial is granted in instances in which one was provided for under the operation of English common law prior to 1791. Further, Part III concluded that, under English common law prior to 1791, the Chancellor often invoked his power to remove cases from the Courts of Common Law on the basis of complexity, deciding them instead in the Court of Chancery.

Courts have begun to realize that the mechanistic approach to interpreting the Seventh Amendment is no longer an effective method of interpretation. Specifically, deciding whether to grant a jury trial based on a static list respects the form but not the substance of English common law, to which courts should turn in reading the Seventh Amendment.

Before *Markman v. Westview Instruments, Inc.*,[237] most scholars deemed the Court's intention in footnote ten in *Ross v. Bernhard*[238] to have been misinterpreted. This footnote claimed that a consideration in granting a jury trial is the "practical abilities and limitations of juries."[239] The Court further strengthened this line of reasoning in *Markman*, lending additional support to the theory of a complexity exception. While Justice Souter's opinion in *Markman* did not explicitly create a complexity exception, the "functional considerations" referred to are not in any way unique to patent cases.[240] They amount to a complexity consideration in other cases as well. Thus, the Court has laid the groundwork for articulating a doctrine of a complexity exception that a proper reading of the Seventh Amendment in light of the 1791 English common law only reinforces. Whether the Court chooses to construct an edifice upon this spadework remains to be seen.

237. 517 U.S. 370 (1996).
238. 396 U.S. 531, 538 n.10 (1970).
239. *Id.*
240. *See Markman*, 517 U.S. at 388.